EMPLOYMENT TRIBUNALS

Claimant: **Mr Zin Lo**

Respondent: **Greater London Reserve Forces' and Cadets' Association**

Heard at: **East London Employment Tribunal**

On: **19, 20, 21 and 25 June 2024 and 5 August 2024 (in chambers)**

Before: **Employment Judge Park**
Members: **Ms J Houzer**
Ms R Hewitt

Appearances

Claimant: **Mr A Leonhardt (counsel)**
Respondent: **Mr J Tunley (counsel)**

RESERVED JUDGMENT

The Judgment of the Tribunal is that:

1. The claimant's claim against the respondent for discrimination arising from a disability under section 15 Equality Act 2010 succeeds.

2. The claimant's claim for direct discrimination under section 13 Equality Act 2010 is not well founded and is dismissed.

3. The claimant's claim that the respondent failed to make reasonable adjustments under section 20 and 21 Equality Act 2010 is not well founded and is dismissed.

4. The claimant's claim for harassment related to disability under section 26 Equality Act 2010 is not well founded and is dismissed.

5. The claimant was not constructively dismissed therefore his claim for unfair dismissal under the Employment Rights Act 1996 is not well founded and is dismissed.

6. As the claimant was not constructively dismissed his claim for wrongful dismissal also is dismissed.

REASONS

Claims and issues

1. The claimant's claims were for:

    1.1 unfair dismissal (section 98 Employment Rights Act 1996);

    1.2 wrongful dismissal;

    1.3 direct disability discrimination (section 13 Equality Act 2010);

    1.4 discrimination arising from a disability (section 15 Equality Act 2010);

    1.5 failure to make reasonable adjustments (section 20-21 Equality Act 2010); and

    1.6 harassment on the grounds of disability (section 27 Equality Act 2010).

2 The claimant's employment terminated because he resigned and he says he was constructively dismissed.

3 The parties had previously agreed a list of issues. At the outset of the hearing the issues on the reasonable adjustments claim and discrimination arising from disability were clarified.

4 Initially the respondent had disputed disability. After the receipt of the claimant's evidence on disability the respondent conceded that the claimant was disabled due to stress and anxiety from 1 March 2024 and it was made aware of this shortly after on receipt of Occupational Health advice.

5 Set out below are the factual allegations the claimant relies on for the different claims.

<u>Unfair dismissal - Constructive dismissal</u>

6 The claimant says the respondent did the following which was conduct that breached the implied term of trust and confidence:

    6.1 fail to deal promptly and reasonably with the claimant's grievance complaint that was raised in July 2021;

6.2 fail to uphold an appeal against a disciplinary outcome, despite there being no compelling evidence to support the disciplinary finding;

6.3 wrongly reprimand the claimant for attending an event on 5 October 2022; and

6.4 delay excessively access to information that the claimant requested (by way of a DSAR) in January 2022.

Wrongful dismissal

7. Was the reason for the claimant handing in their resignation on 28 November 2022 because the respondent's actions were serious enough to amount to a repudiatory breach?

Direct disability discrimination (section 13 Equality Act 2010)

8. Did the respondent reprimand the claimant for attending an event on 5 October 2022 and ban him from attending future events at his place of work expressly because he was absent from work due to ill health?

Discrimination arising from a disability (section 15 Equality Act 2010)

9. Did the respondent treat the claimant unfavorably by reprimanding him for attending an event on 5 October 2022 and banning him from attending future events at his place of work expressly because he was absent from work due to ill health?

10. The claimant says that the 'something' arising from his disability was the claimant's sickness absence between 1 March 2021 and 28 November 2022. The respondent accepts that the absence that this arose in consequence of his disability.

11. The respondent says its legitimate aim was adhering to health and safety procedures and medical advice when an employee is not fit to attend the workplace and protecting the interests and wellbeing of the employee and their colleagues.

Failure to make reasonable adjustments (section 21 Equality Act 2010)

12. The claimant says that the respondent applied the following provisions, criterion or procedures ("PCPs"):

12.1 Applying a standard level of communication in relation to the internal grievance, disciplinary and appeals processes.

The respondent does not admit that these PCPs applied.

13. The claimant says that he was placed at a substantial disadvantage as the level of communication caused him significant additional distress and worry.

14. The claimant says the respondent should have taken the following steps, which would be reasonable adjustments:

    14.1 Provide more frequent and detailed updates in relation to internal procedures.

Harassment related to disability (section 26 Equality Act 2010)

15. The claimant says the respondent did the following which was unwanted conduct:

    15.1. Reprimand him for attending an event on 5 October 2022 and ban him from attending future events at his place of work expressly because he was absent from work due to ill health.

Time limits

16. The claimant started Early Conciliation on 29 November 2023. The claimant submitted his ET1 on 10 February 2023. Given these dates the complaints about things that happened before 30 August 2022 may not have been brought in time.

17. For those claims the Tribunal needed to decide:

    17.1. Was there conduct extending over a period?

    17.2. If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?

    17.3. If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:

        17.3.1. Why were the complaints not made to the Tribunal in time?

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

Procedure

18. Both parties had been represented throughout the proceedings and both were represented by counsel at the hearing.

19. An agreed bundle had been prepared. We were also provided with an agreed chronology. During the course of the hearing Mr Leonhard also provided an essential reading list he had prepared.

20. The claimant gave evidence. He had prepared a written witness statement and was cross examined. He also provided a statement from another witness, Mr Joe Phillipson. Mr Phillipson did not give evidence.

21. The respondent called Ms Jo Craig, Mr Brian Hinchley, Mr Peter Germain and Mr Tony Pringle. They had all prepared written witness statements and were cross examined.

22. Once all the evidence had been heard both counsel provided written submissions.

Findings of Fact

23. The findings of fact we have made which are set out below are based on the issues identified above. We have limited our findings to those factual allegations that underlie the claimant's various claims and other matters that are direct background and context. We carefully considered all the evidence we heard, both documentary evidence and from witnesses. We have only referred to the evidence we heard if it is of relevance to the issues we need to determine.

24. The parties had prepared a helpful and detailed agreed chronology. Much of the factual background set out below reflects the undisputed facts set out in the chronology. We have added in more detailed findings of fact of our own where there were disputes or if the point is of particular relevance to the issues we need to determine.

Background

25. The claimant was employed by the respondent in the role of Cadet Stores Assistant. His employment commenced in July 2013.

26. The respondent is an organisation that supports the operation of the Army Cadet Force ("ACF"). This includes managing its estate. The ACF is run by volunteers. The claimant is also an adult volunteer in the ACF. The respondent is an employer, providing the day to day operational and administrative support. The two organisations are separate but linked. The majority of the respondent's employees are also ACF adult volunteers.

27. The respondent organisation is small and not well funded. It was described by the respondent witnesses as being '*lean'*. Many employees, particularly management, held multiple roles and responsibilities they had to juggle. There were little additional resources to pick up any slack. The part of the organisation in which the claimant worked was also already short staffed before the events that gave rise to this claim.

28. The claimant's direct manager was the Quartermaster who in turn was managed by the Cadet Executive Officer. In 2020 a new Quartermaster was appointed, Jamie Puttock. The claimant had applied for this role and felt the appointment process was not transparent. He also felt that that in the past people in his role had usually moved into the Quartermaster role when the incumbent left. The CEO at the time was David Jackson. Mr Jackson in turn was managed by the Chief of Staff, Tony Pringle.

29. On 24 February 2024 Mr Jackson asked the claimant and a colleague, Andy Quidley, to stay behind for an informal meeting. The claimant was asked when he had left on 12 February 2021. The claimant said he thought it would be 3.30-4pm as normal. Mr Jackson then said CCTV showed him leaving at 1.15 but his timesheet said 4pm. Mr Jackson asked the claimant to write a statement by 12.00.

30. In the statement the claimant said he may have come in early to let the cleaner in at 7am. He said he did not recall what time he left to go on leave but noted that the CCTV had it at 1.15pm. He said he may have pre-filled his timesheet and forgotten to edit it before submitting. The claimant says that after he did the statement he checked his time sheet and the time sheet was still draft and had not been approved.

31. On 25 February 2021 the respondent started a formal fact finding investigation. A document putting together the scope of the investigation was compiled by Mr Tony Pringle, the Chief of Staff and Director for Youth and Cadets. In this Mr Pringle included a list of who would be interviewed. He also said there may be questions for the claimant but these would be limited to the scope of the investigation.

32. On 1 March 2021 Mr Pringle emailed the claimant to advise that Major David Groom would be conducting an investigation.

33. On 1 March 2021 the claimant was signed off work for 2 weeks with stress and anxiety.

34. Major Groom wrote to Mr Pringle on 4 March 2021 with his report following the investigation. The claimant says that Mr Groom never contacted him to find out his account of events.

35. The respondent referred the claimant to Occupational Health. He was seen on 27 April 2021. Occupational Health reported that the claimant was fit for work but there were workplace issues creating a barrier to his return. Occupational Health made various recommendations including a stress risk assessment. This was arranged in May 2021 and it was carried out on 29 June 2021.

36. On 14 June 2021 the claimant wrote to Kate Peyton. He said he was happy to go ahead with the risk assessment but he did not think it would help. He said in this email he had been subject for some time to discrimination, intimidation, bullying and harassment and verbal abuse by the CEO and QM.

37. The claimant raised a grievance on 2 July 2021. The grievance comprised a detailed chronology of events from early 2020 onwards. There were 46 points in total. We are not going to set out the substance of the grievance in detail as there is no claim pursued about the complaints raised within that grievance. The key points we have noted as being relevant background and providing context for the issues we have to determine are as follows:

    37.1. It was lengthy and included many points. These cover a range of different topics.

37.2. Many of the issues were historic by this point, such as his complaints about the appointment of Mr Puttock, that had not been raised at the time.

37.3. There are also general allegations of wrongdoing by Mr Puttock and Mr Jackson. These are not actually complaints about how either of them have treated the claimant.

37.4. The claimant had various complaints about practices that had been in place during Covid.

37.5. The claimant's complains about bullying. This included a specific complaint about how Mr Jackson had treated during a performance review process.

37.6. Finally the claimant complains about the ongoing disciplinary process.

38. The overall sense from the grievance is that he had been unhappy since the recruitment process in 2021 and then the disciplinary process in February 2021 had tipped him over the edge. The grievance lists as a long list of disparate points and it is not easy to figure just by reading the document what the key points are or what the claimant was seeking by raising his grievance.

39. The grievance was acknowledged on 9 July. On 21 July 2021 Mr Pringle wrote to the claimant to advise that Brian Hinchley would be investigating and he would speak to the various people referred to in the grievance.

40. On 22 July 2021 Mr Pringle sent a letter to the claimant inviting him to a formal disciplinary hearing. Mr Pringle advised that they had reviewed the medical evidence and this indicated he could attend a disciplinary hearing. The proceedings had previously been put on hold due to the claimant's absence. The claimant was invited to a disciplinary hearing on 4 August 2021. This did not go ahead as the claimant's union representative was not present.

41. During August 2021 Mr Hinchley also tried to get in contact with the claimant to discuss the grievance. They eventually spoke on 20 August 2021. On other occasions the claimant did not answer.

42. On 31 August 2021 Mr Pringle wrote to the claimant about the disciplinary hearing. This was rescheduled for 9 September 2021.

43. On 1 September 2021 the claimant was due to attend a grievance meeting. That morning the claimant wrote to Kate Peyton to advise he was not well enough to attend the hearing. He said he wanted to get the complaint process underway and he asked that the questions were sent to him via email and he would respond.

44. During early September 2021 there was further correspondence between Mr Hinchley and the claimant. On 2 September Mr Hinchley said he did not have a set of questions he could send. He also said he wanted to discuss

the grievance with the claimant to provide clarification. This was because there were more than 40 items in the complaint and Mr Hinchley wanted to decide how best to proceed. The claimant responded to reiterate that he wanted to deal with matters in writing.

45. The disciplinary hearing had been postponed until 9 September 2021. On 7 September 2021 the claimant emailed Ms Peyton. He said he hadn't had answers to questions he had sent in an email dated 3 September 2021. Mr Pringle acknowledged the email and the disciplinary hearing was postponed. At this point it appears to have been put on hold.

46. The claimant remained signed off work and in early October he continued to correspond with Mr Hinchley about the grievance. The claimant continued to reiterate he wanted to deal with matters by email. On 14 October 2021 Mr Hinchley wrote to explain further why he wanted to meet in person. We accepted Mr Hinchley's explanation of why he wanted to meet in person. We have already noted the somewhat confusing and disparate nature of the grievance itself. To carry out a fair and efficient investigation it is sensible to try and seek clarity from the complainant. This ensures that the person investigating understands what is important or should be prioritised and also what the individual is seeking as a satisfactory resolution.

47. Mr Hinchley explained to the claimant that as his health was being affected he would refer him to Occupational Health for a further assessment. He also said he would *"proceed with interviewing other members of staff referred to in your grievance"*

48. The claimant was reviewed by Occupational Health on 23 November 2023. This was the second attempt Occupational Health had made to review the claimant. Occupational Health reiterated that the main barrier to the claimant returning to work was the work-related issues. They also said he was medically fit for meetings but may find it difficult to engage. They advised that the respondent should engage with the claimant in writing, provide questions in advance, and be generally sympathetic and supportive in their approach. The claimant wanted to see the report before it went to the respondent so they did not receive it until 7 December 2021.

49. On 2 December 2021 the claimant provided to the respondent a letter from his GP dated 16 November 2021. This said that there should be an alternative way of dealing with the grievance, so in writing.

50. On 5 January 2022 the claimant wrote to Kate Payton with a further grievance. This related to the progress of investigation into his complaint. In this email he expressly stated that the first grievance had been about allegations of "*incidents of serious wrongdoing, disregard for covid safety measures, bullying and racism"*. He complained about the insistence on holding face-to-face or video meetings. He also complained about the ongoing disciplinary process.

51. Of note at this point is the fact that the claimant had become aware that Mr Jackson and Mr Puttock had left the organisation. We heard that they had both left voluntarily in late 2021 because they found alternative employment.

52. On 17 January 2022 Mr Pringle acknowledged the second grievance. In this letter he stated that he did not accept the grievance was unreasonably delayed. He explained that their preference was to meet in person and that they did not receive the Occupational Health advice until 7 December. Now that Occupational Health had advised interactions should be in writing they would proceed to send questions to the claimant.

53. Mr Pringle also explained to the claimant that they would write to him separately about the disciplinary process and that would also proceed on a written basis. He also said that it had always been their position that the disciplinary and grievance process should move in parallel.

54. On 21 January 2022 Kate Peyton sent the claimant a list of questions put together by Mr Hinchley about the grievance. This was the first set of questions. Three sets of questions were sent in total. The second were sent on 4 February 2022.

55. On 21 January 2022 Mr Pringle wrote to the claimant inviting him to a disciplinary hearing. In this he set out the background and a list of questions which he would ask. The claimant provided his written responses.

56. On 28 January 2022 the claimant asked for some of the evidence about the disciplinary allegations, specifically the timesheet in question and details of when it was submitted and by whom. The claimant entered into some email correspondence with Mr Pringle on the matter. In particular the claimant wanted information that he says would show that he had not actually submitted the timesheet.

57. On 4 February 2022 Kate Peyton responded to the claimant's query and provided a report. The claimant continued to ask further questions about this information and for the timesheet from 12 February 2021. He also sent Mr Pringle a lengthy email on 18 February 2022 asking questions about the timesheet submission and then another email on 20 February 2022.

58. On 23 February 2022 Mr Pringle wrote to the claimant to say that the 'hearing' had been due to take place that week but he had postponed it to allow the claimant to submit any further information. The claimant submitted a statement on 25 February 2022.

59. On 25 February 2022 Mr Hinchley sent the claimant the third set of questions about the grievance. He also summarised the dates for when he wanted the responses to all three sets of questions.

60. On 7 March 2021 the claimant wrote to Mr Hinchley expressing concern that there had been no investigation so far.

61. On 11 March 2022 Mr Pringle wrote to the claimant with the outcome of the disciplinary. Mr Pringle gave the claimant a first written warning lasting 6 months. He concluded that there was a dispute about whether the time sheet had actually been submitted, so effectively he gave the claimant the benefit of the doubt and discounted that allegation. However, he concluded that when the issue was first raised the claimant had not been open and honest

about his working times and he had intended to mislead. On that basis he gave a first written warning.

62. We accepted that Mr Pringle's conclusion was genuine. There was no evidence to suggest it was not. Mr Pringle had to reach a decision based on what information he had. The claimant had only provided written comments because he had not engaged in person with the disciplinary process. Mr Pringle had accepted the evidence was not conclusive on the more serious allegation. However, he had concerns about how the claimant had acted and as a result gave him the lowest possible sanction. He explained this clearly to the claimant in his letter.

63. On 21 March 2022 the claimant appealed against the written warning. This correspondence is lengthy. The focus of the appeal is on the original underlying allegation and advancing the claimant's argument that Mr Jackson had submitted the time sheet. The claimant did not engage Mr Pringle's conclusion to dismiss the allegation that the claimant had submitted a misleading timesheet due to lack of evidence.

64. In the appeal the claimant also asked for additional information. He has said this was a subject access request. This was the first time he referred to data protection legislation. It is not clear from the letter that the claimant was expressly making a subject access request. He is asking for a wide variety of information, some which is about himself, and then just refers to his rights under GDPR as why he should be entitled to the information. We concluded that the claimant refers to data protection legislation in in passing and it is buried in more detailed requests for wider information.

65. Mr Pringle acknowledged the appeal on 22 March 2022. The claimant asked some more questions on 29 March 2022. On 1 April 2022 Peter Germain, the Chief Executive, wrote to the claimant saying that the questions were about the process so it had been referred to Head of HR.

66. On 7 April 2022 Jo Craig, the respondent's head of HR, provided some answers to the questions the claimant had raised. On 26 April 2022 the claimant wrote to Mr Pringle about the questions. In this he expressly says that his request was a subject access request. He also says it is under the Freedom of Information Act. We find this is the first time that it is clear that the claimant is making a request under GDPR.

67. On 29 April 2022 the claimant wrote to HR asking for updates on his complaint, welfare contact calls and his appeal. Jo Craig, Head of HR, responded to say no appeal had been received. In evidence she accepted this was an error. On 3 May 2022 the claimant forwarded his original appeal document to Ms Craig. He reiterated that it included a data subject access request. On 17 May 2022 Ms Craig acknowledged the subject access request and asked for an additional 2 months due to the complexity of the request.

68. The claimant provided written responses to Mr Hinchley's questions. The last responses were sent on 11 May 2022.

69. On 8 July 2022 the claimant chased up with Jo Craig the status of his complaint, appeal and DSAR. He chased up a number of times again during July and early August and did not receive a response. On 9 August 2022 Ms Craig wrote to the claimant apologising for the delay. This was due to her being off work with Covid related illness which included being in hospital for most of July. She said that Brian Hinchly was concluding the outcome of the grievance but had competing priorities so it would be the end of August.

70. The claimant responded to Jo Craig by email on 14 August 2022. In this email he complained about the lack of information provided under his DSAR, even though it was 5 months since he said he had asked. By this point he had made a complaint to the ICO.

71. On 9 August 2022 Mr Pringle wrote to the claimant to advise there would be an appeal hearing in the disciplinary process on 18 August 2022. The claimant emailed Ms Peyton on 14 August to say he would not participate until he had the information he had requested under his DSAR. The appeal hearing was postponed.

72. The appeal was rearranged for 26 August 2022. The claimant continued to complain that the information he had asked for had not been provided. The hearing went ahead. The claimant did not attend though the claimant's trade union representative did.

73. On 31 August 2023 Mr Germain wrote to the claimant with the appeal outcome. The original decision was upheld. Mr Germain noted that the issue of whether the time sheet had been submitted had not been ruled on in any event because of uncertainty. The issue for him to consider was whether the claimant had been open and honest, as that was why the warning had been given. Mr Germain noted that the usual working arrangements meant there was flexibility and it was not unusual for employees to informally arrange cover. He concluded that in these circumstances the claimant's statement that he did not know when he left was incongruous. He upheld the decision to give a warning.

74. We found that Mr Germain's conclusion was genuine. On this it is important to note that the sanction was just the first written warning that was given based on Mr Pringle's conclusion about what the claimant had said when first asked about the 12 February 2024. There was no conclusion about the time sheet as Mr Pringle had already discounted that allegation at the initial disciplinary. He had been clear about this. The focus of the claimant's appeal had been a conclusion that had not been an outcome of the original disciplinary and went in the claimant's favour.

75. On 31 August 2022 Mr Pringle wrote to the claimant in response to his subject access request. The response is summarised as follows:

    75.1. Some information the claimant had requested was non-personal data. Limited responses to questions were provided along with some documents.

75.2. Regarding the claimant's own data, the respondent had asked for the information from Fujitsu, who held the data. This particularly related to log on details for early March 2021. The information that had been provided so far was inconclusive and the respondent had asked for this from third parties.

76. On 27 September 2022 Mr Pringle wrote to Mr Hinchley about the grievance investigation. Mr Hinchley had prepared an interim report. Mr Hinchley informed Mr Pringle that he intended to carry out what was described as a 'phase 2' investigation. At this point the claimant had not been informed of any further progress. The last updated had been from Ms Craig in August 2022.

77. On 30 September 2022 Mr Pringle wrote to the claimant to advise that an interim report had been prepared. He did not actually provide the interim report to the claimant. The letter just indicates further interviews will be carried out. The claimant did not ask for further information at this point.

5 October 2022 event and letter of 28 October 2022

78. On 5 October 2022 the claimant attended an event at Whipps Cross. This was an ACF event for the Queen's Jubilee. The claimant's ex-partner was receiving a medal and their daughter would also be attending. The claimant says he attended to support them.

79. By way of background, adult volunteers of the ACF received regular updates described as Part 1 orders. This provided information to them including about upcoming events. The claimant had not been an active volunteer with ACF while signed off work but he continued to receive the Part 1 orders. The respondent witnesses described him as 'non-effective' so he was not strictly a member of the ACF at the time. This was referred to just in passing by Mr Pringle and no further evidence was provided on this. We did not accept the assertion this meant that the claimant was not a member of the ACF so could not take part in events. If there were concrete rules about this they could have been provided by the respondent.

80. The claimant received three Part 1 orders during September all referring to the October 5 event. All three clearly stated *"The Commandment would like to invite all the members of the sector to Whipps Cross ARC on Wednesday 5 October 2022*". The second and third added *"only authorised guests are to attend"*.

81. The claimant was a member of the ACF. Guests referred to the guests of those receiving medals who were not otherwise invited, i.e. not ACF members. Our reading of this document is that a reasonable interpretation of all three Part 1 orders is that the claimant was invited to this event as he was a member of ACF.

82. The respondent witnesses said that even if the claimant was invited it was practice to provide notice of attendance via a system called Westminster. No documentary evidence was provided about this, e.g. showing who had registered to attend in advance. Again, it was just mentioned in passing in the

respondent's witness evidence. Our conclusion is there may have been a system in place but we were not satisfied that it was mandatory or even standard practice.

83. The claimant did attend the event. His own account is that he attended without any issue. He met the new CEO and no problems arose. He also met other colleagues. We accepted the claimant's account that nothing untoward happened on the day. No evidence was provided to the contrary and none of the respondent's witnesses from whom we heard evidence were present at the event.

84. Mr Pringle said that the following day he spoke with Mr Tooey who flagged up concerns about the claimant's attendance. According to Mr Pringle, Mr Tooey's concern related to two of the claimant's colleagues had been due to attend to receive medals. They had heard from the claimant in advance he would be attending and as a result they decided not to attend.

85. We did not hear any direct evidence about the colleagues' non-attendance. They were not witnesses and neither was Mr Tooey. The respondent did not provide any documentary evidence, such as emails from the time. The only evidence was from Mr Pringle recounting his discussion with Mr Tooey. However, we accepted Mr Pringle's evidence that Mr Tooey had raised concerns with him about the claimant's attendance after the event. Mr Pringle elaborated on this in oral evidence and explained that the colleagues' workload had increased due to the claimant's lengthy absence and they were tired as a result. We accepted this account as credible. This is not an unusual consequence of someone being signed off work for a prolonged period and we have already accepted that the respondent had limited resources and was short staffed. Therefore, it was likely that the claimant's attendance at the event could cause some upset.

86. On 28 October 2022 Mr Pringle wrote to the claimant about his attendance. The key points of this letter are as follows:

    86.1. He said that only those invited to attend were eligible to go and the claimant was had attended uninvited.

    86.2. Mr Pringle said there were security and safety implications with the claimant attending. He also said that the claimant remained medically unfit for work which was predominantly at Whipps Cross.

    86.3. Mr Pringle instructed the claimant that he was *"not permitted to attend, event, official or unofficial, at Whipps Cross or any other location owned or managed by this Association*" and that it would be reviewed once he was medically certified as fit to return to work.

87. In oral evidence Mr Pringle accepted that the claimant was probably invited to the event, albeit he said that the claimant was 'non-effective'. There was no evidence that the respondent had previously informed the claimant he should not attend any site while signed off work. By way of background, we also note that the medical evidence at the time stated the claimant was physically fit to work but could not due to the issues in the workplace.

However, the claimant had not been on site for over 18 months at this time, having been unfit to even attend any meetings in person.

88. The result of this is that some of the assertions made by Mr Pringle in the letter are not accurate. The claimant had a reasonable expectation that he was able to attend the event. It is not completely clear that there were medical reasons for him not to be there, the medical advice did not expressly say he was not fit to attend the workplace for non-work events.

89. With regards to security and safety, the respondent provided little evidence about the nature of these concerns. In oral evidence it was suggested that knowing who was present onsite was important. Due to the military nature of the site it is understandable that this would be a general concern of the respondent. Mr Pringle also suggested that the health and safety of other employees was important, referring to the colleagues who did not attend. However, the exact nature of these concerns was unclear other than them having been under additional pressure due to the claimant's absence.

90. Our conclusion is that Mr Pringle had concerns about the claimant's attendance at the event and attending the workplace in general while signed off work and he wanted to write to him about it. The concerns were not fully thought through or clearly articulated by Mr Pringle. However, we accepted that Mr Pringle's concerns were genuine.

91. In terms of the nature of the letter, the claimant has alleged that he had been wrongly reprimanded and he was banned from attending future events at his place of work expressly because he was absent from work due to ill health.

92. We accepted the wording of the letter does ban the claimant from attending any event at Whipps Cross and other sites managed by the respondent. Mr Pringle says the situation will be reviewed by when the claimant is fit to return to work. There are no other exceptions to the ban.

93. In terms of whether the claimant was *"wrongly reprimanded"*, we have concluded that Mr Pringle's assertion about the claimant's attendance being uninvited was incorrect. We also find that the wording of the letter is abrupt and heavy handed. The tone of the letter is critical and it could be viewed as a reprimand. However, other than the instruction not to attend events while signed off work, there are no other adverse consequences included in the letter. The letter concludes with Mr Pringle stating that it was *"clarification"*, because the claimant had not discussed his attendance in advance.

<u>Final DSAR response</u>

94. On 8 November 2022 Mr Pringle wrote to the claimant about his DSAR. This set out what the requests were and summarised what had happened. Mr Pringle then said that they had requested information from Fujitsu but they do not hold logs going back to March 2021. Mr Pringle reiterated that as the information about the timesheet had not been available the question of whether the claimant had submitted it was discounted as part of the disciplinary process.

Resignation

95. On 28 November 2022 the claimant submitted his resignation in writing. He listed 41 different complaints as the reasons why he was resigning. We will not list all of these. Based on the evidence we heard and the issues we need to decide we have summarised these as follows:

    95.1. The claimant's resignation was letter lengthy and set out a wide range of complaints. This included complaints about the letter he had received on 28 October 2022 and complaints about the final DSAR letter dated 8 November. He also set out at length again his earlier complaints.

    95.2. The claimant said in evidence that it was the letter of 28 October 2022 that triggered his resignation. The claimant referred to this letter in his resignation. Of 41 paragraphs 6 related to this letter. However, we were not persuaded it was this letter that triggered his resignation. Between that letter and the resignation the claimant received the final response to his DSAR. Only after this did he resign. However, we find that the letter of 28 October 2022 did upset the claimant so it was a factor, just not the main trigger.

96. On 20 December 2020 Brian Hinchley wrote to the claimant with the outcome of the grievance investigation. The majority of the grievance was not upheld. However, Mr Hinchley did uphold a complaint about Mr Jackson's conduct towards the claimant when discussing his performance assessment. No action could be taken as Mr Jackson had already left. An allegation about theft by Puttock and Jackson regarding scrap metal sales was also upheld.

The Law

100 The Claims pursued by the Claimant are:

    100.1 direct disability discrimination (section 13 Equality Act 2010);

    100.2 discrimination arising from a disability (section 15 Equality Act 2010);

    100.3 failure to make reasonable adjustments (section 20-21 Equality Act 2010);

    100.4 harassment on the grounds of disability (section 27 Equality Act 2010);

    100.5 unair dismissal – constructive dismissal (section 98 Employment Rights Act 1996); and

    100.6 wrongful dismissal.

Direct discrimination (section 13 Equality Act 2010

101 Direct discrimination takes place where a person treats the claimant less favourably because of disability than that person treats or would treat others.

Under s23(1) Equality Act 2010, when a comparison is made, there must be no material difference between the circumstances relating to each case.

102 Decisions are frequently reached for more than one reason. Provided the protected characteristic had a significant influence on the outcome, discrimination is made out. **(Nagarajan v London Regional Transport [1999] IRLR 572, HL)**

103 Section 136 of the Equality Act 2010 sets out the burden of proof. Under s136, if there are facts from which a tribunal could decide, in the absence of any other explanation, that a person has contravened the provision concerned, the tribunal must hold that the contravention occurred, unless that person can show that he or she did not contravene the provision.

104 Accordingly, where a claimant establishes facts from which discrimination could be inferred then the burden of proving that the treatment was in no sense whatsoever unlawful passes to the respondent. Guidelines on the burden of proof were set out by the Court of Appeal in **Igen Ltd v Wong [2005] EWCA Civ 142; [2005] IRLR 258**. Once the burden of proof has shifted, it is for the respondents to prove that they did not commit the act of discrimination. To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of the protected characteristic, since 'no discrimination whatsoever' is compatible with the Burden of Proof Directive. Since the facts necessary to prove an explanation would normally be in the possession of the respondents, a tribunal would normally expect cogent evidence to discharge that burden of proof.

105 The Court of Appeal in **Madarassy v Nomura International plc [2007] EWCA Civ 33; [2007] IRLR 246**, a case brought under the then Sex Discrimination Act 1975, states:

'The burden of proof does not shift to the employer simply on the claimant establishing a difference in status (eg sex) and a difference in treatment. Those bare facts only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal 'could conclude' that on the balance of probabilities, the respondent had committed an unlawful act of discrimination.'

106 Inferences can only be drawn from established facts and cannot be drawn speculatively or on the basis of a gut reaction or 'mere intuitive hunch' (**Chapman v Simon [1994] IRLR 124)** or from 'thin air' (***Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337**). Discrimination also cannot be inferred only from unfair or unreasonable conduct (**Glasgow *City Council v Zafar* [1998] ICR 120)**.

107 This means that to succeed with his claim for direct discrimination the claimant must first show that he has been treated less favourably than others in the same circumstances. The claimant must also have shown facts from which we can infer that the reason for the less favourable treatment may have been due to the claimant's disability. Only after this does the burden shift to

the respondent who must show that there is a different non-discriminatory reason for the treatment, that it is in no way due to the claimant's disability.

Discrimination arising from a disability (section 15 Equality Act 2010)

108 Section 15 of the Equality Act 2010 provides:

> *(1) A person (A) discriminates against a disabled person (B) if –*
>
> *(a) A treats B unfavourably because of something arising in consequence of B's disability, and*
>
> *(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.*
>
> *(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.*

109 In **Pnaiser v NHS England [2016] IRLR 170**, the EAT provided guidance as to the correct approach to a claim as follows:

> *(a) A Tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.*
>
> *(b) The Tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a section 15 case. The 'something' that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.*
>
> *(c) Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant: see **Nagarajan v London Regional Transport** [1999] IRLR 572. A discriminatory motive is emphatically not (and never has been) a core consideration before any prima facie case of discrimination arises…*
>
> *(d) The Tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is "something arising in consequence of B's disability". That expression 'arising in consequence of' could describe a range of causal links. Having regard to the legislative history of section 15 of the Act…the statutory purpose which appears from the wording of section 15, namely to provide protection in cases where the*

consequence or effects of a disability lead to unfavourable treatment, and the availability of a justification defence, the causal link between the something that causes unfavourable treatment and the disability may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.

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

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

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

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

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

110 The correct approach to a claim was summarised by the **Court of Appeal in City of York Council v Grosset [2018] IRLR 746**.

> *"36. On its proper construction, section 15(1)(a) requires an investigation of two distinct causative issues: (i) did A treat B unfavourably because of an (identified) "something"? and (ii) did that "something" arise in consequence of B's disability.*
>
> *37.The first issue involves an examination of A's state of mind, to establish whether the unfavourable treatment which is in issue occurred by reason of A's attitude to the relevant "something" ...*
>
> *38.The second issue is an objective matter, whether there is a causal link between B's disability and the relevant "something" …."*

111 The meaning of 'unfavourable treatment' was considered by the Supreme Court in **Trustees of Swansea University Pension and Assurance Scheme v Williams [2019] ICR 230** (at para 27):

> *'… in most cases (including the present) little is likely to be gained by seeking to draw narrow distinctions between the word "unfavourably" in section 15 and analogous concepts such as "disadvantage" or "detriment" found in other provisions, nor between an objective and a "subjective/objective" approach. While the passages in the Code of Practice to which she draws attention cannot replace the statutory words, they do in my view provide helpful advice as to the relatively low threshold of disadvantage which is sufficient to trigger the requirement to justify under this section.'*

112 It is then necessary to look to the employer's defence of justification. S.15(1)(b) EqA provides that the unfavourable treatment may be justified, if it is a proportionate means of achieving a legitimate aim. To be proportionate, the conduct in question must be both an appropriate means of achieving a legitimate aim and a reasonably necessary means of doing so (**Allonby v Accrington & Rossendale College & Others [2001] ICR 1189 CA)**.

113 Justification requires the Tribunal to conduct an objective balancing exercise between the discriminatory effect and the reasonable needs of the employer (**Ojutiku v Manpower Services Commission [1982] ICR 661** and **Land Registry v Houghton & Others UKEAT/0149/14**). It will be relevant for the Tribunal to consider whether any lesser measure might have achieved the employer's legitimate aim (**Naeem v Secretary of State for Justice [2014] ICR 472**).

114 The time at which justification needs to be established is the point when the unfavourable treatment occurs (**Trustees of University Pension and Assurance Scheme v Williams [2015] ICR 1197 EAT**]). When the putative discriminator has not considered questions of proportionality at that time, it is likely to be more difficult for them to establish justification, although the test remains an objective one (**Ministry of Justice v O'Brien [2013] UKSC**).

Failure to make reasonable adjustments (section 20-21 Equality Act 2010)

115 Section 20 of the Equality Act 2010 provides:

(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

(2) The duty imposes the following three requirements.

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

The second and third requirements are not relevant for this case.

116 Section 21 EqA 2010 provides that a failure to comply with the first requirement is a failure to comply with a duty to make reasonable adjustments, and further that A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

117 The EAT in **Environment Agency v Rowan [2008] ICR 218** held that an employment tribunal considering a breach of the duty to make reasonable adjustments (under the then-current DDA 1995), must identify:

(a) the provision, criterion or practice applied by or on behalf of the employer; or

(b) the physical feature of premises occupied by the employer;

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

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

This guidance continues to apply to claims brought under s. 20 – 21 EqA 2010 (see e.g. **Secretary of State for Work and Pensions (Jobcentre Plus) v Higgins [2014] ICR 341** at [29] – [30], where the EAT also noted that it is necessary for the ET to identify the "step" or "steps" that the employer should have to take to avoid the disadvantage).

118 The Court of Appeal in **Ishola v Transport for London [2020] ICR 1204** has given detailed guidance as to the meaning of the phrase "provision, criterion or practice":

"35. The words "provision, criterion or practice" are not terms of art, but are ordinary English words. I accept that they are broad and overlapping, and in light of the object of the legislation, not to be narrowly construed or unjustifiably limited in their application. I also bear in mind the statement in the Statutory Code of Practice that the phrase PCP should be construed widely. However, it is significant that Parliament chose to define claims based

on reasonable adjustment and indirect discrimination by reference to these particular words, and did not use the words "act" or "decision" in addition or instead. As a matter of ordinary language, I find it difficult to see what the word "practice" adds to the words if all one-off decisions and acts necessarily qualify as PCPs…

36. The function of the PCP in a reasonable adjustment context is to identify what it is about the employer's management of the employee or its operation that causes substantial disadvantage to the disabled employee. The PCP serves a similar function in the context of indirect discrimination, where particular disadvantage is suffered by some and not others because of an employer's PCP. [….]. To test whether the PCP is discriminatory or not it must be capable of being applied to others because the comparison of disadvantage caused by it has to be made by reference to a comparator to whom the alleged PCP would also apply. [….].

37. In my judgment, however widely and purposively the concept of a PCP is to be interpreted, it does not apply to every act of unfair treatment of a particular employee. That is not the mischief which the concept of indirect discrimination and the duty to make reasonable adjustments are intended to address. If an employer unfairly treats an employee by an act or decision and neither direct discrimination nor disability related discrimination is made out because the act or decision was not done/made by reason of disability or other relevant ground, it is artificial and wrong to seek to convert them by a process of abstraction into the application of a discriminatory PCP.

38. In context, and having regard to the function and purpose of the PCP in the Equality Act 2010 , all three words carry the connotation of a state of affairs (whether framed positively or negatively and however informal) indicating how similar cases are generally treated or how a similar case would be treated if it occurred again. It seems to me that "practice" here connotes some form of continuum in the sense that it is the way in which things generally are or will be done. [….].”

119 In considering whether the application of a PCP places a disabled person at a substantial disadvantage:

“one must simply ask whether the PCP puts the disabled person at a substantial disadvantage compared with a non-disabled person. The fact that they are treated equally and may both be subject to the same disadvantage when absent for the same period of time does not eliminate the disadvantage if the PCP bites harder on the disabled, or a category of them, than it does on the able bodied”

Griffiths v Secretary of State for Work and Pensions [2017] ICR 150.

120 In considering whether an employer has complied with the duty to make reasonable adjustments, the focus must be on the practical steps that can be taken to alleviate the substantial disadvantage suffered, rather than the process by which a decision is reached, or the information obtained in reaching that decision. See on this point **Royal Bank of Scotland Plc v Ashton [2011] ICR 632**, and in particular the quotation from **Spence v Intype**

Libra Ltd at (reference to section 4A is to the predecessor Disability Discrimination Act 1995):

"The nature of the reasonable steps envisaged in section 4A is that they will mitigate or prevent the disadvantages which a disabled person would otherwise suffer as a consequence of the application of some provision, criterion or practice … The duty is not an end in itself but is intended to shield the employee from the substantial disadvantage that would otherwise arise. The carrying out of an assessment or the obtaining of a medical report does not of itself mitigate or prevent or shield the employee from anything. It will make the employer better informed as to what steps, if any, will have that effect, but of itself it achieves nothing."

121 Paragraph 20 of Part 3 of Schedule 8 to the Equality Act 2010 provides that an employer will not be subject to a duty to make reasonable adjustments if it does not know, and could not reasonably be expected to know, that the relevant disabled person is disabled and is likely to be placed at the disadvantage referred to in the first, second or third requirement as set out in section 20 (see above).

122 In **Secretary of State for Work and Pensions v Alam [2010] ICR 665**, the EAT confirmed that an employer will not be subject to the duty to make reasonable adjustments unless it either knows or ought reasonably to know (a) that the employee is disabled and (b) that his/her disability is liable to place him/her at a substantial disadvantage in the way set out in s. 20(3), (4) or (5) (see [17] – [18]; the case was decided under the predecessor provisions of the Disability Discrimination Act 1995).

123 *"the nature and extent of the disadvantage, the employer's knowledge of it and the reasonableness of the proposed adjustment necessarily run together. An employer cannot … make an objective assessment of the reasonableness of proposed adjustments unless he appreciates the nature and extent of the substantial disadvantage imposed upon the employee by the PCP'.* **Newham Sixth Form College v Sanders [2014] EWCA Civ 734.**

124 The EHRC Code includes examples of adjustments which may be reasonable:

a. making adjustments to premises

b. allocating some of the disabled person's duties to another worker

c. transferring the worker to fill an existing vacancy

d. altering the worker's hours of working or training

e. assigning the worker to a different place of work or training or arranging home working

f. allowing the worker to be absent during working or training hours for rehabilitation, assessment or treatment

g. acquiring or modifying equipment

h. providing supervision or other support.

Harassment – Section 26 Equality Act 2010

125 Under section 26 Equality Act 2010

(1) a person (A) harasses another (B) if –

(a) A engages in unwanted conduct related to a relevant protected characteristic, and
(b) the conduct has the purpose or effect of –

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B. …

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account –

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect.

126 With a claim for harassment the claimant must prove on the balance of probabilities that the conduct he has complained of occurred.

127 The test of whether the conduct amounted to harassment is part objective and part subjective. The Tribunal must take into account the claimant's subjective perception but it is also required to look at that objectively to see if it was reasonable for the claimant to have considered his dignity to be violated or that it created an intimidating, hostile, degrading, humiliating or offensive environment.

128 In **Grant v HM Land Registry [2011] EWCA Civ 769** the Court of Appeal said that:

"Tribunals must not cheapen the significance of the words "intimidating, hostile, degrading, humiliating or offensive environment". They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment."

129 In **Richmond Pharmacology v Dhaliwal [2009] ICR 724** the EAT stated:

"Dignity is not necessarily violated by things said or done which are trivial and transitory, particularly if it should have been clear that any offence was unintended. While it is also important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred), it is also important not to

encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase."

130 Whether or not the conduct is related to a protected characteristic is a matter of fact for the Tribunal drawing on all the evidence before it.

Unfair dismissal

131 The law on unfair dismissal is set out in the Employment Rights Act 1996. The relevant provisions are 94—98. A claim for unfair dismissal can only be pursued when the employee is dismissed. Under section 94c an employee is dismissed when they terminate the contract in circumstances in which they are entitled to do so without notice by reason of the employer's conduct. This is often known as a constructive dismissal.

132 The circumstances that entitle the employee to terminate the contract without notice are as follows:

132.1 there must be a breach of contract by the employer;

132.2 that breach must be sufficiently important to justify the employee resigning;

132.3 the employee must leave in response to the breach not some unconnected reason; and

132.4 the employee must not delay as such as to affirm the contract.

133 The breach relied on can be a breach of an express or implied term. Every contract of employment contains an implied term that the employer shall not, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between the employer and employee The conduct must "*impinge on the relationship in the sense that, looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer".* (**Malik & Mahmud v Bank of Credit and Commerce International SA -1997- IRLR 462, HL**.)

134 In determining whether there has been a breach of the implied term, the question is not whether the employee has subjectively lost confidence in the employer but whether, viewed objectively, the employer's conduct was likely to destroy, or seriously damage, the trust and confidence which an employee is entitled to have in his employer (**Nottinghamshire County Council v Meikle [2005] 1 ICR 1.**)

135 Where there are a number of incidents culminating in a "last straw", the Court of Appeal in **Kaur v Leeds Teaching Hospitals NHS Trust [2019] ICR 1** held that tribunals should ask themselves the following questions (see [55]):

(1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?

(2) Has he or she affirmed the contract since that act?

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

(4) If not, was it nevertheless a part (applying the approach explained in Omilaju [2005] ICR 481) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) 8 breach of the Malik term? (If it was, there is no need for any separate consideration of a possible previous affirmation, for the reason given at the end of para 45 above.)

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

136 Where the act that leads to the employee resigning is entirely innocuous it will be necessary to consider whether any earlier breach has been affirmed. In **Williams v Governing Body of Alderman Davies Church in Wales Primary School EAT**, it was held that where there is conduct by an employer that amounts to a fundamental breach of contract, a constructive dismissal claim can succeed even if there has been more recent conduct by the employer which does not in itself contribute to a breach of the implied term of trust and confidence, but which is what tips the employee into resigning. Crucially, however, the employee must not have affirmed the earlier fundamental breach and must have resigned at least partly in response to it.

137 The test to be applied in assessing the gravity of any conduct is an objective one and neither depends upon the subjective reaction of a particular employee nor the opinion of the employer as to whether its conduct is reasonable or not.

Wrongful dismissal

138 It is accepted by the parties that the claimant's employment terminated without notice. Therefore, if we find that the claimant was constructively dismissed his claim for notice will succeed.

Discussion and conclusions

139 The respondent accepts that the claimant was disabled and the respondent had the requisite knowledge at the relevant time so we do not need to make any finding on that issue.

Reasonable adjustments

140 The claimant has said that the provision, criterion and practice was "the standard level of communication in relation to internal grievance, disciplinary and appeals processes".

141 On this point we accept the submissions by the respondent. The claimant has not shown there was such a PCP that applied generally or that it was applied to him.

142 The respondent is a small organisation. We were not provided any evidence of any normal or standard method of communicating during grievances, disciplinaries or appeals that was followed.

143 The evidence we had showed that the respondent communicated with the claimant while he was signed off work in a way that was tailored to his needs. The respondent primarily communicated with the claimant in writing, particularly once the Occupational Health report was provided. At times the respondent tried to contact the claimant and he did not respond, such as when Mr Hinchley was first contacting him about the grievance. Alongside the written correspondence about the grievance and disciplinary processes he was contacted by Kate Peyton regularly to keep in touch more generally.

144 As the way the respondent communicated with the claimant was bespoke to him and his circumstances it is not a PCP.

145 The claimant has suggested the level of communication was insufficient and placed him at a disadvantage. The disadvantage the claimant says he experienced was additional distress and worry. There was no evidence that the claimant was placed at any such disadvantage.

146 The claimant has not shown there was a PCP in place that was applied to him and placed him at a disadvantage. Therefore, the respondent was not under a duty to make adjustments so this claim fails.

<u>5 October 2022 and letter of 28 October 2022</u>

147 The claimant pursues 3 claims of disability discrimination based on the letter. These are direct discrimination, discrimination arising from a disability and harassment related to disability

148 Our findings of fact on this issue are summarised as follows:

148.1 It was reasonable for the claimant to understand that he was invited to the medal ceremony. That is a reasonable interpretation of the Part 1 orders. There was also no evidence that he needed to notify the respondent in advance of his attendance, even if that may have been expected in practice.

148.2 There was no medical reason for the claimant not to attend the event. The claimant was signed off work because of the ongoing issues, including his grievance. However, this was not a work event, it was organised by the ACF.

148.3 Two other employees expressed concern about the claimant's attendance. This was because they were having to cover the claimant's work he had been signed off sick. We accepted that concerns were raised, even it if was not clear exactly why the claimant's attendance would cause a problem for the other employees.

148.4 No problems actually arose on the day when the claimant attended. He was seen by others and no objections raised.

148.5 Mr Pringle was not at the event but he heard from Mr Tooey about the claimant's attendance. He was also informed about the other employees not attending because of the claimant's attendance.

148.6 We accepted that Mr Pringle had some genuine concerns about the claimant's attendance at the event. These were not completely clearly set out but broadly related to health and safety.

148.7 Mr Pringle wrote to the claimant telling him he was not permitted to attend any events on the respondent's sites while signed off work.

148.8 The tone of the letter was heavy handed and critical. We accepted it could be viewed as being a reprimand, even though there were no other adverse consequences for the claimant beyond criticism and the instruction not to attend events while signed off work.

149 To succeed with the direct discrimination claim the claimant would need to show that he was treated less favourably than someone else in the same circumstances who was not disabled. This would be someone who was absent for a similar length of time who attended an event where he was not expected but was not disabled. We have concluded that it is likely that Mr Pringle would have written a similar letter to anyone who had attended the event while signed off work for over 18 months. There is no evidence from which we could infer that it may actually have been the claimant's stress and depression that was the reason for the letter. We find that the claimant has not been treated less favourably than a hypothetical non-disabled comparator. Therefore, the direct discrimination claim does not succeed.

150 The situation is different with the claim for unfavourable treatment arising from a disability. In their written submissions the respondent accepts the letter is unfavourable treatment.

151 We also find that the letter was unfavourable treatment. The threshold unfavourable treatment is relatively low. The letter included the following elements which are all unfavourable to the claimant:

151.1 The tone of the letter was critical and can be viewed as a reprimand, which would be detrimental to the claimant.

151.2 It was inaccurate as the claimant had reasonably understood that he was invited due to the Part 1 orders.

151.3 There was an absolute instruction not to attend any site while he was signed off work, for other official or unofficial purposes. There were no exceptions to this instruction within the letter.

152 We accept that the letter was unfavourable treatment, as the claimant has alleged.

153 The respondent also accepts that the claimant's absence arose from his disability. This is the 'something' the claimant relies on for this claim. We have concluded that Mr Pringle sent the letter to the claimant because of his sickness absence. Had the claimant not been signed off work there would have been no objections to him attending the event. Any concerns about

health and safety and the impact of the claimant's attendance on other employees were intrinsically linked to the fact the claimant had been signed off work for many months.

154 The respondent says that any unfavourable treatment was justified. It says its legitimate aims were adhering with health and safety procedures and medical advice due to the claimant not being fit to attend the workplace and protecting the interests and wellbeing of the claimant and his colleagues.

155 We accept that concerns about adhering with health and safety procedures and concerns about the wellbeing of employees, both the claimant and his colleagues, can be legitimate aims. We also accepted that Mr Pringle had genuine concerns about the claimant's attendance at the event on 5 October 2022 that were broadly linked to those aims. However, we also reached the following conclusions:

155.1 The claimant had not breached any health and procedures by attending the event. The wording of the Part 1 Orders indicated he had been invited and we did not accept that it was mandatory that he was required to inform anyone in advance.

155.2 While the claimant's colleagues may have been upset by the claimant's presence at the event it was not clear what the actual impact was on them or how their health may have been affected.

155.3 Although the claimant was signed off work due to workplace issues the event was not related to work. The respondent did not have any evidence that the claimant's health would be adversely impacted by attending an ACF event.

156 We have concluded that the respondent had potential legitimate aims that were linked to the events of October 2022, but they lacked clarity. This was reflected in Mr Pringle's evidence. He appeared to have a number of concerns generally about the claimant having attended the event and felt he needed to do something. However, it was unclear exactly what Mr Pringle was trying to achieve writing to the claimant in the way he did, when the letter is considered as a whole.

157 One aim was clear, he has instructed the claimant that he must not attend any workplace site in future while he remained signed off work. We accept that such an instruction could be a reasonable management instruction in the circumstances, taking into account both the claimant's absence and the military nature of the respondent's sites. However, if there was a restriction generally it could have been made clear to the claimant earlier and this did not happen. The instruction in this letter was therefore reactive to the event on 5 October 2022. The instruction was also set out in absolute terms. For example, there was no caveat that would have enabled the claimant to attend ACF events if he notified the respondent in advance. We have concluded the way this instruction was communicated to the claimant was not proportionate. The rationale could have been explained and the option of contacting the respondent first if the claimant wished to attend anything could have been given.

158 The key aspect of the letter that was unfavourable was the critical and heavy-handed tone. This related to what had happened already, rather than that would happen in future. It was also inaccurate, as Mr Pringle had assumed that the claimant had gone uninvited whereas the Part 1 Orders indicated otherwise. It is again not clear how writing to the claimant in this way advanced the aims the respondent has identified. The critical tone means the letter comes across as a reprimand, and the instruction not to attend any site is punitive rather than for any good reason.

159 In summary, we accepted the respondent may have had genuine concerns about the claimant's attendance at the event. We also accepted that it had legitimate aims that warranted writing to the claimant about his attendance and also give him an instruction that limited his attendance at sites while he remained signed off work. We find that the way that the respondent did this was not proportionate. The specific issues had not been fully thought through. No clarification was sought from the claimant first and within the letter no indication that there was any understanding of his situation, or what the impact of the instruction would be. The result was a letter that was heavy handed with the potentially reasonable instruction coming across as punitive.

160 Therefore, the claim for discrimination arising from disability succeeds as the respondent has not established that the letter was justified.

161 Finally, the claimant has also said that this letter amounted to harassment. The conduct was unwanted. We also find that it was related to the claimant's disability. The letter was sent to the claimant due to him attending an event when signed off work with stress and depression. Mr Pringle expressly refers to the claimant being *"medically certified as unfit for work"* and to the claimant being absent from work due to il health. The instruction not to attend any site is linked to this.

162 The claimant was clearly upset by the letter. We have already accepted that the letter was unfavourable treatment. However, while we accept that the letter was heavy handed and critical of the claimant we have not concluded that when looked at objectively it meats the definition of harassment. As we have noted, the threshold for unfavourable treatment is relatively low. This is not the case with harassment. The conduct complained of must have the proscribed effect as set out in section 26 Equality Act 2010.

163 In this case the letter is a single piece of correspondence. When read as a whole the impression is of Mr Pringle being critical of the claimant. We have found it is heavy handed and the situation could have been dealt with in a more understanding or empathetic way. However, the language is professional and it is just the overall tone that is problematic. While the claimant was upset by the letter it is not clear that others would equally be offended.

164 We find that the letter does not meet the definition of harassment and therefore this claim does not succeed.

<u>Constructive dismissal</u>

165 The claimant relies on the following which he says was conduct that was likely to destroy mutual trust and confidence:

165.1 Fail to deal promptly and reasonably with the claimant's grievance complaint that was raised in July 2021.

165.2 Fail to uphold an appeal against a disciplinary outcome, despite there being no compelling evidence to support the disciplinary finding.

165.3 Wrongly reprimand the claimant for attending an event on 5 October 2022.

165.4 Delay excessively access to information that the claimant requested (by way of a DSAR) in January 2022.

Fail to deal promptly and reasonably with the claimant's grievance

166 There was a delay in the grievance process. The claimant raised the grievance on 2 July 2021 and still outstanding when the claimant resigned on 28 November 2022. This is a period of over 18 months.

167 Our conclusions about the grievance process, and what lead to the delay, are as follows:

167.1 The claimant's grievance was lengthy and the way it was written was unclear. We accepted that it was reasonable that Mr Hinchley wanted to clarify various aspects of the grievance before investigating.

167.2 Mr Hinchley tried to arrange a meeting with the claimant shortly after the grievance was raised. He struggled to speak to the claimant initially. The meeting was then due to happen on 1 September, so only 2 months after the grievance was raised.

167.3 The claimant did not attend this meeting. He then then said he wanted to communicate with writing. Mr Hinchley continued to liaise with the claimant. We accepted it was reasonable for him to try and speak to the claimant in person to clarify the scope of the grievance.

167.4 In December that the respondent received advice from Occupational Health that the grievance should be dealt with in writing. This advice was delayed in part due to the claimant not attending the first appointment that was arranged with Occupational Health.

167.5 After this the respondent did deal with everything in writing. This arrangement will inevitably lead to some additional delay. The claimant also delayed in providing his answers to Mr Hinchley's questions. He did not provide his final answers until 11 May 2022.

167.6 There was some delay between the claimant providing his answers and him being notified of the interim report at the end of September. However, given the amount of information that needed to be reviewed and the fact that Mr Hinchley was having to do this alongside his other responsibilities we do find this was understandable.

168 We have concluded that although there was delay it was not unreasonable in the circumstances and there were generally understandable reasons for the delays. There were points where the process could have been improved or expedited. However, the claimant's own conduct at times exacerbated the delays. Any flaws in the grievance were not sufficiently serious to conclude that this was conduct likely to destroy trust and confidence without reasonable and proper cause for doing so.

169 Therefore, the claimant has not shown that the respondent's conduct in relation to the grievance amounted to a fundamental breach of contract.

Disciplinary Appeal

170 The claimant's appeal was not upheld. This is because Mr Germain concluded that Mr Pringle was entitled to reach the conclusion he did based on the evidence he had.

171 We accepted that the original finding of Mr Pringle was genuine and it was supported by the evidence he had. Mr Pringle could only make a decision based on the evidence he had and likewise Mr Germain could only do the same. This was the written evidence as the claimant did not attend either hearing in person to put forward a different account in person.

172 In his appeal the claimant did not address the findings that Mr Pringle had reached. Instead the focus of the claimant's appeal was trying to prove that someone else had submitted the disputed timesheet. By the appeal that issue had already been in the claimant's favour. What remained live was Mr Pringle's conclusion that the claimant had not been completely open and transparent about his whereabouts on 12 February. The evidence from the claimant on this point was inconsistent. We accepted it was open to Mr Germain to uphold the first written warning.

173 The claimant has not shown there was *"no compelling evidence to support the disciplinary finding"*. In addition, the respondent had reasonable and proper cause to uphold the appeal, as it was consistent with the evidence.

174 As the claimant has not shown on the balance of probabilities that the conduct he complains of occurred he has not shown that the respondent breached his contract of employment by upholding the appeal.

Wrongly reprimand the claimant for attending an event on 5 October 2022

175 We accepted that the letter to the claimant dated 28 October 2022 could be viewed as a reprimand, being critical and heavy handed. We also accepted that it was incorrect for Mr Pringle to say that the claimant attended even though he was not invited, as the Part 1 Orders did indicate he was invited to attend.

176 We have also already concluded that this letter amounted to unfavourable treatment that arose out of the claimant's disability and the unfavourable treatment was not justified.

177 The question for us to determine is whether in light of these findings whether this was also conduct that was likely to destroy mutual trust and confidence,

and hence a fundamental breach of the claimant's contract of employment.

178 Often when an employer unlawfully discriminates against an employee it will also be a breach of the implied term of mutual trust and confidence. However, this is not always the case and the relevant tests are different. The discriminatory conduct must also be conduct that is likely to destroy mutual trust and confidence. Such conduct must be sufficiently serious when looked at objectively that it was likely to destroy the employee's trust and confidence.

179 In relation to this we reiterate that the threshold for unfavourable treatment under section 15 Equality Act 2010 is relatively low. In order for a claim to succeed there is no requirement for the unfavourable treatment that has been identified to be serious, so long as there is some disadvantage.

180 Considered objectively we have concluded that the shortcomings of the letter themselves were not conduct that was likely to destroy trust and confidence. It was unfavourable as it was upsetting for the claimant to be criticised for attending something that was important to him and that he understood he was entitled to attend. He was also upset by the instruction that he must not attend any site while signed off work. However, we have also found that Mr Pringle did have cause to write to the claimant and it was the tone of the letter and heavy handed approach that made it discriminatory.

181 Although the letter was discriminatory we have concluded it was not conduct that was so serious that it was likely to destroy mutual trust and confidence. It was a one of incident that could have been handled in a more sensitive manner.

182 We have concluded that the relevant letter, and the reprimand the claimant complains of, does not amount to conduct that was likely to destroy mutual trust and confidence. Therefore, it does not amount to a fundamental breach of contract.

<u>Delay excessively access to information that the claimant requested (DSAR)</u>

183 The relevant facts on this issue are as follows:

183.1 In January and February 2022 the claimant asked the respondent to provide a lot of information relating to the disciplinary allegations. Some documents he specifically requested related to the submission of the relevant timesheet. These requests were made before the disciplinary hearing.

183.2 In the claimant's appeal dated 21 March 2022 the claimant included a number of other queries and requests for information. He referred to a subject access request but this was in passing. The information he requested was not just personal data, which he could request by making a subject access request. He asked for other information that was not personal data and asked for a number of questions to be answered. We concluded that it was not clear on reading the claimant's appeal that it was a data subject access request ("DSAR").

183.3 The respondent provided some responses to the claimant's queries. Jo Craig wrote to the claimant with answers to some questions on 7

April 2022.

183.4 On 26 April 2022 the claimant wrote to Mr Pringle. This email is short and he expressly says that he had been making a DSAR, referring back to his appeal. The claimant chased up the request with Ms Craig in May 2022 and on 17 May 2022 she acknowledged this and asked for more time due to the complexity of the request.

183.5 The respondent did not formally provide a response until 31 August 2023. The delay in part was due to the respondent seeking information from third parties. In addition Ms Craig had been absent and hospitalised for some time.

183.6 The response was not just to the subject access request. The respondent provided answers to wider questions that the claimant had asked. Under the relevant data protection obligations the respondent was not required to do this, they only need to provide the information that they held about the claimant. Trying to obtain the information the claimant asked for from third parties went beyond their obligations to the claimant in this respect.

183.7 The final response was provided on 8 November 2022. In this letter the respondent explained what they had tried to obtain and why it was not possible to provide all that the claimant had asked for.

184 There were delays in responding to the claimant's requests. We have concluded that in the circumstances we do not find those excessive. The relevant context is both the manner in which the claimant made his requests and the scope of the requests. It was not clear that the claimant was making a subject access request until 26 April 2022. The DSAR was embedded in much wider lists of questions and requests for other information. The respondent also went beyond its obligations and tried to obtain the information the claimant wanted from third parties.

185 The requests could have been dealt with more promptly or efficiently. We do not find any failings are sufficiently serious to amount to conduct likely to breach trust and confidence. Ultimately the respondent did what it could to obtain the information that the claimant was seeking.

186 Therefore we conclude that the claimant has not shown that the respondent's conduct relating to his requests for information was conduct that was likely to destroy mutual trust and confidence. There was no breach of contract.

Conclusion

187 The claimant has not shown that the respondent fundamentally breached his contract of employment. To summarise:

187.1 When looked at the four individual allegations, we do not accept that any amount to conduct likely to destroy trust and confidence.

187.2 Any failings by the respondent were not sufficiently serious that when looked at objectively they reached this threshold.

187.3 As the claimant has not shown that the respondent fundamentally breached his contract of employment therefore he was not constructively dismissed.

187.4 Therefore, his claim for unfair dismissal does not succeed.

Employment Judge Park
Dated: 12 August 2024