Case Number: 2205718/2022

THE EMPLOYMENT TRIBUNAL

SITTING AT: LONDON CENTRAL
BEFORE: EMPLOYMENT JUDGE ELLIOTT
MEMBERS: MR D KENDALL
MR D SHAW

BETWEEN:

Mr D Cooke

Claimant

AND

Provar Ltd

Respondent

ON: 15, 18, 19, 20, 21, 22 March, 2 April and 4 and 5 July 2024
(2 April and 4 and 5 July 2024 In Chambers)
Appearances:
For the Claimant: Ms D Grennan, counsel
For the Respondent: Mr R Jones, solicitor

RESERVED JUDGMENT

The unanimous Judgment of the Tribunal is that:

1. The claims for constructive ordinary unfair dismissal and wrongful dismissal for notice pay succeed.
2. The claims for disability discrimination, victimisation, whistleblowing detriment and automatically unfair dismissal for whistleblowing fail and are dismissed.

REASONS

1. By a claim form presented on 5 August 2022 the claimant Mr David Cooke brings claims of constructive unfair dismissal including automatically unfair dismissal for whistleblowing, whistleblowing detriment, disability discrimination in terms of direct discrimination, failure to make reasonable adjustments and discrimination arising from disability, victimisation and breach of contract for notice pay.

2. The case was originally listed to be heard in July 2023 and was postponed due to lack of judicial resource. There were further listing

difficulties in March 2024 which meant that tribunal deliberation time had to be listed separately.

This remote hearing

3. The hearing was a remote public hearing, conducted using the cloud video platform (CVP) under Rule 46. The parties agreed to the hearing being conducted in this way.

4. In accordance with Rule 46, the tribunal ensured that members of the public could attended and observe the hearing. This was done via a notice published on Courtserve.net. No members of the public attended.

5. The parties were able to hear what the tribunal heard and see the witnesses as seen by the tribunal. From a technical perspective, there were no difficulties.

6. The participants were told that was an offence to record the proceedings.

7. We checked that each of the witnesses, who were all in different locations, had access to the relevant written materials. We were satisfied that none of the witnesses was being coached or assisted by any unseen third party while giving their evidence.

The issues

8. The issues were identified at a Case Management Hearing before Employment Judge F Spencer on 3 November 2022 and were clarified and confirmed with the parties on the morning of day 1 on 15 March 2024 as set out below. The hearing was for liability only.

<u>Jurisdiction – time limits</u>

9. Does the Tribunal have jurisdiction to consider each of the claims of disability discrimination and whistleblowing detriment?

10. The time limit as extended as a result of Early Conciliation for constructive unfair dismissal and any claims of discrimination or detriment arising from the claimant's alleged dismissal expires on 22 August 2022.

11. The Effective Date of Termination is 21 April 2022. The claim was filed on 5 August 2022, so the claimant is in time in respect of constructive unfair dismissal and any claims of discrimination or detriment arising from the claimant's alleged dismissal on 21 April 2022.

12. Which of the allegations of discrimination or whistleblowing detriment set out in the claim fall outside the relevant time limit?

13. Do any of those allegations of discrimination form part of a continuing act under section 123(3)(a) of the Equality Act 2010?

14. In respect of those allegations of discrimination which are out of time, would it be just and equitable for the Tribunal to extend time for submission of the claims under section 123(1)(b) of the Equality Act 2010?

15. Do any of those acts or failures, on which the allegations of whistleblowing detriment are based, form part of a series of similar acts or failures and if so, does the last of such acts or failures fall within the time limit in section 48(3) Employment Rights Act 1996.

16. In respect of those allegations of detriment which were submitted out of time, was it reasonably practicable for them to be presented in time and if not, were they presented within such further period as the tribunal considers reasonable.

Constructive Unfair Dismissal

17. Was the claimant subjected to any or all of the following?

    a. Failing to take effective action to prevent Mr Clark from bullying, harassing and discriminating against him during the First Period being January 2020 to September 2021, paragraphs 21 to 25 in the claim;

    b. Failing to make reasonable adjustments during the Second Period being September 2021 to March 2022, paragraphs 27 to 31 in the claim;

    c. Failing to make the claimant aware of the existence of the Chief Product Officer role prior to 24 March 2022, paragraph 37 in the claim

    d. Failing to allow the claimant to apply for the role of Chief Product Officer at any time up to the date of his resignation;

    e. Appointing Mr Clark without prior consultation with the claimant despite understanding that Mr Clark had bullied, harassed and discriminated against him – the appointment being confirmed on 4 April and confirmed to all staff on 6 April 2022;

    f. Lying to the claimant about Mr Clark's appointment in or around 11 March 2022 and on another occasion in March as allegedly confirmed by Mr Waters on 24 March; paragraphs 32 – 34, 37(2) in the claim;

    g. Informing the claimant that he had to leave the respondent at the meeting on 24 March 2022; paragraph 37 in the claim;

    h. Instructing the claimant at the meeting on 24 March 2022 not to lodge a grievance; this included a threat that it would not be good for him to lodge a grievance, paragraph 37(6) in the claim;

i. Allowing Mr Clark to commence the new role on 4 April 2022 and making an internal announcement on 6 April 2022 notwithstanding the claimant had complained in his grievance dated 31 March 2022 that the appointment was unfair and discriminatory and whilst the claimant's grievance process was ongoing, paragraph 47 in the claim;

j. Constructing a number of disciplinary and/or performance allegations ("allegations") against the claimant which were sent to him on 5 April 2022 following his grievance dated 31 March 2022, paragraph 45 in the claim

k. Refusing to appoint an independent party to investigate the grievance and/or the allegations on various occasions in April 2022;

l. Insisting that the grievance and allegations and the question of whether the claimant and Mr Clark could work together, should be considered at a single meeting or if dealt with separately, the grievance would be considered only after the other matters had been determined; and

m. Approaching the grievance, the allegations and/or the question whether the claimant and Mr Clark could work together in bad faith.

n. Subjecting the claimant to unlawful discrimination and victimisation.

o. Subjecting the claimant to whistleblowing detriment.

18. Do any or all of the above matters amount to a breach of the implied term of mutual trust and confidence?

19. Further or alternatively, do any or all of the above matters amount to a breach of the implied term requiring the respondent to reasonably and promptly afford a reasonable opportunity to the claimant to obtain redress of any grievance?

20. If there was a breach of contract, was it repudiatory?

21. Taking into account any final straw, did the claimant resign in response to any such breach?

22. If there was a constructive dismissal, did the respondent have a potentially fair reason? If so, what was it? The respondent relies on some other substantial reason.

23. If there was a potentially fair reason was the dismissal fair taking into account the factors in paragraph 57(2) in the claim having regard to section 98(4) ERA 1996? In the alternative, the respondent asserts that the dismissal was for some other substantial reason under section 98(1)(b) ERA 1996, being the breakdown in working relationships.

<u>Wrongful dismissal: Notice pay</u>

24. It is agreed that the claimant's notice period was 3 months, and he was not paid for that notice period because he resigned without notice when he says there was a repudiatory breach of contract.

25. Is he entitled to damages for breach of contract?

26. If he is entitled, what is the correct measure of damages, taking account of his obligation to mitigate his loss?

Protected disclosures - whistleblowing

27. Did the claimant make one or more qualifying disclosures as defined in section 43B(1) of the Employment Rights Act 1996?

28. What did the claimant say or write; when and to whom? He relied on the following:

(a) The claimant says he made the following oral disclosure at the meeting on 24 March 2022 that:

(i) Mr Clark had bullied and harassed him which had a material adverse effect on his mental health, paragraph 40 in the claim. The respondent accepts that the claimant referred to "*psychological abuse"* and *"psychological violence".* In closing submissions the claimant said that he no longer relied upon this as a protected act.

(b) The claimant says he made the following written disclosures in his grievance of 31 March 2022.

i. Mr Waters was willing to allow Mr Clark to bully the claimant and his colleagues over an extended period of time, and in doing so caused the claimant significant stress and anxiety which in turn exacerbated his health conditions. The respondent accepts that the claimant said this. The claimant contends by providing this information it tended to show there was a breach of the implied term of trust and confidence and health and safety legislation, paragraph 42 in the claim.

ii. Mr Clark had bullied and discriminated against the claimant and others to the detriment of their health. The claimant contends by providing this information it tended to show there was a breach of the EqA 2010.

iii. The respondent discriminated against the claimant by refusing to offer him the Chief Product Officer role and failed to make reasonable adjustments to enable him to be appointed to the role. The claimant contends by providing this information it tended to show there was a breach of the EqA 2010.

29. Were they disclosures of information?

30. Did the claimant believe the disclosures of information were made in the public interest?

31. Was that belief reasonable?

32. Did the claimant believe that the information tended to show that the respondent had failed, was failing or likely to fail to comply with a legal obligation and in the alternative that health and safety was being or was likely to be endangered, namely:

    a. health and safety legislation to ensure, so far as is reasonably practicable there was a safe working environment and to protect the health, safety and welfare of its employees;

    b. obligations under health and safety legislation to prevent its employees from being bullied and harassed

    c. obligations under the Equality Act 2010 not to directly discriminate, victimise and to provide reasonable adjustments.

33. Was that belief reasonable?

34. The respondent accepts that if the claimant made a qualifying disclosure, it was a protected disclosure because it was made to his employer.

Whistleblowing Detriment Claim

35. Did the respondent subject the claimant to any of the following detriments because he had made one or more proven protected disclosures?

    a. Allowing Mr Clark to commence the new role on 4 April and making an internal announcement on 6 April 2022 notwithstanding the claimant had complained the appointment was unfair and discriminatory in his grievance dated 31 March 2022, and whilst the claimant's grievance process was ongoing.

    b. Constructing the allegations against the claimant following his grievance;

    c. Refusing to appoint an independent party to investigate the grievance and insisting that Mr Oliver investigate the matter;

    d. Insisting that the allegations and the claimant's grievance should be considered at a single meeting or, if dealt with separately, that the grievance would be considered only after the other matters had been determined; and

    e. Approaching the grievance, the allegations and/or the question of whether the claimant and Mr Clark could work together in bad faith.

    f. Mr Waters' actions in collaboration with Mr Oliver to dismiss the claimant.

Disability discrimination

Disability status

36. Disability is admitted in respect of 3 conditions, namely an ileo-anal "J pouch", Crohn's disease and Sacroiliitis.

37. It is further conceded that at all material times the respondent had knowledge of the disabilities.

Direct disability discrimination – section 13 Equality Act 2010

38. Did the respondent, because of disability, treat the claimant less favourably than it treats or would treat others contrary to section 13 EqA 2010?

39. The less favourable treatment complained of is that:

    a. Mr Clark bullied the claimant over an extended period of time, and in doing so caused the claimant significant stress and anxiety which in turn exacerbated his health conditions, paragraphs 21 – 24 in the claim.

    b. Mr Waters took no meaningful action to stop the bullying and harassment.

    c. The respondent appointed Mr Clark who was not disabled, to the position of Chief Product Officer which the claimant contends was effectively his own role but under a different name as part of an unfair process, which included:

        (i) The respondent did not advise or consult the claimant about the position or about Mr Clark joining the respondent

        (ii) The respondent continued with the appointment notwithstanding the claimant asked them not to and complained of direct discrimination in a grievance which it had not investigated;

        (iii) Refused to fairly investigate the claimant's grievance.

    d. The respondent constructively dismissed the claimant on 21 April 2022.

40. If there was less favourable treatment, was it because of the claimant's disability?

41. The claimant relies on a hypothetical comparator with whom there are no material difference in circumstances including the claimant's abilities?

Failure to make reasonable adjustments – section 20 Equality Act 2010

42. The claimant relies on the following PCPs:

a. Holding in-person meetings during the period in which Covid was still prevalent but without taking the steps necessary to make safe attendance for all.

b. Conducting a grievance meeting at the same time as a disciplinary hearing.

c. Permitting Mr Oliver to investigate and be the decision maker in respect of complaints about the person to whom Mr Oliver reported, which he witnessed as notetaker for the respondent and about himself.

43. The respondent admitted applying PCP's (b) and (c) above. PCP (a) was in issue. How did any proven PCPs allegedly place the claimant at a substantial disadvantage compared to those without his disabilities?

44. The claimant contends that he was placed at the following substantial disadvantage: he was unable to attend face-to-face meetings and to effectively participate in the investigation of his grievance.

45. If there was a PCP which placed the claimant at a substantial disadvantage, how would any proposed adjustments have avoided the alleged substantial disadvantage?

46. Was it reasonable to make each of the proposed adjustments?

<u>Discrimination arising from disability – Section 15 Equality Act 2010</u>

47. Did the respondent subject the claimant to unfavourable treatment because of something arising in consequence of his disability?

48. The claimant says that his inability to travel internationally and or easily attend face to face meetings during Covid 19 pandemic, arose as a consequence of his disability.

49. What was the unfavourable treatment? The claimant relies on the following:

a. Mr Clark bullied and harassed him in respect of putting pressure on him to visit India between January to April 2020.

b. The respondent marginalised the claimant and he was left to feel as though he was an inconvenience and a nuisance – in particular relation to in-person meetings, including those organised or taking place in or around September 2021, December 2021 and a Management Team strategy week meeting in March 2022.

c. The respondent appointed Mr Clark to the position of Chief Product Officer which they claimant says was essentially his own role as part of an unfair recruitment process. It is admitted that Mr Clark was appointed to this role but denied that it was the claimant's own role.

d. Informing the claimant he was no longer to communicate with his team and placing him on paid leave. The respondent admitted that

the claimant was placed on paid leave but denied telling him not to communicate with this team.

e. The dismissal.

50. Was any unfavourable treatment because of something arising in consequence of his disability?

51. If so, can the respondent show that this treatment is a proportionate means of achieving a legitimate aim? The legitimate aim of appointing Mr Clark was put as: to secure the future success of the business by bringing Mr Clark's experience into the business and the legitimate aim of putting the claimant on paid leave was to give the claimant time and space with no financial detriment, to consider the respondent's settlement proposal and to avoid unsettling the respondent's workforce.

<u>Victimisation - Section 27 Equality Act 2010</u>

52. If so, what does the respondent rely on as a legitimate aim in relation to each allegation of unfavourable treatment?

53. Did the respondent subject the claimant to a detriment because he had done a protected act(s)?

54. The claimant relies on the following as protected acts:

(a) The claimant told Mr Waters and Mr Oliver at the meeting on 24 March 2022 that it had appointed Mr Clark to the position even though it was aware that Mr Clark had bullied and harassed him and others. The respondent denied that these words were used.

(b) The claimant complained in writing in his grievance dated 31 March 2022 that:

(i) he was disabled and that he had been harassed, and discriminated against by Mr Clark to the detriment of his health;

(ii) the respondent had refused to offer the claimant the new position and failed to make reasonable adjustments to enable him to be appointed to the role.

The respondent accepts that the words relied upon in paragraph (b)(i) and (ii) were used but says this did not amount to a protected act.

55. The claimant relies on the following detriments:

a. Allowing Mr Clark to commence the new role on 4 April and making an internal announcement on 6 April 2022 notwithstanding the claimant had complained the appointment was unfair and discriminatory in his grievance dated 31 March 2022, and whilst the claimant's grievance was ongoing.

b. Constructing the allegations against him following his grievance;

c. Refusing to appoint an independent party to investigate the grievance?

d. Insisting that the allegations and the grievance should be considered at a single meeting or, if dealt with separately, the grievance would be considered only after the other matters had been determined; and

e. Approaching the grievance, the allegations and/or the question whether he and Mr Clark could work together in bad faith.

f. Dismissal.

Witnesses and Documents

56. There was an electronic bundle of documents of 669 pages. There was without prejudice documentation in the bundle upon which the parties confirmed that privilege was waived.

57. The tribunal heard from the claimant.

58. For the respondent, the tribunal heard from four witnesses: (i) Mr Geraint Waters, the CEO (ii) Mr Richard Oliver, Chief Financial Officer, (iii) Mr Ricky Mortimer, Chief Operating Officer, who left the respondent in August 2023 and (iv) Mr Richard Clark, Chief Technology Officer who left the respondent at the start of 2024.

59. There was an agreed Chronology and Statement of Agreed Facts.

60. We had written submissions from both parties to which they spoke. They are not replicated here. All submissions and authorities were considered whether or not expressly referred to below. We also had from the claimant a 42-page summary of legal principles.

Findings of fact

61. The respondent is a software product company which helps test large Salesforce implementations. Salesforce is a cloud Customer Relationship Management provider. It was a start-up company founded by Mr Geraint Waters and Mr Paul Noffke in about 2014. When the claimant joined it employed about 60 people.

The claimant’s medical conditions

62. The claimant relied on three medical conditions as disabilities which were admitted by the respondent. These were an inflammatory bowel disease which led to the removal of his colon and the replacement with a j-pouch; Crohn’s Disease and Sacroiliitis.

63. The j-pouch requires the claimant to fit his life around a schedule of eating, taking medication and going to the toilet at least 6 times a day. A visit to the toilet takes 30-45 minutes. We accepted the claimant's evidence that managing this condition is difficult for him in terms of his day to day life. Stress can exacerbate his symptoms.

64. Sacroiliitis is an inflammation of the sacroiliac joint. It is related to his other conditions. The claimant takes six different types of medication.

65. Disability and knowledge of the claimant's disabilities was admitted by the respondent.

<u>The claimant's contract of employment and job title</u>

66. The claimant joined the respondent company on 6 January 2020. He already knew the Chief Executive Mr Geraint Waters because they had worked together at other companies. They have known each other since 2004 and were friends. Mr Waters has visited the claimant in hospital in 2015 when he had surgery related to his disabilities.

67. Mr Waters set up the respondent company in 2014 and in 2019 he approached the claimant to join them. It was agreed that over the years, Mr Waters recruited the claimant on three occasions. He held the claimant and his skills in high regard.

68. Negotiations for the claimant's employment took place during 2019. Mr Waters told the claimant that he wanted him to be responsible for product functionality in the role. In 2019 the respondent was awaiting funding which was expected in the first half of 2020 at which point Mr Waters said that the claimant would have scope to build a team.

69. The Chief Technology Officer, Mr Richard Clark was also present in one of the claimant's pre-employment meetings. The claimant said that there was a discussion in which Mr Clark said the claimant should focus on what the product needed to do and he (Mr Clark) would focus on how to do it.

70. Prior to joining the respondent, the claimant was working at Barclays. He told Mr Waters that he had filed a grievance in that employment which was under investigation. The claimant told Mr Waters and we find that he left Barclays though a negotiated settlement following the conclusion of a grievance against his manager.

71. The claimant was employed as a Functional Architect, initially reporting to Mr Paul Noffke, a Director and co-founder of the respondent. Mr Noffke in turn reported to Mr Waters. The job title was stated in his contract of employment (page 59) and the Job Description was at page 484.

72. The claimant's evidence was that the job specification "*looked a bit different to what Mr Waters and I had discussed*". He said he discussed it with Mr Waters who told him not to worry about any discrepancies and that the documents were just to give him an idea of the changes they had recently brought in. Mr Waters did not recall that conversation. As we have found above, Mr Waters discussed with the claimant that there was potential for him to do well and increase his remit of responsibility. We find that no binding promises were made at that meeting about future potential career progression.

73. We find that Mr Waters was keen to recruit the claimant and he told the claimant in general terms that there was scope to do well and to increase his area of responsibility. We find that these were aspirational comments and that they were not contractually binding commitments.

74. Two of the "*Required Capabilities*" for the claimant's job were "*Excellent interpersonal, relationship building and communication skills across all organisational levels*" and "*Willing to work effectively in a team environment."* (page 484). There was also a required capability to have a willingness to travel to offshore locations "*(currently India and potentially US) to liaise with development teams when required)"* (page 485).

75. Mr Waters had prior experience of managing the claimant in other organisations and said that the claimant had a track record of not being able to work well with others in previous jobs. Nevertheless, he valued his skills, they were friends and he was keen to recruit him into his new company.

76. The claimant's initial job role did not have any managerial responsibility. It involved developing functional specifications for the delivery of features on the part of the Engineering team.

<u>The UI/UX candidate</u>

77. Problems arose in the first two weeks of the claimant's employment, in January 2020, when Mr Clark wanted to hire a UI/UX (User Interface and User Experience) manager. Mr Clark had identified a candidate who was well qualified, experienced in start-ups and interested in becoming Chief Product Officer. Mr Clark was keen to have him on board.

78. Mr Waters told the claimant that Mr Clark had identified a candidate with talent and wanted to proceed with this recruitment. The claimant's view was that his own job title of Functional Architect, was junior to the role he was actually performing and we find that he saw this proposed recruitment as a threat to his own position. Mr Waters decided to appease the claimant and made a decision not to appoint the candidate. He did not want to lose the claimant and supported him on this, even though he thought they should have gone ahead with the recruitment.

79. The claimant said this was his first negative encounter with Mr Clark because Mr Clark was keen to recruit the candidate and the claimant felt that this would undermine his own job. We find that this was the beginning of a theme as to how the claimant reacted when he thought his job or area of responsibility was being challenged.

80. Mr Waters had high hopes for the claimant and as we have found above, he made aspirational comments as to how he could progress within the company. We find that Mr Waters made no promises about any future role, although he expressed a hope that the claimant would eventually grow into a senior management role.

<u>Promotion to Product Manager</u>

81. In April 2020 the claimant was promoted to Product Manager reporting to Mr Waters instead of Mr Noffke. The claimant said that this was to make it clear that he held responsibility for product. We find that as Product Manager the claimant did not hold full responsibility for Product. On Mr Waters' evidence, we find that the role of Head of Product, as the title suggests, was the more senior role. That role had managerial responsibility for areas such as product marketing, product design and user experience.

82. The claimant complained that in about February 2020 Mr Clark denied him access to the Salesforce System. The claimant was unaware that there was an issue with licensing for this system and thought it was only to do with cost and that Mr Clark was being difficult with him. We find that the claimant was mistaken and that Mr Clark did not deny him access to the Salesforce System and was not being difficult with him. There was a wider issue with the number of licences and the amount of work involved.

83. The claimant felt in the first few months of his employment that Mr Clark was uncooperative with him so that he was unable to make substantial progress on the product. He gave examples of Mr Clark telling him he needed to get approval from "*product design experts*" who did not exist and did this to frustrate what he was doing by introducing an approval step that was not necessary. Mr Clark's evidence was that it was common to seek feedback from "*subject matter experts*" who were in the respondent's team in India and he, Mr Clark, did this himself. We find that this was an example of the claimant viewing Mr Clark's actions negatively whenever those actions impacted on his own role.

84. It was put to Mr Clark that he "*made up processes*" to block the claimant, for example by saying that a Customer Advisory Forum existed and needed to be consulted by the claimant when it did not exist. Mr Clark said that in June 2020 it existed on informal basis as it was necessary to secure investment and it was a request for a review rather than an approval process. We find that Mr Clark did not introduce an unnecessary approval step.

85. We find that the claimant's role was to do product design and Mr Clark's to do product strategy and communication and there was a degree of overlap between their roles.

86. The claimant said that in June 2020 Mr Clark refused to sign a contract on the basis that the claimant had not considered sufficient alternatives. He described Mr Clark's actions as "*deliberate"* and *"belligerent".* Mr Clark said that they were not ready to sign the contract without looking at alternatives and he understood that at the time the claimant was happy to look at alternatives. Mr Clark signed the contract after all the options had been considered.

87. It is not denied that in July 2020 Mr Clark deleted one or possibly two of the claimant's slides for a Product update. Mr Clark discussed the slides with Mr Waters the day before the presentation and Mr Waters agreed that these slides should be deleted because they may have had a negative impact on team morale. Mr Clark understood that Mr Waters was going to inform the claimant of this. The claimant believed that this was retaliation for his objection to a proposal Mr Clark made a day or two previously. We find that the claimant was not told about the conversation between Mr Clark and Mr Waters and was not aware of the reasoning behind the deletion of the slides. Unfortunately this only increased the claimant's distrust of Mr Clark.

88. The claimant raised this with Mr Waters in Slack messages, an internal messaging system. Mr Waters said "*Don't worry, it was quite short so not quite worth the transitions on this one. Hopefully you'll have something meaty for the next one"* (page 157). We find that Mr Waters was seeking to appease the claimant whilst at the same time being supportive of Mr Clark's position.

89. When Mr Clark reviewed internal documents authored by the claimant, the claimant described many of his comments as "*nonsense*" saying that he did not grasp the topic or material. The claimant did not accept that he was being critical of Mr Clark. We find that he was critical of Mr Clark. It was part of Mr Clark's role to review documents to be produced by the company. We find that the claimant distrusted Mr Clark and placed a negative interpretation on his actions when they impacted upon his own role.

90. Mr Waters often praised the claimant's work and the claimant thought this made Mr Clark antagonistic towards him. We find that the claimant's perception of Mr Clark was unfounded as we saw no evidence from Mr Clark that he was antagonistic towards the claimant.

91. In July 2020 a 1:1 call took place between the claimant and Mr Clark which was intended to be a conversation to clear the air between them. The claimant described it as "*one of the most sickening moments of his career*" (his statement paragraph 122). Mr Clark denied the words

attributed to him in that meeting such as telling the claimant what his problem was. Mr Clark admitted that he spoke to the claimant about his lack of respect for other colleagues in the company, including Mr Richards. Mr Clark also admitted that they disagreed during this call. In a Slack message to Mr Waters afterwards, the claimant described this call as "*weird*" (page 158). We find that in his witness statement the claimant exaggerated his reaction to the call. His contemporaneous reaction was just to say that it was "*weird*". We find that there would have been a more vociferous reaction at the time, had it really been "*one of the most sickening moments of his career*".

92. We find that what the claimant saw as Mr Clark "*applying the brakes*" to what he wanted to do, was Mr Clark giving reasonable managerial input from his more senior position. There was a inherent distrust on the part of the claimant in relation to any managerial decision Mr Clark made that impacted upon what he wanted to do.

Promotion to Head of Product

93. In February 2021 the claimant was promoted to Head of Product with a new contract issued in September 2021. This contract was at page 61 and at clause 2.1 his job title was given as Head of Product, reporting to the CEO. The Job Description (JD) was at page 486. The claimant drafted his own JD for the role. It was not shared with Mr Clark.

94. Despite the claimant's issues with Mr Clark, we find it did not hinder his promotion in February 2021.

Mr Richard Clark

95. Mr Clark joined the respondent in 2017 as Head of Salesforce Engineering at which time the respondent had about 40 employees. He was promoted to Chief Technology Officer in 2018. This included management of both the Product and Engineering teams. Mr Waters described Mr Clark as "*the third co-founder*" of the respondent company. Mr Waters thought highly of Mr Clark's skills.

96. Mr Clark had previously provided services to the respondent from 2014 through his own company. He had a long-standing knowledge of the company by the time the claimant joined in January 2020.

97. The claimant first met Mr Clark in October or November 2019 during the claimant's recruitment process.

98. On Mr Waters' evidence we find that he constantly tried to mediate between "*these two strong personalities*" (supplemental statement paragraph 37). He accepted that the claimant did a good job and worked hard, but said he struggled with building relationships with colleagues.

99. Mr Clark as Chief Technology Officer was in a more senior position to the claimant. The claimant considered that they were at the same level of seniority because they were both Heads of Department. We find that at no time was the claimant at the same level as Mr Clark who held a senior management role at C-suite level. From May 2020 Mr Clark and Mr Waters jointly shared the role of Chief Product Officer. Mr Waters combined this with his role as Chief Executive.

100. The claimant said that in May or June 2020, Mr Waters told him that other people had been on the receiving end of bullying by Mr Clark, including Mr Jon Robinson, Head of the US at the respondent and Mr Noffke. The claimant said he witnessed Mr Clark being heavily critical of them if they disagreed with his opinion. In cross-examination the claimant said that Mr Clark's reactions to him were "*a little bit different"* to his interactions with Mr Robinson and Mr Noffke as with himself it was persistent and continual. Mr Waters did not support what the claimant said and we find on a balance of probabilities, Mr Waters did not tell the claimant in May/June 2020 that other people had been on the receiving end of bullying by Mr Clark.

101. The claimant's view was that Mr Clark took every opportunity to be critical of him. The claimant thought that the reason Mr Clark did this was "*to prove he was superior and had power over [him]"* (statement paragraph 105). We have found that Mr Clark held the more senior role and we find that he did not need to prove this.

102. The claimant agreed that he did not raise this with Mr Clark. He said this was because he did not think it would be constructive and he thought it would provoke a reaction from him. The claimant also agreed that at no time prior to March 2022 did he raise any formal complaint about Mr Clark. He raised the matters verbally with Mr Waters who said he would address it, but he did not.

103. We find that there were tensions on both sides, that Mr Waters knew about it, but he did not deal with it. He listened to the claimant's complaints and tried to appease him. He took no steps to address the growing problem in this working relationship.

<u>The India trip</u>

104. For the reasons we set out below, we find that this issue relating to the India trip in early 2020 is out of time. If we are wrong about this, we make the following findings.

105. A work trip was scheduled to visit the respondent's office in India in March or April of 2020. Not long after the claimant joined in January 2020, Mr Clark told him that he was to join the trip. Mr Clark thought it would be beneficial for the claimant to go on the trip as a significant number of the team were based in India and it would be good for the claimant to meet them. We find that this was a sensible suggestion to

help the claimant become integrated within the business. This sort of travel was was also one of the required capabilities of the job as we have found above (page 485).

106. The claimant replied that he could not travel to India because of his medical conditions. When the claimant joined, Mr Clark knew that he had medical conditions but was unaware of the seriousness of those conditions. He thought the claimant had IBS or a dietary condition. In submissions the claimant accepted that the first time the trip was mentioned, Mr Clark may not have known of the seriousness of his conditions and we find that this was so.

107. There was a dispute between the claimant and Mr Clark as to what was said about the trip. Mr Clark agreed that he "*encouraged*" the claimant to go. He thought it would be good for team building purposes and we have also found that it was one of the required capabilities for the job. About 75% of the respondent's employees were based in the India office. Mr Waters agreed that it would have been a good way to establish the claimant in his role.

108. The claimant's view was that Mr Clark continued to "*bully and harass*" him about the trip, raising it more than once after he had explained that he could not go for health reasons. The claimant said that this was the first major incident of Mr Clark bullying him, although he said there were smaller incidents prior to that.

109. The claimant raised it with Mr Waters who had a much greater awareness of his medical situation and immediately told him that he did not need to go to India. Mr Waters said there was a brief conversation in which the claimant said: "*Richard wants me to go to India",* and he replied, *"you don't have to go*". Mr Waters then informed Mr Clark about the claimant's medical condition. Mr Clark said that once he understood the medical situation, he organised the trip without any need for the claimant to go.

110. The claimant said that Mr Clark only stopped insisting that he go to India once Covid brought international travel to a halt in March 2020.

111. Our finding is that Mr Clark did not continually insist that the claimant go to India. There was a justifiable business reason for the claimant to go on the trip. We find that once Mr Clark knew about the seriousness of the claimant's medical condition, he took no further steps to insist that the claimant should go. We find he asked twice and no more. We find on a balance of probabilities that once Mr Waters had explained the situation to Mr Clark, he accepted it did not pursue the matter further.

112. We find that Mr Clark did not pressurise the claimant to go to India.

<u>The proposed organisational chart</u>

113. In around August or September 2020 Mr Clark in conjunction with Mr Waters produced a proposed organisational chart (page 293). The claimant knew it was a proposed chart rather than the actual chart (his statement paragraph 128). It showed a list of five "Product Managers" with the claimant's name at the top. The claimant took great exception to this as he said that the other employees were "*far more junior*". Mr Waters and Mr Clark disagreed and said that the other four employees were also experienced in their particular areas and that two of them, RY and SK were peers of the claimant and not junior to him.

114. From April 2020 the claimant held the role of Product Manager. He thought this chart was "*an attempt to demote*" him but he did not speak to Mr Clark about it. The chart was not shared outside the leadership team. It was a consultation document.

115. Mr Waters told both the claimant and Mr Clark that he did not agree with the structure and they needed to have further discussion about it.

<u>January 2021</u>

116. On 7 January 2021 the claimant said that Mr Waters told him that he was *"finally going to address Mr Clark's behaviour*". The claimant said that a Slack message from Mr Waters on that date (page 174) in which he said to the claimant "*you are top priority now*" was confirmation of this.

117. The messages did not show Mr Waters saying he was "*finally going to address Mr Clark's behaviour*". The claimant said that Mr Waters told him that he wanted to dismiss Mr Clark but had been advised against it because of Mr Clark's position in the eyes of investors. Mr Waters had no recollection of telling the claimant that he was going to dismiss the Mr Clark. We find that the claimant misinterpreted Mr Waters' comment "*you are top priority now*" and read far more into it than was intended. The comment meant that on that date in January 2021, Mr Waters had time to prioritise a call with the claimant, not that the claimant was going to become "*top priority*" in relation to Mr Clark. We find that Mr Waters did not say that he was finally going to address Mr Clark's behaviour.

118. On 13 January 2021 Mr Clark sent an email to Mr Waters and Mr Noffke expressing his frustration with the situation in the Technology team. Within that email (page 79) he said:

> *"Clearly the situation with David has not worked as you hoped, and while there have been benefits in the documentation and process changes his product design and decision making has been poor and I am left powerless to do anything about this to resolve it. It's hugely divise (sic) where he claims to exert your authority Geraint and to speak as your voice. While giving David space and public support for the last few months I realise I'm letting him fail rather than be able to help him,and Provar, succeed.*

My preference is to remain at Provar and I'm willing to work in whatever capacity desired to resolve the items above, including stepping down as CTO, but unless urgent action is taken to resolve these issues I feel my current position is untenable."

119. We find that the poor working relationship was having such a detrimental effect on Mr Clark that he was prepared to leave his job.

<u>The restructure of February 2021</u>

120. In February 2021 Mr Waters put in place a restructure with a view to resolving to the working issues between them. He decided to "*split them up*" in terms of their working areas. Both of them continued to complain about the other. Mr Waters said he had been overrun with funding issues and he accepted that he had not dealt with it as he should. He decided that the answer was to appoint Mr Clark to the new role of Chief Innovation and Technology Officer and to promote the claimant to Head of Product. Mr Waters took on the role of Chief Product Officer himself, alongside his role as CEO.

121. We saw an Organisational Chart, produced by the respondent at our request during this hearing. It showed the new job roles. Mr Clark handed over responsibility for the engineering team to Mr Ricky Mortimer, Chief Operating Officer.

122. The details of the claimant's new role and his JD were not shared with Mr Clark. We find that this led to more misunderstanding and mistrust between them.

123. In terms of Mr Waters taking on the role of Chief Product Officer, the claimant said he was told that this was in title only and it was done appease Mr Clark. Mr Waters agreed that he told the claimant that the chart was temporary, until the claimant was ready to take on the CPO role. We find that the claimant did not take on the role of Chief Product Officer in February 2021. He remained Head of Product reporting to Mr Waters.

124. The claimant said that Mr Clark "*directed him to carry out work*" and referred to an email on 3 March 2021. In that email Mr Clark said: "*Could you prepare the stories…".* The claimant's complaint was that Mr Clark did not discuss this with him first and did not say "*would this be possible"* or *"would it impact something else*". We find that this was not a direction from Mr Clark it was a request and there was nothing to stop the claimant explaining any difficulties this might present. We find that the claimant's response was an overreaction.

125. On the same day, 3 March 2021, the claimant complained to Mr Waters in relation to Mr Clark: "*Who in their right mind" does this…"* (page 502). The claimant did not accept that this was rude because it was said in

confidence to Mr Waters. We find that he was being rude about Mr Clark regardless of whether it was in confidence or not.

126. The working relationship did not improve following the reorganisation. On 13 April 2021 after a series of strategy sessions, the claimant said Mr Clark told him it was the "w*orst bit of strategising he had ever seen".* Mr Clark recalled the meeting but had no recollection of that conversation. The claimant complained to Mr Waters in text messages (page 497) saying: "*he's been pissing me off"* and that he (the claimant) was *"very close to blowing [his] top*". Mr Waters did not deny that he heard Mr Clark make disparaging comments about the claimant on a video call and that it was "*inappropriate".*

127. The claimant described Mr Clark as belittling him and said in these text messages: "*the biggest problem facing this company is Richard's persistent behaviour towards people and the failure to address this even to the slightest degree*". The claimant thought Mr Waters was "*pushing around the problem so as to dodge a difficult action*" (page 498). We find that Mr Waters did not grasp the situation in the way that was needed. We find that he spoke individually to the claimant and Mr Clark, hoped he could appease them both and it would all sort itself out.

128. The claimant accepted in his statement (paragraph 148) that he queried some of Mr Clark's decisions but denied that this was exactly what Mr Clark was doing with him. The claimant's view was that his own criticisms were "*always constructive*" but that Mr Clark's criticisms were *"belittling and humiliating*". We find that Mr Clark did not belittle or humiliate the claimant but that this was symptomatic of the claimant's resentment and mistrust of Mr Clark whenever their roles overlapped.

129. On 19 May 2021 in a Slack message to Mr Waters about Mr Clark the claimant said: "*Is he just trying to provoke me, and playing people for fools, or is he REALLY that brainless?"* (page 232). This was over a disagreement about product updates and strategy. The claimant denied that this was rude, but we find it was rude to describe a colleague as "*brainless".*

<u>The claimant's relationships with other staff members</u>

130. We saw other examples of the claimant criticising colleagues, such on 6 and 7 April 2021 (pages 209-211). The claimant's view was that his criticisms were always justified. By way of illustration he described some colleagues as "*whinging*" and said: "*I don't have time for nicities [sic] with Sowjana [a senior employee based in India]*" and on page 235 "*she has serious behavioural issues that either need to be fixed or she needs to go"*. On page 239 he described Mr Paul Richards, Chief Architect, as "*Dictator Richards"* and said that if he did not like things it was "*hard luck".* On page 251 he said he had *"lost all confidence"* in Mr Mortimer who was Chief Operating Officer.

131. Mr Waters had a number of separate conversations with Mr Clark and with the claimant to encourage them to work together. Mr Waters had them both coming to him, complaining about the other. He said he did not tackle it because he was overwhelmed by fundraising issues. He described it as "*an awful time in my life listening to two people who didn't get along*".

132. In August 2021 Mr Clark made the decision to leave the respondent's employment. He was finding it very difficult to work with the claimant, it was taking its toll on him and he thought the situation was not good for the company.

133. Mr Clark left in late August/early September 2021. Mr Waters felt the loss of his skills and was keen to retain him in some way. In September 2021 he offered Mr Clark an advisory role on a contract for services rather than a contract of employment, to retain the benefit of his expertise. We saw the letter of engagement dated 24 September 2021 (page 511). The remuneration for the role was in terms of a grant of share options and the minimum time commitment was for 6-8 hours a month.

<u>Did Mr Clark bully or harass the claimant?</u>

134. Our finding of fact is that Mr Clark did not bully or harass the claimant. It is not in dispute that they had a poor working relationship. They both complained to Mr Waters who did nothing to address it. He tried to appease them individually but took no meaningful action to address a growing problem. The poor working relationship took its toll on Mr Clark and led to his decision to leave in August/September 2021.

135. Mr Clark was the more senior officer in the company. He had a wider remit that had reason from time to time to include the claimant's area of Product. The claimant felt threatened when of the view that anyone was encroaching on his area of Product. He disliked this, whether it was Mr Clark, Mr Mortimer or anyone else. We have also found above that the claimant was inclined to exaggerate his descriptions of the actions of Mr Clark or his reaction at the time.

136. There was a mismatch of understanding between the claimant and Mr Clark as to the scope of the claimant's role and the claimant's perception of his own role, given the aspirational statements made to him by Mr Waters. The claimant resented anyone encroaching, as he saw it, on his territory.

137. It was submitted that Mr Clark saw the claimant's medical condition as a weakness which caused him to perceive the claimant as someone who could be bullied. We do not accept this submission. Mr Clark told the tribunal he had his own medical issues. We found him convincing in evidence that the working relationship with the claimant and the

claimant's attitude towards him, had a negative effect upon Mr Clark as well.

138. For the above reasons our finding of fact is that Mr Clark did not bully or harass the claimant. The claimant took exception to any managerial input from Mr Clark and reacted negatively to any difference of opinion on the way the work should be done if it impacted upon him. This was not bullying or harassment.

The call on 14 January 2022

139. On 14 January 2022 a call took place between the claimant, Mr Waters and Mr Mortimer. Mr Mortimer described this in his witness statement as a "*very unpleasant telephone call*" although on the evidence of all three witnesses we find it was a video call. The purpose of the call was to discuss planning and resourcing. The claimant was unhappy about what he saw as Mr Mortimer removing resource from his area of Product. Mr Mortimer described the claimant as being rude and disrespectful and ultimately aggressive. Mr Mortimer hung up to avoid saying something unprofessional himself.

140. Neither Mr Mortimer nor Mr Waters gave details of this call in their statements despite its significance to them both. Mr Mortimer said the claimant called him a "*f***ing liar*" in relation to what happened with resourcing and accused him of withdrawing people from his workstream. He told the tribunal that this was one of the most unprofessional things he had ever experienced. Mr Mortimer said that the reason he had not put this in his statement was because he had chosen to use respectful words instead. He said it was one of the most unprofessional things he had ever experienced.

141. Mr Waters described the call as "*horrendous*" and "*the straw that broke the camel's back"* and *"the tipping point*". He said that Mr Mortimer came off the call almost in tears. He quoted the claimant as saying to Mr Mortimer: "*You are f***g disrespecting me, you are f***g ruining my job*". Mr Waters regarded this as gross misconduct and in all his time at the respondent he had never heard anyone speak like this to a colleague. Mr Waters decided they could not go on like this. Up until that point Mr Waters agreed that he had "*backed*" the claimant, they were friends and he had recruited him. He decided at this point that the claimant was "*hurting the business*".

142. The claimant was re-called as a witness to deal with the details of this call. He denied using a "*barrage of swearwords* and said he did not call Mr Mortimer a "*f***ing liar*" or even a "*liar*". Mr Waters was adamant that this was what the claimant but said he held back in his statement, due to his friendship with the claimant.

143. The claimant agreed that Mr Mortimer hung up from the call. He said that Mr Waters told him that Mr Mortimer was "*having a bad day*" and that he would be fine.

144. On a balance of probabilities we preferred the respondent's account of what the claimant said on that call, for the following reasons. Both Mr Mortimer and Mr Waters had a very strong reaction to the call. They corroborated each other in evidence and were consistent in what they said. Mr Mortimer no longer works for the respondent so there was no question of employer loyalty. The claimant agreed that Mr Mortimer hung up from the call. He was a very senior manager and we find on a balance of probabilities that something more than just having a bad day, caused him to do so. Whilst we find that it should have been included in the respondent's witness statements, the lack of necessary detail was because the former friendship (Mr Waters) and out of a misplaced decision to use respectful words (Mr Mortimer). We find that the claimant did use a barrage of swearwords during that call and directed his anger towards Mr Mortimer.

145. We saw something of the claimant's attitude towards Mr Mortimer in Slack messages on 1 February (pages 251-253). In a similar way to his views about Mr Clark he felt that Mr Mortimer was encroaching on his area of Product, for example: "*Ricky has basically inserted himself as Product Owner for the whole shooting match, and is dictating himself whether something is worthy (by his own criteria)…"* and describing him as in a "*dictatorial position*".

146. Despite Mr Waters considering that the claimant's behaviour on the call of 14 January 2022 was gross misconduct, he did nothing to address it. He said he "*procrastinated*" because this was his friend.

147. We find that this was a tipping point for Mr Waters in that he realised that something had to be done to manage the claimant's behaviour and his attitude towards colleagues. He regarded the claimant's behaviour as gross misconduct and knew he had to act. He found this very difficult because of their friendship and did not know how to deal with it. He continued to procrastinate.

<u>Mr Clark re-engaged as a consultant</u>

148. In January 2022 Mr Clark was engaged as a consultant his own company. We saw the agreement dated 18 January 2022 (page 516). The initial contract period was for one month from 24 January 2022 and there was a charge at an hourly rate.

149. Mr Waters did not inform the claimant about this consultancy agreement. We find he was under no obligation to do so. As Chief Executive he did not need to inform the claimant as to who he was engaging to provide consultancy services to the business.

The Management Strategy Week and the golf day

150. In March 2022 the respondent held a week-long series of strategy meetings to plan their goals. The claimant was keen to attend part of this in person. The claimant wanted Mr Waters to ask attendees to take a lateral flow test beforehand. Mr Waters agreed that he did not do this. He said he had the claimant's health in mind as he thought it would be better and safer for the claimant to attend remotely.

151. On 10 March 2022 the respondent had planned a golf day. The claimant attended having made all the necessary preparations for his health needs. He felt comfortable about attending because it took place outdoors.

152. The evening before the golf day, Mr Waters sent the claimant a Slack message saying that he was thinking of inviting Mr Clark and asking if he had an issue with that. He said he could put Mr Clark in a different group if he would prefer not to chat to him. As Mr Clark was providing services to the company as an advisor to the Board, Mr Waters saw no reason not to invite him.

153. The claimant felt in a difficult position. He thought he would be the bad guy if he said no and the bad guy if he said yes and then did not speak to Mr Clark. Mr Waters replied immediately that he would not invite Mr Clark (page 505). We find that once again Mr Waters decided to appease the claimant. We find on Mr Waters' own evidence, that his view was that if the claimant was unwilling to mix with Mr Clark at a golf day, there was no way he was ever going to work with him.

154. At a strategy session on 11 March 2022, which the claimant joined remotely, the budget was under discussion. The claimant said he was "*horrified*" to see Mr Clark's name on the Product Budget sheet for the UK. The claimant messaged Mr Waters who explained that Mr Clark had been added for consulting (page 506-507). They discussed this a little more in messages and Mr Waters said that Mr Clark's contribution should have come under IT rather than Product.

155. We find that during the Management Strategy Week, plans were underway to reemploy Mr Clark, as set out below.

The decision to re-employ Mr Clark

156. Mr Waters decided that the business was suffering from the absence of Mr Clark. He considered him as "*the brains behind Salesforce*". The claimant had recruited Mr Arroyo Acuna to fill the gap. Mr Waters said Mr Arroyo Acuna was an expert developer but the expertise they were missing was architectural and this is where Mr Clark came in.

157. In late February 2022, about two weeks before the golf day, Mr Waters invited comments from colleagues in India about the claimant. In an

email of 24 February 2022 to Mr Sharma, the Head of Department in (page 84) he said:

> *Hi fella*
> *Can you add a little detail to your feedback from the people you have been chatting to:*
> *We don't want to work with Dave because (examples & names would be useful)*
> *We do want to work with Richard because…*
> *Regards*
> *Geraint*

158. The wording was such that it actively invited negative comments about the claimant and positive comments about Mr Clark. Mr Waters said he had already spoken to Mr Sharma who had made these points verbally on an unsolicited basis. We find that the comments were not unsolicited but that Mr Waters had asked for the feedback. He had become aware that Mr Clark was available for work and interested in rejoining the business and he wanted to act on this. Mr Waters' email was not a neutral request for comments. We find that the wording and the purpose of that email was to seek negative comments about the claimant and positive comments about Mr Clark.

159. We find that it was not until late February 2022 that Mr Waters made the decision to act upon the "*last straw*" or *"tipping point"* of the 14 January phone-call. The availability of Mr Clark and his wish to re-employ him, prompted him into action and decision making. We find that Mr Waters made the decision by no later than 24 February 2022.

160. Mr Sharma replied on 25 February on behalf of all the line managers in India with a list of reasons "*why not Dave"* and *"why Richard Clark*". There was a negative list of 7 points against the claimant and a list of 5 positive points in favour of Mr Clark (page 84). Unsurprisingly, the claimant disagreed with all the negative points about himself. The comments showed a view that the claimant's attitude to colleagues in India was not good.

161. We find that the colleagues in India had genuine concerns about the claimant as expressed in Mr Sharma's reply of 25 February. There were positive comments about Mr Clark, although with some concerns about his management skills.

162. Mr Waters decided that he wished to "*bring Richard [Clark] back in to the business*" – statement paragraph 66. He said that in a business of their size there was no way for the claimant and Mr Clark to avoid one another. He believed that the claimant would not be willing to work for Mr Clark (statement paragraph 64). He said that he thought it "*respectful*" to give the claimant an option of a generous severance package should he wish to leave.

163. Mr Waters decided not to hold any form of consultation with the claimant about Mr Clark's return, because he considered it "*pointless*" and in his view the claimant was never going to agree, "*however long and detailed the consultation process*".

The Chief Product Officer role

164. In January or February 2022 Mr Clark saw an advertisement on LinkedIn for the role of Chief Technology Officer at the respondent. He recognised it as his former job and applied for it. It was not initially a serious job application. Within a few days Mr Waters contacted him and said that the role should not have been advertised, this was an error, but he could rejoin the company in the role of Chief Product Officer. Mr Waters had been covering that role himself since February 2021 alongside his CEO role.

165. Mr Waters created the role of Chief Product Office at C-suite level of executive management. He had not been able to devote enough time to the role. In his view, the claimant was not operating at that level. Although he thought the claimant had strong technical skills and strategic vision, he lacked the collaborative skills to be part of the leadership team and take the business forward. He said that one of the most important aspects of the role was an ability to work with others including key stakeholders. His view was that the claimant had not demonstrated that he could do this.

166. The detailed discussions about Mr Clark returning to the CPO role began on 9 March 2022 in preparation for the golf day on 10 March. Mr Waters asked Mr Clark if he was interested in attending the golf day but said he would need to speak the claimant about it first. Given the claimant's response, Mr Clark attended at the end of the day, after the golf had finished, to have discussions about the CPO job.

167. It is not in dispute that the claimant was not notified of this job vacancy and he was not given an opportunity to apply. We find that he wished to apply because he held the view that it was the same role as his own, although his job title was Head of Product.

168. There was no JD or even an advertisement for the role of CPO. We find that the reason the claimant was not made aware of the job, was because Mr Waters did not want him to apply. He had already made up his mind that that the claimant was not suitable and he had chosen Mr Clark. This had nothing to do with the claimant's medical conditions and/or any disability. Mr Waters had seen behaviour from the claimant that he regarded as gross misconduct. They had retained Mr Clark's services under a consultancy agreement since September 2021 and had not cut ties because they valued him. Mr Clark was the more experienced and had worked at a more senior level and Mr Waters wanted the benefit of his skills.

169. Mr Clark said that Mr Oliver sent through a JD, although this was a document which was never disclosed or included in the bundle. It was a significant omission to fail to disclose or explain the reason for the absence of the Job Description when Mr Clark, the respondent's own witness, said it existed. Ultimately, we find that the CPO was a more senior role to that which the claimant performed as Head of Product. It was at C-suite level and at a more strategic and higher level. Mr Waters had been covering this role himself and knew exactly what it entailed.

170. Mr Clark was aware that his return would be a problem for the claimant. It was suggested that the two of them sit down to try to understand why there had been so much conflict over the previous 2 years. Mr Clark understood that Mr Waters was going to discuss his proposed return with claimant. Mr Clark wanted that to happen.

171. Mr Waters subsequently told Mr Clark that the claimant did not want to speak to him. We find that this was based on the claimant's reaction to Mr Clark possibly being invited to the golf day and not because Mr Waters had actually been in discussion with the claimant about Mr Clark's return.

172. The offer letter to Mr Clark was dated 14 March 2022 (page 589). Mr Waters said that between Friday 11 March and Monday 14 March everything had been discussed and agreed with Mr Clark. We find that there was some planning and discussion beforehand, with agreement in principle, with the finer details discussed and agreed during those four days.

173. Mr Clark said he accepted the job at the end of March 2022 at which point there had been no meeting with the claimant. Mr Clark was not sure of the exact date. We find on a balance of probabilities that it was just before 24 March 2022 because Mr Waters needed to know that Mr Clark was coming back before he held the meeting with the claimant on that date. We find on a balance of probabilities that Mr Clark accepted the job on or about 23 March.

174. When he accepted the job offer Mr Clark was unaware that there were negotiations on foot for the termination of the claimant's employment and that he was on garden leave and not actually working in the business.

175. We find that Mr Waters was not up front with claimant in terms of telling him about Mr Clark's proposed return. The claimant had no formal right to know about the respondent's recruitment decisions, taking place at a more senior level than himself. We find that the reason Mr Waters did not tell the claimant, was because the decision had already been made to remove the claimant and bring Mr Clark back in.

The meeting of 24 March 2022

176. On 24 March 2022 at 3pm Mr Waters and Mr Oliver met with the claimant by video. It was scheduled as a routine 1:1 catch up meeting between the claimant and Mr Waters. The real purpose of the meeting was for Mr Waters to offer the claimant a severance package to leave the company.

177. Mr Oliver prepared a script for the meeting on 24 March. Despite being a highly relevant document, it was not disclosed and was not in the bundle. Mr Oliver was not able to say what had happened to it.

178. Unsurprisingly the claimant felt "*ambushed*" by the nature of the meeting. At the start Mr Waters told him that Mr Clark would be returning on 4 April as Chief Product Officer and that the claimant would have to report to him.

179. Mr Waters denied that he told the claimant that they had decided he would have to leave. He said it was "*an option*". We find that it was not "*an option*". He had already made the offer to Mr Clark and he held the meeting on 24 March 2022 to offer a severance package to the claimant.

180. Mr Oliver's brief note of the meeting was as follows:

> *"GW outlined Richard Clark's return and the issues it presents for DC's role.*
> *DC agreed to talk without prejudice*
> *GW doesn't think DC can work for RC, but wants to hear DC's views.*
> *GW set out the offer.*
> *DC referred to psychological abuse from RC that resulted in mental health issues. Though not recorded they were discussed. DC thinks GW is acknowledging that by as a result of these actions. .*
> *GW said he knows how DC feels.*
> *DC said bullying was admitted. He said he was subject to "psychological violence" over 18 months*
> *GW said he wants to do the right thing. But he is struggling to make DC successful, e.g. not seeing eye to eye with Ricky [Mortimer]*
> *GW summarised that DC's effectively said he can't work with RC, but DC needs to reflect further. GW can't tell him what to do*
> *DC said there's no need to need to talk further now*
> *GW said we'll send a letter*
> *GW said the situation is "nuts" because DC is high performing"*

181. The claimant did not pursue his contention that he complained about discrimination at this meeting and as set out in our findings below, we find that he did not do a protected act in this meeting.

182. The claimant did not see Mr Oliver's meeting note until after he presented this claim. He made his comments on the note in an undated document at pages 490-491 which was a more detailed account of the meeting. It included a note of Mr Waters saying that he thought it was not possible for the claimant and Mr Clark to work together; that Mr Clark was willing to work with the claimant but that the claimant would need to report to

him. The note said that "*the business concluded that the best option was that DC should leave*". We find support for this in Mr Oliver's statement, (paragraph 18, bullet point 2) that Mr Waters "*certainly presented it as the logical conclusion*" although the claimant's thoughts were requested. We find that it was the conclusion they had already reached.

183. Later that same day, 24 March, Mr Waters sent a letter to the claimant titled "*Without Prejudice*" setting out detailed terms for his departure from the respondent. The second sentence of the letter said: "*As I explained, I wanted to meet with you to see if we can agree terms for your amicable departure from the Company"* (page 96). Privilege was waived on this correspondence and we find that this was the reason for the meeting of 24 March 2022, to discuss terms for the claimant's departure from the company and not to discuss other options.

184. The letter said that Mr Waters had concluded that they should "*part ways*" and the plan was for his employment to terminate one week later on 31 March 2022. The letter set out financial terms of settlement. The claimant was asked to give a response by 28 March. The letter did not say what would happen if the claimant did not agree to the terms.

185. Mr Waters said for the first time under cross-examination that he had considered placing the claimant on a Performance Improvement Plan (PIP). We find that he did not consider this at the time because there was no prior mention of it, for example in the claimant's appraisal only two months earlier. It was not mentioned in either Mr Oliver's or the claimant's note of that meeting.

186. Mr Waters said that the letter sent to the claimant after the meeting was not prepared in advance. He agreed that it was prepared with the benefit of legal input and was based on a template. The meeting took place at 3pm and lasted about 20 minutes. We find on a balance of probabilities that as the stated purpose of the meeting was to see if they could agree terms for the claimant's departure, they had thought about it in advance and the letter was prepared in advance. The decision had already been made and the letter was ready to give to the claimant, having outlined the terms in the meeting.

187. Although Mr Waters suggested that he had put to the claimant that there was an alternative for the two of them to work together, we do not accept this. Although the claimant's note of the meeting said that Mr Waters said that Mr Clark was willing to work with claimant, it was not pursued because "*the business concluded that the best outcome was that DC should leave".* We find that this was the conclusion that had been reached well before that meeting took place. There was no mention of this alternative in Mr Oliver's note of the meeting (quoted above). We find that Mr Waters did not suggest the alternative of seeing if the two of them could work together. This was not what he wanted to do.

188. It is in dispute that at the meeting Mr Waters told the claimant that it would not be good for him to raise a grievance. The claimant said that Mr Waters told him he should not submit a grievance as he had at Barclays. It was put to the claimant that this was not an unreasonable position to take when a deal was on the table, because it would just drag things out. The claimant disagreed. Mr Waters denied that there was a discussion of a grievance in that meeting. We find that there was such a discussion. The respondent did not wish to get involved in a protracted grievance procedure, they simply wanted to reach an agreement which resulted in the termination of the claimant's employment.

189. Mr Waters admitted that he told the claimant at the meeting on 24 March that an announcement would be made the following day about Mr Clark's return. The claimant asked that this announcement be delayed and it was delayed until 6 April. The claimant was told not to attend work and to go on paid leave which was in effect placing him on garden leave. This meeting on 24 March predated the protected act relied upon by the claimant of his grievance letter of 31 March 2022.

<u>The claimant's grievance of 31 March 2022</u>

190. On 31 March 2022 the claimant raised a grievance which he sent to Mr Oliver and copied to Mr Waters (page 88-93). The letter included a complaint of disability discrimination (page 93 point 3)) by saying: "*It [the respondent] is aware that I am disabled and that Mr Clark is not. It has discriminated against me by refusing to offer me the Chief Product Officer role, and has failed to make reasonable adjustments to enable me to be appointed to the role*". We find that this was a protected act.

191. Mr Waters asked Mr Oliver to deal with the grievance. In March 2022 Mr Oliver held responsibility for HR because there was no HR officer in post. He thought that this made him well placed to deal with the grievance.

192. The claimant complained that he was placed on garden leave without a contractual right to do so. His contract of employment at page 70 gave a right to place him on garden leave where either party had given notice to terminate (clause 17.1). At the date of the grievance, notice to terminate had not been given by either party so we find that the claimant was right about this. The claimant's case was that he was told this because of something arising from his disability, namely his inability to travel internationally and/or easily attend face to face meetings during the pandemic. We find that this was not the reason the claimant was placed on garden leave or told not to contact colleagues. The reason was because they had already made the decision to dismiss him following the tipping point on 14 January 2022 and the availability of Mr Clark to rejoin the company and they were putting those plans into place. It was also because they had formed the view that the claimant and Mr Clark could not work together.

<u>Disciplinary allegations</u>

193. Mr Oliver emailed the claimant on 5 April 2022 inviting him to a grievance meeting on 7 April 2022 (page 108). The letter was emailed to the claimant at 13:40 hours so he only had a day and a half's notice of that meeting. The claimant was given the statutory right to be accompanied.

194. This email also said that the meeting would also involve a discussion of a number of allegations set out in a statement from Mr Mortimer (pages 101-102). Mr Oliver said it was not clear whether those allegations, if well founded, would amount to misconduct or unsatisfactory performance (page 109). The claimant was told that dismissal was a possible outcome. There was no mention of a PIP on the performance issues.

195. The headline points of the allegations set out in Mr Mortimer's statement were put as:

- The claimant's refusal to work with their Chief Architect - this was Mr Paul Richards.
- Lack of collaboration and respect with the teams in India.
- An uncooperative an aggressive attitude towards Mr Mortimer.

196. We find that this letter was not an invitation to an investigatory meeting, it was an invitation to a grievance hearing and a disciplinary hearing at the same time.

197. Mr Oliver said that he decided not to hold a separate grievance meeting but to discuss the grievance as part of the disciplinary matters and decide whether he and Mr Clark could work together (page 109). The claimant was told that if he would like a separate meeting, they would hold it immediately afterwards. The claimant was provided with witness statements from Mr Clark, Mr Waters and Mr Mortimer.

198. Mr Oliver concluded the letter by saying that he suggested the claimant continue on additional paid leave and that he should not carry out any duties for the company. He was asked not to have any contact with any other employees or clients and that he would arrange for his IT access to be temporarily suspended (page 110). We have set out our findings on this above as to the reasons the claimant was placed on garden leave. It was not because of something arising from his disability.

199. The claimant considered the disciplinary and performance allegations to be contrived and manufactured in response to his grievance. He also viewed his removal from the workplace as an unlawful suspension and objected to having his IT access cut off (page 111). He also made a data subject access request.

200. The claimant asked for an independent person to be appointed to deal with his grievance. This was refused. Mr Oliver's position was that although he was present at the meeting on 24 March 2022, he was not

a decision maker. He told the claimant that if he was not happy with the outcome, he had a right of appeal to a member of the Board.

201. On 6 April 2022 the claimant was signed off sick with work related stress for two weeks to 20 April 2022 (fit note page 115). This meant that he was unfit to attend the meeting on 7 April.

202. On 6 April 2022 the respondent made a company-wide announcement that Mr Clark was returning as CPO (page 474). This was the day after sending the claimant the letter inviting him to a combined disciplinary and grievance meeting with no opportunity for those matters to be resolved before the announcement was made.

203. By email on 8 April 2022 Mr Oliver rearranged the meeting for 22 April 2022 saying that it would go ahead in his absence, even if the claimant submitted a further fit note. The meeting was remote and the claimant could have breaks if required.

204. By email on 8 April 2022 the claimant strongly objected to this stance saying that he included a further complaint against Mr Oliver for his "*aggressive position*". Mr Oliver replied on 13 April saying that the meeting would go ahead as planned. He said: "*While you may be unwell you have demonstrated by your detailed and reasoned with me, both before and after you submitted a Fit Note (following a request that you attend a meeting), that you are very capable of taking part in a discussion. I have put in place a number of safeguards, including holding the meeting by video and having plenty of breaks, to minimise any stress associated with the meeting".* (page 118).

205. The claimant resigned by email with immediate effect on 21 April 2022 (page 126).

206. Mr Waters made a company-wide announcement by email on Monday 25 April 2022 saying: "*David Cooke has decided to move on from Provar. I would like to thank Dave for his hard work and dedication since joining a little over 2 years ago and I wish him the best in the future*" (page 131).

207. On 28 April 2022 the newly appointed VP of Global HR Ms Lisa Lee, emailed the claimant offering to resolve his grievance, despite the fact that he had resigned and offering "*a fresh set of eyes and an independent approach*" (page 132). The claimant did not take up this offer.

208. It was put to the claimant that it did not matter how the grievance process was conducted because Mr Clark had been reappointed and there was no way he was going to work with him. The claimant said that this prejudged the outcome of the grievance process.

Findings as to the grievance and disciplinary process

209. We find that the disciplinary and grievance process was a sham and was not conducted fairly. Its purpose was to present a gloss of fairness when the sole intention of Mr Waters was the removal of the claimant from his employment. The parties waived privilege on the contemporaneous without prejudice correspondence aimed at the claimant's departure.

210. We find the following flaws in the process:

a. There was no proper investigation into either the grievance, disciplinary or performance issues. Statements had been gathered on 4 April 2022 from Mr Mortimer, Mr Waters and Mr Clark as the senior officers of the company who we find were all of the same mind in seeking the departure of the claimant. There was no attempt to investigate with anyone else mentioned in the grievance such as Mr Noffke.
b. There had been no prior performance issues raised with the claimant yet he was facing potential termination of employment for this. In January 2022 he had gone through an appraisal with Mr Waters which led to no performance management. In oral evidence Mr Waters said for the first time that he had considered placing the claimant on a PIP, yet there was no sign or mention of it. We find that he did not consider this.
c. We find that the refusal to pause the disciplinary process pending consideration of the grievance was because there was no intention to give proper consideration to the grievance. The order of process was first to consider dismissing the claimant for conduct or capability or for his inability to work with Mr Clark. Only once they had considered whether he should be dismissed, would they go on to consider his grievance. We find that this was because the departure of the claimant had already been decided upon.
d. We find that the refusal to postpone the hearing due to the claimant's ill-health was also because the outcome was predetermined and because they wanted to get on with it. The fact that the claimant could engage in correspondence with Mr Oliver about the process, did not mean that he was fit to deal with a hearing involving multiple allegations against him. He had been signed off with work related stress.
e. Whilst we find that an employer is not bound to bring in an independent third party to conduct a grievance or disciplinary process, we find that Mr Oliver was not impartial. He was present at the 24 March 2022 meeting, so he was involved in the factual matters and there was an additional grievance complaint against him personally.
f. The respondent did not give consideration to anyone else once the claimant raised his concerns about Mr Oliver's involvement. We saw a structure chart for April 2022 and find that Ms Lee joined on 14 April 2022 as VP of HR. This could have been passed to her, by way of example. We did not agree with the respondent's submission that it was fine because the claimant had the right of appeal to a Board member. It left the claimant with no effective right of appeal if the

first time he received an impartial hearing was before a Board member at an appeal.

g. There was also a failure to inform him of the CPO role so that he could apply for this in open competition.

211. This sham grievance/disciplinary process was of itself a repudiatory breach of contract. It went to the root of the contract. The claimant correctly concluded that the decision to remove him had already been made. Mr Clark's return was a done deal, it was announced on 6 April. Negotiations were underway for the termination of the claimant's employment – upon which privilege was waived. The claimant could see that there was no way back. We find that he resigned in response to the fundamental breach of his contract of employment. It involved a flawed and unfair process plus the sudden emergence of an array of serious disciplinary and performance issues. We find that he resigned in response to that breach.

Was the claimant constructively dismissed?

212. We find that there was a constructive dismissal in terms of the flawed disciplinary and grievance processes as the decision to dismiss had already been made. This was a breach of the implied term of trust and confidence. The decision to dismiss and the steps taken to orchestrate this was calculated and likely to destroy or seriously damage the relationship of confidence and trust between them.

213. The respondent said that if we found there was a dismissal, the reason was some other substantial reason for the inability of the claimant to work with Mr Clark. The claimant was very protective of his areas of work of Product and was unfortunately unable to work collaboratively with others. He resented any other manager whom he perceived as encroaching on his territory or who might threaten his own promotion prospects. We saw this, in particular, in three areas (i) the proposed employment of a UI/UX manager in January 2020. Mr Waters gave in to the claimant and decided not to go ahead with this recruitment; (ii) his attitude to Mr Mortimer in January 2022 when he thought Mr Mortimer was interfering with Product and (iii) his poor relationship with Mr Clark.

214. We find that Mr Waters was not a strong manager. He listened to the claimant's complaints and chose to appease him rather than tackle the situation. We find that this was largely because of their long-standing friendship.

215. We find that the dismissal was unfair because there was no attempt to see what they could do to repair the relationship before moving to dismissal. The claimant did not know that a failure to take steps to work constructively with Mr Clark could cost him his job. A fair process would have allowed him that opportunity.

216. Mr Waters said in cross-examination: "*we could possibly have attempted mediation*". This could have formed part of a fair process in these circumstances and we find from Mr Clark's evidence that not only was he open to it, he expected to have to sit down with the claimant to talk things through before he returned. We find it received no consideration because the outcome the respondent wanted was dismissal. A skilled mediator may have been able to assist these parties in working together, particularly if they knew that their jobs were at risk. In his witness statement (paragraph 40) Mr Waters said: "*I assumed I would be able to mediate between the two of them to get them to communicate effectively".* At no point did he attempt this.

The reasonable adjustments claim

217. The claimant relied upon three provisions, criteria or practices (PCP's), two of which the respondent admitted applying. These were (i) permitting Mr Oliver to investigate and be the decision maker in respect of complaints about the person to whom he reported and (ii) conducting a grievance meeting at the same time as a disciplinary hearing.

Those PCP's which were admitted

218. We deal firstly with those PCP's which were admitted. The substantial disadvantage relied upon for all three PCPs was that the claimant was unable to attend face-to-face meetings and to effectively participate in the investigation of his grievance.

219. We find that appointing as an investigator / decision maker on a grievance, when that grievance is about that person's own line manager; anyone would be placed at a disadvantage whether disabled or not. This was not fair process and it had nothing to do whether the claimant was able or unable to attend face to face meetings. The majority of this respondent's meetings were on-line in any event.

220. Any person facing a grievance where the investigator or decision maker was making decisions about their own manager, would be placed at a disadvantage. It would make it difficult for any employee, disabled or not, to participate effectively in this grievance as the concern would be that the investigator or decision maker was under the control of their line manager. We find that the claimant was not placed at a substantial disadvantage in comparison with non-disabled employees.

221. The same applies to the PCP of conducting a grievance meeting at the same time as a disciplinary hearing. We consider that any employee, disabled or not, would be placed in the same position. We find that the claimant was not placed at a substantial disadvantage in comparison with non-disabled employees.

The PCP of holding in-person meetings during Covid

222. The respondent did not admit applying a PCP of holding in person meetings during Covid, but without taking the steps necessary to make safe attendance for all. This issue covered the period from September 2021 to March 2022 where it is agreed that the claimant was only able to attend remotely.

223. It is not in dispute during September 2021 to March 2022 the respondent held occasional in-person meetings. The respondent does not have its own offices. It was a start-up and its predominant modus operandi was virtual and on-line. About 75% of the workforce are in India and another part of the team is in the United States. When in-person meetings were considered necessary, they rented space for that purpose. The norm for attendance at meetings in this company was online.

224. During Covid the claimant was placed in the clinically extremely vulnerable group because of his autoimmune conditions. It was a huge risk to him should he contract Covid. He said that he was at risk of "*death or severe illness*". His evidence (paragraph 189 of his statement) was that he should *"stay indoors and not leave home and not have any contact with anyone outside his household".* When the shielding programme ended, he was advised to work from home.

225. The claimant's evidence was that this advice was given to him in April, May or June 2021. We find that this advice was given from 19 July 2021 (letter page 396, paragraph 2). The claimant said he was advised that he should ask his employer take steps to protect him, such as testing colleagues for Covid, ensuring they were vaccinated, wearing face coverings, social distancing and ventilation.

226. The claimant accepts that the respondent could not legally require staff to undergo a Covid test or require them to be vaccinated. The claimant told Mr Waters that he wanted to attend key meetings in person if at all possible. He thought this was important to help build working relationships as he felt he had been side-lined. We deal in turn with each of the 3 in-person meetings relied upon.

<u>Presentation in September 2021</u>

227. The claimant said he particularly wished to attend in person a meeting in late September 2021 relating to Product vision. On 7 September 2021 the claimant sent Mr Waters an email setting out what he wanted in terms of arrangements for in-person meetings (page 82). The claimant recapped in that email that he was in the clinically extremely vulnerable group. He said he could take the tube at off-peak times, but not a taxi. He also said: "*Your suggestion of making everyone take a Covid test that morning makes good sense*". We find that Mr Waters did make this suggestion and although he knew he did not have the legal right to insist upon it, he could ask staff and we find that this was an adjustment that he was prepared to make even though it was not legally enforceable.

The claimant also said that it would be preferable if everyone was fully vaccinated.

228. There was a suggestion of holding in-person meetings outdoors (page 83) which was the claimant's preference. We find that this made for unpredictability because of weather conditions. If it was indoors, he wanted everyone to wear masks, plus 2 metres social distancing, in a well-ventilated room so that for a meeting with 4 people he wanted a room that was sized for 12 people. The claimant said that if it was inside, a meeting with 4 people would need a meeting room sized for 12 with masks and distancing.

229. Mr Waters thought it was dangerous for the claimant to attend in person. He agreed that they did not make the adjustments requested. Mr Waters said they did not have time to put the measures in place and his priority was to get the information presented. Mr Waters said he took the decision out of empathy and care for the claimant and that he could present remotely.

230. The claimant's evidence was that Mr Waters told him that when he saw the email of 7 September 2021 he "*couldn't be bothered to read it*". Mr Waters said he believed that he did say this, so we find that he did. He said it was a joke and that he did read the email. It was not long, at 1.5 pages, so we find he did read it. He said he thought the claimant's health was more important and it was not necessary for him to attend in person. The social part of the meeting was due to take place afterwards in a pub or restaurant and his view, which we find was correct, was that the claimant would not have attended this anyway.

231. The claimant attended the meeting from home. He said it was difficult to share his screen and look at the video of the participants in the room and that it was difficult to judge people's reactions. He said he felt "*very upset*" and "*completely excluded*". We find that the claimant overplayed this because he was not "*completely excluded*". That would have been the case had he been told not to make his presentation or not to attend at all, but he was able to do so remotely.

232. We find as follows: Mr Waters knew of the claimant's extremely vulnerable clinical condition. The risks to the claimant, as he said himself, were death or severe illness if he contracted Covid. Whilst Mr Waters could have put in place the measures suggested, we find that this did not avoid the risk of the substantial disadvantage to the claimant. The claimant accepted the people could not be required to take lateral flow tests or be vaccinated. Mr Waters gave an example of a meeting the following week, where a colleague said on arrival that his wife tested positive for Covid that morning. We find that in the light of the risks to the claimant, both in terms the risks he might encounter travelling and in attendance with others, the reasonable adjustment was for him to attend remotely. We find that the steps the claimant contended for would not

have been reasonable steps to avoid the disadvantage. The respondent did not fail to make a reasonable adjustment.

Board meeting December 2021

233. Mr Waters suggested to the claimant that he attend a Board meeting in December 2021 to present the product strategy. The claimant said that no "*precautions*" were offered to him for this meeting. The claimant's presentation was for a 20-minute slot with questions afterwards. This necessitated travel on public transport to attend. Mr Waters said it was not appropriate for him to attend in person, he told the claimant this and said that the claimant was "*fine with it*".

234. Mr Waters had known the claimant for many years, knew about his health condition and in December 2021 Covid was still prevalent. His evidence was that the safest thing to do was for the claimant to attend virtually but he was welcome to join in person (supplemental statement paragraph 78).

235. Our finding is the same as above, the reasonable adjustment in this context was for the claimant to attend remotely and the respondent did not fail to make a reasonable adjustment.

Strategy meeting in March 2022

236. The claimant wished to attend a meeting during the strategy week in March 2022 as he had not met many of the other departmental managers in person. During that week each head of department prepared their own session and made a presentation. The claimant wanted to attend his own session in person, even if it was just for an afternoon rather than the whole day.

237. The claimant asked Mr Waters to ask everyone to take a lateral flow test on the day of his session. Mr Waters accepts that he did not do so and as we have found above, he said that he had the claimant's health in mind as he thought it would be better for the claimant if he attended remotely.

238. It was unfortunate that the meeting room that had been booked, did not have video conferencing facilities. The claimant was still able to attend via a laptop but it was not ideal.

239. The claimant attended a golf day on 10 March which he felt comfortable with because it was outdoors. We find that this gave him the opportunity to meet and mix with his colleagues and heads of department which is what he wanted.

240. Our finding is as above, that the risk of the claimant attending in person outweighed the benefit of giving his presentation in person and we find that the respondent did not fail to make a reasonable adjustment.

<u>Discrimination arising from disability</u>

241. The claimant said that what arose from his disabilities was an inability to travel internationally and/or easily attend face to face meetings during the pandemic. We find that those matters did arise from his disabilities. He did have an inability or at least some medical restrictions on travelling internationally or easily attending face to face meetings during the pandemic.

242. We have found that Mr Clark did not bully or harass the claimant and this allegation fails on its facts.

243. The claimant said he was marginalised and left to feel as though he was an inconvenience and a nuisance – in particular relation to in-person meetings in September 2021, December 2021 and March 2022. We have made detailed findings on this on the reasonable adjustments claim. We find that the claimant was not "*marginalised*" in relation to these 3 in-person meetings. He was able to make his presentation even though not in person. Only the claimant can say how he felt. If he did feel that he was an inconvenience or a nuisance because of his requirements for attending in person and the effect on others, we can understand this.

244. We have found that due to the claimant's vulnerabilities and the substantial risks to his health in travelling to and attending in person meetings, the respondent pursued a legitimate aim of protecting his health by arranging for him to attend those meetings remotely. This was the norm for meetings at this respondent. We find that it was a proportionate means of achieving that aim as explained by Mr Waters in evidence (including paragraphs 73 and 78 supplemental statement). Mr Waters thought that attendance in person was "*dangerous"* for the claimant and he took the decision for the claimant's wellbeing. The claimant was still able to participate in the meetings and was not excluded.

245. The respondent appointed Mr Clark to the position of Chief Product Officer which they claimant says was essentially his own role. It was admitted that Mr Clark was appointed to the role but denied that it was the claimant's own role. Our finding is that the CPO role was not the claimant's own role, it was more senior, at C-suite level and the intention was that the claimant should report to the CPO. There was no unfavourable treatment in terms of appointing Mr Clark because this was not the claimant's role.

246. Our finding is that the claimant should have been given the opportunity to apply. This was unfavourable treatment. We have considered whether the reason he was not given this opportunity was his inability to travel internationally and/or easily attend face to face meetings. We find that the reason they did not give the claimant the chance to apply was

because they considered Mr Clark the right person for the job and the claimant did not have the skill-set. Mr Waters was of the view that the claimant did not have the expertise, skills or ability to work collaboratively with others which was necessary for a role at CPO level (statement paragraph 71). We find it had nothing to do with the claimant's inability to travel internationally or his ability to attend face to face meetings. The norm at the respondent was for meetings to take place remotely.

247. The claimant complained that he was informed that he was no longer to communicate with his team and placed him on garden leave. This was by letter from Mr Oliver on 5 April 2022 inviting him to a grievance meeting, which said: (page 110): "*Finally, pending our meeting and me providing you with an outcome following the meeting, I suggest that you continue on additional paid leave and do not carry out any duties for the company. Please do not have any contact with other employees or clients".* The respondent submitted that this was not unfavourable treatment. We do not agree. We accepted the claimant's submission that this cut him off from his team members and colleagues and it was unfavourable treatment.

248. We have considered whether this was unfavourable treatment because of something arising in consequence of the claimant's disabilities, being his inability to travel internationally or to easily attend face to face meetings. We find that this was not the reason that they placed him on garden leave or told him not to have contact with his colleagues. It was part of the strategy decided upon by 24 February 2022 to remove him the business.

249. The claimant's dismissal was not because of anything arising from his disabilities. The reason for dismissal was the breakdown in the working relationship between the claimant and Mr Clark, their concern about his ability to work collaboratively with colleagues and the respondent's preference to retain Mr Clark's skills.

The victimisation claim
Did the claimant do a protected act?

250. In submissions at paragraph 124 the claimant said he was prepared to focus on the second of the alleged protected acts, namely the grievance of 31 March 2022. In the light of this and as there was no submission that there was a protected act done at the meeting on 24 March 2022, we find that the claimant did not do a protected act on 24 March.

251. The claimant relied on two matters in his grievance of 31 March 2022: that he said (i) he was disabled and that he had been harassed, and discriminated against by Mr Clark to the detriment of his health and (ii) that the respondent had refused to offer him the new position and failed to make reasonable adjustments to enable him to be appointed to the role.

252. The respondent accepted that he said these words in his grievance but submitted that this did not amount to a protected act because the words were not sufficiently clear and the facts were vague and non-specific (submissions paragraph 47(b)).

253. In the grievance the claimant set out his disabilities in some detail (pages 89-90). In point (3) on page 90 the claimant said: "*It [the respondent] is aware that I am disabled and that Mr Clark is not. It has discriminated against me by refusing to offer me the Chief Product Officer role, and has failed to make reasonable adjustments to enable me to be appointed to the role.*" This is a complaint of disability discrimination and an allegation of a contravention of the Equality Act by failing to make reasonable adjustments. We find that this is a protected act. In point (2) on page 90 he said that Mr Clark had "*bullied and discriminated*" against him to the detriment of his health. We find that this together with the description of his disabilities, is enough to amount to a protected act. The grievance of 31 March 2022 was a protected act.

<u>The detriments</u>

254. We deal in turn with the detriments relied upon:

255. <u>Detriment 1</u>: Allowing Mr Clark to commence the new role on 4 April and making an internal announcement on 6 April 2022 notwithstanding the claimant had complained the appointment was unfair and discriminatory and whilst his grievance was ongoing. As we have found above, Mr Clark accepted the job by 23 March 2022, because Mr Waters needed to know that he was coming back before he held the meeting with the claimant on 24 March. The decision to re-employ Mr Clark, the contractual negotiations and his acceptance of the job had all concluded prior to the claimant doing the protected act. This was not because the claimant had done a protected act.

256. In terms of the announcement on 6 April, we have found above that the decision to make the announcement was made prior to the grievance of 31 March. Mr Waters told the claimant on 24 March, that he proposed to make the announcement on 25 March. The decision to make the announcement was not because of the protected act.

257. In terms of not delaying the announcement, Mr Oliver said that they already had a binding contract with Mr Clark and he saw no evidence of bullying and no reason to delay the appointment or the announcement. We find that the reason they did not delay the announcement was because they had entered into a contract with Mr Clark and they wanted to proceed. It was not because the claimant had complained of discrimination in his letter of 31 March.

258. <u>Detriment 2</u>: Constructing the allegations against him following his grievance. Our finding above is that the respondent used a sham disciplinary and grievance process as part of its plan to "*part ways*" with

the claimant, which they had decided upon by no later than 24 February 2022. The allegations were not constructed because the claimant did a protected act on 31 March.

259. Detriment 3: Refusing to appoint an independent party to investigate the grievance. Our finding is the same as above. The respondent had made the decision to "*part ways*" with the claimant, by no later than 24 February 2022, they wanted to proceed with Mr Clark's employment so they saw no reason to delay by appointing an independent investigator. We find that it was part and parcel of the sham process and not because the claimant did a protected act on 31 March.

260. Detriment 4: Insisting that the allegations and the grievance should be considered at a single meeting or, if dealt with separately, the grievance would be considered only after the other matters had been determined. Our finding is the same as for detriments 2 and 3.

261. Detriment 5: Approaching the grievance, the allegations and/or the question whether he and Mr Clark could work together in bad faith. We agree and have found that the respondent did not take steps to see whether the claimant and Mr Clark could work together and that the process used was a sham. It was not because the claimant did a protected act.

262. Detriment 6: Our finding above is that the decision to dismiss was made by 24 February 2022 and that decision predated the protected act. The dismissal was not because the claimant did a protected act.

Whistleblowing - did the claimant make a protected disclosure

263. The respondent accepted in submissions (paragraph 20) that the statements relied upon by the claimant as protected disclosures were made. The claimant relied upon three disclosures set out in his grievance of 31 March 2022.

264. Disclosure 1: Mr Waters was willing to allow Mr Clark to bully the claimant and his colleagues over an extended period of time, and in doing so caused the claimant significant stress and anxiety which in turn exacerbated his health conditions. The claimant contends by providing this information it tended to show there was a breach of the implied term of trust and confidence and health and safety legislation, paragraph 42 in the claim.

265. Disclosure 2: Mr Clark had bullied and discriminated against the claimant and others to the detriment of their health. The claimant contends by providing this information it tended to show there was a breach of the EqA 2010.

266. Disclosure 3: The respondent discriminated against the claimant by refusing to offer him the Chief Product Officer role and failed to make

reasonable adjustments to enable him to be appointed to the role. The claimant contends by providing this information it tended to show there was a breach of the EqA 2010.

267. We find that the 3 disclosures were all disclosures of information. The first two were disclosures about bullying and discrimination and the third was a disclosure of a failure to make reasonable adjustments by failing to appoint the claimant to the CPO role.

268. We have considered whether the 3 disclosures were made in the public interest.

269. Disclosures 1 and 2 were about alleged bullying by Mr Clark. This was said to be of the claimant himself and of unspecified “others”, although Mr Noffke was mentioned. We find that the reference to “others” had the potential to bring this disclosure within the public interest. We have also considered the reasonableness of the belief that the disclosure was in the public interest. Whilst a disclosure can be both in the public and personal interest, we find that these two disclosures were in the claimant’s personal interests. They were made a week after the meeting on 24 March 2022 within the context of settlement negotiations for his departure. For this reason, we find that the disclosures were not in the public interest but were made as part of his personal dispute with the respondent.

270. Even if we are wrong about this, we find that the claimant did not hold a reasonable belief that the disclosures tended to show the matters relied upon. We have found that Mr Clark did not bully him. The claimant held a view that Mr Clark did bully him, but we find this was not a reasonable belief. It was part of the claimant’s perception of anyone he saw as encroaching on his area of product, or who he thought might threaten his promotion prospects.

271. On disclosure 3, the only person affected by the disclosure that the respondent had refused to offer him the CPO role and had not made reasonable adjustments, was the claimant. We find that disclosure 3 was not a disclosure made in the public interest. It was personal to the claimant.

272. For these reasons we find that the claimant did not make a protected disclosure.

273. If we are wrong about this, we deal below with the detriments.

<u>The whistleblowing detriments</u>

274. Detriment 1: This was allowing Mr Clark to commence the new role on 4 April and making an internal announcement on 6 April 2022 notwithstanding the claimant had complained the appointment was unfair and whilst his grievance process was ongoing.

275. We have found that Mr Clark accepted the job just before 24 March 2022, which was before the disclosure. Mr Oliver saw no evidence of bullying and saw no reason to delay the appointment or the announcement. Our findings are the same as for the victimisation claim.

276. Detriment 2: This was constructing allegations against the claimant following his grievance. Our reasoning is the same as for detriment 2 of the victimisation claim and we find that this was not on the ground of any disclosure made by the claimant. It was part of a plan that had been decided upon by 24 February 2022.

277. Detriment 3: Refusing to appoint an independent party to investigate the grievance and insisting that Mr Oliver investigate the matter. Our reasoning is the same as for detriment 3 of the victimisation claim and we find that this was not on the ground of any protected disclosure made by the claimant.

278. Detriment 4: Insisting that the disciplinary allegations and the grievance should be considered at a single meeting or, if dealt with separately, that the grievance would be considered only after the other matters had been determined. Our reasoning is the same as for detriment 4 of the victimisation claim and we find that this was not on the ground of any disclosure made by the claimant. It was part and parcel of the plan that had been decided upon by 24 February 2022.

279. Detriment 5: Approaching the grievance, the allegations and/or the question of whether the claimant and Mr Clark could work together in bad faith. Our reasoning is the same as for detriment 5 of the victimisation claim and we find that this was not on the ground of any protected disclosure made by the claimant.

280. Detriment 6: Mr Waters' actions in collaboration with Mr Oliver to dismiss the claimant. Our finding is that the decision to dismiss was made by 24 February 2022 and thus predated any disclosure. The dismissal was not because the claimant made a protected disclosure.

Time limits

281. We agreed with the claimant's submission as to the relevant dates. The effective date of termination was 21 April 2022. The period of Early Conciliation was from 22 April 2022 to 25 May 2022. The claim was presented on 5 August 2022. Anything which occurred on or after 23 January 2022 is within time.

282. The parties agreed that what happened on 24 March 2022 was in time and it was accepted by the respondent in submissions that this was part of a sequence of events that began on 10 March 2022. This covers the discussions with Mr Clark about his re-appointment.

283. The respondent accepted in submissions that the whistleblowing detriment issues "*appeared to be in time"* (paragraph 7). We find that the whistleblowing detriments and the victimisation detriments complained of are all within time because they relate to what happened on or after 10 March 2022 and form part of a series of events.

284. The respondent identified the complaint about the India trip to be out of time on the face of it.

285. In submissions the claimant said he had a good reason not to bring his claims within three months of Mr Clark leaving his employment and the conduct in question coming to an end. It was submitted that it was "*not surprising that he decided to let things lie and concentrate on his job, rather than bringing a claim against his employer*".

286. The claimant accepted in submissions paragraph 24 that <u>all</u> the alleged bullying and harassment was out of time because Mr Clark left the respondent's employment as of September 2021 (submissions paragraph 24). Our finding above is that Mr Clark did not bully or harass the claimant so there was nothing with which to link it in terms of any continuing act. We find that deciding to "*let things lie"* rather than bringing a claim, does not make it just and equitable to extend time. As the bullying allegations failed on the facts, there was no time point to consider on any subsequent matters.

287. There was potential for the reasonable adjustments claim to be out of time. Had the reasonable adjustments claim succeeded we would have found it to be within time. There was a series of events culminating in the last act on 10 March 2022 which was accepted as being in time.

The relevant law

<u>Constructive unfair dismissal</u>

288. The applicable law is found in section 95(1)(c) of the Employment Rights Act 1996 which provides that "*for the purpose of this Part an employee is dismissed by his employer if …….the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct".*

289. The leading case on constructive dismissal is ***Western Excavating (ECC) Ltd v Sharp 1978 ICR 221, CA.*** The employer's conduct must give rise to a repudiatory breach of contract. In that case Lord Denning said "*If the employer is guilty of conduct which is a significant breach going to the root of the contract, then the employee is entitled to treat*

himself as discharged from further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed."

290. In ***Malik v Bank of Credit and Commerce International SA 1997 IRLR 462*** the House of Lords affirmed the implied term of trust and confidence as follows:

> *"The employer shall not without reasonable and proper cause conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee"*

291. In ***Baldwin v Brighton and Hove City Council 2007 IRLR 232*** the EAT had to consider whether for there to be a breach, the actions of the employer had to be calculated and likely to destroy the relationship of confidence and trust, or whether only one or other of these requirements needed to be satisfied. The view of the EAT was that the use of the word *"and"* by Lord Steyn in the passage quoted above, was an error of transcription and that the relevant test is satisfied if either of the requirements is met, so that it should be "*calculated <u>or</u> likely".*

292. If there was a dismissal, the tribunal must consider whether the dismissal was for one of the potentially fair reasons set out in sections 98(1)(b) or 98(2) of the Employment Rights Act and whether the dismissal was fair or unfair under section 98(4)

293. In ***Kaur v Leeds Teaching Hospitals NHS Trust 2018 IRLR 833*** the Court of Appeal listed five questions that should be sufficient for the tribunal to ask itself to determine whether an employee was constructively dismissed (judgment paragraph 55):

   a. What was the most recent act (or omission) on the part of the employer the employee says caused, or triggered, their resignation?

   b. Has the employee affirmed the contract since that act?

   c. If not, was that act (or omission) by itself a repudiatory breach of contract?

   d. If not, was it nevertheless a part (applying the approach explained in *Waltham Forest v Omilaju [2004] EWCA Civ 1493*) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a repudiatory breach of the implied term of trust and confidence? (If it was, there is no need for any separate consideration of a possible previous affirmation, because the effect of the final act is to revive the right to resign).

   e. Did the employee resign in response (or partly in response) to that breach?

294. Section 103A provides that an employee who is dismissed shall be regarded …. as unfairly dismissed if the reason (or, if more than one, the

principal reason) for the dismissal is that the employee made a protected disclosure.

Direct disability discrimination

295. Direct discrimination is defined in section 13 of the Equality Act 2010 which provides that a person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

296. Section 23 of the Act provides that on a comparison of cases for the purposes of section 13, there must be no material difference between the circumstances relating to each case.

297. Bad treatment per se is not discriminatory; what needs to be shown is worse treatment than that given to a comparator - ***Bahl v Law Society 2004 IRLR 799 (CA).***

Discrimination arising from disability

298. Discrimination arising from disability is found in section 15 Equality Act 2010:

> *(1) A person (A) discriminates against a disabled person (B) if –*
>
> *(a) A treats B unfavourably because of something arising in consequence of B's disability and*
>
> *(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim,*
>
> *Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.*

299. The approach to be taken in section 15 claims is set out in ***Pnaiser v NHS England 2016 IRLR 170 (EAT)*** by Simler P at paragraph 31. This case also addresses the burden of proof in section 15 cases. Under section 136, once a claimant has proved facts from which a tribunal could conclude that an unlawful act of discrimination has taken place, the burden shifts to the respondent to provide a non-discriminatory explanation. In order to prove a prima facie case of discrimination and shift the burden to the employer, the claimant needs to show:

    a. that he or she has been subjected to unfavourable treatment;

    b. that he or she is disabled and that the employer had actual or constructive knowledge of this;

    c. a link between the disability and the 'something' that is said to be the ground for the unfavourable treatment;

d. some evidence from which it can be inferred that the ‘something’ was the reason for the treatment.

300. If the prima facie case is established and the burden shifts, the employer can defeat the claim by proving either:

a. that the reason or reasons for the unfavourable treatment was not in fact the ‘something’ that is relied upon as arising in consequence of the claimant’s disability; or

b. that the treatment, although meted out because of something arising in consequence of the disability, was justified as a proportionate means of achieving a legitimate aim.

301. 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 (Judgment paragraph 31b).

302. In terms of objective justification ***Homer v Chief Constable of West Yorkshire 2012 IRLR 801 (SC)*** held that to be proportionate, the unfavourable treatment has to be both an appropriate means of achieving the legitimate aim and a reasonably necessary means of doing so. It is not enough that a reasonable employer might think that a measure is justified. The tribunal itself has to weigh the real needs of the undertaking, against the discriminatory effect of the measure.

303. With objective justification, there has to be a balancing of the needs of the employer against the discriminatory effect of the treatment. In ***Department for Work and Pensions v Boyers 2022 IRLR 741*** the EAT said (at paragraph 41):

> *“the ET must undertake the balancing exercise required by s 15(1)(b) EqA by focusing on the outcome – the dismissal itself – but it remains open to the ET to weigh in the balance the procedure by which that outcome was achieved. It will be more difficult for a respondent to show that it acted proportionately when dismissing a disabled employee if, as happened in this case, it has led no evidence on how its decision-makers thought their actions would serve the legitimate aims relied upon. It will also be more difficult for a respondent to show that it acted proportionately when dismissing a disabled employee if it has led no evidence on how, as part of the process culminating in dismissal, its decision-makers considered other, less discriminatory, alternatives to dismissal”.*

<u>The duty to make reasonable adjustments</u>

304. The duty to make reasonable adjustments is found under section 20 EqA. They duty comprises three requirements. Subsection (3) is as follows:

> *The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.*

305. The EAT in ***Royal Bank of Scotland v Ashton 2011 ICR 632*** held that in relation to the disadvantage, the tribunal has to be satisfied that there is a PCP that places the disabled person not simply at some disadvantage viewed generally, but at a disadvantage that was substantial viewed in comparison with persons who were not disabled; that focus was on the practical result of the measures that could be taken and not on the process of reasoning leading to the making or failure to make a reasonable adjustment.

306. This case was considered by the Court of Appeal in ***Griffiths v Secretary of State for Work and Pensions 2015 EWCA Civ*** on the comparison issue. Elias LJ held that it is wrong to hold that the section 20 duty is not engaged because a policy is applied to equally to everyone. The duty arises once there is evidence that the arrangements placed the disabled person at a disadvantage because of her disability.

307. In terms of a PCP, it does not normally apply to a one-off act, unless there is some form of continuum. In ***Ishola v Transport for London 2020 IRLR 368*** the Court of Appeal said "*Something may be a practice or done 'in practice' if it carries with it an indication that it will or would be done again in future if a hypothetical similar case arises"* (paragraph 38). A flawed disciplinary process in respect of one employee is not necessarily a PCP – ***Nottingham City Transport Ltd v Harvey 2013 All ER (D) 267 (EAT).***

308. In terms being placed at a substantial disadvantage, section 212(1) Equality Act defines substantial as "*more than minor or trivial*". A comparison exercise is required by it to test whether the PCP has the effect of disadvantaging the disabled person more than trivially in comparison with others who do not have any disability – ***Sheikholeslami v Edinburgh University 2018 IRLR 1090***.

309. Under section 21 of the Equality Act a failure to comply with section 20 is a failure to make reasonable adjustments. Section 21(2) provides that "*A discriminates against a disabled person if A fails to comply with that duty in relation to that disabled person".*

310. In deciding whether an employer has failed to make reasonable adjustments, as set out by the EAT in ***Environment Agency v Rowan 2007 IRLR 20,*** the tribunal must identify:

> *(a) the provision, criterion or practice applied by or on behalf of an employer, or;*
>
> *(b) the physical feature of premises occupied by the employer;*

(c) the identity of non-disabled comparators (where appropriate); and

(d) the nature and extent of the substantial disadvantage suffered by the claimant.

311. On the burden of proof, the EAT in ***Project Management Institute v Latif 2007 IRLR 579*** (Elias P as he then was) held that the claimant must not only establish that the duty to make reasonable adjustments has arisen, but also that there are facts from which it could reasonably be inferred, absent an explanation, that it has been breached. Demonstrating that there is an arrangement causing a substantial disadvantage engages the duty, but it provides no basis on which it could properly be inferred that there is a breach of that duty. There must be evidence of some apparently reasonable adjustment which could be made. It is necessary for the respondent to understand the broad nature of the adjustment proposed and to be given sufficient detail to enable him to engage with the question of whether it could reasonably be achieved or not.

312. On the question of reasonable adjustments the House of Lords in ***Archibald v Fife Council 2004 IRLR 651*** held that the duty necessarily requires the disabled person to be treated more favourably in recognition of their special needs. It is not just a matter of introducing a level playing field for disabled and non-disabled alike, because that approach ignores the fact that disabled persons will sometimes need special assistance if they are to be able to compete on equal terms with those who are not disabled.

313. Section 15(4)(b) Equality Act 2006 provides that a Code of Practice issued under section 14 of that act "*shall be taken into account by a court or tribunal in any case in which it appears to the court or tribunal to be relevant".* The Equality and Human Rights Commission Code of Practice on Employment (2011) is such a Code.

314. The EHRC Code lists factors which might be taken into account when deciding if a step is a reasonable one to take (paragraph 6.28) as follows:

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

Victimisation

315. Section 27 Equality Act provides that a person victimises another person

if they subject that person to a detriment because the person has done a protected act or because they believe that the person may do a protected act.

316. Each of the following is a protected act:

> (a) *bringing proceedings under this Act;*
> (b) *giving evidence or information in connection with proceedings under this Act;*
> (c) *doing any other thing for the purposes of or in connection with this Act;*
> (d) *making an allegation (whether or not express) that A or another person has contravened this Act.*

317. Section 27(3) says: "*Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.*"

318. It is for the claimant to prove that he did the protected acts relied upon before the burden can pass to the respondent - see ***Ayodele v Citylink Ltd 2018 ICR 748 (CA)***: "*Before a tribunal can start making an assessment, the claimant has got to start the case, otherwise there is nothing for the respondent to address and nothing for the tribunal to assess.*"

319. In ***Scott v London Borough of Hillingdon 2001 EWCA Civ 2005***, the Court of Appeal held that knowledge of the protected act on the part of the alleged discriminator is a precondition to liability. The burden of proving knowledge lies on the claimant.

<u>The burden of proof</u>

320. Section 136 of the Equality Act deals with the burden of proof and provides that if there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

321. One of the leading authorities on the burden of proof in discrimination cases is ***Igen v Wong 2005 IRLR 258***. That case makes clear that at the first stage the Tribunal is to assume that there is no explanation for the facts proved by the claimant. Where such facts are proved, the burden passes to the respondent to prove that it did not discriminate.

322. Lord Nicholls in ***Shamoon v Chief Constable of the RUC 2003 IRLR 285*** said that sometimes the less favourable treatment issues cannot be resolved without at the same time deciding the reason-why issue. He suggested that Tribunals might avoid arid and confusing disputes about identification of the appropriate comparator by concentrating on why the claimant was treated as he was, and postponing the less favourable treatment question until after they have decided why the treatment was afforded.

323. In ***Madarassy v Nomura International plc 2007 IRLR 246*** it was held that the burden does not shift to the respondent simply on the claimant establishing a different in status or a difference in treatment. Such acts only indicate the possibility of discrimination. The phrase "*could conclude*" means that "*a reasonable tribunal could properly conclude from all the evidence before it that there may have been discrimination*".

324. In ***Hewage v Grampian Health Board 2012 IRLR 870*** the Supreme Court endorsed the approach of the Court of Appeal in ***Igen Ltd v Wong*** and ***Madarassy v Nomura International plc***. *The judgment of Lord Hope in* ***Hewage*** *shows that* it is important not to make too much of the role of the burden of proof provisions. They require careful attention where there is room for doubt as to the facts necessary to establish discrimination, but have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other.

325. More recently in ***Efobi v Royal Mail Group Ltd 2021 IRLR 811*** the Supreme Court confirmed the approach in ***Igen v Wong*** and ***Madarassy***.

326. The courts have given guidance on the drawing of inferences in discrimination cases. The Court of Appeal in ***Igen v Wong*** approved the principles set out by the EAT in ***Barton v Investec Securities Ltd 2003 IRLR 332*** and that approach was further endorsed by the Supreme Court in ***Hewage.*** The guidance includes the principle that it is important to bear in mind in deciding whether the claimant has proved facts necessary to establish a prima facie case of discrimination, that it is unusual to find direct evidence of discrimination.

Whistleblowing

327. Under section 48A of the Employment Rights Act 1996, a "protected disclosure" is defined as a "qualifying disclosure" which is disclosed in accordance with sections 43C to 43H of that Act.

328. Section 43B(1) of the Employment Rights Act 1996 defines a qualifying disclosure as follows and as relevant to this case.

> *(1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—*
>
> *(b) the information disclosed tends to show that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject.*

329. Under section 43C qualifying disclosure is made if the worker makes the disclosure to his employer.

330. Disclosure of information should be given its ordinary meaning, which revolves around conveying facts. It is possible an allegation may contain information, whether expressly or impliedly. In ***Kilraine v London Borough of Wandsworth 2018 ICR 185*** the CA said that in order for a statement or disclosure to be a qualifying disclosure, it had to have sufficient factual content and specificity such as is capable of tending to show one of the matters listed in subsection (1) - (of section 43B). There is no rigid distinction between allegations and disclosures of information.

331. In terms of the reasonableness of the belief, the Court of Appeal in ***Babula v Waltham Forest College 2007 ICR 1026*** said that whilst an employee claiming the protection of section 43B(1) must have a reasonable belief that the information he/she is disclosing, tends to show one or more of the matters in that section, there is no requirement to demonstrate that the belief is factually correct. The belief may be reasonable even if it turns out to be wrong. Whether the belief was reasonably held is a matter for the tribunal to determine.

332. The leading authority on the public interest test is ***Chesterton Global Ltd v Nurmohamed 2018 ICR 731.*** The worker's belief that the disclosure was made in the public interest must be objectively reasonable. The words "*in the public interest"* were introduced in 2013 to prevent a worker from relying on a breach of his or her own contract of employment where the breach is of a personal nature and there are no wider public interest implications.

333. In ***Chesterton*** whilst the employee was found to be most concerned about himself (in relation to bonus payments) the tribunal was satisfied that he did have other office managers in mind and concluded that a section of the public was affected. Potentially about 100 senior managers were affected by the matters disclosed. The claimant believed that his employer was exaggerating expenses to depress profits and thus reducing commission payments in total by about £2-3million.

334. The Court of Appeal (CA) held that the mere fact something is in the worker's private interests does not prevent it also being in the public interest. It will be heavily fact-dependent. Underhill LJ noted four relevant factors:

- The numbers in the group whose interests the disclosure served
- The nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed
- The nature of the wrongdoing disclosed – disclosure of deliberate wrongdoing is more likely to be in the public interest than the disclosure of inadvertent wrongdoing affecting the same number of people
- The identity of the alleged wrongdoer – the larger or more prominent the wrongdoer (in terms of the size of its relevant community, i.e. staff, suppliers and clients), the more obviously should a disclosure about its activities engage the public interest although this should not

be taken too far.

335. The term “public interest” is not defined in the legislation. There is a two stage test according to the Court of Appeal in ***Ibrahim v HCA International 2020 IRLR 224*** (i) did the clamant have a genuine belief at the time that the disclosure was in the public interest and (ii) if so, did he have reasonable grounds for so believing? The claimant's *motivation* for making the disclosure is *not* part of this test. The tribunal must look at the claimant’s subjective belief at the time he made the disclosure (Judgment paragraph 25 Underhill LJ).

336. It is for the tribunal to rule as a question of fact on whether there was a sufficient public interest to qualify under the legislation. The term “public interest” is not defined in the legislation. In ***Parsons v Airplus International Ltd EAT/0111/17*** the EAT pointed out that in law a disclosure does not have to be either wholly in the public interest or wholly from self-interest. It could be both and this does *not* prevent a tribunal from finding on the facts that it was actually only one of those. In that case the claimant made disclosures that in principle could have been protected but were found to be made as part of a dispute with the employer which led to her dismissal for other reasons. The EAT found that the tribunal was entitled to find that the disclosures were made in her self-interest and not in the public interest.

337. Section 47B(1) provides that a worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.

338. Under section 47B(1A) A worker has the right not to be subjected to a detriment by another worker in the course of that worker’s employment or by an agent of the employer with the employer’s authority on the ground that the worked made a protected disclosure. Section 47B(1B) provides for vicarious liability on the part of the employer and under section 47B(1C) it is immaterial whether the detriment is done with the knowledge or approval of the employer, subject to a reasonable steps defence in section 47B(1D).

<u>Time limits</u>

339. For the discrimination claim, section 123 of the Equality Act 2010 provides that:

(1) …………proceedings on a complaint within section 120 may not be brought after the end of—

(a) the period of 3 months starting with the date of the act to which the complaint relates, or
(b) such other period as the employment tribunal thinks just and equitable.

(3) For the purposes of this section—

(a) conduct extending over a period is to be treated as done at the end of the period;

(b) failure to do something is to be treated as occurring when the person in question decided on it.

340. The just and equitable test is a broader test than the reasonably practicable test found in the Employment Rights Act 1996. It is for the claimant to satisfy the tribunal that it is just and equitable to extend the time limit and the tribunal has a wide discretion. There is no presumption that the Tribunal should exercise that discretion in favour of the claimant - ***Bexley Community Centre (t/a Leisure Link) v Robertson 2003 IRLR 434***.

341. When exercising discretion under section 123(1)(b) EqA 2010, Tribunals should assess all relevant factors in a case which it considers relevant to whether it is just and equitable to extend time, including in particular the length of and reasons for, the delay – see ***Adedeji v University Hospitals Birmingham NHS Foundation Trust 2021 EWCA Civ 23*** (judgment paragraph 37).

342. The leading case on whether an act of discrimination it to be treated as extending over a period is the decision of the Court of Appeal in ***Hendricks v Metropolitan Police Commissioner 2003 IRLR 96.*** This makes it clear that the focus of inquiry must be not on whether there is something which can be characterised as a policy, rule, scheme, regime or practice, but rather on whether there was an ongoing situation or continuing state of affairs in which the group discriminated against (including the claimant) was treated less favourably. The CA said: "*The question is whether that is "an act extending over a period" as distinct from a succession of unconnected or isolated specific acts, for which time would begin to run from the date when each specific act was committed*" (paragraph 52).

343. The burden is on the claimant to prove, either by direct evidence or inference, that the alleged incidents of discrimination were linked to one another and were evidence of a continuing discriminatory state of affairs covered by the concept of an act extending over a period.

344. The tribunal can find that some acts should be grouped into a continuing act, while others remain unconnected: ***Lyfar v Brighton and Sussex University Hospitals NHS Trust 2006 EWCA Civ 1548***.

345. In ***Aziz v FDA 2010 EWCA Civ 304*** the Court of Appeal said that one relevant but not conclusive factor was whether the same or different individuals were involved in the incidents. The CA said that the claimant must have a reasonably arguable basis for the contention that the various complaints are so linked as to be continuing acts or to constitute an ongoing state of affairs (paragraph 36 of the judgment).

346. The time limit for the whistleblowing detriment claim is set out in section 48(3) Employment Rights Act 1996:

> *(3) An employment tribunal shall not consider a complaint under this section unless it is presented—*
> *(a) before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them, or*
>
> *(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.*

Conclusions

Time limits

347. We have found that the issue surrounding the trip to India is out of time and we had no jurisdiction to hear it. If we were wrong about this, we made findings of fact such that the factual allegation failed. Our finding is that Mr Clark did not bully or harass the claimant or put pressure on him to visit India in early 2020.

348. In addition, as the other allegations of bullying and harassment failed on their facts, there was nothing with which to link the India trip allegations, to form any continuing act.

349. The fact that the claimant chose to "*let things lie*" and not bring a claim at the time also led us to find that it would not be just and equitable to extend time.

350. There was concession from the respondent that the facts and matters starting on 10 March 2022 formed part of a series of linked events through to the claimant's resignation on 21 April 2022. We find that these matters were within time, both for the discrimination and whistleblowing claims.

Constructive unfair dismissal

351. Our finding above is that the respondent was in repudiatory breach of the claimant's contract of employment in terms of the process it adopted with a view to securing his dismissal. We find that the claimant resigned in response to that breach and he did not affirm the breach.

352. The claimant was constructively dismissed and based on the process followed, the dismissal was unfair. Prior to embarking on this process, the decision had been made to terminate his employment. We have found that the reason for dismissal was the breakdown in the working

relationship between the claimant and Mr Clark, the claimant's difficulties in working collaboratively with colleagues and the respondent's preference to retain the skills of Mr Clark.

353. Our findings on the allegations amounting to constructive dismissal set out above at paragraph 17(a) to (o) are as follows: (a) the allegation of bullying by Mr Clark failed on its facts, (b) the claim for failure to make reasonable adjustments fails, (f) our finding was that the claimant did not have a right to know the details of the respondent's recruitment decisions for roles more senior to his own,

354. Issues (c) (d) (e) (g) (h) (i) (j) (k) (l) and (m) all formed part of the process adopted with a view to securing the termination of the claimant's employment.

355. The claims for disability discrimination, victimisation and whistleblowing detriment fail which deals with issues (n) and (o).

356. We find that whilst reason relied upon could amount to a fair dismissal for some other substantial reason, it was unfair because of the procedural failings. For a fair dismissal for the breakdown in the working relationship, it must be clear that the breakdown is irremediable. No steps were taken to see what could be done to repair the relationship. This was something that Mr Clark was open to and expected to happen. Mr Waters mentioned that they could have looked at mediation. We find that this was a sensible step which should have been explored. The claimant did not know that a failure to work on this relationship could cost him his job. He did not have an opportunity to take steps to work with Mr Clark with this in mind.

357. For these reasons we find that the dismissal was unfair under section 98(4) Employment Rights Act 1996. The claim for ordinary unfair dismissal succeeds.

Wrongful dismissal

358. As we have found that the claimant was constructively dismissed without notice, he is entitled to his notice pay and the claim for breach of contract for notice pay succeeds.

Whistleblowing

359. We found that the claimant made a protected disclosure in his grievance letter of 31 March 2022. On the detriment claims, our finding is that they were all part of the process which had been decided upon by 24 February 2022 – prior to any disclosure – save for the timing of the announcement on 6 April 2022. Our finding is that the protected disclosure was not causative of any detriment that formed part of that process.

360. Our finding as to the reason for the timing of the announcement is that the respondent had entered into a contract with Mr Clark by 23 March 2022 and they wanted to proceed with this. It was not because of any disclosure made in the letter of 31 March.

361. The claim for whistleblowing detriment fails and is dismissed.

Direct disability discrimination

362. In terms of direct disability discrimination, our finding on allegation (a) was that Mr Clark did not bully the claimant over an extended period, or at all. That allegation fails on its facts. The same applies to allegation (b). Whilst we have found that Mr Waters failed to take any meaningful action to address the poor working relationship between the claimant and Mr Clark, we find that there was no bullying or harassment. This allegation also fails on its facts.

363. On allegation (c) our finding above is that Mr Clark was appointed to the role of CPO because Mr Waters wished to retain his skills. This had nothing to do with the claimant's medical conditions and/or any disability. Mr Clark was more experienced, he had worked at a more senior level to the claimant and Mr Waters wanted the benefit of his skills. The reason for the appointment was not because Mr Waters preferred a non-disabled person.

364. On allegation (c)(i) Mr Waters was not obliged to advise or consult the claimant about the respondent's recruitment decisions, taking place at a more senior level to the claimant. Whilst this tribunal does not endorse the method of recruitment used, our finding is that the reason for Mr Clark's appointment over the claimant, was not because of the claimant's disabilities. Similarly, the respondent was not obliged to comply with the claimant's request not to appoint Mr Clark, allegation (c)(ii).

365. On allegation (c)(iii) we have found that the respondent failed to investigate fairly the claimant's grievance. Our finding above is that they failed to do this because they had made the decision by 24 February 2022 that they wanted him to leave the business. This was because of the worsening relationship with Mr Clark, the claimant's conduct on the call with Mr Mortimer on 14 January 2022 and what they perceived as his inability to work well with colleagues who overlapped with his area of Product. It was also because they wanted to retain the services of Mr Clark and they decided that the two of them could not work together. It was not because of the claimant's disabilities.

366. We have set out above our findings as to the reason for dismissal – allegation (d). It was not because of the claimant's disabilities.

367. The claim for direct disability discrimination fails and is dismissed.

Reasonable adjustments

368. The claim for reasonable adjustments fails for the reasons set out above. The respondent made the reasonable adjustment of allowing the claimant to attend remotely in the light of the seriousness of his condition and the risks to his health. In relation to the 10 March 2022 meeting, he also had the opportunity to meet with colleagues at the golf event which took place outdoors.

369. On the issues concerning conducting the grievance at the same time as the disciplinary and permitting Mr Oliver to be the investigator/decision maker, our finding is that the claimant was not placed at a substantial disadvantage in comparison with non-disabled employees.

370. The claim for failure to make reasonable adjustments fails and is dismissed.

Discrimination arising from disability

371. The claimant's case was that he was treated unfavourably by the respondent because of his inability to travel internationally and / or easily attend face to face meetings during Covid which arose as a consequence of his disabilities. It was not in dispute that these matters arose from his disabilities.

372. In terms of the unfavourable treatment relied upon, our finding above is that Mr Clark did not bully or harass the claimant to visit India between January to March 2020 (or April as put in the list of issues). This allegation was out of time. Had it been within time, it fails on its facts.

373. We found that the claimant was not marginalised in relation to the in-person meetings, particularly given the normal modus operandi of the company of meetings on line. If he felt he was an inconvenience or a nuisance, because of his requirements for attendance in person, we understood this but found that the respondent pursued a legitimate aim of protecting the claimant's health by arranging for him to attend those meetings remotely

374. We repeat our findings of fact as to the reasons for the appointment of Mr Clark to the CPO role including that this was not the claimant's own role. It was not because of something arising from the claimant's disabilities.

375. We found that in informing the claimant not to communicate with the team and placing him on paid leave, this was unfavourable treatment but it was not because of something arising in consequence of the claimant's disabilities.

376. We repeat our findings of fact as to the reason for dismissal. It was not because of something arising from the claimant's disabilities.

377. The claim for discrimination arising from disability fails and is dismissed.

Victimisation

378. The claimant relied upon his grievance of 31 March 2022 which we have found was a protected act. He no longer relied upon what he said in the meeting of 24 March 2022.

379. Allowing Mr Clark to commence in post was part of a decision made by 23 March 2022, which predated the protected act. The protected act was not causative of Mr Clark's appointment. The decision to make the announcement was made prior to the protected act and the reason for not delaying the announcement was because the respondent had entered into a contract with Mr Clark and they wanted to proceed with this. It was not because of any protected act in the letter of 31 March.

380. In terms of the other acts of victimisation relied upon, these formed part of the process following the decision made by 24 February 2022. This was not because the claimant did a protected act on 31 March 2022.

381. The claim for victimisation fails and is dismissed.

____

Employment Judge Elliott
Date: 5 July 2024

Judgment sent to the parties and entered in the Register on: 11 July 2024
______________________________ for the Tribunal