Case Number: 3301531/2023

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr O Ball	v	Riskex Limited

Heard at: Watford **On**: 14-16 October 2024 in person and on 2 and 3 January 2025 by Cloud Video Platform

Before: Employment Judge Hyams **Members:** Mr R Baber, Mrs J Costley

Representation:

For the claimant: In person
For the respondents: Mr Stewart, of counsel

UNANIMOUS JUDGMENT

1. The claimant was not discriminated against directly within the meaning of section 13 of the Equality Act 2010 ("EqA 2010") because of disability, contrary to section 39(2) of that Act.

2. The claimant was not harassed within the meaning of sections 26(1) and (4) of the EqA 2010, contrary to section 40 of that Act.

3. There was no failure to make a reasonable adjustment within the meaning of sections 20 and 21 of that Act.

4. The claimant was not dismissed within the meaning of section 39(7)(b) of that Act.

REASONS

Introduction: the parties and the claims made by the claimant

1 The claimant worked for the respondent as a Sales Development Representative from 9 May 2022 until he resigned with immediate effect on 15 January 2023. It is his case that his resignation was a response to conduct of the respondent

which justified him resigning at common law, so that he was dismissed within the meaning of section 39(7)(b) of the Equality Act 2010 ("EqA 2010") by reason of preceding and ongoing breaches of that Act.

2 The claim was not sufficiently focused and the claimant was ordered by the tribunal on 7 June 2023 to provide further information about it. The order was at pages 41-43 of the hearing bundle. Any reference below to a page is, unless otherwise stated, a reference to a page of that bundle.

3 On 4 July 2023, the claimant sent the email and its attachments at pages 45-56 in compliance with that order. On 11 July 2023, the respondent's solicitors wrote (in the email at page 57):

> "We write to inform the Tribunal that the Respondent accepts the claimed conditions of depression, anxiety and amniotic band syndrome as satisfying the Equality Act definition of disability."

4 In an undated document at pages 59-64, which purported to state the claimant's claims in full, the claimant wrote this.

> "The claimant has a physical disability in the form of Amniotic Band Syndrome. This is a birth defect that the claimant has suffered with since 18th June 1989. It causes the claimant to have no working fingers or thumb on his left hand."

5 On 31 July 2023 Employment Judge ("EJ") Michell conducted a preliminary hearing by telephone. In paragraph 5 of the record of that hearing, at page 76, EJ Michell said this.

> "The claim is not as clearly articulated as it ought to be. Details of acts/omissions said to amount to discrimination are not properly particularised. Nor is it clear what disability the claimant relies upon. The money claim is not adequately explained, either."

6 EJ Michell described the issues on page 77. He recorded that the "money claim" was in fact for income which the claimant did not receive from the respondent because he had resigned. While EJ Michell ordered the claimant to provide further information, he recorded the issues relating to the claim under the EqA 2010 as he understood them in the following way (on page 77).

> "(10) On the basis of what the claimant told me, his disability discrimination claim is made pursuant to ss 13, 20 & 21 and s 26 EqA.
>
> (11) In terms of the 'reasonable adjustments' claim,
> (i) The claimant relies on two PCPS:
> a. The PCP of requiring staff to work in the office.
> b. The PCP of requiring staff to do a set amount of work.

(ii) The claimant says that by reason of his disabilities, the first PCP put him at a particular disadvantage because of the problems he was having in driving, and dressing and washing himself at the time (throughout his employment). This not only made attendance at work physically problematic, but also meant that the prospect of being at work caused him discomfort, embarrassment and anxiety.

(iii) As regards the second PCP, the claimant asserts that he was not able to cope with the amount of work he was asked to do, which caused him anxiety.

(iv) The claimant asserts that a reasonable adjustment in relation to the first PCP would have been to allow him to work from home. As regards the second PCP, he asserts he should have been given a lighter workload."

7 By the time of the hearing before us, the parties had agreed a list of issues. It was at pages 100-102. It was in large part consistent with the above list of issues relating to the claim of a failure to make reasonable adjustments. It stated the claimant's claim of direct discrimination within the meaning of section 13 of the EqA 2010 in substance as a claim that

7.1 the respondent treated the claimant less favourably because of the protected characteristic of disability by not permitting him to work from home for extended periods of time, and in this regard the claimant compared his treatment with that of Quintin Matthee, Mark Legg and David Dack; and

7.2 the claimant's line manager, Mrs Nikki Porter, treated him less favourably because of his Amniotic Band Syndrome

7.2.1 by arranging for photographs to be taken of the staff of the respondent in September 2022 when the claimant was on holiday; and

7.2.2 by not inviting the claimant to a Christmas office (in effect) party at the end of 2022.

8 The list of issues also included a claim that there was harassment of the claimant within the meaning of sections 26(1) and (4) of the EqA 2010 as a result of Ms Catherine Rumbelow, the respondent's Chief Operating Officer, "not follow[ing] the correct grievance procedure on the 8th December or the 12th December" 2022. It is claimed that Ms Rumbelow "completely ignored the guidance set out in the employee handbook" and that that related "to all three disabilities". By way of explanation of that claim, this was said in paragraph 3.1.2 of the list of issues (at page 101):

> "miss rumbelow ignored the guidance in the employee handbook. It stated all grievances should be heard within 14 days. Miss rumbelow made me supply my grievance 3 times before it was accepted, and even then it took over 21 days to follow the grievance procedure. In doing so this relates to all 3 disabilities as the grievance was raised about disability discrimination to all 3 disabilities."

9 In addition, it is claimed that it was such harassment as a result of both Mrs Porter and Ms Rumbelow "making [the claimant] have to go into repeated detail about [his] disabilities on 5 separate occasions and the levels of humiliating detail [he] had to go into while explaining [his] abilities on 5 separate occasions." That was as a result of "their refusals to make reasonable adjustments" which "repeatedly caused [the claimant] to have to supply embarrassing details that caused [him] humiliation and had negative affects on [his] mental health disabilities." The latter was a statement of the effect of the claimed harassment, of course.

10 While the list of issues asked (in paragraph 3.2) whether that was "unwanted conduct", that was a redundant question, since the conduct was plainly unwanted. The protected characteristic relied on in support of the claim was the claimant's "disability of Amniotic Band Syndrome".

11 There was no claim of constructive dismissal stated in the list of issues. As a result, on Monday 14 October 2024, EJ Hyams checked with the claimant to see whether he was pressing that claim. On the following day, the claimant said that he had not decided whether he was pressing that claim. Only on 16 October 2024 did the claimant finalise his position in that regard. He did so while cross-examining Ms Rumbelow, but at the request of EJ Hyams to state his position. That was because the cross-examination of Ms Rumbelow at that point was about the respondent's grievance procedure and the manner in which it was applied (or, it was the claimant's case, not applied) by Ms Rumbelow. The claimant then said that he was indeed pressing a claim of constructive dismissal.

The adjournment and resumption of the hearing

12 That cross-examination took place in the morning of the third day of the hearing, 16 October 2024. The hearing was originally listed by the order of EJ Michell to be heard over four days, starting on 14 October and finishing on 17 October 2024. The intention was at the time of the listing that the four days would be sufficient for the determination of remedy as well as liability in the event of the success of any one of the claimant's claims. The hearing was then listed to be heard in three days because (it became apparent during the week) EJ Hyams had several hearings in his diary on 17 October 2024 which had to be conducted by him. Then, by reason of one of the intended non-legal members not being available to sit after all, communicated late on Friday evening, the tribunal lacked a third member in the morning of 14 October 2024.

13 While we, the newly-constituted tribunal, made very good use of our time on Monday 14 October 2024 by reading all of the relevant documents and all of the witness statements carefully, we did not start hearing oral evidence until the start of 15 October 2024. The oral evidence was then concluded shortly before lunch on 16 October 2024, and it was clear that we were going to need to adjourn the hearing to at least one further day, for deliberation, and two if we were to give an oral judgment.

14 Neither party had come to the hearing with written submissions, and it was clear that the claimant was going to be assisted by us, through EJ Hyams, putting into writing a description of the case law to which EJ Hyams had referred from time to time during the hearing.

15 We therefore did that in a document which was sent to the parties on 24 October 2024 and, as recorded in that document, we adjourned the hearing to 2 and 3 January 2025 to be continued by CVP only and to start not before 11am on 2 January 2025. We made orders for the exchange of written closing submissions and, if wanted, a response to the other party's closing submissions. We resumed the hearing on 2 January 2023 at about 11:10am having read the parties' closing submissions and the claimant's reply to the submissions of the respondent. We then heard the parties' oral submissions until 12:20pm, after which we deliberated in private. We then, shortly after 3pm on 3 January 2025, gave an oral judgment through EJ Hyams, dismissing the claims. The claimant, having previously been informed of his right to ask for written reasons and having been reminded of that right by EJ Hyams after he had given the oral judgment, then asked for our judgment to be accompanied by written reasons. These are those reasons.

Relevant law

Harassment and direct discrimination

Harassment

16 Section 26 of the EqA 2010 provides:

> "(1) A person (A) harasses another (B) if–
>
> (a) A engages in unwanted conduct related to a relevant protected characteristic, and
>
> (b) the conduct has the purpose or effect of–
>
> (i) violating B's dignity, or
>
> (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
>
> ...
>
> (4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account–

(a) the perception of B;
(b) the other circumstances of the case;
(c) whether it is reasonable for the conduct to have that effect."

17 We return to section 26 below, after considering the meaning of the words "conduct related to a relevant protected characteristic". In order to do that, it is helpful to consider the effect of section 13 of the EqA 2010, which is in any event relevant here and provides:

> "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."

18 It is not possible to make a successful claim of both (1) harassment within the meaning of section 26 and (2) detrimental treatment within the meaning of section 39(2)(d) of the EqA 2010. That is because of section 212(1) of that Act.

19 There is in the judgment of Underhill LJ in *Unite the Union v Nailard* [2019] ICR 28 an illuminating discussion about the impact (or otherwise) of the use of the words "unwanted conduct related to a relevant protected characteristic" in section 26(1) of the EqA 2010 instead of the words in section 13, namely "because of a protected characteristic". In *Carozzi v University of Hertfordshire & Another* [2024] EAT 169, His Honour Judge ("HHJ") Tayler accepted conduct may be related to a protected characteristic within the meaning of section 26(1)(a) of the EqA 2010 as a result of the existence of the mental element required for a successful claim of direct discrimination within the meaning of section 13, but he also said that conduct may completely unwittingly be related to a protected characteristic. We understood the latter statement to be capable of being correct only if there is some objective evidence of such a relation.

20 We record here that paragraph 7.9 of the Equality and Human Rights Commission's code of conduct on employment ("the Equality Code") is in these terms.

> "Unwanted conduct 'related to' a protected characteristic has a broad meaning in that the conduct does not have to be because of the protected characteristic."

21 That statement was not referred to in *Nailard*. The statement is, however, the subject of the illustrations in the passage in the Equality Code which follows immediately after it, which we now set out.

> "It includes the following situations:
>
> *a) Where conduct is related to the worker's own protected characteristic*. **Example**:

If a worker with a hearing impairment is verbally abused because he wears a hearing aid, this could amount to harassment related to disability.

7.10 Protection from harassment also applies where a person is generally abusive to other workers but, in relation to a particular worker, the form of the unwanted conduct is determined by that worker's protected characteristic.

Example:
During a training session attended by both male and female workers, a male trainer directs a number of remarks of a sexual nature to the group as a whole. A female worker finds the comments offensive and humiliating to her as a woman. She would be able to make a claim for harassment, even though the remarks were not specifically directed at her.

b) Where there is any connection with a protected characteristic.

Protection is provided because the conduct is dictated by a relevant protected characteristic, whether or not the worker has that characteristic themselves. This means that protection against unwanted conduct is provided where the worker does not have the relevant protected characteristic, including where the employer knows that the worker does not have the relevant characteristic. Connection with a protected characteristic may arise in several situations:

- The worker may be associated with someone who has a protected characteristic.

Example:
A worker has a son with a severe disfigurement. His work colleagues make offensive remarks to him about his son's disability. The worker could have a claim for harassment related to disability.

- The worker may be wrongly perceived as having a particular protected characteristic.

Example:
A Sikh worker wears a turban to work. His manager wrongly assumes he is Muslim and subjects him to Islamaphobic abuse. The worker could have a claim for harassment related to religion or belief because of his manager's perception of his religion.

- The worker is known not to have the protected characteristic but nevertheless is subjected to harassment related to that characteristic.

Example:
A worker is subjected to homophobic banter and name calling, even though his colleagues know he is not gay. Because the form of the abuse relates

to sexual orientation, this could amount to harassment related to sexual orientation.

- The unwanted conduct related to a protected characteristic is not directed at the particular worker but at another person or no one in particular.

Example:
A manager racially abuses a black worker. As a result of the racial abuse, the black worker's white colleague is offended and could bring a claim of racial harassment.

- The unwanted conduct is related to the protected characteristic, but does not take place because of the protected characteristic.

Example:
A female worker has a relationship with her male manager. On seeing her with another male colleague, the manager suspects she is having an affair. As a result, the manager makes her working life difficult by continually criticising her work in an offensive manner. The behaviour is not because of the sex of the female worker, but because of the suspected affair which is related to her sex. This could amount to harassment related to sex.

7.11 In all of the circumstances listed above, there is a connection with the protected characteristic and so the worker could bring a claim of harassment where the unwanted conduct creates for them any of the circumstances defined in paragraph 7.6."

22 The Equality Code was issued under section 14 of the Equality Act 2006, section 15(4)(b) of which provides that it "shall be taken into account by a court or tribunal in any case in which it appears to the court or tribunal to be relevant".

23 Sections 26(1) and (4) of the EqA 2010 need to be read in the light of the decision of the Employment Appeal Tribunal ("EAT") in *Richmond Pharmacology v Dhaliwal* [2009] ICR 724, and the decision of the Court of Appeal in *Land Registry v Grant (Equality and Human Rights Commission intervening)* [2011] ICR 1390, where Elias LJ said in relation to the claimed harassment in that case:

> "the effect cannot amount to a violation of dignity, nor can it properly be described as creating an intimidating, hostile, degrading, humiliating or offensive environment. Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment."

24 In paragraph 22 of *Dhaliwal*, the EAT, with Underhill P (i.e. Mr Justice Underhill, sitting as the President of the EAT) presiding said this:

> "We accept that not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very 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."

25 In *Betsi Cadwaladr University Health Board v Hughes* (unreported; UKEAT/0179/13/JOJ, 28 February 2014), the EAT (Langstaff P presiding) said this in paragraphs 12 and 13 of its judgment having just set out paragraph 22 of the judgment in *Dhaliwal*:

> '12. We wholeheartedly agree. The word "violating" is a strong word. Offending against dignity, hurting it, is insufficient. "Violating" may be a word the strength of which is sometimes overlooked. The same might be said of the words "intimidating" etc. All look for effects which are serious and marked, and not those which are, though real, truly of lesser consequence.
>
> 13. It was agreed, too, that context was very important in determining the question of environment and effect. Thus, as Elias LJ said in *Grant*, context is important. As this Tribunal said, in *Warby v Wunda Group plc*, UKEAT 0434/11, 27 January 2012:
>
> > "…we accept that the cases require a Tribunal to have regard to context. Words that are hostile may contain a reference to a particular characteristic of the person to whom and against whom they are spoken. Generally a Tribunal might conclude that in consequence the words themselves are that upon which there must be focus and that they are discriminatory, but a Tribunal, in our view, is not obliged to do so. The words are to be seen in context;".'

26 *Dhaliwal* is authority for the proposition that the intent of the impugned conduct is relevant. That was said at the end of the following passage in the judgment of that case, the whole of which (including the footnotes, which we have integrated into the text by inserting them in square brackets and putting them into italics) was in our view helpful:

> '14. Secondly, it is important to note the formal breakdown of "element (2)" into two alternative bases of liability—"purpose" and "effect". That means that a respondent may be held liable on the basis that the effect of his conduct has been to produce the proscribed consequences even if that was not his purpose; and, conversely, that he may be liable if he acted for the purposes of producing the proscribed consequences but did not in fact do

so (or in any event has not been shown to have done so) [*Those alternative forms of liability could be described, from the perpetrator's point of view, as "objective" and "subjective"; but using that terminology risks confusion with the separate question whether the effect on the victim should be judged "subjectively" or "objectively"—as to which, see para 15.*]. It might be thought that successful claims of the latter kind will be rare, since in a case where the respondent has intended [*We use "intend" as the equivalent verb to the noun "purpose" used in the statute: "purpose" as a verb has an archaic ring. In this context at least there is no real difference between the terms "purpose" and "intention".*] to bring about the proscribed consequences, and his conduct has had a sufficient impact on the claimant for her to bring proceedings, it would be prima facie surprising if the tribunal were not to find that those consequences had occurred. For that reason we suspect that in most cases the primary focus will be on the effect of the unwanted conduct rather than on the respondent's purpose (though that does not necessarily exclude consideration of the respondent's mental processes because of "element (3)" as discussed below).

15. Thirdly, although the proviso in subsection (2) is rather clumsily expressed, its broad thrust seems to us to be clear. A respondent should not be held liable merely because his conduct has had the effect of producing a proscribed consequence: it should be reasonable that that consequence has occurred. That, as Mr Majumdar rightly submitted to us, creates an objective standard. However, he suggested that, that being so, the phrase "having regard to … the perception of that other person" was liable to cause confusion and to lead tribunals to apply a "subjective" test by the back door. We do not believe that there is a real difficulty here. The proscribed consequences are, of their nature, concerned with the feelings of the putative victim: that is, the victim must have felt, or perceived, her dignity to have been violated or an adverse environment to have been created. That can, if you like, be described as introducing a "subjective" element; but overall the criterion is objective because what the tribunal is required to consider is whether, if the claimant has experienced those feelings or perceptions, it was reasonable for her to do so. Thus if, for example, the tribunal believes that the claimant was unreasonably prone to take offence, then, even if she did genuinely feel her dignity to have been violated, there will have been no harassment within the meaning of the section. Whether it was reasonable for a claimant to have felt her dignity to have been violated is quintessentially a matter for the factual assessment of the tribunal. It will be important for it to have regard to all the relevant circumstances, including the context of the conduct in question. One question that may be material is whether it should reasonably have been apparent whether the conduct was, or was not, intended to cause offence (or, more precisely, to produce the proscribed consequences): the same remark may have a very different weight if it was evidently innocently intended than if it was evidently intended to hurt. [*This is not to reintroduce a requirement of "purpose" by the back door: the point is not that the*

perpetrator cannot be liable unless he intended to cause offence but rather that, if he evidently did not intend to, it may not be reasonable for the claimant to have taken offence.]'

The burden of proof

27 Section 136 of the EqA 2010 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 provision 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."

Direct discrimination

28 There is much case law concerning the application of that provision. In the light of that case law we concluded that the issues arising in relation to a claim of direct discrimination were best stated as follows.

28.1 Applying section 136(2) of the EqA 2010, are there (among those things which the tribunal has found were facts) facts from which the tribunal could decide, in the absence of any other explanation, that the claimant was treated less favourably and detrimentally because of a protected characteristic? When asking that question it is possible to take into account the respondent's evidence about, but not its explanation for, the treatment. That is clear from paragraphs 19-47 of the judgment of Leggatt JSC (with which Lord Hodge, Lord Briggs, Lady Arden and Lord Hamblin agreed) in the Supreme Court in *Efobi v Royal Mail Group Ltd* [2021] UKSC 33, [2021] ICR 1263.

28.2 If so, then, applying section 136(3) of that Act, has the respondent satisfied the tribunal on the balance of probabilities that the claimant was not to any material extent so treated?

28.3 Alternatively, applying the decision of the House of Lords in *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337, what was the real reason for the manner in which the tribunal has found the claimant was in fact treated?

Claims of failures to make reasonable adjustments within the meaning of section 20 of the EqA 2010

29 Section 20 provides so far as relevant:

> "(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 comprises 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."

30 Paragraph 20 of Schedule 8 to the EqA 2010 provides this.

> "(1) [An employer] is not subject to a duty to make reasonable adjustments if [the employer] does not know, and could not reasonably be expected to know– ...
>
> (b) ... that [a] disabled [employee] has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement [within the meaning of section 20 of that Act]."

31 In many cases, a claim of a failure to make reasonable adjustments will be a claim to the same effect as a claim of a breach of section 15 of the EqA 2010, as the two claims are in reality two sides of the same coin. That is clear from what was said by Elias LJ in paragraphs 26 and 27 of his judgment (with which McCombe and Richards LJJ agreed) in *Griffiths v Secretary of State for Work and Pensions* [2016] IRLR 216.

32 A claim of a breach of section 15 is of unfavourable conduct because of something arising in consequence of a disability which is not a proportionate means of achieving a legitimate aim.

33 There is the following helpful summary of the applicable principles in paragraph L[377.02] of *Harvey* concerning the question whether any unfavourable treatment "is a proportionate means of achieving a legitimate aim":

> "The EAT in *Hensman v Ministry of Defence* UKEAT/0067/14/DM, [2014] EqLR 670 applied the justification test as described in *Hardy and Hansons Plc v Lax* [2005] EWCA Civ 846, [2005] IRLR 726, [2005] ICR 1565 to a claim of discrimination under EqA 2010 s 15. Singh J held that when assessing proportionality, while an ET must reach its own judgment, that must in turn be based on a fair and detailed analysis of the working practices and business considerations involved, having particular regard to

> the business needs of the employer. (Applied *Monmouthshire County Council v Harris* UKEAT/0010/15 (23 October 2015, unreported)). As stated expressly in the EAT judgment in *City of York Council v Grosset* UKEAT/0015/16 (1 November 2016, unreported), the test of justification is an objective one to be applied by the tribunal; therefore while keeping the respondent's 'workplace practices and business considerations' firmly at the centre of its reasoning, the ET was nevertheless acting permissibly in reaching a different conclusion to the respondent, taking into account medical evidence available for the first time before the ET. The Court of Appeal in *Grosset* ([2018] EWCA Civ 1105, [2018] IRLR 746) upheld this reasoning, underlining that 'the test under s 15(1)(b) EqA is an objective one according to which the ET must make its own assessment'."

Constructive dismissal

34 A claim of a dismissal within the meaning of section 39(7)(b) of the EqA 2010 usually relies on conduct which, taken cumulatively, amounts to a breach of the implied term of trust and confidence. That is the obligation on an employer and employee not, without reasonable and proper cause, to act in a way which is likely seriously to damage or to destroy the relationship of trust and confidence that exists, or should exist, between employer and employee as employer and employee. The obligation can be breached by either a single act or an accumulation of conduct which, taken together, amounts to a breach of that term. In determining whether there was such conduct, the approach required to be taken is stated most clearly and authoritatively in paragraphs 14-16 of the judgment of Dyson LJ (as he then was) in *Omilaju v Waltham Forest London Borough Council* [2005] ICR 481.

35 A breach of the implied term of trust and confidence will be a dismissal within the meaning of section 39(7)(b) of the EqA 2010 only if, applying paragraphs 68 and 69 of the judgment of Cavanagh J in *De Lacey v Wechseln Ltd (t/a The Andrew Hill Salon* [2021] IRLR 547, the conduct which constituted that dismissal included conduct which was in breach of the EqA 2010 which "materially influenced the conduct that amounted to" that breach of the implied term of trust and confidence. That may be an oversimplification of the test required by that judgment to be applied, which was stated in paragraph 69 in the following words.

> "Where there is a range of matters that, taken together, amount to a constructive dismissal, some of which matters consist of discrimination and some of which do not, the question is whether the discriminatory matters sufficiently influenced the overall repudiatory breach so as to render the constructive dismissal discriminatory. In other words, it is a matter of degree whether discriminatory contributing factors render the constructive dismissal discriminatory. Like so many legal tests which are a matter of fact and degree, this test may well be easier to set out than to apply. There will be cases in which the discriminatory events or incidents are so central to the overall repudiatory conduct as to make it obvious that the dismissal is

> discriminatory. On the other hand, there will no doubt be cases in which the discriminatory events or incidents, though contributing to the sequence of events that culminates in constructive dismissal, are so minor or peripheral as to make it obvious that the overall dismissal is not discriminatory. However, there will be other cases, not falling at either end of the spectrum, in which it is more difficult for an ET to decide whether, overall, the dismissal was discriminatory. It is a matter for the judgment of the ET on the facts of each case, and I do not think that it would be helpful, or even possible, for the EAT to give general prescriptive guidance for ETs on this issue."

36 The implied term of trust and confidence is the means by which an employee can normally rely on any failure by the respondent to comply with its own grievance procedure, and that is likely to be the case here. As discussed on 16 October 2024, the main key case where the EAT expressly referred to the contractual impact of a failure by an employer to give an employee an opportunity to state a grievance concerned a situation where (unlike here) there was no such opportunity given at all. That case was *Goold (Pearmak) v McConnell* [1995] IRLR 516, where, as it was said (accurately) in the headnote:

> "It is an implied term in a contract of employment that the employers will reasonably and promptly afford a reasonable opportunity to their employees to obtain redress of any grievance they may have."

37 Where there is in place a grievance procedure, we did not see that term as having any effect, as (1) it is rather too nebulous to be applied on its own and (2) the now well-established implied term of trust and confidence provides a much more reliable test for determining whether there has been wrongful conduct, not least because a failure to comply with a grievance procedure could be part of an accumulation of conduct which, taken together, amounts to a breach of the implied term of trust and confidence.

The evidence before us

38 We heard oral evidence from the claimant on his own behalf and, on behalf of the respondent, from Ms Nikki Porter and Ms Catherine Rumbelow. Ms Porter was at all material times the respondent's Managing Director and Ms Rumbelow was at all material times the respondent's Chief Operating Officer.

39 We had before us a bundle of documents which, including its index, was 408 pages long.

40 Having heard that oral evidence and read such documents in the hearing bundle to which we were referred and any others that appeared to us to be relevant, we made the following findings of fact.

Our findings of fact

The claimant's role and where he was required by the respondent to work

41 Ms Porter worked at the respondent's offices in Milton Keynes and Ms Rumbelow worked mainly from home.

42 The claimant's contract of employment (at pages 105-115), which was sent under cover of the letter of offer at pages 103-104 dated 5 April 2022, stated (on page 106) that the claimant's place of work was the respondent's "main office". The respondent employed 13 members of staff at the time of the claimant's employment. That was stated by Ms Porter in paragraph 4 of her witness statement, which was not challenged and which we accepted. She continued:

> "4. ... Of these, we employed 4 in the sales team. I was Owen's line manager. The role of Sales Development Representative is to make outbound telesales phone calls promoting our products and services, qualifying potential opportunities and securing online demonstration appointments. The role is primarily telephone based, and requires the employee to use our CRM System to record the outcome of calls and to manage daily activities.
>
> 5. It was on or around the second day after he started working for us, that we became aware that Owen has a birth defect to his left hand. I initiated a conversation with Owen to discuss whether he required any adaptations or assistance with workstation equipment to enable him to do his job. During this conversation, Owen made it clear that his left hand did not affect his ability to work and that no adjustments were required. Moreover, his lack of hesitancy to answer the question, his tone of voice and body language gave me the impression that he was very definite about his answer."

43 The claimant did not put it to Ms Porter that any part of that passage was not true, including by putting it to her that she and he had not had the conversation to which she referred in paragraph 5 of her witness statement. He himself said nothing about that conversation in his own witness statement. In addition, he put it to Ms Porter that she was aware of his physical disability "from early on in" his employment. We therefore accepted what she said in the rest of paragraph 4 of her witness statement and in paragraph 5 that statement.

44 The claimant's contract of employment continued under the heading "Work Location" on page 106:

> "You may also be required to travel within the UK and elsewhere in the world, or to work from home as required by the scope of your duties. Any requests by your manager or line of business to travel and/or occasionally work from another location will be subject to local law and will be appropriate and reasonable for the efficient and proper performance of your duties.

> Any requests for an employee to work for an extended period or permanently from another location will also be subject to local law and should this entail a significant change in travel time or relocation, mutual agreement and/or reasonable notice will be required.
>
> Travel and working in another location may be subject to having the relevant work permit/visas in due time.
>
> Reimbursement of travel expenses will be in accordance with the policy applicable to you in the UK."

45 That seemed to us to have been lifted from a standard set of terms which plainly was inapplicable. Adopting the words of HHJ Tayler in paragraph 27 of his judgment in *Ramos v Nottinghamshire Women's Aid Ltd* [2024] EAT 67, "it is clear that the word processor ha[d] done much of the heavy lifting" in the drafting of that passage. In fact, the parties agreed orally, in the manner described by Ms Porter in paragraph 6 of her witness statement (which was not challenged) that the claimant "would be able to work from home for two days a week after the four week induction onboarding period had been completed". She continued:

> "6. ... Following successful onboarding, Owen was informed that he could work two days, Monday and Thursday, from home but that he would need to work the remaining three days from the office as internal meetings, training and other collaborative activities needed to be organised around these days.
>
> 7. Things seemed to be going well and in September 2022, I personally nominated Owen for a team Employee Recognition Award because he had started to make appointments earlier than anticipated [page 145].
>
> 8. From 6 June 2022 onwards, Owen only actually worked the required three days per week from the office on four separate occasions. Owen would regularly send me last-minute text messages requesting to work from home on additional days; due to these requests being made at such short notice, I had to agree them to avoid causing significant operational disruption. Owen would provide a variety of reasons to not attend the office, including: not being comfortable leaving his dog unsupervised; needing to take his dog to the vets; sinus infection, hay fever, stomach bugs, testing positive for Covid, a sore throat, heatstroke, and failing to reset his alarms after a lack of sleep."

46 The claimant did not contest that passage, and in any event we accepted it as accurate. Thus, the claimant attended the respondent's offices in person for the first four weeks of his employment without any apparent difficulty, and certainly without any indication by him of difficulty in doing so.

Events of September and December 2022 which were claimed to have been directly discriminatory

47 All was therefore going apparently well at the time when the first incident about which complaint was made in these proceedings occurred. That was the day in September 2022 when photographs were taken of staff of the respondent. The manner in which that allegation was made and responded to was relevant, and was as follows.

48 On 18 August 2023, the claimant sent the email and its enclosure at pages 84-91. That was done in response to the order of EJ Michell to which we refer in paragraph 6 above, which was to provide further information. On page 88, the claimant said this.

> "**Examples of Indirect Discrimination**
>
> December 2022 – The claimant was the only member of staff with a visible disability and he was the only member of staff that was not invited to the Christmas party in the board room or the Christmas meal and drinks out of the office. This could be seen as an example of discrimination as the claimant was the only person not invited to attend either event.
>
> Summer 2022 – there was company photos being taken of all employees and members of staff. Even Mark and Catherin were attending which it was rare to see them in the office. The claimant was due to be working from home on the day that the pictures were being taken. The claimant asked Ms porter if he should make himself available at the office that day to be present for the pictures. Ms Porter told the claimant not to, This again could be seen as further discrimination as the only employee with a visible disability was not invited to be in the company photos. Excluding the claimant further. And again the claimant was the only employee not invited to attend the company photos."

49 Those were new allegations, in that they had not been stated in the claimant's claim form or elsewhere in writing before they were made in the document of which that passage was part. The respondent was given permission by EJ Michell to amend its grounds of resistance in response to the claimant's further information, and the amended grounds were at pages 92-99. The amendments responding to those two new allegations were stated in new paragraphs 6 and 21, which were in the following terms, respectively.

> "6. The company arranged for Ms Catherine Rumbelow, Chief Operating Officer, to take workplace pictures on 01 September 2022. This was not an important event and not all staff were present. The Claimant did not attend on this day because he was on annual leave from 31 August and returning on 05 September."

> "21. On 30 November, Christmas festivities were announced during a Talk Shop staff meeting and everyone was invited to attend, including the Claimant."

50 The claimant said nothing in his witness statement about either of those events. Ms Porter, on the other hand, said this in the following paragraphs of her witness statement.

> "9. Owen has alleged that I excluded him from work photos on 01 September 2022, which he suggests is discrimination. I find this suggestion absolutely abhorrent. Pictures were taken that day by Catherine Rumbelow, Chief Operating Officer, but this was not an event where everyone was invited and told they needed to attend apart from Owen. This was not seen as an important event and not all staff were present. The real reason Owen did not take part in the pictures that day was because he was on annual leave from 31 August and returning on 05 September [page 146]. As we do with our other employees, when Owen started working for us we asked and encouraged him to let us take his picture so that we could then post the picture of him on our website and social media, which we did [pages 407-408]."

> "59. Owen has said that I excluded him from work events. Although given the opportunity to, he hasn't confirmed what event/s he was excluded from during these proceedings. He has mentioned in his timeline of discrimination that he was excluded from a 'Christmas party in the board room or the Christmas meal and drinks out of the office'. Owen, and other members of staff, were initially told on 30 November during a Talk Shop meeting [page 220] that we would be having a little festive cheer in the office with a few drinks and nibbles afterwards. Everyone was invited to attend, including Owen. Owen was also included on the email invite which was sent out on 08 December 2022 at 10.30 am [pages 257-258]."

51 Mr Stewart put the latter paragraph to the claimant, and took him to pages 220, 257 and 258 (not, as EJ Hyams said when giving oral judgment, only page 220: Mr Baber corrected that error after the hearing had ended and we now record the correct position). The first of those was a presentation "slide", which referred to "Festive Team Building and Drinks". The claimant's response was to say this (as noted by EJ Hyams, tidied up for present purposes).

> "A: I had had my access to work systems removed from this point.
>
> Q: Are you saying that you were deliberately excluded?
> A: I was on leave; off.
>
> Q: So you would not have been able to attend in any event?

A: It is similar to when photographs were taken; so, yes, I was due to be out of the office at the time and I offered to come in but I was told not to worry about it. The Christmas thing, I would probably not have gone; but my access had been removed.

Q: So it was not deliberate exclusion; but you would not have gone in any event?
A: I do not recall seeing this [i.e. probably page 220 and pages 257-258]; I was removed from the systems but by the time of Christmas I was so bad that I was not in a mood for celebrating.

Q: Regarding what you say about photographs: that was not in your witness statement?
A: I was told to keep things specific; I wanted to stick to things that were most relevant.

Q: You had no evidence to support it [i.e. the allegation concerning the photographs]?
A: Only verbal conversations. I knew pictures were coming up and that I was going to be off on annual leave; so I just went on leave."

52 Pages 257 and 258 were emails sent at 10:30 and 10:39 on 8 December 2022 by Ms Porter, to among others the claimant. In fact, the claimant relied on what he said in emails which were sent and received later on that day in support of his claim (see for example the email referred to on page 90 as "Email 3" which was copied at pages 229-230 and which we have set out in paragraph 63 below). In any event, as could be seen from the email dated 13 December 2022 at page 254 from Ms Porter to the claimant, the only things to which his access was removed were the respondent's "business systems, specifically Vonage and Mycus". That was because he was not going to be "working between now and 3rd January" and was a temporary measure.

The events which were relevant to all of the other claims of the claimant stated in the list of issues at pages 100-102

53 The rest of the claims of the claimant to which we refer in part by way of summary in paragraphs 6-11 above concerned the claimant's claim that he should have been permitted to work from home more than he in fact was so permitted, and the manner in which the respondent (through Ms Porter and Ms Rumbelow) dealt with the claimant's assertions that he should be so permitted. (By the time of closing submissions, the claim in relation to the claimant's workload was not pressed: see paragraph 121 below.)

54 The events relating to those parts of the claimant's claims from 27 October 2022 to 19 December 2022 were described by Ms Porter in paragraphs 11-57 of her witness statement. Those events were in many respects either recorded in writing or were themselves in writing in the sense that the events consisted of

emails between the claimant and Ms Porter. We did not understand the claimant to take issue with the factual part of those paragraphs of Ms Porter's witness statement. He did not take Ms Porter to any of them when cross-examining her. Rather, he took her to documents in the bundle and put points to her arising from them. For example, he cross-examined Ms Porter closely on the rationale which she stated in her email of 7 December 2022 at pages 231-232 (which we have set out in paragraph 62 below). That is not a criticism of the claimant because Ms Porter did not in terms state in her witness statement the things which were in that document as evidence in her witness statement, and the content of the document (to which she referred in paragraph 46 of her witness statement) was of central importance to our consideration of the claimant's claim that it was a reasonable step to permit him to work from home on every day of the week in the period in question here. However, some aspects of that content were stated in Ms Porter's description of what she had said to the claimant in the important meeting of 29 November 2022 to which she referred in paragraphs 29-35 of her witness statement. That was itself in part based on the contemporaneous record of that meeting at pages 205-210.

55 We emphasise that the period during which it was the claimant's case he should have been permitted to work from home entirely was not stated specifically by him, as he did not particularise the claim in that way, but that it was in our view plainly from the time when the claimant went home during the working day, taking half a day's sick leave on 22 November 2022 as described in paragraphs 22-27 of Ms Porter's witness statement, until his resignation, which was done by the claimant sending his email at pages 355-356. That email was sent at 12:58 on Sunday 15 January 2023 and the resignation was with immediate effect. We record here that we accepted the whole of the passage in Ms Porter's witness statement at paragraphs 11-57.

56 The claimant was absent from work because of sickness from 22 to 28 November 2022 as shown by the fit note at page 199. The first date when the claimant said that he should be permitted to work from home all the time was 28 November 2022. That was done in the email of that date at page 201, which was in these terms.

> 'Good afternoon Nikki,
>
> I have spoken with a doctor today and have been advised that I am fit for work. But have been advised to work from home due to stress related illness. I have attached a medical note to this email. I am aware it says "advised for light duties" on the medical note, if required I can get the doctor to be more specific with his wording.
> Also on top of this, I have fractured my hand last week so will be unable to drive. I haven't currently got a medical note for this but can get one if required.

> Can you please confirm that in light of the advice I have received today from my GP surgery and the fact I have a broken hand, it will be OK to work from home?'

57 The fit note was at page 202 and referred only to a "stress related problem". The email at page 203 from Ms Porter to the claimant dated 28 November 2022 permitted him to work from home on the following day.

58 The next day was the day of the meeting of 29 November 2022 of which there was the contemporaneous record at pages 205-210 to which we refer in paragraph 54 above. The final two substantive paragraphs of that record were at pages 209-210 and were as follows.

> "Nikki then moved onto Owens current doctors note and the need to get further information around light duties and to ensure he is safe to work with a fractured hand. Owen expressed that he needs to work and can work with his injured hand, mainly because it is his left hand and it's not something he requires full use of for his current work. Nikki also offered support to Owen regarding transport to get him to the office each day and home. Owen expressed that this would not be possible as its not the transport that's the issue, it's that Owen struggles to dress himself take a shower and wash his hair and general day to day activities hence home working is more suitable. Owen did raised with Nikki that Nikki can come and help dress him if required, of which Nikki felt the comment with inappropriate. Nikki then confirmed that once he had received an updated doctors note she would review and confirm back to Owen arrangements regarding working from home.
>
> Nikki moved on to discuss today's duties, events later this week and any other additional support Owen may need whilst working from home. Nothing was raised from Owen and the meeting was then closed with the view that Owen will continue to work from home for the rest of the day and Nikki will decide on further home working once a revised doctors note is received."

59 At the end of that day, 29 November 2022, Ms Porter sent the email at page 211, in which she said this.

> "Thanks for forwarding your fit note, having reviewed this and short-term work activities, I confirm that I authorise you to work from home up until and including next Monday 5th December. At this time, I will need to review the situation with you as its important we get you back into the office working with the rest of the team. At that time, we can consider if there are any working adjustments that enable you to return to the office."

60 In paragraph 43 of her witness statement, Ms Porter said this.

> "I had a 1-1 Teams call with Owen on 06 December in order to see how he was getting on. The conversation was driven by him not wanting to come into the office, not any other adjustments. Owen laboured the point that he could do his job as long as it was from home as he said it only involved using the phone."

61 On 7 December 2022, so on the following day (which was a Wednesday), at 12:34pm, the claimant sent Ms Porter the email at page 224. The whole of that email was important, and it was in these terms.

> "Following on from our meeting yesterday, I would just like to raise a few points around a statement you made during our meeting.
>
> You mentioned to me that if my doctor gives me a medical note that says I am fit to work but from home or on lighter duties, then you will take it as I am not fit for work because I am not in the office.
>
> As a disabled member of staff that has further disabled himself by accidentally breaking my hand, I am concerned at this ultimatum that you will ignore the advice of a medical professional and deny me the right to earn money, when working from home is a reasonable adjustment that is being suggested by the doctor. The doctor is making these suggestions as currently I can not drive at all due to having no fingers and a broken hand on top of it. Also on top of this I can not currently dress myself properly or wash myself sufficiently (which I have made you aware of), the thought of being in the office not dressed and washed correctly is embarrassing and humiliating and amplifies my other health issue surrounding the stress. It is causing me anxiety and a lot of worry. I suffer with depression and anxiety and these statements are amplifying these conditions.
>
> Then to have it said to me that doctors advise will be ignored, even though in these circumstances of me suffering with stress, work related stress, anxiety, depression and being physically disabled and then having a broken hand, the thought that on top of that Riskex will willingly force me to not earn money and be at more financial detriment is not very fair or nice when there is reasonable suggestions being made that allow me to care for my health and wellbeing and also allow me to work and earn money during a national financial crisis.
>
> The comment to declare me not fit to work against the doctors advise is also unfair as I have not been offered any other alternative. You just went straight to denying me the ability to earn money even though a doctor is saying I can work but adjustments need to be made. The only alternative offered was that someone will give me a lift into the office, which I appreciate but does not offer me any solution to the embarrassment of not being able to wash or dress properly.

> This whole matter is putting me in a position where you will make me choose between my health and safety or my financial situation and responsibilities. The statement you made makes me feel like you are giving me the ultimatum that I have to risk my physical health by driving and mental wellbeing by being anxious and embarrassed to be in the office or I can not work and earn money? As I am sure you are aware, mental health illnesses are a protected characteristic of disability discrimination law. Due to the fact that I am currently suffering with work related stress on top of depression and anxiety I hope this statement will be reviewed. I will be seeking further advise around this. Also the fact that I am disabled due to having no fingers on top of having a broken hand, I feel my physical disability is also being overlooked and not taken into consideration in the slightest.
>
> I ask for riskex to either be fair and reasonable and work with the doctors advise, or offer suitable alternatives that take my physical and mental health into consideration during these struggles I am facing, or if you will declare me not fit to work against medical advise and my above points and me wanting to work I will be expecting to be paid in full.
>
> I am hoping this situation can be resolved, however I do have a couple of concerns I could be starting to be discriminated against, so if that continues to be the case I would be massively concerned."

62 Ms Porter responded to that email later on that day, in her email at pages 231-232, which she sent to the claimant at 5.11pm, and in which she said this.

> "Following our call yesterday and your note below, I am writing to provide clarity regarding your working from home arrangements, particularly in relation to your recently fractured hand.
>
> To confirm our conversation yesterday, I advised you that I authorise you to WFH for the rest of the week until your fit note expires [and that was therefore until 9 December 2022, we noted] however, after that you will need to return to the office the agreed 3 days per week as I need you back in the office with the rest of the team. I also advised that if you receive another fit note advising that you are fit to work but only from home then by the terms of that fit note you will be deemed unfit to work as the business requires you to return to the office next week.
>
> This was by no means an ultimatum or at any time did I say or infer that I would ignore medical advice. My intention was to help you with your logistics planning by clarifying ahead of next week that a fit note advising to work from home would not automatically mean that I would be in a position to authorise that.

We have spoken before regarding the reasons why it is important for you to be in the office 3 days per week and why the business needs you to be here. For the avoidance of confusion, I have outlined them below:

1. **Your Employee Development Plan (EDP):** You are still relatively new to the business and as such have only acquired a basic knowledge of our products and the markets we serve. Your objectives as laid out in your EDP require you develop a deep understanding of both HSE Legislation and the AssessNET product. This means that you need to shadow sales meetings and demonstrations as well as learn from others by participating in general work-related conversations.
2. **Cross fertilisation of ideas:** We are a small business with only 5 people working in the commercial function. We are also operating in a volatile market where we have to continually come up with new ideas to respond to changing market needs and being physically together every week is an important part of sharing ideas and bouncing off one another.
3. **Team collaboration and supporting your colleagues:** Again, as a small sales unit the team are reliant on each other to build a working environment to motivate each other and build a collaborative working culture.
4. **Operational efficiencies:** Your prolonged absence from the office adds an increased burden on my time and that of your colleagues in terms of the duplication required to having to repeat briefings on new campaigns or processes and other important work-related information.

As you are aware, I have for some time now been very flexible regarding your working from home due to various different challenges you have had and therefore demonstrated how supportive we have been as a business. For a number of different reasons, you have not been present in the office for 3 days in any given week for more than 3 months now, and I hope this example illustrates how supportive I have been. However, your prolonged absence from the office is now causing operational disruption to the business.

When you review your fitness to work with your GP next week and in the event that they feel that you are still fit to work with reasonable adjustments, Can I suggest that you ask them to put as much detail as possible on the fit note as this will help me to make an informed decision and make suggestions regarding any lighter duties or other adjustments that may be possible."

63 On 8 December 2022, so the next day, which was Thursday, the claimant wrote to Ms Porter at 09:22 (pages 229-230) in the following terms.

“Morning Nikki,

Thank you for your reply yesterday.

I apologise, but in response to your first line in your email, again you mention that if my next fit note advises that I am fit to work but to work from home, the business will still require me to be in the office and that I will be deemed unfit to work if I am not. However if the medical note states I AM FIT FOR WORK, but it advises that I need to work from home, this is medical advise stating I am fit to work but I am not fit to travel or dress etc. So this definitely appears that if my doctor says I am fit to work but from home or can not travel etc then you will deem me unfit for work? Apologies for my possible confusion, however this statement gives the impression you are saying you will ignore medical advise provided by my doctor? I understand you say the business requires me to return to the office. However if I am currently further incapacitated by having a broken hand, more so than I normally am due to not having fingers, it is possible for me to do my job from home so may I ask that this statement means you require me in the office so desperately that the business is prepared to put me at risk of injuring myself further?

I appreciate you have been understanding at times when I needed to work from home. As I stated following my probation review, I appreciate this but also it has never been raised as an issue at the times where I have asked or needed to for emergency reasons. This issue was never raised until recently. It is unfortunate that I have broken my hand on top of the stress related illness I’m facing currently. And I fail to understand why in the light of a serious injury on top of a serious physical disability and suffering with mental health issues the business is so demanding I return and put myself at physical or mental health risks?

In answer to your statement about not being present in the office for 3 days in any given week for the last 3 months, originally you said this was the last 6 months so this statement has changed quite a lot, but following looking at your report I noticed this was not the case. Also, I notice that you are counting weeks where I did 2 or 3 days in the office but then had annual leave as a week where I did not fully work in the office. I feel it is unfair to penalise me for using annual leave.

I will review with my GP tomorrow and will also have a fracture clinic appointment on Monday as well. When discussing options moving forward with my doctor I will ask him to elaborate a bit further on the medical note. However in light of the fact my hand is not getting better and the swelling is getting worse, I fear it may be the same situation as last time.

Which is now causing me greater anxiety and adding to my work related stress following your statement/ultimatum that “if your doctor signs you off

> fit to work but from home, it will be deemed that you are not fit to work". It really sounds and feels like if my doctor advises me I still need to be careful and take care of my health you will deem me unfit, which really gives the impression that next week you may make me choose between health or money. Which again makes me feel like my physical disability and current injury is not being considered and my mental health is being further damaged with the stress, worry, anxiety and upset it is causing. Which again is amplifying the thought I am being discriminated on grounds of my disability. I have no fingers so when an injury like a broken hand happens it affects me more than most able bodied members of staff, but this is not being understood or considered at all. I am having expectations that would maybe be ok for 2 handed people, but as a 1 handed person breaking your hand severely and dramatically hinders you.
>
> As mentioned in light of all this, if my doctor advises I should work from home, and you deny me the right, I will expect to be paid in full or I will pursue whatever legal action is necessary to retrieve any lost wages.
>
> You mention that my not being in the office is causing operational disruption to the business, could you please elaborate on how? And please provide some tangible examples?"

64 Ms Porter replied at 12:59pm on that day in the following terms (at page 229):

> "I am going to schedule a Teams call for Monday when we can discuss the below, by which stage I will have had the opportunity to review any new fit note that you might supply and therefore be able to make an informed decision and other suggestions regarding any lighter duties or other adjustments that might be possible.
>
> Given the number of points and concerns you have raised, James Sharp will also attend as note-taker.
>
> During the meeting, I will also respond to your separate email of this morning regarding potential legal action for heat stroke personal injury claim.
>
> I realise you have several concerns and frustrations at the moment Owen, but it's important that you remain focussed on work activities during work hours until our meeting on Monday."

65 Later on the same day, 8 December 2022, at 15:02, the claimant sent the email at page 233 to Ms Rumbelow. In that email the claimant raised a grievance about the manner in which Ms Porter had been acting towards him in relation to his requests to work from home more than he was already permitted to do. The respondent's grievance procedure was at page 143 which included the following indication of the time within which a grievance would normally be addressed.

"If a formal grievance process required, we will:

- Arrange a formal meeting within a reasonable timeframe, ideally to be held within two weeks of receiving the grievance;
- Allow you to be accompanied to any formal grievance meetings by a workplace colleague;
- Encourage you to explain your grievance more thoroughly and explore with you how you think it could be resolved;
- Adjourn the meeting if required to undertake further investigations e.g. speaking with employees and reviewing emails;
- Respond to you in writing of what action will be taken to resolve the grievance (if any);
- Allow you to appeal if you are not happy with the outcome;
- Hear the appeal within a reasonable timeframe, ideally no more than 14 days after receiving the appeal;
- Ensure the appeal is heard by an impartial person who has the authority to overrule the original decision;
- Confirm the outcome of the appeal within a reasonable timeframe, ideally within one week of the appeal meeting; and
- Maintain written records of the process."

66 Shortly after sending that grievance email to Ms Rumbelow, the claimant sent the email at page 228 to Ms Porter. It was sent at 3:08pm on the same day, i.e. 8 December 2022, and was as follows.

"Thanks for your reply.

I have escalated this to Catherine as I feel this needs an impartial person to hear my complaint and then investigate and decide impartially.

As my complaint involves you I do not feel this would be a fair and impartial process with you leading it.

I will wait to hear from Catherine what her next steps will be."

67 At 19:37 on 8 December 2022, Ms Rumbelow wrote to the claimant in the email at page 233:

"Sorry to hear about this. I will need to fully understand the situation, so I would like to do a Teams call with you first thing tomorrow at 0845 at the start of the day.

I will call you tomorrow and we can take it from there."

68 On Sunday 11 December 2022, i.e. Sunday, at 18:56, Ms Rumbelow sent the claimant the email at page 238. Its text was in these terms.

"Further to our conversation via Teams on Friday when you outlined your grievance regarding Nikki Porter, Riskex's Managing Director, I have taken on board your comments and have also had a brief conversation with Nikki.

It's important that these serious allegations are investigated thoroughly, and that we support you going forward. Please note that I am on annual leave from tomorrow, Monday 12th December 2022 and will be available again when the office reopens on 3rd January 2023.

I am aware that you have an appointment at the Fracture Clinic on Monday 12th December, and am unable to predict what your Doctor's fit notes may advise until you can be deemed fully fit for work. However, depending on the outcome of any medical appointment and fit note we receive, I propose the following temporary adjustments, of which Nikki is fully supportive.

1. On the days that you would usually be expected to attend the office, which is a priority for Riskex as a business in order to continue with your training and for operational efficiencies, we offer you reduced hours. You may start one hour later, and finish one hour earlier than the norm, with a half hour break for lunch. Normal hours will be resumed once you are fully recovered. On the contracted days that you are working from home, then normal hours (8.45am to 5.15pm) will be worked.

2. We are a small business, and as your Line Manager, Nikki Porter will continue to support you with day-to-day operational activities. She will also continue to work with our HR lawyers regarding compliance advice.

3. In the lead up to the Christmas break, if you are not comfortable liaising with Nikki Porter on a 1:1 basis for operational matters, then you can contact James Sharp for support in his capacity as a member of the Riskex SMT.

If you wish to pursue a formal grievance procedure about Nikki Porter, then in the first instance you need to confirm this in writing to me, via email, clearly stating the details of your grievance.

This will form the basis of a formal grievance meeting, the process of which will be outlined separately, according to the procedure detailed in the Riskex Employee Handbook (see attached).

Any further investigations and formal discussions will take place early in the New Year."

69 The claimant responded at 22:04 on the same day in the email at page 239:

> "In response to your email, I would like to raise a grievance against Nikki Porter.
>
> Based on the facts already outlined in emails sent to you on Friday and earlier this evening.
>
> I feel I am being discriminated on the grounds of disability discrimination and the fact Nikki will not make reasonable adjustments to my working arrangements. Even though I am a disabled member of staff making the request in light of having a broken hand. Also when this issue was raised twice it was ignored twice.
> I feel I have already evidenced enough information to demonstrate that I am being discriminated.
>
> The law and guidance around this matter is pretty clear and quite clearly being totally ignored.
>
> I look forward to your response in relation to my grievance and what the next steps are."

70 Ms Porter then emailed the claimant about work matters on the next day at 10:39am (pages 241-242). He replied at 11:58 (page 241):

> "I have not long returned from my fracture clinic and hand therapy appointment at the hospital. It took a bit longer as they are concerned that the swelling has not gone down at all and that I have no movement in the wrist.
>
> As you are aware I have been signed off on a medical note with lighter duties as part of the doctors advice, I have been given quite a few different activity lists and campaigns to focus on so due to the stress related illness at present and being on lighter duties has meant some tasks are behind.
>
> Also due to the broken hand I am fully typing with one hand. Which is hard work and also leads to strains and aches so I have to take extra rest breaks to let my right hand recover."

71 Ms Porter responded at 4.01pm (page 244):

> "I fully appreciate that you will be less productive whilst your fractured hand slows you down, which is one of the reasons it's important for you to update your activity lists when requested as unless you let me know which projects you are behind on or you are struggling with at the time, I will be unable to help by either diverting or postponing activity.
>
> Please therefore complete the activity progress spreadsheet (there's very little typing, mostly just updating me on numbers).

> This will give me the opportunity to understand what your work productivity is at the moment and therefore more accurately plan workloads and expectations.
>
> If you are struggling to do this please let me know as I'm happy to type in the spreadsheet for you based on a verbal update."

72 At 8.23am on the next day, Tuesday 13 December 2022, Ms Porter sent the email at pages 250-251, in the following terms.

> "Please can you advise the situation regarding your medical fit note as per your emails, I was expecting this at the end of yesterday? I need to understand the detail of your fitness to work so that I can properly appraise any reasonable adjustments that may be possible if that is relevant, particularly in the light of your emails yesterday advising that there is no improvement regarding your physical injury or stress despite the reasonable adjustments we have already made over the last 2 weeks.
>
> I do need to have received and reviewed your new fit note and ascertained your fitness to work before you begin work this morning."

73 At 9.48am on the same day the claimant responded (page 250):

> "Just a quick follow up.
>
> Can I just ask the reasoning behind sending this email at 8:23, this is out of my work hours and due to the fact I am suffering with work related stress with everything going on, I would of [sic] thought it would show more of a duty of care and more sensitivity by perhaps holding off before piling pressure on me."

74 At 1.08pm on the same day, the claimant sent the long email at pages 252-253 to Ms Porter, Ms Rumbelow, Mr Sharp and Mr Mark Delo. It included the following paragraph (on page 252).

> "As I have clearly explained to Nikki in my emails dated 7/12/2022 at 14:59, which Nikki responded to on 7/12/2022 at 17:11 with further discrimination by ignoring requests for reasonable adjustments to be made, I then responded on 8/12/2022 at 10:17 again stating that I was in a situation currently that being disabled and having a broken hand requires me to need to ask for reasonable adjustments to be made and that the law protected me around this, I was again confronted with further discrimination and my requests ignored on multiple occasions. I am a disabled member of staff. I suffer with a physical disability, that affects my day to day abilities with certain tasks, having a broken hand makes some of these tasks impossible for me. Not making reasonable adjustments around this when asked is

discrimination. I also suffer with mental health issues in the form of anxiety and depression, these are also protected under disability discrimination by the Equality act 2010 as a form of disability, I currently have medical notes that show I am also suffering with a work related stress illness, I have explained multiple times that not making the reasonable adjustments and putting pressure on me to return to the office when I will not be dressed or washed correctly is making my anxiety a lot worse and impacting my mental health, this is also ignored, which in turn is further discrimination."

75 At 15:40 on that day, 13 December 2022, Ms Porter sent the email at page 254 to the claimant, all of which was relevant. Its text was this.

> "Despite clear communication from me via email at 08.23 am this morning advising that you should not work until I have received, reviewed, and responded to your fit note, I can see from our systems that you have made work related calls via our VOIP system and entered notes onto our CRM system and therefore have ignored this instruction that has been given for your own health and safety.
>
> As you are aware as a business we have a duty of care for your health and safety and therefore until I receive a medical note confirming your fitness to work I cannot allow you to work as at this stage I do not have adequate information in order to make an informed decision. Your emails of yesterday advising on the outcome of your fracture clinic appointment gives me enough cause for concern regarding your fitness to work to mean that I do need confirmation via a medical fit note before I can authorise you to work and on the basis of any agreed reasonable adjustments.
>
> That being said and given the current situation regarding the fact that your hand injury has not improved and that you are still suffering from stress, I have made the decision to grant you leave from work on full pay until and including 23rd December 2022. This decision is purely discretionary, and I hope will aid your hand injury recovery as well as your stress and anxiety.
>
> As you know, we have an office shutdown from close of business on the 23rd of December, reopening on Tuesday 3rd January 2023 with all staff taking 3 days of their annual leave allowance during the office closure period. Your fitness to work will be reviewed on Monday 3rd January 2023.
>
> As you will not be working between now and 3rd January I will arrange for temporary switch off to our business systems, specifically Vonage and Mycus.
>
> I hope that the time off work between now and January 3rd will be beneficial to you in aiding your recovery."

76 On 19 December 2022, Ms Porter asked the claimant for "a copy of [his] medical note of last week". That was done in the email on page 256. The claimant responded in the email above it on the same page, which was also dated 19 December 2022, stating among other things this:

> "As you put me on full leave with full pay in light of all the circumstances, plus then removed me from the work systems, I presumed the matter was decided and cancelled the medical note."

77 The next relevant event was that at 10:11 on 3 January 2023 the claimant sent the email at pages 279-280 to (principally) Ms Rumbelow. Its text was this.

> "When Nikki put me on leave last month, I was told that my access to work systems was being removed and my fitness for work would be reviewed on the 3rd of January.
>
> On returning this morning I still have no access to Mycus or Vonage. There has also been no indication to a meeting being set to review my returning to work.
>
> I am also STILL waiting for a response regarding my Grievance against Nikki and the blatant discrimination I have faced. Which by now is massively overdue according to the employee handbook.
>
> In light of the above I logged in early this morning so I could be ready in advance if there was any meetings scheduled or calls to discuss any of the above. Which there has been absolutely zero mention about any of it.
>
> Due to being sat here for an hour and a half with absolutely zero contact from any senior management, I am logging off and will presume that as there has been no discussion or confirmation that my leave period is expired, I will expect to be paid in light of the poor organisation and communication on behalf of Riskex.
>
> May I ask that this is reviewed and a meeting scheduled with advance notice for later this week to discuss the plan moving forward.
>
> I hope to hear something from someone regarding the above."

78 At 12:28 on the same day, 3 January 2023, Ms Rumbelow replied (pages 278-279):

> 'Thank you for your email, and I hope you're feeling better and that your hand is now recovering.

I have instructed James to restore your access to Vonage and MyCus, although I still haven't received the copy of the fit note that is outstanding from the 12th December 2022 for our records.

James explained in his email of the 23rd December, as follows:

> "given your recent hand injury has been slow to improve, and your various communications regarding your work-related mental health issues, it is imperative that we receive an updated fit note that confirms your fitness to work status before the 3rd January 2023. You will be unable to return to work until we have received and reviewed this."

As of this morning we hadn't had any communication from you in this regard, or any update as to your current health status so that we can effectively assess your current situation. Your return to the office is important so that we can continue your training and development, in line with your EDP.

Regarding your behaviour, we have asked you to follow a reasonable management request and your continued failure to respond may be liable to lead to disciplinary action against you.

Please can you give me an update of your current position, and supply a copy of the outstanding fit note by end of play today."

79 The claimant replied at 12:46 on the same day in the email at page 278. It was in these terms.

> "Before I answer any of this email. I ask again, what is happening with my grievance? This was raised to you directly on the 8th of December. I have still had no response, no meeting scheduled? I have asked for an update but had no reply? Can you please inform me what you intend to do?
>
> In response to your email:
>
> My hand has still not fully recovered. I have my next fracture clinic appointment tomorrow and will find out more. My mental health situation has not changed due to the ongoing discrimination I have faced.
>
> In relation to a medical note from the 12th of December, As Nikki put me on full leave with pay. I took the matter as closed. Nowhere in Nikkis email did it say this was dependent on a medical note. She made the decision with the information that she had. I feel that the decision was made to put me on full leave, when I was just asking to work from home, due to being put ON LEAVE my situation in my personal life is none of Riskex business in that time. As I was on leave and not working, I do not wish to share my private, personal and sensitive information for that time.

> James email was sent at 17:11 on the 23rd of December. 4 minutes before the close of business. Again as I was on leave, this was nowhere near a reasonable amount of time to read, respond or reply to this email. And again I refer to my above point, as I was on leave, and it was Christmas, my health across this period was not any of Riskex business.
>
> In regards to returning to the office, I have still not fully recovered. And as nobody has scheduled a meeting to discuss this with me, I was unaware what the next steps should be. I was told I was not allowed to return to work until this had been reviewed on the 3rd of January. Threatening disciplinary action is a bit unfair Catherine. As this is the first time I have been spoken too about my current situation. First time I have been asked for an update. Even though senior management told me not to return until this had been reviewed. To threaten disciplinary action is unreasonable, especially due to the fact nobody in management has reached out to tell me what to do. Even more Especially when I am still waiting for a response to my grievance against Nikki."

80 On the following day, 4 January 2023, Ms Rumbelow sent the claimant the letter at page 281, inviting him to a formal grievance meeting on 6 January 2023 in person at the respondent's offices.

81 Also on that day, the claimant's GP issued the fit note at page 282, stating that the claimant was suffering from "Work-related stress" and that he "may be fit for work taking account of the following advice", which was that "Working from home is recommended". That was stated to be the case for 7 days from 3 January to 9 January 2023. It was not clear when that was sent to the respondent, but at 8.24am on 4 January 2023 Ms Rumbelow sent the email at pages 289-290 in which she reiterated what was said in James' email of 23 December 2022 as set out in paragraph 78 above, and then said this.

> "Planning and preparation from you to obtain a fit note, based on your individual knowledge of your health status would have enabled us to review this effectively.
>
> We would like to arrange a meeting to discuss your return to the office and productive work, but as you say you have not recovered and are still having problems, it is essential that we have your Doctor's opinion (not the fracture clinic) in the form of a current fit-note in order to do this safely.
>
> As you have not provided a fit note to cover you as of 3rd January, the situation is unclear to us if you are indeed safe to work, and therefore it would appear you are currently on unauthorised unpaid leave.
>
> Once you've attended the fracture clinic today, please let us know the outcome and also provide a fit note from your GP if appropriate.

I will be sending you an invitation to attend a grievance meeting in another email, which I plan to arrange for this week."

82 The claimant then responded (at 8.40am) in the email at page 289:

"Also I'm addition [sic] you email a moment ago, I feel it is important to add, another reason I am not willing to supply further medical notes, last month I had medical notes and was told repeatedly by Nikki that the advice would be ignored. And then the doctors advice was ignored in the end.

So I have no faith surrounding this matter."

83 Evidently, after that, the claimant sent the fit note at page 282 to which we refer in paragraph 81 above, as at 11:58, Ms Rumbelow sent the claimant the email at pages 288-289 in the following terms.

'I am finding your communications very confusing as you've just informed us that you are indeed fit for work. If this is the case, why did you not attend the office yesterday and today as per your employment agreement to work from the office on those days?

We are doing our utmost to help you and yet your approach seems very confrontational and is frankly very disruptive to our business and unprofessional. I am personally very disappointed with the tone of your emails and behaviour as you it seems you have no intention of working.

I am working to arrange the grievance meeting, which I will email you about shortly.

Riskex has always maintained very high ethical business standards and we have tried our utmost to support you, and yet you continue to criticise and act in a confrontational manner.

In answer to your assertion that we have been requesting your medical notes, that is not the case. We have only requested the relevant fit-notes, and I quote from your Employment Contract:

> "The company should be notified as early as possible on the first day of illness. The company reserves the right to require medical certificates after seven days, and periodically thereafter."

Your refusal to supply us with the information we need to support you in this ongoing process is obstructive and not helping us to reach a solution.

> In fact, as we appear to be reaching an impasse, what solution to your grievance do you seek? This will be discussed at the grievance meeting, and it would be helpful if you give this some thought.'

84 On the same day, at 16:02, the claimant responded in the email at pages 287-288. The email started with the following two paragraphs (after which the claimant made a number of assertions about the law).

> "Yes it is all getting a bit confusing. And hard to keep up with.
>
> In regards to my health as mentioned there has been no return to work meeting held for my health to be discussed and reviewed as per Nikkis email in December. Following my fracture clinic appointment, yes my physical injury is gradually improving but still not 100%. There will be a follow up appointment in 2 weeks. In regards to my mental health and the work related stress, there has been zero improvement. Due to the obvious reasons that I have previously outlined. Due to the nature of my anxiety and depression and work related stress, which has been affected by the discrimination I faced from Nikki, I do not feel comfortable to be in the office with my ongoing complaint. These are things I would of been willing to discuss in a review meeting as per Nikkis instructions in December."

85 Ms Rumbelow responded in the email sent at 5:00pm on the next day, 5 January 2023, at page 287, which started:

> "To address points made in your email below, please let us clarify the following:
>
> 1. Thank you for providing a fit note from your doctor, which we note is backdated to 3rd January 2023. We are also pleased to note an improvement and that there is no recommendation for any other special measures, so we trust you will be fully able to maintain your normal work hours from now on. It is obviously imperative for your personal development that you return to the office in order to progress your training from next week."

86 We pause to record that in the email at page 286, which was sent at 19:57 on the day before, 4 January 2023, Ms Rumbelow had written to Ms Porter that her (Ms Rumbelow's) "hope and understanding [was] that [the claimant would] be returning to work tomorrow, working from home for this week."

87 The formal grievance meeting arranged for 6 January 2023 took place. It was held via Teams and "recorded by mutual consent" as the written record at pages 291-295 stated. There was a transcript at pages 296-306. It showed that the claimant apologised for his comment "Nikki can come and help dress him if required" recorded in the passage which we have set out in paragraph 58 above.

That was in the passage at the bottom of page 300, where he was recorded to have said this.

> "So, I get it, I was offered a lift into the office, and I might have made a slightly inappropriate stupid comment at that point."

88 What was of great importance in our view was the summary of the claimant's grievance stated at the bottom of page 298, which was this.

> "So in a nutshell, obviously my grievance is that I asked for reasonable adjustments to be made surrounding obviously being disabled and then having a further disability added to me for a period of time of breaking my hand. That was declined multiple times via email."

89 It was also relevant that the claimant said what he wanted as an outcome of the grievance process. As far as Ms Porter was concerned, as recorded at the bottom of page 303, the claimant said this:

> "I would then expect it to be handled as a gross misconduct, that is what's happened, it's a gross misconduct, it's in the employee handbook. Obviously as that, I would expect Nikki to be disciplined as such, which would be an instant removal, gone. To then have me stay and move past it, I would want a pay rise."

90 At page 302, we saw that there was this exchange recorded.

> "Moderator1: Okay. So, really, the grievance at the moment appears to be focussed on that time when you broke your hand, and the insistence that Nikki suggested that you should be working at the office. Does that summarise where your grievance lies at the moment?
>
> Owen Ball: Yes. To clarify it in a line, and the way I would like it to be written, and this is, kind of, my stance on it, Nikki denied me a reasonable request for adjustments to be made to my working day and my workload, yes? That's how I would like it summarised, because that is literally what has happened. I asked for something reasonable to be done, Nikki denied. I explained why it was, kind of, the only reasonable option that there was, and it wasn't unreasonable in the slightest at all. And I think if this ended up going to a tribunal, I honestly think a tribunal judge would fully agree, fully agree. That's the legal advice that I've had. So, I am strong in my stance that I have been discriminated, yes? Hands down, simple as. Disability is in the same category of protection as race, religion, gender, sexuality, so it's the same thing, I've been discriminated. That is a gross misconduct by Riskex's employee handbook, and I expect it to be treated as such."

91 On 9 January 2023, the claimant sent Ms Rumbelow the email at page 320 in response to hers of that day immediately below his in which she wrote that the

respondent was expecting him to return to work at the office the next day. In his email, the claimant wrote that he felt

> "very uncomfortable in returning to the office while the investigation is still ongoing. Especially with nikki still in the capacity of my line manager etc. My anxiety over this is not great. I will get you an updated medical note from my gp to help with this period while the grievance investigation is ongoing."

92 At page 324, there was an email from Ms Rumbelow to the claimant which she sent at 10:19 on the next day, 10 January 2023. It was in the following terms.

> "We see from your notes input into MyCus that you have started work this morning, without first agreeing with us whether you are fit to do so by submitting a fit note from your GP. As a result, this is unauthorised working from home, and we deem it misconduct as you have not been given permission to do so.
>
> Please cease immediately and submit your fit note as agreed yesterday, so that we can determine how to proceed and execute our duty of care.
>
> As we have explained on a number of occasions, in accordance with your Employment Contract, and in order to effectively provide your training and development to ensure you deliver the results that the business requires, it is essential we have you back in the office.
>
> If you are unable to attend the office on your office working days, then you are not fit for work and will be placed on Statutory Sick Pay.
>
> I look forward to receiving your fit note, and the copy for the 12th December 2022, as a matter of urgency."

93 The claimant then obtained the fit note at page 335 on the next day, 11 January 2023, stating that the claimant was suffering from a "Stress related problem", and that he "may be fit for work taking account of the following advice", which was "Can work from home" for the four weeks from 10 January to 6 February 2023 inclusive. On the next day, 12 January 2023, Ms Rumbelow responded (page 336) that the claimant would be paid statutory sick pay only as he "still need[ed] to report to Nikki Porter, [his] line manager" and he had "already advised that [he did] not wish to deal with her". The claimant replied shortly afterwards on the same day, in the email at the top of page 336, in these terms.

> "This is a serious breach of my employment contract. The doctor has advised I am fit to work from home, as the doctor has clearly stated. You are ignoring this advice and you a[r]e further refusing me reasonable adjustments to be made. I will review this with my legal advisors. It will be added to any settlement amount. As the illness I'm suffering with is stress related following the behaviour I have faced from Nikki, I will be seeking full

payment for this period of time. I look forward to hearing from you tomorrow in regards to the outcome of my grievance."

94 That outcome was stated in the document entitled "Official Grievance Against Nikki Porter, Riskex Managing Director – Response to Owen Ball – 13th January 2023" at pages 346-353, which was signed by Ms Rumbelow and which we therefore regarded as being her document. The outcome was to dismiss the claimant's grievance. On pages 351-352, Ms Rumbelow said this.

> 'Regarding adjustments, Nikki Porter considered your fit notes and the comments you made, but based on viability, reasonableness, and Riskex's business needs, unfortunately we could not agree to some of these aspects.
>
> As a new employee, and in line with your Employee Development Plan, Riskex are dedicated to ensuring that you receive the adequate coaching, mentoring and personal development skills you need to achieve your targets. This is our company policy and has been shown to be the most effective way to train new team members.
>
> Whilst some work can be completed remotely at home, there are occasions where ad hoc advice, encouragement and training is supplied by managers to new staff based on them observing and listening to live calls. It is an unacceptable burden on a manager's time if it involves extra time to review recorded calls and provide training (Riskex does not record calls). If a new staff member is solely working from home, performance and development levels suffer, and this is detrimental to our commercial business objectives.
>
> Spontaneous training is offered when a need is identified, which is impossible when staff work entirely at home. A recent example of this has been described by Nikki Porter regarding the training she provided to a colleague. Observing that there was some confusion over terminology, Nikki took this person to the boardroom for a private coaching session. Within 15 minutes and some role play, the lesson had been learned and call response rates improved significantly. If you are working entirely from home, you are not able to benefit from coaching such as this.
>
> Similarly, within the Riskex office there is a culture of mutual support and morale boosting congratulations, as sales roles can be mentally challenging. It is important for mental wellbeing and personal growth to be surrounded by more experienced staff members, and this is not possible working from home – your presence in the office is required so that you can contribute to this culture and support your team, and importantly, receive their support.
>
> With regards to adaptations as you faced the need to work from home, as you stated you could not drive and were unable to attend the office, you

were offered a lift to work, help with inputting notes by telephone, and offered reduced hours on your agreed office days for an opportunity for more time to arrange assistance to get ready to attend the office.

Regarding a fit note's suggestion of "Amended Duties", your contractual role is to make telephone calls and record the responses via our CRM, and supply reports to your Line Manager, Nikki Porter on a Friday.

Offers were made to help input notes by phone if you found typing was overwhelming, but these were rejected. It is not clear to us what a fit note's suggestion of "Light Duties" could consist of in your case, considering that your role is to make telephone calls, manage emails and enter notes to our CRM system.

As a result, we find that there is nothing that we can amend, and nothing else we can suggest you do. If you are unable to provide the contractual service to our business as detailed in your Employment Contract, then you are unfit for work.

In accordance with the Equality Act 2010, we must consider and provide reasonable adjustments, and we have done what we can in relation to your role and your newness in the role, as well as your understanding of the product and your role, which partly is done by shadowing colleagues in the office.

We acknowledge that there is no demanding physical element to your job, however it does involve mental engagement to talk to people on the phone, in a manner that will engage them and deliver results. Considering the unfortunate stress difficulties that you have reported, this has also given us cause for concern regarding your health and safety, but there are no further adaptations we can suggest for your role to help mitigate this.'

95 Ms Rumbelow then said that she had found "no evidence" that Ms Porter disliked the claimant and that she (Ms Rumbelow) had been unable to "identify any evidence of discrimination" against the claimant. Ms Rumbelow concluded the document with the following two paragraphs on page 353, which were as follows.

"Your claim that Nikki Porter denied you a reasonable request for adjustments to be made to your working day and workload is rejected, as there is a weight of evidence to the contrary, and for the reasons explained above, if you are unable to attend the office, you are not fit to work.

You have the right to appeal this decision in accordance with our Grievance Policy."

96 The claimant's resignation on 15 January 2023 in his email at pages 355-356 to which we refer in paragraph 55 above was the direct result of the rejection by Ms Rumbelow of his grievance against Ms Porter in the document at pages 346-353.

97 We now record that we accepted that the respondent's reasons for rejecting the claimant's request to be permitted to work from home entirely at the times when he made that request were genuine. Those reasons were as we have set out in paragraphs 62 and 94 above.

Ms Porter's knowledge of the claimant's mental health condition

98 Ms Porter's evidence was that she did not know until the claimant's email of 7 December 2022 which we have set out in paragraph 61 above that he was suffering from the mental health condition which the respondent subsequently accepted (after these proceedings had been commenced) was a disability within the meaning of section 6 of the EqA 2010.

99 The claimant put it to Ms Porter in cross-examination that the text messages between him and her at pages 182-188 "show[ed] a decline in [his] mental health and a deterioration". She said that she accepted that his mental health was suffering from "bereavement", arising from the death of his grandmother, and that that suffering started at the beginning of November 2022. EJ Hyams then asked the claimant and Ms Porter what, if anything, was said by the claimant about his mental health otherwise. The claimant said that he made Ms Porter aware of his mental health in relation to the bereavement because he was "aware of a trigger point for [his] mental health" and that as a result he wanted her to know about that "trigger point". Ms Porter, however, said that she did not recall the claimant "saying anything more about his mental state." Later on in the cross-examination, it was put by the claimant to Ms Porter that it was "safe to say" that she was aware that he was struggling, and that he had told her the "history that [he] had with mental health, the struggles it had caused [him], and the likely effect of his grandmother's death". EJ Hyams pointed out to Ms Porter that that was a strong assertion. She said this in response: "It is. It did not happen." We preferred her evidence in that regard to that of the claimant. That was in part because we preferred her evidence to his, having heard and seen both of them give evidence, and in part because of the content of the email of the claimant at page 278 which he sent on 3 January 2023, the first full paragraph of which was plainly incorrect on the facts. We have set out that paragraph in paragraph 79 above. For convenience, it was in these terms.

> "Good afternoon Catherine,
> Before I answer any of this email. I ask again, what is happening with my grievance? This was raised to you directly on the 8th of December. I have still had no response, no meeting scheduled? I have asked for an update but had no reply? Can you please inform me what you intend to do?"

100 That was incorrect because there had been (1) a response from Ms Rumbelow to the grievance, in the emails of 8 December 2022 and 11 December 2022 at, respectively, pages 233 and 238, which we have set out in paragraphs 67 and 68 above, and (2) a meeting with the claimant which took place by Teams on 9 December 2022, to which Ms Rumbelow referred in the second of those emails.

101 Accordingly, there had by 3 January 2023 (in fact by 11 December 2022) been both a reasonably full initial response to the claimant's grievance of 8 December 2022 from Ms Rumbelow and a meeting via Teams with her.

102 The first paragraph of the email of 3 January 2023 at page 278 was also misleading because Ms Rumbelow informed the claimant in her email of 11 December 2022 that she was going to be on leave from 12 December 2022 to 3 January 2023.

103 A further relevant factor here, which helped us to conclude that the evidence of Ms Porter was to be preferred to that of the claimant, was the inaccuracies of the claimant to which we refer in paragraphs 108 and 109 below.

The circumstances of the comparators

104 Before stating our conclusions on the claimant's claims, we record that the claimant said nothing in his witness statement about the circumstances of the comparators to whom we refer in paragraph 7.1 above, and that what Ms Porter said in paragraphs 62-64 of her witness statement about them was not challenged by the claimant in cross-examination. As a result, and in any event because we found Ms Porter to be an honest witness, doing her best to tell the truth, we accepted what she said in those paragraphs. That was, so far as relevant, as follows.

104.1 "Quintin [Matthee] was without a car between 12 June and 05 July, which was 3 weeks and 2 days. He was authorised to work from home for much of that time, however he attended the office on a number occasions during this period when the business needed him to. Once he even hired a car at his own expense and at least twice was given a lift by James Sharp."

104.2 "There have been 2 occasions in the last year or so when Mark Legg has worked from home. He spent one week at home at the end of July 2022 when he had covid symptoms and from 20 to 28 April 2023 when he was recovering from a hernia operation."

104.3 "David Dack was allowed to work from home for two weeks due to an infected ingrown toenail, the condition lasted several more weeks however David was on SSP for that time and not working."

<u>Our conclusions on the claims of the claimant</u>

(1) The claim of direct discrimination within the meaning of section 13 of the EqA 2010, contrary to section 39(2)(d) of that Act, because of the protected characteristic of disability

105 Given the finding which we state in the preceding paragraph above, we concluded that the circumstances of the comparators in relation to whose treatment the claimant relied in the manner which we stated in paragraph 7.1 above, namely Quintin Matthee, Mark Legg, and David Dack, were materially different from those of the claimant. In fact, we concluded, the claimant wrongly described those circumstances. He did so on page 88, where he said that they were as follows (with the name of Mr Matthee slightly mis-spelt).

> "Quintin Mathee was allowed to work from home for 4-6 weeks due to having problems with his car.
>
> Mark Legg was allowed to work from home for about 6 weeks due to an unknown reason.
>
> David Dack was allowed to work from home for 1-2 weeks due to an ingrown toenail."

106 In any event, we found the actual circumstances of the comparators, which we have set out in paragraph 104 above, were materially different from those of the claimant.

107 There was in the circumstances before us nothing (i.e. there were no facts which we found) from which we could draw the inference that the claimant was treated any less favourably than he would have been if he had not had the protected characteristic of disability (whether in the form of amniotic band syndrome or anxiety and/or depression) in regard to being permitted to work from home. We add that we did not see any hint of ill-will on the part of Ms Porter or Ms Rumbelow towards the claimant because of either of those disabilities.

108 As for the claim of being excluded from the photographs taken by Ms Rumbelow on 1 September 2022 because of the protected characteristic of disability, the claimant in the first instance claimed (see paragraph 48 above) that he was "due to be working from home on the day that the pictures were being taken" and that he "asked Ms Porter if he should make himself available at the office that day to be present for the pictures" but she "told [him] not to". However, by the time of cross-examination, he had (see paragraph 51 above) accepted that he was in fact on leave on that day, and that "[he] knew pictures were coming up and that [he] was going to be off on annual leave; so [he] just went on leave". That meant that the claim to have been treated less favourably because of his disability was not well-founded on the facts. In any event, we concluded that there was nothing in the circumstances before us (i.e. there were no facts which we found) from which we could draw the inference that the claimant was treated any less

favourably than he would have been if he had not had the protected characteristic of disability in regard to being invited to participate in the group photographs taken by Ms Rumbelow on 1 September 2022. For the avoidance of doubt, at that time, given what we say in paragraphs 98-103 above, the only disability of which the respondent was aware was the claimant's amniotic band syndrome.

109 Similarly, the claim to have been excluded from the Respondent's "Christmas party in the board room or the Christmas meal and drinks out of the office" (stated in the passage from page 88 which we have set out in paragraph 48 above) was not well-founded on the facts which we have found as stated in paragraph 52 above. The fact that the claimant claimed (in fact for the first time in cross-examination, as we record in paragraph 51 above) that he did not see or receive the emails of 8 December 2022 at pages 257 and 258 on the basis that his access to the respondent's systems had been removed did not assist his credibility. In any event, on our findings of fact stated in paragraph 52 above, the claim plainly failed because the claimant was invited to both of those events in precisely the same way as his colleagues were.

(2) The claim of a failure to make a reasonable adjustment in the form of permitting the claimant to work from home more than he was already permitted to work from home

110 We record here for the avoidance of doubt that the claim of a failure to make a reasonable adjustment by permitting the claimant to work from home had to be read as a claim not to permit him to work from home for five days per week rather than two. That was because of what we say in paragraphs 45 and 46 above. In addition, the claimant was in fact permitted to work from home until 9 December 2022, given what we record in paragraphs 56-62 above. The claim in this regard therefore related to the period from 12 December 2022 until 13 January 2023. (The reference to 6 December 2022 in the oral judgment given by EJ Hyams on 3 January 2025 as the start date of that period was mistaken given the text which we have set out in paragraph 62 above, and is therefore now corrected.)

111 The claimant's position from 7 December 2022 onwards until his resignation was related primarily to the broken bone in his left hand. That was clear from a number of passages in the documents, including the fact that in the email of 7 December 2022 which we have set out in paragraph 61 above, the claimant's reasons for wanting to work from home all related to the broken bone. However, that broken bone did not affect to any great extent the claimant's ability to work, given what he was recorded to have said in the passage from page 209 which we have set out in paragraph 58 above, which so far as relevant for the sake of convenience we now repeat.

> "Owen expressed that he needs to work and can work with his injured hand, mainly because it is his left hand and it's not something he requires full use of for his current work."

112 In addition, the claimant was offered and rejected lifts to and from work, as shown by what he himself said next as recorded on page 209 as set out in paragraph 58 above. For convenience, we repeat it here:

> "Nikki also offered support to Owen regarding transport to get him to the office each day and home. Owen expressed that this would not be possible as its not the transport that's the issue, it's that Owen struggles to dress himself take a shower and wash his hair and general day to day activities hence home working is more suitable."

113 On that basis, the only possible legal basis for the claim of a failure to make a reasonable adjustment was that the impact of the claimant's amniotic band syndrome had been exacerbated by his bone fracture, and that that exacerbation had led to (1) even more difficulty for him in doing normal day-to-day things and (2) for the reasons stated in the email of 7 December 2022 which we have set out in paragraph 61 above, him (the claimant) feeling more anxious and depressed than he would have been if he had not had that bone fracture.

114 The claimant seemed to us not to have made it clear to the respondent until, possibly, in the grievance hearing of 6 January 2023 (as recorded at page 302, in the passage which we have set out in paragraph 90 above), that he was seeking an adjustment in the form of working from home only temporarily. While it post-dated the claimant's resignation, we saw that at page 365, on 24 January 2023, the claimant wrote this.

> "I have never once implied that the fracture was the disability. To suggest so is ridiculous.
>
> Post fracture I did make it very clear I was struggling. Also relevant to note that I made it clear the fracture was a further hindrance on top of the disability. Also relevant to note, I made it clear someone without the disability would probably of been ok."

115 In fact, on 6 January 2023, as we record in paragraph 88 above, the claimant said this (and we repeat it for the sake of convenience):

> "So in a nutshell, obviously my grievance is that I asked for reasonable adjustments to be made surrounding obviously being disabled and then having a further disability added to me for a period of time of breaking my hand. That was declined multiple times via email."

116 The bone fracture to which the claimant there referred as his broken hand would in all probability not itself have been a disability since it was unlikely to have a long-term adverse effect within the meaning of section 6 of the EqA 2010. However, (1) we had no medical evidence (of any sort; not even an extract from a hospital clinic's records) before us about the fracture, and (2) the claimant at no time suggested to us that the fracture was likely to last for more than a year,

or to recur. As a result, we could not come to a reliable conclusion on the question whether the claimant's fracture had or was likely to have a substantial and adverse long-term effect on his ability to carry out normal day-to-day activities. Certainly, we were unable on the evidence before us to accept on the balance of probabilities that it had, or was likely to have, that effect. We therefore concluded that the fracture was not in itself, or alternatively did not itself give rise to, a disability within the meaning of section 6 of the EqA 2010,

117 In any event, the passage which we have set out in paragraph 115 above showed that the claimant regarded the bone fracture which led to what he said was him "breaking [his] hand" as a disability which in itself justified the making of reasonable adjustments within the meaning of section 20(3) of the EqA 2010, and pressed his case to the respondent on that basis. Of course, if there was a duty to make such adjustments then the fact that the claimant stated its basis wrongly did not remove the need to make such adjustments. However, we concluded on the evidence before us that the claimant's "[broken] hand", had for current purposes the same impact on the claimant as it would have done on someone without amniotic band syndrome. The impact might (but might not) have been greater because of the amniotic band syndrome, but because we had no medical evidence before us about the fracture we were not persuaded on the balance of probabilities that the impact on the claimant was greater as a result of his amniotic band syndrome than it would have been if he had had a fully-formed left hand.

118 Accordingly, we concluded that if the only reason for the claimant not being willing to attend the respondent's offices in person was the effect of the fracture on his ability to dress and wash himself, then he was not put at a substantial disadvantage within the meaning of section 20(3) of the EqA 2010 as a result of a disability within the meaning of section 6 of that Act. Rather, he was put at such a disadvantage by reason of a bone fracture which on the evidence before us was going to have only a temporary effect.

119 As for the respondent's reasons for refusing the claimant permission to work from home in effect for an indefinite period, we accepted fully the explanations of (1) Ms Porter at pages 231-232 which we have set out in paragraph 62 above and (2) Ms Rumbelow at pages 351-353 which we have set out in paragraph 94 above as being objective justifications for not permitting the claimant to work from home more than two days per week.

120 In those circumstances, we concluded that there was no failure to make a reasonable adjustment within the meaning of sections 20 and 21 of the EqA 2010 through refusing to permit the claimant to work from home in the period from 12 December 2022 onwards here.

121 The claimant did not in the end argue that his workload should have been reduced on the basis that such a reduction was a reasonable adjustment. For the sake of completeness we record here that the only apparent basis for asking

for such a reduction was in the claimant's email at page 241 which we have set out in paragraph 70 above. In her response, at page 244, which we have set out in paragraph 71 above, Ms Porter offered help to type into the spreadsheet whatever the claimant said needed to be put in the spreadsheet. Accordingly, the reduction in the claimant's workload was sought in part because of the claimant's bone fracture which, as we indicate in 118 above, was not a disability within the meaning of the EqA 2010. Otherwise, such a reduction appeared from the email at page 241 to have been sought because of what the claimant referred to as "the stress related illness at present". That was an imprecise basis for a reduction in workload but in any event it was not relied on as such by the claimant here.

122 We add for the avoidance of doubt that while the claimant's written closing submissions referred in a number of places to anxiety and depression, those conditions were linked to what the claimant claimed was the main cause of his difficulties, which was the bone fracture. For example, in the middle paragraph on page 7 of those submissions, this was said.

> "It is highly relevant to keep the physical disability and the struggles the claimant was facing during this period as complementary aspects of the case, especially as the impact of the claimants disabilities was also having a worsening effect on his mental disabilities, leading to a serious increase in the levels of anxiety and depression that the claimant was facing at the time. There is further case law to support the physical disability element of the claimants claim. It can be seen within HMRC v Linsley (2018) the key principles within this case were that the tribunal considered the importance of consistency in making reasonable adjustments, especially when a disability worsens. This becomes relevant to the claimant's case as the tribunal found employers must address the new challenges posed by compounded disabilities, such as exacerbation due to injuries. It can also be seen within G4S Cash Solutions (UK) Ltd v Powell (2016), the key principle within this case was that the employer was found liable for failing to make adjustments after an employee's mobility worsened. This case supports the fact that the respondent had a duty to evaluate the new conditions that were impacting the claimants disability, and that they should have made adjustments accordingly, none of which took place when the claimant made Ms Porter and Miss Rumbelow aware of his disabilities and the exacerbation the injury was causing to his day to day abilities. There is also an example within the Archibald v Fife Council (2004) case that demonstrates that employers must assess the impact of exacerbated disabilities, the house of lords found that reasonable adjustments should be made if and when an employee could no longer uphold the obligations set against them due to the worsening of a disability."

123 We did not find the cases to which the claimant referred there (including *Archibald v Fife Council*) to be of any assistance to us in our deliberations on the facts of this case. *Linsley* concerned parking arrangements for someone suffering from ulcerative colitis, the symptoms and discomfort of which were

(unsurprisingly) increased by stress. *G4S Cash Solutions (UK) Ltd v Powell* is reported at [2016] IRLR 820 and concerned pay protection for an employee whose role was changed to one at a lower level in the pay hierarchy as a result of a disability.

124 We add that the claimant sent us and the respondent none of the cases to which he (the claimant) referred in the numbered paragraphs of his written closing submissions, and that we were unable to find two of them despite searching on the internet generally, on Westlaw, and on Bailii.org, namely

124.1 *East Sussex County Council v Walsh* [2003] UKEAT/0211/03, and

124.2 *Sinclair v London Underground* [2001] UKEAT/0345/01.

125 In addition, the claimant relied in numbered paragraph 2 of his closing submissions on *Home Office v Collins* [2005] UKEAT/0293/05, but the only judgment in that case that we could find was that of the Court of Appeal ([2005] EWCA Civ 598), which overturned that judgment of the EAT.

126 We add for the avoidance of doubt too that if the claimant had relied on his antipathy to Ms Porter as giving rise to depression and anxiety, which we could see hinted at in the extracts which we have set out in paragraphs 91 and 93 above but which we did not see followed up in his closing submissions or otherwise except to the extent that he wanted her to be dismissed, then it was not a reasonable step within the meaning of section 20(3) of the EqA 2010 in the circumstances to permit him to work from home. That was because in our view it was not such a reasonable step to permit the claimant not to liaise with Ms Porter in the circumstances of the respondent to which we refer in paragraph 119 above, namely as set out by us in paragraphs 62 and 94 above.

(3) The claim of harassment in regard to the following by Ms Rumbelow of the grievance procedure and otherwise

127 Given (1) what we say in paragraphs 65, 67, 68 and 101 above, and (2) the sequence of events which we record in paragraphs 80 and 87-90 above showing that (a) Ms Rumbelow invited the claimant on 4 January 2023 to a formal grievance meeting to take place two days later, on 6 January 2023, and (b) that that meeting happened, we could not see that there was any (or at least any material) departure by Ms Rumbelow from the respondent's grievance procedure. Certainly, we concluded that the claim that there was such a departure or an ignoring (as claimed as recorded in paragraph 8 above) of the respondent's handbook guidance was completely unfounded on the facts.

128 Mr Stewart submitted on behalf of the respondent that there was in the circumstances before us no evidence of an inappropriate probing of the claimant's difficulties in regard to getting dressed. He did so in the following

passage, where he first referred to the grievance procedure and then referred to the question whether there was any inappropriate probing.

> ‘44. The grievance took 34 days to initiate, investigate and conclude. Deducting from that period the time that Mrs Rumbelow was on annual leave (22 days) provides a total period for dealing with the grievance of 12 days. Considering the guidance within the Grievance Policy [143] it cannot possibly be said that the handling of the grievance was not conducted within a ‘reasonable timeframe, ideally to be within two weeks of receiving the grievance…’. Furthermore, pursuant to the case of *Unite the Union v Nailard* 2019 ICR 28, which is helpfully referred to by EJ Hyams in his note of the 24th of October 2024, it cannot be the conclusion of any reasonable tribunal that any delay, perceived or actual, was related to the Claimant’s protected characteristic. At its highest, any delay was associated purely with the Respondent’s closure over the Christmas period and the availability of Mrs Rumbelow. As she explained during her evidence, the Respondent company is a small business that does not have the breadth of personnel to delegate matters such as these. There was no one other than her who could have dealt with a complaint against one of its most senior managers. It is to be noted that at no point did the Claimant balk at the prospect of not having his grievance attended to until after Christmas. It is also to be noted that the Respondent took such steps and measures as it thought reasonable to preserve the status quo of the Claimant over this period as well.
>
> 45. A similar comment can be made as regards the Claimant’s assertion that he was repeatedly required to provide “humiliating” details of his disability and personal circumstances to either Mrs Porter or Mrs Rumbelow. The examples of where the Claimant says that he was forced to provide this detail can be seen in his email of the 8th of December 2022 [**229-230**] and during his conversation with Mrs Rumbelow during their Team meeting. The simple fact is that his assertion is simply not credible.
>
> 46. The Claimant volunteered information that he thought was relevant to his grievance. If there was any repetition of facts relating to his disability then this was at his volition and made as part of his continuing diatribe against the Respondent and Mrs Porter. It would be entirely normal for any employer to ask questions of an employee regarding the nature of their complaint. There is nothing to suggest that the nature or purpose of any questions asked of the Claimant were other than for the purposes of understanding the basis of his grievance.”

129 We agreed with those submissions.

130 In any event, the difficulties of the claimant in regard to dressing and washing were related to the effect of the bone fracture to which we refer in paragraph 56 onwards above. While such questions as were asked about the claimant's difficulties in regard to coming to work in person constituted conduct which was in our view capable of being found by us to be related to the claimant's disability of amniotic band syndrome (although if the difficulties resulted only from the bone fracture then that might not be correct), so that we gave the claimant the benefit of any doubt in that regard, that conduct was in our judgment not done with the purpose of violating the claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for him. Nor, in the circumstances, and applying section 26(4) of the EqA 2010, did it have that effect.

131 Accordingly the claim of harassment failed.

(4) The constructive dismissal claim

132 It should be implicit from what we say above that the claim of a "constructive" dismissal within the meaning of section 39(7)(b) of the EqA 2010 did not succeed. For the avoidance of doubt, we concluded that it did not do so.

In conclusion

133 None of the claimant's claims succeeded. We therefore dismissed them all.

Approved by:

Employment Judge Hyams

Date: 8 January 2025

SENT TO THE PARTIES ON

21 January 2025

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FOR THE TRIBUNAL OFFICE