# EMPLOYMENT TRIBUNALS

| *Claimant* | *Respondent* |
|---|---|
| **Mr D Scantlebury-Watson** | **Architectural Powder Coatings Ltd** |

## RESERVED JUDGMENT OF THE EMPLOYMENT TRIBUNAL

**HELD AT NEWCASTLE** **ON 2, 3, 4, 5, 8, 9, 10 & 11 May 2017**
**and 5, 7, 8, 12 13 & 15 ( deliberations) June 2017**

**EMPLOYMENT JUDGE GARNON**
**Members Mr R Dobson and Mr D Cattell**

***Appearances***
**For Claimant in person**
**For Respondent Mr J Thornhill Solicitor**

## JUDGMENT

**1. The claimant was at all material times a disabled person.**

**2. The claim of unlawful deduction of wages (and only to the extent it duplicates such claim, that of breach of contract) is well founded in so far as it relates to underpayment of profit share only. We order the respondent to pay to the claimant £1765.22 gross of income tax and National Insurance.**

**3. The remaining claims are not well founded and are dismissed.**

## REASONS

(bold print is our emphasis and italics are quotations from statements or documents)

### 1. Introduction - Sources of Evidence and Issues

1.1. The claims presented on 5th March 2016 are of constructive unfair dismissal , breach of contract , failure to pay correct wages including holiday pay , an uplift under s 38 Employment Act 2002 and various types of disability discrimination and harassment under the Equality Act 2010 ( the EqA).

1.2. The disability relied upon is Asperger's Syndrome (Asperger's) a form of autism the effects of which the claimant explains. It is a lifelong neurological, not psychological, condition. The claimant can and does, in his words, "school himself" to hide some of its

effects, but there are others he cannot change. He said in respect of various actions of his " that is the way I am wired". Stress exacerbates some of its effects.

1.3. The respondent concedes he has the impairment but not that (a) it amounts to a disability or (b) all behaviour of the claimant which caused them concern arose in consequence of his Asperger's, as contrasted with his personality or (c) it had , or ought to have had, knowledge of the effects of his Asperger's. The response contained an employer's contract claim for overpaid bonus withdrawn at the hearing on arithmetic grounds, not on principle.

1.4. The claimant resigned by a letter dated 2nd, sent on or about 4th and received by the respondent on or about 5th November 2015 giving 6 months notice which he was not required to work . During it he was ill with stress and depression medically certified as such until late December 2015. He does not assert he was discriminated against because of that as a separate impairment. He says the depression arose because of the discrimination not vice versa.

1.5. We heard the claimant and took his additional particulars of claim (running to 206 paragraphs), his disability impact statement and his witness statement as his evidence in chief. For the respondent we heard its witnesses Robin Orchard, his wife Patricia Orchard, Mr David Owen, Ms Elaine Blaylock, Mr Gary Dent and Mr Gary Pitt. We read their witness statements which too were long. We had six lever arch files of documents running to over 2000 pages. Our findings of fact will rehearse far less evidence than we heard and read in the interests of simplicity.

1.6. Similarly, there are potentially some points of law which could be dealt with at length involving much case law and matters of legal academic interest. The claimant is highly intelligent and has done considerable legal research. In the EqA claims the overlap between the various sections engaged is challenging even for experienced lawyers. Where, as here, the findings of fact mean that however the claim is put, it will fail on a few key points, there is nothing to be gained in detailed discussion of other points. Apart from the claim of direct discrimination and those in the next paragraph, the other claims come in the end to the issues of whether what the respondent did were acts for which it had **reasonable and proper cause,** were a **proportionate means of achieving a legitimate aim**, and, in the harassment claim had the unlawful purpose or could **reasonably** be taken to have the unlawful effect.

1.7. The claims for unlawful deductions from wages/ breach of contract relate to allegations the respondent failed to pay an agreed pay rise, profit share and pay for holiday accrued but not taken.

1.8. The liability issues, best broadly framed for now, are: -

1.8.1. What were the express terms of the claimant's contract as Managing Director (MD) Designate especially as to
(a) job duties and authority
(b) profit share
(c) holiday pay
(d) pay increases

1.8.2. Did the respondent commit fundamental breaches of any such express terms, or of terms implied by law other than the implied term of mutual trust and confidence?

1.8.3. Further or alternatively, did the respondent, **without reasonable and proper cause**, conduct itself in such a manner calculated or likely to destroy or seriously damage the relationship of mutual confidence and trust between itself and the claimant?

1.8.4. If so, did he resign in part in response to such breaches before affirming the contract? If so, there was a dismissal (which would be wrongful) and the respondent does not seek to show a potentially fair reason for it.

1.8.5. Was the claimant at material times a disabled person?

1.8.6. If so what behaviour of his arose in consequence of Asperger's?

1.8.7. From what date did the respondent have actual or constructive knowledge of (a) disability and (b) its effects?

1.8.8. Has the respondent done any unlawful act amounting to direct discrimination under section 13, and/or discrimination because of something arising in consequence of disability under section 15 and/or a failure to make reasonable adjustments under sections 20 to 21, and/or indirect discrimination under section 19 and/or harassment under s 26 .

1.8.9. Having regard to the findings in 1.8.1.(b) –(d) above , what sums are owed by the respondent to the claimant ?

## 2.The Relevant Law

2.1. The concept of constructive dismissal is for practical purposes the same under the EqA as under the Employment Rights Act 1996 (the Act) so we will set out only the latter. Section 95(1)(c) of the Act provides an employee is dismissed if: -

> "*the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct*."

2.2. An employee is "entitled" so to terminate the contract only if the employer has committed a fundamental breach of contract, ie. a breach of such gravity as to discharge the employee from the obligation to continue to perform the contract, see Western Excavating (ECC) Ltd v Sharpe [1978] IRLR 27. The conduct of the employer must be more than just unreasonable to constitute a fundamental breach.

2.3. If express terms of the contract governing pay , job duties, etc can be said to have been breached, those breaches are fundamental and the claimant resigned , at least in part , in response to the breaches not for some other unconnected reason before affirming the contract, there is a dismissal and no implied term need be considered .

### Formation and Terms of a Contract

2.4. This is important, because the claimant, probably due to Asperger's, fails to distinguish broad indications of intent and "mere promises" from legally binding terms.

Contracts at their simplest are formed when one party makes an offer, the other accepts it, "consideration" is given and there is an intention **on both sides,** to create legal relations. More often in commerce, an "opening "offer is made followed not by acceptance but a counter offer. Offer and Counter offer may go on for some time. Acceptance, and hence formation of a contract happens when there is a meeting of minds, in legal Latin "consensus ad idem". Consideration is often no more than mutual promises, "if A does one thing, B will do another ".

2.5. While an agreement to agree is no agreement at all, one may have a contract of employment containing all **essential** terms and a collateral statement of intent as to details of how its rights and duties are to be exercised in practice. In this case, the collateral statement, which will be referred to as the "succession plan" or "exit plan" , addressed the withdrawal of Mr Orchard from day to day operations and the taking over of such operations by the claimant. A key dispute is that the claimant says the succession plan was itself agreed and formed a contract while the respondent says it was a negotiation which never produced agreement.

2.6. Intention to create legal relations may be expressly negated in respect of some or all terms to which reference is made in a document. In versions of a succession plan originally called " Going Forward" ( and in later revisions ) Clause 11 contains " *It is intended that this document , though not contractually binding in all its terms, will be appended to a new contract of employment to be entered into … to include those terms above referring to DSW's conditions of employment* ". If there is a binding oral agreement which is sufficiently certain , a failure to record it does not matter .However, parties will often in complex negotiations reach consensus but one or both may wish to delay become bound until they check something and/or think further. They may then use words like the above to indicate they are not yet committed until a further step is taken.

2.7. Express terms are those which have been specifically agreed between the parties, whether in writing or orally. They may not spell out everything the parties agreed and need to be supplemented by implied terms to which we come shortly Express terms may not always be clearly expressed . Lord Hoffman in Investors Compensation Scheme-v-West Bromwich Building Society explained one must in interpreting express terms look for the intention of the parties at the time the contract was made. His judgment includes

*Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract…*

*The meaning which a document (or any other utterance) would convey to a reasonable man is* ***not the same thing as the meaning of its words.*** *The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax.*

*The "rule" that words should be given their "natural and ordinary meaning" reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in The Antaios Compania Neviera S.A. v. Salen Rederierna A.B. 19851 A.C. 191, 201:*

*". . . if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense*."

The emboldened words are important in this case because of a symptom of Asperger's which we shall call "**literalism**" and explain in Part 3.

2.8. There is a fine line between interpreting an express term and supplementing express terms with implied ones. In searching for the intention of the parties, courts will often look at the circumstances surrounding the making of the contract as an aid to interpretation and to clarify ambiguities. The courts will not imply a term simply because it is a reasonable one, but only if the court can presume it would have been the intention of the parties to include it. To make such a presumption, the court must be satisfied:

(i) the term is **necessary** in order to give the contract business efficacy, or
(ii) it is the normal custom and practice to include such a term in contracts of that particular kind, or
(iii) an intention to include the term is demonstrated by the way the contract has been performed, or
(iv) the term is so obvious that the parties must have intended it.

In Marks and Spencer v BNP Paribas Securities Services 2015 UKSC 72. Lord Neuberger said the test is not '**absolute** necessity', but it is helpful to say a term can only be implied if, without it, the contract would lack '*commercial or practical coherence'*.

**Business Efficacy**

2.9. There is a general presumption parties intended to create a **workable** agreement. If, therefore, it is **necessary** to imply a term in order to make it workable, the courts will do so. However in Scally v Southern Health and Social Services Board 1991 ICR 771 the House of Lords felt it would be stretching the doctrine too far to imply a term which was only necessary to the one isolated aspect of the whole agreement.

**Conduct of the Parties**

2.10. Another way in which courts may imply a term is to look at how the parties have operated the contract in practice, including all the surrounding facts and circumstances. This approach may demonstrate the contract has been performed in such a way as to suggest a particular term existed from the start, even though the parties had not expressly spelled it out it when the contract was made.

2.11. The individual terms must be sufficiently clear and certain for the courts to be able to give them meaning. An agreement to agree is no agreement at all. In Polymer Products Ltd v Pover EAT 599/80, a term that on transfer of job location the employee would be offered new duties, relocation allowance and salary '*all to be mutually agreed*' was too vague and uncertain. In Puntis v Governing Body of Isambard Brunel Junior School EAT 1001/95 a deputy head teacher had told the claimant, a teacher, of her temporary promotion '*Have no fears, Sue, your promotion will be made permanent.'* One of the grounds on which the EAT held there was no contractually binding agreement was the inherent uncertainty of the statement. There was no indication of when the permanent appointment would be made or what she would be required to perform to justify permanent promotion. Similarly, in Judge v Crown Leisure Ltd 2005 IRLR 823, the Court of Appeal held a 'promise' made by a director that he would ensure an employee was placed on roughly the same level of remuneration as other managers 'eventually' or 'in due course', was not legally enforceable.

**The other alternative**

2.12. Because in all civil cases the burden of proof rests on the party asserting a contractual term exists and has a certain meaning , whichever one's case depends on its existence will lose if he fails to discharge that burden. . Ambiguities must be construed, to use the Latin phrase, "contra proferentem", which means against the person who is asserting the term. Each party may **think** they have reached " consensus ad idem" or a true "meeting of minds", but the Tribunal may find they were at cross purposes and did not **on some term which is not necessary to the very existence of a contract,** eg that certain hours of work will attract a "premium" rate of pay. A permissible finding is that there is no express term at all and no **necessity** to imply one to avoid such a conclusion. If the straws of agreement are not there, tribunals must be wary of making the brick of a contractual term, by imposing their view of "reasonableness".

**Breach**

2.13. A breach may be actual or anticipatory. An actual breach of contract arises when the employer refuses or fails to carry out an obligation imposed by the contract at a time when performance is due. For example, a reduction in an employee's monthly pay cheque is an actual breach. An anticipatory breach arises when, before performance is due, the employer intimates to the employee, by words or conduct, he does not intend to honour an essential term when the time for performance arrives. A letter at the beginning of the month stating that 'With effect from the end of this month your salary will be reduced "would be an anticipatory breach. Vague or conditional proposals of a change in terms, conditions or working practices will not amount to an anticipatory breach.

2.14. Once it has been established a relevant contractual term exists and breach (actual or anticipatory) has occurred, we must then consider whether the breach is fundamental. This is essentially a question of fact and degree. The employer's motive for the conduct causing the employee to resign is irrelevant to whether or not there has been a fundamental breach. In Wadham Stringer Commercials (London) Ltd v Brown 1983 IRLR 46, a sales director, was demoted in status and moved into a cramped and unventilated office. The employer argued economic circumstances impelled it to treat him in this way, but the EAT stressed the test of fundamental breach is purely contractual and surrounding circumstances are not relevant, at that stage.

2.15. The employer's obligation to pay correct wages is so fundamental that breaches of this duty are usually repudiatory , but may not be if there is a genuine dispute about what is correct , see Financial Techniques (Planning Services) Ltd v Hughes 1981 IRLR 32, for anticipatory breach, and for actual breach Bridgen v Lancashire County Council 1987 IRLR 58, per Donaldson MR "*The mere fact that a party to a contract takes a view of its construction which is ultimately shown to be wrong, does not of itself constitute repudiatory conduct. It has to be shown that he did not intend to be bound by the contract as properly construed.*'

2.16. Implied terms which may be breached fundamentally include a failure to give an employee adequate "support" or to look after his health by ensuring vulnerable employees are not exposed to excessive work demands ( Walker-v-Northumberland County Council).or unnecessary risk factors (Waltons and Morse –v-Dorrington) , conducting a business unlawfully Malik-v-BCCI and, as in WA Goold (Pearmak) Ltd v McConnell 1995 IRLR 516, a duty promptly to afford a reasonable opportunity to employees to obtain redress of any grievance they may have.

2.17. Walker was considered f in Hatton-v-Sutherland and Somerset County Council-v-Barber 2002 IRLR 263, where Hale LJ , as she then was , uttered words in the different legal context of whether a harmful reaction to the pressures of the workplace is reasonably **foreseeable** ( not a requirement in discrimination cases , see Essa-v-Laing) which are still helpful especially in assessing deemed knowledge in this case and whether the term implied by Walker has actually been breached

*25. The answer to the foreseeability question will therefore depend upon the inter-relationship between the particular characteristics of the employee concerned and the particular demands which the employer casts upon him…. A number of factors are likely to be relevant.*

*26. These include the nature and extent of the work being done by the employee. Employers should be more alert to picking up signs from an employee who is being over-worked in an intellectually or emotionally demanding job than from an employee whose workload is no more than normal for the job or whose job is not particularly demanding for him or her. It will be easier to conclude that harm is foreseeable if the employer is putting pressure upon the individual employee which is in all the circumstances of the case unreasonable. Also relevant is whether there are signs that others doing the same work are under harmful levels of stress. There may be others who have already suffered injury to their health arising from their work. Or there may be an abnormal level of sickness and absence amongst others at the same grade or in the same department. But if there is no evidence of this, then the focus must turn to the individual, as Colman J put it in Walker, at p 752e:*

*"Accordingly, the question is whether it ought to have been foreseen that Mr Walker was exposed to a risk of mental illness materially higher than that which would ordinarily affect a social services middle manager in his position with a really heavy workload."*

*27.More important are the signs from the employee himself. Here again, it is important to distinguish between signs of stress and signs of impending harm to health. Stress is merely the mechanism which may, but usually does not, lead to damage to health. Walker is an obvious illustration: Mr Walker was a highly conscientious and seriously*

*overworked manager of a social work area office with a heavy and emotionally demanding case load of child abuse cases. Yet although he complained and asked for help and for extra leave, the judge held that his first mental breakdown was not foreseeable. There was, however, liability when he returned to work with a promise of extra help which did not materialise and experienced a second breakdown only a few months later. If the employee or his doctor makes it plain that unless something is done to help there is a clear risk of a breakdown in mental or physical health, then the employer will have to think what can be done about it.*

*28. Harm to health may sometimes be foreseeable without such an express warning. Factors to take into account would be frequent or prolonged absences from work which are uncharacteristic for the person concerned; these could be for physical or psychological complaints; but there must also be good reason to think that the underlying cause is occupational stress rather than other factors; this could arise from the nature of the employee's work or from complaints made about it by the employee or from warnings given by the employee or others around him.*

*29. But when considering what the reasonable employer should make of the information which is available to him, from whatever source, what assumptions is he entitled to make about his employee and to what extent he is bound to probe further into what he is told? Unless he knows of some particular problem or vulnerability, an employer is usually entitled to assume that his employee is up to the normal pressures of the job. It is only if there is something specific about the job or the employee or the combination of the two that he has to think harder. But thinking harder does not necessarily mean that he has to make searching or intrusive enquiries. Generally he is entitled to take what he is told by or on behalf of the employee at face value. If he is concerned he may suggest that the employee consults his own doctor or an occupational health service. But he should not without a very good reason seek the employee's permission to obtain further information from his medical advisers. Otherwise he would risk unacceptable invasions of his employee's privacy.*

*30… The point is a rather different one: an employee who returns to work after a period of sickness without making further disclosure or explanation to his employer is usually implying that he believes himself fit to return to the work which he was doing before. The employer is usually entitled to take that at face value unless he has other good reasons to think to the contrary: see McIntyre v Filtrona Ltd, Court of Appeal, 12 March 1996.*

*31. These then are the questions and the possible indications that harm was foreseeable in a particular case. But how strong should those indications be before the employer has a duty to act? Mr Hogarth argued that only 'clear and unequivocal' signs of an impending breakdown should suffice. That may be putting it too high. But in view of the many difficulties of knowing when and why a particular person will go over the edge from pressure to stress and from stress to injury to health, the indications must be plain enough for any reasonable employer to realise that he should do something about it.*

2.18. If there is a fundamental breach of any of the above terms, consideration of the implied term of mutual trust and confidence. is unnecessary . What does the term mean? In Woods v WM Car Services (Peterborough) Ltd [1981] IRLR 347, the EAT, said: -

"*It is clearly established that there is implied in a contract of employment a term that the employer would not, without reasonable and proper cause, conduct themselves in a manner, calculated or likely to destroy or seriously damage the relationship of confidence and trust between an employer and an employee. To constitute a breach of this implied term, it is not necessary to show that the employer intended any repudiation of the contract. The Employment Tribunals function is to look at the employer's conduct as a whole and determine whether it is such that its cumulative effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it any longer. Any breach of that implied term is a fundamental breach amounting to repudiation since it necessarily goes to the root of the contract."*

2.19. The House of Lords in Malik emphasised the conduct of the employer, **objectively considered**, must be likely to cause serious damage to the relationship between the employer and the employee and must be without "reasonable and proper cause". That too must be objectively decided by the Tribunal. It cannot be enough the employer thinks it had reasonable and proper cause. Bournemouth University Higher Education Corporation v Buckland 2010 ICR 908 or that its conduct fell within the range of reasonable responses. Equally, if the acts of the employer are objectively for reasonable and proper cause there is no breach even if employee genuinely but mistakenly interprets the acts as hurtful and destructive of his trust in confidence in the employer.

2.20. A breach of this implied term may result from a number of actions extending over a period as explained in Lewis v Motorworld Garages [1985] IRLR 465. This doctrine, sometimes called the last straw doctrine, was further explored in London Borough of Waltham Forest v Omilaju [2005] IRLR 35. The last straw does not in itself have to be a breach of contract or of the same character as the earlier acts. Its essential quality is that when taken in conjunction with the earlier acts on which the employee relies, it amounts to a breach of the implied term. It must contribute something to that breach, although what it adds may be relatively insignificant. The last straw viewed in isolation need not be very unreasonable or blameworthy conduct, though an entirely innocuous act on the part of the employer cannot be taken as the last straw,

2.21. Resignation is acceptance by the employee the breach has ended the contract. Conversely, he may expressly or impliedly affirm the contract and lose the right to resign in response to the antecedent breach. There is a lengthy explanation of the principles in WE Cox Toner (International) Ltd v Crook [1981] IRLR 443, approved in Henry v London General Transport [2002] IRLR 472, but we will give the shorter, but effective explanation in Cantor Fitzgerald v Bird [2002] IRLR 267, that affirmation is "*essentially the legal embodiment of the everyday concept of 'letting bygones be bygones'".* Delay of itself does not mean the employee has affirmed the contract.

**Disability Discrimination and Harassment**

2.22. The definition of disability is in section 6 and schedule 1 to the EqA Section 6 includes

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

(2) A reference to a disabled person is a reference to a person who has a disability.

2.23. Section 212 defines "substantial" as " more than minor or trivial"

2.24. Schedule 1 includes

(1) The effect of an impairment is long-term if—
(a) it has lasted for at least 12 months,
(b) it is likely to last for at least 12 months, or
(c) it is likely to last for the rest of the life of the person affected.
(2) If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is **likely to recur.**
5(1) An impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if—
(a) measures are being taken to treat or correct it, and
(b) but for that, it would be **likely** to have that effect.
(2) "Measures" includes, in particular, medical treatment and the use of a prosthesis or other aid.
The House of Lords in SCA Packaging –v-Boyle 2009 ICR 1056 held the word "likely" in these contexts meant "could well happen ". Goodwin v The Patent Office emphasised the definition is concerned not only with things people cannot do but things they can do only with difficulty. Vickery v British Telecom made clear the decision as to whether a person is disabled is one for the Tribunal to make and not for any medical expert.

2.25. Among the symptoms the claimant describes is "depression". Physical impairments may produce psychological as well as physical effects. In Olaleye v Liberata UK Ltd UKEAT/0445/13, Lady Stacey said it was plain the physical condition had given rise to mental consequences for the claimant including anxiety and insomnia. She was allowed to lead evidence to show she had suffered stress and anxiety as a result of the underlying condition and the effect it had on her. If the claimant's depression is "reactive" to the effects of his Asperger's, he need not show a separate impairment.

2.26. Unlawful discrimination requires a **discriminatory act** and a **type of discrimination**. The **acts** are in section 39 and the obvious one complained of is dismissal but it may also be subjecting him to "any other detriment". Harassment is made unlawful by s40.

2.27. The **types** of discrimination are as follows, first noting section 6 (3) includes that in relation to the protected characteristic of disability a reference to a person who has a particular protected characteristic is a reference to a person who has a **particular** disability.

2.28. Section13, headed "Direct discrimination", says
(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

and s 23 adds :

(1) On a comparison of cases for the purposes of section 13, there must be no material difference between the circumstances relating to each case.

(2) The circumstances relating to a case include a person's abilities if—

(a) on a comparison for the purposes of section 13, the protected characteristic is disability;

2.29. Section 15 says

(1) A person (A) discriminates against a disabled person (B) if—

(a) A treats B unfavourably **because of** something arising in consequence of B's disability, and

(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

In Basildon & Thurrock NHS Trust v Weerasinghe [2016] ICR 305 at paragraphs 26 to 31 Langstaff P referred to the two-stage approach identified by the statutory provision, both causal, first, there must be something arising in consequence of the disability; secondly, the unfavourable treatment must be "because of" that "something". In Charlesworth-v-Dransfield Engineering Simler P has recently agreed this approach.

2.30. Section 19 defines indirect discrimination thus:

(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—

(a) A applies, or would apply, it to persons with whom B does not share the characteristic,

(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

(c) it puts, or would put, B at that disadvantage, and

(d) A cannot show it to be a proportionate means of achieving a legitimate aim.

2.31. Section 39 (5) imposes the duty to make reasonable adjustments, Section 20 explains it and section 21 says it is discrimination not to comply with it Section 20 sets out three requirements but only one is relevant in this case
(3) The first requirement is a requirement, where a provision, criterion or practice of ( the employer) puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

2.32. Section 26 includes
(1) A person (A) harasses another (B) if—
(a) A engages in unwanted **conduct related to a relevant protected characteristic**, and
(b) the conduct has the purpose or effect of—
(i) violating B's dignity, or
(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—

(a) the perception of B;
(b) the other circumstances of the case;
(c) whether **it is reasonable for the conduct to have that effect**.
The relevant protected characteristics include disability;

2.33. Harassment and "detriment "under s 39 are mutually exclusive (see s 212(1)). Non purposive harassment does not require proof of why the respondent acted as it did provided the unwanted conduct **relates to disability** and **reasonably** has the proscribed effect .If we find no purposive harassment, what remains involves **striking a reasonable balance under ss 4.**

2.34. As for the interrelationship of s 13, 15, 19 and 20/21, understanding the present law is easier if one considers its development over the years. However, with a litigant in person, even of great intelligence, this is no place for fine legal analysis. Under the Disability Discrimination Act 1995 as amended (the DDA.) Stockton Borough Council-v-Aylott held direct discrimination was **less** favourable treatment because of a **particular** disability. The Tribunal found the respondent had a stereotypical view of mental illness which caused them to treat Mr Aylott less favourably than they would have treated a person with physical illness. The claimant is alleging something like that here. If people made assumptions about his behaviour, direct discrimination may have occurred. Contrast where an evidence based view of his behaviour, which would have been formed whether he had Asperger's or not, was the cause of unfavourable treatment, s 13 would not apply, but s15 probably would.

2.35. Section 15 does not require **less** favourable treatment than that experienced by any comparator. If the "reason why" the claimant was treated unfavourably .was something arising in consequence of disability it is discrimination unless ss 1 (b) is shown. Discrimination occurs when one treats people whose circumstances are the same differently or when one treats people the same when their circumstances are different. The first is direct and the second indirect. Under the DDA. the type of discrimination now made unlawful by s15 was originally a form of direct discrimination while failure to make reasonable adjustments was a form of indirect.. Mummery L.J.said in Stockton Borough Council.–v-Aylott:

*26. Disability discrimination takes different forms. In the case of direct discrimination on a prohibited ground the aim is to secure equal treatment protection for the individual person concerned on the basis that like cases should be treated alike. The essential inquiry is into why the disabled claimant was treated less favourably than a person not having that particular disability.*

*27. In the case of indirect discrimination the aim is to secure equal treatment results for members of a group to which that individual belongs. The essential inquiry is into whether the members of that group, who appear not to have been discriminated against on the ground of disability, have not in fact had equal treatment protection on the basis of the prohibited ground as a result of the disproportionate adverse impact of a neutrally worded provision, criterion or practice.*

The potential for overlap was explored in General Dynamics-v_ Carranza UKEAT/0107/14 by HH Judge Richardson and has been approved by Elias LJ in Griffiths –v-DWP

2.36. Indirect discrimination in practice adds little to the protection afforded by s 21. In theory, disadvantage under s 19 need not, in terms, be "substantial" and lack of

knowledge of disability and effects is not expressed as a defence. There is an express defence of *proportionate means of achieving a legitimate aim*, which used to be called "justification". Practically, whether an employer can "justify" an indirectly discriminatory provision, criterion or practice (PCP) and whether it is acting reasonably in not taking a step to prevent a PCP under s20/21 placing the claimant at a disadvantage, are the same question.

2.37. Under the DDA, if an employer wished to "justify" disability related discrimination (the closest equivalent to s15), it had first to have complied with the duty to make reasonable adjustments. In its early days, the DDA permitted, theoretically, justification of a failure to make reasonable adjustments. Collins-v- National Theatre held the "justification test" added nothing to the test of whether it would be reasonable to make the adjustment. The DDA was amended to remove that tautology. It remained the case, and we believe does to this day, though the EqA does not expressly say so, that it is logically impossible to justify s15 discrimination unless the employer has first complied with the duty to make reasonable adjustments. However, if no adjustments would not succeed in removing or alleviating the disadvantage, there is usually little more to be done to justify unfavourable treatment, including dismissal. Sections 20/21 are the most important aspect of this case, and we will focus on that shortly.

**Knowledge**

2.38. Under s 15 the respondent is not liable if it shows it did not know, and could not reasonably have been expected to know the claimant had the disability. Section 19 says nothing about knowledge but does contain a "justification" defence. Paragraph 20 of Schedule 8 says the duty to make reasonable adjustments only arises where the employer knows or could reasonably be expected to know, the employee: "*is likely to be placed at the disadvantage*". In Secretary of State for Work and Pensions –v-Alam, Lady Smith said the issues on a s20/21 claim are:

*1. Did the employer know **both** that the employee was disabled **and** that his disability was liable to affect him in the manner set out in section 4A(1)? If the answer to that question is: "no" then there is a second question, namely,*

*2. Ought the employer to have known **both** that the employee was disabled **and** that his disability was liable to affect him in the manner set out in section 4A(1)?*

*If the answer to that second question is: "no", then the section does not impose any duty to make reasonable adjustments.*

2.39. Ridout v TC Group [1998] IRLR 628 was decided shortly after the DDA came into force. The claimant had photo sensitive epilepsy a rare variation of a condition stereotypically associated as characterised by convulsions and collapse. She ticked her application form for a job to the effect she had that disability. When she attended for interview she was put in a room with no windows illuminated by fluorescent strip lights. She attended wearing a pair of sun glasses hanging on a cord around her neck. She did not say the lighting in the room was a problem for her although she did comment on the lighting as she walked into the room in terms which the Tribunal found could merely have been to explain why she had dark glasses. The respondent did not realise it should take any further steps. Morison P set out as one of the claimant's submissions:

*"The onus in this case was on the prospective employee to inform the prospective employer of a disability but that once he or she has done that the onus passes to the employer to make such enquiries as are necessary to satisfy himself that he can discharge his duties under section 6 (*the predecessor of section 20/21 EqA*). Such enquiries may simply be limited to making further enquiries of the employee. The submission made to us was the appellant, having discharged the onus on her at the first stage, the prospective employer failed to take two opportunities to consider their position first on receipt of the application form and secondly when she arrived for interview".*

That submission was rejected. The EAT said:

*"Subsection 6 requires the Tribunal to measure the extent of the duty, if any, against the actual or assumed knowledge of the employer both as to the disability and its likelihood of causing the individual a substantial disadvantage in comparison with persons who are not disabled … It seems to us they were entitled from the material before them to conclude* ***no reasonable employer would be expected to know without being told in terms by the applicant*** *that the arrangements which he in fact made in this case for the interview procedure might disadvantage this particular applicant for the job. As it was said in argument, this form of epilepsy is very rare".*

and later:

*"We accept what Counsel for the appellant was saying that Tribunals should be careful not to impose on disabled people … a duty to 'harp on' about their disability … It would be unsatisfactory to expect a disabled person to have to go into a great long detailed explanation as to the effects their disablement had on them merely to cause the employer to make adjustments which he probably should have made in the first place. On the other hand, a balance must be struck. It is equally undesirable that an employer should be required to ask a number of questions about a person suffering from a disability as to whether he or she feels disadvantaged. There may well be circumstances in which that question would not arise. It would be wrong if, merely to protect themselves from liability, the employers … were to ask a number of questions which they would not have asked of somebody who was able-bodied.* ***People must be taken very much on the basis of how they present themselves****".*

**Reasonable Steps and Burden of Proof**

2.40. In Newham Sixth Form College v Sanders Laws L.J. approved Environment Agency v Rowan [2008] ICR 218 saying a Tribunal considering a reasonable adjustments claim should usually identify:

(a) the provision, criterion or practice applied by or on behalf of an employer, or
(b) the identity of non-disabled comparators (where appropriate) and
(c) the nature and extent of the substantial disadvantage suffered by the claimant.'

2.41. The PCP will need elaboration, which we will do in our conclusions, after we have set out our findings of fact. Expressed broadly for now, the PCP was that whoever was appointed MD should be able to manage and direct the company in such a way as to balance sometimes competing considerations. He should run it lawfully, especially in its dealings with employees and health and safety, retain and if possible expand its

customer base and work while producing sufficient profit distributable by dividend to its shareholders to enable Mr Orchard to retire.

2.42. The requirement under s20 is that it disadvantages the claimant *in comparison to persons who are not disabled*. If the practice disadvantages everyone to whom it is applied **equally**, disabled or not, there is no comparative disadvantage. But if it disadvantages the claimant more for a reason inextricably linked to his disability, it is self evident he is at such a comparative disadvantage, see Fareham College-v-Walters

2.43. The nature and extent of the disadvantage is contentious and cannot be understood until we have made findings about Asperger's and its effects.

2.44. The test of what steps are reasonable is objective (Smith-v-Churchills Stairlifts). The duty is on the employer to take steps. Archibald –v-Fife Council, explained steps that are not "normal" should be considered for disabled people What Parliament always intended was explained by Baroness Hale

*57. … the Act entails a measure of positive discrimination, in the sense that* ***employers are required to take steps to help disabled people which they are not required to take for others****. It is also common ground that employers are only required to take those steps which in all the circumstances it is reasonable for them to have to take.*
*58. …* ***The control mechanism lies in the fact that the employer is only required to take such steps as it is reasonable for them to have to take. They are not expected to do the impossible.***

2.45. The needs of the employee **and** the employer must be taken into account. Chief Constable of Lincolnshire –v- Weaver EAT /0622/07held "*the Tribunal assessed the reasonableness of allowing the Claimant onto the scheme merely by focusing on his own position. They were obliged to engage with the wider operational objectives of the Force",*

2.46. While employers are required to take such steps as are reasonable in all the circumstances to help disabled people, which they are not required to make for others what steps an employer should take involves **striking an objectively reasonable balance.** The deciding issue for the Tribunal on any section 20/21 claim is often what steps it would have been objectively reasonable for the respondent to take which it did not take at all, took to a lesser extent than needed , or took later than needed .

2.47. Section 136 states:-

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

2.48. In Project Management Institute v Latif 2007 IRLR 579 the EAT explained that, in order to shift the burden onto the employer, the claimant must not only establish the duty has arisen but facts from which it can be reasonably inferred, absent an explanation, it has been breached. Accordingly, by the time the case is heard, there must be evidence of some apparently reasonable adjustments that could be made. It would be an

impossible burden to place on an employer to prove a negative – i.e. for the employer to show that no adjustment could reasonably have been made. If the claimant sets out the steps, the Tribunal must decide whether the respondent's given reasons for not doing them are objectively reasonable by critically evaluating them, weighing their importance to the employer against the discriminatory effect.

2.49. In Newham v Sanders Laws L.J. cited Langstaff J in RBS v Ashton [2011] ICR 632
*"Thus, so far as reasonable adjustment is concerned, the focus of the Tribunal is, and both advocates before us agree, an objective one. The focus is upon the practical result of the measures which can be taken. It is not - and it is an error - for the focus to be upon the process of reasoning by which a possible adjustment was considered. As the cases indicate, and as a careful reading of the statute would show, it is irrelevant to consider the employer's thought processes or other processes leading to the making or failure to make a reasonable adjustment. "*

2.50. This replicates Spence-v-Intype Libra where Elias P. said:

*38…. The issue…, is whether the necessary reasonable adjustment has been made; whether it is by luck or judgment is immaterial.*
*40. A tribunal will be fully entitled in the light of all the evidence before it to conclude that an employer has failed to make a reasonable adjustment, and his ignorance of the employee's requirements, whether the result of indifference or ignorance, will not avail the employer one iota. He may carry out an assessment and fail to make reasonable adjustments; equally, he may fail to carry out the assessment but make all necessary reasonable adjustments. Mr Spence's contention is that even if he takes such steps as are reasonable to mitigate or eliminate the harm, he will be potentially liable for any failure to carry out an assessment. We do not think that conclusion is compatible with the language of the legislation.*
*43. We accept the concept of reasonable adjustment is a broad one, but we do not consider this assists the argument. The nature of the reasonable steps envisaged in s4(A) is that they will mitigate or prevent the disadvantages which a disabled person would otherwise suffer as a consequence of the application of some provision, criterion or practice. … the duty is not an end in itself but is intended to shield the employee from the substantial disadvantage that would otherwise arise.* ***The carrying out of an assessment or the obtaining of a medical report does not of itself mitigate or prevent or shield the employee from anything.*** *It will make the employer better informed as to what steps, if any, will have that effect****, but of itself it achieves nothing****.*
*48. In short, what s4(A) envisages is steps will be taken which will have some practical consequence of preventing or mitigating the difficulties faced by a disabled person at work. It is not concerned with the process of determining which steps should be taken.*

**A proportionate means of achieving a legitimate aim**

2.51. In older cases the term used was "Justification" .Balcombe LJ said in Hampson v Department of Education and Science [1989] ICR 179, 191:

*"justifiable" requires an objective balance between the discriminatory effect of the condition and the reasonable needs of the party who applies the condition."*

2.52. Pill LJ in Hardys and Hanson -v-Lax provides an overview quoting other cases. First a sex discrimination case Allonby v Accrington and Rossendale College [2002] ICR 1189. where Sedley LJ stated:

*"29. In this situation it is not enough that the tribunal should have posed, as they did, the statutory question "whether the decision taken by the college was justifiable irrespective of the sex of the person or persons to whom it applied". ..**Once a finding of a condition having a disparate and adverse impact on women had been made, what was required was at the minimum a critical evaluation of whether the college's reasons demonstrated a real need to dismiss the applicant; if there was such a need, consideration of the seriousness of the disparate impact of the dismissal on women including the applicant; and an evaluation of whether the former were sufficient to outweigh the latter.***

Then Pill L.J. said

*32 .. The principle of proportionality requires the tribunal to take into account the reasonable needs of the business. But it has to make its own judgment, upon a fair and detailed analysis of the working practices and business considerations involved, as to whether the proposal is reasonably necessary**.** I reject the appellants' submission (apparently accepted by the EAT) that, when reaching its conclusion, the employment tribunal needs to consider only whether or not it is satisfied that the employer's views are within the range of views reasonable in the particular circumstances.*
*33. The statute requires the employment tribunal to make judgments upon systems of work, their feasibility or otherwise, the practical problems which may or may not arise from job sharing in a particular business, and the economic impact, in a competitive world, which the restrictions impose upon the employer's freedom of action. The effect of the judgment of the employment tribunal may be profound both for the business and for the employees involved. This is an appraisal requiring considerable skill and insight.*

**Justification is also about striking an objectively reasonable balance**

2.52. In Newham v Sanders Laws LJ later said

*14. In my judgment these three aspects of the case -- nature and extent of the disadvantage, the employer's knowledge of it and the reasonableness of the proposed adjustments -- necessarily run together. An employer cannot, as it seems to me, make an objective assessment of the reasonableness of proposed adjustments unless he appreciates the nature and the extent of the substantial disadvantage imposed upon the employee by the PCP. Thus an adjustment to a working practice can only be categorised as reasonable or unreasonable in the light of a clear understanding as to the nature and extent of the disadvantage. Implicit in this is the proposition, perhaps obvious, that an adjustment will only be reasonable if it is, so to speak, tailored to the disadvantage in question; and the extent of the disadvantage is important since an adjustment which is either excessive or inadequate will not be reasonable.*

## 3 Disability, Symptoms and Outward Appearance, leading to Knowledge

3.1. Autism is a lifelong developmental disability and a neurological condition. It is a “spectrum” condition meaning all autistic people share certain difficulties, but being

autistic will affect them in different ways. Asperger's Syndome is a term used since about 1990 and now more often encompassed in a diagnosis of " Autism Spectrum Condition".

3.2. It affects how a person perceives the world and interacts with others, which is differently to what the claimant calls "neurotypical" people. He accepts **he has none of their intuitive abilities that relate to behaviour and communication. He is reluctant to ask for help or explain why he needs it.** His Asperger's has other adverse effects including sensory difficulties with bright artificial light which can cause anything from irritability to debilitating migraines .This hearing started in a venue with no natural light . On the second day the claimant said his wife had insisted he tell the Tribunal he had ended the first day with a splitting headache. We readily arranged to hear the rest of the case in a different venue. Had the claimant mentioned this at either of the preliminary hearings we could have made those arrangements from the start. We accept he does have difficulty asking for help but **the respondent could not be expected to spot that, without being told, as he either behaved as comfortable with demands upon him or did ask for help .**

3.3. He says Asperger's is responsible for **communication difficulties** such as avoiding eye contact. In his written closing submission he says *The Claimant respectfully asks the Tribunal to allow for the symptoms of his disability when considering his own cross-examination by Mr. Thornhill. The Claimant makes poor eye contact, often takes a great deal longer than a neurotypical would to answer a question (preceding silence being common), and frequently asks for a question to be rephrased or repeated to ensure his own understanding. The Claimant nevertheless would hope that his endeavouring to answer every question as helpfully as possible and the comparatively small number of questions he could not answer because he was unable to recollect events has been duly noted.* We do not doubt the claimant's veracity on the vast majority of points. However his perception may be in question on many. Failure to make eye contact and delay in responding was simply not apparent in this hearing. His memory for detail was extraordinary. The claimant explained why**.** It is not a "social situation " and he had prepared extensively for it He was the same when in a one to one meeting with a person at work. **Hence, we accept the respondent's witnesses who say they did not realise, and could not reasonably have, without being told, Asperger's affected him in this way**

3.4. Asperger's affected him in childhood. He was a target for bullying because he was "*seen to be 'different' (or 'wierd')"* due to his literal thinking, obsessive behavior and social awkwardness. He says "*My formative years predated modern research into and diagnosis of Asperger's and even today, many years later, I still suffer from the effects of experiences I had before anyone even knew that my difficulties had a name*"

3.5. He has low self-confidence, which, causes stress, anxiety, and depression. He has had depression to a varying extent since his teens. He avoids social gatherings as these aggravate the symptoms and he is perceived as aloof. He does not use public transport and shops by Internet or in the early hours in 24-hour supermarkets. Speaking of a work/social gathering he said *"I went and hated every minute".* Talking Therapies a course aimed at neurotypical people,conducted in groups, was therefore unsuitable for him , but it may have been even if one to one, as it is about enabling people with psychological impairments to change their behaviours. The claimant cannot,

3.6. Asperger's has especially impacted upon his education and study. He is articulate and of high intelligence: (a Stanford-Binet evaluation puts him in the ninety-eighth percentile) but his academic achievements are poor. Bullying at secondary school saw high levels of truancy and middling GCSE passes. He has excellent A level grades due to attending night classes at College. His attempts at Higher Education were spoiled by the social requirements, he attained a Distinction in the foundation module of an Open University Psychology degree without attending lectures but was taken home mid-way through the compulsory residential school due to a serious panic attack. In **September 2015** (we emphasise the date because it will be seen an great deal else was happening then) he left a Diploma in Management qualification after one session because of its group-based activities. He says, and we agree, that but for his Asperger's he would have a degree and "*it would be a first*".

3.7 He cannot interpret non-verbal communication, so finds it hard to 'read' others. His interpretation of language is over-literal which can cause confusion or offence. He gives an example where a colleague asked, "Do you have David's telephone number?", to which he answered "Yes, I do", without giving the number. We will call this **literalism.**

3.8. He can be seen to be abrupt and rude, eg not saying "good morning" to colleagues but going straight to his desk to start work. He is said to use dismissive hand gestures, eg a facing palm to indicate "Stop talking" though he is not conscious of doing so. We will call this "**rudeness**".

3.9. Asperger's causes him **difficulty in accepting others' points of view**; accepting changes in routine; understanding unwritten rules; **dealing with situations where rules are broken**; and organising his time without self reminders .His use of IT is exceptionally good. He is dependent upon the Calendar and Reminder functions on his mobile phone and Apple watch to remind him of even family commitments. He becomes angry and distressed at unforeseen events, last-minute changes to schedule or when arrangements are changed without him being informed. He has strong religious belief, in his words "a high moral compass" , and a heightened sense of right and wrong, which causes the difficulty in dealing with situations where rules are broken. He says "*I cannot readily come to terms with the fact others may not automatically feel or display the same viewpoint, which can be the cause of friction. I have been accused of being 'black and white' in my thinking.*". Before us, he demonstrated this trait often. and we will call it "**black and white thinking**" In this, and some other, respects, a difficulty for any neurotypical observer or person with whom he is working is that characteristics he associates with Asperger's, are matters he has in common with some people who are not on the Autistic Spectrum at all.. Even the claimant had not heard "black and white thinking", which is why he objected to others using the phrase, until he "Googled" during the hearing and found this article by a person who has Asperger's

## *Aspergers and "Black and White" thinking*

*This topic was suggested to me by a friend of mine who also has Aspergers. I have touched on the tendency of people on the autistic spectrum to think in terms of absolutes-what other people call "black and white thinking", but this is the first time I have dedicated a whole blog post to it.*

*Personally, I have always thought in absolute terms and this has an impact on my whole life. Things are either right or wrong-there is no middle area for me. There is a very fixed*

*and rigid way in which I think. I am frequently accused of being pedantic, particularly in terms of language. I sometimes find myself unable to resist correcting someone in their speech if I know that they have not said something in the correct way. I have cut down on this particular habit a lot because I know that it annoys people and I don't wish to intentionally annoy anyone but sometimes it just slips out. It also affects my morals (in a good way, I hasten to add!) I have very absolute ideas of correct versus incorrect behaviour and I still struggle to comprehend why other people behave in ways which can be so cruel and, in my view, morally incorrect.*

*This type of extreme thinking also affects my emotions. I am always liable to assume the worst in any given situation because, in my mind, if something is not the best outcome it can be, it is automatically the worst outcome. My mind doesn't seem to recognise the so called "middle ground". As a result, my life is an emotional roller coaster a lot of the time because, if something isn't the best outcome it can be, I am dealing with my own emotional fall out about it for a long time afterwards. I believe this is also why a lot of people with Aspergers identify as perfectionists-that personality type seems to lend itself to "black and white" thinking. Of course, it is also a personality type that I believe lends itself to depression a lot of the time too and a lot of people with Aspergers also experience intense depressive episodes, whether they have diagnosed depression or not. The connection between "black and white" thinking and certain mental health conditions is an interesting one and I would like to see more research into it.*

*Of course the majority of the world does not think or work in absolutes. There is lots and lots of "middle ground"-something that is not allowed in one situation is then allowed in an ever so subtly different situation. This really confuses us and means we have to learn ever more complex social rules which can then change on a whim. To me, if something is illegal, it is illegal. I have never been on illegal music or video sharing websites, something which I think puts me in the minority of people my age. I have a love for rules and would never knowingly break these, which is probably one of the biggest reasons why I was considered a "teacher's pet" during my school years.*

*I know that this type of rigid thinking can make us come across as very irritating-I have heard people with Aspergers referred to as "precocious" and "insufferable" due to the way that we think. I would ask anyone who is reading this who doesn't think in the way that we do to imagine just how exhausting life is for us when we view everything in such extreme ways and struggle to see the "middle ground". Please try and support us through the emotional roller coaster that this type of thinking can cause and please try and appreciate that this type of thinking does have it's advantages too-we are often incredibly loyal and honest because of the way in which we view things.*

**The description given is remarkably close to the behaviours of the claimant with which the respondent had real problems. They did not know, and could not reasonably be expected to , without being told , that black and white thinking caused the claimant not to see, let alone accept, others point of view , not to tolerate even minor breaches of "rules" and be unbending in his handling of staff performance and conduct.**

3.10. What the claimant terms "sensory overload" causes him to be one of two extremes: either quiet, withdrawn or moody developing into irritation; or the state known as 'meltdown'. He then becomes distressed and his behaviour may be perceived by others as unreasonableness, or a '**mood swing'** which is what we will call it. This is his description of himself, but he objects when Mr or Mrs Orchard said exactly that. **The**

**respondent did not and could not reasonably have been expected to know mood swings, which occur in many people who are not on the autistic spectrum at all, may have arisen in consequence of Asperger's, without being told.**

3.11. A major problem in this case is his compulsion to work extended hours without a break, so he says and thinks "*with no reduction in output or quality* ". One day he told us he had worked on preparing for this case until 5.45 am on one day of hearing. Probably the most important aspect of Asperger's for this case, is what he terms by one of two nouns "**perseveration**" or "perseverance". The verb is "to perseverate" (not "to persevere"). In the claimant it is pronounced causes difficulties he describes thus :

*"'Perseveration' means to respond in the same way repetitively, although it is not only about doing the same thing over and over, it is also continuing to do that thing past the point where it is reasonable to stop. Perseveration causes me to fixate on a task, which is particularly evident in my work: I will draft and re-draft a piece of work but am rarely satisfied with the result; and I can dwell for many minutes on a single element of punctuation, or for hours on matters such as page layout that most will never even notice (I will be aware of even a one point change in text size, or in the spaces between text – a difference of one seventy-second of an inch). I always use formal terms in my writing even when I know it is long-winded and affects reading comprehension: for example, one of the Respondent's customers is known to everyone as simply, "Dortech"; but my own writing always used the formal, "Dortech Architectural Systems Ltd." even though I am aware that the long form adds nothing useful (moreover, I must check the entire document to see that its use is consistent throughout). Perseveration means that I become 'stuck', neither processing nor progressing through a thought pattern, affecting both the time taken to carry out an activity and the way in which that activity is carried out*

*I work long hours either due to perseveration or to compensate for the time wasted in the 'stuck' state of the same (my heightened sense of honesty, integrity and right and wrong sees me beholden where I feel time has been wasted; and the same causes me to ensure that I meet my own definition of a 'good day's work', which is unconsciously linked to rate of pay). Though this results in an outstanding work ethic, it equally causes me to work excessive hours that I am not able to limit because of the overriding cognitive factors. A working week that is double my contracted hours is routine and 100 hours plus weeks are common; and I have been known to regularly work all day and night, and indeed for up to three successive days and nights with only short evening breaks (in which to put my children to bed, my sole concession toward any kind of domestic normality. I believe the Respondent willfully took advantage of my Disability in this respect, whereas previous employers upon observing such behaviour had instead taken practical steps to limit my working hours".*

**The respondent did not and could not reasonably have been expected to know overwork , which many people who are not on the autistic spectrum at all do if they are ambitious and keen to show their worth to their employer , may have arisen in consequence of Asperger's, without being told.**

3.12. We repeat many of the claimant's symptoms appear in neurotypical people. During 2008, he told Mr Orchard his son had been diagnosed with Asperger's and said "*I think I have Asperger's and this is why I do some things"* He gave Mr Orchard extracts from 'The Complete Guide to Asperger's Syndrome' by Tony Attwood , annotated by himself

as to how Asperger's affected his working life eg , "*managing and communicating stress and anxiety, fitting in with the group, asking for help, interpersonal skills*" and "*The person with Asperger's syndrome may need initial and continuing support from his or her employer regarding job expectations…The employee with Asperger's syndrome will also need regular feedback confirming success*" As will be seen the respondent viewed his behaviour as typical of a person who was ambitious and exceptionally interested in making more money. We can now see how he viewed any refusal of a pay rise as a condemnation of his efforts and achievements. He sees money as a recognition of them rather than something more to spend. **The respondent did not and could not reasonably have been expected to know this, without being told.**

3.13. Mr Orchard read the extracts from the book and discussed the matter with Mr. Owen by telephone. Mr Owen is a non-practicing barrister who provided advice to Mr Orchard for a fee. Mr. Owen enquired if the claimant .had asked for anything specific to be done .He had not, so Mr Owen advised there was no need to do anything until he did . Mr. Orchard had noticed little, if any, behaviour of the claimant which he associated with what he had read. There was no reason for him to do as the claimant suggests he should by taking advice from the company solicitors, Ward Hadaway. Mr Orchard freely admits he later "forgot" the possibility of some connections between the claimant's behaviour and Asperger's because the claimant did not present as having the problems described to any great extent. The claimant does not believe Mr Orchard treated this information with sufficient import. We disagree. The claimant says "*No effort was made to **monitor** my wellbeing or to be **proactive** in assisting me to manage workplace stress*" He suggested he should have been referred to Occupational Health or a medical report obtained. We disagree. To do either would have been intrusive in the absence of him indicating it would do some good. The claimant was unable to explain, when our Employment Judge set out the principles in Spence, what good it would have done. Moreover, it is likely any knowledge obtained by a report would have shown the traits which caused problems between him and the respondent **could be not reduced in effect by any reasonable step.**

3.14. Without knowing it was caused by perseveration, of which he did not hear until this case, Mr Orchard made great efforts to prevent the claimant working long hours. He did view it as choice not a compulsion. When Mr Orchard saw the claimant hard at work, he often asked " *is there anything I can do*" and was given the reply " *No*" usually with something like, "*it will be quicker or better if I do it myself*" Mr Orchard says " *I really do not know what I could or should have done to assist Darren. If I had adopted most of the strategies suggested, Darren, quite rightly, would have criticised me for treating him differently and negatively because of his Asperger's*". We agree. He would also have probably accused Mr Orchard of "interfering".

3.15. Mr Orchard noticed the claimant's paid close attention to detail, but as then Commercial Manager that was an asset to the company. He noted the claimant had some slightly unusual mannerisms, but in his opinion most people do. The claimant was focused hardworking and, driving through change which is exactly what the company required. He did not suggest the company needed to do anything to accommodate him and he was just making Mr Orchard aware, perhaps as an explanation for some of his behavioural characteristics. The claimant continually sought more authority and responsibility. His ability to complete projects was valued since it supplemented Mr Orchard's weakness in carrying through solutions. The claimant worked long and

irregular hours. He was professional and although he at times experienced stress and anxiety had no difficulties in communicating that stress. He did not "bottle it up" .

3.16. The claimant states "*those with Asperger's Syndrome set themselves such high levels of attainment that anything that doesn't meet that level can cause them huge amounts of stress and anxiety. The smallest mistakes can upset a person with Asperger's Syndrome for days, and they can have a lot of difficulty forgiving themselves*" We call this "**perfectionism**". However, the traits we have identified led to (a) overwork beyond the point it would be reasonable to stop (b) a view, and forthright expression, of other staff's failings so unforgiving as to amount to bullying (c) an attitude that a "gold standard" of compliance with rules had to be achieved immediately whatever the cost (d) an approach to contract negotiations which was pedantic and unreasonable. The claimant gives two examples of steps he suggested to alleviate his difficulty related to dates, and his approaching 'meltdown'. We will deal with both later. **The respondent did not, and could not reasonably have been expected to know, without being told, perfectionism , which many people who are not on the autistic spectrum at all exhibit , may have arisen in consequence of Asperger's,.**

3.17. Despite the lack of medical evidence we accept the extreme manifestations of the above traits probably are something arising form Asperger's .As will be seen, the claimant takes black and white thinking, perseveration and perfectionism, which many neurotypical people exhibit to a much higher level, but not so much so as to alert the respondent to the possibility he has a substantial impairment. However, another trait which caused a great deal of difficulty in relationships with the respondent is the claimant's apparent expectation that he could have the best of both worlds. We will call this "**self contradiction**" and, while it **may be** a consequence of the convergence of his other symptoms, we cannot find it more likely than not that it is. More than any other factor, it was the cause of many of the acts of the respondent which the claimant describes as bullying or harassment. Those acts were in response to the claimant's refusal to sign a contract to enable Mr Orchard to retire, as we will later explain.

## 4 **Findings of Fact**

### **The Business**

4.1. The company provides aluminium powder coating services to the construction industry. It usually employed about 30 people. The financial year is 1 April to 31 March. The Board, comprised Mr Orchard and latterly the claimant as voting Directors, Mr Orchard having the casting vote. Pat Orchard attended meetings as Company Secretary. David Owen, a non practicing barrister, provides management support and guidance on a self-employed consultancy basis and would also attend. The management team latterly comprised the claimant, Mr Orchard and Mrs Orchard.

4.2. The office staff were Gary Dent as Production Planner and Transport Manager working approximately 39 hours per week, Craig Johnson as Office Co-ordinator working 39 hours, Catherine Bonner as Telephonist/Administrator and Elaine Blaylock working part time as Purchase and Bought Ledger Clerk also with responsibility for credit control.

4.3. The shop floor production and distribution team was Gary Pitt ( known as " Tosh") as Works Supervisor working approximately 60 hours per week, with 17 Operatives on production and distribution, 2 Drivers and a part time Cleaner.

4.4. Mr and Mrs Orchard acquired the company in April 2002 and hold all the shares. Mr Orchard, who has a Natural Science degree and had been MD of a company making the powders used in the coating process .initially worked full time sometimes partly from home. They live in the Midlands a four hour drive from the company premises at Blaydon. Mr Orchard will be 70 in December 2017. He always hoped to retire at 62. In order to exit the business he sought potential purchasers over the years especially in 2008. Then came the recession in 2009 when any sale opportunities disappeared until 2014 when he and Mr Owen started to again speak with possible purchasers. During poor trading periods on two or three occasions he considered closing the business, but, conscious several jobs depend on it, resisted sale to competitors who may "buy to close".

4.5. After 2009 he started to consider the possibility of appointing a person as Managing Director ( MD) to run the business with him continuing as Chairman with diminishing day to day involvement and ultimately just supervisory oversight. Mr and Mrs Orchard would never entirely relinquish control. The company was their "pension" and they would need to retain control of the finances and be involved in major decisions. They did want to release day to day control. They had two "key red lines" no future MD could cross-they would not transfer any voting shares and Ms Blaylock would report direct to them. Also they wanted some contract **to be signed** confirming an agreement to how the role of MD would be defined before letting go of the reins completely.

4.6. By 2011 the claimant was identified as a potential MD and a plan for "succession" was drawn up called "Going Forward" later re-named "The Way Forward". The claimant's main points of complaint in this case are

(a) failure to properly investigate a grievance made by him;
(b) limiting his authority in key areas contrary 'Going Forward'
(c) failing to meet obligations **to him** under a duty of health, safety and welfare;
(d) bullying and harassment;
(e) breach of contract in a failure to award him an agreed pay rise in 2015.
(f) failure to pay for accrued untaken holiday after his decision to resign
(g) failure to make profit share payments to him
(h) serious failings in Health & Safety provision generally.

4.7. We will deal with the last four first. We embolden some dates because they occur at key points in the chronology of the first four which are the crux of the claimant's case, but his evidence on the last four spoke volumes about his thinking and approach.

*Failure to award an **agreed pay rise** in 2015*

4.8. The 'Going Forward' document in January 2012 stated, "*There will be no base increase in salary for the first three years of this agreement. Thereafter (this) will be **reviewed***".In December 2014 the claimant's salary increased to £62,000.00 as from January 2015. It was intended it would be reviewed again as part of the budgetary process in March/April 2015, but no pay rise would be applied during 2015. Mr Owen made enquiries with Nigel Wright Recruitment Consultants who advised that, given the

recessionary pressures especially in the North East, the claimant was probably paid at the top end of the range for on target earnings of an experienced MD.

4.9. Mr Orchard said in March 2015 to the claimant he was, "*due a pay rise in April*", and asked what figure he thought reasonable. He replied it should be for Mr Orchard to decide. At no time did Mr Orchard consider he was obliged to increase the salary. The claimant met with him on **19th April 2015** to discuss 'Going Forward' matters and the salary review. He says Mr Orchard **reneged** upon his **commitment** in April to a pay **"rise"** and accuses him of "*playing semantics*" when he said, "*The promise was to review, which we have done*". He told the claimant, "*If you'd just asked for a couple of thousand, I'd have given you it*". The claimant took this as a failure to acknowledge his efforts in some tangible way. He told Mr Orchard he would have been content if he had said, his salary was where it should be, but the company would like to mark his efforts in some way with something like an Apple Watch, "*as a thank you*". Mr Orchard immediately agreed to him choosing such an item as a gift which he did in June 2015.

4.10. That notwithstanding, the claimant considers him to have reneged upon an agreed pay rise and claims withholding of the extra pay is a breach of contract and unlawful deduction of wages. **There was no contractual right to a rise . This is pure literalism.**

*Holiday Pay*

4.11. The claimant says the stance taken by the respondent typifies their attitude to legal obligations. In mid 2012 NHS Leeds-v-Larner confirmed a person cannot be obliged to take the 20 days leave guaranteed by European law while that person is sick. Otherwise employees can be required to take leave when their employer says, subject to notice of the length required by the Working Time Regulations 1998 ( WTR) being given.

4.12. The claimant, having resigned, wrote on 11th November 2015: "*You will understand that I am entitled to receive all of my normal remuneration and benefits throughout this period… I will continue to accrue holidays throughout my entire period of notice and will require payment for all outstanding holiday not taken by the end of the 2015 Holiday Year* ***in December's salary*****".** This is wrong. The Larner right is to carry forward leave not be paid in lieu at the end of the leave year.

4.13. Mr Orchard replied on 7th December 2015: "*Can you please provide me with full details and an explanation as to the holiday you consider that you had accrued prior to resigning your employment?... Also I do not understand why holiday pay would accrue during your notice period…Will you please also note you are required to take any holiday, which might have accrued and may continue to accrue during your notice period*".

4.14. The holiday year runs from January to December. The claimant was entitled to 25 days each year plus 8 statutory holidays. Mr Orchard did not keep a record of holidays. When the claimant worked beyond his normal hours of work he might claim time back as holiday. We prefer Mr Thornhill's submission that if he worked on a weekend, that is "overtime", for which he is not entitled to be paid. The claimant expresses his holiday entitlement in hours and says in his written submissions he has 60 hours to carry forward. If we accept his version, his working week was 35 hours so this equates to 1.7 weeks or 8.5 days. His 60 hour figure includes a Saturday at 2.5 hours and a Sunday at 3.75 hours. Ms Blaylock's evidence is that two entries of 12th August and 14th August of holiday days booked but "not taken" totalling 11.25 hours are wrong in the sense the

hours were never " debited" so should not be added back . Even if they were, the claimant had taken all his 20 day entitlement under Regulation 13 and Larner does not permit him to carry forward Regulation 13A leave or contractual leave. The whole issue was presented to us in a confusing way but even on his own argument we cannot find his claim proved. The tone of what follows is relevant in that it shows why the respondent saw the claimant as able to argue his case forcefully even when on sick.

4.15. The claimant wrote on 12th December 2015: "*Your legal advisors Ward Hadaway are of the highest calibre and I therefore cannot understand how they would make such elementary mistakes concerning Employment Law as found in your letter… I can only conclude that you have proceeded in this vein in the hope that I will not challenge the various (deliberate) oversights made and (that you) have wilfully delayed matters*…" Mr Orchard replied on 18th December: "*You are not entitled to payment of accrued holiday in your December 2015 salary. On the basis you are absent due to sickness your accrued holiday entitlement will be carried forward in 2016.. during any period of sickness or otherwise you are required to take holiday in an effort to ensure that, so far as possible, all holiday accrued during 2015 or 2016 and still outstanding is exhausted*".

4.16. Mr Orchard was genuinely of the opinion the claimant should use his accrued holiday during 2015 and 2016 during his notice period and did not know about Larner

4.17. The claimant now cites Sash Window Workshop Ltd. v King (EAT/0057/14). Advocate General Tanchev has just given the opinion employers are bound to provide an 'adequate facility' for workers to exercise the right to paid annual leave under Article 7 of the EU Working Time Directive (No.2003/88). Once the employer does so, the worker then becomes responsible for taking it up. **The claimant's last sick note expired in December 2015.** As the claimant was not sick in 2016, the requirement he take his leave during the notice period was lawful so his claim for holiday pay fails.

4.18 On this and the profit share point even if the correct analysis had shown an entitlement, the respondent's position throughout is a classic Financial Techniques (Planning Services) Ltd v Hughes situation, When under enormous pressure, as will be seen, if Mr Orchard got points wrong or did not take advise, it does not amount to a fundamental breach of contract.

*Failure to make profit share payments*

4.19. The claimant was entitled to 20% of profit as calculated in the management accounts. The amended 'Going Forward' with a covering letter of 6th January 2012, stated, "*We would move to quarterly from financial year 2013/14*", and, "*in the event that such interim exceeds the total payment due for the year, any excess will stand as a debt against future payments and will be recouped therefrom*". In presentations held to explain the arrangement to the workforce (a profit share arrangement was put in place for them too) Mr Orchard stated, "*If we lose money, we won't take money away from you; you just won't receive any more money until we make up our losses and make money again".*

4.20. The claimant was paid a bonus of £5,102.60 in February 2015 in respect of the quarter to end December 2014. The financial performance in the final quarter of the year to 31st March 2015 was poor with negative cash contribution. The claimant was entitled to a bonus for the full year of £8,756.20, had already been paid £12,850.80 so had been overpaid £4,094.60. By June 2015 at the end of the first quarter he was working back the

overpayment from the previous year. By September 2015 (the end of the second quarter) the cash position was improving.

4.21. On **22nd September 2015,** Mr Orchard told the claimant he was due a profit share of "*around £4,500*" for the period ending June 2015. However, by the time the figure was finalised the claimant had resigned. The trading performance in the months following his resignation were appalling. Gary Dent had also left. Mr Orchard decided if a payment was made based on the September 2015 figure it would result in the claimant being significantly overpaid for the year. On 7th December 2015, Mr Orchard wrote, "*I will consider the payment of a bonus to you once management accounts have been finalised. But I am reluctant, **and I would appreciate your comments,** to make a bonus payment to you in advance. A payment in advance may result in an overly large payment, which the company would find difficult to recover*".

4.22. The cash position at the year end in March 2016 was a negative £26,352.00 so he was entitled to no bonus for that year. This is all true . However his employment lasted until 2nd May and we may have needed to imply a term about termination part way through a quarter, but Mr Thornhill concedes the most beneficial for the claimant being 20% of the profit for May divided by 31 x 2 = £185.02 plus 20% of the profit for April of £28,374 = £5,674.80 less the previous year overpayment of £4,094.60 leaving £1,765.22.

4.23. However, the claimant argues, contractually the respondent is neither entitled to withhold a quarterly payment ***for any reason,*** nor reclaim overpayments. We reject this as profit share was plainly a running account. He is also concerned about the accuracy of the respondent's records **but there is no evidence they are inaccurate.** If we had found the claimant was entitled to more, Mr Orchard's position again is a Financial Techniques (Planning Services) Ltd v Hughes situation.

4.24. The claimant also says " *The figures circulated ahead of the April Board meeting do suggest a small overpayment of £1,877.25, but only because cash flow in that period absorbed, "£36k electrics, £7k waste disposal, £7k electrical survey, £11k forklift purchase = ~£61k of extra unbudgeted cost", £50,000 of which was due to Robin Orchard's neglect of his Health & Safety obligations over a period of years; something that the Claimant would accordingly have expected to be a **matter for negotiation**" .*
There is no reason it should be a matter for negotiation. As will be seen shortly our Employment Judge asked him whether it was right for the respondent to prioritise health and safety expenditure over profit share and he said it definitely was. This is a good example of his " self contradiction" and of why the respondent saw him as avaricious.

*Health & Safety provision*
4.25. The claimant says he was "***appalled at Orchard's cavalier attitude** toward Health & Safety".* He lists several examples ( we will cite only some) including Mr Dent's failure to ensure vehicle safety checks were carried out by checking drivers were doing "walkaround" checks on the vehicles before setting off. The respondent was subject to a Traffic Commissioner hearing where the Commissioner advised a step like taking a bulb out to ensure the driver did a proper walk around check. A driver called Mr Surtees was caught in this way and for that, and the claimant says other failings, dismissed. Mr Dent thought that harsh. His view does not show the respondent as a whole, or he, had a "*cavalier attitude*" to vehicle safety.

4.26. The two HGV vehicles were loaded without a weighbridge, and excess weight violations were, in the claimant's words, "*noted by VOSA*". He does not say the company was prosecuted. The company does not have a weighbridge, it would be very unusual for one of its size to have one. Many small companies with vehicle operators licences use the experience of drivers and other operatives to estimate how heavy a load is. They may occasionally check by using a public weighbridge for which there is a fee. Occasionally, they may get it wrong and be overladen. The alternative is to check weigh every load, which is costly, causes delay and is impractical. An occasional mistake does not show the respondent had a *cavalier attitude* to legal requirements.

4.27. Upon becoming Operations Director and with a remit to include Health & Safety improvements, the claimant itemised several requirements in a long email on 14th July 2011. He says none were acted upon but he did not resign preferring to fight on to improve standards and protect the staff. Mr Orchard's position generally is that he does not accept everything the claimant asserts and considers he is **exaggerating** on some which are basically true. Some people do so deliberately for effect. To others molehills really do appear to be mountains. Mr Orchard accepts management of health and safety risks was not as good as it should have been but when the claimant started to take control, his contribution was major, was recognised and he oversaw many significant improvements. We must look for indicators of whether the claimant was taking **too perfectionist** an approach.

4.28. The email listed many tasks which needed completion. The claimant and Mr Orchard met and the list was amended to try and reduce the claimant's workload. Important matters were not delayed, but Mr Orchard tried to ensure the claimant focused on what really **needed** to be done. In a telling comment in oral evidence the claimant criticised the respondent for doing only "*what was **needed** when they **had** to*", as opposed to everything that" ***could** be done when it **should** be"*.

4.29. He says Mr Orchard told insurers in 2008 their **requirement** to have extensive work carried out on the "*aged and dangerous*" electrical installation would be complied with within six months (thereby securing continuance of the policy; but the work was not done for six years. Mr Orchard accepts problems with the electrical system had been known for some years and were identified as a **matter to consider** but the insurer did not **require** remedial work and a decision was taken it be postponed due to lack of funds. We find Mr Orchard is correct because were he not, the insurer would not have missed or tolerated a dangerous situation for six years .

4.30. On 9th February 2012, about a month after the claimant became MD Designate, two HSE Officers carried out an inspection. They issued three **Improvement** Notices. It is plain fact no **prohibition** notices were issued which indicates the inspectors did not think the matters identified serious enough risks to stop the operation in question. Following the inspection the claimant did a report on 10th February 2012 and the immediate improvements required were made. There was a follow up inspection on 5th April 2012 and the claimant's report, circulated on 10th April, was discussed at the Board meeting on 19th April 2012 and the necessary improvements were carried out. Prior to the next Board meeting on 16th May 2012, the claimant submitted a report. An extension had been given by HSE to comply with the improvement notice and compliance was discussed at the Board meeting. The Board's approach was they needed fully and properly to comply with the notices. The work was done to the satisfaction of the HSE.

4.31. The claimant criticises Mr Orchard for not attending the HSE inspection in February. In January 2012 Mr Orchard had an operation to a torn rotator cuff muscle in his right shoulder and could not drive for about six weeks. He was not at Blaydon when the unannounced inspection took place. The claimant said " *As owner he should have been there"* We disagree for reasons we will explore more fully later but in summary are that a shareholder who is trying to invest day to day operational control in a managing director would not normally attend even an announced inspection . If he had come, the claimant would,as will be seen , probably have accused him of *"interfering* ".

4.32. Towergate Insurance's risk assessor inspected the premises on 19th June 2014 and, in the claimant's word, **decreed** wide-ranging improvements **must be** affected in an exacting timescale or cover **could be** cancelled which may have led to business closure. The areas to be addressed were the electrical wiring and disposal of waste chemicals. Mr Orchard says Towergate made a number of **recommendations** but did not require immediate action. This was discussed at the Board meeting on 30th July 2014 and most of the work recommended was carried out.

4.33 As in 4.29 above, we find the claimant wrongly equates requirements with recommendations and necessity with desirability.

4.34. The claimant, in 2015 organised a safety audit by a Chartered Health & Safety practitioner, Jason Telford, which showed failings. The claimant recommended the Board engage Mr Telford on a retainer as "competent person". Mr Orchard believed the work could be done internally, despite what the claimant calls "*the absence of training or, indeed, of available resource*". "Available resource" means staff. It was the claimant who drove the policy to have as few staff as possible. Matters like Health and Safety require enough staff with enough time to devote to what is a non-productive task in which they have to be trained .Training is non productive time. ..The solution lay in his own hands, to recruit someone either to be trained to spend part of the time on Health and Safety, or release an existing member of staff to do so. Mr Orchard says the claimant suggested the respondent **needed to recruit a full time employee** at a cost of approximately £30,000 per annum which Mr Orchard felt was not justified, as he explained in an email on 2nd April 2015. The claimant then put forward a suggestion of using outsourced support in an email on 13th April 2015. The Board agreed a consultant should be appointed for half a day to report on actions needed.

4.35. On **21st May 2015** the Board agreed to take action once the report was produced and on **18th June 2015** agreed existing staff would be appropriately trained. The claimant said it was a legal requirement to have a "competent person" **on site.** He wanted Mr Pitt and himself to be the people trained **and be paid extra** for the responsibility. The Board considered it incorrect to pay an MD extra for a responsibility already part of his role and was aware Mr Pitt was already working excessive hours. The claimant's last report to the Board before resigning was **1st September** and his last meeting 22nd September 2015. Mr Orchard now understands from Mr Telford that he, despite not being based on site, was able to act as the 'competent person'. This shows the claimant's perfectionist, and we find unrealistic approach. He could not bring himself to recruit and train someone who, with support from Mr Telford, could do what was **needed** part time.

4.36..The claimant alleges Mr Orchard would order discharge of effluent into waterways knowing it would exceed the company's consent limits, immediately after Northumbrian Water had done their monthly monitoring visit, to ensure the chance of detection would be slim. Mr Orchard denies this, and we prefer his evidence as we have no evidence to support the claimant's view .

4.37. The claimant says Mr Pitt in his Fire Warden inspection identified **nineteen separate serious failings** that required action. Mr Pitt said he listed everything which could be a potential hazard including that there was only one stairwell .Most of the actions were simply resolved. If there was **need** to install new stairs, the Fire Authority would have closed the business down.

4.38. The claimant gives far more detail but none of the issues **required** more action than was taken. Funds were not limitless. As Mr Orchard wrote to him in a different context "*Rome wasn't built in a day*". The claimant says in paragraph 155 of his particulars the respondent usually *prioritised cost over safety failed to engage competent persons and obtained documentation at minimal cost that would be enough to pass casual scrutiny* ***rather than insist upon compliance at whatever cost was necessary"***

4.39. Pefectionism on what he is perseverating upon at the time and "black and white thinking" would compel the claimant, if he had autonomy, to achieve a "gold standard" and have it done immediately. If the money was not available, the only alternative would be closure of part or all of the operation, which is what the claimant said he did not want. Objectively, if things were as bad as they appeared to the claimant , the HSE, Fire Authority and Insurers would have insisted on more than steady improvement , which the respondent delivered, and forced it to take more drastic remedial steps more quickly. The claimant's position that the respondent's approach to these matters is in itself a fundamental breach of contract is untenable.

**The First Four Allegations of Breach of Contract, which overlap**

4.40. In 2006 the claimant came to his interview with a full presentation having researched the company and within a week was reporting his achievements. This is what made him a valuable employee and led to the offers of progressive promotion. The claimant was issued with a contract of employment on 8th May 2006 and this was signed (as amended at clause 1.2) by him on 16th May 2006. He was given a pay rise to £30,000 in October 2006 and to £32,000 in April 2007. He was issued with a new contract of employment on 8th January 2008 with a pay rise to £35,000, a bonus paid annually and an increase in holiday entitlement to 33 days (inclusive of bank holidays). This was signed on 10th January 2008**.**

4.41. The claimant says when he commenced employment "*the Company was disorganised, inefficient and lacking structure; and its staff were poorly managed, poorly trained and lacking engagement and discipline. …Most improvements required greater effort and engagement from the staff and met with resistance from Gary Dent, Production Planner, Ann-Marie Forster, Administrator and Andrew Savory, Supervisor.I had concerns over Dent's and Forster's performance at the outset. Dent would seem to take instruction but would ignore that instruction and instead continue with his own methods. Dent was given formal counselling on 28/11/06. Forster was prone to casual conversation and her performance was inconsistent. Both had poor attendance records.*

*My efforts to manage Dent were hampered by Orchard, who cossetted Dent. Where my improvements impacted upon the operational/production areas of the company I regularly encountered resistance from Charles Robson, Works Manager*"

4.42. When we read this and other parts of his statement, the claimant did not appear to have a good word to say about anybody. The claimant does not see it like that. He says everyone's performance goes up an down. When down, they have to be "managed".

4.43. The claimant says "*Orchard's reluctance to deal with personnel issues is well known: he has variously been described by employees as, "spineless", "jellyfish" and, "a coward"; his habit of being off site if any disciplinary matters were taking place was something of a joke among staff; his continual avoidance or delegation of any such matters to others was widely acknowledged; ..*" Mr Orchard admits he was "*too soft on personnel problems*" so he appoints people to address them on his behalf. We accept Mr Orchard was rightly concerned when staff turnover became a major problem largely due to decisions by the claimant to dismiss or give repeated warnings causing people to leave. He says the claimant had a tendency to see only the very good or the very bad in employees and went from thinking an employee was very good to thinking them very bad. Mr Orchard freely admits telling the claimant " *not to be so black and white*" in his judgment of employees and to recognise there was benefit in some employees being just '*alright*' which was often enough and certainly better than having nobody.

4.44. The claimant working long hours was noted as early as 2008. On 14th July 2008 he wrote to Mr Orchard "…*the support that I receive from you is inadequate… in alleviating my day-to-day workload... This is having an increasingly pronounced and adverse effect on my wellbeing. My workload is increasingly difficult to manage… with an apparent avoidance by you to tackle problem areas and (especially) problem people, and in the face of you having obvious concerns as to my own operational effectiveness*".

4.45. This shows the claimant, even in the early days, was not afraid to speak out in strident terms. Mr Orchard tolerated this because he was achieving good results. In some notes Mr Orchard wrote , "*I consider (Darren's) addition to APC has done more to move the Company forward than any other single decision I have made*". At all times Mr Orchard **encouraged** the claimant **not to overwork.**

4.46. The claimant also says *Even when Orchard would engage with me he did so in a detached, robotic manner: he would draft notes that he would then confer with advisors about; re-draft those notes into a letter-like form; and then read this to me ad verbatim. I found this process to be dehumanising and confusing.* Mr Orchard admits he did so especially later when discussing the MD's relationship with the company. Objectively, there is nothing unreasonable, dehumanising or confusing in what Mr Orchard did and no reason for him to think the claimant would find it so because he had Asperger's.

4.47. On 22nd August 2008 Mr Orchard received three letters of complaint from Gary Dent, Anne-Marie Forster and Charles Robson all alleging unacceptable behaviour by the claimant. When shown these, the claimant pointed out the language used indicated they were written by the same person and they were printed on the same printer. We accept a Mr Salvage helped Mr Robson co-ordinate these complaints, but they may all be true, and no reasonable employer would ignore them **just** because there may have been collusion between the complainants. The claimant wrote to Mr Orchard this was a

"*deliberate and orchestrated campaign to discredit me*". Mr Robson resigned and claimed constructive dismissal, a claim which was settled. However, Ms Forster's grievance raised serious issues of bullying, at a time when she was pregnant. To protect the company and the insurance policy that is part of its arrangement with Ward Hadaway, he was advised to appoint Mrs Orchard to consider it. A grievance meeting was conducted by her with Ms Blaylock attending as work colleague to Ms Forster.

4.48. Ms Forster was young and inexperienced. The claimant draws a distinction between disciplinary and "counselling" meetings. He held the latter often and to the other person they appeared, and to an extent were, occasions for criticism and a step on the way to formal discipline. Ms Foster was given on a Friday a letter summoning her to such a meeting on the following Monday .We accept Ms Blaylock's evidence he "timed" delivery of such letters in this way more than once. The claimant does not see how a young person would be worried by the prospect of a meeting. Ms Forster fretted about it all weekend and collapsed in the toilets at work on the Monday morning. When the claimant arrived at the factory an ambulance was there and he later went to visit Ms Forster's grandfather, with whom she lived, who said she had collapsed when shopping on Saturday. In an e-mail to Mr Owen years later at page 566 he says "*it is generally accepted that the Anne-Marie "collapse "never happened* ". We find it did. Ms Blaylock and Mr Dent describe the claimant as a bully. When cross examining them the claimant pointed out some kind considerate things he had done for them. Both accepted he had but said the main problem was his changeability, one day, to quote Ms Blaylock, "*nicey nice*" next day picking fault with the least thing. The claimant is oblivious to the fact his idea of "managing "employees' performance reasonably appears to others as bullying.

4.49. The claimant objected to the grievance process but eventually provided his response. Ms Forster had resigned on 22nd June 2008. The claimant raised a written concern as to the conduct of Ms Blaylock in the grievance hearing .Ms Blaylock had offered to host it at her home as Ms Foster felt uncomfortable going to the office. She was there as Ms Foster's work colleague representative to assist Ms Forster to put her grievance, so her role was to speak up for Ms Forster and the claimant's objection to her conduct was unfounded. Mrs Orchard, based on what she heard during this process thought the claimant's management style had been heavy handed but did reject the grievance. We reject his suggestion Mrs Orchard treated him unfavourably because of this incident, but it did inform her views when similar concerns arose later. Ms Blaylock, based on this and other incidents viewed the claimant, reasonably, as "*a terrible bully*". She knew nothing of his Asperger's and based her views on first hand observation.

4.50. On 30th July 2008 Mr Orchard and the claimant had agreed the company would recruit a new Works Manager. They met again on 10th September 2008**.** Mr Orchard proposed a bonus to incentivise the claimant not to work long hours. He was supposed to provide a spreadsheet each week showing his hours of work but did not, so the process just did not work. The claimant did not change. When they got to the time for payment Mr Orchard felt it was unfair to not pay the bonus and to penalise him because he had been hard working. Tyrone Clements was appointed Works Manager in late 2008.

4.51. By mid-2009 the company and the whole country was in recession and financial crisis. Mr Orchard was age 61 and with retirement being in practice not an option he was struggling with work and "*deeply unhappy*". He called upon Malcolm Inchley a personal friend to review the company. The claimant was promoted to Commercial Manager at

some point in 2009, with an increase in salary and a bonus. Mr Clements was dismissed on 13th July 2009 for poor performance, but labelled a redundancy. The claimant cannot accept it is ever right to "dress up" a dismissal in a way which will avoid conflict. Having a three months contractual notice period, Mr Clements was paid £7,500 in lieu.

4.52. In October/ November 2009. Mr and Mrs Orchard and Mr Owen started to consider the claimant as the potential future MD. **At that stage, he had informed Mr Orchard he believed he had Asperger's.** The claimant says Mr Inchley's Report seems to confirm Mr Orchard's informing him of the claimant's Asperger's: "*You tell me that Darren… has some significant weaknesses, some of which may be inherent traits that cannot be changed*". This is wholly consistent with Mr Orchard having told Mr Inchley about the claimant's tendency to overwork, being unwilling to change his ways despite being encouraged to do so and take an inflexible view on personnel matters, none of which are exclusive to people with Asperger's. The claimant is described by Mr Inchley as "*A genuinely valuable asset, without which you would probably find the Company to be virtually beyond your ability to cope*".

4.53. Mr Orchard agrees he was expressing reservations about the claimant but asked Mr Inchley to negotiate a package for a new role. Mr Inchley attempted to do so without any forewarning before a meeting at the Orchards' home on 2nd November 2009. The claimant says this was unprofessional and underhand, so declined to discuss what he considered a private and personal matter between himself and the Orchards. In the circumstances of Mr Orchard "*struggling with work and deeply unhappy*", for the Orchards to ask a third party to conduct negotiations was wholly reasonable.

4.54. Rather than appoint a Works Manager to replace Mr Clements, Noel Lathan was appointed Works Team Leader from 26th April 2010. The claimant says "*Lathan's performance was poor from the outset, and his duties were progressively transferred back to me by Orchard by 21/10/10.* He was poor only by the claimant's standards, because he does not accept "alright" or "better than no-one "as Mr Orchard does.

4.55. The claimant says "*The Company's historical poor management and training of its staff saw high staff turnover as improvements were sought, primarily in staff engagement and staff performance. Performance management methods including staff appraisals were introduced. The company underwent almost continuous change, including my addressing organisational failings such as overstaffing, unnecessary use of temporary labour and poor supervisor performance. There were seventy-six departures in a decade 33% of which were under my jurisdiction, of which 8% were short-server dismissals. In 2014 Orchard acknowledged that, "Factory discipline (is) unrecognisable from 2 years ago" and by my departure, was achieving greater turnover, output and efficiency with one shift than with its previous two after a 36% reduction in staffing.* The claimant is proud of his achievements, but oblivious to the consequences on staff morale, the cost of settled claims and the increase in his own workload because he can not accept "alright".

4.56. He says Asperger's **compels him** to address "poor performance" and breaking of rules and as the company did not invest in new equipment, as they have since he left because now they have the money, his only way of improving company performance was to be tough on under-performing staff. Mr Owen, who has in the past had to dismiss many people, agrees "*if people won't change you have to change the people*" but also found the claimant's views of staff inflexible and dogmatic. In our combined experience

we have rely seen a small workforce being on so many warnings or such a rate of staff turnover. The claimant had an arrangement with job agencies and the Job Centre to trial people many of whom would be unlikely to be "good" employees, but the speed with which he wrote off new starters as hopeless in alarming. Mr Pitt, one of the claimant's allies in many respects, says since the claimant's departure a more "relaxed" approach to performance management has produced better morale **and results**.

4.57. As for the relationship with overwork, staff who gave evidence said the claimant spent hours preparing for such meetings. He agrees, and in cross examination asked "*What's wrong with that?.*" He says he took no pleasure in "managing" people in this way, but that is the opposite of the impression everyone else had. The time he spent on it inevitably ate into his day in the office and caused him to work late or take work home.

4.58. By later in 2010 the Orchards were looking have the claimant on the Board as Operations Director which they eventually did. On 14th October 2010 the claimant wanted to be paid in a more tax efficient manner so suggested he be given shares and paid by dividend. The company took advice from its auditors who said voting shares would need to be transferred which the Orchards were not prepared to do, as they were not prepared to give away any control of the company: They would allot non-voting shares but the advice received was a dividend could safely (so far as HMRC was concerned) be paid only if shares had true value. This issue about shares arose repeatedly during later negotiations. The claimant was giving the appearance of trying to force the Orchards into giving him shares by exploiting the fact they needed him. He does not see this at all, because he does not "read" people.

4.59. On 31st January 2011 the claimant said he was not willing to carry on as Operations Director and wanted to revert to Commercial Manager. He now says he felt pressurised into the Operations Director role. **That is not so to a neurotypical person**. As Mr Owen put it, how can offering someone promotion, increased status and salary be "pressure". The claimant says they were playing on his sense of duty. We reject that. We accept the respondent's view his "resignations" reasonably appeared as holding the company to ransom.

4.60. They agreed terms without him being given shares and he resumed as Operations Director. The terms were signed on 10th March 2011 with the claimant's slight addition. This was the last contract he was prepared to sign. Mr Orchard stressed to the claimant he needed to manage his hours by delegation and also by the introduction of new IT. A letter of 24th February 2011 confirming the appointment as Operations Director says, "*hours agreed during the week*" and "*specified maximum additional hours at home*". He says they were never quantified and **no safeguards** were put in place, therefore his working long hours continued. We will return to the question of **what** safeguards.

4.61. The claimant says he "*became disillusioned at the lack of interest shown by, and the lack of support I received from, Orchard; by Orchard's interference in Operational matters e.g. without consulting me or Factory Supervisor Gary Pitt he apportioned a new task to a member of staff without any documentation or training and indemnified the employee against any errors made. That member of staff went on to knowingly release out-of-specification which cost the Company £15,000 in replacement material and a lost customer, yet and Pitt and I were left powerless to act."* We accept Mr Orchard's evidence the decision was one he and Mr Pitt took. They needed a task to be carried out

internally because sub-contracting would pose problems. He told the employee who took on the task that if he made errors they would not *'take his head off'*.. He did make errors and the claimant was frustrated he could not be disciplined because of the assurance given to him. Since then, the same operative has been further trained and this is now a highly profitable part of the business.

4.62. On 30th August 2011 the claimant wrote,"…*after much deliberation I feel it necessary to resign from the board of Directors... The demands of the Operations Director role are having an adverse effect on my family life and on my personal happiness and wellbeing…*" Mr Orchard says this "*was a bolt from the blue*." He was about to go on holiday, but wrote on 6th September 2011 saying he was saddened by the decision but respected it. He was content for the claimant to revert to Commercial Manager, but to facilitate his own retirement needed to recruit either a replacement Operations Director or an MD. We reject the claimant's argument his e-mail should have put the respondent on notice of his vulnerability. As Mr Thornhill put to him resigning , going sick or raising a grievance, co-incided with him seeking some advantage in negotiations to be successor to Mr Orchard and he was using them as a tactic. **We do not find he was, but it is how it reasonably appeared** to the respondent.

**September 2011 to January 2012**

4.63. Mr Orchard having mentioned in his letter of **6th September 2011** he might consider recruiting an MD the claimant made it known he was keen to be considered. Mr Orchard thinks it was Mr Owen who told him the claimant really did not want to resign and was content to remain as Operations Director on the basis he would then move to MD. Towards the end of September/beginning October 2011 various meetings took place. Mr Orchard reasonably thought as the claimant wanted the more onerous position of MD he may have resigned to exert pressure. He seemed to have given up asking for shares.

4.64. The claimant was not content with the terms offered and raised the issue again of shares in his letter of 9th November 2011. The Orchards remained unwilling to transfer voting shares. Mr Orchard said at this time "*People like you… I should say, people of your age… don't often get a chance to be a Managing Director*" Mr Orchard was not, as the claimant alleges referring to his working class upbringing or his disability "*before hastily changing the focus to age*". Mr Orchard agrees such a remark was made on a couple of occasions because he felt it quite strongly. He did not manage a company until he was aged 44 and felt he was giving the claimant a massive opportunity at age 39. The claimant now says he was bullied into taking on the role of MD. We do not accept that. The claimant presented as wanting more money and being very ambitious. This is a convenient time to leave the chronology and deal with some miscellaneous allegations of bullying the claimant makes which are not related to disability in any way.

4.65. He says Mr Orchard would frequently make disparaging remarks about the claimant being working class: Whenever the actions of the Labour Government irked him, Mr Orchard would say, "*Your mate Tony Blair*…". Mr Orchard says his own parents were not well-off. The remark he saw as just a loose figure of speech about political views, not disparaging about class. We agree.

4.66. When the claimant, Mr Dent and Michael Reynolds were having a conversation about vintage champagne, the claimant says Mr Orchard ***sneeringly*** said: "*You wouldn't*

*even know the year*". Mr Orchard does not recollect the comment saying he would have no idea about champagne vintage. We accept whatever was said was in jest. Similarly, at a work social function, Mr Orchard may well have said loudly "*Why aren't you drinking*" but he was not aware the claimant does not drink alcohol. The claimant says he abstains for reasons related to his Asperger's, We accept his word, but it is not a feature common to all persons with Asperger's some of whom say moderate alcohol consumption helps them overcome social inhibitions.

4.67. On 27th March 2015 at a works event at Karting North East, Mr Orchard said something to the effect he wanted to beat the claimant, but again all in jest and not , as alleged, a dismissive remark.

4.68. The Going Forward document, generated by Mr Owen, was intended to map out a plan for the claimant's progression to MD and Mr Orchard's "exit". The first draft was issued on 4th November 2011 and amended by the claimant by letter of 5th December . Mr Owen incorporated his comments into the document and emailed the thoughts of the Orchards on 11th December and 19th December. They were not content with his counter proposals. Over Christmas and New Year, they clarified their thoughts and discussed the matter with Mr Owen. They produced a counter proposal sent on 6th January 2012 expressed as "a final offer" to be accepted before the January 2012 Board meeting, because they wanted to get agreement concluded.

4.69. **At no time did the claimant show any insight into how momentous a step it was for the Orchards to hand the fruits of their life's work into the stewardship of an MD upon whose management skills their income in retirement would depend.**

4.70. The claimant says "*A further attempt to bully or harass me came with the inference that failure to accept would mean their **engineering a redundancy or demotion**, by way of another Orchard ad verbatim reading of the prepared note at [512]. I took umbrage at this clear attempt at bullying that was not consummate with an executive-level negotiation*". When he became Operations Director over a year earlier, the claimant was told he could revert to Operations Manager if it did not suit him. His decision in August 2011 was to "resign" but soon after he agreed to stay in the role if it would lead to him becoming MD. If terms were not agreed and another MD had to be found elsewhere who would look after Operations himself in this small company, the role of Operations Manager may well not be needed. This is not "engineering" a redundancy, and the document at page 512 is, as Mr Owen put it, ***just being honest*** that a redundancy situation **may** come about. This reveals another aspect of the claimant's perceptions which may be related to Asperger's but which the respondent could not possibly have seen as being. If something is said or written which the claimant takes as a promise, he expects it to be honoured **forever**. He does not see how a statement made in good faith, later may, in changed circumstances, no longer apply.

4.71. On 9th January 2012, the claimant informed Mr Orchard he had decided to decline his offer. Mr Orchard asked, "*What is it that you can't accept? I am sure we can reach an agreement*". The claimant's response was, "*If your 'final offer' isn't final, then don't say that it is, Robin. I do not appreciate you and David trying to bully me into accepting your terms by making threats"*. Making "final offers" is a common negotiating tactic which would not appear to a neurotypical person to be "bullying" or "threats". Mr Orchard made a phone call to Mr Owen. The claimant says he accepted the role of MD **that same**

**afternoon after further discussions on the basis the 'Going Forward' document issued on 6th January 2012 would be revised to include amended terms he and Mr Orchard agreed that day. He now says pages 904-909 are that agreement produced on or about 5th March 2012.** The claimant says terms were finalised and agreed, and accepts only no written Terms and Conditions as MD exists. He adds *A 'Going Forward' with the agreed 9 January 2012 revisions was never issued, nor a new Contract of Employment. The parties continued to* ***observe the principles*** *of 'Going Forward'*

4.72. Mr Orchard does not accept agreement was reached on all terms on 9th January, and neither do we. If agreement was reached we cannot understand why was there so much more correspondence. Mr Orchard asked the claimant to make a counter proposal in writing, which he did on about 11th January .The Orchards and Mr Owen discussed it and on **16th January 2012** agreed a revised Going Forward document (page 2086 to 2091). Several points, especially those related to Mr Orchard's future level of involvement and "handover" visits to customers are couched in terms which are too uncertain to be enforceable. Most importantly in both versions paragraph 11 reads ;" *It is intended that this document , though not contractually binding in its totality, will be appended to a new contract of employment to be entered into before January 31st 2012 to include those terms above referring to DSW's conditions of employment* "

4.73. In short, while the bare terms of employment were sufficiently agreed to be worked to, vital details remained to be agreed of limitations on the authority and duties of each of the claimant as MD and Mr Orchard as Chairman and, jointly with his wife, owner of the company. They were still to be "thrashed out". The claimant says *Though Orchard's original offer [510] stated, "As soon as I have your positive response I will draw up a new contract of employment to reflect those terms", he did not do this; and no* ***satisfactory*** *new Contract of Employment was ever produced".* Why would one not be, if Mr Orchard was so keen to retire **and had reached** agreement? **Agreement was not reached.**

4.74. The claimant also says *I did not have any aspirations to run the Company but felt pressurised by Orchard and Owen into accepting the Managing Director Designate role, and I consider that they exploited my Disability by scaremongering that took advantage of my loyalty to the Company and my duty to my staff.* **No-one at the respondent could be expected to see their own actions as the claimant sees them. We wholly reject his claim they took advantage of his disability.**

4.75. The draft contract of employment *at* page 876 to 886. was prepared by the claimant and contains all the points required by s1 of the Act and more but **nothing** about Mr Orchard's exit or the limitations on the claimant's authority . On the third day of evidence our Employment Judge put to the claimant " Going Forward" read like a non contractually binding collateral succession plan which **aimed** to define the relative roles of the claimant and Mr Orchard and the reporting line of Ms Blaylock, but which needed some further steps to make it a binding agreement. He asked the claimant whether he had realised that. He had not. He was then asked whether he would have taken the MD Designate role if he had realised, he replied "No". He added the dialogue between him and the Orchards was always "*We retire, you run the business*"**.** He added he expects people to "*keep their word*".This shows literalism, lack of intuition and inability to read people. No neurotypical objective observer would read Mr Orchard as giving his word to stay in the Midlands come in one day per month to do "the financials and another for the Board meeting, **without** a clear commitment from the claimant . Mr Orchard would have

attended Blaydon less but never let go so completely that the claimant would not need Board approval for some steps. In any vote though there never was one, Mr Orchard **controls, and is,** the Board.

4.76. Mr Cattell asked the claimant on day 5 of evidence what was the most influence on his decision to resign. He said it was "*the whole Way Forward thing*" explaining the company had still not been handed over to him and the signs were it never would be. His submission is that pages 904-909 was his agreement, not 'an agreement to agree'. the duties to remain with Mr. Orchard were attendance at Board Meetings, financials, and the line management of Mrs. Blaylock. We cannot accept that, though we accept the claimant genuinely sees it that way..

4.77. On the detail the claimant says Mr Orchard agreed to *progressively pass over* management of all customers and staff and never said at the time what the claimant asserted he said in evidence which is, "*I'm **not even beginning to withdraw** until I get something signed"*. That was not what Mr Orchard's evidence was and not what happened. He did **begin** to withdraw, but could not completely. The claimant accuses Mr. Orchard of instructing "*the Claimant's staff*" contrary to his own instructions; and overruling him in areas where *he had no jurisdiction to do so*, most notably the terms of Mr. Dent's leaving which he says was the last straw in a continued, ongoing pattern of unreasonable behaviour. They are not **the claimant's** staff, they are the company's. How can a main shareholder and director with a casting vote who has not expressly "ceded" managerial rights have "no jurisdiction? The claimant simply does not see, let alone accept, Mr Orchard's point of view as reasonable. We do. .

4.78. Mr Orchard announced the claimant's appointment to the workforce, saying on the claimant's account: "*Now you may not agree with this… but at least he is fair*". He considered this a spiteful effort to undermine him and *reinforce historical negative perceptions* of him Mr Orchard does not recall the words used but was appointing the claimant to manage his company so to suggest he was trying to undermine him is nonsense in his view , and in ours .

4.79. The claimant worked as MD on the employment terms detailed in Going Forward from January 2012. He managed the company, had authority to make suggestions about its running and did so, on a frequent basis. Generally the Board agreed. He focused upon the needs, normally staffing needs, of the office in his reports to the Board. He made the decisions as to what resource and support was needed.

4.80. The claimant accuses the respondent of not providing an accurate written statement under s1 of the Act, and seeks an award under section 38 of the Employment Act 2002. He says it was always envisaged the Going Forward document would be attached to a new contract of employment but later he insisted it be attached to the one he had signed in 2008. That does comply with s1. He cannot have it both ways.

4.81. The claimant produced the document at page 876 to 886. Ward Hadaway advised he should be issued with a more detailed contract and provided a draft Service Agreement (page 910 to 929) in a standard form for an MD. The claimant refused to sign it .He complains certain clauses are less advantageous than his 2008 contract ,which is true , but the salary is much greater and with increase in pay and status come

"down-sides" like restrictive covenants. The claimant did not amend the draft to something he would sign.

4.82. Mr Orchard strongly denies the claimant was bullied during the contract negotiations. Pressure was exerted, because they wanted to get the contract concluded but the pressure was not unreasonable or excessive. Pressure is something Mr Orchard, and we, have learned to see differently during this case. Mr Orchard knew little about Asperger's and the claimant presented not as someone needing help but as a formidable adversary in negotiations. We find that view entirely reasonable.

**February 2012 to October 2014**

4.83. Mr Orchard tried to let the claimant run the company but certain of his behaviours worried him as did the absence of a signed agreement. When he mentioned this to Mr Owen, he would reply "*It's working, don't rock the boat"*. Mr Orchard was still entitled to make some decisions and did not consider that interfering. The inconsistency he struggles to understand is that the claimant complains about '*interference*' but also that Mr Orchard was not sufficiently involved to provide him with "support". The claimant to this day does not seem to see Mr Orchard's viewpoint. Like Mr Orchard we struggled to see how the claimant could have it both ways. What he later said made us realise he wanted "*predictable*" support which in practice meant Mr Orchard should be at Blaydon whenever the claimant needed him but stay away when he did not. This was wholly incompatible with Mr Orchard's legitimate aim to retire and leave the company's day to day running in safe hands.

4.84 The claimant had earlier expressed reservations about Ms Blaylock reporting to Mr Orchard rather than himself, a view partly shared by Mr Owen. However, Mr Owen accepted this was the Orchards' red line. The claimant did not and expressed his view again and again. Next to the claimant's note, *"I would have real difficulty with Elaine being 'outside the system'"* Mr Orchard wrote "*Tough"* .This issue was a stumbling block in the negotiations. The Orchards were content for the claimant to manage Ms Blaylock's holidays and hours of work, but wished to retain control of financial decisions and saw her reporting to them as a key element in retaining financial control.

4.85. The claimant "resigned" again on 6th July 2012 probably in response to the draft service agreement, but continued as MD. The status quo then prevailed. He was doing a good job in most respects. Mr Orchard was 65 in December 2012. His working hours were reducing, but he worried he did not have a signed contract protecting the interests of the company and himself and felt unable to withdraw totally from management.

4.86. The claimant emailed Mr Orchard on 16th August 2013 saying he had worked 123.5 hours the previous week and this impacted on his wellbeing. The Board authorised steps to recruit. Craig Johnson joined as Office Co-ordinator 9th September 2013. The claimant was free to work the hours he needed at times that suited him. Mrs Orchard once criticised him for taking a morning off to recuperate form late working saying "*the MD should be at the company*". We have no doubt what she meant. He should be there when other people need him to be, not work all night and come in late. The claimant had the solution in his own hands-recruit and delegate. It was not an option to expect Mr Orchard to come to work as an assistant.

4.87. On 18th December 2013 the claimant emailed Mr Owen including:
"*Robin's involvement is sporadic at best and he comes and goes as he pleases largely without any forewarning, rhyme or reason; and our having to work to "Robin time" is hampering our efforts. He was initially supportive and worked within the parameters we set; but since has reverted to what he calls his being a 'butterfly', going from disinterest to quite aggressively questioning his lack of being involved in something, and then seemingly on any issue which pops into his head at any given moment. Staffhave commented on what they perceive as a lack of interest from him.*
*I am sitting here with a stress headache like you wouldn't believe. The talk about reducing my workload is just that, talk, because my workload just gets bigger and bigger; and that balanced against the lack of trust (and, from Pat, basic respect)… leads me to continually question my role, my worth, my future. My commitment and performance does not falter; but the personal cost and in particular the effect on my home life is becoming rather too much to bear.*

4.88. The claimant says these sentiments were passed on to Mr Orchard, who neither acknowledged the difficulties nor **put in place any measures** to reduce the claimant's levels of stress. However, Mr Orchard in January 2014 offered the claimant more assistance across the next two months than Mr Orchard had ever intended to work. The abiding message from Mr Orchard to the claimant was to encourage him to work normal hours, not "*work yourself into the ground*" , take his holidays but recruit and train staff to a level which would enable the company to be left in their hands while the claimant was away for any reason **without** him relying on Mr Orchard to come in to work .

4.89. Mr Owen issued a discussion paper, 'RO exit from APC' on 12th February 2014 in which the terms were disadvantageous to those originally agreed according to the claimant. He and Mr Owen met to discuss the document on 13th February 2014, and then the claimant and Mr Orchard met to do so further on 19th February 2014. They decided to refine 'Going Forward' by issuing a new Contract of Employment. Shares in the company and Ms Blaylock reporting to the Orchards were raised again by the claimant, so the succession plan did not really progress.

4.90. On 26th March 2014 (604) the claimant wrote to Mr Owen again
: "*On several occasions I have made Robin aware of the pressure I have been under for the last two-to-three months - back to 60+ hour weeks in the office alone, and, for the last two months at least, anything between two and eight more hours a night when I finally get home… I need Robin to urgently cover a handful of my duties. … Robin has however confirmed his availability for the next month as, in total: "maybe" Wednesday 9 April (only); then week commencing 14 April - when I'm on holiday (though as Robin has kindly reminded me, "I have already said I'm not covering holidays"); and then nothing until sometime in May... he has pretty much gone ahead with his withdrawal plans without any agreement from me*".

4.91. The reply at page 611 on 31st March 2014 at 17:39 shows Mr Orchard's position**:**
*"All of the above is on the basis that this is the final time we hear about shares and how much work he does. I'll help , within reason, but we have to get to a stage where he is happy to leave the business to his subordinates when he goes on holiday and I have to get to a point where I can forget about APC when I'm not officially working. I started at my desk at 8.30 this morning, have had perhaps 2 hours off during the day and I'm still her .* ***This is not retirement"***

4.92. Mr Orchard's whole purpose in making the claimant MD was for him to reduce his own work to two days a month. He never got close to achieving this goal. If the claimant complained about workload when Mr Orchard was there, Mr Orchard would ask what he had to do and could he or others help. The claimant would respond by saying it was quicker for him to do it himself.

4.93. Mr Orchard , not having heard of "perseveration" until this case was underway , did not associate excessive hours of work with Asperger's but that the claimant was ambitious and reluctant to delegate . Mr Orchard believes excessive hours worked leads to tiredness and poor decisions. The company manages more turnover, more profitably and with fewer office staff now than when the claimant was employed, so there was no **need** for him to work excessive hours. Undoubtedly some days he worked did, but **why?** Every report was lengthy and perfectly presented even down to the typing. As Mr Owen put it, when a person is an MD what matters is *the work that goes into the hours not the hours that go into work.*

4.94. Mr Orchard and Mr Owen even discussed the possibility of removing the claimant's keys so he had to leave when the site closed, but that would be totally inappropriate for an MD responsible for attending the site in an emergency. They would have also had to also remove his remote IT access. To ensure the claimant took his holidays, Mr Orchard refused to pay him, as he did other staff, money in lieu of holidays over the statutory minimum. Mr Orchard recalls in 2009 speaking with Debbie, the claimant's wife, on a boat trip with the Ward Hadaway employment team asking if there was anything she could do to persuade her husband to work fewer hours and she simply said "*no, that is how he is*". Also, though the respondent did not have this information at the time, the claimant's comments to his doctor in July 2012 (page 214) that he was not prepared to delegate because he felt he could do the job better himself, mirrored comments he made to Mr Orchard when offered help.

4.95. The self contradictions of the claimant's case can be illustrated by another example. Investment in a new IT system, intended to reduce workload had been discussed since about 2010. Initially the claimant wanted a bespoke IT system at high cost. This was rejected because bespoke systems were thought to be unreliable, put the company at the mercy of the installer and are high cost. The claimant then suggested additional programming of the existing, commercially available, system. The Board agreed, but it needed protocols to be identified for a third-party programmer to implement. This was never done because the claimant repeatedly asserted he needed fifty per cent of his week over a six month period to complete the protocols. Following his resignation, this task was completed by Mr Johnson and Mr Dent by about April 2016 as part of their normal working day and the new system has been implemented. Earlier in these reasons we dealt with the claimant's argument about "withholding of profit share which was that cash was absorbed by expenditure on Health and Safety. His statement says the funds required for new IT were " *continually diverted toward other capital expenditure, including £94,982 on new chemical tanks in 2013, and circa £43,000 on a complete electrical rewire in 2015*" . Factually this is correct,. The claimant's case is Health and Safety came top of the priorities, then his own overwork which would be reduced by better IT, then bonus. **That was the order adopted.**

4.96. The claimant says an email dated 5th March 2014 page 603a is "bullying". Mr Orchard disagrees and so do we. One of the few items the claimant had to discuss with Mr Orchard under Going Forward was major pricing changes with large customers. Mr Orchard had every right to insist the claimant did. The claimant replied , "*Email is not the best medium here; picking up the telephone would have been preferable as your response rather comes across as talking down to a child rather than expressing a constructive opinion to a co-Director*". At other points he says e-mails, rather than telephone calls, avoid "meltdown" ( see shortly).

4.97. Mr Orchard accepts he failed to inform 'key customers' of his impending retirement and the claimant becoming MD. We see why. The claimant had a history of "resigning" and refused to sign any binding contract. How could Mr Orchard be expected to visit customers to say he was retiring but they would be left in safe hands, if he had no commitment from the person in whose hands they were to be left? A list of 'key customers' was never defined. The original 'Going Forward' document contained no list. A list of 14 was proposed after its issue. Mr Orchard referred to only "6-8 of large customers"; in a revised list was produced by him in about February 2014. A list of 12 'was in an e-mail on 25th June 2015..The claimant says it was *a deliberate act to limit the Claimant's authority.* **We reject that completely , it demonstrates no consensus on the important point was ever reached.**

4.98. Two isolated tangible "steps" were suggested by the claimant, but without reference to his Asperger's. He asked colleagues to enter appointments into a Shared Calendar.. All did with the exception of Mr Orchard who continued to pass on date-related information by telephone or face to face. This is a classic illustration of the claimant's inability to see another point of view. Mrs Orchard told us where they live has poor internet connections. Mr Orchard explains
*Late in our relationship, perhaps the end of 2014 or early 2015, I had occasion to complain to Darren when he was away from the office when we had agreed a meeting and I had made the journey to Blaydon. He told me he had difficulty dealing with dates and needed meetings to be placed in the company electronic diary. I use - and have always used - a paper diary. It is perhaps a generational thing but also my work is not office based and I was at this time semi-retired and my diary includes my work and social life. The electronic diary is difficult to access remotely from outside the office so I would have to struggle to log-on to the office diary to input the appointment as well as note the appointment in my paper diary. Despite these challenges I attempted to do as Darren asked, but I accept that sometimes I forgot. However, I think it was an unfair request, in that in a meeting or during a telephone conversation we would agree to meet. I would then put the meeting in my paper diary and Darren was asking I log-on to the company computer system and also put the meeting in his diary (being the electronic calendar). I appreciate that Darren, as with most people, needed meetings to be in his diary or he would forget. But I do, even in the cold light of this litigation, struggle to see why when we agreed the time to meet Darren could not use his iPhone which he had on his person at all times and input the diary entry. Or, if he as I did, struggled to access the diary remotely why he could not make the entry when he got back to his desk in the office.*

**We find Mr Orchard's view completely reasonable and reject the reasonable adjustments claim on this point.**

4.99. On the other step of "meltdown" avoidance the claimant says he " *asked Orchard to modify his own behaviour: where Orchard felt something was important he would need to share that information immediately and in face-to-face conversation – irrespective of whether the information was* ***immediately relevant****, or indeed relevant to the other party at all. Orchard would regularly turn up at my desk and enter such discourse without considering my workload at that time, or the complexity of the task(s) in hand, or the number of tasks I was having to manage simultaneously; and when I would have to say that I could not receive him and would ask he instead send me an email to be viewed later, he would complain. I asked for this practice to desist. It did not*"

4.100. We do not accept the claimant ever suggested he faced special difficulties due to his Asperger's. When Mr Orchard was in Blaydon he often would go to the claimant's office and ask to speak with him. Sometimes the claimant would say he was in the middle of something and ask if they could speak later and Mr Orchard would agree. However, Mr Orchard may reasonably have thought a matter was *immediately relevant*. This is one of many instances where we find not only an inability to see Mr Orchard's point of view but to recognise he has vast experience in running the company and **he owns it. We reject the reasonable adjustments claim on this point too.**

4.101. A new document 'Service Agreement wh6656453v1' with a version of 'Going Forward' as its Annexe 1, is undated, but was likely issued sometime in July 2014. The claimant refused to sign as he thought it was disadvantageous to him. He says Mr Orchard attempted to" harass" him into signing over the next two months We accept pressure was exerted and reasonably so, as the claimant just refused to sign or redraft

4.102. Mr Owen met the claimant on 15th October 2014 and began "*I must come out of this meeting with that document signed"* and , according to the claimant "*employed pressure tactics such as referring to "unnecessary delays" and the cost to the company of his involvement"* . This is not a pressure tactic but a statement of plain truth. Mr Owen wanted to understand the changes the claimant wanted to the Service Agreement which he had refused to sign. After reviewing the draft the claimant had annotated, Mr Owen conceded it was in some ways disadvantageous compared to his existing contract of employment, but far more beneficial in others.

4.103. The claimant and the Orchards met on 21st October 2014 **to 'clear the air'.** They all prepared notes before the meeting which they shared. Mrs Orchard's version of what she said, of which she has a note, is she lacked "*the confidence to give you more autonomy*". The claimant's version is, "*You lack the* ***attitude*** *for more autonomy"*. Mrs Orchard also said, "*there are few who would put up with his attitude and mood switches*" and likened dealing with his multitasking to "*being in a spin dryer*". These were her views, based **not on stereotypical assumptions about Asperger's** but on experience and observation. We wholly agree it was right she express them at a "clear the air" meeting. Mrs Orchard did not have the purpose made unlawful by the harassment provisions of s26. On the basis a" clear the air " meeting has the purpose of those attending being able to speak freely, overcome differences and move on to work effectively together, it was not reasonable for it to have that effect.

4.104. Mr Orchard and the claimant met on 23rd October 2014 where it was agreed the draft Service Agreement would be discarded , 'Going Forward' would be reformatted by the claimant **for approval** to be signed by both parties. The claimant created and issued

a document entitled, '*Amendment to written particulars of terms of employment'* by email on 25th October 2014. He says rather than sign this document ***as was agreed***, Mr Orchard insisted on *reworking the document himself*. There was never an agreement Mr Orchard would sign **whatever** the claimant drafted.

4.105. From mid 2014 Mrs Blaylock was absent from work because she had suffered a severe fracture to her arm and had been successfully working from home. She was to start a phased return one day per week on Mondays. On 3rd November she arrived to find the claimant was using the office she had been meant to use for training a new employee. He did not welcome her back. She had to work in the office used by Mr Pitt on the ground floor. It was freezing cold so she had to go home. There was another failed attempt to return on 10th November due to the office available to her being in a mess with wires all over the place. The claimant's handling of this situation was intolerable and reasonably appeared to Mrs Blaylock to be vindictive. She complained to Mr Orchard by telephone.

4.106. Mr Orchard decided there was no need for her to work in the office, rather than from home. Allowing her to work from home was a pragmatic way in which the difficult relationship between her and the claimant could be managed. He did not explain his decision to the claimant until he could not avoid it and accepts he maybe should have explained it earlier. He feared a negative reaction which in fact occurred, when he explained to the claimant that if he had not made his decision he feared one or both would have left. The claimant wanted to meet with Ms Blaylock, but Mr Orchard did not think that was of any real benefit and would turn into a showdown between two valued employees. **This was not "soft" or cowardly, but sensible, staff management.**

4.107. During a short car journey on about 20th October 2014 when Mrs Blaylock had come to a meeting after which the claimant gave her a lift she "*grumbled about work*" . The claimant either misinterpreted or twisted what she had said into a complaint about the Orchards. He told them she had a problem **with them**. The Orchards visited Mrs Blaylock at home prior to Christmas. She reassured them this was absolutely not the case –quite the contrary, and she was annoyed the claimant had suggested she had. Before Christmas, Craig Johnson had told the claimant of likely trouble from Ms Blaylock at him not providing her with a suitable office for her phased return.

**The Events of 2015**

4.108 In January 2015 Mr Orchard announced Ms Blaylock would now work exclusively from home. He admitted he had agreed this following a complaint from her about having to work alongside the claimant, but said, "*her working from home was my idea... If I had not done this then one or both of you would have left*". The claimant's view of this is he was "*disappointed in Orchard for acting upon an unsubstantiated complaint before I had been spoken with or even made aware of the alleged situation. Robin Orchard had however refused to specify the allegations made by Elaine Blaylock.. and would only allude to a, "need to keep you both in the business*".

4.109. Mr Orchard e-mailed a draft he called "Son of Going Forward", on 11th January 2015 in which he stated, "*RO and DSW will agree a new employment contract as a matter of urgency. As soon as possible thereafter they will agree a service agreement, which shall not disadvantage DSW compared to his current contract but will include*

*areas such as non-competition that would be expected in such an agreement*". The claimant says attempting to "*include areas such as non-competition*" was again looking to **amend** the agreement upon which he had accepted the MD role in January 2012. The claimant says he expects people to "keep their word". Neither we nor Mr Orchard disagree they should, but it pre-supposes a party ever gave their word, unequivocally.

4.110. We often see people playing semantics. Mr Orchard is not one of them. That no mention was made in discussions in 2012 of "non-competition" clauses, does not preclude them being inserted in a draft for approval or negotiation in 2015. As Mr Owen said, he has never seen an MD's contract without them. Neither have we. The claimant at one point seemed to be saying a document described as a "service" agreement "was different to a "contract of employment". The old term for employment was "service" and another word for a contract is an agreement. They are two terms for the same thing. There is nothing unreasonable about the content of this document.

4.111. In a meeting on 13th January 2015 the claimant showed Mr Orchard an e-mail from Ms Blaylock of 29th October 2014. Ms Blaylock admits she sent e-mails which read as if she had no problem with the claimant, but, we accept, she only did so to keep the peace and stay in his favour. The claimant wanted Mr Orchard, and us, to accept Ms Blaylock is a manipulative woman who had "played" Mr Orchard to get her own way. We do not accept she did. She wanted to work in the office but found the claimant a bully and rude. Not knowing of the effects of his Asperger's she said to us she could not understand why if someone said "good morning" to the claimant, he would sometimes answer but on other occasions push past them without saying a word.

4.112. The claimant and Mr Orchard met on 16th January 2015 and worked through the document. The notes are at pages 655 to 656. The first line of the document reads: "*This document is an initial basis for proceeding and is subject to amendment as time progresses should this prove necessary* "The objective neurotypical view is that the statement in the notes of 16th January that the "*document was agreed subject to the following changes*", none of which refer to the first sentence, simply refines what was always intended to remain not contractually binding until incorporated into a signed agreement. There is no "magic" in signature itself, but until consensus had been reached on everything it remained an "agreement to agree" albeit getting closer to consensus. If the claimant had focussed on reaching agreement, they may have, but he was "perseverating" on something else –the Blaylock issues.

4.113. At a board meeting on 20th January the claimant attempted informally to raise his concerns about the situation with Ms Blaylock as an 'any other business" item but was prevented, he says, *by the dismissive and aggressive behaviour of Mrs Orchard*. He said Ms Blaylock had a problem with the Orchards and would prefer to be managed by him. Mrs Orchard responded "*rubbish*". The claimant immediately stood and said, "*well, if you are going to be unprofessional then here is a grievance*" and handed over a pre-prepared document dated 20th January 2015. Since the Orchards were named in the grievance, they asked Mr Owen to deal with it.

4.114. The claimant and Mr Owen met informally in a public house that evening to discuss these events. Mr Owen stressed the meeting was to be "*off the record* "and the claimant was not to repeat what was discussed unless it resulted in an agreement. The claimant does not accept it was off the record, but we do. This is just what we would

expect from a lawyer. The claimant made notes on the train going home. If it were not off the record, he would have made notes at the meeting in front of Mr Owen. We also find Mr Owen did not say he considered Ms Blaylock, "*a duplicitous individual*" only that if what the claimant said about her was true, she **would be** a duplicitous individual.

4.115. The claimant says Mr Owen was "scaremongering" by declaring his grievance, "could break up the Company". We wholly disagree. If the claimant carried on trying to gain control over Ms Blaylock and insisting on an outcome which would show him as blameless, Ms Blaylock as manipulative and Mr and Mrs Orchard as naïve enough to be taken in by her and "guilty" of undermining him , it **could** break up the company. Mr Owen proposed the matter be dealt with informally. The claimant had not given us any reasonable explanation of what he hoped this grievance would achieve for him. When Mr Cattell asked him, he said he wanted to be "***exonerated***".

4.116. On 21st January 2015 Mr Owen said the grievance would be held in abeyance until 23rd January 2015, to allow the claimant to seek advice. We accept his evidence the claimant then spoke with him by telephone and said he withdrew the grievance.

4.117. On 23rd January 2015 at 13:51 the claimant started sick leave due to work-related stress. He says during his absence he received "*a string of bullying, ill-founded emails from Mr Owen which were the cause of further distress and resulting depression"*. No objective reading of the e-mails could warrant such a description. On the contrary, one at page 678 starts by expressing concern for his ill health and saying they must sit down with Mr Orchard when he has recovered to discuss how by recruiting help they can reduce his workload and stress. The Orchards had to cancel a holiday to India to take over when the claimant was on sick leave and to support him on his return.

4.118. On 23rd January 2015 the claimant asked Mr Owen to confirm in writing the proposed actions they had discussed on 20th. Mr Owen emailed,

"*Further to our telephone conversation, may I confirm that you have withdrawn your grievance on the basis that I will convene another 'clear the air' discussion with the Orchards…*
*In the circumstances I see no need to place Elaine in the invidious position of suffering an interview regarding a withdrawn grievance. Furthermore, as there is no grievance, there is no need for me to adjudicate as to whether the Orchards conducted themselves properly in their actions.*
*It is important to note that in withdrawing your grievance you waive your right to raise the matters complained of in any further forum. In essence, the concerns expressed in your letter cannot be used in any other grievance. This is particularly relevant to your insinuation that your treatment 'may have been discriminatory'*".

The claimant's statement says

**"***At no point had the Claimant withdrawn his grievance. In seeking to* ***protect Elaine Blaylock from due process*** *the Respondent wilfully failed to observe the company's grievance procedure and disadvantaged the Claimant; and considers the, email entirely inappropriate, being wilful disinformation intended to place pressure upon the Claimant despite being aware of his stress-related illness***" .**

The procedure was not breached in our view. The emboldened words show what he wanted was for Ms Blaylock to be disciplined. There was no "due process" in place for her just as there was no allegation against him from which he could be "exonerated". We find the claimant cannot comprehend that a difference of views between himself and Ms Blaylock is best dealt with by a solution which does not involve what he thinks should always happen – a "showdown" between them to decide who is "in the right".

4.119. The claimant wrote on 26th January 2015 at 14:01
"*This is incorrect. My grievance is not "withdrawn" nor did I ever instruct you as such; I asked for the grievance to be held in abeyance awaiting your written confirmation on the actions you propose to best resolve the situation in an informal manner.*
*Can you please confirm that the email below is that proposal and in what capacity (personal, colleague, advisor, Board member) you make that proposal?".*

4.120. At 14.21, the claimant, perhaps already having taken legal advice, e-mailed
: "*Your comment, "It is important to note that in withdrawing your grievance you waive your right to raise the matters complained of in any further forum" is incorrect: if matters are not resolved informally via whatever means you propose then I still have the option of raising a formal grievance at a later stage: grievances are not 'time barred' in the same way that employment tribunal claims are; and it would be unreasonable for me to resort to a formal grievance if an informal process was effective at resolving the issue(s).*
*I look forward to you confirming your proposal adjusted for the two factual errors that I have brought to your attention";*

4.121. On 27th January 2015 at 13.34 Mr Owen responded:
"*Your two emails of yesterday leave me with little choice but to proceed to hear your grievance and adjudicate thereon. In those circumstances I would normally wish to interview you further and, indeed, the grievance procedure would tend to indicate that I am obliged to do so…of course, we could do this as part of the Board meeting set for 11th February Alternatively, if you feel that your letter is sufficient, you may waive your right to this interview".* We accept the phrase "as part of the Board meeting" was an error and meant "on the same day as" the Board meeting. Mr Owen would not possibly have been taken by a neurotypical person to have meant the interview would take place during a meeting at which two of the persons named would be present.

4.122. On 27th January at 15:40 the claimant replied in an e-mail including
"*As you are aware, I am currently absent due to work-related stress. I would appreciate your assistance in resolving this matter in the least disruptive manner possible.*
*It was at my instigation that you and I met informally in an initial dialogue to solve this situation on 20 January 2015; and I am disappointed to note that the suggestion you made in your email of 26 January in terms of how you proposed to take this matter forward has not been reflected in your correspondence to me since…*
*I remain committed to solving this matter amicably…*
*Please accept this as confirmation that I wish that we proceed with the matter informally at this stage as per your suggestion during our meeting of 20 January".*

4.123. On 28th January 2015 at 16:06 Mr Owen replied and rather than quote it all we extract the main points which are (a) wishes to the claimant for a speedy recovery and encouragement not to work so hard which would be addressed when he was fit to return (b) a reasoned assertion that informal resolution was not possible because it would leave

important matters unresolved and (c) an implication it would not proceed until the claimant was well.

4.124. On the same day at 18:41 the claimant sent a long e-mail concluding he wanted the grievance held in abeyance but still wished to proceed **informally**. In other words, he wanted the one thing Mr Owen had explained the respondent would not agree.

4.125. The claimant says Mr Owen did not proceed with hearing he grievance, informally or otherwise, it was never "*investigated*" and he was given no justification for that inaction then or since. We reject that. He had two choices –withdraw or proceed formally. The " ball was in his court" to elect which when he returned . He says he is still angered by the way Mr Dent's 'grievance' (see later) "*was engineered by Orchard and Owen, yet that my own written grievance was held in abeyance for what I thought was for the good of the company but that I then asked to be investigated informally and then formally (838-9)– and that is listed in the Company's own legal renewal document for 2016 was never acted upon*. As we will explain shortly the circumstances are wholly different

4.126. Page 838 is an e-mail of 20th October 2015. In the interim the grievance was being held in abeyance by the claimant, in Mr Owen's words as a "*Sword of Damocles* "over the respondent. The first time he asked for it to be actioned again was at a meeting with Mr Orchard on 5th July to which we will come later. Page 718 shows the respondent confirmed the grievance existed in its annual legal support renewal application to Ward Hadaway in April 2015.That document also shows in the last 12 months 3 other grievances, 4 first written warnings , 5 final written warnings , 2 capability dismissals and one attendance dismissal . In a workforce of about 30, this is alarmingly high.

4.127. The comparison which the claimant draws with the handling of Mr Dent's later grievance is wholly misconceived. The claimant was an MD complaining of Ms Blaylock and the Orchards. Mr Dent later and Ms Forster earlier both alleged the claimant, to whom they were subordinate, had bullied them. Mr Orchard's and Mr Owen's view of this whole episode highlights the difference between their neuro-typical approach and the claimant's black and white one. The respondent could not leave the other grievances because, if true, they would expose the company to claims but this one, unless and until the claimant pressed it, could be left.

4.128. When the claimant returned from his period of sickness on 2nd March 2015 a return to work interview was carried out, because he insisted on one, by Mr Orchard. The claimant complains he was not" *referred to occupational health nor were any risk assessments carried out*.". There was no reason to take either step before the parties discussed what they were going to do to prevent the claimant working to the point of having to go sick with stress.

4.129. A four week phased return started but, despite a letter of 7th February 2015 in which Mr Orchard stated, "*We shall of course do everything we can to assist you by way of a phased return to work*" the claimant complains he was offered "no support", as Mr Orchard was not on site or even readily contactable for the majority of those four weeks. This cannot be correct. Mr Orchard having cancelled a holiday to be available at Blaydon, must have spent a good deal of time there.

4.130. The claimant says he returned to a workload greater than he had left and Mr Dent, Mr Johnson and Mr Pitt confirmed they had received little support from Mr Orchard during the claimant's absence. Mr Dent said, "*I had to run the company*". We find the truth is that Mr Orchard let them get on with their day to day work in the company and they did. He did what was needed to manage and direct the company but , as they and Ms Blaylock said , it "ran itself" .The claimant says he could not **limit himself** to the intended hours due to the problems allowed to accumulate in his absence. He wrote page 687 at 17.41 that day recounting recent resignations and dismissals had resulted in a staffing crisis and recommending paying better rates to encourage better candidates. The Board readily agreed. The claimant could have done that much earlier, if he thought low pay was the reason for poor staff.

4.131. We are not convinced this period of absence was due to overwork rather than, as the respondent suspected, a fit of pique over the Blaylock issues. However we will give the claimant the benefit of the doubt. Herein lies his biggest self contradiction. He complains of "*the Respondent*" limiting his authority in key areas and says (a) he had responsibility for all operational matters with the exception of effluent consent levels and finances (b) all staff of a managerial level or lower would report to him with the exception of Ms Blaylock, (c) Mr Orchard was to withdraw from the day-to-day operations. That is generally what happened. The result was the claimant became ill, on his own account partly due to overwork. He then complains Mr Orchard would regularly "*ignore, interfere with, or overrule his decisions*". Especially contradictory was his assertion it was wrong for Mr Orchard to say during his absence "*that had better wait until Darren gets back*". Mr Orchard's statement at paragraph 118 reads
*During Darren's sick leave in the early part of 2015. I returned to full time work at Blaydon. During that time, I deliberately left a number of decisions for Darren's return because he had previously complained about me taking actions in areas he considered his responsibility. I just did what was necessary to keep the factory running. On his return, Darren complained I had left matters for him which I should have covered and produced the document at page 690. Most of the issues were minor and also he didn't like some decisions I had taken, the main example being that I had issued a final written warning to a short serving employee following discussion with, and agreement by, the Works Supervisor. Darren unpicked that decision and dismissed the employee.*

We find in the claimant's eyes, Mr Orchard was damned whatever he did.

4.132. The claimant says within a week Mr Orchard and Mr Owen again begin to apply pressure on contract matters and issued another document on 12th March with a revised version on 14th March. He also says Mr Orchard "*reneged upon a pay rise*" ( dealt with earlier). Mr Orchard had been unable to withdraw £65,000 in 2013/14 Dividends in order to keep the overdraft within limits. The claimant says *" this, when taken with my refusal to agree to lesser terms, was another factor in Orchard and Owen's decision to remove me from office by nefarious means*" They were trying to get him to commit to staying, not remove him , and to no objective observer could their means be described as nefarious.

4.133. Mr Orchard attempted to crystallise the matters they had discussed on 16th January 2015 into an amendment to the statement of terms and conditions of employment and issued the document on 12th March 2015. He was hoping once this was agreed they could turn it into a 'proper' service agreement with clauses typical for an

MD . Further to a conversation with the claimant during which he highlighted a concern Mr Orchard amended the document and reissued it on 14 March 2015.

4.134. The claimant was unwell on 13th March 2015 and proposed an extended phased return which Mr Orchard not only agreed by e-mail but instructed the claimant not to exceed. During the phased return, which the claimant accelerated despite requests that he should not, Mr Orchard worked full time at Blaydon. The only exception was the first week of March 2015 when Mr Orchard saw his GP about blood pressure and stress levels and when he had an industry association meeting in Birmingham.

4.135 For family reasons the claimant submitted a Flexible Working request to Mr Orchard on 13th March which was granted. The claimant received a Flexible Working request from Mr Dent on 15th March and met with him on 26th to discuss it having worked with the office team to explore suitable working patterns that would suit everyone He did not confirm arrangements in writing to Mr Dent until 30th April **.**

4.136. The claimant says the poor performance of Catherine Bonner, the administrator he had been training on 3rd November when Ms Blaylock tried to return to work , had not been addressed during his absence and upon his return he received negative comments about her from Mr Dent and Mr Johnson. He would have objected if it had been addressed by Mr Orchard. He noted Mr Orchard had failed to conduct a Return to Work interview with her for a two-day absence, 4th and 5th February. He intended to address both issues in a meeting on 20th March but as she said she had had a miscarriage. "*Out of compassion I delayed any meeting on performance for one month, which would allow me to observe her performance during that time*." They met on 17th April to discuss her performance and the claimant summarised the meeting in a letter. She wrote in response denying shortfalls in her performance. The claimant says "*I saw only resentment and rancour from Bonner thereafter. Bonner fell pregnant again and rightly wished to be cautious so as not to jeopardise her wellbeing or that of her baby and was absent for most of this period due to Maternity-related issues, not returning until 09/09/15 on a reduced-hours basis.*

4.137. The claimant In his resignation letter later wrote that during his absence on sick in January to March 2015 Mr Orchard "***naively believed the excuses of a worker that had been "absent without leave" rather than conduct a proper investigation, and this complex and time-consuming issue was instead left to me*****"** This appears to be a reference to Ms Bonner whose honesty had not been questioned before and whose was probably connected to her miscarriage.

4.138. The claimant says the whole office team's performance had been inconsistent. Mr Pitt, was bemoaning the poor support from Mr Dent and Mr Johnson during the claimant's absence, and what he saw as a lack of effort on their part. Mr Pitt accepts he "*had a moan*" , as we all do from time to time, and still clashes with Mr Dent and Mr Johnson in a way all shop floor supervisors will always clash with those in the "office ", but it does not prevent the business running properly . Mr Pitt said in cross examination the company is now running more efficiently with a more "relaxed" atmosphere than when the claimant addressed every slump in any individuals performance by invoking formal procedures

4.139. There was a visit by Tyne & Wear Fire and Rescue Service in about April The claimant e-mailed on 9th April 2015, "*Though Tosh is our nominated Fire Warden, as the owner of the business it is Robin who is responsible for fire safety*". The claimant says: ***Characteristically,*** *he tried to absolve himself of this responsibility with, "The owners of the business are the shareholders. They have no legal responsibility in this matter. It is the Board which has legal responsibility. Action is the responsibility of the operational management i.e. Darren and his team".* The claimant replied: "*I am afraid this is incorrect: the business owner(s) has/have legal responsibility"*

4.140. The claimant is simply wrong. The owner of the business is the company which operates by its directors. Mr and Mrs Orchard own the company. Mr Orchard correctly says *I was concerned that Darren, having taken responsibility on a day to day basis for health and safety and* ***as a Board member****, was trying to suggest that any legal responsibility was* ***mine alone****. I also felt that Darren's response was related to the fact that Darren was unhappy with the emails I had sent him around this time relating to his salary review* **.** The claimant again and without any justification says *My unapologetic stance on Health & Safety was, I believe, a significant factor in Orchard and Owen's decision to remove me from office by nefarious means.*

4.141. During April 2015 the claimant told Mr Orchard he was not content with the document issued on 14th March 2015 and referred back to their meeting on 16th January 2015. Mr Orchard asked him to send his record of the amendments from that meeting which he did on 16th April 2015. Mr Orchard considered those notes and reissued the amendment to particulars of employment on 19th April 2015. The claimant suggested they should append the **final** (whatever that means) version of 'Going Forward' to his particulars of employment. Mr Orchard **agreed in principle** on 30th April 2015 but his e-mail at page 749 contains

"…*However, it leaves open two important matters*
*We need to formally confirm your move from MD Designate to the MD post you have filled for three years now. This can be done by a side letter*
*What this does not do is address my move out of operational involvement in the Company, a move we both wish to occur in the short term. Until this is settled we cannot put in place hand over visits to major customers and internal clarification of the position to other members of the Company. I attach a document which, I believe, would allow us to proceed once also attached to your current contract , Longer term we will need, for the protection of us both, to move to a full service contract that is as beneficial to you as the combination of these documents*".

4.142. The claimant did not respond. No neurotypical person could read into the oral or written exchanges consensus on Mr Orchard's exit.

4.143. Mr Orchard tried to push along the contract issue by email on 10th June 2015 They agreed to meet on 19th June 2015, prior to which the claimant complains Mr Orchard made arrangements to visit customers who were not 'key customers' and to visit "lapsed" customers. The claimant sent an email dated 14th June 2015. Mr Orchard had fielded an approach from Aire-Valley Aluminium Ltd, quoted on 5th June 2015 and visited on 16th June 2015. The email included "*Ahead of discussions on The Way Forward please consider Aire-Valley as a case in point: they are an account with an established history of only using us when they are let down by others, and returning to their previous*

*source shortly thereafter. Why then do they warrant a personal response from you rather than their approach being forwarded to the office; and especially why do they receive a follow up visit? There is a reasonable argument to say that in business terms this is without justification: your involving yourself in this way serves only to not delay but actually reverse any advancement of the Way Forward programme".* Mr Orchard fully explained to us the commercial reasons for the approach he had taken with this company. He is experienced, he is the owner and the claimant had not signed anything, so there was no reason for him not to do as he did .

4.144. The claimant's email on 15th June 2015 covered several customer related points including a company called FK Group. In his resignation letter the claimant says *Consider the FK Group matter, where **your commercial naiveté** saw you agree to take work at unrealistic prices, and also agree to pressing work that I specifically stated that I did not wish the Company to accept and wished us to "price ourselves out of".* Again Mr Orchard fully explained what he did with this company was what is often called a " loss leader", taking on difficult low profit margin work in the hope it would win more profitable work in future. There is no reason he should not have. He is experienced, he is the owner and the claimant had not signed anything .The claimant's e-mail on the point contained "*You have changed the position on this and I am already unhappy that I learned from Tosh of your decision to accept the pressings - rather than you **having the good grace to discuss it with me. I** cannot understand why you have to see worst case scenario on everything, and your reluctance to turn down business despite perfectly legitimate reasons is not helpful, to say the least…*

*Not wishing to be blunt, but you must decide who is running the show here. If the budget is mine to achieve and all commercial aspects of the business are mine, then, with all due respect, I expect you to respect my decision in such cases. This needs to be said. I cannot run the Company being second guessed in this way. Success for APC in 2015 will come from well chosen volume profile work with added value services"*

4.145. Mr Orchard made a decision about the FK Group which differs from what the claimant would have done. Mr Orchard should not and would not have done so if the claimant were confirmed as MD. But the claimant was not because he had signed nothing . Even had he done so the emboldened words show no understanding of the fact the Orchards own the company or respect for Mr Orchard's knowledge and experience.

4.146. On the same day the claimant e-mailed "*I have taken the liberty of copying David in to (this email on proposed price movements) as there are some Board level/Way Forward issues that I believe he should be party to. Indeed, perhaps the time has come for him to mediate this matter".*

4.147. The claimant, Mr Orchard and Mr Owen met on 19th June 2015. In the minutes at pages 769-770 , it was noted, although Mr Orchard did , "*not like the contract side being as it is*" he would " ***move forward on the basis of DSW signing the original The Way Forward document and that document being appended it to DSW's Contract of Employment***." The problems are clear. First on no reasonable view does "move forward" towards agreement mean the same as "arrive at" agreement. No agreement was reached that day. Second, not until closing submissions did the claimant identify what he says is the document **he was prepared** to sign as that at page 904- 909 which is headed "**Going** Forward", while Mr Orchard says he agreed to sign the document at 739-

743 which is entirely different. Third, the claimant says it was to be appended to the contract he signed in 2008 as updated in 2011, while Mr Orchard says it was to be appended to the contract the claimant drafted in 2012 at 876-886. Last but not least, pages 904-909 still contain clause 11 quoted above.

4.148. Mr Orchard was not prepared for this meeting, since he had understood they would be discussing a different matter entirely. He felt coerced by the claimant and Mr Owen to agree to step back from the end of the following week without an appropriate service agreement signed. He was uncomfortable because the claimant had not given any clear commitment but he accepted , **subject to** agreeing a budget by 23rd June 2015:, the claimant identifying the duties performed by Ms Blaylock for which he should be responsible and which performance issues he felt required Mr Orchard, he would cease day-to-day involvement **as far as practicable** by **26th June.**.

4.149.. The claimant circulated minutes of the that meeting on **23rd June 2015. No budget was agreed** but the claimant produced a document in relation to Ms Blaylock which Mr Orchard could not accept. He was worried she would leave and he would not have proper financial control. He reviewed her duties and confirmed in his email of 25th June 2015 she would continue to report to him. He also reviewed the document at page 739 to 743 and found certain aspects directly contradicted what he understood had been agreed at the meeting on 19th June 2015 and in Board meetings since the "Going Forward" document had been produced. Consequently he took the view certain areas of responsibility needed clarifying and he wanted to make clear that, except in extreme situations, he would not be available for operational matters. Mr Orchard's email with an attachment updating the original Going Forward includes : "*For the avoidance of any doubt the following apply to our agreement and take precedence over the Way Forward document. These are the essential modifications to the contractual side of the agreement*". Mr Orchard ended that email with, "*Before closing I wish to point out that I had expected last Thursday's meeting to cover the detail of price movements referred to in your email of the 5th June. As such I was totally unprepared for the intense discussion on the Way Forward that occurred. I felt strongly pressured by both you and David in reaching the agreement we did*".

4.150. We have no doubt the parties did not reach consensus at the meeting. With so many versions of the succession plan and "contract of employment" in circulation that is hardly surprising. The claimant learned of a promotion by the respondent's bank, whereby card terminals were provided on preferential terms and believed allowing customers to make credit card payments would be of benefit to the company. Though he asked Mrs Blaylock to acquire such a terminal on 22nd June 2015, a signature was required from Mr Orchard. The claimant says he refused to sign "***both as a show of superiority and as a limiting of the Claimant's authority".*** In our view this was a financial matter , but even if we are wrong , Mr Orchard was "superior " to the claimant and , until a full agreement was reached , had every right to limit the claimant's authority .

4.151. The claimant then says "*Though Orchard largely ceased his day-to-day involvement* ***save for occasional interference*** *he did not comply with the other agreed actions from that meeting, such as informing the workforce of the agreement, organising a mailshot to the customer base and organising farewell visits with his accounts. The situation continued to be one of ongoing uncertainty, or, in retrospect, of Orchard 'hedging his bets*'. This was because the claimant had still not signed anything. Instead of

focusing entirely on getting to a point of agreement, the claimant busied himself with routine matters. For example, on 23rd June 2015 he met Mr Dent due to his failing to observe the agreed Flexible Working times on sixteen occasions most of which are lateness of a few minutes, made up for by staying late.

4.152. The claimant e-mailed Mr Orchard on 29th June 2015,
"*The last sentence of (the 25 June 2015) email suggests that the first and most important "pie and pint" should for you and I to have. Please confirm a suitable day and location (I will meet halfway down if you prefer). It is in no-one's interest to proceed in this vein. David has not been copied in to this email; this is a matter solely for you and I"*

4.153. Everything the claimant said and wrote at this time indicates he wanted Mr Orchard to withdraw from day to day involvement. However he then complains Mr Orchard increased his workload further in June 2016 by declaring himself no longer available as a resource save for attending Board meetings. **The claimant can have one or the other , not both.**

4.154. They met on the evening of Sunday, 5th July 2015. Mr Orchard made it clear he considered it essential the Way Forward document be signed and appended to the claimant's contract together with an update and clarification of detail on his exit as set out in his email of 25th June 2015. Mr Orchard says the claimant agreed and Mr Orchard expected him to provide the paperwork duly signed. He did not do so. The claimant says he **proposed**: "*I sign the original The Way Forward memo, you staple it to my Contract of Employment, we move on*". Had they not been at cross purposes as to which document was which, this would have been progress. The claimant in his statement says it was agreed at that meeting the grievance from January was to be made formal "***as a reciprocal act***". Mr Orchard too stated it was better for the grievance to be resolved. However, he did not understand the reference to a "reciprocal" act. We do. Having failed to get control over Ms Blaylock by agreement, the claimant wanted a battle to prove he was right and Ms Blaylock and Mr Orchard were wrong. That way, he could achieve the control he wanted, if necessary by getting rid of Ms Blaylock. Mr Orchard said Ms Blaylock, who is described by the company accountants as the best bookkeeper in the North East, did not have a good relationship with the claimant which maybe stemmed from her seeing the way he had treated Ms Forster in 2008. We find the claimant did not like her and wanted to "put her in her place".

4.155. Mr Orchard wrote to him on 30th July 2015 asking him to sign within 30 days. Mr Owen had made attempts to have the claimant withdraw his grievance, for example, he claimed discussions on the sale of the company to Berwick Group had been placed in jeopardy by having the grievance, "in the background", and told the claimant, "*we need to make this go away*". The claimant says he resisted all efforts to make him withdraw his grievance. Again, what Mr Owen was saying was plain truth. If any potential buyer performed "due diligence", it would find the MD had a grievance against the Chairman, his co-shareholding wife and the person in charge of finance, and would be "frightened off". The claimant just did not realise, or care about, that, because he was perseverating on getting "justice" as between him and Ms Blaylock.

4.156. The claimant says "*Again, rather than act as he had agreed, Robin Orchard instead produced a further document, 'Amendment to written particulars of terms of employment' dated 30 July 2015, to which was appended a reformatted version of his*

*email from 25 June 2015, with a covering letter that rhetorically asked, "should I assume that you have signed if you do not return the documents within 30 days?", wording that the Claimant considered the work of David Owen and another example of his pressure tactics*". Applying "pressure" was wholly justified and the way it was done falls far short of "bullying" or "harassment". Mr Orchard and Mr Owen asked for the return of that document throughout August. The claimant told Mr Orchard he had given it "*a brief glance*", seen it was not "*the document agreed upon*", so put it to one side as a lesser priority, in light of his high workload at that time. On 3rd September 2015 the claimant committed to review the document in the next few days.

4.157. He did so and wrote to Mr Orchard on 8th September 2015, explaining why he would not sign: "*there are substantive changes to the content and wording (e.g. the reference to a salary review has been expunged)… the formalised version of your email of 25 June 2015 is held to, "…take precedence over the Way Forward document", something that was not agreed… … I must emphasise that my position here is not one of obstinance: indeed, I am as keen as you are to resolve this impasse. I will not however sign unsatisfactory documentation simply as a courtesy to you".*

4.158. Mr Orchard responded on 10th September 2015 accepting the version of the Way Forward he had sent was wrong and attaching what he believed was the correct version, but he was unsure before us which version that was. The claimant emailed back on 11th September reopening the issue about Ms Blaylock's hours of work. Mr Orchard did look again at Ms Blaylock's duties and emailed the claimant on 22nd September maintaining his previous position as to her working from home.

4.159. At the same time as these vital negotiations, the claimant scheduled one-to-one meetings with Mr Johnson and Mr Dent. Mr Dent in his view was still not doing all he should, both were not producing paperwork to the required standard; and Mr Johnson was not organizing his own workload. The meetings were on 17th and 18th September respectively. Mr Johnson did not agree with all points the claimant raised but did not protest strongly. Mr Dent arrived, in the claimant's words "*with a negative demeanour and without so much as a notepad and pen claiming, "I'll remember everything"*.

4.160. The claimant reallocated Mr Dent's workload to allow him to concentrate on driving the Production Plan, and by shifting Ms Bonner's duties from core to more peripheral ones so her absences would not have such a detrimental effect on efficiency. He moved line management of the two Drivers from Mr Dent to Mr Pitt as he thought Mr Dent had never performed this aspect of his Transport Manager duties especially well and moved the administrative duties of producing the daily Transport Lists to Mr Johnson. He took on Sales Order Processing ( SOP) from Ms Bonner, which added to his workload. He says *These changes were discussed with Dent and Johnson on 25/06/15,.. Rather than receive this help in a positive manner Dent later said that he felt that it was, "not fair" although he did not express any such sentiments at the time* .It would be obvious to anyone who had intuition into how others feel, that if the claimant explained his reasons to Mr Dent as he did to us, Mr Dent would find it unfair. Worse was to come.

4.161. Mr Dent had e mailed the claimant much earlier about overtime for a trip to the Surface World exhibition at the NEC in Birmingham. The claimant had booked trains from Carlisle to save £430 which would mean Mr Dent leaving home at about 4 30am and returning by midnight. Mr Dent received no reply so did not "bypass" the claimant by

simply asking Ms Blaylock if overtime for attending had been authorised. The claimant says going to Ms Blaylock was something Mr Dent had done previously and been specifically been asked not to do. The claimant believed overtime should not be paid to Mr Dent because he was "salaried" not hourly paid, but as the travel times were unsocial he told Mr Dent he was not required to attend if he did not wish to. As for his request for overtime, the claimant said "*It's, well, it's a fucking joke, Gary*". **After** the exhibition, he said he would reconsider paying overtime only because Mr Dent complained about additional childcare costs for the day which the claimant said **he had not mentioned at any point previously. Again intuition and knowledge of Mr Dent's personal circumstance would have informed any reasonable manager of this.** From this point, Mr Dent's interactions with the claimant were strained.

4.162. The claimant invited Mr Orchard to meet with him after the 22nd September 2015 Board meeting to discuss the contract again. Mr Orchard declined because he wanted Mr Owen to handle negotiations, and there is no reason why he should not. The claimant says he was '*doorstepped' by David Owen before 0900 on 22 September 2015 (that day's Board meeting was scheduled for 1330; the Claimant was not made aware of David Owen's planned early arrival), with his first words being a forceful, "Contract. He's told me that we need to get this resolved. Today. Okay?". The Claimant, incensed by this intrusion, argued his case rather forcibly, suggesting to David Owen, "You best get on the phone and prepare (Robin Orchard) for disappointment, **because I ain't signing**". The Claimant nevertheless engaged with David Owen in an effort to progress matters*.

4.163. On 23rd September the claimant and Mr Johnson attended the Surface World exhibition arriving home after midnight. On 24th September Mr Dent and Mr Pitt attended. Next day the claimant alleges Mr Pitt said Mr Dent, "*was not interested*" and insisted on taking an earlier train home obliging Mr Pitt to miss an organised tour the claimant had specifically asked him to make. Mr Pitt's evidence gave the full picture. The reason Mr Dent was not interested was the exhibition was mainly of production equipment not office equipment and the reason Mr Pitt missed the tour was other delegates had said it was not useful To any observer, as well as to Mr Dent , the claimant was gunning for him.

4.164. Mr Owen summarised the discussion they had on 22nd in an email to the claimant on 24th September 2015: *"I think - and if you disagree at all please tell me - we agreed the following: 1. You will send me - hopefully by email - documentation that you are willing to sign. This will include a contract; the Way Forward document and a version of Robin's email seeking to update any outdated elements contained within those two documents; 2. You will conditionally sign those documents once, obviously, I have agreed the documentation with Robin; 3. You will stipulate the items Robin needs to complete before your conditions are released. I discussed his farewell tour with Robin and it is his intention to give you a list of people whom he will visit as part of the Christmas bottle run. There may be a smaller list where he wishes to lunch or dine with old contacts in the New Year but, again, this will be itemised. I think we are at least close to the last chance saloon on this and it is evident that the process is placing unnecessary stress on all parties. I think it is essential that this is completed **before Robin departs for Chile on November 1st** and trust we can move forward expeditiously",*

4.165. An example of Mr Orchard doing tasks he would have left to the claimant if he had a signed agreement is Quest Solutions Ltd who contacted Mr Orchard with a query that would have been referred to the claimant or one of his team. The claimant e-mailed Mr

Orchard on 24th September 2015, *"Thank you for answering (the customer's query) – but as I'm sure you realise, you prolong your involvement by doing so. I note that Quest are one of the accounts you wished to organise a goodbye visit with. This should therefore really have been a case of either referring the customer's query on, or answering the query but arranging a visit as you do so; only answering the query takes us backwards"* .The claimant complains Mr Orchard did not reply to that email. We cannot see a reason why Mr Orchard should reply. More to the point, we cannot see any neurotypical person acting in good faith in these circumstances sending a "points scoring" e-mail in preference to spending his time answering Mr Owen.

4.166 On 2nd October 2015 Mr Dent resigned saying it was "time for a change". **It is astounding the claimant did not "see it coming", but his Asperger's may explain that.** Mr Dent would not say whether he was leaving for a competitor only that he had, "something lined up". The claimant says :" *I was somewhat torn because I felt that we were on the cusp of great things and I wanted Dent to play a part in delivering the improvements that I was working towards but I become worn down by trying to manage Dent, his Personnel File ran to two thick folders, so frequent were the issues with him against Orchard's cosseting of him; and so I acknowledged Dent's resignation by letter that afternoon using the format approved by the Company's legal advisors that had been used for staff departures for some years [565b], and enclosing an Exit Questionnaire with an SAE for Orchard's home address for reasons of transparency. I informed staff of Dent's decision by way of a 'Personnel Update' memo*

*.I had reasonable suspicions that Dent was going to a competitor. I disabled removable memory drives on his work machine and monitored his browser history (for webmail) and Exchange account (for email) to ensure no privileged information was* ***stolen****. I was entitled to do this as System Administrator and with Dent having signed his agreement to the IT policy on 21/06/06 and for the Employee Handbook incorporating that same policy.The Claimant acknowledged his resignation and the terms of his leaving by letter. It was the company's standard letter as approved by its legal advisors, save for its introductory paragraph where the Claimant offered personal thanks for the efforts Gary Dent had made on the company's behalf; and the terms of leaving were the company's standard terms and as such were used* ***in all similar previous resignations."***

4.167. Mr Dent was a very long serving member of staff, in a senior position leaving without giving a credible reason so there were no *similar previous resignations*. Mr Dent's loyalty and honesty had never been doubted, yet the claimant sees nothing wrong with treating him as a potential thief. This is his assumption that anyone leaving to join a competitor may want to harm the respondent so should be treated with suspicion. Because he has, on his own account, no intuitive ability and cannot "read" others' feelings, it did not register with him (and still does not) that Mr Dent had been forced to leave by his management style.

4.168. The letter acknowledging Mr Dent's resignation asked for the return of a mobile phone, which for a convoluted but honest reason was being used by Mrs Dent while Mr Dent used another, and repayment of 8.08 hours for leave taken but not yet accrued which were standard terms. Mr Dent raised no objection to the terms of his leaving **to the claimant,** saying on 5th October 2015 he would surrender the mobile telephone, "tomorrow". Of course, he would not raise objection to the claimant. He spoke to and later e-mailed Mr Orchard to express dissatisfaction. Mr Dent was the longest serving

employee in the office, having joined as a junior six months after Mr Orchard purchased the company and worked his way up to Production Planner and Transport Manager. Mr Orchard was saddened by his decision because he had been a loyal, though not perfect, employee. Mr Orchard had for some time urged the claimant to be more sympathetic to Mr Dent who was young with four very young children to support. Mr Orchard accepts he "*cosseted*" Mr Dent a little. What the claimant had done was in accordance with the normal rules, but Mr Orchard felt Mr Dent was a special case.

4.169. The claimant was due to take annual leave from 5th to 8th October**.** He began to recruit for Mr Dent's replacement, asked Mr Pitt to ensure Mr Dent did not work alone during his absence and emailed the IT support company, to make security changes to Mr Dent's accounts and protect files from being copied. On 6th October **t**he claimant spoke with Mr Dent who had, trying to help, done the Sales Order Processing but "*not well*" in the claimant's view. The claimant told Mr Dent he had *hoped for better from him in his final two weeks.* Mr Dent was terse and argumentative, and the claimant cut the meeting off with, "*I do SOP, please use me. Okay?*".

4.170. The claimant says he was "*obliged to cancel my annual leave due to workload. I made a telephone to Orchard that evening in which Orchard unexpectedly turned the conversation to the subject of Dent's leaving, asserting that, "…we shouldn't take his phone off him". I called Orchard back and asked whether anyone had made any complaint to him. Orchard denied this and, even though I was aware of Dent's email to him. Orchard called back later and insisted that, because, "Gary has been with me from the beginning" he should retain his handset and we should forego the excess holiday. I raised the matter of Dent's email to Orchard. Orchard, clearly surprised, affected to, "not to have opened" the email – clearly a lie as its content could not be derived from the Subject line alone. This concealing of another grievance involving me and Orchard obviously lying to me profoundly affected me, as did being overruled which directly undermined my authority and legitimised any member of staff disagreeing with my position being able to bypass me and go direct to Orchard. This, I felt, made my position among my staff untenable and was then "the last straw" in my treatment (although there have been other breaches committed by the Respondent since) that I considered to amount to a repudiatory breach that I did not accept. I left for home late that evening extremely upset, and I did not sleep.*

4.171. The claimant now accuses Mr Orchard of lying when he "affected to not to have opened the email". However, at that point he had not, although he was aware of most of its contents having spoken to Mr Dent. It did cross his mind perhaps the claimant was seeking to settle old scores because Mr Dent had supported Ms Forster in her 2008 grievance. Mr Orchard accepts, as he did in respect of the Blaylock matter, it would have been more polite to have spoken to the claimant before he told Mr Dent he could keep his phone and not repay his holiday, but he was, as ever, trying to keep the peace.

4.172. On 6th October 2015 Mr Owen e-mailed the claimant*: "Ten days have now passed since I sent you the email below. Please respond as soon as possible. It is* ***essential*** *that I am able to review the necessary documentation before the end of this week".* The claimant replied **that day**

"*I am aware ten days have passed. Similarly, I am sure you are aware of my workload (witness that I am supposed to be on holiday today, for example). I do recall our discussion (although, "a version of Robin's email seeking to update any outdated*

*elements contained within those two documents" was certainly not agreed upon – you will surely recall how incensed I was at the inclusion of that email). However, I have since taken advice and have been informed that it is not in my best interests to conditionally sign any documents. Before the end of the week I will endeavour to produce unsigned copies of 1. and will certainly produce 3. If I then have Robin's response to 3. with a binding stipulation that what is agreed therein will be adhered to, then 2. will follow; but not before. I am sorry if this is not the response you expected, but there have been too many instances where matters have been agreed and then not acted upon; and therefore I will not sign anything until the exit/handover strategy we agreed upon on 19 June of this year, but which has not moved forward one iota since then,* ***is underway***".

It was never agreed Mr Orchard would **exit first and then the claimant would sign** a contract. On 30th April and at all subsequent times Mr Orchard had said the claimant should sign and then he would exit, not vice versa.

4.175. On the morning of 7th October the claimant informed Mr Orchard he would not be attending work. He was absent under Self-Certification until 14th October then had a GP's certificate He complains that on 8th October Mr Orchard sent him a query that could have been answered by using the Customer Complaints Database.The resignation of Mr Dent and the claimant's sickness absence placed massive pressures upon Mr Orchard who had to take day to day control, essentially doing both their jobs and was very concerned the company **and he** may not survive. He was close to a mental breakdown and faced significant ill health. He says *I* ***had to contact*** *Darren for information on 9 October 2015 (page 829). He emailed me on 14 and 15 October 2015 (page 830 and 831) and I did not feel able to respond. I did not know if Darren was unwell or whether he was using Gary's resignation to try and exert pressure on me as part of the protracted contractual negotiations. I was just about holding myself together and I couldn't afford the time or the mental energy associated with having to meet or respond to Darren. I asked David Owen to communicate with Darren on my behalf.*

4.176. In his discussions with Mr Orchard, Mr Dent had said he had been bullied by the claimant who had been the subject of similar complaints in the past. Mr Orchard was worried the company might face a legitimate constructive dismissal claim. Also he wanted to get to the bottom of why Mr Dent had resigned. He did not have the time or the energy nor think himself sufficiently independent to investigate. Nor did Mr Owen. That is why Mr Orchard asked Mr Thornhill to act on the company's behalf. The claimant argues Mr Dent did not want to make a complaint, Plainly he did and so confirmed to us He adds Mr Orchard arranged for Mr Dent to be interviewed by Mr Thornhill "*because of his prejudiced views as to the Claimant's alleged poor interpersonal skills that are a condition of his disability. The Claimant considers this to represent an act of direct disability discrimination under the Equality Act 2010*." We reject that totally. As with all the allegations of direct discrimination made by the claimant, it was not the respondent's witnesses' **prejudiced** views of **alleged** behaviours which caused them to act to make him do, or prevent him doing, things which they believed were unfair, ill-judged or plain wrong, but rather their **considered view** of **actual** behaviours which the evidence of their own eyes and ears reasonably provided.

4.177 Mr Dent was interviewed by Mr Thornhill and a signed statement given which made a number of allegations about the claimant, who now says the signed statement is clearly not in phrasing and vocabulary used by Mr Dent and "*as such the Claimant*

*questions the **authenticity** of the document. The Claimant also notes that Gary Dent was not asked by Joe Thornhill to provide any evidence of, or give any examples to support, his allegations and that the Respondent did not interview the people named in the statement in order to verify or dispel the allegations made*. A solicitor taking a statement must record the content given by the witness, but may, and should, convert what are often emotive ramblings into something intelligible. Further, once the statement of a "complainant" is taken, **then** it is decided what further enquiry needs to be made usually after, not before, the person accused has had his say. The claimant's case is that the respondent organised for Mr Dent to meet with Mr Thornhill "*for malicious ends: to ensure a grievance was created, and facilitate the commencement of a process of disciplinary action against the Claimant*. We reject that totally It is true Mr Dent joined a competitor; and his subsequent return to the respondent in 2016 is without precedent but that only goes to show that, without the claimant being there, he is happy to be.

4.178. On 14th October the claimant was given a 4-week sick note and was very ill with stress, anxiety, insomnia, and the onset of depression. He needed time off work but says *I nevertheless was conflicted, somewhat fixated on not having been able to finish an important quotation that would secure three months' worth of work for the Company. Against my wife's wishes I attended the workplace that night to complete that quotation. I noted that Orchard was working at my desk and sent him an email asking if he would meet me the following day regarding my Med 3. I left at somewhere around 0145 having first raised concerns by email to Orchard about Bonner's Maternity Leave and Pitt working constant thirteen hour days".* GP's often rightly issue Med3's based on their patient's account of how they feel. There was no reason for Mr Orchard or Mr Owen to think the claimant was so ill he could not deal with a few routing queries based on how he was behaving not only in attending work in the middle of the night but also in the tone and content of the e-mail exchanges which he was, and would continue to, engage.

4.179. On 15th October Mr Owen emailed asking communication to Mr Orchard be done via himself. There was no reason why Mr Orchard, a scientist and businessman who was under enormous strain, should not use Mr Owen, a lawyer who could take a calm view, to act on the company's and his behalf. The following day Mr Owen emailed to request a Self-Certification form and Med 3 so Mr Orchard could put in an insurance claim for his second cancelled holiday. The claimant replied asking why Mr Orchard had refused to meet, why he had to communicate via Mr Owen and why his grievance had still not been investigated. Mr Owen replied "*concerns have been raised, which are being investigated, as regards your management approach which it is suggested resulted in Gary (Dent) resigning his employment*" and "*can you please clarify precisely what you suggest was discussed and agreed as regards your grievance on 5 July 2015" .*

4.180. On 20th October 2015 the claimant emailed
"*In respect of my grievance of 20/01/2015: on the evening of 5 July 2015, at my instigation and following a private email that I sent to Robin on 29 June 2014, Robin and I met at Asper's Restaurant in Newcastle upon Tyne, ostensibly to discuss Robin's unhappiness at the outcome of the meeting between he and I (mediated by you) on 23 June 2015 (my invitation was specifically triggered by the last sentence of Robin's email of 29 July 2015). The two agreed outcomes of that meeting were: (1) that I would bring to an end **our contractual dispute** (refer to my letter of 8 September 2015 for the specifics of how this was to be achieved); and, **as a reciprocal measure**, (2) that my Grievance would be heard, as I was not prepared to waive any of my rights regarding that particular*

*situation. You are already aware that the former did not transpire in the manner agreed; and the latter seems not to have been acted upon at all. To learn this evening that my own grievance is apparently still to be acted upon almost four months after the event, whereas an allegation made against me has seemingly been investigated immediately, is of serious concern .* He ended "*Perhaps you would ensure that my grievance now be heard as was agreed?" .*The words "*as a reciprocal measure"* must mean that in exchange for the claimant bringing to an end the contractual dispute , his grievance would proceed . He never had brought it to an end. It had never been agreed his grievance would be heard **first** and then the contract dispute resolved.

4.181. On 20th October Mr Owen replied, "*I will respond in due course*". He attached minutes of the 20th October Board Meeting which included "*The Board resolved that it would be necessary to access DSW's corporate email*" The claimant objected by return as he had neither signed agreement to the IT policy nor the Employee Handbook incorporating that same policy. "*I do not give my permission for this, nor do my Contract of Employment or Company Handbook permit you to take such action… you have failed to give any reason for your decision; you have not completed an impact assessment (especially important given the reason for my absence, and the likely affect such intrusion will have on my wellbeing); and there is a (less intrusive) alternative to monitoring… Monitoring therefore is not justified*". The claimant was the person in the company who understood IT. He says a less-intrusive alternative to such action was available, but the respondent did not know it and neither would we. The double standard is clear. The claimant, a stickler for due process, had himself not signed the very policy he relied upon to inspect Mr Dent's e-mails.

4.182. The claimant says he became clinically depressed and on 22nd October 2015 emailed Mr Orchard: "*You are aware that I am absent due to work-related stress. The extent of how serious things had become can be gauged by the immediate 4 week Med 3 insisted upon by my GP… and… my GP insisting upon, above all, a period of rest…".* Over the coming days he says he was ***interrupted by*** Mr Johnson and Mr Orchard twice. He emailed Mr Orchard on 23rd to complain about the conduct of Mr Owen. Mr Orchard's reply was, "*If you have an issue about the way in which David and I are communicating with you, can you please keep that separate and raise it with David*". He emailed Mr Orchard that afternoon with, "*Let it be noted that I have attempted to answer every question asked of me whereas yourself and David have failed to answer any that I have posed"*. Mr Owen and Mr Orchard had only sent emails to the claimant on matters such as customer and IT issues. He says "*Owen's usual pressure tactics were in evidence: "You seem to be unwilling to recognise that Robin and the very future viability of the company is under immense pressure with Gary having resigned and you absent due to sickness at the same time"*. This is also a statement of truth, not a pressure tactic.

4.183. On 3rd November 2015 Mr Owen emailed Mr Dent's statement and said "*Gary's allegations are potentially very serious and may amount to bullying and gross misconduct. However, I wish to understand your response to these allegations and I would like to meet with you as soon as possible. You are, of course, entitled to attend any meeting with a colleague or trade union representative. I appreciate that you are currently absent from work due to sickness and I do not wish for us to meet unless you are properly fit and able to manage the meeting. However, it is important that this meeting takes place before you return to work". ,* later stating*, "If it is not possible for us*

*to meet before your due date for a return to work, I will need to* ***consider whether*** *suspension is appropriate".* We find nothing wrong with Mr Owen's approach.

4.184. The claimant replied asking for an independent investigator and neutral location Mr Owen replied on 4th November agreeing to the latter but proposing to investigate himself as Ward Hadaway's quoted fee was high. The claimant replied he did not feel well enough to deal with the matter at that time and would do so after his next GP appointment; The claimant was convinced Mr Orchard and Mr Owen had engineered Mr Dent's 'grievance' with a view to a baseless disciplinary process and subsequent dismissal. He felt there was little option but to raise a grievance and resign. He began his letter of grievance and resignation, working on it day and night ,avoiding being at home, going missing for hours to drive nowhere in particular, stopping at all night cafés where he would work on his letter for hours on end. The finished letter, over 15,000 words long, was sent on about 4th November.

4.185. The letter itself sets out what was important to the claimant **at the time.** It is legalistic and gives the impression he is likely to make a claim. This huge letter is one we need not recite in detail but the **order** in which points are raised is **instructive**

4.186. He starts with *" being overruled on the formalities of Gary Dent's leaving"* and says *Moreover, I believe that you chose to act in this way because of your continued unwillingness to accept my disability, preferring instead to hang on to your own misguided and unsubstantiated criticism of my alleged lack of interpersonal skills. This represents an act of disability discrimination.*

4.187. He then says *I note that, at the time of writing, another 'key employee' Elaine Blaylock still has no Contract of Employment after ten years or more, and again despite this being discussed with you several times - and it can be said that your lax attitude towards Gary and Elaine's contracts when considered against your eagerness to continually try and impose an unsuitable contract on me does rather suggest discriminatory behaviour on your part.*

4.188. He reverts to the February 2008 issues with Mr Robson and Ms Forster then deals with alleged repudiatory breaches under the various headings. He cites "*multiple acts of direct discrimination,* including
(a) Repeatedly dismissing his decision-making as black and white "***despite overwhelming evidence to the contrary ".***
(b) Declaring his treatment of customers as "unprofessional" and behaving in a discriminatory manner because of this, on which he says
*Difficulty with the communication and control of emotions is a characteristic of Asperger's; but your (and Pat's) assumption that it somehow must follow that my privately held opinion becomes behaviour is ignorant, discriminatory, and entirely unsupported by evidence. Limiting my authority because (as Pat memorably said in our meeting at Yours Business Networks on 21 October 2014) I, "lacked the attitude for more autonomy" constitutes an act of direct discrimination.*
(c) Repeatedly alluding to his alleged lack of approachability on which he quotes Mr Orchard saying "*you know, Darren, there are days when I just stay out of your way because of your mood. And if I notice it*…"

None of the above are based on assumptions about people with Asperger's but on the observations of those who saw his behaviour.

4.189. As for limiting his authority, he writes
*You have limited my authority in key areas, arbitrarily involving yourself in matters that are **not of your concern without having the decency to inform me**. You (to use your own phrase) 'butterfly' from project to project, and you have a long history of rapidly losing interest in projects and leaving behind you a trail of chaos that Gary Pitt and I are obliged to make good.*

4.190. The letter continues with such matters as

*My strong management seems to be seeing me excluded me from key Company (or, more accurately, key personnel) issues without justification*
This probably refers to Mr Dent and Ms Blaylock

*Similarly, you have repeatedly failed to engage in constructive dialogue regarding **the dispute over** 'The Way Forward' and my Contract of Employment, instead repeatedly delegating the matter to David Owen who has often resorted to misinformation, bullying and harassment in an effort to force unsatisfactory terms of employment upon me.*
There is no reason Mr Orchard should not use Mr Owen especially when he was under pressure himself.

4.191. He recounts the meeting on 23rd October 2014 and says "*we agreed (and you confirmed by memo) that the best way forward was to reformat and formalise 'Going Forward' into a new document which would be signed by us both. I created and issued that new document the following day*." He then says "*Over the next few months "documents were issued by you and rejected by me. I later summarised this as, "fundamental difference of opinion, in that **I am unwilling to sign anything other than the original document as this was the basis of my acceptance, whereas you wish to update 'The Way Forward', ostensibly to reflect business changes in the period between the original issue and the present day".** In so acting you had, it should be noted, **reneged on** our agreement of 23 October 2014.*

4.192. The claimant confirmed to us when giving evidence the **original** version, which he then thought was pages 2086-2091 with clause 11 **was all he would sign**. He wrote *"… as the whole 'Going Forward' issue dragged on you became more obdurate, by turns involving yourself in day-to-day matters without invitation, 'asserting your authority' by visibly overruling me on several issues, and, throughout, instructing David to repeatedly contact me to secure the signing of your preferred document - which I refused to do (and not out of obstructiveness but simply because none of your documents adequately represented our agreement).* This pure literalism, which he confirmed here, would have meant a document which was by the time of signature outdated overtaken by events and contained Clause 11 was, in his view, the only correct one to sign.

4.193. Under the heading of " Failure to properly investigate a grievance" **he first** raises the 2008 *" coordinated attack intended to bring about my removal,* by Mr Robson, Mr Dent, and Ms Forster . Then he raises January 2015 where Mr Orchard decided to allow Ms Blaylock to work from home" *based upon "one person's unsubstantiated complaint ..and where I, the subject of the allegation, had not been spoken with or even made*

*aware of the alleged situation*." He says *David asked that I leave my grievance in abeyance and allow him to manage this situation, in that he would organise a meeting between you, Pat and I with David as Chair to resolve the conflict, without allowing Pat to derail the process; force you to revisit the flexible working process for Elaine, following protocol and with your decision based on gathering the full information, not just on Elaine's opinion, and allow me an audience with Elaine* ***as I please.***
Such an audience was **never** agreed. It is inconceivable Mr Orchard or Mr Owen would ever have permitted Ms Blaylock to be exposed to what the claimant clearly wanted to have which was a " showdown" over who was telling the truth.

4.194 "Serious failings in Health & Safety provision" come near the end of the letter Finally, he addresses breach of contract in a failure to pay profit share and in failing to award an agreed pay rise in 2015.

4.195 On 9th November, Mr Owen emailed the claimant "*You have now been asked for the relevant access keys for FileMaker on two separate occasions. I must now insist that these are provided* ***by return****" on 9 November 2015.* The claimant replied, "*I was asked by Robin for a PIN (not "access keys") that I have no knowledge of. I replied to Robin by email eighteen days ago (i.e. within a day of his original email) with a number of suggestions as to how he may be able to solve whatever problem he is seeing"*.

4.196 On 10th November Mr Owen sent a second email "*Dear Darren, Please supply by return the following: • the admin password for the Filemaker Database together with the Admin password for the Microsoft server running the Filemaker server software*". The claimant referred him back to Mr Orchard having given him that on 21st October 2015,

4.197 On 10th November the claimant received a letter from Mr Orchard acknowledging his grievance and resignation which included
"*You have suggested that you are providing six months notice. However, of course, your contract only requires you provide two months notice. Can you please clarify whether you are providing your contractual notice or whether you are providing six months notice?,* and "*once you are fit, that you will not be required to work your notice period*".

4.198 To "*safeguard*" his six months' contractual notice, his wife attended the respondent's premises on 11th November with the original, signed copy of his 2008 Contract of Employment. He considers this to have been a deliberate attempt to cause him further stress and anxiety. We accept Mr Orchard's explanation the contractual discussions had been so convoluted he thought the notice was just two months and, as he was at the time under enormous pressure, he failed to check.

4.199. On 10th November 2015, the claimant's automatic Out of Office details were changed to: "*As of November 10 I am no longer working at Architectural Poweder (sic) Coatings. If you have any queries, please call Robin Orchard at 0191 499 0770 or email robin@apc-gb.com*". The claimant says this was incorrect and unhelpful. **It was neither.** He was still employed but not working, and it was essential customers should know who to contact.

4.200. Six paragraphs of the claimant's closing submissions concerned what he says was an unreasonable investigation into his grievance by the respondent's appointed independent investigator, Mrs. Helen McDougall. We asked him if he was alleging any

form of discrimination and he confirmed he was not. It cannot be relevant to his decision to resign as it postdates it, so we do not deal with it .

## 5. Conclusions

5.1. The express terms of the claimant's contract as MD Designate were

(a) as to job duties and authority:--- to manage and direct the day to day running of the company, including all staff except Ms Blaylock, subject to oversight by the "Board" which in practice meant Mr Orchard as the only other director who held a casting vote . He was not **yet** authorised to do so to the exclusion of Mr Orchard until an exit and succession plan which was contractually binding was agreed in detail. It never was.

(b) as to profit share -- he was to be paid 20% of the profit as shown in the management accounts quarterly on a " running account" basis as described in our findings of fact

(c) as to holiday pay -- his entitlement was 33 days including statutory holiday with no carry forward unless required by law

(d) as to pay increases -- **only** to have it **reviewed** at intervals.

5.2. The respondent did not commit fundamental breaches of any such express terms,

5.3. As to terms implied by law other than the implied term of mutual trust and confidence

5.3.1. WA Goold (Pearmak) Ltd v McConnell 1995 IRLR 516, implies a duty to afford a reasonable opportunity to employees to obtain redress of any grievance promptly. In that case, two salesmen raised a grievance about changes to sales methods which had the effect of reducing their salaries. The salesmen concerned were "blocked" from even seeing the relevant manager by his PA. It was far more than an employer trying to persuade an employee his concerns should be dealt with informally, or held in abeyance in the wider interests of the company, or "made to go away" when it would be spotted on due diligence. There was no fundamental breach of that term in this case.

5.3.2. In Malik-v-BCCI the business of BCCI was being run dishonestly and everyone involved was tarnished by that. It was far more than a business being run in **questionable** compliance with some statutory regulations about transport or health and safety. There was no fundamental breach of that term in this case.

5.3.3. The claimant believes the respondent failed in its common law duty implied into the contract (and its statutory duty under the Health and Safety at Work Act 1974) to take reasonable care of his health and safety where there was a real risk of foreseeable psychiatric injury. He had two periods of absence in 2015 but an otherwise good sickness record. The second absence was, he argues, especially foreseeable given its proximity to, and similarity in circumstances to, the first. He cites in his submissions Barber v Somerset County Council from which we set out passages per Hale LJ earlier. We reject his submission . As said earlier GP's will give sick notes for "work related stress" and/or "depression" based on the patient's account of how they feel. Not only was the timing of the January absence consistent with the claimant having a fit of pique in his long running

battle with Mr Orchard over the management of Ms Blaylock, he was writing long, cogent and confrontational e-mails while on sick leave . When he returned on 2nd March he appeared to be "firing on all cylinders" and continued to until the next incident in which he felt undermined, the departure of Mr Dent. The claimant says Mr. Owen in evidence categorised his absences due to work-related stress and depression as "negotiating tactics" which displays cynicism about Asperger's and mental health. We disagree. That is exactly how they appeared. For these reasons, and those given in the discrimination claims below, we find no breach of this implied term.

5.4. We conclude the respondent, did not **without reasonable and proper cause**, conduct itself in such a manner calculated or likely to destroy or seriously damage the relationship of mutual confidence and trust between itself and the claimant. Our reasoning is the same as for our conclusions that the acts of which the claimant complains under the EqA were a proportionate means of achieving a legitimate aim, to which we will come shortly.

5.5. As there is no fundamental breach, there was no dismissal.

5.6. The claimant was at all material times a disabled person. We think we have said enough in Part 3 to justify that conclusion, and emphasise that Part contains largely the claimant's description of himself. Asperger's has had, and continues to have, a devastating impact of his life to a greater degree than apparent when he was at work.

5.7. We deal first with direct discrimination under section 13. Our conclusion is plainly none occurred. The claimant's submissions show how even a very intelligent person who has done legal research has difficulty navigating the difference which has been brought into the law in the last decade. The claimant says:
*The hypothetical comparator Managing Director would not have the symptom of, "black and white thinking", albeit this is one that the Claimant did not recognise in himself then, but has come to do so when thought of in terms of rule-based behaviour, in which things are either right or wrong. The hypothetical comparator Managing Director would not be proscriptive and rule-based to an untypical degree or show the attendant issues therefrom.*
*The Claimant suggests that direct discrimination is demonstrated.*
*The Claimant cannot demonstrate that discrimination arising from disability is demonstrated.*

5.8. Black and White Thinking is **not** exclusive to people with Asperger's .The same can be said of many of the claimant's other behaviours. The comparator is someone who behaved the same but for different reasons, for example due to a mental impairment such as Obsessive Compulsive Disorder or simply as a manifestation of personality. The commonest cases of direct discrimination are where less favourable treatment results from stereotypical assumptions that because a person has a particular disability he will behave in a certain way. Aylott was such a case, this case is not.

5.9. We accept the following passages from Mr Orchard's statement

*123 .. At the highest level I valued Darren's contribution to the company and consistently promoted him over a period of time. I wanted to retire and leave Darren to run 'my baby'.*

*I wanted to give him control over the company which was to provide me with a comfortable retirement.*

*124 I had certain concerns about Darren. I felt that Darren belittled me and did not treat me with any respect. I did not entirely trust him to always act in the best interests of the company. I felt he was often just concerned with his own personal financial interests. I was concerned that sometimes Darren had erratic hours of work. I wanted him, for the good of himself and the company, to delegate.*

*125 I was concerned that Darren formed a view about people and things and that he could not be shaken from that view and then he suddenly changed to adopt almost the opposite view point. This was most pronounced with people. An employee was the worst employee and he wanted to dismiss and then after a very short while that person was the best employee – or vice versa. This meant that the company experienced chronic staff turnover and often decisions were just not fair and just.*

*126. I really do not know if any of these concerns I had were in any way linked to Darren's Asperger's. I do not think they were. But my approach with Darren was the same as I would have adopted with anyone else, in that to give up control of my company, I wanted a very clear plan to be agreed. Unfortunately that plan could not be agreed with Darren and he decided to resign his employment.*

5.10. The reason for all treatment of which the claimant objects was not Asperger's in itself but the behaviour which arose, or may have arisen, in consequence of Asperger's. If the claimant has an arguable case, it is under s15 not s13. The claimant also compares the management of his grievance in January 2015 with that of those raised by Ms Forster in 2008 and Mr Dent in 2015. Any differences were in no sense due to his Asperger's but to fundamental differences between the subject matter of the grievances. His grievance was an objection to Mr Orchard allowing Ms Blaylock to work from home. Mr Dent resigned in October 2015 and, like. Ms Forster, alleged bullying.

5.11. The approach we take to the remaining claims may seem odd to lawyers on the earlier parts of the legal tests, but we have a reason for it. The findings we make as to proportionate means of achieving a legitimate aim, the steps which could have been taken under section 20 and the reasonableness of such steps, are so clear that, in our judgment, if we "give the benefit of the doubt" to the claimant on all other contentious questions, we would still we reach the same conclusion . We see no benefit in burdening a litigant in person with detailed discussion of legal issues which do not change the result, but we must touch on them briefly. They are (a) what are the "somethings" which arise in consequence of Asperger's (b) whether and when did the respondent have actual or constructive knowledge of (i) the disability and (ii) its effects and (c) what treatment under s15 was " unfavourable ".

5.12. As for (a), the main behaviours which arose, or may have arisen, in consequence of Asperger's can be broken down into
(a) lack of intuition and inability to "read" others
(b) communication difficulties he overcame so well at work that no-one would guess he had any
(c) literalism
(d) rudeness

(e) "Black and White" thinking
(f) perseveration
(g) perfectionism
(h) "mood swings"
(i) viewing remuneration as a measure of his "worth"

5.13. Our attempt to break down the symptoms and effects is , we hope, helpful, but does not adequately reflect how complex a Syndrome Asperger's is . It is the combined effects which produce the behaviours. The behaviour we cannot find to be something arising in consequence of Asperger's is what we have termed "Self Contradiction" The more graphic phrase recently used in a judgment by Lady Justice Smith is "*wanting the ha'penny **and** the bun*". This was a big problem for the respondent. In the contract negotiations he wanted the best of the terms on offer as MD, mainly salary, the best of the terms he had as a comparatively junior employee and no additional restraints. As regards Mr Orchard, he wanted him not to "interfere", but be there whenever his workload got too heavy .In these conclusions, **we will nevertheless presume all the behaviours which caused the respondent to act as they did towards the claimant arose in consequence of his Asperger's.**

5.14. As for (b) , under section 15 the respondent is not liable if it shows it did not know, and could not reasonably have been expected to know, the claimant had **the disability**. Knowledge of "the disability" in our view means more than knowledge of the "impairment". Being aware someone has a condition with a particular medical name does not mean the employer knows, or could reasonably be expected to know, how that condition limits in a more than trivial way the employee's ability to perform normal day to day activities and thus becomes a "disability". If we are wrong, an absence of actual or constructive knowledge of the effects must be relevant to whether what the respondent did which was unfavourable to the claimant was a proportionate means of achieving a legitimate aim.

5.14. Under s20/21 lack of knowledge of the effects is expressly a defence. Alam sets out the tests for the duty to arise. We find in most respects it did not. A common point made on behalf of claimants is that if the Tribunal spots in the evidence facts which show connections between the impairment and the disproportionate adverse impact of a PCP, so should the employer have spotted them. We disagree. We have training, experience, total focus over 15 days and a much better explanation from the claimant than he ever gave at work. Following Ridout the claimant must be taken very much as he presented himself. In paragraphs 3.2, 3.3, 3.9, 3.10., 3.11., 3.12., and 3.16, we have explained why the respondent did not and could not reasonably have been expected to know, limitations on the claimant's abilities were due to manifestations of Asperger's.

5.15. In particular, the respondent did not and could not reasonably have known:
(a) Perseveration was the cause of overwork
(b) Perseveration, perfectionism and black and white thinking caused an unbending approach eg to Health and Safety, staff performance and caused "mood swings"
(c) Viewing salary as a reflection of his "worth" as an employee caused him to present as greedy for money
(d) Lack of intuition, inability to see others point of view and literalism caused him to approach the whole contract negotiation in a way which reasonably to any objective observer appeared pedantic, self serving and downright awkward.

5.16. The only point upon which we find the respondent ought to have known his Asperger's provided an explanation for his behaviour was what the claimant concedes was rudeness in social communication, for example, not saying "good morning". This was not a problem for the Orchards or Mr Owen of whose acts and omissions complaint is made . Ms Blaylock and other colleagues found it offensive but she had no power to do anything about it so put up with it in silence. Like everyone else, she thought he was shy, and rude, by personality.

5.17. Spence explains why a failure to conduct assessments or obtain medical reports is not in itself a failure to make reasonable adjustments .However, had the respondent delved more deeply into Asperger's , they would have found the claimant could not avoid behaving as he did . The aims of the respondent required the claimant to have more autonomy and be able to exercise it in a balanced way, as we shall shortly explain. If Mrs Orchard did use the phrase "you lack the **attitude** for more automony", more research would have revealed she was one letter away from the truth, in that he lacked the **aptitude** for more autonomy. Attitude can be changed, aptitude generally cannot.

5.18. However, **we will presume** both (i) **the respondent knew** the behaviours which caused them to act as they did towards the claimant arose in consequence of his Asperger's and (ii) some or all of the PCP's it imposed, to which we will come shortly, **would place him at a substantial and particular comparative disadvantage because due to his Aspergers he would find it more difficult to comply with them.**

5.19. As for (c), under section 15, what treatment was "unfavourable"? As Mr Owen put it, how does offering someone more salary and status rank as unfavourable treatment? Objectively, we see his point. However, it may be Parliament intended us to ask only whether the claimant found treatment unfavourable. **We will presume** the latter and that **all the treatment to which the claimant objects counts as "unfavourable".**

5.20. As we explained in 2.37 above, if there was a failure to make reasonable adjustments, justification under s 15 is impossible. As Laws LJ said in Sanders, aspects of the case "run together". The PCP which the respondent applied, would have to any person who was to become MD, and its legitimate aim, can be expressed as follows , and contains positives ( what the MD is expected to do ) and negatives ( what he expected not to do ):--

In order to enable Mr Orchard to withdraw from day to day operational involvement and "retire" but receive sufficient dividends on his and his wife's shares to be rather like a "pension" the MD would have to be relied upon to run the company in such a way as to ensure it prospered, in the short and long term, by

(a) committing himself to a contract which protected both parties and, in return for much improved terms as to pay, contained obligations including restraint clauses, **not** insisting on signing only a version of a succession plan which was outdated, incomplete in detail, contained a clause which said it was not legally binding in all respects and stapling it to a contract entered into years earlier for a different job. (It is convenient to say now the respondent did provide a written statement of his terms of employment under Section 1 of the Employment Rights Act 1996 in March 2011 (para 4.60 above) and of changes to its essential terms as his employment status changed He was not prepared to accept as accurate anything else they tendered . His claim under s 38 of the 2002 Act fails).

(b) "managing " staff to ensure discipline and **adequate** performance **but with** recognition of their limitations and personal circumstances sufficient to ensure staff stability, loyalty and good morale are maintained , and **not** , for example (i) conduct an investigation into whether a young woman who claimed to have had a miscarriage actually had (ii) insist on a long serving employee repaying a mere 8.08 hours of overtaken holiday (iii) fail to make an effort to ensure a key employee returning to work on a phased basis after a long illness was welcomed back and had a suitable workstation (iv) have about half the staff on some form of warning or counselling programme.

(c) ensuring **enough** was spent on health and safety, IT and other "investment" of profit to ensure the company's future operational effectiveness **but not** spend whatever it took to achieve a "gold standard" when a cheaper step would have been sufficient thereby leaving insufficient cash to make profit share payments to staff, including himself ,or dividend payments to the shareholders . The claimant showed no recognition of or insight into the truth of Mr Orchard's comment (paragraph 4.132) that he had been unable to draw any dividend due to the company overdraft.

(d) work hard enough to achieve the above **but not** (i) work so many hours in his quest for perfection as a result of being unable to delegate that he would periodically be at risk of making himself ill (ii) fail to trust his staff so he could himself take a holiday without Mr Orchard having to "come out of retirement "to cover for him.

5.21. The claimant's main case on reasonable adjustments is centred on the trait of perseveration which he says compelled him to work unreasonable hours even when aware of the detriment to his own wellbeing. He says the respondent should have reduced his workload, but instead increased it and Mr Orchard **exploited** his perseveration for the respondent's gain. Nothing could be further from the truth even though we accept it is the claimant's genuine belief .The respondent made every effort to reduce his workload. Even when the contract negotiations were at an intense point on 11th January 2015, Mr Orchard's concern for the claimant is evident from his e-mail "*One point that we really need to look at in depth is how we reduce your hours to something more reasonable. You working yourself as hard as you do is not good for you, nor is it good for the company*.

5.22. On his own admission the claimant would continue to work past the point where it is reasonable to stop and he says, though the respondent tried to persuade him not to, it should have done more. **What more, we asked should this respondent have done?** He replied when he worked for a previous employer "on the clock", he was **forced** to go home. He suggested he could have been made to clock in and those records used at regular review meetings with him , and/or that he have his keys and remote IT access removed to prevent him working . This is wholly incompatible with an MD role.We have dealt with the two other practical steps he suggested at paragraph 4.98 (Mr Orchard making entries in the claimant's electronic diary) and paragraph 4.100 (Mr Orchard not "interrupting him" with queries) None of these steps would have been reasonable.

5.23. Nothing the respondent could have done would make the claimant **see for himself** the necessity to sign an effective binding contract was a condition precedent to him being confirmed as MD, given more autonomy and be put in a position where Mr Orchard could "exit" and leave the company in the hands of the claimant and/or others to whom he

delegated. If the claimant had been given the autonomy he asked for when he says he should have been, nothing the respondent could possibly have done would stop him
(a) managing staff in a way some would reasonably see as bullying. Had he been left to his own devices, Mr Dent, who had already left, would probably have claimed constructive dismissal and certainly would not have come back. Ms Blaylock would almost certainly have left and if she claimed constructive dismissal she would very probably have won. **Of the three people upon whose work the running of the company in the temporary absence of its MD would depend (Mr Pitt, Mr Dent and Ms Blaylock) two would have been driven out by the claimant's behaviour**
(b) prevented the claimant from working to the point of "meltdown" periodically, and ironically, the more times he went off sick, exposed the company to an allegation by him that it was failing to foresee the risk of him damaging his own health ( a Barber claim)
(c) missing the chance of future profitable work from such companies as FK Group due to his "black and white" thinking about the low profit work they wanted done presently .

5.24. If the behaviour of someone who produces good financial results becomes on occasions unfair, unreasonable and excessive , and no steps succeed in moderating that, the **proportionate , and only, course** is to limit the claimant's authority in key areas and , when necessary to intervene and overrule decisions he has made or is about to make . That is all the respondent did.

5.25. In so far as the respondent treated the claimant unfavourably because of something arising in consequence of his Asperger's or imposed a PCP which placed him at a particular disadvantage because he could not comply with it as easily as a person without Asperger's , we find it was a proportionate means of achieving a legitimate aim.

5.26. As for harassment, our observations also go to the proportionality point. Much of the conduct of which complaint is made did not "relate to" Asperger's at all. None of the conduct of which he complains was purposive and, though it had a harassing effect it was not reasonable to see it as such. In particular

(a) as for remarks about "black and white" thinking, even in the presence of others, the claimant himself says "*Rigidity in thought and behaviour is common in those with Asperger's*" . It is not reasonable to view as harassment a statement which is true and designed to help the claimant recognise and hopefully overcome, his difficulty.

(b) as for remarks about the claimant's perfectionism and high standards, including, "*Your problem is that you think nobody does it as well as you*", the claimant says "*People with Asperger's set themselves such high levels of attainment that anything that doesn't meet that level can cause them huge amounts of stress and anxiety. The smallest mistakes can upset a person with Asperger's Syndrome for days, and they can have a lot of difficulty forgiving themselves*". Perfectionism is not a trait exclusive to people with Asperger's. Neither is struggling to delegate, On a number of occasions Mr Orchard tried to help him delegate, and recognise needed to, in Mr Orchard's words *even if that meant accepting slightly poorer work than he might achieve himself.* Again, it is not reasonable to view as harassment a statement which is true and designed to help the claimant recognise and hopefully overcome his difficulty.

(c) Neither Mr nor Mrs Orchard referred to the claimant as unprofessional, because this was not the case. He was always well prepared and professional but had a view some

customers, particularly ones with whom Mr Orchard had a good personal relationship, were poor customers and the company should be pricing jobs so as not to win them. Mr Orchard felt the claimant was wrong and said so. It is not reasonable to view as harassment a statement of opinion by an experienced MD, who is still the major shareholder and director with a casting vote, which is true and designed to help the claimant see the benefit in taking a long term view of a customer's potential value

5.27. Cases where the disability and the job simply cannot be made to "match" are rare but do exist. We are not saying the claimant could never be a director of any company. His performance in the early years shows that when he has someone to whom he is subordinate, who can and does intervene to restrain the claimant's excesses of behaviour in such matters as staff discipline and his own overwork , his performance in other areas is so good as to attract tangible recognition . Had the respondent appreciated those excesses were such that nothing it or the claimant did could control them if he were given the "Number 1" role, it would not have appointed him to it. When the claimant was referring to previous employments in a subordinate role, our Employment Judge asked him why he thought he could undertake such a solitary a role as MD in a company where Mr Orchard would do as little as he aimed to do in retirement. The claimant replied it would not be solitary because he would have such a good team behind him. None of that team escaped his trenchant criticism. None of them would have been in a position to overrule him or force him to go home without taking work with him. His Asperger's has explained to us why behaviour, which in a neurotypical person would be unreasonable , bullying, avaricious and gratuitously awkward , is something he cannot help himself from doing . That explanation does not mean the respondent, or those with whom he worked, should reasonably be expected to put up with it.

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**T M GARNON EMPLOYMENT JUDGE**
**JUDGMENT SIGNED BY THE EMPLOYMENT JUDGE ON**
**26th July 2017**

**SENT TO THE PARTIES ON**
**26 July 2017**

**P Trewick**
**FOR THE TRIBUNAL OFFICE**