JB1

EMPLOYMENT TRIBUNALS

Claimant: Mr S Ali

Respondent: C6 Intelligence Information Systems Ltd

Heard at: London Central **On:** 24 - 27 July 2017
(and 9 August in Chambers)

Employment Judge: Ms A Stewart

Members: Mrs C Seddon
Mr I McLaughlin

Representation

Claimant: In Person
Respondent: Mr S Purnell of Counsel

JUDGMENT

1 It is Ordered, by consent, that the Respondent's name be amended from Mergermarket Ltd to C6 Intelligence Information Systems Ltd.

2 The Tribunal has jurisdiction to consider all of the Claimant's complaints of discrimination because they have been presented within the time limits set out in section 123 of the Equality Act 2010.

3 In respect of the Claimant's substantive complaints, the unanimous Judgment of the Tribunal is as follows:

(a) The Claimant's complaints that he was treated less favourably because of his race and/or his religion and belief, within the meaning of section 13 of the Equality Act 2010, are not well-founded and fail.

(b) The Claimant's complaint that the Respondent failed to make reasonable adjustments for him as a disabled person, within the meaning of sections 20 and 21 of the Equality Act 2010, is not well-founded and fails.

(c) The Claimant's complaint that he was victimised, within the meaning of section 27 of the Equality Act 2010, is not well-founded and fails.

(d) The Claimant's complaint that he suffered harassment related to his race, within the meaning of section 26 of the Equality Act 2010, is not well-founded and fails.

(e) The Claimant's complaint that he suffered harassment related to his religion or belief, within the meaning of section 26 of the Equality Act 2010, is well founded and succeeds.

(f) The Claimant's complaint that the Respondent is in breach of his contract in failing to pay him his notice pay, is dismissed upon withdrawal by the Claimant.

4 A Remedy Hearing in relation to paragraph 3 (e) of this Judgment will take place on 4 October 2017.

_____

Employment Judge A Stewart
18 September 2017

EMPLOYMENT TRIBUNALS

Claimant: Mr S Ali

Respondent: C6 Intelligence Information Systems Ltd

Heard at: London Central **On:** 24 - 27 July 2017
(and 9 August in Chambers)

REASONS

Introduction

1 The Claimant, Mr Shahan Ali, brings the following complaints before the Tribunal;

1.1 under **section 13 of the Equality Act 2010** that he suffered direct discrimination on the grounds of his race and/or his religion or belief in that; the Respondent refused to provide a room where he could sleep undisturbed during his rest breaks; and/or in that he was dismissed.
1.2 under **section 26 of the Equality Act 2010** that he suffered harassment on the grounds of his race and/or religion or belief in that Ms Mills used the phrase "the missing terrorist" in his hearing at a meeting on the 13th September 2016.
1.3 under **section 27 of the Equality Act 2010** that he was victimised, in that he was dismissed because he had complained about the Respondent's failure to provide sleeping pods, this being a protected act.
1.4 under **sections 20 and 21 of the Equality Act 2010** that the Respondent failed to make reasonable adjustments for his disability of narcolepsy, including providing sleeping pods in order to mitigate the substantial disadvantage of not being able to sleep during his rest breaks which he suffered as a result of the Respondent's alleged PCP in failing to provide "adequate sleeping facilities", which the Tribunal interpreted as meaning any room where the Claimant could sleep undisturbed.
1.5 The Claimant withdrew his complaint of breach of contract, namely failure to pay notice pay, during the Tribunal Hearing.

2 The Respondent denies that the Claimant was subjected to any of the alleged acts of discrimination and disputes that the Claimant was to be regarded as disabled for the purposes of **section 6 of the Equality Act 2010**, at the material time. The Respondent contends that the Claimant was

dismissed for reasons of conduct and that all efforts were made to accommodate what it knew of his medical condition. The Respondent also contends that the Tribunal has no jurisdiction to consider any of the Claimant's complaints relating to acts which occurred more than 3 months prior to the date of presentation of the Claim Form (allowing for any extension afforded by the Early Conciliation regime), because they are out of time.

3 The Tribunal heard evidence from the Claimant himself and from Ms Emma Mills, the Claimant's Line Manager from June 2016 and Head of Sales for the Respondent at the material time; and from Mrs Lindsay Jackson, previously Ms Lindsay Joyce, HR Advisor at the material time.

Conduct of the Hearing

Application to amend

4 The Claimant made application to amend his Claim at the start of the first day of this hearing in order to include the material which the Respondent has listed as 'new material' contained in his Further and Better Particulars dated 2 June 2017, which the Respondent contends is beyond the scope of his original claim. This material is set out at page 84 F of the hearing bundle, to which the Tribunal refers. The Respondent resists any such amendment application on the grounds that it is out of time.

5 Firstly, having regards to chronology: the Claimant was dismissed from his employment on 19 September 2016, which is the latest date on which any of the alleged acts of discrimination could have occurred. He notified ACAS of his claim on 8 December 2016 and a certificate was issued on 8 January 2017. He presented his Claim Form on 7 February 2017 and there was then a Preliminary Hearing (Case Management) on 12 May 2017 and Further and Better Particulars were filed on 2 June 2017.

6 The Claimant has had the benefit of solicitors on the record from December 2016 to 6 July 2017, although he says that he received very poor service from the first firm of solicitors and the dates show that he only just managed to get things done in time. This service was apparently provided under some form of legal aid scheme. The Claimant himself has no legal qualifications or experience and does not understand, and did not understand, the difference between Further and Better Particulars and an application to amend. The Tribunal therefore, with the Respondent's agreement, has treated the Claimant's Further and Better Particulars as an application to amend, although only from today's date because there was no indication on the face of the document that it was an application to amend and a request has only been properly made today.

7 The Tribunal carefully considered the Claimant's application and the Respondent's resistance and has made the following decisions, referring to page 84 F of the Bundle relating to the alleged PCP: (i) In relation to the 'NB' material under paragraph (iii) "failure to provide adequate sleeping facilities"; the Tribunal has decided that this must be taken to mean any suitable room where the Claimant could sleep undisturbed because his ET1 at paragraph 3 says "a Nap Room", which in that context must be taken to mean something wider than the 'sleeping pods', which are mentioned immediately afterwards and clearly does

not mean solely the 'Wellness Room', otherwise that phrase itself would have been used. However, "facilities" does not include a lock on the Wellness Room, a suitable single bed or blackout blinds which are mentioned in paragraph 5 NB on page 84 F because there is no factual or pleaded grounding for any of those items, or anything like them, in the ET1 and secondly, the Claimant's case is that the Wellness Room was not suitable in any event because it had no privacy because other members of staff could and would use it regularly and because he could be observed using it, and not because of any such physical factors.

8 As to paragraph (iv) on 84 F, the Tribunal concluded unanimously that the substantial disadvantage being the Claimant's "inability to sleep during his rest breaks" when necessary during the day, does not constitute a material or substantial amendment of his ET1 and therefore will be allowed because his ET1 paragraph 3 states that his narcolepsy affects him in with a variety of different symptoms but that "the symptoms are alleviated by regular sleep breaks" and this concept in fact informs the entire rationale of his request for a sleep room, so that this, being substantively contained in his original claim, does not constitute an amendment to his claim requiring approval.

9 In coming to these decisions the Tribunal has had regard to the Employment Tribunal Presidential Guidance on allowing amendments (2014); the nature of the amendment, whether it is substantial or minor, the time limits where a new claim is asserted, the timing and manner of the application, and concluded that 'Nap Room' must properly be considered to mean <u>any suitable room where the Claimant could sleep undisturbed,</u> the reason for its need being explicit in the ET1. However, the addition of such physical detail as a lock, a bed and blackout blinds are outside the scope of the Claim Form as originally pleaded and are out of time. These will not be allowed because the Tribunal was not satisfied that it would be just and equitable to extend time by almost 4 months up to the Further and Better Particulars and 5 months and 3 weeks up to the date of today's hearing, despite (i) that the Claimant stated that he had received poor legal representation, he did have the benefit of some legal advice throughout this relevant period; (ii) that he had two car crashes in February and March 2017, but he was not seriously injured and was hospitalised for one night only. Many Claimants in discrimination cases are litigants in person, including those labouring under disabilities and it would be unduly prejudicial to the Respondent to have to respond to the additional details which the Claimant now seeks to insert today, on the first day of the full merits hearing. The application has only been explicitly made today, 5 ¾ months after the date of the ET1.

10 We have also looked at an extra paragraph on page 84 K of the Bundle which the Respondent contends is an attempt to raise, by way of amendment, a claim for disability harassment in relation to two comments made in September which are particularised in the Claimant's paragraphs 9 and 10 of his Further and Better Particulars. The Tribunal has decided not to allow those two extra claims to be added to the Claimant's case because the Claim Form makes no reference whatever to harassment on the grounds of disability, but only to harassment on the grounds of race and/or religion and the Claimant's Further and Better Particulars state in terms that the Claimant "overheard" the first comment and was present when the second comment was made, and therefore there is no reason why those matters could not have been pleaded in his original ET1. They constitute a completely new head of claim and the Preliminary Hearing conducted on 12th May ordered that there would need to be an application for

amendment if any new harassment claims were to be lodged and set a date limit for that at the 26th May. We are now almost 2 months down the line and it is too late to do that today as it would be highly prejudicial to the Respondent to be forced to answer these new claims on the first day of the Full Merits Hearing.

Disclosure

11 Towards the end of the first day of the hearing, the Claimant raised the issue that he felt that not all of the documents which he had disclosed were in the bundle and also that the Respondent had perhaps failed to disclose the full entirety of his email chains from his work computer. The Tribunal warned the Claimant that it was a very serious allegation to assert that professional representatives were deliberately withholding documents or deliberately failing to disclose relevant documents, in contravention of their duty. After an adjournment for the parties to consider their disclosure positions, the Respondent stated that all of the documents which the Claimant had sent had been included in the bundle and the Claimant did not pursue any allegation that any omissions had been in any way deliberate. The Tribunal requested that the Respondent overnight conduct a reasonable review of its disclosure in order to reveal any additional relevant matters which may have been included in the Claimant's work email and also reminded the Respondent that a respectful manner towards a Claimant in person was an essential aspect of assisting the Tribunal in ensuring compliance with the Overriding Objective. The following morning at the outset of the hearing, the Respondent produced a small bundle of extra documents which had resulted from a further search using slightly different search terms through the Claimant's inbox. In the main they appeared to constitute the final reply emails from the Claimant in two email chains produced which were already in the bundle from other persons in the workplace and were therefore relevant and important.

Tribunal questioning:

12 On the afternoon of the second day of the hearing the Tribunal began to question the Claimant about the effects of his alleged disability on his everyday life. The Respondent expressed some concern at the Tribunal questioning the Claimant in detail on this matter, since he had not given explicit evidence on this issue, although a disability impact statement was included in the bundle. This statement was short and in places inaccurate and the Claimant asserted that he had been very badly represented by his initial representatives who had prepared this statement, that he had tried to correct inaccuracies contained within it but had had no time to do so within the time limits for submission of the document. The Tribunal adjourned to consider the Respondent's concerns. Upon resumption of the hearing, the Tribunal explained to the Respondent that as Counsel he had an additional duty to assist the Tribunal in conducting a fair hearing, particularly as against a Claimant effectively in person who, although he had had legal advice, had consistently asserted that his first solicitors had been inadequate and who had no one with him in Tribunal. It was important that all parties assisted the Tribunal in ensuring a level playing field and to this end the Tribunal read out the provisions contained in **section 6 of the Equality Act 2010** on the issue of what was considered to be a disability for the purposes of the Act. It had seemed that the Claimant at the outset of the hearing believed that his blue disability badge and red disability badge and travel pass was sufficient to establish his disability. This however is not the test. The Tribunal also reminded

the Respondent that the Tribunal has a duty to make such enquiries into any relevant matter as it considers necessary in order to determine fairly the issues before it. The Tribunal then proceeded to question the Claimant in order to elicit evidence on how he contended that his alleged disability had a long term adverse effect on his ability to carry out normal day to day activities.

Other matters:

13.1 The Tribunal explained to the Claimant at different stages of the hearing Tribunal procedures, the process of cross examination and the purpose of final submissions.

13.2 Just before the Claimant made final submissions on the final day of the hearing, he suddenly asked for anonymity, not only for himself but also, if that would be fair, for all of the Respondent's witnesses and other people. The Tribunal explained that a fundamental principle of the system of justice was that it was conducted in public and that exception to this principle would only be made on very specific grounds and after a specific and supported application. The Respondent at this point said that the only two ways of guaranteeing anonymity in this case would be for the Claimant either to withdraw his claim or for the parties to achieve a settlement. The Tribunal adjourned for both parties to consider their positions and take instructions. After this adjournment, the Claimant stated that he wished to continue and the parties indicated that it looked extremely unlikely that a settlement was possible. Accordingly, the Claimant proceeded to make his submissions.

14 On the morning of day 3 of the hearing, the Respondent brought an email from Jamie Binks, dated the previous day, in which he provided written answers to questions posed by the Respondent relating to the Claimant's evidence about his dealings with both the Claimant and KWM about possible use of KWM's sleeping pods. These answers appeared to confirm some elements of the Claimant's evidence and to contradict other elements. The Respondent did not contend that it was not possible for Mr Binks to attend in person, should that have been thought necessary and did not seek a witness order. The general view among the parties and the Tribunal was that it would be disproportionate to order Mr Binks to attend since the point of dispute thrown up regarding the sleeping pods was minor in the context of the whole claim. It was common ground, and clearly explained to the Claimant, that without being subject to cross-examination the answers provided by Mr Binks would carry very little evidential weight.

The Issues

15 The Claimant having withdrawn his complaint of breach of contract, the issues which the Tribunal has had to determine were as follows:-

15.1 Was the Claimant disabled within the meaning of **section 6 of the Equality Act 2010** at the material time?

15.2 Did the Respondent know, or ought it reasonably to have known, of the substantial disadvantage advanced by the Claimant, at the material time?

15.3 Are there facts from which the Tribunal could find, in the absence of an alternative explanation, that the Claimant suffered discrimination at the hands of the Respondent on the grounds of his race and/or religion or belief, in its refusal to provide adequate sleeping facilities and/or in dismissing him?

15.4 If so, has the Respondent satisfied the Tribunal, on a balance of probabilities, that it did not commit those acts of alleged discrimination?
15.5 Has the Claimant shown that he suffered a substantial disadvantage as a result of the provision criterion or practice which he alleges?
15.6 If so, did the Respondent fail to make reasonable adjustments so as to avoid the alleged disadvantage?
15.7 Did the Claimant do a protected act within the meaning of **section 27 of the Equality Act 2010?**
15.8 If so, did the Respondent subject the Claimant to the detriment of dismissing him, because of his protected act?
15.9 Did Ms Mills' remark about the "missing terrorist" have the effect of violating the Claimant's dignity or creating an adverse environment for him, within the meaning of **section 26 of the Equality Act 2010**?
15.10 Does the Tribunal have jurisdiction to hear all of the Claimant's complaints or are any of them out of time as having taken place prior to the 8 September 2016, as contended by the Respondent?

The Facts

16 The Respondent is part of the Mergermarket Group which provides market information, reporting and analysis to subscribers. This includes pre-event intelligence, production of M&A league tables, a global library of historical M&A transactions and news and data on equity capital markets and the world's largest private equity firms. The Respondent was acquired in November 2015 by the Mergermarket Group. The Respondent has about 320 employees in its London office, where the Claimant worked, all of whom are accommodated on a single floor of an office building which also accommodates other organisations.

17 The Claimant, who identifies himself as a British Pakistani and a practising Muslim, began his employment with the Respondent on the 2 May 2016 as a Direct Sales Executive on a salary of £50,000 per annum plus entitlement to a discretionary bonus. His appointment was subject to a 6 month probationary period.

18 The Claimant initially reported to Ms Fiona Davies as his Line Manager, however from June 2016 onwards he reported to Ms Emma Mills, Head of Sales at the material time. Ms Mills in turn reported to Mr Darren Innes, CEO of the Respondent.

19 The Claimant was diagnosed with narcolepsy in 2013 having suffered from excessive tiredness and day time sleepiness, from the age of 15 or 16 onwards. He stated that he ticked the "prefer not to say" box on his application form when asked whether he had a disability, because his experience had led him to think that narcolepsy is a little understood condition leading some people to see it as laziness. The Claimant told the Tribunal that initially his employment went well and that he would try to take short naps when he could in order to help manage his condition, including occasionally in the downstairs disabled toilet in a sleeping bag. However, he stated in the first week that the Respondent noted that he was gradually turning up late to work and would be tired during the day.

20 He therefore, by email on 10 May, told his Line Manager, Ms Davies, that he had narcolepsy 'which is considered a disability'. He stated in the email "I don't let it bother me but in the morning I take medication that helps me stay

awake. I never have problems during the day and, if anything, I am more productive than some people without narcolepsy because the medications I use improve concentration. Some mornings are a tiny bit foggy for me but I don't have many problems." He warned that although aiming to be at work at 8.30 every day, if he was slightly late it could well be his narcolepsy and that he sometimes felt exhausted but that usually by 9.30 to 10 his body felt normal. "People with narcolepsy don't get deep sleep or proper rest but it isn't a major issue – Winston Churchill had narcolepsy." He went on to tell Ms Davies in the email that it had never stopped him being able to sell at his previous job with Thomson Reuters, and that she could tell Darren Innes if she wished but "I don't want to freak him out – it is very mild my condition and I don't suffer from cataplexy which is the form of narcolepsy that people get freaked out with." He also said that his only symptom was excessive day time sleepiness, that he had ticked the 'prefer not to say box' on his application form because he did not think it was a big issue and that having had the condition since he was 15, he had still got a 2:1 at University and had built up his sales career.

21 Ms Davies forwarded the Claimant's email to Lindsay Jackson in HR, saying she had just spoken with the Claimant regarding the email, asking whether there should be a formal reply and saying "I am not worried about this and will obviously be supporting him where we can."

22 Within an hour of the Claimant having sent his email to Ms Davies, Mrs Jackson emailed the Claimant saying "thank you for declaring your condition, it is helpful for us to be aware and it would be good to get a better understanding of how the condition affects you and if there is anything you require from us that might help?" She went on, "I know you said you are OK in the day, however, just to make you aware we have a wellness room that can be used at any time for you to take a rest in if you require it. Please ensure to keep both me and Fiona in the loop if anything changes or if you need anything."

23 The Claimant replied to Mrs Jackson, with copy to Ms Davies, saying "thanks I was scared to mention it to be honest because I look totally normal and don't like people knowing I have this. I just don't want to be a few minutes late one morning and have you thinking I am being lazy, it is a difficult condition to understand." He said that with medication he was able to control symptoms very well and "my narcolepsy itself is very mild". He added that he did not declare it during the interview because "it does not affect my ability to work." He then asked for a quick chat, when she might have a moment.

24 Mrs Jackson replied "Firstly I would like to reassure you this is not a problem for us, we prefer to know and understand people's conditions so we can help if we can. It sounds like you have it under control with medication, but please do let us know if anything changes and also it is good for the Line Manager to be aware if you are slightly late on some days, although please ensure to let her know if you are running late and not just come in late."

25 On the evidence before the Tribunal, it was apparent that even prior to his declaration of his narcolepsy to the Respondent, the Claimant was seeking to find a resting room/bed anywhere in the building. In his communications with Ms Camille Coulon, the London Office Assistant of Mergermarket Group, who was dealing with him in relation to his security pass and locker, he stated that it was because Ramadan was coming up that he might need a quick nap daily because

he would be without food and water for almost 20 hours a day. Ms Coulon first suggested some sleeping accommodation in the offices of KWM, another tenant in the building, which the Claimant took up with Mrs Jackson. He emailed Mrs Jackson on the 24 May saying that during the day, even with medication he sometimes needed to take a short nap, 'only 10-15 minutes' sometimes and asked if she could get permission from KWM to use their sleeping areas, which he had discovered. He added, "It is also more convenient for me than resting on this floor because I would not want colleagues to know about my condition." Mrs Jackson replied immediately that she had passed it on to Katy Shaw, the office manager, who was emailing at once to KWM. The Claimant replied "Thanks! It honestly gives me so much relief knowing that the building has these facilities. The rooms are private and nobody can see you napping, the communal rest areas are not always the best places to sleep because people walk in and out. Thanks a lot it just means my condition won't affect my productivity, I don't mind a working lunch here and there if I need to nap during lunch time, I was finding parking spaces nearby I could use to sleep in my car 10-15 minutes lol! So this is way more encouraging." Mrs Jackson replied immediately "Bless you. Glad we can make things more comfortable for you", to which the Claimant replied "Cheers I try not to tell people!" Mrs Jackson replied "I understand, but it is nothing to be ashamed of." The Claimant replied "I know, I just get worked up. At Thomson Reuters, I told them I had narcolepsy because I thought it was the right thing to do, but they used it as an excuse not to pay me full commission even though I smashed all my targets … to penalise someone for having a disability is a bit harsh and the fact that one boss told everyone I had the condition made it very embarrassing if I was ever late. That is why I was genuinely scared to tell anyone. I moved here because I wanted a proper sales job and although I had a secure job at Thompson Reuter, I did not appreciate the jokes managers used to make. Mrs Jackson replied "Oh no that is awful, so sorry you had such a bad experience."

26 On 24 May, Ms Shaw tried with KWM in the following terms "I totally understand the access issue and that it is a KWM area. We were just hoping that we could use it as a goodwill gesture to help out a neighbour so to speak. We don't need to have permanent access via his security card as I know the two systems aren't compatible but if there is anyway he could be let in to borrow a space privately when he needs to, it would massively help us from an employer point of view. It is classed as a disability and we don't have an appropriately private area up here that he can use without causing embarrassment. If there is any arrangement we could come to it would be super helpful."

27 On the afternoon of the 24 May, Katy Shaw emailed Mrs Jackson saying that she had heard back from the KWM and had been informed that the Claimant would not be able to use their sleeping pods as they are located in an access controlled area. The issue was because the Respondent's security passes could not be activated for their controlled areas, nor could anyone from the Respondent be allowed into their areas due to confidentiality issues. She told Mrs Jackson that KWM had "used the same reason for why we can't use the stairs, the post room, the bike store, the first floor café etc", but that she was going to go back and ask for some leniency in this particular case and do her best to negotiate on the Claimant's behalf. Mrs Jackson replied "Oh no!! Can we say it is due to disability reasons?"

28 On the following day, the Claimant emailed directly to Ms Shaw asking for news about the dedicated sleeping pods and explaining in detail why he might need to use them, usually only for 'a 10-15 minute power nap' but that the rooms were perfect because they were hidden away and none of his colleagues would know about his condition except his Line Manager and Darren, "which is important because it is an embarrassing condition to have." He had hoped to begin accessing the room from that day onwards and noted that there were three sleeping pods and with access how much easier such facilities would make his life.

29 Ms Shaw replied the same morning telling the Claimant she had been trying to negotiate access to the sleeping pods but that it was proving rather difficult. She explained in detail why KWM were not allowing access to anyone not employed by them, that the issues were around confidentiality and security and even though these are minor they were still saying 'no'. She explained that the Respondent had previously tried to access other areas in KWM but that they were simply not prepared to countenance it. She said she was so sorry that KWM had now responded with a formal 'no', having checked with their boss. She then said, although he should not get his hopes up, she would attempt again through a contact with whom she had a good relationship at KMW, when he came back from holiday.

30 The Claimant replied asking whether it could be mentioned that he had a disability and that the sleep pods would make his life a lot easier. He then went on to say "I appreciate your help, perhaps you could ask how much a pod costs, don't worry I am not asking the Respondent to buy one", but perhaps he could pay out of his own pocket if the price was reasonable. "PS. sorry for causing so much hassle I didn't think they would react so harshly, I do have a disability but I do not see myself as disabled, if that makes sense. I can't control my wakefulness which is why it is classed as disabled although I am not physically disabled". He suggested that by using the term disabled KWM would perhaps be more helpful.

31 On the 25 May, Ms Shaw emailed to Jamie Binks, a private contractor, working with KMW, attaching details of the Claimant's condition and saying "I wonder if there is anything we can do or any arrangement we can come to which would let him borrow the pods? Could we pay for example? We have never had anyone with this condition in our company before and it would be amazing if we could provide for him in some way." She sent a chasing email to Mr Binks on the 2 June asking if there was any news. Mr Binks replied, "There are potential security, insurance and responsibility concerns regarding this type of request so I need to be very careful with how I approach it." Ms Shaw then had a phone call with Mr Binks and on the 7 June, Ms Shaw wrote the following email: "I understand how busy you are and also what a big ask it is from us, all of those concerns are very valid. I did not think it would work but I said I would ask on his behalf so we can leave it for now. If anything changes in the future where you think this may work please let me know as he is a permanent employee of ours now."

32 In the meantime, on the 26 May, the Claimant emailed to Ms Shaw asking that if KWM were unable to let him use their facilities, "Is there anywhere else I could have a peaceful nap without being disturbed?" Ms Shaw replied "We have our Wellness Room that has a pull out bed but there is currently no lock on the

door. Do you want me to look into getting a lock on the door for you? Would that help? Please feel free to use that room whenever you need though, that it is what it is designed for."

33 The Claimant replied on the 31 May, "The room would be very useful but because there are people sitting outside the room it would be embarrassing using the room for napping purposes. A lock would help, but I was wondering if there was another entrance to the room? I know most of the staff now and I wouldn't want to attract unnecessary attention." The Claimant went on to explain that using the pods would help cope with his sleepiness but would also avoid awkward questions from colleagues; that things had been difficult at Thompson Reuters where people joked and it is not something he wished to advertise to people. He added "If KMW are unable to help, I will have to sort something out myself. I am not trying to be demanding and honestly understand if the Wellness Room is the best you can offer. I am sure we can persuade KMW as we are only asking for one employee with an extremely rare sleep disorder to access a room designed for napping. Let's keep our fingers crossed!"

34 On 2 June the Claimant emailed to Katy Shaw asking for an update on the KWM situation and saying he was conscious that Ramadan began the following week. He stated that he had looked into sleeping pods locally, but the nearest were at Virgin Active Gym in Liverpool Street which was quite far. He was also looking at parking around the area as he did not mind napping in his car, but "it is very expensive around here." … "Again, if KWM aren't able to help I will still find a way to cope but it would make my life so much easier if I had access to the rooms on the ground floor. Honestly it would mean the world to me. My medication has not been working as well. Sometimes it is great and some weeks I still get sleepy, but I am still able somehow to get through. Don't want to create any issues!! Thanks again as always! Sorry for asking so many times!"

35 On 9 June, Ms Shaw emailed the Claimant apologising for the delay and saying there had been a lot of emails back and forth with KPM, but "I am afraid they can't authorise this request, unfortunately. It is for the same reasons as with previous requests we have made to share their space, but it is just not possible from their side I am afraid."

36 The Claimant replied to Ms Shaw some 20 minutes later "Hi Katy sorry for being such a pest. I am very gutted to be honest. It will really make my life difficult knowing there are facilities to help me but I am unable to use them – it is nobody's fault. Is there another 'suit room' or a room of that size we could put a lock on perhaps? Don't worry, if there is no other room on this floor then I would find something to help me, but I would probably need at some point in the near future to work with you and my managers to explain that some days I might need to nap and because there is no room here to use, it could take me a little longer than usual. Don't want to be problematic but also need to be realistic." This followed an exploration of how distant the Virgin Gym sleep pods were.

37 The Claimant contended before this Tribunal that Katy Shaw did not in fact make every effort to assist him and indeed avoided making eye contact with him when she saw him in the lift or around the office. He stated that he believed that Katy had made up her own mind about the sleeping pods as she did not want to 'bother' Jamie Binks. The Claimant asserted that Mr Binks had told him personally that he could use the sleeping pods if the Respondent was to provide

insurance cover for him. Mr Binks in an email dated 25th July 2017, in other words on the second day of the hearing, denied that he had told the Claimant this. Mr Binks however was not called to give evidence and submit to cross examination on this or any other issues.

38 Ms Davies and Ms Joyce planned a meeting with the Claimant which took place in the late afternoon of 9 June, at which they discussed some concerns about the Claimant being away from his desk and people being unaware of where he was for long periods of time. For example; being gone for over 40 minutes in the middle of the afternoon and coming back with a Café Nero coffee or going out to buy bottles of water and being away from his desk for long periods every day and also taking a longer than allocated lunch break on a day where he was also late arriving. There was also a concern about him working from home without prior agreement and being late regularly on most days, even though some flexibility had been agreed. The pattern they had seen so far was a concern as they worried about a lack of focus when they saw short bursts of activity and long intervals away from his desk. This had now been noticed by more senior managers who were asking the Line Manager to justify where the Claimant was and what he was doing but they were unable to do so as they did not know themselves. They also needed to discuss sick days and hospital appointments so that their expectations could be managed.

39 On 16 June, Ms Davies sent the Claimant an email summarising their discussions on the 9th June and reminding him of the following agreed protocols; if he was running late he should ring, and not text, his manager before 8.30am; if he was off sick ditto but no later than 30 minutes after his start time; that he must log his sick days on the HR self service system and seek approval in advance of taking time off for his hospital appointments and that medical evidence of these appointments was required at the time of making the request. It would then be for the manager to decide if he could come in late and make up the time or take the appointment as sick leave or as holiday. The email stated that they wished fully to support him and had offered the Wellness Room, although the Claimant had declined this offer, but that he should use it any time he wanted and that he should let them know if there was anything further they could do to support him.

40 Ms Mills told the Tribunal that at about this time in early June, Ms Davies did a handover of her line management of the Claimant and that she was copied in on the email setting out Ms Davies' concerns regarding his conduct. She stated that issues became apparent immediately after she started to line manage the Claimant including persistent lateness and disappearing from his desk without notifying anybody. She stated that after she gave him feedback on these issues, his attendance would improve briefly before he would slip back into his old patterns and that she found this more frustrating because it showed what he could do if he tried. She also told the Tribunal that she did some of her own research into narcolepsy on the Narcolepsy UK website in about mid July in order to see what she could do to support the Claimant. She stated that she never saw him to go to sleep or look tired in the office and that he always appeared alert and engaged.

41 Mrs Jackson stated that issues with the Claimant's conduct started early on in his employment and that the issues which Ms Davies had identified on the 9 June continued to be a problem throughout his employment, for example disappearing for stretches of time without telling his manager where he was and

if he was running late, consistently failing to notifying his manager of his whereabouts and expected time of arrival. The expectation was that as soon as he awoke, if he was late he should contact and tell the Respondent that he was running late but rather than doing so he would just turn up materially late for work. Mrs Jackson also said that his method of notification did not follow the required process, which was to be by phone. He would instead send emails and text messages even after having been told not to notify in this way.

42 On 21 June 2016, the Claimant woke up at almost 2 o'clock in the afternoon and phoned the Respondent, who had been seeking him and sending him messages during the day seeking his whereabouts. The internal emails demonstrate the Respondent becoming very concerned for the Claimant's welfare and preparing to call his next of kin, as well as trying to arrange cover for any gaps which may have appeared in his business diary.

43 Also at lunchtime on the 21 June, the Claimant emailed Katy Shaw asking for somebody from security to allow him to pass through the door to use the sleeping pods and asking that she try one last time because "my narcolepsy has never been this problematic and I have been late regularly since beginning this new role. The medication has a very bad effect on me and I want to avoid potentially harming my body with powerful medications by having access to the private sleeping facility at work. I will be as productive as I can be … I know you tried your best and I know you want to help but I am asking kindly for the last time if you can try and help, I am only 26 and I don't want to lose my job because of punctuality. Sadly, at this rate, regardless of how good a salesman I may be, my timekeeping will get me fired. Nobody is at fault here because my condition is very difficult to control, but if I have the sleeping pod available I believe I would be able to improve punctuality significantly. I actually love this new job Katy, it's the best opportunity I have ever had to sell and support my parents up in Scotland more and I want to do my best here. Thank you as always. If there is nothing more you can do, I understand."

44 On 22 June, Katy Shaw replied to the Claimant saying she was sorry to hear that, but that KWM who ultimately control access to the rooms on their premises would need to change their security and insurance liability and this was not something they were willing to do and unfortunately that was the situation, as their two premises were very separate and distinct. She reminded the Claimant that they offer the wellness room that he could use "although I am aware you are reluctant to use this … With regards to that, is there anything we can do to that room for you? We are still able to put a lock on there if you like and can buy blankets etc. Please just let us know and we can adapt it for you very easily." The Claimant replied thanking Katy and saying "I think the lock sounds good but I don't want to cause you guys any grief. It will be useful to have a lock there so that when I urgently need to nap, I know I can go somewhere without someone walking in on me. Don't worry about the blankets etc, I will be able to bring some in."

45 During the same period, the Claimant was also trying, without success, to find parking spaces near the office by way of a disabled season ticket, so that he could use his car to take a nap.

46 On 23 June, the Claimant went straight to a client meeting without coming into the office, since he had woken up late. On 24 June the Claimant woke up in

Hospital because his doctor had given him the wrong dose of a narcolepsy drug on prescription, which had caused an overdose. He indicated to the Respondent that he had almost died. He also stated his intention to hire a carer to come in every morning and physically drag him out of bed because once he was awake he was able to function and work as normal and that, as the Respondent must have seen, his medication did not affect his ability to work during the day. He went on to say that he was struggling with the mornings and it pained him more than anyone else to be late like this whilst on probation. He stated that moving from his previous role at Reuters had been a massive risk and, from a job security angle, was tough but he exhorted the Respondent to "please keep full faith in me". He said "please do not think for a second I am being lazy or deliberately unreliable, once I get past this morning issue I promise you will be able to rely on me more than anyone else". He explained that there is no cause for narcolepsy, that he had lived a normal life beforehand and then was struck by this uncontrollable desire to fall asleep. He again apologised and said "I really don't know what to keep telling you all other than thanks for being as nice as you have been. Thanks for everything." This email was sent to Ms Mills, Ms Davies and Mrs Jackson.

47 On 29 June, the Claimant awoke at almost 8pm, having slept all day for 21 hours straight. He emailed to the Respondent saying that there were no excuses for being late but it was his condition causing problems he hadn't had in a long time. He asked that no one in the team be told, because it would be a topic for teasing. Ms Mills had naturally been chasing the Claimant all day. The Claimant believed that this sleep paralysis period had been caused due to his attending work at 5.30am to 6pm on the Monday and 9am to 6pm on the Tuesday.

48 On the 30 June, the Claimant was in the office working at 1am in order to make up the 5 hours missed the previous day, in addition to the extra hours he had worked on the Monday. Ms Mills and Mrs Jackson decided that this was not at all appropriate, that there was nothing of value that the Claimant could do working during those hours and that he was to be told not to work at that time of day in future. On the 1 July, Ms Mills was trying to contact the Claimant who was not in the office at 10.35 in the morning.

49 On the 4 July, he was working from his parent's home in Glasgow, with permission, because it was the Muslim festival of Eid. He emailed to Ms Mills and Ms Davies at 8.40am saying that he was already working and that he had his mother 'on the case' making sure that he was up early. He stated in this email "I appreciate all of your patience and I promise I am trying my best to make things right because I want to give myself the best chance possible to sell and help the team reach our goals. I love the job and I love the company so let's hope we get there in the end." Ms Mills replied "happy to assist with such flexible working as is practical and suitable for the business, but I note from the weekly sales report that you still have only seven items in the pipeline, which does not reflect the lists you have been showing me. Please do carve out some time today and ensure you add the items to the pipeline that we have discussed on multiple occasions. I expect to see a significant increase in your personal pipeline after the business development activity this week." This referred to the task of turning potential business leads into actual business prospects.

50 On the 6 July, Ms Mills emailed the Claimant again saying "when you are back from leave, can you please help me understand why your pipeline grew

from seven to only nine over a full day of business development activity. Comparatively, your peers made significant increases in pipeline and also made four to six appointments each yesterday. These are specific tasks you had been assigned. If you are unable to achieve them, we need to understand why and how we can help you in meeting the required standard." The Claimant replied saying that he felt these emails were very strongly worded and that he was being as positive as possible despite his medical problem and expressed the fear that Ms Mills lacked faith in him. Ms Mills, in evidence before the Tribunal, accepted that the tone of this last email from herself had perhaps been slightly curt but she did not resile from its contents.

51 Ms Mills replied to the Claimant; "lets talk about this on Friday so that you can enjoy your holiday day". At 11.23pm that evening, the Claimant wrote a long email to Ms Mills saying that he wanted her to know that "this job means everything to me. My intention was never to be late for work" and that his rare sleep disorder was causing him difficulty, that he was often in a foggy state and everyday on waking up he was in absolute agony and pain and that his medication, upon which he had become reliant, had stopped working, that he knew he was on probation but he feared he sometimes felt it came across as arrogant or too demanding, "but in all honesty I don't expect anything from C6 because offering me a job with a good salary at my age is more than enough to support me. Never once have I expected the company to dish out money on me and I appreciate everything you all do for me, including understanding my problem with lateness. I do not want to leave this company at all costs. I am getting to grips with my own medical problem as soon as possible. I hope to see a massive improvement over the next few weeks and months;" that he was hoping to have a carer in place by next week that this should end the problem of punctuality. He said that this was costing him a lot of money but it was because his job was more important to him than anything. "I hope you understand. Darren hired me because I managed to convince him I am good enough. You and Fiona have guided me well and I promise I will deliver on the numbers. At Thomson Reuters nobody helped me and whenever I dropped a big deal they were shocked, I came from a very bad environment to one where I feel a part of a team and I really like it here. I want to work with you all to make the right strides forward. Sorry for the emotional email but I just wanted you to know I have nothing but the upmost respect for you, Fiona and Darren. Thanks Emma."

52 On the 7 July, Ms Mills forwarded this email from the Claimant, in reply to her own, to Mrs Jackson, attaching a summary of all the documented incidents of concern of which she was aware, including from Ms Davies' period as the Claimant's Line Manager. These were in tabulated form, linked to elements in the initial job advert to which the Claimant had responded, the purpose being that it would constitute a good starting point for their conversation with the Claimant who would dial in from his home in Scotland on the following day. Mrs Jackson replied that this meeting should take place face to face rather than over the phone, since a face to face meeting had more meaning and impact, and she suggested postponing it to the following week.

53 This review discussion document, which was before the Tribunal, was tabulated to show the responsibilities set against associated tasks, challenges, both current and potential, including performance to date, sick leave absence, meetings and concerns and the final column showing supportive actions and other events. From pages 2 onwards, the document showed lists of incidents set

against their impact, supportive action and then next steps. This document formed the basis of discussion at the subsequent meetings between the Claimant, management and HR, referred to below.

54 On 11 July, the Claimant contacted the Respondent at 10.16 saying that he was in the Hospital emergency room because somebody had poked him in the eye with an umbrella that morning on his way to work. This prevented the Claimant from attending a pre-arranged meeting, which was then rearranged for later in the day. This meeting resulted in a summary email sent from Ms Mills to the Claimant on 13 July setting out the contents of the meeting together with future action points and saying should the Claimant feel that the notes required any addition or amendment please send them to HR and herself. The email set out the review document's contents showing issues of lateness, non attendance, lack of focus, associated recording of activity and unreasonable requests made to other departments. It attached the updated ongoing list of 'incidents' which had amounted to nineteen 'events' occurring within the first two months of the Claimant's employment. This was stated to be equivalent to one incident or issue every other working day. The email stated that "All agreed that this was more than is reasonable to expect and that the impact to the business and team was negative and required correction."

55 The Claimant had stated at the meeting that he was seeking medical assistance for his condition, but that his form of the condition meant that it only prevented him from waking in the morning, but that once awake he could function normally. Mrs Jackson agreed to investigate with the company's medical insurance to see if sleep conditions could be covered and to consider adding the Claimant to the insurance immediately, as a supportive action. This was beyond what was normally available to staff during their probation period.

56 The agreed actions points listed in the email were:
56.1 That the Claimant was to ensure that Neena, the Team Administrator, had access to his intranet diary, so that she could ensure he was at his desk ahead of client calls;
56.2 That the Claimant would put all travel plans, including train times, into the intranet shared calendar and would ensure that team and management were aware when he was expected to be travelling and arriving at client appointments;
56.3 The Claimant would advise the team administrator when he was going to be in later than agreed start-time;
56.4 The Claimant would advise the team administrator when he was going to be away from him desk for a prolonged period; and
56.5 The Claimant would advise by email and phone when he expected he might be later to the office than expected and that this contact should be made immediately upon expectation of being late. The Claimant stated that he was employing a carer to wake him each morning.

57 The Claimant's reply to this email was: "Thank you Emma for the clear summary. I will work on these points as agreed – I won't let you down." He did not proffer any suggested amendments or additions to the record of the meeting as set out in the email.

58 On 12th July, the Claimant said in an email to Mrs Jackson that he did need health insurance because he urgently needed private help with urological problems as it would take 6 to 7 months for him to be seen on the National

Health Service. He added: "Sometimes I feel like an old man with my level of fatigue" and that during his previous garden leave he was in and out of hospital through medical private cover panicking when his medication stopped working.

59 On 14 July, the Claimant emailed at 4.53 in the afternoon saying that he had forgotten to take his afternoon dose of medication because they had had a team meeting and that as he was extremely sleepy at his desk he had nipped outside to Fitness First where there was an area where he could nap and that he would be back in the office in half an hour. He apologised for not having let anybody know but "it was embarrassing as the team was around". Mrs Jackson replied "Thank you for letting us know. Please try to remember to take your medication, we have a lot of concern for your wellbeing." The Claimant, on the same day, was seeking information from the London Sleep Centre regarding any potential sleeping pods in the location of his workplace, because his company "does not have a suitable place to sleep and I was looking to find out if there is one nearby because I need to rest at lunchtime to help with my symptoms." The London Sleep Centre replied that it was unable to advise on this matter.

60 On 15 July, Mrs Jackson confirmed that the Claimant would be added to the company's health insurance policy prior to his passing his probation and that this news should be kept confidential as it was an exception being made for himself, "as we would like to support you in every way we can. We would not normally do this for any staff members." The Claimant wrote a very grateful email in reply and added that the carer system was working and that he felt very positive, looking forward. The Claimant had a carer coming to wake him each morning, as of the 15 July.

61 On 18 July, the Claimant emailed to Ms Mills at 10.02 saying that he was in Oxford at a client meeting which he forgotten to tell her about, although it was in his diary, to which Ms Mills replied "you were instructed not to attend meetings independently, why are you attending meetings without a member of the team to accompany you, please see me when you get in." The Claimant replied that the meeting was not a demonstration and he had understood that he was not allowed to do demonstrations by himself, but that he could not miss important client meetings and apologised for his misunderstanding. Ms Mills emailed to the Claimant at 1.55 pm saying "we still have not seen you in the office and you have now been absent for four hours for a single client meeting" since his email at 10.02, which was after the time agreed that he would be in the office. She added "You have been instructed at every meeting and in writing that should you not be attending the office at the agreed time, you would let us know in advance." Also, given his product knowledge feedback the previous week, he should not be at client meetings on his own and that he needed to explain how one client meeting took from 10 to 2, as that was a very long time to be out of the office. She summarised that this was not acceptable or appropriate behaviour. The Claimant accepted in cross examination that his narcolepsy had not caused him to break the rules regarding notifying the Respondent early of his absences, going to see clients alone, or the fact of no communication within this four hour time period.

62 On the afternoon of the 18 July the Claimant emailed Mrs Jackson saying that he understood that Ms Mills had been upset but that it was the second time he had been dragged into a room and shouted at by her and once before by Ms Davies and that people outside could hear, which was embarrassing, that he was struggling with the stress not just from work but also with the fact that the Doctors

were not helping him with his condition and that he had not been given any new medication.

63 On 19 July the Claimant, Ms Mills and Mrs Jackson had a meeting about these events, as a result of which the Claimant was issued with a verbal warning whereby a further incident of a similar nature may result in him being dismissed. The summary email following this meeting set out the following concerns about the events of that day, namely that at 10.02, after failing to attend the office on time, i.e. before 9.30, you advised that you would be attending a meeting with a prospective client and then arrived at the office at 2 o'clock. The concerns about such conduct were as follows; failure to report to the office before the agreed time; failure to arrange for a colleague to attend the meeting with you, as requested, whilst you come up to speed with the details of the product; meetings not detailed in the diary/shared calendar; travel arrangements not detailed in the diary/calendar and the email failed to advise that the appointment was in Oxford not in London and set no expectations as to when you would be returning to the office. The email stated that all of the above items were expected of all team members and were communicated to the Claimant both collectively and individually. The Claimant told the Tribunal that he had believed, at the time, that this warning had been fair.

64 On the following day, the 20 July, the Claimant emailed in at 9.32 saying he was on his way but was stuck on the DLR. He eventually arrived at 10.30. The Claimant emailed Mrs Jackson later that morning saying that the carer had woken him up but he was not able to leave the apartment until ten past nine and that the DLR was then delayed. He said that his head had been foggy that morning and he was grateful that the carer was nice enough to help him and he was awaiting delivery of a 'Sleep Shepherd' device to promote wakefulness and reduce fog in the morning, which had been very expensive and which he had brought for himself.

65 Ms Mills told the Tribunal that she herself had been travelling to City Airport on the DLR at the same time as the Claimant that morning and had not experienced any delays on the line and that she had checked online and that TFL had said that all lines were reporting a good service. She stated that this did make her wonder about how honest the Claimant was being with them, although apart from this occasion his explanations had never been checked and they had taken everything he had said at face value and given him the benefit of the doubt. However, she did query with Mrs Jackson whether this constituted another 'incident' and made the point that the Claimant's disruptiveness was hampering their collective ability to be successful.

66 On 20 July, the Claimant wrote a long and emotional email to Darren Innes, the CEO, expressing his gratitude for being hired, stating that managing his stressful sleep disorder had been the challenge and saying that he was given a verbal warning the previous day and that he had never once said that Ms Mills or Mrs Johnson should have to put with his constant lateness and incidents. "I agree that the right action was taken and I do not want to bring the team down." "I have nothing but the upmost respect for you, Ms Mills and Ms Davies and I genuinely mean this with all my heart. Nothing is more agonising for me than waking up late and having to face everyone in the office … if I am dismissed during probation I will not be likely to get another job like this again, which of

course is nobody's fault, which is why I have to thank you for putting faith in me." Mr Innes forwarded this email to HR and decided not to respond.

67 The Claimant accepted in cross-examination that of the five concerns expressed in Ms Mills' email of 20 July recording their meeting the previous day, only the first, i.e. failure to report to the office before the agreed time, was caused by his disability because he was unable to focus when waking up, whereas the other failures were not caused by his disability.

68 On 21st July, the Claimant emailed to Mrs Jackson saying that he had got in at 9.18 and that he thought he should keep working at getting in at 9 but that the 9.30 flexibility, granted by the Respondent, "helped reduce his pressure on getting in, significantly". He stated that his Sleep Shepherd device had arrived but that he had taken it off halfway through the night without realising it, but that it seemed to have helped him to have had a couple of hours of deep sleep for a change.

69 On 26 July, the Claimant emailed at 9.02 am saying "Hey all, the morning carer is working well. I am going to be in before half nine." Also on 26th July, at the Respondent's suggestion the Claimant emailed to his colleagues and team members informing them that he had a sleep disorder called narcolepsy causing foggy mornings and excessive daytime sleepiness and that he just wanted everybody to know because it could look bad when he strolled in at 9.30 unless people knew why.

70 On 27 July, the following day, the Claimant did not attend the office at all because he had slept for the entire day, a period of what he described as 'sleep paralysis'. The Claimant emailed Mrs Jackson and Ms Mills at 6.26 in the evening saying that he had been woken by Police and his cousins knocking on his door as he had fallen asleep again after the carer left and had been scared being woken up in this way to find 40 missed phone calls. The Respondent, mindful that he had been hospitalised previously for a medical overdose, had during the day got in touch with his mother, as his next of kin, in Scotland. The Claimant was very concerned that his mother had been contacted as she had been very distressed and his father had a heart condition and he asked that his mother be replaced by a friend or cousin as his next of kin on the Respondent's records, although he also thanked the Respondent's for being "very supportive". In his email to Mrs Jackson the Claimant expressed his deep concern for the upset caused to his parents and said "I know I messed up today but I am worried about my parents and I can't have this happen again, I don't want them to know that I am late for work or persistently late for work. You haven't done anything but help me, its just my parents don't understand my narcolepsy very well."

71 The Claimant's brother got in touch with the Respondent saying that he had contacted the Claimant, who had had a narcolepsy episode, after the carer left, and had fallen asleep. He invited any further future concerns to be communicated to himself and ended "I really appreciate the concern and I am happy to know that he works with people who are genuinely concerned for his safety." Mrs Jackson replied that she was sorry for worrying the family but that they had been very worried about the Claimant.

72 On 3 August, Senior HR reminded Ms Mills that the Claimant's probation period was due to end in 3 months time on 3rd November and stated that she

should have, hopefully, an idea of whether he was on track to pass his probation or not. She reminded Ms Mills that new starters should be assessed on performance in the job role, achievement of objectives, attendance, timekeeping and application of company values and behaviours. Ms Mills replied attaching the list of concerns and challenges which she and Mrs Jackson were working on with the Claimant saying that they had met with the Claimant regularly so that he was well aware. She added that on that day, the 3 August, there was another 'incident' of non attendance which is "very disappointing as he has shown some very promising sales ability."

73 On 4 August, the Claimant informed the Team Administrator by email that he was going to go to the Wellness Room for a quick nap, "usually 25 minutes is enough and usually knock out in a few minutes". He also asked Mrs Jackson whether it was still possible to get a lock for the Wellness Room. Mrs Jackson replied; "yes I can speak to Katy about this." The Claimant replied that someone had walked in on him and luckily he was not using the bed, otherwise people would have seen me in the room. That had meant that he "could not get the quick nap that I needed today, but I don't want to be a pain either, I should be able to get through the day but a nap can help".

74 On 11 August, the Claimant did not come to work because he mistakenly believed that it was a day booked as annual leave, although he had not in fact completed this process. The Claimant had also failed to diarise a business meeting on that day. The Claimant went to Scotland for a family wedding and worked from home on the following day.

75 On 15 August, at 9.56 am, the Claimant emailed the Team Administrator saying he was stuck on the M1 trying to get to work ASAP, but that the traffic was horrific. On 17 August, the Claimant was happy to report his first closed sales deal and thanked Mr Innes and Ms Mills for giving him a final chance. "I was sad when my narcolepsy was causing me problems and Ms Mills could have let me go if she wanted." On 19th August, the Claimant again thanked both Ms Mills and Mrs Jackson for "keeping me on and having faith in me" and reported two further closed sales deals.

76 On 23 August, the Claimant texted the Team Administrator at 2 o'clock in the afternoon because he had not woken up and apologising that he was unable to control his narcolepsy sometimes. On the 2nd September, the Team Administrator texted the Claimant at 9.49am asking if he was coming in to which the Claimant replied "yes I am coming in, I have a bladder problem and have not been able to leave yet, a bit embarrassing but I am awake and working and will be in asap." It was clear from this that the Claimant had not contacted the Respondent by email as soon as he had woken up and anticipated being late.

77 On 8 September the Team Administrator texted at 10.40 in the morning to find out if the Claimant was coming to work, to which the Claimant replied at 12.04, "yes I am coming in but have not been well this morning hence the late reply" and saying that he was in pain with bladder issues and wondered whether he should work from home. The Administrator replied that Ms Mills had said he needed to take the day off as a sick day. The Claimant told the Tribunal that he had been taking off the Sleep Shepherd device unconsciously during the night and that after the carer left in the morning he would then fall asleep again.

78 On 9 September the Claimant texted the Administrator at 9.28 saying he was driving in that morning because he was in a little bit of pain, but better than yesterday, but was stuck in a tiny bit of traffic but would be in before 10. When challenged in Tribunal that this indicated that he was not doing as requested, namely contacting the Respondent as soon as he woke up when he anticipated being late, the Claimant said that he was confused in the morning and then admitted that he probably had said that in order to buy more time in order to get ready and leave. He accepted, when pressed, that this was, in effect, lying to his employer.

79 On 12 September the Claimant texted the Office Administrator at 13.49 saying he was coming in but because it was Eid "it took forever getting out of the Mosque … I will be there for 2.20pm at the latest". At 15.33 on the same day Ms Mills emailed to Mrs Jackson saying that they needed to revisit the Claimant together again if possible, that he had taken half a day today which had been approved and then arrived at the office at 14.40 missing all but 10 minutes of the mandatory sales training. At 17.15 on the same day, the Claimant emailed Mrs Jackson saying that she was the reason why he was probably still in his job and, although he was loving his job more and more, there were a few concerns which he wanted to highlight in absolute confidence.

80 On the afternoon of 13 September 2016 Ms Mills chaired a team meeting at which eight members of the sales team, including the Claimant, were introduced to a new member of staff. The Claimant's evidence was that Ms Mills began the meeting by introducing each member of the team to the newcomer by reference to their cultural background. She introduced one person as "the French princess", an Italian member of staff as "the Italian cage fighter" and Mr Faisal Ayub, an Iranian Muslim as "the missing terrorist". Ms Mills then introduced the Claimant by his first name, Shahan, and the Claimant contended that this implied, and was understood by everyone at the meeting, to mean that whilst Mr Ayub was the missing terrorist he was in fact the "present terrorist". The Claimant said that he went into complete and utter shock at the time and found the comment deeply hurtful, offensive and racist. He experienced it as a deliberate attack against himself and Mr Ayub, and this on the day after the Muslim festival of Eid.

81 Ms Mills' evidence before the Tribunal was that she did use the words 'missing terrorist' and was deeply sorry and regretful for having done so. She said she had intended it to be a good natured comment highlighting how diverse and characterful the team was but she recognised now that it was ill judged. The Claimant raised a grievance relating to the matter on the 2nd October subsequent to his dismissal. His evidence at the grievance investigation was that he had assumed at first that this a private joke between Ms Mills and Mr Ayub but felt extremely embarrassed himself, since he also is a Muslim. He was also then embarrassed for Mr Ayub, whom he noticed was blushing with embarrassment. He said that the only person smiling was Ms Mills and that he regarded this as a racist assault. However, he said that he maintained his self respect and ignored the comment at the time, in the interests of team spirit, but after dismissal he had felt obliged to tell the truth about this disgusting abuse. He stated that he had come to believe that his job loss had more to it than his performance, in the light of what he had heard on that day.

82 Ms Mills said that she went straight after the meeting to speak to her Line Manager, Mr Innes, about what she had said "because I was aware it was not the best thing to say", even though everyone seemed to be in high spirits at the team meeting and there was a good atmosphere with a lot of banter. Mr Innes said "these things happen" but that it should not happen again. The Respondent instigated a disciplinary investigation into Ms Mills' conduct following the Claimant's grievance and on the 21st November Ms Mills was issued with a first written warning because she had made a comment of a racist nature and the Respondent had a zero tolerance policy to this type of conduct, in particular when perpetrated by a manager. This warning was to last on her file for 6 months. Ms Mills told the Tribunal that, although it was not an excuse for what she had said, she had previously heard the phrase being used in a light-hearted bantering conversation between Mr Ayub and Mr Gavin Parr, a colleague from Dubai who was visiting the London office.

83 Mr Ayub made a complaint about this incident as part of a wider grievance about race and religious discrimination, intimidation and harassment, against Mr Innes, Ms Mills and another person, which he lodged on 10 May 2017. The Tribunal was given to understand that this grievance has been the subject of a settlement between Mr Ayub and the Respondent, to which a confidentiality clause applies.

84 On the 13th September at 17.03, Ms Mills emailed Mrs Jackson, as part of their correspondence regarding their need to revisit the Claimant's 'incidents' review document. She said that she had discussed with Mr Innes the preferred course of action for their upcoming meeting and that they felt that "the net contribution of the Claimant is negative to the team as a whole and particularly to the management group. It is regretful as we feel he is a talented sales person but we feel that given the level of support, the opportunities offered, that his efforts to improve are insufficient and that as a result we should end his employment with us." She sought Mrs Jackson's views and advice.

85 At 11.50am on 14 September, the Claimant emailed the Team Administrator, copied to Ms Mills, saying that he was coming in to the office but that he had been in hospital overnight because the bladder scanning equipment used the previous day had caused him a lot of pain and therefore the carer had been cancelled. He had thought he would be able to go straight from work but as soon as he got home his sleepiness kicked in. He arrived in the office at 13.49.

86 On the 15 September, the Claimant emailed the Respondent at 11.41am saying that he had been admitted to hospital since 2am that morning with a bladder blockage and had asked the Nurse to contact them, that he was in a great deal of pain and was probably unable to come to work. Ms Mills replied that she was very sorry to hear he was unwell and wondered whether he would be able to attend a meeting or whether it should be rescheduled. The Claimant said that despite his absolute agony he would make every attempt to be in the office tomorrow for that meeting, that he was intending to fly to Glasgow the following evening and that his cousin was here with him to ensure that he was OK. There was a certain ambiguity between the Claimant's account and the hospital records as to the Claimant's admission time, which indicated that it had been at 20.21 on the 15th September 2016 and also showed no previous emergency attendances in the last 24 months. However, the substance of the Claimant's illness and complaint was confirmed by the hospital record.

87 The Claimant informed the Respondent on the 16 September that he was using a catheter and was unable to come in to work. Mrs Jackson replied that there was no need for him to come in and that they could meet with him the following week.

88 On 19 September at 9.30am the Claimant emailed Ms Mills saying he would try to come in for training later but would be working otherwise from home because the catheter was proving difficult. Ms Mills replied that if he was unable to come in he should take the day as sick leave and should not be working from home and that the Respondent preferred that he should take the time as sick leave and recover well. The Claimant had a phone call with Ms Mills later on 19 September, during which the Claimant said that he was confident that he could come in for the training. Ms Mills reiterated that if he was unable or unwell they would prefer that he took the time off sick as they did not want to cause any regression in his condition and asked if there was anything else they could do, for which the Claimant thanked her for being 'always helpful'.

89 The Claimant however did arrive at the office at 2.45 wearing his catheter. He was diverted from the training meeting and had a meeting instead with Ms Mills and Mrs Jackson who told the Tribunal that he could not be allowed to attend the training as it was something which could have been valuable to the attendees and could have given him a competitive advantage if he then went on to be employed by one of their competitors.

90 During this meeting, he was told that his employment would be terminated on the grounds of his continued poor conduct during his probation period. The Claimant was shocked by this news and tried to argue against it. The Respondent reiterated their concerns about his failure to communicate by phone in advance after repeated reminders and that it had been necessary for him to follow procedures which he had failed to do, despite expectations having been made very clear to him. The Claimant was handed a letter confirming his dismissal to take effect as of the 19 September with the Respondent making payment in lieu of one week's notice plus 3.5 days of accrued holiday. The Claimant argued his good sale performance against his dismissal, i.e. that he had been performing well. He contended before this Tribunal that the real reason for his dismissal was his race, religion or belief and disability. He asserted that the Respondent had a culture of bullying and discriminating against ethnic minorities and those with disabilities and was prepared to condone acts of harassment carried out by its employees.

91 Mrs Jackson stated in evidence that it had got to the point where the amount of management time being invested in trying to keep track of the Claimant and trying to get him to comply with instructions was disproportionate. As such, Mr Innes had said that they needed to stop this as it was getting ridiculous. Ms Mills and Mr Innes decided that they could not deal with it anymore and the decision was taken by Mr Innes to terminate the Claimant's employment before he was sent on an expensive training course which all sales employees were due to attend and which would have given him considerable advantage to take onwards to any future employers/competitors of the Respondent. The Tribunal was told that two probationary members of staff had their employment terminated at this stage, one being the Claimant and the other being a South African employee whose sales performance had been

disappointing. The same reasoning for the timing of the dismissal applied in both cases.

92 Mrs Jackson stated that, unusually, the Claimant was paid an additional £2,052 in commission on the 27th October 2016, after his termination date, because the company felt that he deserved it, given that he had performed well in terms of his sales figures.

93 The Respondent has a policy governing equal opportunities including zero tolerance of discrimination of any kind, victimisation, harassment or bullying. Both witnesses called by the Respondent gave evidence that they had received regular training in equality and diversity and that the workforce was racially and ethnically diverse.

94 As to the Claimant's medical condition, it was clear from the evidence before the Tribunal that the Claimant had a settled diagnosis of narcolepsy for which he was under various hospital specialist consultant and sleep centre treatment, including the Sleep Disorders Centre at Guys Hospital. He was regularly prescribed various medications in an attempt to control this condition, which demonstrated varying degrees of success. A letter dated 27 July 2016 from a consultant physician in sleep and respiratory medicine confirmed that the Claimant attended the Sleep Disorders Centre for narcolepsy and that his main complaint was severe morning sleep inertia which affected his ability to wake up on time and present to work on time. It requested a parking place close to his workplace as being beneficial. The Claimant had been barred from driving for a period of time on health grounds, but had then been allowed by the DVLA to recommence driving and was able to do so at the material time and currently.

95 It was also clear that the Claimant suffered at times from a variety of what he described as side effects from his medication, including urology and bladder problems requiring the use of a catheter for certain periods and necessitating at times urgent hospital treatment. A Professor/Consultant in urology stated on 24 May 2016 that he had had bladder problems for six months, the symptoms of which 'put him in the severe group with a terrible quality of life'. The Consultant also reported that his fitness was being affected by his narcolepsy and that his amphetamine treatment affected his appetite and that he could be quite dehydrated as a result of the bladder issues. The Claimant asserted that his dehydration problems resulted from the medication taken for his narcolepsy although there was no confirming medical evidence on this issue.

96 The Claimant's disability impact statement dated 26 June 2017 ran to just over one page in substantive length. The Claimant contended that this had been drawn up by his first legal representatives who had been of very poor quality and had not been accurate in various respects, for example stating that he could not drive which he had attempted to correct but had not had time to do in the last minute rush to submit the statement on time. In his impact statement as submitted, the Claimant's evidence was that in the absence of medication he simply could not stay awake and that this affected a number of his day to day activities including falling asleep on buses and tubes, over-shooting his stop and forgetting to tap his Oyster card on the way out of the tube station. He also stated that even on medication he was unable to exercise since workouts at the gym caused him a great deal of fatigue and that he was only able to carry out light physical activity and was unable to carry heavy shopping bags from the

supermarket to his car and that his lack of exercise had resulted in cysts and arthritis in his back owing to muscle fatigue.

97 When questioned by the Tribunal, he said that he often slept sixteen to twenty four hours at a stretch at weekends, experienced chronic fatigue and never felt refreshed since narcolepsy prevents deep sleep and only allows rapid eye movement sleep. He stated that this also impeded recovery from injury since tissue was not able to heal itself and that he felt excessive daytime sleepiness which impacted not only his work life but also his social life as he was so unreliable that he hesitated to make any arrangements with friends since he continually let them down. He also stated that confusion and failure of concentration were symptoms of his condition and that he was unable to eat healthily because of the amphetamines. He stated that his medication was taken every four hours but started to wear off after three hours, leaving one hour during which he was struggling. He did however manage to do his own cleaning and laundry, basic shopping, meal preparation and cooking. He also told the Tribunal that he owned two businesses and that they kept him busy so as to avoid him getting sleepy.

98 The Claimant presented his complaints to the Tribunal on the 7 February 2017.

The Law

99 As to the law, the Tribunal directed itself as follows:

(i) **Section 6 of the Equality Act 2010** provides that a person has a disability if they have a physical or mental impairment which has a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities. **Schedule I part 1** so far as material, provides as follows: **Para 2**: long term means has lasted, or is likely to last for at least 12 months or for the rest of a persons' life. **Para 5:** the impairment is to be treated as having a substantial and long-term adverse effect on the person's ability to carry out normal day-to-day if, disregarding the effect of any treatment or medication prescribed for the impairment, it would be likely to have that effect. **Paragraph B1 of the Statutory Code Guidance on the Definition of Disability (2011)** provides that a substantial effect is 'one that is more than minor or trivial'. The Code provides detailed assistance on all aspects of the definition of disability for these purposes.

(ii) **Section 13 (1) of the Equality Act 2010** provides that "a person (A) discriminates against another (B) if, because of a protected characteristic (including race, religion or belief and disability) A treats B less favourably than A treats or would treat others".

(iii) **Section 20 (3) of the Equality Act 2010** provides that 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, there is a duty upon A to take such steps as it is reasonable to have to take to avoid the disadvantage.

(iv) **Section 21 of the Act** provides that "a person discriminates against a disabled person if they fail to comply with a duty to make reasonable adjustments".

(v) **Section 26 (1) of the Equality Act 2010** provides that "a person (A) harasses another (B) if; **(a)** A engages in unwanted conduct related to a relevant protected characteristic and **(b)** the conduct has the purpose or effect of violating B's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for B." **Sub-section (4) of section 26** provides that "in deciding whether conduct has the effect referred to in **(1) (b)** above, each of the following must be taken into account; (a) the perception of B; (b) the other circumstances of the case; (c) whether it is reasonable for the conduct to have that effect."

(vi) **Section 27 of the Equality Act 2010** provides that a person (A) victimises another person (B) if A subjects B to a detriment because B does a protected act, including making an allegation (whether or not express) that A or another person has contravened this **Act**.

(vii) **Section 39 (2) and (4)** provide that an employer A must not discriminate against an employee of his, B, … by dismissing B or subjecting B to any other detriment".

(viii) **Section 123(1) of the Equality Act 2010** provides that, subject to extension to allow for the Early Conciliation process, a complaint may not be brought to the Tribunal after the end of the period of three months starting with the date of the act to which the complaint relates, or such other period as the Tribunal thinks just and equitable. **Subsection (3)** provides that for the purposes of this section, (a) conduct extending over a period is to be treated as done at the end of the period; and (b) failure to do something is to be treated as occurring when the person in question decided on it. **Subsection (4)** provides that in the absence of evidence to the contrary, a person is to be taken to decide on failure to do something when (a) they do an act inconsistent with it, or (b), if there is no inconsistent act, on the expiry of the period in which they might reasonably have been expected to do it.

(ix) **Section 136 (2) of the Equality Act 2010** provides that "if there are facts from which the Tribunal could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the Tribunal must hold that the contravention occurred … **(3)** but this does not apply if A shows that A did not contravene the provision".

(x) The Tribunal reminded itself that discrimination may not be deliberate and may consist of unconsciously operative assumptions on the part of the employer. It is therefore incumbent upon the Tribunal to examine indicators from the surrounding circumstances and events, both prior and subsequent to the acts complained of, in order to assist it in determining whether or not particular acts were discriminatory (**Anya v University of Oxford [2001] IRLR 337).**

(xi) Inferences of unlawful discrimination may not properly be drawn solely from the fact that the Claimant has been unreasonably treated, although they may properly be drawn from the absence of any explanation for such unreasonable treatment. (**Bahl v The Law Society [2004 IRLR 799).**

(xii) The Tribunal had regard to the cases of **Igen v Wong [2005] ICR 931** and **Madarassey v Nomura International Plc [2007] IRLR 246** in setting about its task.

(xiii) The following additional principal cases were cited before the Tribunal in argument: **Mensah v Royal College of Midwives [1996] UKEAT 124/94/1712;Robertson v Bexley community Centre [2003] IRLR 434; British coal Corp v Keeble [1997] IRLR 336; Aderemi v London & South Eastern Railway Ltd [2013] ICR 591; Environment Agency v Rowan [2008] IRLR 20; Newham sixth Form College v Sanders [2014] EWCA Civ 734; Project Management Institute v Latif [2007] IRLR 579; Dept of Work and Pensions v Alam [2010] ICR 665; Smith v Churchill's Stairlifts PLC [2006] IRLR 41; Home Office v Collins [2005] EWCA Civ 598; Richmond Pharmacology v Dhaliwal [2009] IRLR336;**

Conclusions

Jurisdiction:

100 The Respondent essentially contends that any act complained of prior to 8 September 2016 is out of time, is not part of a continuing act ending with the date of dismissal and that there are no grounds upon which a just and equitable time extension can be granted. This contention applies to the refusal of sleeping pods, one of the acts of direct discrimination complained of, and the failure to make reasonable adjustments by provision of a sleeping room. The Respondent contends that the decision that the sleeping pods on KWM premises could not be used by the Claimant was finally made on 7 June 2016 (paragraph 31 of these Reasons) and communicated to the Claimant on 9 June (paragraph 35 of these Reasons).

101 The Tribunal accepted that, as a matter of law, the material date for time beginning to run against the Claimant is the date of decision and not the date of communication of that decision (the **Mensah** case), although the Claimant's knowledge, or lack of it, may well be relevant to any exercise of the just and equitable discretion to extend time.

102 However, the Tribunal decided unanimously in its determination of the Claimant's application to amend on day one of the hearing, that "nap room", "such a pod" and "sleep pods" – terms used in the Claim Form, must be taken, in context, to mean something wider that the specific KWM sleeping pods namely; any suitable room where the Claimant could sleep undisturbed when he needed to do so (paragraphs 7 and 9 of these Reasons). This was the substantive underlying thrust of the Claimant's case as pleaded, and is borne out by the facts as found by the Tribunal - when told that the KWM pods are impossible, the Claimant immediately turned his request to the potential availability of any other room on the premises for him to use (paragraph 36 above). The Claimant's search continued, both within and out-with the Respondent's premises, for example reverting to a reconsideration of a lock on the Wellness Room on 4 August 2016 (paragraph 73 above). There was no evidence that this broad search for a suitable sleeping room was ever concluded or that the Respondent ever gave up on its open offers of help to the Claimant in any way he requested and the Respondent at no point acted in a way inconsistent with this openness. Further, it was reasonable for the Respondent to remain open to offering assistance and support to the Claimant in any way which presented itself until the termination of his employment. The Respondent stated that the fire authorities would not allow a lock on the wellness room for safety reasons, but there was no

specific evidence of this before the Tribunal and it would not, in any event, preclude the ongoing search, or at the very least the Respondent's openness to finding an alternative room, should there be any change in circumstances. The Claimant continued to press the Respondent about his need for a place to nap and indeed continued his own personal search outside the workplace, throughout his employment.

103 The Tribunal concluded unanimously that this was a continuing state of affairs up to the Claimant's dismissal and that it would be unduly formalistic to attribute a narrower meaning to "sleeping pods" in the context of the direct discrimination complaints than in the context of reasonable adjustments. Accordingly, all of the Claimant's complaints are in time and the Tribunal has jurisdiction to consider all of them.

Race discrimination:

104 The Tribunal asked itself whether there were any facts from which it could find that the Respondent had treated the Claimant less favourably on the grounds of his race as a British Pakistani in respect of the provision of a sleeping room and/or in dismissing him, and it concluded unanimously that there were none, for the following reasons:

104.1 In respect of the provision of a sleeping room: no member of the Respondent's staff, of whatever race or ethnic origin, was permitted to use the KWM sleeping pods. Conversely, all members of staff, of whatever race or ethnic origin, were permitted the use of the Wellness Room. All of the evidence before the Tribunal showed that the Respondent promptly and persistently made all reasonable efforts, both formally and informally, to procure the use of the KWM sleeping pods for the Claimant's use, but to no avail. The Respondent asked regularly what else it could do to help and raised the possibility of adapting the wellness room for the Claimant's comfort, including the provision of a lock, a blind and blankets. The fact that this came to nothing did not appear to be due to lack of trying on the part of the Respondent and the Tribunal concluded unanimously, on all the evidence before the Tribunal, that the offers and efforts of Ms Mills and Mrs Jackson, and indeed Katy Shaw and the other personnel at the Respondent were genuine and sincere. Further, the Claimant regularly told the Respondent not to worry and that if nothing could be provided for him, he would make his own arrangements.

104.1.1 There was no evidence whatever that any real comparators were treated differently to the Claimant in regard to the provision of sleeping facilities, nor that an hypothetical comparator – a person of different race to the Claimant but with all of his other characteristics, health issues and work history in common, and who had said and done what the Claimant had said and done, would have been treated any differently to the way in which the Claimant was treated.

104.2 Dismissal: The Tribunal, having carefully scrutinised all of the evidence before it, concluded unanimously that the reason for the dismissal of the Claimant during his probation period was his conduct, namely his persistent failure to follow the processes and agreed action points raised by the Respondent, despite numerous review meetings and a formal warning, and with no indication of the promised, and agreed, improvements which were required. The Claimant continued to fail to notify that he would be late as soon as he

awoke, so as to free management from having to chase him and enable them to rearrange his business day, including appointments, where necessary; he failed consistently to inform the Team Administrator when he was going to be away from his desk for any lengthy period; he failed to detail his diary and travel arrangements fully on the shared calendar and, despite clear instructions, travelled to a client meeting in Oxford alone. There were 19 separate events of concern during the first 2 months of his employment.

104.2.1 By mid-September, the Respondent, in the persons of Ms Mills and Mr Innes, had come to the view that the amount of effort and management time devoted to supporting the Claimant to improve his conduct, had become disproportionate and, on balance, unproductive, despite his obvious talents as a sales person. The decision to dismiss was taken. It's timing at that particular time was triggered by the upcoming expensive and valuable training to be rolled out to all members of the sales team and both the Claimant and a South African colleague, whom it was envisaged would not be staying with the Respondent long term, were dismissed before they could attend this training. This was a business decision; that the expenditure on them would be unwarranted and that they would glean potential benefit from the training which they might take forward into employment with a competitor.

104.2.2 The Tribunal found no evidence that the Claimant's race had anything to do with his dismissal. In fact, the Respondent showed considerable leeway towards the Claimant in various ways, including agreeing a later start time of 9.30 rather than 9am and signing him up to the company private medical insurance scheme despite the fact that he was only on probation, a benefit not given to any other probationer, of whatever ethnic origin. Further, the Claimant, in his emails, consistently thanked the Respondent effusively for all the support and help he was being offered and sometimes acknowledged his own short comings and the potential justification for dismissing him for his timekeeping, and by his own admission he had a good relationship with Mrs Jackson in HR. His complaints of direct race discrimination, contrary to **section 13 of the Equality Act 2010**, accordingly fail.

Religion or belief discrimination:

105 The Tribunal asked itself whether there were any facts from which it could find that the Respondent had treated the Claimant less favourably on the grounds of his religion as a Muslim, in respect of the provision of a sleeping room and/or by dismissing him, and it concluded unanimously that there was, namely; Ms Mills' remark "the missing terrorist" about a Muslim colleague, at a meeting on 13 September 2016 in the Claimant's presence, as set out in paragraph 81 of these Reasons. This was the Claimant's line manager and, together with Mr Innes, the Claimant's dismissing officer. The Tribunal is mindful that prejudice may consist of unconscious assumptions as well as conscious attitudes.

105.1 The Tribunal concluded that the phrase "the missing terrorist" used in September 2016 could only reasonably be taken to refer to Islamist terrorism. There have been a series of horrific terrorist attacks over recent years, in various European countries, including France and the UK, for which Islamist terrorist groups have claimed responsibility. These shocking events have figured widely in news coverage in all media, as has the increase in unlawful discriminatory incidents perpetrated against individual Muslims and certain Mosques, in the

aftermath of these events. In this context, the phrase "the missing terrorist" used of any Muslim, other than as a strictly factual description of an actual missing terrorist, is, on the face of it, capable of indicating a discriminatory frame of mind on the basis of religion or belief, whatever the tone in which it is said. It is not indicative of discrimination on the grounds of race or ethnic origin, since Islam is not confined to any particular race or ethnic origin.

105.2 The Tribunal therefore looked to the Respondent for an explanation which satisfied the Tribunal, on a balance of probabilities, that the fact that the Claimant is a Muslim, a fact well known to the Respondent at the material time, played no part whatever in his dismissal and/or the non-provision of a sleeping room for his use.

105.3 The Tribunal was unanimously satisfied that the Claimant's religion had nothing whatever to do with the non-provision of a sleeping room nor with his dismissal, for all of the reasons set out above in relation to his race (paragraphs 104.1 and 104.2, 104.2.1 and 104.2.2). There was no evidence whatever that the Claimant, as a Muslim, was treated any differently to any other real comparators in relation to the sleeping pods or the wellness room, nor that an hypothetical comparator – being a non-Muslim sales person with the same characteristics, health condition and work history – would have been treated any differently to the way in which the Claimant was treated. The Tribunal found that the Respondent made every effort to gain access for him to the KWM sleeping pods and offered to adapt the Wellness use for his convenience and was unanimously satisfied that the Claimant was dismissed for reasons of conduct after considerable leeway had been shown him for a probationer. As a further background fact it was clear that the Respondent allowed the Claimant to work from home at his parents' house in Scotland over the Muslim festival of Eid and the Claimant clearly felt able to be open about his religion in the workplace. His complaints of direct discrimination on the grounds of his religion or belief, contrary to **section 13 of the Equality Act 2010**, accordingly must fail.

Disability

106 The Respondent disputes that the Claimant is to be regarded as disabled within the meaning of **section 6 of the Equality Act 2010**, contending that there is insufficient evidence of substantial and long-term effect on his ability to carry out day to day activities either in the medical evidence provided or in his impact statement. Further, the Respondent points to the many occasions where the Claimant said to the Respondent in his emails that his condition was 'very mild', not 'a major issue', that once awake he functions and is able to work as normal, and even 'more productively than some people', and that with medication his symptoms are very well controlled.

107 The Claimant states that he began to develop symptoms of excessive tiredness and sleepiness during the day and disrupted night-time sleep at the age of 16, some ten years ago. He was diagnosed with narcolepsy in August 2013, at the age of 23. The Tribunal is mindful that diagnosis per se is not determinative of the issue under **section 6** and that regard must be had to the substantive realities day to day, particularly in regard to what the Claimant cannot do, or can only do with difficulty.

108 Principally, the Claimant cannot wake up in the morning in a reliable way, and without medication or when medication becomes ineffective (which happens at intervals over time) or produces such side effects as to become counterproductive, he cannot wake up at all. The consultant at Guys and St Thomas' hospital stated in a letter dated 27 July 2016 that the Claimant has 'severe morning sleep inertia which affects his ability to wake on time and present to work' and again in a letter dated 10 July 2017 that the Claimant had been suffering with 'significant morning sleep inertia and day time hypersomnolence for a long time.' … 'He struggles to establish full wakefulness in the mornings (sleep inertia) and remains excessively sleepy during the day. He requires naps during the day.'

109 The facts as found by the Tribunal over the material time, as set out above in these Reasons, amply confirm this medical evidence. The Tribunal accepted that the Claimant had great difficulty waking up and remained subject to excessive sleepiness during the day and felt tired all the time, necessitating naps at short notice and the need to go out and/or move about in order to fend off the urge to sleep. The Tribunal also accepted that the Claimant's medication was intermittently ineffective and sometimes produced unpleasant and difficult side-effects. Also, that at times, particularly at weekends and at times during the week, he slept for 16 to 21 hours at a stretch and that this was out-with his control, despite the use of the Sleep Shepherd device and the employment of a Carer. The evidence was that he also suffered from 'fogginess' on waking up in the morning and that his concentration and memory could be affected.

110 The Tribunal accepted that, when awake, the Claimant functioned reasonably well and was able to work, as witness his sales achievements, and to take reasonable care of himself in terms of basic shopping, cooking and cleaning. However, it was clear that the Claimant expended considerable effort, anxiety and money in trying to mitigate the effects of his narcolepsy (for example in employing a carer, buying a Sleep Shepherd device and continually seeking places where he could nap during the day) and felt ashamed and embarrassed.

111 On all the evidence, the Tribunal was unanimously satisfied that the Claimant's condition constituted a physical, neurological, impairment whose effect on his ability to carry out normal day to day activities was more than minor or trivial. Day to day activities within the meaning of the 2011 Guidance, is a very broad concept. The inability to wake up in the morning, rendering the Claimant radically unreliable in terms of getting to work or honouring any social or other commitments, impacts the Claimant in his day to day activities in every way, including getting to work, meeting friends or conducting a normal social life, including travelling on public transport, due to his forgetfulness in the proper use of his oyster card or alighting at the correct stop. The Tribunal accepted that the Claimant felt unable to arrange meetings with friends because he was so likely to let them down and that his social life was therefore very constrained. It was also clear that, without any medication, the Claimant was likely to sleep for very extended periods, in a wholly uncontrolled manner, at any time, day or night. The Further, the Tribunal was unanimously satisfied that but for the medication which the Claimant was taking, his impairment would be very likely to have a substantial adverse effect on his ability to carry out any day to day activity requiring him to be awake. For that reason, in any event, it is to be treated as having that effect **(Sched. I, Pt 1, Para 5 of the Equality Act 2010).**

112 The Tribunal unanimously concluded, having regard to the factual realities of his condition, that the Claimant, in his communications with the Respondent, sought to minimise the effects of his narcolepsy, because he had suffered the humiliation of considerable mockery at his previous employment and was very anxious to avoid a similar situation with the Respondent, being also afraid that too much disclosure would cause him to lose his new job, which he very greatly valued. He also, perhaps consequently, displayed a false optimism regarding the hoped for solutions provided by the Sleep Shepherd device and the services of a Carer whom he employed. The Tribunal did not attach great weight in this regard to the tick-box answers provided by the Claimant in his application for the services of this carer in respect of his ability to cook, clean, wash etc, since this application was solely for the purposes of defining the area of responsibility of the care-provider, which was simply to ensure that he was awake in the morning and not to provide any of the other customary carer services.

113 The Tribunal concluded unanimously, having regard to all of the evidence before it and to the provisions of **section 6 and Schedule I part 1, including paragraph 5 of the Equality Act 2010** that the effects of the Claimant's physical impairment were considerably more than minor or trivial and that, on all the evidence, it was an effect which was long-term, within the meaning of the statute. Accordingly, the Claimant is to be regarded as disabled for the purposes of the **Equality Act 2010** at the material time.

114 The Tribunal also concluded unanimously that the Respondent knew of the substantial adverse effects of the Claimant's physical impairment from the date of his disclosure of his narcolepsy on 10 May 2016 (paragraphs 20 to 22 of these Reasons) and/or ought reasonably to have known of them, in conjunction with their observations of the Claimant's lateness record and unexplained absences from his desk, manifest from the start of his employment and continuing.

Reasonable Adjustments:

114 The alleged practice, as amended, was the failure to provide any suitable room where the Claimant could sleep undisturbed in order to alleviate his substantial disadvantage of being unable to sleep, in house, during his rest breaks when he needed to do so. In fact, the Respondent did provide the use of the Wellness Room for all staff to make use of and the Claimant said that he used it about once a month when he had to. It was not ideal from his point of view because others could come in and use it at any time, for example for breast feeding, and there were some 320 staff with the right to access this room. The Claimant was therefore liable to be disturbed, which defeated the object, at least to some extent. He was also reluctant to use the room because he felt embarrassment at being seen by other staff to be regularly using it for the purpose of sleeping, and fearful of being mocked, at least up to the date when he informed his immediate team colleagues of his narcolepsy. He stated that he used a sleeping bag on the floor of the basement disabled toilet, out of the way of his colleagues on the work floor. He also at times used his car when he could park locally enough, and a gym which was not too far away.

115 The Tribunal found the Respondent's practice of not providing a private, undisturbed room for sleeping purposes to be one which put the Claimant, as a person disabled by narcolepsy, at the substantial disadvantage, in comparison to

persons not thus disabled, of being unable to sleep on the premises when his condition required it, so that he could continue to be effective at work. The Respondent therefore fell under a duty to take such steps as it was reasonable to take in order to avoid that disadvantage.

116 On the facts as found by the Tribunal, the Respondent made every effort, both formal and informal, to obtain the use of the KWM sleeping pods for the Claimant's use. This proved to be absolutely impossible. The Respondent offered to get a lock fitted to the wellness room and provide a blind and blankets. However, the Claimant was always reluctant to use this room and initially refused the idea of a lock, reverting to it again as a possibility only in August. The suit room was too small and there did not appear to be any other possible room within the Respondent's estate which could be adapted or used at that time. The Respondent regularly asked the Claimant how it could help and what more could be done and granted him a later start than his colleagues, at 9.30. The reality was that the one crucial need which the Claimant had was a suitable place to sleep. However, he regularly said to the Respondent not to worry, he understood if nothing more could be done and he would find his own solution.

117 Had the Claimant been more forthright about how crucial his need was for a sleeping place, whether on the premises or elsewhere but nearby, it may well have been reasonable for the Respondent to attempt to find a suitable place elsewhere. However, the Claimant appeared to downplay his need, in the main, perhaps because he was afraid of losing his job. This fear, at least on the basis of his disability, was groundless, in the Tribunal's view, since all the evidence indicated that the Respondent was overwhelmingly supportive and sympathetic to the Claimant's condition once he had disclosed it on 10 May 2016, to the extent of obtaining private medical cover for him, something not normally available to probationers.

118 In all the circumstances and in the light of the Claimant's contemporaneous downplaying of his need and his regularly stated position that he would find his own solution, the Tribunal concluded unanimously that the Respondent took all reasonable steps to find the Claimant a room for sleeping. The Respondent acknowledged, in hindsight, that it would perhaps have been best practice to seek an OH report on the Claimant, not least to counteract the possibility that a probationary employee may be downplaying his difficulties. However, given the Claimant's regular gratitude and assurances and his good sales performance, the Tribunal does not find that the Respondent failed to make reasonable adjustments in this case by failing to obtain an OH report. The Claimant's complaint under **sections 20 and 21 of the Equality Act 2010** accordingly fails.

Victimisation:

119 The Claimant claims in his Claim Form that he complained about the Respondent's failure to provide sleep pods, that this was a protected act and that he was dismissed by reason of this protected act. He asserted in evidence that he was refused the use of the sleep pods on multiple occasions, the last time being on 9 September 2016. However, he did not specify any particular conversation or document which he alleges to have been a protected act for the purposes of **section 27 of the Equality Act 2010.** The Tribunal was unable to find a protected act for these purposes in the evidence before it and the

Claimant's complaint of victimisation within the meaning of **section 27 of the Equality Act 2010** accordingly fails. Further, and in any event, the Tribunal was unanimously satisfied with the Respondent's explanation for the Claimant's dismissal as dealt with in paragraphs 104.2 and 104.2.1 of these Reasons and that no unlawful considerations formed part of this decision.

Harrassment:

120 The Tribunal unanimously found that the phrase "the missing terrorist" in the current social climate (as set out in paragraph 81 above) when used of any Muslim and in the hearing of another Muslim is an inherently shocking and offensive phrase, unless it is used in a strictly factual sense to refer to an actual missing terrorist, for example in a news bulletin following an atrocity. This is particularly so in the workplace circumstances in which Ms Mills admits to having used the phrase about Mr Ayub on 13 September 2016. She was the team Line Manager at a group meeting at which a new member of staff was being introduced. The Tribunal accepted that Ms Mills did not intend to offend and she states that it was used in a light hearted manner. However, levity of tone in the use of this phrase is likely to add to the shock of its inappropriateness, rather than otherwise, in the Tribunal's view.

121 The Tribunal accepted the Claimant's evidence that he was shocked, hurt and offended by it, as a Muslim. It was clearly unwanted conduct and the Tribunal concluded unanimously that it had the effect of violating his dignity and creating a degrading, humiliating and offensive environment for him at that meeting and potentially thereafter in the eyes of his colleagues attending that meeting, including a new member of staff. In coming to this conclusion, the Tribunal has had regard to the Claimant's perceptions and to the workplace circumstances in which the phrase was used, by a line manager, at a whole team meeting introducing a new member of staff and was unanimously satisfied that it was reasonable for the conduct to have had that effect on the Claimant, when regarded objectively.

122 The Tribunal unanimously did not accept the Respondent's contention that this case fell within the parameters of the dicta in the **Dhaliwal case** discouraging "a culture of hypersensitivity" relating to "things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended." The use of the phrase "the missing terrorist", even light-heartedly, about a Muslim member of staff, particularly during a period of Islamic terrorist outrages across Europe, is not a trivial matter. The statute, in its use of the two alternatives 'purpose or effect', provides for harassment to occur within its meaning, even when unintended. The Tribunal noted that whilst Ms Mills did not intend offence, she was well aware at the time that she had said something inappropriate and felt that the incident was serious enough for her to go immediately to Mr Innes her line manager and report what had happened, even without anyone complaining at the meeting. Further, the Respondent took it seriously enough to issue her with a Warning which remained live for six months on her file.

123 Accordingly, the Claimant's complaint that he suffered harassment in this incident, related to his religion, is well-founded and succeeds, although the Tribunal did not accept that it was reasonable, within the meaning of **section**

26(4) of the Act, for him to understand the phrase to imply that he himself was the terrorist who was present.

124 There will be a Remedy Hearing on 4 October 2017.

_____
Employment Judge A Stewart
18 September 2017