EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Dr Michael Wiseman	**v**	**Indigo Consulting Group Ltd**

Heard at: Watford
On: 4 to 6 September 2024 and
10 and 11 October 2024 (in chambers)

Before: Employment Judge Bedeau
Members: Mr A Scott
Mr I Murphy

Appearances
For the Claimant: In person
For the Respondent: Ms K Hosking, counsel

RESERVED JUDGMENT

1. The claim of direct discrimination because of disability is not well-founded and is dismissed.

2. The claim of failure of the duty to make reasonable adjustments is not well-founded and is dismissed.

3. The claim of constructive discriminatory dismissal is not well-founded and is dismissed.

4. The case is listed on **17 and 18 December 2024**, to start at 10am, in person, to hear and determine the respondent's application for its costs to be paid by the claimant. Parties must attend by 9.30am

REASONS

1. In a claim form presented to the Tribunal on 23 February 2023, the claimant made claims of constructive unfair dismissal, constructive discriminatory dismissal, direct disability discrimination, and failure to make reasonable adjustments. He repeated those claims in his amended particulars of claim dated 5 April 2024.

2. In the response presented to the Tribunal, initially on 3 April 2023, and amended on 18 September 2023 and 25 March 2024, the claims are

denied. The respondent admits that the claimant's social anxiety, generalised anxiety disorder, and depression are disabilities under s.6 Equality Act 2010. The issue is one of knowledge. It denies that it had discriminated against him on grounds of disability and asserts that there were concerns about his performance.

3. A case management preliminary hearing was held on 11 July 2023 before Employment Judge Alliott, who formally dismissed the constructive unfair dismissal claim as the claimant did not have the requisite two years' qualifying period of service with the respondent. The Judge listed the case for this final hearing and set out the claims and issues. They are as follows:

The issues

4. The issues between the parties which potentially fall to be determined by the Tribunal are as follows:

Disability

4.1 The respondent concedes that the claimant was disabled at all material times in accordance with the Equality Act 2010 because of the following conditions:

4.1.1 Social anxiety.
4.1.2 Generalised anxiety disorder.
4.1.3 Depression.

4.2 The respondent disputes that it knew or ought to have known that the claimant was so disabled at any relevant time.

Dismissal

4.3 For the purposes of the claimant's discrimination claims, was the claimant dismissed?

4.3.1 The claimant relies on the implied term of mutual trust and confidence and points to the alleged discriminatory conduct as the fundamental breaches of that term.

EQA, section 13: direct discrimination because of disability

4.4 Did the respondent subject the claimant to the following treatment?

4.4.1 On 1 November 2022 at a probation review meeting, when the claimant spoke to Mr Peter Kane about homework, Mr Peter Kane refused the request saying that homeworking was disruptive.

4.4.2 If the claimant was dismissed, dismissing the claimant

4.5 Was that treatment "*less favourable treatment*", i.e. did the respondent treat the claimant as alleged less favourably than it treated or would have treated others ("comparators") in not materially different circumstances? The claimant

relies on the following comparator, Mr Edward Baldwin and/or a hypothetical comparator.

4.6 If so, was this because of the claimant's disability?

EQA, sections 20 & 21:reasonable adjustments:

4.7 Did the respondent not know and could it not reasonably have been expected to know the claimant was a disabled person?

4.8 Did the respondent have the following PCPs:

4.8.1 Being required to work in the work office on a full-time basis?

4.9 Did any such PCP put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled at any relevant time, in that?

4.9.1 By reference to paragraph 98(B) of the particulars of claim including the footnotes, exacerbating the claimant's social anxiety thereby causing him discomfort, having to type one handed and adversely affecting the claimant's work performance.

4.10 If so, did the respondent know and could it reasonably have been expected to know the claimant was likely to be placed at any such disadvantage?

4.11 If so, were there steps that were not taken that could have been taken by the respondent to avoid any such disadvantage? The burden of proof does not lie on the claimant, however it is helpful to know what steps the claimant alleges should have been taken and they are identified as follows:

4.11.1 Allowing the claimant to work 2 or 3 days a week from home.

4.12 If so, would it have been reasonable for the respondent to have to take those steps at any relevant time?

Remedy

4.13 If the claimant succeeds, in whole or part, the Tribunal will be concerned with issues of remedy and in particular, if the claimant is awarded

The evidence

5. The claimant gave evidence and did not call any witnesses. On behalf of the respondent, evidence was given by Mr Peter Kane, Principal, and former owner of the respondent company.

6. In addition to the oral evidence, the parties prepared a joint bundle of documents comprising of 787 pages. References will be made to the pages as numbered in the bundle.

7. This case is about the claimant who worked for the respondent for over three months and who claims that because of his disabilities he was discriminated and that there was a failure to make reasonable adjustments.

The respondent's case is that the claimant was comparatively new to the work of the respondent and was reluctant to take on board advice. There were concerns raised by Mr Kane, the former owner of the respondent company and the claimant's line manager, about his performance and behaviour. Although he resigned, the respondent contends there was no breach of the implied term of mutual trust and confidence and there was no discriminatory behaviour towards him.

8. Credibility is an important issue because it is a case of whether it is the claimant's evidence, or the evidence given by Mr Kane, we should accept.

The claimant's strike out application

9. The Tribunal spent the afternoon on the first day of the hearing considering the claimant's strike out application. He served his witness statements close to midnight on 14 June 2024 and said that at the time the bundle of documents was not finalised and he only had 10 days to prepare and serve his statement. The respondent served theirs on 15 June 2024 at 10.18am. He alleged that the respondent's representatives had time to read and did read his witness statement prior to serving their statement. He claimed that their alleged improper behaviour compromised the integrity of their evidence and undermined the fairness of the proceedings.

10. He also challenged the content of Mr Kane's witness statement, alleging that he had misled the Tribunal in stating that he first saw the claimant's doctor's letter dated 22 November 2022, on the 19 May 2023, when it was in fact shown to him on the 24 November 2022, by the claimant prior to his resignation. Further, the statement in the representatives' 3 July 2023 correspondence that the letter could not be found and was later found on or around the16 July 2024, did not explain Mr Kane having seen it on 19 May 2023.

11. In addition, reference in Mr Kane's witness statement to a discussion having taken place on 1 August 2022, was false as it was on 24 November 2022. He, allegedly, also falsely claimed that the job title of the respondent's Office Administrator, was that of Office Manager to bolster the respondent's case.

12. There were further challenges to Mr Kane's witness statement leading the claimant to accuse the respondent of perjury and conspiracy to commit perjury, and that the respondent's legal adviser drafted false testimony.

13. The claimant also complained that the respondent did not send the technical reports he had worked on by the date of disclosure. He gave a chronology of events detailing his requests for the reports, and the respondent's representatives' responses. He stated that on the 15 January 2024, the representatives sent a bundle of documents, but it was missing evidence in support of his case. Another bundle sent on 19 January 2024, was missing several technical reports and policy documents. Up until 24 May 2024, the representatives, he said, amended the bundle of documents by adding documents without a disclosure list and refused to include the reports and policy documents. He, therefore, applied for a strike out of the response

based on the respondent's conduct which had, allegedly, prejudiced the final hearing. There was subsequent correspondence in relation to what should be included in the bundle.

14. On 6 August 2024, the claimant emailed an electronic bundle of documents which the representatives agreed should be consolidated into a single bundle. The final bundle was sent to him on 19 August 2024, of which he informed the respondent's representatives that several pages were missing. These were received by him on 21 August 2024. Included in the bundle were the technical reports and policy documents. The bundle is not agreed. The claimant said that the respondent had breached the orders issued by Tribunal.

15. Ms Hosking, counsel on behalf of the respondent, submitted that in relation to the bundle, there were several rounds of disclosure following the case management preliminary hearing on 11 July 2023, to the spring of this year. All reports as ordered by EJ Young at a further preliminary hearing held on 12 March 2024, were put in the bundle on or around 21 May 2024. The bundle at that time comprised of 640 pages. The document not seen by the claimant was an email dated 18 June 2024. The claimant stated that he had not had an employment contract, but the email disproved that claim.

16. Up to 19 July 2024, all the technical reports and policy documents were disclosed to the claimant. On 8, 13, and 27 August 2024, he wanted further documents added to the bundle, as well as the additional documents he produced on the first day of this hearing. He had documents since July 2024 and further changes to the bundle were due to him.

17. Ms Hosking went on to submit that Mr Kane had prepared his first witness statement for the hearing before EJ Young, who considered the claimant's application to amend which was allowed and the Judge issued further case management orders. The statement was not originally included in the bundle, but the respondent now does not object to its inclusion.

18. In relation to paragraph 39 of Mr Kane's witness statement that the claimant asked him whether he, Mr Kane, had a problem with him, Mr Kane said that the conversation was on 1 August 2022. Ms Hosking said that the date was wrong because it was on the 24 November 2022.

19. With regard to the claimant's doctor's letter dated 22 November 2022, Ms Hosking said that Mr Kane will assert that he had not seen it during the claimant's employment and believed he had read a different report on 24 November 2022.

20. The Office Administrator, Ms Emma Boyle, could be described as Office Manager, as her role is quite wide and the two job titles are interchangeable.

21. Ms Hosking further submitted that other parts of Mr Kane's witness statement were not misleading, and the claimant would be able to put questions to him in cross-examination. There was no editing of Mr Kane's

witness statement to take into account the content of the claimant's statement.

22. Ms Hosking said that the claimant's strike out application before this Tribunal was not the first. In another case before an Employment Tribunal, the Judge ruled that it was not appropriate to apply for a strike out based on the claimant's interpretation of the evidence.

Conclusion

23. Striking out either a claim or response under rule 37 is a draconian step and Tribunals should be wary of doing so without considering other options. We do not accept that either the respondent or the representatives behaved in the manner alleged by the claimant. Where there is a dispute in relation to the evidence or the issues, Tribunals must be slow to strike out, Abertawe Bro Morgannwg University Health Board v Ferguson [2013] ICR 1108, a judgment of the Employment Appeal Tribunal.

24. We did not hear evidence in relation to the claimant's application, only submissions. It is clear that, in every material particular, the parties are in dispute over the claimant's performance, the conduct of proceeding, the preparation of the bundle, and witness statements. The claimant was attempting to take a tactical advantage of the Tribunal's rules of procedure without clear and cogent evidence in support of his assertions or in support of one or more of the five grounds in rule 37. The points raised by him about Mr Kane's evidence could be put in cross-examination to challenge his credibility. The bundle of documents, though not agreed by the claimant, is the bundle before the Tribunal and comprises of 784 pages covering slightly over three months of the claimant's employment with the respondent which is more than proportionate in this case. We are not persuaded that the delay in compiling a final bundle lies entirely with the respondent.

25. We are satisfied that a fair hearing is possible and refused the claimant's application for a strike out.

Findings of fact

26. The respondent specialises in advising clients in the construction industry with regard to research and development tax relief, a government incentive, that rewards companies engaged in innovation and technical advancement. The legislation providing tax relief for research and development was passed in 2009 and came into effect in 2010.

27. In 2016, Mr Peter Kane set up the respondent company and became Managing Director. In July 2023, the shares in the company were sold to Ryan Tax Services (UK) Ltd, which is owned by Ryan L.L.C, a leading global tax services and software provider.

28. As an integral part of the respondent's business, it provides a comprehensive claims review, preparation and submission service for tax

allowance to His Majesty's Revenue and Customs, "HMRC". Eligibility for tax allowance for research and development is governed by the Department for Business, Energy and Industrial Strategy guidelines. In summary, the writer who is making the submission for tax relief to HMRC, is required to declare whether:

> "• There is a clearly definable (ringfence-able) R&D [Research and Development] project?
>
> • Did the R & D Project seeks to advance science or technology?
>
> • Did the project require the resolution of scientific or technological uncertainty?
>
> • Did the R & D project expand on or increase the level of knowledge or capability within the industry?
>
> • As a result of the R & D, is the system/process "Better" than the original or industry standard?
>
> • In the view of a competent professional was the advancement made readily deducible?
>
> • Are we confident that the technical uncertainty and the resulting advancement in knowledge was achieved solely by the claimant?"

(page 409 of the joint bundle)

29. The detailed guidelines are on pages 137 to 148 of the bundle.

30. The claimant worked in Research and Development for over 30 years. From 2013, he worked as a Technical Project Manager and Team Manager for the leading United Kingdom Accreditation Scheme which accredits bodies for the assessment, testing, inspection and certification of construction product innovations. He has substantial knowledge and experience of the construction industry and materials section. He carried out particular assessments, wrote technical documents/certifications, and also acted as a technical reviewer to maintain technical accuracy and legal alignment with statutory regulations. He also worked for the British Board of Agrément, "BBA", a body that supports innovation and sets standards for excellence and quality in construction products and systems.

31. He had no prior experience in preparing technical reports for tax allowance for research and development.

Recruitment of the claimant

32. On 21 June 2022, he was contacted by the respondent as it found his Curriculum Vitae in the Curriculum Vitae library. He was spoken to by Ms Brooke Spencer, the respondent's Project Manager. She said to him that as he had experience in technical report writing, would be open to considering a position with the respondent as a Construction Specialist. The claimant was interested and advised that he would be looking for a hybrid working

arrangement. Ms Spencer emailed him a copy of the Construction Specialist job description. In it, there is reference to flexible working. It states, "Flexible working patterns can be discussed and considered." It further stated that the respondent was looking to hire a self-motivated and enthusiastic Construction Specialist to join its growing technical team based in Hertfordshire. It went on:

> "The role is varied and includes speaking with project managers and engineers, identifying developments and innovations within their projects and extracting the necessary information required to compile a report…. This role requires an adaptable and knowledgeable person of the construction industry with effective communication."

(122)

33. After reading the job description the claimant expressed an interest in the role and met with Mr Lee Marie, Operations Director, on 24 June 2022, for an interview. He was advised by Mr Marie during the meeting that he would be offered the position. They then discussed the role and benefits including considering the option of hybrid homeworking after one month of working. The claimant informed Mr Marie that he would have to take holiday leave in September to coincide with his wife's holiday entitlement. Mr Marie did not see that as being a problem.

34. The claimant was invited to a second interview with Mr Pater Kane, former Managing Director and owner of the respondent company, on 28 June 2022 at 10am. This was normal practice as Mr Kane would conduct the second interview with successful candidates. According to the claimant, he found Mr Kane not overly warm and welcoming as he was just interested in the processes involved in assessing construction projects and systems, and what was involved in preparing the BBA Certificates.

35. In Mr Kane's evidence before us he said that the claimant came across well during the interview. He had some related experience in the form of drafting European Technical Assessment Certificates. He pointed out to the claimant that, although he had written Research and Development related reports before, he needed to learn how to write Technical Reports that would support the sort of Research and Development claims the respondent submit to HMRC on behalf of its clients for tax allowance. It meant that he had to learn about the relevant legislation to report on tax as well as technical issues. There was no mention made of the claimant's emotional or mental health issues. It was made clear to him that he was being offered an office-based role. The possibility of hybrid working was discussed but it was dependent upon his performance as well as on the respondent's workload and requirements. It was understood that if hybrid working arrangements were to be allowed, the role would still be predominantly office-based, and that flexibility would be required.

36. Mr Kane decided to offer the position to the claimant and a letter dated 29 June 2022, confirming the offer, was sent to him. It stated that his salary would be £52,000 per annum; bonus would be £250 per report included

within a successful claim paid after the respondent received payment from the client; a discretionary annual bonus; he would be office-based at The Transmitting Station, Great North Road, Brookmans Park, Hatfield; his start date would be 26 July 2022; and his hours would be 8.30am to 5.30pm, Monday to Friday. He was required to sign a confidentiality and non-competition agreement in addition to an employment contract at the commencement of his employment. The letter further stated that:

> "Hybrid working to be discussed after the first month of working."

(125)

37. The claimant replied by email later in the afternoon to Mr Marie and to Mr Kane thanking them for discussing the position with him. He enquired about pension contributions and then wrote:

> "Other than that, I am happy with the terms, start date and happy to sign the contract and agreements.
>
> It's an exciting opportunity and I'm also very much looking forward to working with you and being part of the company's continued success."

(page 126)

38. The issue in relation to pension contributions was clarified by Mr Marie in his email response to the claimant, dated 1 July 2022. (126)

39. After the claimant had received pension details, he stated that he had no further questions to raise at that stage and accepted the offer. (127)

40. On 11 July 2022, Mr Marie granted his holiday request for the period 8 to 16 September 2022.

41. He commenced employment with the respondent on 26 July 2022 and was shown around the premises. Mr Marie sent him the guidelines by the Department for Business, Innovation and Skills on Research and Development for Tax Purposes; a copy of the Technical Report process; and a report template. (130 to 148)

42. Contrary to the claimant's assertion that he believed that Mr Marie was his line manager, we find that he was line managed by Mr Kane. It was expected that he would be shadowing Mr Kane and would be learning on the job. Mr Marie, Ms Emma Boyle, Office Manager, and the other report writers, all reported directly to Mr Kane. The claimant did not report to Mr Marie as Mr Marie's role in the company was to compile final claim reports combining technical, financial and tax calculations. Although he would write reports, it only represented about 40% of his work.

<u>The claimant's terms and conditions of employment</u>

43. The claimant's employment contract is dated 28 July 2022, but he stated that he did not receive it until August of that year. Clause 2.2. states that

during the first three months of his employment he would be on probation, and it may be terminated during that period at any time upon one week's notice or payment in lieu of notice. The period may be extended at the respondent's discretion for up to a further period of three months. During the probationary period his performance and suitability for continued employment would be monitored. At the end of it he would be informed in writing if he is successful. His job title was that of Technical Report Writer and during his employment would be required to comply with all reasonable and lawful directions given to him by the respondent, and to:

> "Promptly make such reports to Peter Kane in connection with the affairs of the company on such matters and at such times as are reasonably required."

44. Although his place of work would be the Transmitting Station, his contract stipulated that:

> "Or such other place within a 25 mile radius of central London which the company may reasonably require for the proper performance and exercise of his duties."

45. In clause 23.1, it states that the agreement and any documents referred to, constitute the entire agreement between the parties and supersede and extinguish all previous agreements. (149 to 167)

46. We find that there were production meetings on Mondays at which the claimant and other staff member attended. On Fridays the respondent would alternate between leaving the office an hour early at the end of the day or going out for a team lunch.

The claimant's work

47. Mr Kane's practice is to give new starters short reports to work on. The claimant's first project was Project 336-AJE Facades Ltd – London City Island. This was signed off by Mr Kane after the fourth draft as it met the respondent's standards. In Mr Kane's view this first attempt was good, and he said that to the claimant in order to "build him up and to bring him on board". We find that it was said to boost the claimant's confidence while acknowledging that he had a lot to learn. The report was authorised by Mr Kane on 25 August 2022, and through HMRC, the respondent was paid for it. (171 to 192)

48. The claimant's second project, Project 341-Addington (UK) Ltd, was signed off and authorised on 31 August 2022. (194 to 211, 697)

49. He asserted that he was not allocated a sufficient throughput of work to fulfil what was expected of him. According to Mr Kane, the claimant was slow carrying out his work and was on leave from 8 to 16 September 2022 inclusive which affected his work rate.

50. The claimant said in evidence that, on or around 19 September 2022, he was sitting at his desk in close proximity to the glass walled main meeting room in which Mr Marie and Mr Kane were present and observed Mr Kane

talking to Mr Marie saying that there were substantial errors in a technical report produced by the previous Technical Manager who had left the respondent's business. The report was given to Mr Marie to work on, but it had substantial errors which were not picked up by Mr Marie. According to the claimant, Mr Kane was loud, angry and confrontational in his discussion with Mr Marie, and it went on for nearly two hours, questioning him repeatedly about why he did not correct the errors in the report.

51. Mr Kane called a meeting with Mr Marie and the claimant either on 21 or 22 September 2022, to discuss the project summaries for AD Bly Client B. This was work done by the claimant who explained that for two projects labelled 1 and 2, there was little, or no research and development associated with either project. He said that he had spoken to the client about Project 1 who advised that more specific details should be sought from their sub-contracted consultant. Mr Kane advised the claimant to arrange another meeting with the client and not to speak with the consultant who was likely to charge for his time. This was supported by Mr Marie. In relation to Project 2, Mr Kane advised the claimant to arrange another technical meeting with the second client contact and to ask more questions. Mr Kane's said that, in his view, there was enough research and development to write to HMRC Tax Claim Reports based on Projects 1 and 2. This, in the claimant's view, was contrary to his assessment of the project technical details identifying little or no research and development entitling the client to tax relief.

52. We pause here to observe that the claimant had only been in employment with the respondent for two months and yet he was challenging the knowledge and experience of Mr Kane in relation to submitting the two reports in order to gain tax relief.

53. At a production meeting held on 26 September 2022, involving all of the respondent's staff, AD Bly was discussed. The claimant advised that he was arranging a second technical meeting with the client to discuss Project 1. Mr Kane instructed him to arrange a second technical meeting with the client after he, the claimant, had determined that there was little or no research and development to write either of the two reports. According to the claimant, Mr Kane openly criticised and humiliated him in front of the other members of staff for arranging a second technical meeting.

54. Mr Kane said in evidence that, in relation to the client, they may not have presented the claimant with the full picture. Mr Kane's point was that certain helpful information had to be teased out of the client to enable the respondent to do the best job for them and that the information should be collected at the first meeting. It should not normally be necessary to have to arrange repeat meetings. This approach to the client, we find, was pointed out to the claimant by Mr Kane and that the claimant was not humiliated during meeting. Following on from a further visit to the client, the claimant was successful in securing research and development tax relief for the client, AD Bly in relation to the two projects. What Mr Kane was doing was giving to the claimant the benefit of his knowledge and experience garnered over many decades, on how and when to obtain information from a client in

order to put in a successful tax relief claim. The claimant's approach to the AD Bly claim revealed a certain lack of knowledge, on his part, in this specialist area.

55. We further find as fact that the claimant was reluctant to take on board instructions from Mr Kane. (298)

56. Within weeks of him starting work, Mr Kane had concerns about whether he was the right person for the position. He discussed his concerns with Mr Marie who persuaded him to wait until the end of the claimant's probationary period before making a decision about his future with the respondent. Mr Kane was worried that the claimant's previous experience in preparing manuals and European Technical Assessment Certificates, meant that he was too used to reproducing information that was already to hand rather than teasing out the right information from a client and presenting it in an efficient way. Mr Kane was further of the opinion that the claimant only wanted to work his way.

57. In his witness statement, at paragraph 43, Mr Kane stated that the respondent's clients, being construction companies, were not always going to be aware of what the respondent would need in order to submit a claim for tax relief to HMRC. With its larger clients, a point of contact may be a relatively junior person in the Accounts Department who would certainly need help and assistance in ensuring that the respondent received the right information and supporting documentation for a tax relief claim. From the claimant's experience of preparing ETA Certificates and with an incomplete knowledge of the relevant tax rules, it was becoming clear to Mr Kane that he was not used to having to challenge a client and test the facts before preparing draft reports.

58. In relation to the claimant's email to Mr Kane dated 28 September 2022, referring to the production meeting discussion, he wrote:

> "There is no identifiable basis to write a Technical Report for Waltham Abbey, however, happy to discuss further."

(298)

59. Upon receipt of the email Mr Kane called him to a meeting in the glass walled meeting room on the same day. It was to discuss its content. The claimant alleged that Mr Kane had read out aloud the email. This Mr Kane denied in evidence. We find, however, that parts of it were referred to by him in his discussion with the claimant. Mr Kane felt that the claimant was not teasing out information from the client and had adopted a methodological approach rather than an inquisitive one. Mr Kane was not attempting to either denigrate or besmirch the claimant's character, but it was clear that the claimant had to change the way in which he approached clients.

60. We do not accept that Mr Kane said to him that he did not have experience in writing R & D reports. It is clear in paragraph 16 of the respondent's

amended Grounds of Resistance, dated 18 September 2023, that the respondent acknowledged that,

> "The claimant had some relevant experience of the respondent's work but did not have any material experience of preparing R & D claims for tax purposes or of relevant legislation particular to the construction industry before he joined the respondent."

61. We find that Mr Kane was being constructive and was not vindictive, abusive, or had engaged in unnecessary confrontation with the claimant, as the claimant had asserted.

Claimant's meeting with Mr Marie on 28 September 2022

62. Later in the afternoon, at 4.30pm on 28 September 2022, the claimant had a meeting with Mr Marie and said to him that Mr Kane had made a casual threat to his employment without any rational justification. He then revealed to Mr Marie that he had a disability, namely anxiety and asked whether he could work from home in accordance with the offer letter of employment, that being, after one month's employment he could discuss hybrid working. This had been discussed with Mr Marie during the interview on 28 June 2022. The claimant further asserted that he said to Mr Marie that the office environment was noisy, and he found it very difficult to concentrate and to focus all day, for three to five days continuously. He said that Mr Marie accepted that he was disabled, and they engaged in a lengthy discussion about how Mr Marie knew about the provisions in the Equality Act because his daughter has a disability, and he was trying to ensure that she got appropriate support. There was a discussion about hybrid working during which the claimant said that he suggested that he should work Monday and Tuesday in the office to deal with administrative tasks and to arrange client meetings, and Wednesday to Friday, working from home, in order to give him the environment to focus and concentrate without disruptive noise and distraction allowing him to write his technical reports. According to the claimant, Mr Marie agreed with him about the level of noise in the office and, in principle, to his hybrid working proposal and to consider his request. It was acknowledged in evidence, however, that there was no formal response from Mr Marie.

63. As will become apparent later in the judgment, on 9 November 2022, Mr Kane called Mr Marie to a meeting he was having with the claimant and asked him, "Did Michael state during that meeting that he suffered from anxiety or was disabled?" Mr Marie replied, "No". At that point the claimant suggested that Mr Marie might not have heard him to which Mr Kane found it difficult to believe as Mr Marie is more alert than most on the issue of disability on account of his daughter suffering from Mitochondrial disease.

64. We find as fact that the claimant's account of his alleged conversation with Mr Marie did not take place in relation to discussing his anxiety as a disability and home working as a reasonable adjustment. We are of this view for a number of reasons. Firstly, if Mr Marie agreed to pursue the issue of home working at the end of the meeting on 28 September, it was

not followed up by the claimant to get an outcome. Secondly, Mr Kane had known Mr Marie for 15 years, who has a disabled daughter. If the issue of disability was raised by the claimant, Mr Marie would have discussed it with Mr Kane as it would involve the company making, possibly, a reasonable adjustment or adjustments. Thirdly, the claimant did not, according to his account, also disclose to Mr Marie his generalised anxiety disorder and depression.

65. In the afternoon of 28 September 2022, Mr Kane travelled with the claimant to Radlett for a meeting with one of the respondent's clients, 4D Structures Ltd. This meeting was arranged by the claimant to discuss several projects and whether they would qualify for research and development tax relief. 4D Structures was a new client allocated to the claimant. He said in his witness statement, at paragraph 37, that he was reeling internally with high levels of anxiety from the earlier "abusive meeting". Here he was referring to the meeting he had with Mr Kane earlier in the day. What was clear from the evidence, however, was that he and Mr Kane travelled to the site together. Mr Kane was driving, and they talked about current affairs and other non-work-related issues. Mr Kane interacted with the client with some input from the claimant. There was nothing to suggest that Mr Kane was hostile towards the claimant, nor did he humiliate the claimant while travelling to and from the client.

Mr Kane and the claimant's meeting on 31 October 2022

66. The claimant alleged that on 31 October 2022, in the afternoon and without prior notice, Mr Kane called him into a private meeting room to discuss the client AD Bly. The claimant said that he had no evidence that AD Bly was solely responsible for research and development, if there was any R&D at all. Mr Kane said that he had spoken to his friend at AD Bly, whom he had known for a long time, and that the company had full ownership of everything. The claimant said that no evidence was provided by Mr Kane in support of his statement. He further claimed that he was criticised by Mr Kane who said to him that he, the claimant, did not trust what the client was saying in the absence of evidence supporting R&D and that without any due diligence checks to protect the business and HMRC from fraudulent claims, Mr Kane was making a fraudulent claim to HMRC. The claimant wrote in paragraph 46 of his witness statement the following:

> "It would appear therefore that the legislative declaration that required confidence that R & D had actually carried out by the client, as a measure to avoid fraudulent claims, was meant to mislead the HMRC into thinking those checks had been done."

67. As already found, a tax relief claim was submitted to HMRC and approved. The claimant was wrong in making the very serious allegation that Mr Kane was engaging in fraudulent activities to deceive HMRC. We bear in mind that, at that time in his employment, he had only been employed for three months, and we heard no evidence that Mr Kane had been the subject of a fraudulent investigation by HMRC in relation to the AD Bly report or to any reports.

Probation review meeting on 1 November 2022

68. After working for the respondent for three months, Mr Kane scheduled a meeting with the claimant on 1 November 2022, to discuss his probation. During the meeting he gave reassurance to the claimant about some of the good work he did and explained why he was going to extend his probationary period by one month. He pointed out that he, the claimant, did not take directions well and that Mr Kane was not happy with his output. He compared the claimant's output with Mr Edward Baldwin's, who commenced employment with the respondent as a Technician Report Writer on 18 July 2022. This showed that in the same period Mr Baldwin had completed 15 technical reports but the claimant only six. In Mr Marie's case, he had prepared seven reports but, unlike the claimant and Mr Baldwin, he had other duties as well as technical report writing.

69. We find that Mr Baldwin was more experienced than the claimant and was always likely to be more efficient. Mr Kane said that the disparity between them was more than he would have expected, and it was evident to him that the claimant had much to improve. Mr Baldwin had over 20 years hands-on experience in the construction industry and knew the ins and outs of the construction business and the issues and challenges the respondent's clients faced from the start to the end of their projects. Although he needed to learn about the relevant tax rules and regulations, he was a far more experienced candidate than the claimant which was reflected in the more generous offer made to him by the respondent. (123)

70. Mr Baldwin lives in East Grinstead, off the M23 motorway. The respondent's office is in Hatfield. From Mr Baldwin's home to the respondent's office is over 70 miles each way. The journey, without traffic, is one and a half hours each way. By train the journey is three and a half hours each way requiring the passenger to take two busses and two trains.

71. It was agreed that Mr Baldwin's role was to be home-based as he was unlikely to accept an offer of employment if he was required to work from the office. The terms of his contract still requires him to work in the office every alternate Monday.

72. This meant that the second report writer, namely the claimant, Mr Kane wanted to work from or predominantly in the office. The claimant's home is 14½ miles from the respondent's office which would take between half an hour to forty-five minutes to drive each way at peak times.

73. Mr Kane was of the view that the claimant needed to improve and hence decided to extend his probationary period. The claimant did not accept his appraisal and only after Mr Kane had delivered it did he say to him, "As you know, I am disabled". He then referred to the alleged conversation he said he had with Mr Marie about five weeks earlier that he had a disability and that he suffered from anxiety which we have mentioned above. There was then a discussion about hybrid home working. Mr Kane did say to the claimant that homeworking would be disruptive to claimant's on the job training, which was important, and he did not believe that the claimant's problems

were caused by distractions at work but were down to fundamental gaps in his knowledge, skills and experience which would improve by Mr Kane working closely with him. Mr Kane was also of the view that the claimant's typing speed had nothing to do with the number of reports he prepared. In evidence Mr Kane said that the time it takes for a report to be completed was far more to do with the quality of its content and how well it is written as opposed to how quickly it is typed up.

74. The claimant had informed Mr Kane that the office environment was having an effect on his performance. It was noisy and disruptive, affecting his ability to concentrate and focus, and his typing speed. These were because he had a disability and that he suffered from anxiety.

75. Looking at the claimant's performance, Mr Kane had in his possession a schedule of technical reports from 18 July 2022 submitted by the claimant, Mr Baldwin and Mr Marie. Mr Marie had completed six reports, Mr Baldwin twelve, and the claimant five. The reports submitted to Mr Kane for review, one from Mr Marie, three from Mr Baldwin and one from the claimant. The total number of reports submitted were six from the claimant, fifteen from Mr Baldwin and seven from Mr Marie. (128)

76. There was no evidence to suggest that the information contained in the schedule was in any way concocted or incorrect. The claimant did not mention general anxiety disorder or social anxiety during the meeting, and it ended with Mr Kane saying that to discuss hybrid working or working from home the claimant had to write more and better reports.

77. We find that the statement by Mr Kane that homeworking would be disruptive was not meant to refer to the claimant's home environment being disruptive, but that it would be disruptive to his training and having to shadow Mr Kane.

78. The claimant challenged the extension of his probationary period by one month. He asserted that Mr Kane's performance feedback was dishonest, vindictive, malicious and abusive, and that no reasonable employer, acting reasonably, would extend a probation period because the quality of work produced by the employee was good, or because an employee with no prior experience of performing a job role, was alleged not to have achieved an exemplary standard, The extension of his probation was purely out of malice to "knock me down a peg or two", as he alleged.

79. We find as fact that it was open to Mr Kane to terminate the claimant's probation after three months, but he chose not to do so for the reasons he gave in evidence. He also could have extended the probationary period by up to a further three months, but again, he chose not to. We are of the view that there was room for improvement, and he extended the claimant's probation by one month. In that regard he was neither acting unreasonably, maliciously, nor vindictively. He wanted to retain the service of the claimant by extending the probationary period by one month which was for the claimant's benefit.

80. Mr Kane was of the view, on 1 November 2022, at the meeting, that the claimant had not been offered a home working role and was not ready to work unsupervised.

81. Following the meeting, on 8 November 2022, Mr Kane emailed the claimant stating the following:-

> "Dear Mike,
>
> Further to your three-month review on 1 November 2022 I thought it best to summarise my comments and identify the next.
>
> During the meeting I made the following points in relation to your first three months:
>
> - You had integrated well and developed solid working relationships with the team;
> - You struggled to take my direction, being quite defensive on occasion when it was given;
> - The quantity of reports produced was below expectation; and
> - That the quality was of a good but not exemplary standard.
>
> For the above reasons I stated that your probationary period should be extended to the end of the month, which I now confirm to be 30 November.
>
> In the later half of the meeting you stated, for the first time, that you suffer from anxiety and that indigo should take the reasonable adjustments to accommodate you. I am going to schedule a meeting over the coming days to identify the next steps of this point."

(410)

82. Neither the claimant nor Mr Kane took notes at the meeting on 1 November 2022. The above is a contemporaneous written account summarising the main points discussed during the meeting.

83. From 1 to 9 November the claimant continued to work in the office drafting reports and did not ask for reasonable adjustments to be implemented in the workplace.

84. Mr Kane and the claimant next met on 9 November 2022.

<u>Meeting on 9 November 2022</u>

85. As referred to above, Mr Kane told the claimant at the meeting on 1 November 2022, that there would be another meeting to identify next steps. He intended that Mr Marie should be present at the scheduled meeting on 9 November 2022, for the first five minutes. The reason being that the claimant told Mr Kane, on 1 November, that he had informed Mr Marie that he was disabled. As already referred to earlier in this judgment, at the start

of the meeting Mr Kane asked Mr Marie if the claimant had told him that he was disabled. We repeat, he specifically asked, "Did Michael state during that meeting that he suffered from anxiety or was disabled?". Mr Marie replied, "No." At that point the claimant suggested that Mr Marie may not have heard him which Mr Kane found to be an unusual thing to say and pointed out that Mr Marie might be more alert than most to issues relating to disability on account of his daughter suffering from Mitochondrial disease.

86. After Mr Marie left the meeting, Mr Kane and the claimant continued their discussion. The claimant wanted Mr Kane to make adjustments. General anxiety disorder and social anxiety, stress or depression had still not been mentioned during the meeting by the claimant.

87. Mr Kane had read that anxiety is not a disability and pointed that out to the claimant stating that he did not believe that he was required to make any adjustments. The claimant was only interested in getting Mr Kane to concede that he was disabled. There was no discussion about, and the claimant did not suggest, putting his desk or working space in a different part of the office, or about him being able to work in a space that could be made more private which was the other side of the boardroom. (611 to 616)

88. Mr Kane did not rule out the possibility that the claimant may be disabled but needed more information and asked for medical evidence to be provided by the claimant within two weeks. Following the meeting, he emailed the claimant on the same day stating:

> "Dear Mike,
>
> Following on from our meeting of earlier today, I would like to confirm the following.
>
> - Anxiety is not a disability;
> - Hybrid working is not a condition of your employment; and
> - Indigo is not obliged to make a reasonable adjustment in the absence of medical evidence.
>
> I request that by 23 November 2022 you provide:-
>
> - A medical opinion stating the precise nature of your alleged condition;
> - A prognosis for recovery; and
> - A range of reasonable adjustments that you feel would be appropriate."

(412)

89. In evidence, Mr Kane said that he did not accuse the claimant of "unsubstantiated lying" but did tell him that he did not necessarily accept that he was disabled. The respondent had not been on notice of him being disabled for some time nor was there an established duty to make

reasonable adjustments. He had seen no evidence of the claimant being socially awkward or finding it difficult to interact with colleagues. On the contrary, he had been an active participant in team building on the respondent's overnight team building trip to Portsmouth when those present went sailing on the Solent on 26 September 2022. He also joined Mr Kane and the other team members for lunch at Mr Kane's 50th birthday party held at The Ivy on 4 November 2022, in St Albans, Hertfordshire. On that occasion, Mr Kane told the Tribunal, and we accepted his evidence, that the claimant sat next to him and engaged in a friendly interchange. They also met at production meetings on Mondays, at 10am, during which the claimant would respond directly to questions asked.

Alleged breach of confidentiality

90. Ms Emma Boyle, Office Administrator, was also copied in the above email. The claimant alleged that that was a breach of confidentiality, in that his medical information had been disclosed to her. Having heard Mr Kane, we find that Ms Boyle's role was wider that the role of Office Administrator. Effectively she was his Personal Assistant and managed all aspects of office and administrative work and was the only one in that position in what is a small company. As a small company it was appropriate that Ms Boyle be copied into this email in order that a record be kept.

91. From the evidence, the claimant attended work from 9 to 23 November 2022, without complaint.

Meeting on 24 November 2022

92. Mr Kane was expecting the claimant to give him medical information on his anxiety by 23 November 2022. However, by 24 November 2022, he did not receive anything from the claimant and called him over. He asked him about the medical information he had requested. The claimant responded saying that he did not have the information with him and assured Mr Kane that a letter was ready and was with his doctor. He said he would bring it in to work the following day. Mr Kane was not convinced and instructed him to collect the letter from his doctor straightaway. The claimant left the office and returned within a couple of hours with a letter. The letter was not handed to Mr Kane but was shown to him, which Mr Kane read. The claimant did not let him take or keep a copy of it. Although Mr Kane believed that the letter he read is not the letter in the bundle, there was no evidence the claimant had produced two different letters dated 22 November 2022.

93. The letter was written by Dr Nicola Cowap on 22 November 2022 and states the following:-

> "This man has been a patient at this surgery since 2008. He has a long history of anxiety that has been exacerbated by relationship issues and work stress. At that time he was very disabled by his symptoms of social anxiety and was finding it difficult to leave the house. He was not sleeping or eating well and was unable to work.

> He has tried various antidepressant medications over the years and has also taken Propranolol, Diazepam and Zanax which he obtained privately. He was referred to the Primary Mental Health Care Team initially in October 2009 and was offered treatment with a group of therapists. He was also seen by a Consultant Psychiatrist in 2011 until April 2012 and [w]as treated with Citalopram 40mg. He consulted again in October 2015 and reported low mood and anxiety and was restarted with Citalopram 20mg which he took for about three months, He presented again in October 2020 with anxiety and work-related stress and sleeping difficulties and was started on Citalopram 20mg that he took for two months.
>
> He restated Citalopram again in November 2021 after presenting with again with stress and anxiety related to bullying allegations from January 2021 and was referred to the Wellbeing Team. He was offered regular sessions with a therapist starting in June 2022, these were completed in August this year."

(504, 787)

94. On reading the medical report, Mr Kane was of the view that there was no information about the matters that he had requested with a view to helping the claimant in the workplace. We find that the report did not address the three bullet points in Mr Kane's email, namely current medical conditions; a prognosis for recovery; and possible range of reasonable adjustments.

95. We asked the claimant whether he had shown the email from Mr Kane, dated 9 November 2022, to his doctor to which he replied, "No". The doctor's letter makes no reference to generalised anxiety disorder nor to depression.

96. We further find that the claimant, not having complied with Mr Kane's request by 23 November 2022, it was Mr Kane who took the initiative in asking him whether he had obtained the medical report as he was anxious to discuss "next steps" and possible reasonable adjustments. This does not convey the impression that Mr Kane was in any way vindictive or malicious towards the claimant.

97. During the meeting, the claimant asked Mr Kane whether he, that is Mr Kane, had a problem with him, and that he would limit any conversations to "Good morning" and "Good night" but would engage in general communication with those in the office. The claimant then said that was "abnormal behaviour" to which Mr Kane responded by saying, "Yes, because you said you knew everything about R & D."

98. We find that the position adopted by Mr Kane was to acknowledge that the claimant had 30 years' involvement in research and development but not 30 years involvement in tax relief claims for research and development work.

99. Mr Kane expressed to the claimant that the doctor's letter did not meet what he had requested in the email of 9 November. The claimant accused him of having a vendetta against him and became agitated. He walked out of the room and typed his resignation. He then picked up his car keys and left the premises. We find that the meeting lasted three minutes.

100. The claimant told the Tribunal that after leaving work on 24 November 2022, following his meeting with Mr Kane, he collected the doctor's letter at 1.10pm and then took his lunch break at his home before returning to work at around 2.30pm. He was questioned by a member of the Tribunal about his timings. He was asked how long did the meeting last with Mr Kane, to which he replied, "90 minutes". It was then put to him that it did not tally with the date and time of the resignation letter. Which is dated 24 November 2022 at 14.58. He responded by saying, "It was 35 minutes" but that also did not correspond with the timings having arrived back at work at 2.30pm, according to the claimant in paragraph 103 of his witness statement, and the time of the resignation letter, which is dated 24 November 2022, at 2.58pm, it was under 30 minutes. As already found, the meeting was very short.

The claimant's resignation

101. In his resignation email, the claimant wrote to Mr Kane the following:

> "Dear Peter,
>
> It with regret that I am unable to work with you, and as such consider myself constructively dismissed.
>
> This is based on requests to carry out questionable unlawful requests to complete work knowingly to be misleading/false.
>
> Bullying
> Unfair and unreasonable comments
> Confrontation
> Harassment by disability
> Unlawful requests that I should have recovered from disability to work for Indigo CG.
>
> I will be taking out a tribunal claim against you."

(505)

102. The claimant said in evidence that he resigned because Mr Kane refused reasonable adjustments on 1 November 2022 and had denied him, as an adjustment, working from home. He alleged that Mr Kane's refusal to allow him to work from home was malicious conduct.

Mr Edward Baldwin

103. We have already made reference to Mr Baldwin's circumstances. He does not suffer from the same disabilities as the claimant. He was offered a home working role due to the respondent's confidence in his abilities based on the fact that he spent his life working in construction and on account of the impracticability of him having to commute to the respondent's office. There are differences between his circumstances and those of the claimant. Mr Baldwin is very open to gaining and maintaining relevant tax knowledge and does not suffer from a "laboratory mindset". His first draft reports were

much better than the claimant's and it was this that enabled him to have more reports approved quickly.

104. The requirement for the claimant to work in the office full-time would have been discussed and reviewed once he had passed his probation, which would have been the case for anyone who took the job offered to the claimant.

Credibility

105. We considered the credibility of Mr Kane and the claimant. The claimant made wild, unsupported allegations about Mr Kane's behaviour. He accused him of being malicious, vindictive and engaging in fraudulent activities with HMRC. There was no evidence of work done by Mr Kane and/or by the respondent which was challenged by HMRC as being fraudulent. The overwhelming majority of claims for tax relief were approved by HMRC. There is no record and no evidence of the respondent engaging in any fraudulent activities in submitting tax relief claims to HMRC. Further, the claimant's account of his timings on 24 November 2022 from leaving his workplace to collecting the doctor's letter and to returning to work for the meeting, as well as the timing of his resignation, are inaccurate by a substantial measure. It was also clear that he did not raise generalised anxiety disorder or depression during the meetings on 1, 9 and 24 November 2022. These conditions are also not referred to in the doctor's letter. He contended that Mr Kane did not engage in meaningful discussions with him, but we found that they sat next to each other at Mr Kane's 50th birthday party. They travelled by car to see a client and engaged in general chit chat. There were interchanges during Production meetings, and there was the team building event on the Solent. From 1 to 24 November 2022, he continued to attend work at the respondent's premises without incident.

106. Further, at the commencement of the hearing the claimant told the Tribunal that when giving evidence he did not want Mr Kane to be in his line of sight because it would cause him anxiety. Mr Kane, therefore, moved his seat to sit on the left side of his counsel so that the claimant could not see him while giving evidence. It was pointed out by a member of the Tribunal that, he, the claimant, would be cross- examining Mr Kane who would be sitting virtually opposite him. The claimant acknowledged that that would be the case and raised no concerns about doing so. He cross-examined Mr Kane on the second day of the hearing, who was in full view of him, for four hours and twenty minutes. During that time, the claimant raised no concerns about his anxiety.

107. Mr Kane gave his evidence clearly and explained what he meant by using the word "disruptive" and a "laboratory mindset", as well as the claimant's "30 years of research and development experience". He came across as someone who was concerned to retain the service of the claimant as a technical writer. He could have terminated his employment based on performance after three months but decided to extend it by a further month. He could also have extended it up to three months but chose not to do so. He wanted to address the issues in relation to possible reasonable adjustments, and took

the initiative, on 24 November 2022, to speak to the claimant about the medical evidence he had requested in his email dated 9 November 2022. The claimant knew that he was required to produce the medical evidence by 23 November but took no steps to inform Mr Kane that it was going to be delayed.

108. Having considered the evidence and the way in which it was given by the claimant and by Mr Kane, we preferred the evidence of Mr Kane who came across as the more credible witness. Where his evidence conflicts with the evidence of the claimant, we preferred his evidence over that of the claimant's.

Submissions

109. We have considered the submissions by Ms Hosking, counsel on behalf of the respondent, and by the claimant. We have taken into account the authorities that they have referred us to. We do not propose to repeat their submissions herein having regard to Rule 62(5) Employment Tribunal's (Constitution and Rules of Procedure) Regulations 2013, as amended. We have taken them into account in our conclusion.

The law

Disability

110. Section 6 Equality Act 2010, "EqA 2010", states:

> "(1) A person (P) has a disability if –
>
> (a) P has a physical or mental impairment, and
>
> (b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities."

111. Section 212(1) EqA defines substantial as "more than minor or trivial." The effect of any medical treatment is discounted, schedule 1(5)(1) and where a sight impairment is correctable by wearing spectacles or contact lenses, it is not treated as having a substantial adverse effect on the person's ability to carry out normal day-to-day activities, schedule 1(5)(3).

112. Under section 6(5) EqA, the Secretary of State has issued Guidance on matters to be taken into account in determining questions relating to the definition of disability (2011), which an Employment Tribunal must take into account as "it thinks is relevant."

113. The material time at which to assess the disability is at the time of the alleged discriminatory act, Cruickshank v VAW Motorcast Ltd [2002] IRLR 24.

Direct disability discrimination

114. Under section 13, EqA direct discrimination is defined:

> "(1) 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."

115. Disability is a protected characteristic, sections 4 and 6. Section 23, provides for a comparison by reference to circumstances in a direct discrimination complaint:

> "There must be no material difference between the circumstances relating to each case."

116. Section 136 EqA is the burden of proof provision. It provides:

> "(1) This section applies to any proceedings relating to a contravention of this Act.
>
> (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provisions concerned, the court must hold that the contravention occurred."
>
> (3) But subsection (2) does not apply if A shows that A did not contravene the provision."

117. In the Supreme Court case of Hewage v Grampian Health Board [2012] ICR 1054, it was held that the Tribunal is entitled, under the shifting burden of proof, to draw an inference of prima facie race and sex discrimination and then go on to uphold the claims on the basis that the employer had failed to provide a non-discriminatory explanation. When considering whether a prima facie case of discrimination has been established, a Tribunal must assume there is no adequate explanation for the treatment in question. While the statutory burden of proof provisions has an important role to play where there is room for doubt as to the facts, they do not apply where the Tribunal is in a position to make positive findings on the evidence one way or the other.

118. In Madarassy v Nomura International plc [2007IRLR 246, CA, the Court of Appeal held that the burden of proof does not shift to the employer simply on the claimant establishing a difference in status, for example, 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.

119. "Could decide" must mean what any reasonable Tribunal could properly conclude from all the evidence before it. This will include in that case, evidence adduced by the claimant in support of the allegations of sex discrimination, such as evidence of a difference in status, a difference in treatment and the reason for the differential treatment. It would also include evidence adduced by the respondent in testing the complaint subject only to the statutory absence of an adequate explanation at this stage. The Tribunal would need to consider all the evidence relevant to the discrimination complaint, such as evidence as to whether the acts complained of occurred at all; evidence as to the actual comparators relied on by the claimant to

prove less favourable treatment; evidence as to whether the comparisons being made by the claimant is like with like, and available evidence of the reasons for the differential treatment.

120. The Court went on to hold that although the burden of proof involved a two-stage analysis of the evidence, it does not expressly or impliedly prevent the Tribunal, at the first stage, from hearing, accepting, or drawing inferences from evidence adduced by the respondent disputing and rebutting the claimant's evidence of discrimination. The respondent may adduce in evidence at the first stage to show that the acts which are alleged to be discriminatory never happened; or that, if they did, they were not less favourable treatment of the claimant; or that the comparators chosen by the claimant or the situations with which comparisons are made are not truly like the claimant or the situation of the claimant; or that, even if there has been less favourable treatment of the claimant, it was not because of a protected characteristic, such as, age, race, disability, sex, religion or belief, sexual orientation or pregnancy. Such evidence from the respondent could, if accepted by the Tribunal, be relevant as showing that, contrary to the claimant's allegations of discrimination, there is nothing in the evidence from which the tribunal could properly infer a prima facie case of discrimination.

121. Once the claimant establishes a prima facie case of discrimination, the burden shifts to the respondent to show, on the balance of probabilities, that its treatment of the claimant was not because of the protected characteristic, such as, race, sex, religion or belief, sexual orientation, pregnancy, or gender reassignment but for a non-discriminatory reason.

122. This approach to the burden of proof test was approved by the Supreme Court in the case of Royal Mail Group Ltd v Efobi [2021] UKSC 33, Lord Leggatt.

123. The employer's reason for the treatment of the claimant does not need to be laudable or reasonable in order to be non-discriminatory, B-v-A [2007] IRLR 576, a judgment of the Employment Appeal Tribunal.

124. The Tribunal could pass the first stage in the burden of proof and go straight to the reason for the treatment. If, from the evidence, it is patently clear that the reason for the treatment is non-discriminatory, it may not be necessary to consider whether the claimant has established a prima facie case, particularly where he or she relies on a hypothetical comparator. This approach may apply in a case where the employer had repeatedly warned the claimant about drinking and dismissed him for doing so. It would be difficult for the claimant to assert that his dismissal was because of his protected characteristic, such as race, age or sex, Lord Nicholls in Shamoon-v-Chief Constable of the Royal Ulster Constabulary [2003] ICR 337, judgment of the House of Lords.

125. The protected characteristic must have a significant influence on the decision to act in the manner complained of. This is subjective, Gould v St John's Downshire Hill [2021] ICR 1, a judgment of the EAT.

The duty to make reasonable adjustments

126. Section 20, EqA on the duty to make reasonable adjustments, provides:

> "(1)Where this Act imposes a duty to make reasonable adjustments on the person, this section, sections 21 and 22 and the applicable Schedule apply; for those purposes a person on whom the duty is imposed is referred to as A.
>
> (2) The duty comprises the following three requirements.
>
> (3) The first requirement is a requirement, where a provision, criterion of practice of A's put 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 is reasonable to have taken to avoid disadvantage."

127. Langstaff J, President, Employment Appeal Tribunal, Nottingham City Transport Ltd v Harvey [2013] EqLR 4, held,

> "Practice" has something of the element of repetition about it. It is, if it relates to a procedure, something that is applicable to others than the person suffering the disability…disadvantage has to be by reference to a comparator, and the comparator must be someone to whom either in reality or in theory the alleged practice would also apply.", paragraph 18.

128. Guidance has been given in relation to the duty to make reasonable adjustments in the case of Environment Agency v Rowan [2008] IRLR 20**,** a judgment of the EAT. An Employment Tribunal in considering a claim that an employer had discriminated against an employee by failing to comply with the duty to make reasonable adjustment, must identify:

> (1) the provision, criterion or practice applied by or on behalf of an employer, or
>
> (2) the physical feature of premises occupied by the employer;
>
> (3) the identity of a non-disabled comparator (where appropriate), and
>
> (4) the identification of the substantial disadvantage suffered by the claimant may involve consideration of the cumulative effect of both the provision, criterion or practice applied by or on behalf of an employer and the physical feature of premises. Unless the tribunal has gone through that process, it cannot go on to judge if any proposed adjustment is reasonable because it will be unable to say what adjustments were reasonable to prevent the provision, criterion or practice, or feature, placing the disabled person concerned at a substantial disadvantage.

129. A Tribunal in deciding whether an employer is in breach of its duty under section 20 EqA 2010, must identify, with some particularity, what "step" it is that the employer is said to have failed to take.

130. The employer's process of reasoning is not a "step". In the case of General Dynamics Information Technology Ltd v Carranza [2015] ICR 169, the EAT held that the "steps" an employer was required to take by section 20(3) to avoid putting a disabled person at a disadvantage, were not mental processes, such as making an assessment, but practical actions to avoid

the disadvantage. In order to decide what steps were reasonable, a tribunal should, firstly, identify the pcp. Secondly, the comparators. Thirdly, the disadvantage. In that case disregarding a final written warning was not considered to be a reasonable step.

131. In O'Hanlon v Revenue and Customs Commissioners [2007] EWCA Civ 283, [2007 ICR 1359, the Court of Appeal held that increasing the period during which the disabled employee could claim full pay while on sick leave to alleviate financial hardship following a reduction in pay, would not be a reasonable step to expect the employer to take as it would mean that the employer would have to assess the financial means and stress suffered by their disabled employees.

132. In relation to the shifting burden of proof, in the case of Project Management Institute v Latif [2007] IRLR 576, EAT, it was held that there must be evidence of a reasonable adjustment that could have been made. An arrangement causing substantial disadvantage establishes the duty. For the burden to shift,

> "…it would be 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.", Elias J (President).

133. Paragraph 6.10 of the Code 2011 provides:

> "The phrase 'provision, criterion or practice' is not defined by the Act but should be construed widely so as to include, for example, any formal or informal policies, rules, practices, arrangements or qualifications including one off decisions and actions."

134. In relation to the comparative assessment to be undertaken in a reasonable adjustment case, paragraph 6.16 of the Code states:

> "The purpose of the comparison with people who are not disabled is to establish whether it is because of disability that a particular provision, criterion, practice or physical feature or the absence of an auxiliary aid disadvantages the disabled person in question. Accordingly and unlike direct or indirect discrimination - under the duty to make adjustments there is no requirement to identify a comparator or comparator group whose circumstances are the same or nearly the same as the disabled person's."

135. The proper comparator is readily identified by reference to the disadvantage caused by the relevant arrangements. It is not with the population generally who do not have a disability, Smith v Churchills Stairlifts plc [2006] IRLR 41, Court of Session.

136. In the case of Kenny v Hampshire Constabulary [1999] IRLR 76, a judgment of the Employment Appeal Tribunal, it was held that the statutory definition directs employers to make reasonable adjustments to the way the job is structured and organised so as to accommodate those who cannot fit into existing arrangements.

137. The test is an objective one. The employer must take "such steps as….is reasonable in all the circumstances of the case." Smith v Churchills Stairlifts plc [2006] IRLR 41.

Constructive discrimination

138. It is an implied term of any contract of employment that the employer shall not without reasonable cause conduct itself in a manner likely to destroy or seriously damage the relationship of trust and confidence between the employer and employee, Malik-v-Bank of Credit and Commerce International [1997] IRLR 462, House of Lords, Lord Nicholls.

139. In the case of Lewis-v-Motorworld Garages Ltd [1985] IRLR 465, the Court of Appeal held in relation to the "last straw" doctrine that,

> "…the last action of the employer which leads to the employee leaving need not itself be a breach of contract; the question is, does the cumulative series of acts taken together amount to a breach of the implied term?", Glidewell LJ.

140. Dyson LJ giving the leading judgment in the case of London Borough of Waltham Forest-v-Omilaju [2005] IRLR 35, Court of Appeal, held:

> "A final straw, not itself a breach of contract, may result in a breach of the implied term of trust and confidence. The quality that the final straw must have is that it should be an act in a series whose cumulative effect is to amount to a breach of the implied term. I do not use the phrase 'an act in a series' in a technical sense. The act does not have to be of the same character as the earlier acts. Its essential quality is that, when taken in conjunction with earlier acts on which the employee relies, it amounts to a breach of the implied term of mutual trust and confidence. It must contribute something to that breach, although what it adds may be relatively insignificant.
>
> I see no need to characterise the final straw as 'unreasonable' or 'blameworthy' conduct. It may be true that an act which is the last in a series of acts which, taken together, amounts to a breach of the implied term of trust and confidence will usually be unreasonable and, perhaps, even blameworthy. But, viewed in isolation, the final straw may not always be unreasonable, still less blameworthy. Nor do I see any reason why it should be…. .
>
> If the final straw is not capable of contributing to a series of earlier acts which cumulatively amount to a breach of the implied term of trust and confidence, there is no need to examine the earlier history to see whether the alleged final straw does in fact have that effect.", pages 37 - 38.

141. The test of whether the employee's trust and confidence has been undermined is an objective one, Omilaju.

142. A constructive discriminatory dismissal arises where the discriminatory conduct materially influenced the conduct that amounted to a repudiatory breach. The last straw need not be discriminatory, Williams v Governing Body of Alderman Davies Church in Wales Primary School [2020] IRLR 589, a judgment on HHJ Auerbach, Employment Appeal Tribunal, and De

Lacey v Wechseln Ltd t/a The Andrew Hill Salon [2021] IRLR 547, EAT, Cavanagh J.

Conclusion

143. We now consider the List of Issues set out in paragraph 4 in this judgment.

Direct disability discrimination

144. The respondent has admitted that the claimant is disabled by reason of his three medical conditions but disputed knowledge.

145. The claimant claimed that on 1 November 2022, at the probation review meeting, Mr Kane refused his request for hybrid homeworking because it was disruptive, paragraph 4.4.1.

146. We have already found what Mr Kane meant by his use of the word "disruptive". It had nothing to do with the claimant's home being disruptive, but that it would be disruptive to the claimant while being trained and while shadowing Mr Kane. He had no previous experience in submitting claims to Her Majesty's Revenue and Customs for tax relief and it was important that he should continue to shadow Mr Kane in order to learn on the job. Had this been Mr Baldwin or a hypothetical comparator, in similar circumstances, we have no doubt that Mr Kane's decision would have been the same, namely that during the probation period it was important that they should shadow him to learn more about the requirements of their role and the respondent's processes. By working from home Mr Kane would not have been in a position to supervise their work, nor would they be exposed to the full learning experience Mr Kane would have given them if they were shadowing him.

147. In relation to this aspect of the claim, following Madarassy and Efobi, there was no evidence upon which this Tribunal could decide that the claimant had been treated less favourably. Accordingly, he had not satisfied the first limb of the burden of proof test. This claim is not well-founded and is dismissed.

148. In relation to the second aspect of the direct disability discrimination claim, that the claimant was dismissed, in that he was constructively dismissed by the respondent, paragraph 4.4.2. Here he relied on Mr Baldwin as an actual comparator and/or a hypothetical comparator in similar circumstances. The claimant had resigned on 24 November 2022, following a brief meeting with Mr Kane. The question here is whether or not Mr Kane's conduct and/or the respondent's conduct, amounted to a repudiatory breach of the implied term of mutual trust and confidence. It was Mr Kane who approached the claimant to remind him that he was waiting for the medical information which should have been supplied by 23 November 2022. It was noticeable that the doctor's report made no reference to those matters Mr Kane had asked for in his email. Further, it made no reference to generalised anxiety disorder and depression. Mr Kane was, therefore, not in a position to engage in a meaningful discussion about the claimant's anxiety being a

disability with reference to the doctor's letter and the possibility of implementing reasonable adjustments to either remove or to ameliorate any disadvantages. From the claimant's behaviour in the workplace it was not reasonable for Mr Kane to know about any substantial adverse effects. The claimant became agitated during the meeting and left collecting his keys and exiting the premises. From 1 November to 24 November, Mr Kane was anxious to find out more about the claimant's anxiety and to discuss next steps to include the possibility of reasonable adjustments, but the claimant was not forthcoming with the information requested. We find and do conclude, that there was no fundamental breach of the implied term of mutual trust and confidence on the part of Mr Kane or by the respondent.

149. Had it been Mr Baldwin in similar circumstances, who did not have the claimant's disabilities, there would have been a discussion about whether the doctor's letter addressed the concerns raised by Mr Kane. This goes to the issue of knowledge. The same would apply to a hypothetical Technical Report writer someone who is either not disabled or without the claimant's disabilities. Accordingly, no less favourable treatment had been established at the first stage of the burden of proof test. This aspect of the direct disability discrimination claim is not well-founded and is dismissed.

150. We further find that Mr Kane's approach to the claimant was to address performance issues and discussed with Mr Marie the possibility of terminating his employment at the at the probationary review meeting but was dissuaded from doing so by Mr Marie. This led to him extending the probation by one month in such circumstances where he could have terminated it or extended it up to a further three months. He extended it for the claimant's benefit, a fact which the claimant did not appreciate. Mr Kane wanted him to have more on the job learning and training.

Failure to make reasonable adjustments

151. As we have already stated, the respondent conceded that the claimant was a disabled person at all material times because of social anxiety; generalised anxiety disorder, and depression. The issue here is one of knowledge. Did the respondent know or ought it to have known the substantial adverse effects on the claimant's ability to carry out normal daily activities, paragraph 4.7?

152. What Mr Kane was told on 1 November 2022 by the claimant was that he suffered from anxiety. No information was given about it being long-term and the adverse effects. Mr Kane did not observe the claimant suffering in the ways he asserted during the meeting on 1 November, and reasonably requested medical evidence in support of what the claimant was saying in relation to his anxiety. What was provided to him in the doctor's letter dated 22 November, did not address those matters he requested in his email. In the doctor's letter there is no reference to generalised anxiety, its long-term effects and whether those effects, if any, could be considered as substantial. Further, no information was given in relation to depression and its long-term effects. It also did not address, in relation to anxiety, the long-term adverse effects on normal day-to-day living. The meeting on 24

November was very short and the claimant did not provide further information to assist Mr Kane in coming to a view about his three medical conditions.

153. We have come to the conclusion that Mr Kane did not have knowledge of the claimant's three conditions at any time from 1 to 24 November 2022, amounting to disabilities. There was no duty and no breach of the duty to make reasonable adjustments, Environment Agency v Rowan.

154. Even if we are wrong about knowledge or deemed knowledge, did the respondent apply a provision, criterion or practice requiring its staff to work in the office on a full-time basis, paragraph 4.8.1? It was clear from the evidence given by Mr Kane that that was not the case as Mr Baldwin worked from home apart from 1 day in 10.

155. We conclude that there was the possibility of an employee, such as the claimant, discussing hybrid working after successfully completing their probation. It is, therefore, not the case that during the claimant's employment the respondent's employees were required to work in the office on a full-time basis. It was possible, had the claimant successfully completed his probation, that a discussion was likely to have taken place in relation to hybrid working from home and in the office either with Mr Marie or Mr Kane, or both.

156. Even if the pcp relied upon by the claimant was applicable, which we do not accept that it was, did he suffer a substantial disadvantage in relation to persons who are not disabled, paragraph 4.9?

157. The claimant produced no evidence that the application of the alleged pcp, exacerbated his social anxiety causing him discomfort in having to type one-handed affecting, adversely, his work performance. Notwithstanding raising his anxiety on 1 November, he continued to work from the respondent's premises without complaint about the workplace being noisy.

158. We, therefore, do not accept that he was put at a substantial disadvantage by the application of the alleged provision, criterion or practice.

159. Even if we are in error, did the respondent know and could it reasonably have been expected to know that the claimant was likely to be placed at any disadvantages, paragraph 4.10? In the absence of further medical information in relation to the claimant's anxiety, Mr Kane did not know, neither could he be reasonably expected to know of the disadvantages. He requested medical evidence he expected would answer the questions put in his email, but these were not addressed in the doctor's letter. He, therefore, did not have actual knowledge nor deemed knowledge of the disadvantages.

160. Again, even if we are in error in relation to the above, in that the respondent was under a duty to take such steps to either remove or ameliorate the disadvantages, there were options available other than hybrid working from home and in the office, such as, putting the claimant's desk, or work area, in

a different part of the office that would be much quieter, or working in a space that could be made more private which was the other side of the boardroom, paragraph 4.11.

161. The respondent occupies the first floor of a building with 1,600 square feet office space. There is plenty of room for the seven members of staff who work there. There is also room for a relax seating area and it is not crowded. We have seen photographs of the open plan office, and it is clear that the desks are widely spaced and that the claimant could have been located in an area which was much quieter for him to work. In doing so, he would have been given the required supervision he needed and the opportunities to ask questions of Mr Kane, his line manager and someone whom he shadowed. He needed to gain greater knowledge of how the respondent conducted its affairs and business as well as its policies, practices and procedures. Discussion with his work colleagues was also a benefit to him being a comparatively new starter. Instead he was only fixated on hybrid working from home.

162. We have come to the conclusion that this claim is not well-founded and is dismissed.

Constructive discriminatory dismissal

163. The claimant relied on the implied term of mutual trust and confidence and asserted that he had been discriminated by the respondent amounting to fundamental breaches of that term, paragraph 4.3.1. The last act was on 24 November 2022. Having regard to our findings and conclusions above, that the claimant was not discriminated against because of his disabilities, he cannot support a claim of constructive discriminatory dismissal, even though the last act complained of may not have been discriminatory, Williams v Governing Body of Alderman Davies Church in Wales Primary School. We have not found that at any point was he discriminated against by reason of his disabilities.

164. He has to establish that he was constructively dismissed for a discriminatory reason and that the discriminatory conduct materially influenced the conduct that amounted to a repudiatory breach. The last straw need not be discriminatory. In this case, the actions of Mr Kane we have not found to have been discriminatory because of disability.

165. Further, we come to the conclusion that he was not constructively dismissed by the respondent. He had voluntarily resigned from his employment on 24 November 2022, after a meeting with Mr Kane that lasted about 3 minutes. This claim is also not well-founded and is dismissed.

166. It follows from our conclusion that all of the claims are not well-founded and have been dismissed.

167. The provisional remedy hearing listed either on 17 or 18 December 2024 is vacated but having regard to the respondent's application for its costs to be paid by the claimant, the Tribunal has decided to keep the dates **17 and 18**

December 2024 in the list. The parties must attend on these days by 9.30am.

168. If the parties have not yet prepared for the costs hearing the following orders will now apply:-

168.1 The respondent must serve on the claimant a costs schedule and a witness statement explaining how the costs have been arrived at by no later than **4pm Monday 2 December 2024**.

168.2 The claimant must serve a witness statement setting out his means, namely his earnings, any savings, any shares, whether he is renting or paying a mortgage or owns his residential property outright, and any other assets, by no later than **4pm 10 December 2024.**

168.3 The respondent shall prepare and serve on the claimant a joint bundle of documents relevant to costs, by no later than **4.00pm 13 December 2024,** and must bring four copies of the bundle to the Tribunal on the first day of the hearing.

Employment Judge Bedeau
15 November 2024
Date: ……..

Sent to the parties on:
15 November 2024

For the Tribunal Office

Recording and Transcription
Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here: https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/