EMPLOYMENT TRIBUNALS

Claimant:		**Respondent:**
Mx V Collins	v	Brighton & Hove LGBT Switchboard

Heard at: London (South) (via CVP) **On:** 17-21 June 2024; 14-18 October 2024

Before: Employment Judge Fredericks-Bowyer
Tribunal Member C Wilby
Tribunal Member S Townsend

Appearances
For the claimant: In Person
For the respondent: Mr J Lewis-Bale (Counsel)

A Tribunal appointed intermediary was also present for every day of the hearing

RESERVED JUDGMENT

1. The claimant was unfairly dismissed on 23 August 2022 because the respondent's procedure was unfair. The following principles apply to remedy:-

   1.1. The claimant's basic award is reduced to **nil** by operation of *s122(2) Employment Rights Act 1996*.

   1.2. The claimant's compensatory award is reduced to **nil** to reflect the 100% chance the claimant would have been fairly dismissed had a fair procedure been followed.

   1.3. The total award for the unfair dismissal is therefore **£0.00**

2. The following claims are not well-founded and are dismissed:-

   2.1. Less favourable treatment because of disability;

2.2. Victimisation following protected acts;
2.3. Failure to make reasonable adjustments; and
2.4. Harassment related to disability.

REASONS

Letter to the claimant

1. The claimant has learning disabilities. I said that I would write a shorter letter at the start of the judgment. The letter explains why we have come to the decisions we have. It is written under guidance of the intermediary report -

> Dear Vernon
>
> This is the letter I said I would write to you. I explain the decision we made and why. The rest of this judgment does the same but in more detail. If you want to understand all the detail, you should take the whole document to somebody who may help.
>
> Giving bad news is the hardest part of my job. This decision probably feels like bad news for you. I am sorry about that. We understand why you are angry and upset about what happened. That is not enough to win all of your claims.
>
> I am sorry for the length of time you have waited for this. Your claim was complicated. It was heard over a long time. The bundle of documents was not in an easy form to follow. Some of the evidence was difficult to interpret.
>
> Unfair dismissal
>
> We have decided you were unfairly dismissed. The respondent decided to dismiss you before you had the chance to state your case. The respondent told you it had not made a decision when it had. Nothing you said could have avoided dismissal. That means your dismissal was procedurally unfair because the decision was made in the wrong order.
>
> When there is procedurally unfair dismissal, we decide what would have happened if the procedure had been fair. We have to decide what would have happened if the decision was made at the right time. That is after your meeting on 17 August 2022. We understand why the respondent felt your relationship with it had irretrievably broken down at the end of that meeting. In other words, there was no reasonable hope that you could carry on working without conflict.
>
> You do not have to do anything wrong to be fairly dismissed for 'some other substantial reason'. The respondent would be reasonable in deciding the relationship could not be repaired if it had made the decision at the right time. That means it was able to dismiss you fairly. We decide that there would be a 100% chance you would have been dismissed with a fair procedure.
>
> We looked carefully at why the relationship broke down. We have concluded that your demands about the occupational health report and the grievances

were the main reasons. We consider your demands were unreasonable. The respondent was not in control of what you wanted to happen. We conclude that if you had been more reasonable, you may not have been dismissed. It is just and equitable to reduce your basic award to nil. We consider you were responsible for the relationship breakdown that led to dismissal.

Direct disability discrimination

To win this claim, you needed to show that the things you complained about could have been done because of your disability. You need to show more than the thing you complain about and the fact you have a disability. This is the first step. We understand a certain model of phone was preferred by you because of your physical disabilities. It broke and you were unhappy with how long it took to get a replacement. You were also unhappy that you did not have a safe phone charger. There was no evidence the respondent made any decisions because of your disability. There was no evidence it failed to act because of your disability.

You cannot win the claim without that evidence. This claim is dismissed.

Harassment related to disability

You complained that the respondent deliberately sent you a large volume of emails outside working hours. You said this was harassment related to your disability. We disagree. You said you must reply to emails when received. You did not consider that you could turn off notifications to avoid them. We believe the respondent witnesses. They said that emails were sent as soon as possible when able. They may fall out of work hours. Those sending emails were very busy or volunteers. You also replied outside of work hours. There is no evidence that emails were deliberately sent to you with anything about your disabilities in mind.

You complained about receiving a letter in tiny font. You said this was harassment related to disability. We disagree. A printed and scanned letter in the bundle did have small font. The original version sent to you was also in the bundle. That had normal font size. We conclude the small font version was made at your end when the letter was printed and scanned. The respondent did not send you a letter with tiny font. There is no harassment.

You complained about the respondent sending you a new sick leave procedure which was the same as the old procedure. You said this was harassment related to disability. In the hearing, you argued that it was not fair to use it because you had not read it. The respondent has a sick leave procedure. It sent that to you. It was in a new format. You needed to have it. It is not reasonable for you to feel harassed about the document. It is not reasonable for you to feel harassed about what the respondent told you about it.

You complained that Simon said he had better things to do than meet you in a welfare meeting. You said this was harassment related to your disability. We disagree. We conclude the comment was not meant in the way you feel. Simon

was frustrated with the fall out. We accept that. He had just been in a car accident and was exhausted. We accept that. None of you wanted to be stuck in the dispute. The comment was about the dispute. It was not about any of your disabilities. We conclude that you understood that. You did not complain at the time. In those circumstances, there is no harassment.

You also complained about a meeting being scheduled on your day off. You said that was harassment related to your disability. We disagree. You sent an email saying you were willing to meet on non-working days. It is not reasonable for you to feel that you were harassed when one was set for a non-working day.

We accept you have processing difficulties which made things more difficult. That does not mean that how you felt was always reasonable. We have to look at all the circumstances. It is not just about your perception.

All of these claims are dismissed.

Victimisation due to protected acts

You say you did four protected acts.

1. Reporting disability discrimination on 18 January 2022. The notes show a positive conversation. They show you were reassured when you said you did not feel valued. The notes do not show you mentioned disability discrimination. You said the note taker, John Hammond, was not a problem for you. We believe his notes. We conclude the notes would have said if you had reported discrimination. They do not. We conclude you did not make this report. This is not a protected act.

2. Reported concerns in e-mails on 24 January 2022, 31 January 2022, 21 February 2022 and 22 February 2022. We have read those e-mails. They do not contain an allegation that you were discriminated against. This is not a protected act.

3. Reported unsuitability of equipment to John Hammond by e-mail on 1 May 2022. There was no such e-mail in the bundle. You do not mention this in your witness statement. There is no evidence of the e-mail at all. We cannot consider this a protected act.

4. Complaining of unfair treatment due to disabilities by e-mail to Jacob Baylis on 4 May 2022. We have read the e-mails you sent on 4 May 2022. We do not agree they complain of unfair treatment because of your disabilities. You are asking to be listened to at work. You are saying things you need to work effectively. You do not make an allegation that you were discriminated against. Your e-mail is hopeful and positive. We do not read it as a complaint, grievance or accusation related to disability. It is not a protected act.

You did not do any protected acts. You cannot have been victimised. These claims are dismissed.

Failure to make reasonable adjustments

You say the respondent failed to provide equipment to assist with your learning disabilities. You complain that you were told to be more articulate. You say that you should have had working dictation equipment. We have considered this. Your complaint stems from a long e-mail exchange. The respondent was trying to respond to all of the points you made. You were told that all of your points had been covered. You were told to articulate clearly any issues which had not been responded to.

We do not agree with you. The language used was plain in meaning. You were asked to articulate anything not addressed. You were not told to 'articulate more clearly'. In our judgment, you have misinterpreted what was said.

This means that there is no evidence you were told to articulate things more clearly. We cannot conclude there was such a provision, criterion or practice (PCP). That is the first step for this claim to be successful. This claim fails. It is dismissed.

Conclusion

Your dismissal was unfair. Sadly, your actions in leading to the dismissal means that you do not win any money for that claim.

We understand why you brought your disability claims. We understand that your disabilities make aspects of life feel difficult. They are a vulnerability which you must overcome every day. It is easy to think that others are motivated to do things you don't like because of them. In this case, those thoughts and feelings were not successful claims.

This letter may be longer than you were expecting. I am sorry about that. Your claims were complicated. There were many parts to your claims. We have taken time to consider them carefully. I am sorry the process from beginning to this outcome took so long.

I hope now you can put this behind you.

Yours sincerely

Employment Judge Fredericks-Bowyer.

The parties, documents, and the hearing

2. The claimant worked as a Translink Coordinator from 31 March 2020 to the dismissal on 23 August 2022. The respondent is a charity aimed at assisting the LGBTQ+ community in Brighton. It operates a helpline and has other targeted services for the most vulnerable members of the LGBTQ+ community in the area.

3. The claimant has complex disabilities. The health conditions, accepted as disabilities for these proceedings, are:-

   3.1. Severe dyslexia;

   3.2. Psoriatic arthritis;

   3.3. Osteo arthritis;

   3.4. Degenerative disorder;

   3.5. Fibromyalgia; and

   3.6. Severe neurodivergence.

4. We had the benefit of an intermediary report, and an intermediary on each of the hearing days, to assist with helping the claimant to access the hearing. The reasonable adjustments suggested by the intermediary were implemented during the hearing. We had strictly timetabled breaks. The claimant was able to request additional breaks. Simple language was used. Explanations were repeated. Mr Lewis-Bale checked his cross examination questions with the intermediary, and re-wrote them when required. The intermediary interjected if matters were not simply explained or questions were complex. At one point during cross examination, the claimant was having difficulty in avoiding being drawn into argument. I (the Judge) acted as a conduit for communication for around ten minutes with the agreement of the parties and the intermediaries.

5. At the start of the hearing, we had access to a bundle of documents which ran to 1122 pages. Give the number of claims and issues, and the claimant's adjustments, the original five day listing proved to be inadequate. A further five days were required. The gap between the parts of the hearing is regrettably long, but that is the reality of Employment Tribunal litigation in current circumstances. We made an order for search and disclosure of further documents from the respondent at the end of the first part of the hearing. They were provided for the second part. We therefore had an additional 31 pages at the second part of the hearing.

6. An issue arose in respect of the transcripts of recorded meetings between the claimant and the respondent. The claimant noted an error (which was agreed) in the transcript and so considered that none of the transcript cold be relied upon. The claimant submitted that we should listen to the recordings in the hearing. We declined to do so, noting that that would take days of Tribunal time. This would not be a proportionate action to take where there was no issues directly raised with the rest of the transcript. We were sitting remotely and also did not have the technical ability to listen to the recordings together in the hearing. We continued on the basis of the transcripts and heard evidence about the substance of the conversations to glean appropriate context.

7. Page references in this judgment refer to page references of the bundle. References to 'additional' pages refer to the additional documents.

The witnesses

The claimant

8. The claimant gave evidence in support of the claim. We consider the claimant gave evidence honestly in line with honestly held beliefs. It is clear that the claimant has deeply held grievances against the respondent. Although we consider the claimant gave honest evidence, we do not consider that evidence is always reliable. The claimant showed a tendency to interpret matters as negatively as possible, and was quick to assume that someone was attempting to take advantage of their real vulnerability.

9. The claimant's learning disabilities are essential to the claim. They were referenced frequently, and we made accommodations as outlined above to enable proper participation in the hearing. Many of the conversations which took place during the events giving rise to the claim did not benefit from these accommodations and adjustments. There was no claim about those, but the simple fact is that the claimant's difficulty in processing matters was operative at that time. It therefore follows that the claimant's perception, and memory of events, may not be as reliable as others who were present. This is something the claimant admitted, though in a different context, when repeatedly saying that those learning disabilities meant that it was common to get the wrong end of the stick.

10. We do not deny the claimant's reactions or feelings about what has happened. However, some of the legal tests applied in this claim are more objective than the claimant's feelings or belief.

Gray Hutchins

11. Gray Hutchins, CEO and Safeguarding Lead at The Clare Project, gave evidence about their interactions with the claimant as the dispute between the parties unfolded. Some of the evidence did not relate to the issues in this case, but we take the relevant evidence as an honest assessment of how the claimant presented during the time of the dispute and what the claimant perceived about the dispute.

Simon Dowe

12. Simon Dowe, Chair of Trustees for the respondent, gave evidence on behalf of the respondent. He was involved with most aspects of the claimant's claim, and was the main person at the respondent dealing with the claimant (with assistance from the other witnesses who were external advisers). Mr Dowe gave candid evidence about what happened and thoughts about it. It was apparent that the dispute was stressful for him, and he was not always composed answering questions in cross-examination. It is clear to us that he found dealing with the claimant to be difficult and frustrating.

Alison Daymond

13. Alison Daymond, the owner and manager of Adastra HR Limited, gave evidence on behalf of the respondent. Adastra was the respondent's Hr Adviser at the time the claim relates, and Ms Daymond was the main contact for the claimant during that time. It was apparent to us that the relationship between Ms Daymond and the claimant was difficult. During cross examination, communication between the pair

broke down and the Tribunal was required to take steps to restore it. In our view, Ms Daymond's responses were occasionally defensive, and we perceived motivation to case the respondent and Adastra in the best possible light rather than candidly answering questions asked. This defensiveness was particularly obvious when responding to issues around the dismissal process and the decision to dismiss the claimant.

Kim Nicol

14. Kim Nicol, Director of Workplace Legal Solutions Limited, gave evidence on behalf of the respondent. Her witness statement outlined that she was instructed by Adastra to conduct the claimant's appeal against dismissal. Her witness statement also says that she was instructed by the respondent to consider the claimant's grievances. During cross examination, Ms Nicol revealed that she had drafted some of the advice created during the dispute and, importantly, the first draft of the letter used by the respondent to dismiss the claimant. It was only at this point that it became plain that Ms Nicol is a practicing Solicitor. This was unfortunate timing, as arguably the previous responses to questioning involved disclosure of confidential or privileged material. Ms Nicol was assuring in her view that there was no unauthorised disclosure. Nevertheless, it is important that where a Solicitor gives a witness statement in proceedings, they make clear their professional standing so that the status is known and appropriate consideration given by the Tribunal to protect confidentiality and privilege.

15. We found Ms Nicol's evidence to be straightforward, open, and without any attempt at guile or nuance. We are grateful for that approach.

The issues

16. The claim was managed over more than one case management hearing. The issues were defined in draft form by Employment Judge Cawthray on 24 October 2024. They were then amended by Acting Regional Employment Judge Khalil (as he then was) on 27 February 2024.

17. The combined list of issues with which we were concerned were:-

17.1. ***Unfair dismissal –***

17.1.1. *What was the reason or principal reason for dismissal? The respondent says the reason for dismissal was some other substantial reason.*

17.1.2. Did the respondent act reasonably or unreasonably in all the circumstances, including the respondent's size and administrative resources, in treating that as a sufficient reason to dismiss claimant?

17.1.3. What award is the claimant due?

17.1.4. Should any reduction to the basic award or compensatory award be made to reflect any claimant conduct or any probability that a fair procedure would have resulted in a fair dismissal?

17.2. ***Direct disability discrimination (s13 Equality Act 2010)***

17.2.1. It is agreed that the claimant was disabled throughout the relevant period by the following conditions:-

17.2.1.1. Severe dyslexia;

17.2.1.2. Psoriatic arthritis;

17.2.1.3. Osteo arthritis;

17.2.1.4. Degenerative disorder;

17.2.1.5. Fibromyalgia;

17.2.1.6. Severe neuro divergence.

17.2.2. Did the respondent do the following things:

17.2.2.1. Not replacing the claimant's work phone with a model that they were able to use from 18 February 2022.

17.2.2.2. Not replacing the claimant's phone charger when it broke and was unsafe.

17.2.3. Was that less favourable treatment?

The Tribunal will decide whether the claimant was treated worse than someone else was treated. There must be no material difference between their circumstance and the claimant's.

If there was nobody else in the same circumstances as the claimant, the Tribunal will decide whether she was treated worse than someone else would have been treated.

17.2.4. If so, was it because of disability?

17.2.5. Did the respondent's treatment amount to a detriment?

17.3. ***Harassment related to disability (s26 Equality Act 2010)***

17.3.1. Did the respondent do the following things:

17.3.1.1. Deliberately send the claimant a large volume of emails outside of working hours, telling the claimant they had interpreted emails wrongly. Relevant dates are 2, 3, 19, 21, 28 June 2022, 25 July 2022, 1, 11, 16 August 2022.

17.3.1.2. At a meeting on 20 June 2022, Simon Dowe saying he didn't want to be there and had better things to do.

17.3.1.3. Expected the claimant to attend a meeting on their day off which they needed due to medical needs.

17.3.1.4. The respondent wrote to the claimant in tiny font and was dismissive when the claimant raised it.

17.3.1.5. The respondent denied making changes to the sick leave policy when on sick leave but said it had changed procedure although there is no difference between the two.

17.3.2. If so, was that unwanted conduct?

17.3.3. Did it relate to disability?

17.3.4. Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

17.3.5. If not, did it have that effect? The Tribunal will take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

17.4. ***Victimisation (s27 Equality Act 2010)***

17.4.1. Did the claimant do the following and were they protected acts?

17.4.1.1. Discuss feeling discriminated against in a meeting with Jacob Bayliss and John Hammond on 18 January 2022.

17.4.1.2. Emailed Seb Feast on 24 January, 31 January, 21 February and 22 February 2022.

17.4.1.3. Emailed John Hammond on 1 May 2022 complaining about unsuitability of work equipment due to disability.

17.4.1.4. Emailed Jacob Bayliss on 4 May 2022 complaining about unfair treatment as a result of disability.

17.4.2. Did the respondent do the following things?

17.4.2.1. Not recognising Unison.

17.4.2.2. Providing false information on the occupational health referral.

17.4.2.3. Being told to put the complaint about the occupational health referral into writing, and then using it to dismiss them.

17.5. ***Failure to make reasonable adjustments (s20 & 21 Equality Act 2010)***

17.5.1. Did the respondent have the PCP of telling the claimant to articulate themselves better?

17.5.2. Did that PCP put the claimant at a substantial disadvantage because of the claimant's disabilities?

17.5.3. Did the respondent know or ought it to have known about that substantial disadvantage?

17.5.4. Did the respondent fail to make a reasonable adjustment to alleviate that substantial disadvantage?

Relevant facts

18. The relevant facts as we find them on the balance of probabilities are set out below. These were found unanimously by the three members of the Tribunal. Where we heard a conflict in the evidence, we set out how we have resolved that conflict at the material time.

The employment

19. The claimant started working at the respondent on 25 March 2020. The role involved supporting service users with issues arising as a result of their vulnerability. The claimant was employed by the respondent but the funding for the work the claimant did was provided largely externally. The claimant worked alongside colleagues but did not form part of a team doing precisely the same work. The claimant was line managed for a time by Jacob Baylis, who then became the CEO of the respondent. The claimant was on a temporary contract, which was extended several times. The extensions are not part of the claim so we do not deal with the detail of them.

18 January 2022

20. A trans and non-binary link development session took place on 18 January 2022. There is a contemporaneous note of the meeting on pages 239 and 240. The claimant says they raised feeling discriminated against as a result of disability at this meeting. In their evidence, the claimant explained that this was about feeling undervalued because they were given an older phone compared to those on other projects who were given new equipment. The type of phone required was informed by the claimant's disability, although the claimant's main complaint in the hearing was that the phone and/or the charger were unsafe to use. The claimant does not give evidence to the effect that the complaint raised at the time was related to their disability. We have no evidence that the claimant actually mentioned disability in the meeting in a way which was a complaint of discrimination.

21. Mr Baylis and Mr Hammond were present at the meeting. Neither of those gave evidence. The claimant was the only witness who was there. The respondent denies that the claimant made a complaint of disability discrimination because the minutes do not reflect that. The claimant does not dispute the contents of the note other than that they do not cover anything. It was put to the claimant in cross examination that, if the claimant had raised such an issue, it would be recorded. The claimant was shown other records of meetings between the claimant and line management which do record things the claimant said they were unhappy about.

22. The relevant parts of the minutes record:-

> *"We discussed Vernon and their project feeling valued and John and Jacob apologised for any occasions where Vernon or their work haven't been considered or valued appropriately. John and Jacob confirmed their commitment to Vernon and their incredible value to Switchboard…"*
>
> *"A huge thank you to Vernon for all your hard work, passion and commitment. You are compassionate and care truly for the service users you provide (often essential) support to."*

23. We accept that the claimant raised a complaint at the session about not feeling valued. This is what the claimant says and this is reflected in the minutes of the meeting. The claimant contends there was a complaint of discrimination. We do not find that the claimant overtly complained of being a victim of disability of discrimination. This is not what the claimant has written in evidence in chief, and this is not what was said in cross examination. We find that the comments were limited to the perceived unfairness of colleagues having new equipment whilst the claimant had old equipment, which is what led to the claimant feeling under-valued. We are secure in this factual finding because, additionally, this was the subject of a long exchange when the claimant gave evidence and it was clear to us that the perceived unfairness rankles with the claimant still.

The broken phone, charger, replacements, and emails to Seb Feast

24. There is limited evidence in relation to the claimant's mobile phone issues other than what the claimant says about them. This is because the claimant was the only witness at the hearing who had direct knowledge of the issues. Mr Dowe gave some evidence about the issue, but that was high level evidence based on his understanding and assumptions because he was not directly involved. Generally, therefore, we accept the parts of the claimant's evidence which were not effectively challenged.

25. The claimant was given an iPhone 5 when the employment started and this seemed to work well for a time. Eventually, the phone started to work less well and the charger became frayed and damaged. The claimant says that they complained about this for several months until asking for a new phone in January 2022. The respondent had received new funding which had resulted in the people working through those contracts receiving new equipment. The claimant's service did not receive that budget.

26. The claimant required a specific type of phone. They were familiar with and confident using an iPhone. The device could not be too big to reduce the risk of exacerbating a medical condition. This meant that the claimant could not comfortably operate a new iPhone, because the models were generally too big. The claimant did not replace the handset or charger, although did use a personal phone charger instead.

27. When the claimant's iPhone eventually stopped working, the former CEO Mr Hammond gave them his handset. This meant that the claimant was unable to comfortably use it. Additionally, the phone was given to the claimant without a charger. We accept that the claimant found this series of events to be very frustrating. The claimant felt that, over a period of months, the respondent had

showed that the service they ran was not valued. The claimant considered that the respondent had failed to provide equipment required to do the job role. The issues with the handset were persisting on 18 March 2022 (page 280). There, the claimant says that the phone works but implies that there is a battery issue meaning that the phone needed to be plugged in at all times.

28. Alongside the events above, the claimant was also in contact with Seb Feast, the Data and Admin Officer at Together Co Social Prescribing. That organisation provided funding to the respondent for the claimant's role. It was a separate entity and a relationship of importance to the respondent because it provided funding which supported respondent staff. The claimant's emails to Seb Feast were on pages 963 to 965.

29. Having reviewed the emails and heard the claimant answer questions about them, we find the following facts:-

    29.1. The emails note that the claimant does not have a working phone.

    29.2. The claimant's intention was to raise the issue of the phone in the hope that the funder could assist with securing one.

    29.3. The claimant mentioned health issues and dyslexia, but does not set out why having a phone or specific phone was important in respect of any disability.

    29.4. The claimant does not make an allegation of discrimination in the emails, nor do they raise a complaint to the funder about bullying, harassment, or anything else which might be considered to be discrimination.

Incident with colleague

30. We accept that the difficulties the claimant experienced with their work phone added to the stress and difficulty experienced. This either led to or coincided with a flare up of the claimant's symptoms and caused the claimant to be, as in their words, at risk of meltdown.

31. The claimant says that such a meltdown occurred in front of a co-worker. This happened on 28 February 2022. The claimant accepts a meltdown occurred, but denies the substance of the co-worker's complaint. The co-worker said that the claimant threw a phone charger at them during a disagreement involving equipment. The claimant says that it was probably dropped. The respondent's investigation was inconclusive and no action was taken against the claimant.

32. The claimant and the co-worker wished to remain apart following these events. There was a subsequent issue when the pair were on site together through miscommunication. The respondent says and we accept (the claimant does not dispute it) that the co-worker was placed with the respondent by an external entity. On or just before 18 August 2022, the external entity raised a safeguarding concern about the co-worker working at the respondent if the claimant was to be present (page 706).

33. We find as a fact this meant that one of the claimant or the co-worker had to be absent from the office at any one time since the date of the incident, and this was reinforced by the external entity on 18 August 2022.

May 2022 emails to John Hammond and Jacob Baylis

34. The claimant contends that they sent an email to John Hammond on 1 May 2022. There was no such evidence in the bundle and the claimant did not give evidence to support the contention. We do not find that such an e-mail was sent where we have no indication that it was other than what is written in the list of issues.

35. The claimant sent two emails to Jacob Baylis on 4 May 2022, which are also relied upon as protected acts. The first was sent at 7.14pm (pages 339 to 340). The second, in the same chain, was sent at 8.06pm (page 337).

36. The first e-mail is a long summary of the issues the claimant had in respect of the phone. It is asking for a way for Mr Baylis and the claimant to resolve the issue. There is a complaint in the e-mail, in relation to not feeling valued or listened to at the respondent. We find that only part of the e-mail touches upon a subject which might allow it to be a protected act, and so the relevant part of the e-mail is –

> *"On a positive note I do feel you valued and listened to me about the lone working policy so thank you for that, and I do feel we can sort this out and in not constant worry about being falsely accused and losing my job or not being able to effectively do my job.*
>
> *You know I love im job and I am good at it. Yes I have some learning needs and health conditions but that does not mean I can do my job or not be valued I should not have to feel I need to proved proof or my knowledge when I question something may not be right. I should have the right equipment. All of this just adds to my stress and makes be feel worse in im flare and not supported."*

37. The second email has three paragraphs. The first is a complaint about Mr Baylis' cover for the claimant during absence, and is not relied upon by the claimant. The second paragraph is a reflection of the claimant's career and not relied upon as being the protected act. The third paragraph reads –

> *"Staff may not like me because I have a learning disability and chronic health condition. But my client do and they generally speak highly of me and the help and support I give them and the service I have built I putt 100% in to my job and clients".*

6 June 2022 absence and the absence policy

38. On 6 June 2022, the claimant reported sick with work related stress (page 411). Ms Daymond says and the claimant agrees that the claimant was due to take annual leave for the following two days. When Ms Daymond replied (pages 412 to 413), she attached an absence policy and wrote:-

> *"The attached policy is one of a number of new policies being implemented by Switchboard to support staff and explains the best practice absence management steps which will be followed. I have attached this for your information".*

39. The claimant was due to be on holiday for part of the working week, but was due to work on 6 June 2022. Ms Daymond advised the claimant that, in line with the policy, the claimant would be marked as sick when unwell and the holiday days would be credited back for future use. The claimant observes, as part of the claim, that this would result in a reduction in pay. Ms Daymond asserts in evidence that the policy was not a great change from the previous practice at the respondent, but notes that there was not previously a written policy on the point. As a matter of fact, in our view, that is in itself a change in policy. However, we accept the general proposition from the respondent that sickness should be treated as sickness and holiday treated as holiday, and this is a principle that the respondent followed before the written policy was implemented.

40. The claimant says that they felt harassed as a result of the change in policy, particularly when (in the claimant's words) they were made to feel that they had misunderstood the policy because of their learning difficulties. We accept that the claimant was in difficulty at the time of this exchange. The claimant was off work with workplace stress. However, we do not consider that the respondent sought to explain away misunderstanding as a result of learning disabilities. We do not find that as a fact. The respondent explained the policy as is outlined above. We accept Ms Daymond's evidence that she was merely seeking to follow the written policy which was then in place. We were shown no evidence that Ms Daymond linked any concern or question from the claimant to their learning disabilities.

16/17 June 2022 proposed meeting on the claimant's day off

41. On 16 May 2022, the claimant wrote to Ms Daymond about issues relating to occupational health, as is set out above. In that e-mail, the claimant mentions the work being done in respect of work problems on settled days off. When explaining the general importance of having days clear for rest which are not involving work issues, the claimant also wrote *"…although am happy to do the odd meeting on my non-working days…",* communicating an understanding that meetings on non-working days might be unavoidable and could be accommodated. Although the claimant did later request that meetings and communications were not held on days off, we do not consider that this was intended to override the earlier communication in relation to meeting on non-working days where that could not be avoided. The claimant demonstrated willingness to attend meetings on their days off throughout the dispute by making arrangements to attend.

42. The respondent knew that it needed to have a welfare meeting with the claimant in June 2022. The claimant wished for the Union representative to be present at the meeting. This was the subject of some dispute but the respondent did eventually agree for the Union representative to be present. The only day upon which the claimant, the representative, human resources and Mr Dowe could be present was Thursday 16 June 2022. This was the claimant's normal day off. There is some confusion about the date of the proposed meeting. We are satisfied that Thursday

16 June 2022 is the correct date because it is referred to as being in that date in the bundle (page 439).

43. The claimant was notified of the meeting in the suspension letter sent by Mr Baylis on 13 June 2022 (pages 423 to 426). The meeting was expressed to be unable to be rescheduled because (1) it had already been rescheduled once when the claimant did not attend, and (2) it was the only date upon which Mr Baylis, Mr Dowe and human resources could accommodate. Mr Baylis also wrote –

> *"Failure to attend this meeting could be deemed as obstructing the organisation's ability to move forward with resolutions to enable you to return to work and decisions about support may have to be made in your absence if you do not attend"* (page 425).

44. The letter acknowledged that the meeting was scheduled for a non-working day. Mr Baylis reiterated that the claimant was not required to respond on a non-working day, but wrote that *"it is a reasonable management request to ask you to attend the welfare meeting on the 16th in order to progress the support you are requesting"* (page 426).

45. On 14 June 2022, Mr Dowe had a car accident and was hospitalised. He explained this to Ms Daymond upon his release from hospital the following day (page 436). The proposed meeting on 16 June 2022 was therefore cancelled on 15 June 2022 (page 439) and the claimant acknowledged this on the same day (page 438).

46. As a matter of fact, the claimant was expected to attend this meeting on their day off from the moment it was set on 13 June 2022 to when it was cancelled on 15 June 2022.

Meeting with Simon Dowe on 20 June 2022 and support plan

47. The abandoned meeting outlined above took place on 20 June 2022. Simon Dowe says, and we accept, that he was still suffering from the effects of the accident and perhaps was not in the best state to do the meeting. The transcribed notes of that meeting were at pages 459 to 480. The claimant complains about a comment Mr Dowe made at the start of the meeting, which was to the effect that Mr Dowe has better things to do than to be dealing with the claimant's welfare. Mr Dowe clarified what he said when giving evidence, correcting a part of the transcript which does not make sense when read alone. Mr Dowe says he said (he says having listened to the recording directly:-

> *"I'm thinking about you, and everybody. I value what you say. I wouldn't be sat here otherwise. I've got better things to do. But I value what you say. I want to hear what you say. I want to hear the whole story, and I want to end this meeting in a place where we can all move forward in a positive way".*

48. The claimant agrees that Mr Dowe said the he had better things to do. The claimant characterised this comment as dismissive, emphasising that Mr Dowe said he did not want to be sat in the meeting. We prefer Mr Dowe's evidence on this key issue in the case. We accept the wording outlined above as what was said. This is because

we found Mr Dowe's evidence as outlined in the summary part of this judgment. He also referenced the transcript directly, and when doing so in his witness statement he knew there was a possibility that we may have listened to that recording during the hearing.

49. We also consider that the words said reflected how he felt. He did not want these issues to be at play at the respondent. He would prefer for everyone to get along and be well at work, rather than having difficulties to be resolved. This is a very normal feeling, in our view, and reference to 'better things to do' was meant as expression of the sentiment that there were other things to do which were preferable to being in the welfare meeting, for all parties.

50. For us to consider otherwise, as the claimant alleges, would be for us to ignore or find dishonest the other sentences around the offending phrase. It is plain to us, and we find as a fact, that Mr Dowe was seeking to find solutions for the claimant's difficulties and that he wanted to listed to the claimant. He would not do that if he intended to dismiss the claimant's difficulties as the claimant alleges. In our view, the claimant's recollection of this meeting is not reliable because of the fixation on the most negative interpretation of the stand alone comment which Mr Dowe admits he made. We accept Mr Dowe's proposition that the claimant has taken this out of context.

51. Following the meeting, Simon Dowe sent the claimant a letter and action plan on 9 July 2022. The letter, dated 7 July 2022, is at pages 520 to 524. The claimant complains that this letter was sent with 'tiny font' in a deliberate act of harassment related to dyslexia. The covering email, on page 519, shows that the letter was attached in .doc form. We consider it more likely than not that that is the format of the letter from page 520. We find this because that is what Mr Dowe explained, and also because the claimant sent back a response to the letter on page 525 where there is no complaint about its accessibility. The claimant responds to the letter, writing in red font, from page 530 to 536. It is clear the letter can be read and understood.

52. In truth, the claimant accepted that they could access (albeit with difficulty) the letter from page 520 of the bundle. The complaint relates to page 991, where the letter appears again in a zoomed out form with a margin down the side that appears to be the result of the document being printed and then scanned in a certain way. The letter is zoomed out and so the font is very small in that version of the letter. However, that is plainly not the version that Mr Dowe sent to the claimant. If it was, the claimant would not have been able to amend the document in order to provide comments in red font.

53. It follows that we find, as a fact, that the respondent did not send tiny font to the claimant.

Emails outside work hours

54. It is plain to us that there is a very significant volume of e-mail correspondence between the claimant and the respondent during the dispute. The claimant would often send several e-mails in a day, responding instantly to e-mails with a reaction, and then following up in piecemeal fashion as and when new points were wished to

be made. It is equally apparent that the respondent felt that communicating in writing was the primary form of communication.

55. The claimant used several e-mail addresses throughout the dispute. There was a work e-mail account, to which the claimant had patchy access or use when on suspension. There were then at least two personal e-mail addresses in use. The claimant's work e-mail address set out their working hours. The respondent witnesses all knew what the claimant's working days were. All said, and we accept, that they did not generally require a response to any e-mail on a non-working day for the claimant. The only exceptions were extraordinary, such as when arranging a meeting which was to be held on the claimant's next working day. We find that there was no interest on the part of any respondent witness in making the claimant respond to them on their day off simply for the sake of it. There was absolutely no evidence before us indicating that was the case.

56. Instead, we find that the respondent was sending e-mails to the claimant as and when they could to keep the issues moving along. In particular, we find:-

    56.1. Mr Hammond did not expect responses to e-mails from people outside their work hours, as his e-mail footer explained (page 384).

    56.2. Mr Baylis had the same attitude and the same sort of e-mail footer (page 354).

    56.3. Mr Dowe was a trustee and volunteer with other work and employment, and so he was compelled to send e-mails outside of regular working hours because that was often the only time he had to dedicate to his role as Chair of the Trustees.

    56.4. Ms Daymond runs a busy HR practice with multiple clients, which means that she worked odd and long hours. We are persuaded by her evidence that she was stretched at the time in question and was sending e-mails in response to the claimant whenever she could, regardless of day or time, to ensure that the progress of the claimant's HR issues was not delayed.

57. In the hearing, the claimant explained that they received a notification whenever an e-mail arrived. The way the claimant's learning disabilities operated meant that there was a compulsion to read the e-mails. It was more stressful to leave them unread. Once read, there was a compulsion to respond in the way described above. The claimant did not take any steps to mute the notifications, saying that e-mails were used for all sorts of reasons and so they needed notifications. The claimant did not take any other steps to limit the impact of receiving the e-mails, such as those suggested in cross examination – (1) setting up a rule to divert the e-mails, or (2) setting up a new e-mail account which did not push notifications.

Requirement to articulate better

58. A series of emails were exchanged on 1 August 2022. By our count, the claimant sent Ms Daymond at least four emails which covered different complaints. It is a feature of all of the email exchanges with the claimant that a series of frustrated emails were sent in a flurry, with each thread then descending into an instant

messenger style exchange with further details or information given in what essentially becomes an ongoing written argument. We find that the respondent found this sort of correspondence difficult to deal with and that it generally made the process of dealing with the claimant very difficult. This finding is supported by the evidence of all of the respondent witnesses and by our own assessment of the material we have read.

59. On 1 August 2022, the claimant sent an email querying whether the respondent had dealt with all of the points it should have in respect of their grievance. This follows long exchanges of emails over the previous week. Ms Daymond says, and we accept, that the respondent was unclear what the claimant wanted to be addressed which had not been addressed. Ms Daymond accepted that the claimant was not satisfied by the grievance responses on 1 August 2022, but that she was not sure what had not been addressed at all. As a result, she sent the claimant the email below on 1 August 2022 (page 631):-

> *"Switchboard believe they have provided all evidence requested relevant to the points discussed and they have documented everything they believe they are required to.*
>
> *If you believe there are still points outstanding from the answers you have given, please help us by articulating clearly what those issues are.*
>
> *It is important to note however that if they are "differences of opinion" on matters considered closed by Switchboard, then of course you have the right to take appropriate action…"*

Facts relevant to the claimant's dismissal

April 2022

60. The facts outlined above were part of a general decline in the relationship between the claimant and the respondent in 2022. The problems the claimant experienced with the equipment, feeling less valued, and the altercation with the colleague all led towards the claimant's sickness absence in early June 2022.

61. In her evidence, Ms Daymond said that she was concerned about the claimant's health from April 2022. We accept this evidence. We find that the claimant's relationship with their line manager, Jacob Baylis, had started to break down from this point. This was the evidence from Ms Daymond, and also from the claimant, who said they could not understand the line manager's approach.

62. On 4 April 2022, Mr Baylis sought to speak to the claimant in relation to the investigation from the colleague's complaint following the altercation about the phone charger (page 293). The claimant refused, saying that everything should be in recorded meetings or by e-mail (page 293). Ms Daymond offered to speak informally to 'break the ice', and Mr Dowe also offered to do the same. In the e-mail exchange offering that (page 294), Mr Dowe also said:-

> *"We do need to keep in the back of our minds that they have a track record and although I wholly agree with our approach we are dealing with someone who has form when it comes to disputes"*.

63. On 6 April 2022, Ms Daymond wrote to Mr Baylis (page 295):-

> *"…did you say that Vernon was not prepared to even have a phone conversation with you?...*
>
> *As part of their employment they are not permitted to withhold communication with the employer. Vernon is currently suspended due to investigation of conduct…*
>
> *They are not making it any easier on themselves to argue fair treatment when they are not engaging with any kind of communication with you as the employer."*

64. O 5 April 2022, the claimant wrote to Mr Baylis to request a meeting *"on Wednesday"* with their union representative present. The e-mail also gave an update on a number of health matters and we find the claimant communicated issues relating to:-

    64.1. A need to stop any impact on mental health;

    64.2. Damage to feet following a recent condition flare, which required specialist equipment;

    64.3. A new diagnosis (fibromyalgia);

    64.4. Damage from psoriatic arthritis; and

    64.5. Pain from low bone density.

65. Mr Baylis reported this to Ms Daymond, who suggested allowing the union representative to attend and, in light of the claimant's e-mail, discussing an occupational health referral with them to provide support.

66. Following the meeting on 6 April 2022, it was agreed that the claimant would take a few days off and return on 19 April 2022 (page 309). Upon the claimant's return, Mr Baylis was asked to complete the referral to occupational health so that the respondent could get advice on adjustments for the claimant (page 313). The e-mail to Mr Baylis from Ms Daymond advised that the claimant had already agreed to the referral (which we confirm as a fact), but that a physical signature was also required. Ms Daymond said that the claimant would need to have sight of the referral form once uploaded.

67. The signed referral form was shown to us at page 314. The form itself does not require the claimant to have seen or approve the information provided by the respondent to the occupational health adviser. The referral (pages 324 to 327), completed by Mr Baylis, contained the following phrases which are relevant to these proceedings:-

> *"Due to pain, discomfort and fatigue caused by a mixture of mental health, learning and physical challenges and disabilities Vernon has struggled with some elements of their job description at Switchboard."*

68. On 27 April 2022, the claimant came face to face with the colleague with whom they had had the altercation about the phone charger. We find this arose due to some confusion about the room booking issue. The claimant advised they did not feel safe on site and so had cancelled all meetings which were due to be held at the respondent's offices (page 318).

69. On the same date, Mr Baylis forwarded the e-mail to Ms Daymond and Mr Dowe. The relevant parts of that correspondence (page 319 to 320) are:-

> *"I have also received two unrelated complaints about VC [the claimant] today and need to find time to sit down with them and address the issues – both of which are around curt communication that is perceived as accusatory or aggressive…*
>
> *…am I able to request that VC not use the office until we have established an agreed return plan and engaged in mediation?*
>
> *[the colleague was] saying they don't feel safe around [VC]…*
>
> *Another colleague complained about the tone of an email from Vernon in writing to me. That would be our 8th complaint in the space of 3 months*
>
> *Unfortunately VC return is not going as smoothly as hoped and I am concerned that other staff are now considering not using the office or potentially leaving Switchboard if we cannot resolve this swiftly…"*

70. In reply, Mr Dowe suggested suspending the claimant. We find he had also reached conclusions about the claimant in respect of these, as yet not investigated, allegations. We also consider those conclusions extended to the claimant as an employee generally (page 321):-

> *"I do not believe we should tolerate any behaviour from VC that has a negative impact on the other staff. It is inexcusable and I personally would support another suspension. We have a lovely staff team and they do not deserve having to deal with this unacceptable behaviour in their workplace.*
>
> *I feel like we are exposing our innocent hardworking employees to abuse that we know is happening, and for me that needs to stop right now sending a clear message to all, what type of employer we are and how we appreciate and take care of our team".*

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71. Later, on 17 May 2022, Mr Dowe sent Ms Daymond an instruction e-mail about the room booking system, saying that it was quite clear in terms of how to use it. Mr Dowe also concluded, in relation to the claimant (page 378):-

> *"'The boy that cried wolf unfortunately for them, they have run the pot of goodwill dry. They need to stop putting obstacles in the way of being able to do their job and actually knuckle down and crack on with it otherwise we have to conclude that we clearly can't offer the level of support they need."*

72. On 3 May 2022, the claimant reported that there were some issues that need to be discussed to avoid their mental health declining (page 328). On the same date, the claimant e-mailed Ms Daymond and observed that (page 332):-

> *"…I got that wrong and will just have to put up with how things are with no support or concern for me,*
> *I love my job and I am good at it but I have to except Things are not going to fully change and I just have to except im never going to feel valued or supported well, I will work from home and keep away from the others and the unsafe office environment,*
> *Simon has never respond to an email I have sent him in the past do I dont expect he will now no do I feel he will support or listen or value me."*

73. On 4 May 2022, the claimant sent the e-mails outlined above. The claimant sent a total of 5 e-mails one after the other without response on 4 May, timed at: (1) 4:25pm; (2) 5:54pm; (3) 7:14pm; (4) 8:01pm; and (5) 8:06pm. All were raising complaints or frustrations about working at the respondent. We accept that the e-mails led Ms Daymond to form the view that the claimant may have lost trust in the respondent as their employer. Mr Baylis was off work when all of these e-mails were sent.

74. Upon return to the office on 10 May 2022, Mr Baylis wrote to Mr Dowe and Ms Daymond to opine that the claimant was clearly struggling in the role and that a medical suspension seemed appropriate given that the claimant was consistently raising mental health concerns (pages 353 to 354). The e-mail also raised the following points:-

    74.1. Mr Baylis did not think more could have been done about the phone issue;

    74.2. The claimant did not appear to be managing their own stress;

    74.3. The claimant was refusing to meet with any colleagues unless Mr Baylis was present;

    74.4. The claimant considers that colleagues are talking behind their back; and

    74.5. The claimant often felt excluded even thought that was not the case.

75. During this period, the claimant met with occupational health and had sight of the information provided by Mr Baylis. Ms Daymond recalls the claimant saying that Mr Baylis had entered *"wrong information"* when they caught up on 12 May 2022. The claimant also said that the appointment had not been long enough. Upon

investigation, the respondent discovered that the claimant had been late for the meeting and then was unhappy that there was not as much time for the meeting as anticipated (page 366).

76. On 16 May 2022, the claimant wrote (pages 369 to 372) to complain about what Mr Baylis had written on the occupational health referral. The complaint was multi-faceted, but the important headings were:-

    76.1. Mental Health – the claimant said they did not have *"any ongoing mental health"* and had, instead, situational mental distress. The referral cited mental health as is outlined above.

    76.2. Job Performance – the claimant denied that there had been any breakdown with colleagues or stakeholders. The referral cited struggles to communicate with colleagues and inability to collaborate.

    76.3. Confrontational language – the claimant denied using confrontational language.

    76.4. Health and safety – the claimant said they had complained about health and safety issues, most notably fire risks.

    76.5. Waiting lists – the claimant said that the stressful waiting list, which Mr Baylis cited as a concern for wellbeing, was there because of the suspension and the claimant's work not being picked up.

    76.6. Medication – the claimant said they were not on anti-depressants, which the occupational health report stated. The claimant clarified that they were taking amitriptyline, which is used as an anti-depressant, but that it was not prescribed for a mental health reason.

    76.7. Mobile phone – the claimant said that their mobile phone was not working at the time of the meeting.

77. Despite those concerns with the report or its basis, the claimant also said they were *"happy with the recommendations the OT has made"*. However, the claimant said that they *"do not agree with some of the statements Jacob has made"* and so they had been advised *"not to sign the report due to not agreeing with some of Jacob's input"*.

78. On 18 May 2022, the claimant wrote to Ms Daymond again to highlight that the respondent had never raised work concerns, and yet now there were said to be problems (page 381). The e-mail also referenced the *false malicious allegations* made by the colleague in relation to their altercation. In fact, the grievance against the claimant was dismissed only because it could not be proven. It was not found by the respondent to be false, malicious, or disproved.

79. We accept the respondent witnesses' evidence that the claimant was difficult to communicate with in May 2022, because the claimant would communicate only in writing and would send multiple e-mails about the same or similar issues, either in reply to the respondent or on their own motion. We accept as accurate what Ms Daymond characterised in an e-mail to Mr Dowe on 19 May 2022 (page 383):-

> *"I've had another couple of long emails from Vernon – very repetitive. I'm going to do you one reply to all of them because I want to break the cycle of Vernon sending multiple emails. I know that Jacob came back to about 20 from Vernon when off sick."*

80. On 20 May 2022, occupational health advised the respondent that they had addressed the comments the claimant raised in the report, but that the claimant was still not going to release the report to them (page 385).

81. On 24 May 2022, Ms Daymond e-mailed the claimant to ask for the occupational health report to be released (page 389). Ms Daymond explained the importance of the respondent understanding the respondent's health issues and occupational health advice to be able to support the claimant. There was a suggestion that the claimant may require a follow up appointment.

82. The claimant replied on 25 May 2022 (page 388) and said:

> *"As I have clearly stated on advice from unison I am fully with in my employee rights not to sign the OT repot if I do not agree with it, I have out lined my reasons to you and Simon why im not signing the report. The report has to be truthful and correct before I will sign it."*

83. On 26 May 2022, there was a board meeting where Mr Dowe gave an update about HR matters generally, and we find that included an update about the claimant (pages 1125 to 1127).

84. On 30 May 2022, the claimant sent a long e-mail to Ms Daymond (pages 395 to 396) reiterating the position in respect of the occupational health report. The claimant says that Mr Baylis' comments were *"all completely untrue"* and this could be proven. The claimant, in our view, displayed a lack of ability to see the issues from the respondent's point of view. They could not see that, no matter how innocent they may have felt in relation to the colleague issue, the claimant had still been party to a dispute which had affected work relations. The claimant could not see that their manner, which they accept was 'direct' albeit as a result of disability, might nevertheless cause issues with others. The claimant also says that they will never release the report and it was all incorrect, despite earlier saying they were happy with the recommendations made. The claimant clearly understood why the respondent wished to see the report, but said they would refuse and that the consequences were *"how it has to be"*.

85. On 31 May 2022, the claimant was invited to a welfare meeting with Ms Daymond and Mr Dowe (page 401). The claimant was allowed to bring a union represented. The meeting had the following agenda points:-

    85.1. The current referral to occupational health to support reasonable adjustments in the role;

    85.2. The concerns about the Mr Baylis' comments in the occupational health referral;

85.3. The mobile phone issue;

85.4. Discussion about the occupational health recommendations, which the claimant had been willing to disclose; and

85.5. Any other welfare issues.

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86. The claimant did not attend the meeting because it was too short notice (page 406). This is the meeting complained of as being arranged on a non-working day. The union representative made contact with the respondent about it and Ms Daymond advised them that the union was not recognised and would not be directly corresponded with (page 419)

87. On 6 June 2022, Mr Baylis sent Ms Daymond an e-mail setting out what the respondent was doing compared to the suggested reasonable adjustments that the claimant had communicated. Of the 18 points raised, Mr Baylis felt the respondent was doing most if not all of them. Of the ones where the respondent was not providing the adjustment, it was clear that it was the first time the issue had been raised, and Mr Baylis committed to taking steps (pages 414 to 416).

88. Around this time, Mr Dowe began taking advice from Ms Daymond about the implications of the on-going dispute. The respondent was plainly envisaging the claimant bringing proceedings against it (page 421). We find that the respondent was considering dismissing the claimant as early as 9 June 2022. This is because Ms Daymond's e-mail includes the line:-

> *"…don't worry 50k is worst-case if there's no process followed. Yes there would be a cost to defend a claim…"*

89. Mr Dowe agreed that he had been taking advice about dismissing the claimant, as part of his role as trustee to consider all of the options and decide what is in the interests of the charity.

90. Mr Dowe responded on the same day (page 421) and wrote:-

> *"Understood about the costs attached to this and thank you for making yourself available to talk to the trustees.*
>
> *Your email to UNISON was poetry and they will hate it. I think we definitely need to start playing hard ball now and everything has to be done limited to your legal responsibilities – no more Mr Nice Guy!".*

91. The claimant was placed on medical suspension on 13 June 2022. On the same date, the union representative raised concerns that the respondent had breached the Equality Act 2010. She also advised that the claimant would continue to refuse to release the occupational therapist report (pages 432 to 435).

92. On 15 June 2022, the claimant sent a long e-mail explaining that the report would never be released and that it would not be accurate as it had false information. The

claimant said that the only way forward was to withdraw the last report and make a new referral with 'correct' information (pages 438 and 439). At no point by 15 June 2022 had the claimant clearly articulated what remained inaccurate in the report that represented a barrier to it being released. It appeared to us in the hearing that the claimant thought they had been clear.

93. On the same date, Ms Daymond raised the issue in reply (page 439), where she wrote:-

> *"The OH report as far as we are aware has still not been released by the given deadline. Switchboard are prepared to extend this deadline to close of business tomorrow…, alternatively please provide the reasons why the report is not accurate, as the OH report is reflective of the conversation you had with the OH consultant and of which you confirmed to me had enabled you to discuss your health matters regardless of the referral form provided by Jacob.*
>
> *To date, it is unclear what is inaccurate in the report and unclear why it cannot be released as a supportive measure to support the welfare meeting…"*

94. On 16 June 2022, the claimant responded (page 440):-

> *"just to be clear as your extended deadline is the end of today I will not be signing or releasing the occupational health report as it presently stand*
> *If you wish to [discipline or suspend] then please do and we can go to a tribunal…"*

95. In reply, Ms Daymond reiterated that despite the e-mails and documents sent previously, the respondent was not clear about what needed to change in the report for it to be released. We note that at this point, Ms Daymond and the respondent had not seen the report and so could not have known what the problem was with it.

96. On 19 June 2022, Mr Dowe sent an e-mail to the board of trustees (page 1128). It said that the respondent had placed the claimant on medical suspension as a protective measure. It suggested an extraordinary board meeting to *"keep you all fully up to date with any potential risks to the organisation"*.

97. On the morning of 20 June 2022, the claimant sent another long e-mail to Ms Daymond (page 442). We find the following facts arising from the e-mail:-

    97.1. The claimant could not understand why the information given already was not sufficient for the respondent to understand what was wrong with the report;

    97.2. The claimant was adamant in writing that the welfare meeting would not discuss the OH report or the release of the report;

    97.3. The claimant was happy to go to tribunal if the respondent continued to ask about the report;

97.4. The claimant blamed the respondent for causing on-going work stress; and

97.5. The claimant felt threatened, bullied and victimised by the respondent.

98. Following this e-mail, the claimant re-sent Ms Daymond the e-mail which the claimant said provided reasons and evidence as to why the occupational health report was inaccurate and founded on false information (page 444 to 445). These were vague and unparticularised assertions that the management instruction to occupational health was "completely untrue", and so the resultant report was "not relevant". The claimant does not engage with any more detail about the problems, aside from what is set out at paragraph 76 above. We find as a fact that the respondent was simply not clear what the issues were for two reasons:-

98.1. Despite many long e-mails about the subject, the claimant is never explicitly clear about the issue; and

98.2. The claimant stopped the respondent from even seeing the report in order to understand what might have been inaccurate and so what might have been corrected, as we find the respondent was willing to correct.

99. The welfare meeting took place, as outlined above, on 20 June 2022. As well as the claimant, Ms Daymond, Mr Dowe and Mr Baylis were in attendance. The notes were shown to us at page 459 to 480. From hearing evidence and reading the transcript, we find the following facts:-

99.1. Ms Daymond said that the respondent wanted to understand what reasonable adjustments the claimant needed to come back to work and enjoy the role.

99.2. When the claimant was asked to speak freely about their concerns with the occupational health report, the claimant closed the conversation down by stating that the report would not be released.

99.3. Initially, when the respondent tried to engage the claimant with understanding the occupational health report and concerns with it, the claimant said it was a separate issue and would not provide detail about the concerns.

99.4. The claimant was distrustful of the respondent, said that they would talk about the concerns in order to move the conversation on, but then referenced the e-mail correspondence which we have found the respondent thought was vague and unclear.

99.5. The claimant said one issue was Mr Baylis saying that the claimant had *"mental health issues"* and then referred to *"the very false and malicious allegation"* which was the altercation with the colleague.

99.6. When Ms Daymond read the referral out, which does not use the wording complained about, the claimant argued and interrupted.

99.7. Mr Baylis clarified that the wording was not intended to say that the claimant had a mental health issue, and the claimant said that the original

version of the report referenced 'anti-depressant' and so Mr Baylis had been believed.

99.8. The claimant confirmed that the offending reference to anti-depressants had been removed by occupational health in the updated report which was still not being released to the respondent.

99.9. The claimant refused to consider that they had assumed the reference to anti-depressants was triggered by Mr Baylis' wording, and refused to release the report even if Mr Baylis' referral was excluded.

99.10. The meeting then moved on to talk about the recommendations that the claimant had disclosed.

99.11. There was some productive discussion around the claimant's proposed return to work.

99.12. The claimant said they did not feel safe in the office with other staff present due to feeling having been the victim of a false allegation.

99.13. Ms Daymond pointed out that others in the office feel that they were the victims of the claimant's behaviour, and at that point the claimant said they were making a formal grievance against the other staff member for making a false allegation.

99.14. The claimant said they felt bullied at work.

99.15. The claimant said that there was a problem with management managing staff at the respondent.

99.16. The claimant told Ms Daymond and Mr Dowe that they were not listening to concerns when the pair were trying to clarify the specifics of the claimant's complaints and pointing out that the respondent has to balance the needs of all staff.

99.17. The claimant was unable to accept that the respondent was listening to them unless the claimant's accounts and feelings were accepted as absolutely the factual position of all staff involved.

99.18. The claimant set out in some detail issues with other staff members not believing that their health concerns are genuine, and named four specific individuals. Mr Baylis said those staff members were surprised to learn that the claimant had concerns about them.

100. On 21 June 2022, the claimant put a grievance in against the colleague with whom they had had the altercation earlier in the year (page 481). On the same date, the claimant's union representative sent an e-mail complaining about several aspects of the meeting the previous day, saying that the claimant felt bullied, disrespected and upset following the meeting.

101. On 23 June 2022, the claimant wrote to Ms Daymond (page 493) and included the words *"you are very where the period of mental health I had was 100% caused*

by switchboard… although [if] this continues my mental health may deteriorate again…".

102. In the meantime, the respondent instructed Ms Nicol to investigate the grievance raised by the claimant against the colleague. On 28 June 2022, Ms Daymond explained to the claimant that no disciplinary action had been taken following the investigation into that grievance, but that the respondent had not decided that the allegation against the claimant was 'false' and so did not agree to that characterisation (page 505). The claimant was mistrustful of Ms Nicol's grievance process (page 510).

103. On 29 June 2022, there was a trustee board meeting at the respondent. Mr Dowe and Ms Daymond gave an update to the board about the claimant, the suspension, and the grievance. The last comment against that item in the minutes (page 1130) is:-

> *"RM and GH discussed they were happy to meet with [Ms Daymond] to discuss formulating a draft exit plan for further discussion and consideration."*

104. Consequently, we find that the respondent was taking steps designed to end the claimant's employment from 29 June 2022.

July 2022

105. The claimant asked about a return to work in early July 2022, and was told that the medical suspension would remain in place until a full return to work plan could be put in place. Mr Baylis told the claimant that the occupational health advice was a key part of that puzzle (page 517).

106. On 7 July 2022, the respondent invited the claimant to a further meeting (pages 520 to 521). The important wording of the letter includes:-

> *"We discussed your concerns in the meeting but feel there is not any incorrect information provided in the employee referral form and that the report should be released to us. The report is an important tool in any further discussions and enable Switchboard to manage this situation. You have previously confirmed to Ali that you had every opportunity to speak openly with the OH consultant and that the report was acceptable apart from one correction of the name of a medication. You have also been advised that any concerns you have about Jacob should be raised via the grievance process, and not by withholding important medical evidence that could help us make reasonable adjustments so that you can fulfil your role.*
>
> *You also stated that as well as refusing to release this report, that you would refuse to release any future reports. A blanket refusal prevents us from making important decisions about how to support you with your disabilities. As I explained in the meeting, whilst you have sent Switchboard several medical documents relating to your disabilities, we*

> *are not medical experts and require OH guidance to advise us on next steps to consider.*
>
> *We have asked you to confirm the reasons why you believe the report cannot be released and have given you reasonable notice to do so (and extended the time limit as well). You are now requested once more to release the OH report by the end of Monday 11th July 2022 so that we can verify the contents in advance of the next welfare meeting you have verbally shared with us as one of us are medical experts…"*

107. Consequently, having read this letter and heard from Mr Dowe and Ms Daymond, we consider that the respondent had formed the view that it could not simply rely on the statements from the claimant about the adjustments recommended. It needed to see the recommendations for itself, with the reasoning for them, before making the adjustments. This was a view formed due to (1) the claimant's complex needs, (2) the claimant's unclear communication around the report and other issues, and (3) the claimant saying that the whole report was flawed because of Mr Baylis' instructions.

108. The letter also set out 16 action points from the adjustments the respondent understood were required based on the claimant's reporting. All were reported as *"considered complete"* or as no further action for the respondent.

109. On 11 July 2022, the claimant e-mailed Mr Dowe to reiterate that the report would not be released whilst it contained false information. The claimant said they would get a full response together. The claimant also raised a grievance in the e-mail against Mr Baylis for *"writing false information in an occupational health report"* (page 525).

110. Following this, the claimant provided comments on the letter and the action plan. In summary, the claimant:-

110.1. Confirmed that the occupational health report would not be released whilst it had the 'false information' from Mr Baylis.

110.2. Denied that there was a refusal to release future reports and that they would be happy to engage with OH in the future if the correct information was provided.

110.3. If the respondent disciplined or dismissed the claimant because of the refusal to release the report, then the claimant and Unison would begin Tribunal proceedings.

110.4. Stated that they believed the respondent had discriminated against them in relation to their disabilities.

111. A further welfare meeting took place on 12 July 2022. The notes of the meeting were at pages 537 to 547. The same attendees were present and the claimant was supported by an assistant at the meeting. At the meeting, Mr Baylis explained why the claimant had been placed on medical suspension, because it was clear to management from e-mails that the claimant was stressed and distressed in the work

environment. The claimant said they felt able to return to work, but not necessarily to the office. Ms Daymond suggested that the inability to go to the office was indicative of broke relationships with colleagues, which was another reason for the suspension, and the claimant refuted this. The meeting ended without progress being made towards removing barriers to the claimant returning to work. The claimant said that there were no barriers from their side, despite the multiple objections in writing to the respondent's proposed welfare plan allowing a return to work.

112. A third welfare meeting took place on 25 July 2022, the notes of which were at pages 570 to 585. The claimant's union representative attended. We accept Ms Daymond's characterisation of this meeting as confrontational. The notes show that there was heated discussion about the occupational health report and the referral made by Mr Baylis' referral to the claimant's mental health. Mr Dowe was not comfortable discussing the report without seeing it. The claimant said that they would like the Tribunal to have a view on the issues, and Ms Daymond noted that constantly referring to suing the respondent was not a constructive approach. The claimant responded: *"that's what is going to happen Ali once you have done your investigation"* (page 572).

113. In the meeting, Ms Daymond explained that Mr Baylis' referral is only the step that provides context for the referral. She emphasised that the report itself, which is supposed to help, is compiled by an occupational health professional who relies on the medical evidence provided and what the claimant says directly about the conditions.

114. The union representative said that the claimant felt that Mr Baylis had reported the claimant had poor mental health. The representative did not deviate from that view when informed that, objectively, that is not what Mr Baylis had said.

115. The claimant spoke about the issues from their perspective. In a way which is common when the claimant speaks, any point of disagreement is followed by a challenge to the respondent to provide evidence that the claimant had ever said or implied something in the past. The emphasis placed by claimant in this meeting was that Mr Baylis' comments in the occupational health report did not reflect what Mr Baylis had said in the claimant's review in January 2022. It is plain to us that the claimant did not appreciate or accept that the matters which took place between January 2022 and the referral in late April 2022 (ie. the altercation, the impact of the grievance against the claimant, and the e-mails the claimant was sending).

116. In the meeting, Ms Daymond asked if the claimant would consent to release the recommendations part of the occupational health report with the respondent so that the respondent could fully understand the recommendations and the context of them. This would, she explained, be a necessary step as part of the workplace risk assessment to get the claimant back to work. In response, the claimant said (page 580):-

> *"We are going to have to decide what you are going to do about this report, and then take your action against me doing it because if we… you're saying I can't come back to work until this is done, and if I'm never going to do it, I am never going to be allowed back to work."*

117. Eventually, it was decided that the respondent could make adjustments based on the information available, but that the risk assessment would note that occupational health advice had not been taken in respect of the adjustments.

118. The conversation then returned to the occupational health report. It is clear that the respondent did not understand the problem. The union representative suggested that the respondent re-write the management section, but Ms Daymond noted that the management can write what they consider correct in the referral. The claimant then refused to discuss the matter further, saying it could be dealt with in the grievance raised against Mr Baylis.

119. The claimant then reverted from the position that they could return to work with adjustments and reiterated that they felt they would not be able to return to work without releasing the report, and they would not release the report. When summarising, the claimant reverted back to all of the initial positions taken in previous meetings and ignored any explanations the respondent had offered and said:-

119.1. The respondent dealt with a malicious false allegation against them.

119.2. They had been on 6 or 7 weeks of suspension for one day's sickness.

119.3. Their service and reputation had been destroyed by the respondent's actions.

119.4. The respondent's actions with this issue had had a hugely negative impact on wellbeing.

119.5. The respondent was *"destroying"* the claimant.

120. The meeting ended in disagreement.

121. On 25 July 2022, Ms Daymond wrote to the claimant (page 586), attaching the wording Mr Baylis had written in the OH referral. In the e-mail, Ms Daymond wished to understand which parts had caused offence. She noted that management could choose what to write in the referral. She said that the respondent was open to a new referral, but that it was the respondent's *"opinion that there are communication problems within the workplace, hence the need for mediation within the whole workplace"*.

122. On 28 July 2022, Mr Baylis sent Ms Daymond an outline of complaints about the claimant. Mr Baylis says *"this does not include any of my own experiences of shouting and intimidation from VC"* (page 609). The summaries were at pages 610 to 612. The five employees all reported similar instances where the claimant was perceived to be angry or grumpy, including a general view that the claimant should not be upset. The two stakeholder reports indicated that the claimant was volatile in that they had had arguments with others and withdrawn the service on one occasion from a partner organisation.

123. On the same date, the claimant e-mailed Ms Daymond and reiterated that they did not feel safe in the office. The e-mail concluded with:-

> *"I'm prepared to take what legal and non-legal action needs to be taken. No matter how long it takes for the impact it has on my wellbeing"* (page 614).

124. Later on the same evening, the claimant told Ms Daymond that the claimant was well-known in the area as a non-violent person and that this would all be clear in the area *"once this finaly comes our wheb / if it gets to legal action…"* (page 615).

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125. On 1 August 2022, the claimant raised a grievance against the respondent as an organisation for an incident involving the same colleague they had had an altercation with which triggered this whole course of events (page 634). On the same date, the claimant confirmed to Ms Daymond that the claimant and Unison would start legal proceedings against the respondent because there were *"differences of opinion"* (page 636). Tribunal proceedings were referenced again in an e-mail on page 637.

126. On 2 August 2022, the claimant wrote a long e-mail complaining about the respondent. It included words such as *"ridiculous"*. The claimant also said that they would no longer speak to the respondent about the issues because the matter was with Unison and would be the subject of proceedings.

127. On 10 August 2022, Mr Baylis provided a statement to the respondent about working with the claimant (page 647). Mr Baylis recorded that:-

127.1. The claimant was rude and belittling and refused to engage in team activities.

127.2. The claimant used words such as *"pathetic", "useless"* and *"ridiculous"* about Mr Baylis and his work.

127.3. The claimant would complain about the respondent to third parties.

127.4. Mr Baylis felt facilitating the claimant's return would be detrimental to the team.

127.5. Rebuilding trust and confidence between the claimant and the team was highly unlikely.

128. In cross examination, the claimant refuted these points and did not consider they were genuine. The claimant did admit to being frustrated with Mr Baylis, and said that sometimes they had said that Mr Baylis ought to know or do certain things as a line manager. In his evidence, Mr Dowe said that Mr Baylis was not as open with the claimant as he should have been about problems. Ms Daymond supported that view, and both respondent witnesses described this as a necessary development area for Mr Baylis.

129. We are satisfied that Mr Dowe and Ms Daymond genuinely believed that the contents of Mr Baylis' statement, and the earlier reports from colleagues and stakeholders, were true.

130. At 9:09am on 12 August 2022, the claimant again said that the matter was with Unison's legal team (page 652).

131. At 9:21am on the same date, Ms Daymond wrote to Mr Dowe (pages 653 to 654) and said:-

131.1. She had concerns over the current state of affairs.

131.2. The claimant had raised two grievances, one against Mr Baylis, and that she could see the toll his was having on Mr Baylis.

131.3. The claimant seemed *"at the end of their tether and is now seeking legal support in order to decide the best way forward".*

131.4. It was important to consider *"the wider interests of the organisation, its employees and stakeholders, the service it provides and the trustees' overall objectives"*.

131.5. She has genuine concerns about whether the claimant could be reintegrated into the organisation.

131.6. Mr Baylis seemed to think that the claimant could not be reintegrated, and Mr Baylis had indicated that he was considering moving on to another role.

132. At 9:27am on the same date, the claimant wrote to Ms Daymond (page 655) to say that *"I am now placing a formal grievance against Jacob for saying I'm too scared to work with people in coffee shops…"*. This was the second grievance about Mr Baylis, and in addition to the grievance brought by the claimant against the colleague and the organisation. The claimant had, from this point, four grievances raised.

133. At 11:28am on the same date, Mr Dowe wrote to the board of trustees (page 1137). The relevant parts of that e-mail said:-

> *"The current ongoing difficulties with one of our staff members has reached a stage where I need to call an extraordinary board meeting to be agreed regarding our next steps…*
>
> *… The primary decision before us is regarding the staff member who now has raised three official grievances against other staff two of which are against our CEO Jacob. I have been advised by our HR Consultancy that the board need to decide whether to continue on our current path or we make a decision that will protect the well-being of our CEO Jacob who is now under unreasonable professional and personal pressure… In summary, this would be a vote of confidence in our CEO or our employee."*

134. Page 1137 was not disclosed until our specific order requiring documents showing interaction with the board of trustees. In our view, this is a highly relevant and important document, because it shows that the board was being briefed with a binary scenario in messaging which clearly guides readers to an end point where Mr Baylis is backed and remains, and where the claimant is dismissed. We find as a fact, on the balance of probabilities, that Mr Dowe had already decided that the clamant should be dismissed when he sent this e-mail. This is plain to us from the

contents of the e-mail, supported by the earlier frustrated and exasperated tone of e-mails he sent to Ms Daymond about the claimant.

135. On 15 August 2022, Mr Baylis spoke to Ms Nicol as part of the investigation into the claimant's grievances. In that interview, he supported what he had written in the occupational health referral with real life examples of the issues he felt the claimant was facing. At the end of the interview, Mr Baylis was recorded as saying (page 661):

> *"It is just becoming increasingly difficult to see a way forward.."*

136. On the same date, there was an extraordinary board meeting of the trustees of the respondent. No minutes of the meeting were disclosed. In evidence, Mr Dowe explained that he and Ms Daymond had spoken about the issue and that the board agreed to move forward with a *"some other substantial reason"* process. When asked what this meant in practice, Mr Dowe said that the board had decided to support Mr Baylis and for the claimant to go through the process described. When asked if this meant the board had decided the claimant should be dismissed, he agreed.

137. Mr Dowe's candid admission was out of step with Ms Daymond's evidence, which was to the effect that the board only approved the process to dismiss but not the actual decision, which would be taken at the end of the process by Mr Dowe. Ms Nicol was not present at the time but, after hearing how Mr Dowe described the mechanics of the board meeting and what followed, said that it *"sounds like it happened differently to what I had understood"*.

138. We have already found on the balance of probabilities that Mr Dowe had decided the claimant should be dismissed, and so the board's resolution to go through the process (if that was what happened) was, in our view, a respondent decision to dismiss the claimant. Actually, we find as a fact that the board did know it was deciding to dismiss the claimant and had resolved accordingly at the meeting on 15 August. Further support from this factual conclusion is drawn from the e-mail which Mr Dowe sent to the board after the meeting (page 665), which said relevantly:-

> *"This morning we agreed unanimously to act quickly to protect our CEO and contain any potential reputational damage to SWITCHBOARD. In line with this decision, I have just emailed the attached letter to VC and their UNISON representative.*
>
> *I have spoken to a contact who specialises in 'crisis comms' and they are on standby to draft responses to any press/public/crisis questions…*
>
> *I am grateful for your support today and I have no doubt in my mind that we are acting in a fair and considered way given the nature of the circumstances."*

139. The letter referred to was at pages 666 to 668. The letter provided a brief narrative of the dispute between the claimant and the respondent, and then set out the following thoughts:-

139.1. There has been a complete breakdown in relations.

139.2. The claimant did not trust the respondent's actions or processes.

139.3. This is supported by the decision to take a legal route.

139.4. The respondent cannot continue to employ someone where trust and confidence has broken down.

139.5. Mr Baylis was concerned about the claimant's reintegration.

139.6. Mr Baylis may not have trust and confidence in the claimant.

139.7. The respondent wished to have a frank conversation with the claimant to see if the relationship can be restored.

139.8. There would be a meeting to have that conversation, and a result might be dismissal.

139.9. *"No decision will be made until after the meeting"*.

140. That meeting happened on 17 August 2022. The notes were shown to us at pages 676 to 705. The claimant was present with their union representative. The union representative asked what decision was to be made as a result of the meeting. Mr Dowe emphasised that no decision had been taken, but the decision was to be about whether the claimant could return to work. The meeting was a long run through of the history of the dispute, and Mr Dowe went through each parts of the letter.

141. The claimant and their union representative were able to comment on each of the respondent's concerns and ask questions about the respondent's position or process throughout. It is clear that the claimant felt that they would be required to back down to return to work, and that they were not willing to compromise. The claimant admitted talking negatively about the respondent to others. The claimant said they did not think Mr Baylis ever acted maliciously, and that the issues could be sorted out with conversation. At one point, the claimant suggested that Mr Baylis should be suspended.

142. On 18 August 2018, Mr Baylis informed Mr Dowe that he had spoken to the organisation which employed the seconded in colleague whom the claimant had raised a grievance against. That person's employer did not want the colleague on site if the claimant was going to be there (page 706).

143. On 23 August 2022, Mr Dowe wrote to the claimant to inform them they were to be dismissed from employment. The letter (pages 712 to 716) says that the decision was made since 17 August 2022. The decision was communicated to have been made for the following reasons:-

143.1. **Whether, as it appeared, the relationship with Mr Baylis had fundamentally broken down from the claimant's perspective –**

Mr Dowe decided that it had due to the number of complaints brought against Mr Baylis, indicating a total lack of confidence and trust in him because matters could not be resolved between them. This included stating that Mr Baylis should

be suspended. Mr Dowe considered it was impossible to restore that relationship.

143.2. **Whether, as it appeared, there is a complete breakdown of trust and confidence between the claimant and the respondent as a whole –**

Mr Dowe decided that there had been such a relationship breakdown, evidenced by repeatedly claiming that the respondent had broken workplace law and referencing legal proceedings to follow. Mr Dowe noted that the claimant was extremely critical of all the respondent had done in relation to the employment for a significant period of time. Mr Dowe considered that the claimant had no trust and confidence in the respondent's efforts to resolve the issues so that they could come back to work. Mr Dowe noted this is likely to mean that the claimant would remain suspicious and mistrustful going forward and unhappy with everything the respondent did. Mr Dowe considered it was impossible to restore that trust.

143.3. **Whether, as it appeared, Mr Baylis had lost all confidence in his ability to work with the claimant –**

Mr Dowe considered that the claimant and Mr Baylis would be unable to return to a 'normal' working relationship with the claimant, based on his comments but also based on the claimant's attitude towards Mr Baylis. Mr Dowe also noted the issue with the colleague.

143.4. **Summary**

Mr Dowe explained that these factors led to the decision to dismiss, and in making the decision he had also thought about balancing the needs and interests of the charity, the stakeholder, the users, and the other employees.

144. The employment was terminated with effect from the date of the letter, but payment was made in lieu of notice. The claimant was given the right of appeal, which they took.

145. The claimant responded on the same day to the communication with: *"ok as we all knew this was gonna be your decision we will see you at tribunal in around 12 to 18 months time…"* (page 719).

146. On 29 August 2022, the claimant appealed the dismissal (page 721 to 726). The letter reiterates all of the points the claimant raised in the welfare meetings and the dismissal meetings, repeating their views about the investigation against them, the occupational health referral, Mr Baylis and the way the dismissal process had been run.

The claimant's appeal

147. The claimant's appeal was ultimately heard by Ms Nicol. There was some disagreement about whether Ms Nicol was appropriate, but she heard the appeal in October 2022. Her appeal outcome was not sent to the claimant because it required some investigation, and there was a recommendation for the grievance brought by the claimant against Mr Baylis to be concluded. This is because, essentially, Ms Nicol

considered the respondent was incorrect to conclude that the relationship between the claimant and the respondent had broken down. She upheld the view that the claimant and Mr Baylis could no longer work together, and said that the claimant's re-employment then hinged on whether Mr Baylis left or was dismissed for gross misconduct as a result of the claimant's grievance.

148. We find as a fact that the claimant's appeal process was never completed because they never received their dismissal appeal outcome.

Relevant law

Unfair dismissal (some other substantial reason)

149. The respondent bears the burden of showing that a dismissal was for a reason which is listed as 'potentially fair' at *section 98 Employment Rights Act 1996*. 'Some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held' is a potentially fair reason. Where the Tribunal finds that a dismissal is potentially fair, it should then judge the 'fairness' by considering whether in the circumstances the employer acted reasonably or unreasonably in treating the reason as being sufficient to dismiss the employee, in accordance with equity and the substantial merits of the case (*section 98(4) Employment Rights Act 1996*).

150. The reason must not be capricious or whimsical (*Harper v National Coal Board [1980] IRLR 260*). If the reason could potentially justify dismissal, then it would be a substantial reason (*Kent County Council v Gilham [1985] IRLR 18, CA*). Relationship breakdown, where the relationship has fallen apart even without any particular misconduct on the part of the employee, has been held a substantial reason (*Ezsias v North Glamorgan NHS Trust [2011] IRLR 550*). The relationship breakdown must be real and reasonably perceived (*Leach v Office of Communications [2012] ICR 1269*).

151. Factors such as the seniority of the individual, the relationships' importance, and the size of the employer are all relevant considerations when deciding whether dismissal is justified under some other substantial reason where there has been a relationship breakdown (*Phoenix House Ltd v Stockman and others [2017] ICR 84*). The Tribunal will consider whether the respondent has taken reasonable steps to resolve the problems which have arisen (*Turner v Vestric Ltd [1980] IRLR 23*).

152. Procedural fairness is an integral principle of a fair dismissal (*Taylor v OCS Group Ltd [2006] ICR 1602*). If a finding of unfair dismissal is made as a result of an unfair procedure, then the tribunal should consider the likelihood that the employee would have been dismissed in any case had a fair procedure been followed. The compensation to be awarded should be reduced to reflect that likelihood (*Polkey v AE Dayton Services Ltd [1987] UKHL 8)*.

153. *Section 122(2) of the Employment Rights Act 1996* provides that the tribunal should reduce the basic award to reflect any circumstances where the tribunal considers the conduct of the claimant before the dismissal makes it just and equitable to do so. By *s123(6) ERA 1996*, where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the claimant, it shall

reduce the compensatory award by such proportion as it considers just and equitable having regard to that finding. The tribunal must make a reduction where there is a finding of contributory fault (*Optikinetics Limited v Whooley [1999] ICR 984*). The reduction may be as much as 100% (*W Devis & Sons Ltd v Atkins [1977] ICR 662*).

154. When considering whether or not to make a reduction for contributory conduct, it is helpful to keep in mind guidance from *Nelson v BBC (No 2) [1980] ICR 110* which said:

154.1. the relevant action must be culpable and blameworthy;

154.2. it must have caused or contributed to the dismissal;

154.3. it must be just and equitable to reduce the award by the proportion specified.

155. Broadly, it is understood that the reduction should be: (1) 100% where the employee's conduct is wholly to blame for the dismissal; (2) 75% where the employee is mostly to blame; (3) 50% where there is equal blame; and (4) 25% where the employee is partly to blame.

Direct discrimination

156. *Section 4 Equality Act 2010* lists protected characteristics for the purposes of that Act. Disability is listed as a protected characteristic. The protected that the claimant identifies as holding are within the list at *section 4*, and is therefore a protected characteristics which the claimant has.

157. *Section 13(1) Equality Act 2010* 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"*.

158. This means that the claimant would have suffered from direct discrimination if we find that, in relation to each allegation, she was treated less favourably than someone who was not disabled.

159. The claimant must establish that she was objectively treated in a 'less favourable' way. It is not sufficient for the treatment to simply be 'different' *(Chief Constable of West Yorkshire Police v Khan [2001] ICR 1065 HL*). The person(s) with whom the comparison is made must have *"no material difference in circumstances relating to each case"* to the person bringing the claim (*section 23(1) Equality Act 2010*). The comparator should, other than in respect of the protected characteristic, *"be a comparator in the same position in all material respects as the victim" (Shannon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337 HL)*.

160. If there is no such comparator in reality, then the Tribunal should define and consider how a hypothetical comparator would have been treated if in the same position as the claimant save for the fact that they would not have the protected characteristic relied upon *(Balamoody v United Kingdom Central Council for Nursing, Midwifery and Health Visiting [2002] ICR 646, CA)*.

161. The phrase 'because of' is a key element of a direct discrimination claim. In *Gould v St John's Downshire Hill [2021] ICR 1 EAT*, Mr Justice Linden said, in respect of determining 'because of':-

> *"It has therefore been coined the 'reason why' question and the test is subjective… For the tort of direct discrimination to have been committed, it is sufficient that the protected characteristic had a 'significant influence' on the decision to act in the manner complained of. In need not be the sole ground for the decision… the influence of the protected characteristic may be conscious or subconscious."*

162. It is a defence for a respondent to show that it had no knowledge of the protected characteristic relied upon, on the basis that the protected characteristic it did not know about could not have caused the treatment complained of (*McClintock v Department for Constitutional Affairs [2008] IRLR 29 EAT)*. However, this defence does not apply where the act itself is inherently discriminatory (such as differentiation on the grounds of a protected characteristic), and in such cases whatever is in the mind of the alleged perpetrator of the discrimination will be irrelevant (*Amnesty International v Ahmed [209] ICR 1450 EAT*).

163. Under *section 136(2) Equality Act 2010*, the claimant needs to show facts, found on the balance of probabilities, which could lead the Tribunal to properly conclude that the discrimination has occurred before any other explanation is taken into account. If the claimant succeeds with this, then it is for the respondent to show that the contravention has not occurred (*section 136(3) Equality Act 2010*). The Tribunal must first consider whether the burden does shift to the respondent. The claimant must show more than simply there is a protected characteristic and a difference in treatment (*Madarassy v Nomura International Plc [2007] IRLR 246*).

164. Once the burden has shifted, if it does, the respondent must to show that the treatment was 'in no sense whatsoever' due to the protected characteristic *(Igen Ltd v Wong [2005] IRLR 258)*. In weighing up whether or not there has been discrimination, the Tribunal should consider all of the evidence from all sides to form an overall picture. Causation, or the 'why' the conduct was committed, is a subjective conclusion of law rather than objective conclusion of fact: what is the reason for the conduct and is that reason discriminatory (*Chief Constable of West Yorkshire Police v Kahn [2001] UKHL 48*. It is almost always the case that the Tribunal needs to discover what was in the mind of the alleged discriminator (*The Law Society v Bahl [2003] IRLR 640*).

Failure to make reasonable adjustments

165. *Section 20 Equality Act 2010* provides:-

> *"(1)…*
>
> *(2)…*
>
> *(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.

…."

166. *Section 21 Equality Act 2010* provides that a failure to comply with the three parts of *s20* is a failure to comply with a duty to make reasonable adjustments, which is an act of discrimination. In other words, the employer must take reasonable steps to alleviate the substantial disadvantage where 'substantial' means *"more than minor or trivial"* (*section 212(1) Equality Act 2010*).

167. An employer is not liable in respect of a failure to make reasonable adjustments unless it knows or is reasonably expected to know that a PCP will place the employee at a substantial disadvantage. *Schedule 8 Equality Act 2010* deals with in work reasonable adjustments. *Paragraph 20(1)(b)* includes employees by virtue of the definition of an 'interested disabled person' in *Part 2 of Schedule 8*. *Paragraph 20(1)(b)* reads (together with *20(1)*):-

> *"A (employer) is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know…that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement"*

168. Often, cases will turn on whether or not the employer has adopted or operates the 'PCP' which is being alleged. That is principally a finding of face made by the Tribunal on the available evidence. Provisions and criteria are usually written down and understood to be rules or measurements for certain things to be done or made available. The Tribunal will examine whether the circumstances amounting to the PCP have been applied to a claimant, and then consider whether it would be done so again or applied in analogous scenarios to others. If the answer to those considerations is 'yes' then there is likely to be a practice (*Ishola v Transport for London [2020] IRLR 358)*. A 'practice' might be found where a Tribunal considers there is an expectation or requirement for something to be done or not done (*Carerras v United First Partners Research Ltd EAT 0266/15)*.

169. A holistic approach should be adopted when considering the reasonableness of the adjustments, including the timing of those adjustments, and may include factors such as the effectiveness of the steps, the cost, the practicability, and the nature and size of the employer's undertaking *(Burke v The College of Law and another [2012] EWCA Civ 87 CA)*. An employer cannot properly be criticised for failing to take a particular step or failing to take particular advice because the Tribunal is looking at the end of the process and at what has or has not been done to alleviate a substantial disadvantage and whether that decision is reasonable (*Tarbuck v Sainsbury's Supermarket Ltd [2006] IRLR 664*). Where the Tribunal is considering whether an employer should have made an adjustment suggested by an employee, the first question is whether the suggestion would have made any difference in alleviating the substantial disadvantage (*First Group Plc v Paulley [2017] IRLR SC*).

Harassment related to disability

170. *Section 26 Equality Act 2010* provides:-

"(1) A person (A) harasses another (b) if –

(a) A engages with unwanted conduct related to a 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; and

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

171. 'Disability' is a protected characteristic because it appears in the list of protected characteristics at *section 4 Equality Act 2010*.

172. Under *section 136(2) Equality Act 2010*, the claimant needs to show on the balance of probabilities that there are facts from which the Tribunal can decide that harassment related to disability has occurred. If the claimant succeeds with this, then it is for the respondent to show that the contravention has not occurred (*section 136(3) Equality Act 2010*). This means that the claimant will need to show more than simply she was disabled at the time any unwanted conduct occurs (*Private Medicine Intermediaries Ltd v Hodkinson EAT 134/15*.

173. Harassment claims must be determined by considering evidence in the round, looking at the overall picture. Although the knowledge and perception of the characteristic on the part of the alleged perpetrator is relevant, it is not necessarily determinative *(Hartley v Foreign and Commonwealth Office Services [2016] ICR D17)*. This means that the determination of the words 'related to' is a finding the Tribunal should make drawing on all of the evidence before it to account of the possibility, for example, that the alleged perpetrator may be displaying a sub-conscious bias which affects the recipient even if they do not know of the protected characteristic (*Tees Esk and Wear Valleys NHS Foundation Trust v Aslan and another [2020] IRLR 495 EAT*).

Victimisation

174. *Section 27 Equality Act 2010* says, relevantly:-

"27(1) A person (A) victimises another person (B) if a subjects B to a detriment because –

(a) B does a protected act, or

(b) A believes B has done, or may do, a protected act.

27(2) Each of the following is a protected act –

(a) Bringing proceedings under this Act;

(b) Giving evidence or information in connection with proceedings under this Act;

(c) Doing any other thing for the purposes of or in connection with this Act;

(d) Making an allegation (whether or not express) that A or another person has contravened this act."

175. What will qualify as a 'protected act' under *s27(2)(c)* has been guided by cases which dealt with prior *Equality Act 2010* as well as since. The *Race Relations Act 1977* used the wording 'by reference to' instead of 'in connection with'. 'By reference to' has been found to have broad ambit and might cover protected acts which are done even where the doer does not have the legislation in mind (*Aziz v Trinity Street Taxis [1988] IRLR 204*).

176. In respect of *s27(2)(d)*, even if the protected characteristic at play with the act is not mentioned or quoted, there must be something sufficient about the complaint to show it is a complaint to which *Equality Act 2010* potentially applies (*Durrani v London Borough of Ealing UKEAT/454/2012*). It must be a complaint. Where there is no complaint, or where the statement is equivocal, it is open to the Tribunal to conclude that there is no protected act because there is not a report of something being wrong about which something must be done (*Chalmers v Airpoint Ltd UKEAT/31/19*).

177. There is no contravention of the *Equality Act 2010* where a protected disclosure is made. The contravention occurs if Person A is subjected to detriment because of a protected act. This is, broadly, a 'reason why analysis' (*Greater Manchester Police v Bailey [2017] EWCA Civ 425*). There can be no 'reason why' in respect of an alleged detriment where no protected act is established. A victimisation claim will fail as soon as the alleged protected act(s) is/are found to not have protection under *s27(2)*.

Conclusions

178. Our unanimous conclusions and reasons for those conclusions is set out below. We have considered these conclusions carefully. In so doing, we thought about Mr Lewis-Bale's written and oral submissions. The claimant struggled to articulate the closing of their legal case. Instead, the claimant delivered the same points and arguments raised at the time of dismissal, and as argued in cross examination. This meant that the claimant's submissions were not focused on the legal claims as they had been defined and clarified across two case management hearings.

179. We have considered the evidence against the legal tests. It is impermissible for us to seek to make the claimant's arguments for us, or to guess what their submissions would be if they were focused around the legal test. In deliberations, it occurred to us that the claimant may not have advanced the claims which appear most sensible to those with a grasp of the facts in the case. It is not our role to match a case to the evidence, either, and so we have been careful not to get drawn into conjecture of evolving the case to match the evidence.

180. It follows that, although the claimant has not won the majority of the claim, that does not mean we endorse all of the behaviours of the respondent. This judgment should not be read as a vindication of the respondent or its actions. It should be read simply that the claimant did not meet the standard required to prove the discrimination and victimisation claims, and that their actions in the first half of 2022 did seriously contribute to a breakdown in relations such that they were able to be dismissed.

Unfair dismissal

Liability

181. The respondent says the dismissal was fair for 'some other substantial reason', namely a relationship breakdown between the claimant and the respondent – in particular, the respondent's then CEO Mr Baylis. In our judgment, the breakdown of relationship between an employee and their line manager CEO in a small organisation plainly could be a reason to justify dismissal, which would make it a substantial reason. We ask ourselves whether, in this particular context, that substantial reason exists?

182. In our judgment, the respondent made the following conclusions. The respondent is a small organisation. The claimant had significantly fallen out with their CEO over several matters, at the heart of which was an occupational health referral that the CEO had made. The claimant had lodged four grievances against the organisation, Mr Baylis, or another member of staff. Other members of staff were wary of the claimant. Mr Baylis was unclear how the relationship could be recovered. The claimant was refusing to believe that anyone at the respondent was trying to help. The situation was damaging the claimant's wellbeing. The situation was damaging Mr Baylis' wellbeing. The claimant was intent on taking legal action against the respondent. All of these factors risked destabilising the respondent.

183. We consider, if reasonably drawn, those conclusions are more than sufficient to justify dismissing the claimant. Having heard the evidence and seen the documents in the bundles, we consider that those conclusions were within the range of reasonable responses for the respondent to conclude. In gathering the information to draw those conclusions, the respondent had carried out a fair investigation. This had included consulting with members of staff and, to the extent possible, occupational health. The claimant had every opportunity to engage with the respondent throughout, was able to speak at multiple welfare meetings, and engaged in prolonged e-mail traffic. In our judgment, this case does satisfy the tests in *Gilham* and *Ezsias*. The consideration that the respondent was a small employer and that multiple relationships were strained or destroyed means that the breakdown

in relationship is more likely to justify dismissal, when considering the range of factors required by *Pheonix House*.

184. The relationship breakdown was also, in our judgment, real and reasonably perceived. The claimant was vociferous with their criticism of the respondent throughout the documents in the bundle. It is clear that the claimant expressed themselves in a way which was at times derisive and discourteous. The claimant appeared unable to accept or respond to an alternative point of view. The claimant's views were fixed from the outset and carried right through to the hearing, even where they were plainly mistaken. This means that the respondent does not fall foul of the reasoning in *Leech*.

185. The claimant's fixed views also meant that the respondent's efforts to resolve the issues were not successful. Those efforts included multiple meetings, a variety of approaches to engage with the claimant's health reports, suggesting mediation, and explaining the impact of the claimant's actions. The claimant was simply unmoved. In our judgment, the respondent took reasonable steps to try to alleviate the substantial reason which would justify dismissal, as is required by *Turner*.

186. However, there is a significant procedural fairness failing which, in our view, undoes the justification outlined above. We can see that the respondent, and Mr Dowe in particular, became extremely frustrated with the claimant and the claimant's approach to the issues. In our judgment, Mr Dowe and the respondent as a whole lost patience with the claimant and, as we have found, determined to dismiss the claimant before the proper procedure could take place. Mr Dowe had decided to terminate the claimant's employment at some point around 12 August 2022. This is a factual finding we have made on the evidence of his e-mails at the time.

187. Further, we have found that the board approved that dismissal at its meeting on 15 August 2022. The respondent submissions disagree with this, but Mr Dowe admitted as much on the stand. His follow-up e-mails indicate that the positive decision to support Mr Baylis (in a dynamic which had been case as one of Mr Baylis or the claimant must leave) had been made. It might be that the board minutes could have given us a different perspective, but they were strangely missing (the only minutes we were not shown).

188. This means that everything that followed 15 August 2022 until 23 August 2022 was effectively a sham process. The claimant was told that no decision had been reached when it had. In our judgment, the claimant went to the meeting on 17 August 2022 in a situation where nothing they could have said would have led to a different outcome. In our judgment, the dismissal was pre-determined. Following *Taylor*, an unfair process in a dismissal renders the whole decision to dismiss unfair.

189. This is not the sort of case where the appeal stage would render an unfair dismissal or process fair because those deficiencies were rectified. Instead, further procedural unfairness ensued because the appeal process never concluded. The claimant was effectively, in our view, denied their right to appeal because a final decision was never approved or issued to them. This is a grave oversight for which we consider there is no reasonable explanation.

190. Consequently, we conclude that the claimant was unfairly dismissed.

Remedy

191. We turn next to consider the basic award and compensatory award for the claimant. The claimant did not seek reinstatement.

192. The respondent submits that the claimant's conduct was such that we should make reductions to both the basic and the compensatory award. We deal first with *Polkey* and the compensatory award. We have considered what was likely to have happened if the procedural deficiencies were removed and the respondent had followed a fair procedure.

193. In our judgment, a fair procedure would align closely with what the respondent actually did, save that the extraordinary board meeting which decided to dismiss the claimant would have taken place after 17 August 2022. That meeting could then have taken into account the claimant's arguments and points raised when they knew that their job was at risk.

194. We have thought carefully about what would have happened in those circumstances, and we consider we can be fairly sure that nothing different would have happened in the 17 August 2022 meeting. Mr Dowe ran that meeting reasonably, following the guidance he had been given. Mr Dowe carefully went through each of the respondent's concerns and allowed the claimant and/or the union representative to answer each of them. In our view, it is more likely than not that the claimant would have behaved in exactly the same way and made the same points, including those around Mr Baylis being suspended and not feeling that the respondent had done anything to try to assist since before April 2022.

195. This means that, in the alternative 'fair' process, Mr Dowe would have reported the same material to the board as he did on 15 August 2022, except that he would then also report that there had been a recent meeting with the claimant where the claimant knew dismissal could result, but all the same arguments (and more) had been repeated, and so the claimant had further 'dug in' to their position.

196. In our judgment, that circumstance would only have given the board more evidence to justify deciding to dismiss the claimant as they had done prematurely on 15 August 2022. This means that there is a 100% chance, in our judgment, that the claimant would still have been dismissed with this part of the procedure rectified.

197. The claimant would, in our view, have gone on to submit the same appeal as they did in reality because the claimant did not realise the decision had been taken before 17 August 2022. This would have been dealt with by Ms Nicol. If a fair procedure had been followed, that report would have been issued to the claimant. In our view, the recommendations to conclude the grievance against Mr Baylis would have been carried out.

198. What would that mean for this dismissal? Ms Nicol upheld the decision to dismiss on the relationship breakdown with Mr Baylis. The only way in which that might have been different is if Mr Baylis was dismissed for what he wrote on the claimant's occupational health referral, which would require the respondent to decide that submitting his honestly held belief (as even the claimant accepts) about the claimant's wellbeing at work was a matter of gross misconduct. We are very secure

in concluding that there is no chance that that would have happened. The claimant was reporting mental distress and upset at the time. It is not gross misconduct for Mr Baylis to characterise that as a mental health issue. Even then, that is not the wording used. Similarly, Mr Baylis had evidence of strained relationships with colleagues, including the grievance against the claimant. It is not gross misconduct to characterise that as a difficulty in the working relationship with others.

199. Consequently, we also conclude that there was a 100% chance the claimant would have been dismissed even if the appeal unfairness had been rectified. This means that the claimant is not entitled to any compensatory award.

200. The respondent submits that we should reduce the claimant's basic award because it is just and equitable to do so where their own conduct has contributed to the dismissal. We have found facts indicating that the claimant was intransigent and discourteous in respect of the respondent. It is fair to say that their correspondence throughout the dispute has displayed high emotion, upset, anger, and derision. The claimant's blanket refusal to even discuss compromising in respect of the occupational health report was, in our view, misguided. That led directly to confusion and distrust on both sides where, in our view, a reasonable approach of listening to Mr Baylis' explanation would likely have led to resolution and the report being released. The respondent's reasonable position that it needed to see the conclusions in the report for the claimant to be able to safely return to work only led to the claimant becoming more fixed in opposition to the claimant, refusing to talk, bringing multiple grievances in a sea mistrust.

201. We are satisfied that it is just and equitable to reduce the basic award due to the claimant. In our judgment, had the claimant adopted a reasonable stance in respect of any part of the dispute, then the dismissal would have been avoided. We are secure in that finding because we consider the respondent was keen to integrate the claimant back to work up until the claimant entered a grievance against Mr Baylis. Thereafter, we consider that the dismissal could have been averted if the claimant had reasonably let that process run without continuing to argue, deride, and bring further grievances. In short, we consider the claimant contributed entirely to their own dismissal because they generated the numerous reasons for which the respondent would have effected a fair dismissal if a fair procedure had been followed.

202. It follows, having considered that the dismissal was entirely as a result of the claimant's misguided dealings with the respondent, that this is one of those rare cases where it is just and equitable for us to make a 100% reduction to the claimant's basic award.

203. This means the only remedy for the claimant is the declaration that their dismissal was unfair. There is no monetary award attached to this successful claim.

Direct disability discrimination

204. The claimant alleges that the issues with the phone and charger were instances of direct disability discrimination. The claimant needed to prove facts from which we could conclude that the decisions complained of were done due to disability.

205. We are not satisfied that the claimant's complaints constituted less favourable treatment. We are satisfied that the claimant's service area did not come with a budget to furnish the claimant with a brand new phone. A used model was required. This would be the case whether or not the claimant had the disabilities alleged.

206. When the phone stopped working, it needed to be replaced. There was an issue getting a phone that the claimant could use. A non-disabled comparator would have been given the same phone initially. It cannot be said that the phone given, which admittedly did not sound suitable for the claimant, was given because of the disabilities the claimant has.

207. The claimant has not advanced this claim as a failure to make reasonable adjustments claim. Even if he had, we note that the respondent did respond reasonably quickly to fix the issue. That the replacement phone had no working charge was not something that happened because of the claimant's disability. It was merely how the phone arrived, and would have arrived if the claimant was not disabled.

208. It follows that the claimant would have been in all the same circumstances if they were not disabled, and so the same position as a hypothetical comparator. Consequently, there is no less favourable treatment.

209. Where there is no less favourable treatment, we cannot go on to consider what may have caused less favourable treatment. We remark only that there is absolutely no evidence before us that anything was done to the claimant because of their disability. We find no trace of disability discrimination.

210. It follows that this claim fails.

Failure to make reasonable adjustments

211. The claimant alleges that the respondent has the PCP of requiring themselves to express themselves more articulately. We have found one instance in one e-mail where the claimant was told to better articulate their argument because it was not understood. In our view, this most closely aligns with the definition of a 'practice' in *Ishola*.

212. However, we must look at the context of the overall conversation. This was a correspondence exchange about the claimant's welfare/support plan. The respondent considered that each and every one of the claimant's concerns had been raised. The claimant was saying, we think (it is not clear), that they had not been dealt with. Ms Daymond's request was for the claimant to say what had not been dealt with. This is not, in context, and instruction to 'better articulate'. In our judgment, it was a request for the apparent gap between what the respondent had addressed and what the claimant thought the respondent had not addressed to be highlighted.

213. In our judgment, this is something that would be applied to others only in the sense that anyone is entitled to ask for clarification where they are no clear about what the other is saying. That is communication. It is not, in our judgment, of itself a provision, criteria, or practice.

214. If we are wrong about that, we go on to consider what could reasonably have been done to alleviate the difficulty the claimant had with communication, which would allow the claimant to communicate the issues with the welfare plan. The respondent could have arranged to speak to or meet with the claimant for oral explanation. The respondent did that when it subsequently met with the claimant in order to discuss all of the issues between them. To the extent, then, that this might have been a PCP which caused substantial disadvantage, we consider that the respondent made the adjustments reasonably required to alleviate it.

215. It follows that this claim fails.

Harassment related to disability

216. The steps required for us to find harassment related to disability are set out above. We do not repeat them here, but simply apply those principles to each of the allegations in the claim.

217. Deliberately sending the claimant a large volume of e-mails outside work hours and telling the claimant they had interpreted e-mails wrongly:

217.1. We have not found as a fact that the claimant was deliberately targeted with e-mail outside work hours. The e-mails were deliberately sent in that they were not sent by accident but, in our view, the thrust of this allegation comes from the claimant's belief that they were being targeted by the respondent. Instead, we found that the respondent was responding to the substantial number of claimant e-mails as and when it was able to.

217.2. The claimant did not show us anywhere where they were explicitly told they had interpreted e-mails wrongly. Often, Ms Daymond or Mr Dowe disagreed with the claimant's interpretation of events. This does not surprise us, as we have been cautious with the claimant's evidence precisely because we perceive that the claimant does not always interpret events accurately. The claimant admits to this as part of the description of their learning disabilities.

217.3. We accept that the claimant was unhappy to receive e-mails outside work hours. We accept that the claimant was unhappy to feel that they were being told they were mistaken about things they believed to be true. The claimant's evidence indicated that they were generally distressed until the medical suspension. Thereafter, it seemed to us the claimant inadvertently accepts that they recovered.

217.4. The claimant says the mischief from receiving e-mails outside work hours is that they are compelled to instantly respond to avoid stressing and ruminating on the response. Similarly, we are satisfied from all of the evidence and the hearing that the claimant cannot let disagreement lie, either. The claimant's view must be put across in an effort for it to prevail. We are not, however, persuaded that these facets of the claimant's character mean that the matters complained of reach the definition under *s26(1)(b) Equality Act 2010*. We are not persuaded the claimant felt as strongly negatively as the legislation requires.

217.5. Alternatively, even if the claimant did feel so strongly, we do not consider that that reaction was reasonable. The claimant was sending many long and aggressive e-mails to the respondent. These were often sent in succession over a short period of time without the chance of reply. In our judgment, considering the factual findings above, the respondent witnesses and Mr Baylis were at times swamped with repetitive, aggressive or intense correspondence. Those took some time and thought to respond to. The respondent witnesses were busy at the time. Mr Dowe had a full time job alongside his voluntary role at the respondent. Ms Daymond was an adviser with other clients.

217.6. In our judgment, the respondent cannot be vigorously criticised for responding when it was able, even if this was outside work hours. It is true that a 'delay send' function could have been utilised, as was put to Ms Daymond in cross examination. The difficulty with that, though, is that the claimant may send other correspondence in the meantime which would also need addressing. Similarly, the respondent must be able to tell the claimant they disagreed with the claimant's interpretation, and to point out why the claimant was mistaken.

217.7. We are satisfied that the claimant took no steps to mitigate the impact of receiving e-mails outside work hours. They did not mute their e-mails or turn off notifications. They did not channel the e-mails to another account (as they were able to do) to enable them to receive other e-mail traffic but not receive respondent e-mails until they chose to look at them. The claimant cannot reasonably expect that it would be harassment to be told by the respondent that the respondent disagreed with them.

217.8. Consequently, for all of those reasons, we do not consider that the claimant's reaction to the conduct, if it was strong enough to meet the definition under *s27(1)(b)*, would have been reasonable. The harassment claim here would fail for that reason, also.

218. Mr Dowe saying he did not want to be at the meeting on 20 June 2022, and had better things to do:

218.1. We found as a fact that Mr Dowe made a statement of this nature in a very general fashion, and not in the context that the claimant perceived. He was not, in our judgment, seeking to diminish the claimant or their difficulties. The comment was a reflection on the fact that he had just had a severe car accident, and also that nobody would choose to be in circumstances which would require a difficult welfare meeting where there was likely to be conflict between employer and employee.

218.2. We also note that the claimant did not complain about the comment immediately at the time, which we consider to relevant to our analysis of this allegation.

218.3. In short, we do not consider that the claimant felt as is required under *s27(1)(b)* in response to what was said here. We consider that the claimant interpreted the comment in the way it was intended at the time it was said, which is why there was no reaction. Certainly, we can see from all of the meeting

transcripts that the claimant was not slow to be vocal about disagreement or offence.

218.4. Even if the claimant's reaction reached the requisite character later, upon reflection and after the rest of the meeting, we do not consider that the reaction was reasonable. Mr Dowe was not dismissive of the claimant in the meeting. He explicitly said, at the same time as the words the claimant complains of, that he wants to listen and understand the claimant. He engaged with all of the issues and discussed them at length. We are satisfied the respondent was engaging properly with the claimant at this time.

218.5. The bald words taken out of context appear shocking or offensive. In their proper context, their meaning is plainly not shocking or offensive, and it would not be reasonable to feel as required by *s27(1)(b)*. This claim is dismissed.

219. Expecting the claimant to attend a meeting on a day off which they needed for their medical needs:

219.1. We found as a fact there was no such expectation on the date complained of, because the claimant did not attend the meeting and it was rearranged without sanction. It follows that this claim fails because it is not reasonable for the claimant to feel harassed in the circumstances where they had on other occasions indicated a willingness to meet on non-working days anyway. This claim is dismissed.

220. Writing to the claimant in tiny font and dismissive when the claimant raised it:

220.1. We found as a fact that the respondent did not send the claimant correspondence in tiny font. The document the claimant complains of was created upon printing in a certain format, rather than how it was sent on e-mail. It follows that this cannot form the basis of a harassment claim, because it was not conduct done to the claimant by the respondent. The claimant did not show us evidence that the respondent dismissed concerns about it, but in any case we are satisfied that the respondent would be justified in denying the action because the action was not done. This claim is dismissed.

221. The respondent denied making changes to the sick leave policy when on sick leave but said it had changed procedure even though there is no difference between the two:

221.1. We found that the respondent implemented in written form the policy which had been followed by the respondent before the written policy. The respondent is entitled to do that whether or not the claimant was on sick leave.

221.2. We confess we are not clear about the basis of this allegation, even after the claimant had a good effort at articulating it to us, and even after Mr Lewis-Bale had tried to give us his interpretation. The wording of the issue is also a bit confusing, and we consider that the Judges in case management were likely unclear as to the basis of the claim.

221.3. As a Panel, we can only make so many reasonable enquiries to understand a case which is being presented to us. It is the claimant's case. As

best as we understand it from the claimant, this is a claim about putting a policy into writing when on sick leave, and then saying it was the same policy as before in written form. In the hearing, the claimant sought to add a requirement to read the policy to our reading of the claim. That is not the pleaded claim and no permission was given to alter it to that basis.

221.4. It follows that the claimant has not made out this allegation. The respondent explained the application of the policy to the claimant. As was typical of the claimant's interactions with the respondent throughout, the claimant was mistrustful of the respondent's actions and has interpreted the intention of the respondent in the most personally victimising/damaging way possible.

221.5. The respondent introduced a written policy which was the same as the previous practice. It applied the unchanged practice to the claimant. It confirmed the policy in writing to the claimant. It is not reasonable, in our view, for the claimant to have felt harassed by that. Indeed, the claimant has not presented us with evidence they did feel as required by *s27(1)(b)*. This allegation fails.

222. None of the claimant's allegations of harassment related to disability succeed. This head of claim is dismissed.

Victimisation

223. The claimant claims to have done four protected acts. We consider in turn whether each meets the definition. In each case, we understand the claimant seeks to rely on *ss27(2)(c) & (d) Equality Act 2010*.

224. Complaints of discrimination to John Hammond and Jacob Baylis on 18 January 2022:

224.1. We found the claimant made no complaint of discrimination for a protected characteristic on this date. There was nothing found in the conversation that was about or was related to an allegation of contravention of *Equality Act 2020*. This is not a protected act.

225. E-mails to Seb Feast on 24 January, 31 January, 21 February & 22 February 2022:

225.1. As above, we found no complaint of discrimination, or indeed any complaint of bullying or mistreatment of any kind, in these e-mails, beyond the equipment provided which needed replacement. These are not matters which relate to *Equality Act 2010*. This is not a protected act.

226. Email to John Hammond on 1 May 2022 complaining about unsuitability of work as a result of disability:

226.1. We found as a fact, on the balance of probabilities, that this e-mail does not exist. It was not shown to us and the claimant made no reference to it in evidence. This is not a protected act.

227. Emails to Jacob Baylis on 4 May 2022 complaining about unfair treatment as a result of disability:

227.1. The relevant parts of these e-mails are set out in the factual findings. In our view, these e-mails are communicating the claimant's point of view. They are intended to frame the claimant's position and are a hopeful and positive commentary on what works well and how relations might be in the future.

227.2. In our judgment, none of the wording is unequivocal and it is not clear to us that a complaint is being raised that may require some action to be done. In our view, following *Chalmers*, it is open to us to conclude that these e-mails do not constitute protected acts.

227.3. Our preliminary view that these are not protected acts is supported by the absence of facts indicating that the claimant ever followed up on these e-mails. If they were intended to be complaints, the claimant would reference them again. Certainly, elsewhere, the claimant is not shy about making complaints and following up on them.

227.4. Consequently, we do not conclude that these are complaints made about or anything to do with *Equality Act 2010*. They are hopeful commentary. They are not protected acts.

228. We found that none of the claimant's protected acts meet the definition of 'protected acts'. It follows that there cannot be victimisation because there can be no detriments which follow protected acts which do not exist.

229. We do not go on to consider if the claimant's alleged detriments were negative treatment where there were no protected acts because it would not be proportionate to do so. The victimisation claim is also dismissed in its entirety.

Disposal

230. Only the unfair dismissal claim succeeds but, for the reasons outlined above, the claimant is not receiving any financial award for that claim. The only remedy is the declaration of the unfair dismissal. That means this judgment ends the matter and there is no need for further hearings.

231. We end by recording our thanks to the parties for their assistance and patience with this complicated dispute. In our view, Mr Lewis-Bale's contribution must be acknowledged, because we appreciate the steps he took to engage with the intermediary and to make the hearing and litigation process accessible for the claimant. His efforts in this case are a credit to his profession.

Approved by: Employment Judge Fredericks-Bowyer

21 March 2025