EMPLOYMENT TRIBUNALS

Claimant:		**Respondent:**
Mr B Kenbata	**v**	**London Borough of Brent**

Heard at:	Watford and In chambers	**On:** 10, 11, 12, 16,17, 18, 23 May 2017 **On:** 24 May 2017
Before:	**Employment Judge R Lewis** **Members: Mr S Bury and Mr A Kapur**	
Appearances		
For the Claimant:	Ms N Mallick (Counsel) [Not on 10, 11,12 May 2017]	
For the Respondent:	Mr A Smith (Counsel)	

RESERVED JUDGMENT

1. The claimant's claims of disability discrimination, including claims of harassment and victimisation, fail and are dismissed.

2. The claimant's claims of detriment as a result of public interest disclosure fail and are dismissed.

REASONS

1. This was the hearing of claims presented by the claimant on 6 November 2015 and 29 March 2016. They had been the subject of a case management hearing on 28 April 2016 and again on 9 February 2017, both before Employment Judge Henry. The present hearing dates were allocated at the February hearing, when both Counsel who appeared before us appeared before Judge Henry. We apologise to the parties that this Judgment has been delayed.

Case management

2. Judge Henry's order of February 2017 incorporated a list of issues [63.94 to 63.104]. The bundle also contained what we understood to be Counsels' agreed list of issues, which had been emailed to the tribunal and incorporated into the order [63.107 to 63.118]. The two lists were word for

word identical apart from being numbered differently. In these reasons, we refer to the numbering in Counsels' agreed version, which is appended to these reasons (ie 63.107-63.118), which we find easier to refer to. Nothing turns on the point except for convenience.

3. The present judge had no involvement with the case until shortly before the hearing. On 2 May and again on 9 May, the claimant emailed to the tribunal to state that Ms Mallick was not available on Monday 15 May due to another professional commitment, and asking the tribunal not to sit on that day. This request came to the judge too late to be dealt with. The judge understood from the correspondence that Ms Mallick was otherwise available for all the dates which had been fixed while she was present, and thought it best to leave the application to the claimant, or Counsel, to make at the start of the hearing.

4. On the first day of the hearing, Wednesday 10 May, Counsel did not attend. The claimant acted in person. He told us that Ms Mallick would not be available until the following Tuesday, and asked us not to adjourn, but to proceed to hear his evidence, such that Ms Mallick would be available to cross-examine.

5. On the following morning, the tribunal received an email from Ms Mallick's clerk, which gave a different version of events from that presented by the claimant. Ms Mallick wrote that she had not entered into a professional commitment to represent the claimant but in light of the circumstances, would represent the claimant from the fourth listed day onwards, as she did. When Ms Mallick did attend, we told her and we record that while the professional arrangements between her and her client were a matter for them, any difficulty which followed from their arrangements must fall upon the claimant and not on any other party.

6. We were grateful to Ms Mallick for taking up a burden which was not easy. She was of course at the disadvantage of not having heard the claimant give evidence. We noted that the claimant took some notes during his evidence, but did not act on the tribunal's reminder that he had the right to be accompanied by a note-taker or friend during his evidence.

7. As the tribunal was in the event only available for eight of the ten listed days, and in light of the circumstances, this hearing was limited to liability only.

8. At the start of the hearing, the claimant presented to the tribunal a document which he called an opening statement. In it, he asked the tribunal to address the continuing consequences of the events which were in the list of issues. It was, in effect, an application to amend by the addition of issues spanning the period from about March 2016 to spring 2017 and it was rejected. It would have rendered the present hearing unviable, and overturned the discipline of case management of the previous fifteen months. The additional issues have not been the subject of pleading, case management, disclosure or witness evidence.

9. The tribunal had three lever arch files of papers, about 1,000 pages. As a working bundle, it was in roughly chronological form, but our difficulty, and that of the parties, was compounded by the inclusion of significant numbers of irrelevant documents; considerable duplication and by frequent departures from chronology. A small core bundle would have assisted everyone.

10. After opening case management on the first day, the tribunal read witness statements and some portions of the bundle. The claimant gave evidence for the best part of two days. The adjustments which he requested, which were accommodated, were the provision of a particular type of chair, and more frequent breaks than might be usual. The claimant had also submitted a witness statement from a GMB officer, Mr Euton Stewart. Mr Smith had no questions for Mr Stewart, and, once signed, the statement was accepted in evidence.

11. The respondent called 11 witnesses, who gave evidence over three days. We were grateful to both Counsel for enabling the witness evidence to be concluded within that period.

12. The witnesses, in order of giving evidence, were the following:

- Ms Karina Wane, Head of Community Protection, who investigated and reported on the claimant's grievance and on matters which arose in the course of her investigation;
- Ms Janet Daley, Senior HR Advisor, who supported Ms Wane in the above;
- Mr Sayed Yusuf, Traffic Engineer, who brought grievances against the claimant and against whom the claimant also complained;
- Mr Sahil Dalsania, formerly employed by the respondent in Traffic Orders, who had been named by both the claimant and Mr Yusuf as an eye witness to the events of 18 September 2015;
- Mr Amir Amirhosseini, Team Leader, who was the claimant's line manager between April and July 2015 on an acting basis;
- Mr Sandor Fazekas, Project Development Manager, who was the line manager of the claimant's line managers (i.e. Ms Barnes, Mr Amirhosseini and Mr Dryden);
- Mr John Dryden, Team Leader, and the claimant's line manager in succession to Mr Amirhosseini since 6 July 2015;
- Mr Tony Kennedy, Head of Service, to whom Mr Fazekas reported, and who suspended the claimant in 2015;
- Ms Paulette Weekes, Consultation Officer, whose professional interaction with the claimant led her to report his actions to more senior management;
- Mr Solomon Nere, Senior Traffic Engineer, whose professional interaction with the claimant led him to report his actions to more senior management;

- Ms Victoria Basham, Senior HR Advisor, who had supported Mr Kennedy, and who supported Mr Gavin Moore in an investigation into allegations made by the claimant against Ms Weekes, and supported Mr Robert Anderton in the disciplinary investigation recommended by Ms Wane.

13. The claimant asked the tribunal to exclude the witness statement and evidence of Mr Dalsania, on the basis that it had been served later than the timetable set by Judge Henry. Mr Dalsania's statement was one page, and its purpose was in effect to verify remarks which he had made at an interview in October 2015 [375], with which the claimant was fully familiar. Mr Smith explained that Mr Dalsania's statement had been served late because of his work commitments with his new employer. It seemed to us that the balance of justice lay entirely in admitting the evidence and that the claimant was not prejudiced by our doing so.

14. The claimant's witness statement was 125 pages long. It was repetitive, as portions of it were cut and pasted to advance the claimant's different legal claims brought under the same factual heading. It went much wider than the remit of the list of issues. It seemed to us that the correct approach was that cross-examination should be confined to the list of issues, and that Counsel would not be criticised for failing to address every issue raised in such a long statement. Matters which were not challenged would not be taken to have been agreed or conceded. The same approach of course applied to Ms Mallick's cross-examination of the respondent's witnesses, although in both instances we stated that it would be helpful to complete the narrative of matters about which we heard some evidence.

15. The list of issues was long and diffuse. It contained a number of self-evident factual mistakes (names and dates). It also contained a number of jurisdictional gateways. The logic of our findings, notably on disability, is that the tribunal did not have jurisdiction to hear considerable portions of these claims. We have proceeded to make findings and conclusions on those matters nevertheless, first in case we are later found to have been wrong on any of those points; and secondly because it is in the interests of justice to do so, in light of having heard the evidence on them at this hearing.

16. A further matter of case management arose on the final day of the hearing, when the tribunal heard submissions. The written submissions of Ms Mallick referred to the respondent having conceded that the claimant was disabled by virtue of mental health and then withdrawn the concession. Mr Smith denied that any such concession had taken place.

17. After hearing some argument, and referring to the tribunal file, the judge made the following note, which was read to the parties, who had no further comment:

> "Claimant's Counsel has since February 2017 said that at the preliminary hearing in April 2016, the respondent conceded that the claimant by virtue of mental

> health met the section 6 definition of disability. The respondent's position has been that it did not make any such concession and that Judge Henry's order of April 2016 was wrong. The agreed list of issues of February 2017 did not and does not require the tribunal to decide any jurisdictional issue which might arise."

Executive summary

18. In light of the length of this document, it might be helpful to set out a short summary. We were mainly concerned with events in the period between June and December 2015. The claimant was suspended early in December 2015, and remains employed by Brent, but has not returned to work since suspension.

19. The claimant joined the employment of the London Borough of Brent in late 2014, on the declared understanding that as a result of an arthritic condition, he met the legal definition of a person with a disability. The claimant has also asserted that by virtue of mental or psychiatric conditions, he met the definition of a person with a disability. We find on the evidence that he did not, and that therefore all claims based on mental disability fail. The list of issues referred repeatedly to perception and stereotyping. We were concerned to use those words correctly. Ms Mallick did not advance an alternative claim that the claimant was not in fact mentally disabled, but was perceived as such and discriminated against on that basis. We find that he was not perceived as such. We find that he was not treated in any respect on the basis of a stereotype about disability.

20. The claimant claimed that his formal grievance of 5 August 2015 was both a protected act for the purposes of the Equality Act, and a protected disclosure for the purposes of the "whistleblowing" provisions of the Employment Rights Act. We find that the 5 August grievance was a protected act, but not a protected disclosure. The claimant asserted that his first claim to the employment tribunal (presented on 6 November 2015) was a protected act and a protected disclosure, and we agree. By email of 28 October 2015, the claimant reported allegations against Ms Weekes, which he claimed constituted a protected disclosure. We disagree, and find that the claimant did not have a reasonable belief in the allegations, such as to meet the necessary legal test.

21. The claimant complained of three failures to make reasonable adjustment, two relating to his admitted arthritic disability, and one to his mental health. Our finding is that none of the proposed adjustments constituted a reasonable adjustment.

22. The heart of this case was that the claimant complained that a sequence of events in which he was involved, running primarily from 8 June to about 17 December 2015 were each, for different reasons, forms of disability discrimination, including harassment and/or victimisation; and/or detriments on grounds of public interest disclosure. For reasons which we set out below, we do not accept the claimant's allegations or analysis, and prefer the evidence of the respondent. We find that the claimant was in

general not a reliable witness, and that the respondents' witnesses were reliable, and sometimes impressive. In each instance, we find either that the event complained of did not happen; and/or did not happen as the claimant described it; and/or that we accept the respondent's stated non-discriminatory reasons for the event. We find that all the events of which the claimant complains were untainted by any consideration of disability in any respect, or by any protected act or disclosure. All the claimant's allegations fail.

General observations

23. We preface our findings of fact with general observations.

24. As is usual in the work of the tribunal, we heard evidence on a wide range of matters, some of it in some depth. Where we make no finding on a matter about which we heard, or where we do so but without going to the depth to which the evidence took us, that should not be taken as oversight or omission, but as a true reflection of the extent to which the point was of assistance to the tribunal.

25. While that remark is commonplace in our work, we record a matter which is far from commonplace, namely the conspicuous ill will shown throughout the hearing between the representatives. We record that that was the case; that it was unhelpful; and beyond that, we make no further comment or finding about it.

26. In considering the evidence in general, we have attached considerable weight to contemporaneous items, whether they were notes or emails (making allowance for the obvious problems in email communication). We attach some weight to the records made by Ms Wane and Ms Daley in October 2015 of their investigations, because the events were relatively fresh in the minds of those whom they interviewed at the time: their focus was an event two or three weeks before. Ms Mallick invited us to give more weight to the notes made in February 2017 of statements given by witnesses to the claimant's disciplinary enquiry. These were notes made up to 18 months after the event, and we attach little or no weight to minor or verbal inconsistencies between what the witness may have said at that enquiry, when compared with an email sent at a much earlier date. We also bear in mind that almost all the notes we saw were not transcripts but summaries, and we do not expect them to be examined to the standard of a forensic transcript.

27. The matters before us arose mainly between January and December 2015. They cannot have pre-dated the date the claimant started his employment, and they do not postdate presentation of the second ET1 (in the absence of any application to amend). Evidence of events before December 2014 or after March 2016 may assist the tribunal to see a full picture. The first event of discrimination which we were asked to consider allegedly took place on 8 June 2015. Although the respondent had pleaded limitation in defence, Mr Smith said very little about it. Day A was

7 September and Day B was 7 October, and the first claim was presented on 4 November 2015. Events before June 2015 may constitute relevant background evidence.

28. In our analysis, we have noted that there were a number of events where the claimant asked the tribunal to consider that up to six separate heads of claim attached to a single incident. Rather than repeat ourselves, we have referred to all the unlawful factors and heads of claim collectively as the "extraneous" considerations or factors in this judgment. Where therefore we say that a decision was untainted by any extraneous matter or factor or consideration, we mean, in each case, that it was not an act of direct discrimination or harassment, whether on grounds of physical disability or mental disability; was not because of something arising in consequence of disability; was not related to a failure to make a reasonable adjustment; and was not because of any protected act or protected disclosure.

29. We have below departed from strict chronology where we think that makes our reasons easier to follow. We have found it easier to set out our conclusions on each issue, or group of issues, as we go along.

Credibility

30. In deciding this case, it has been our responsibility to assess the evidence of the claimant against that of eleven witnesses for the respondent. In so doing, we take care to make a number of allowances. We accept that the procedure of the employment tribunal is of itself artificial, stressful, and possibly unfamiliar (although not to this claimant), and we should therefore not attach particular weight to any discomfort manifested in the tribunal by a party. That is particularly so where, on the first three days of the hearing, the claimant attended without a representative or companion. We must take care also to ensure that any concerns about the claimant's arrangements with Ms Mallick do not affect our assessment of credibility: they are separate matters. When we read his emails (which were a substantial element of the evidence in this case), we know that email is not a medium which encourages reflection, or shows at its best in the scrutiny of legal proceedings. We must finally treat with caution the number of witnesses; it is our responsibility to assess the quality of evidence, not its quantity.

31. The claimant represented himself on the first day, and gave evidence for two days. He was present throughout the rest of the hearing. He at all times conducted himself entirely appropriately and respectfully throughout the hearing. Almost all the documentation in the bundle was either written by the claimant or about him.

32. When we set out our findings of fact, we note that the factual issues arose in June 2015 and thereafter. There is a distinction between three alleged events in June, which the claimant asserted happened, and the respondent denied having happened; and the great majority of the

subsequent events, where it is common ground that a primary event took place, but the dispute is as to the interpretation of the event.

33. Where we have to consider a dispute of evidence between the claimant and any other witness on behalf of the respondent, we prefer the evidence of another witness or witnesses, and we do not find the claimant to be a reliable witness, for a number of factors which we now set out. In so saying, we do not say that all of the below factors applied on each occasion or to each matter on which the claimant gave evidence. Taken cumulatively, they pervaded his evidence, such as to lead us to the overarching conclusion that he was not a credible witness.

34. While we treat with caution the numerical imbalance between the claimant and the witnesses on behalf of the respondent, we note that the imbalance reflects a consistent theme of the respondent's case, which was that the claimant had difficulty in making and maintaining professional working relationships with colleagues, including his line managers.

35. We note the absence of any positive evidence in support of any part of the claimant's case, including (e.g. 8 June 2015) matters on which the claimant said there were up to 20 independent witnesses.

36. The claimant pitched his case high. We mean by this that the claimant's case was an un-nuanced assertion of serious allegations. Two obvious examples were the assertions, repeated in closing by Counsel, that the only reason for Mr Nere's email of 3 September was the claimant's disability; and that the only reason for his suspension was his disability. We are sceptical about that approach, as it does not seem to us to reflect the reality of complex, multi-factorial decision making.

37. The claimant and Ms Mallick advanced assumptions and syllogisms unsupported by evidence. On occasion, the claimant mistook sequence for causation. The claimant asserted that when he was off sick, he was talked about by colleagues; that his absences were noted and discussed; that his colleagues knew that he had a mental health condition; that they therefore knew that he was disabled; and that they therefore spoke in hostile terms about his disability and him as an individual. By definition, all of these assertions arose from events of which the claimant could have no personal knowledge. None of them was supported by evidence. The claimant put forward no allegation of having been spoken to in a hostile manner about his health. (In so saying, we note our finding as to the 24 July conversation).

38. The claimant speculated about linkage between diffuse and diverse matters, and in doing so at times relied on unsustainable interpretations. Ms Mallick gave a striking example in closing, when she asserted that references in the claimant's occupational health report in July (144-5) to 'fatigue', which in context clearly referred to the fatigue caused by his spinal condition, should be read as implying the mental condition of fatigue; and that as fatigue is also a symptom of a mental health disability,

the report should be read to refer to the claimant's mental health. That line of argument was simply unsustainable.

39. The claimant made a number of assertions in evidence about matters which he could never prove. In particular, he analysed the motives and thought processes of other people in ways which were inherently incapable of proof. When cross-examined about Ms Weekes' email of 27 October [246], the claimant, according to the judge's notes, stated as follows:

> "I don't accept that she genuinely felt what she said at page 246. It was not an honest account. She may have been upset. I don't believe she believed I was rude. I am not in a position to know if she felt beneath me. .. I don't know if she felt I was discourteous. I don't think she believed I was disrespectful, she is lying. The words "intolerable and stressful" were an exaggeration based on her perception. I don't know if she felt stressed."

40. We find that the claimant had no basis for challenging any aspect of Ms Weekes' account of her own thoughts and feelings.

41. The claimant criticised those involved in his line management for on occasion involving other line managers and on occasion not doing so; and on occasion engaging formal process and on other occasions engaging informal process. He showed no understanding that managers faced with unpalatable alternatives are liable to be criticised, whatever they do. He failed to appreciate the value given to individual management discretion; the importance of proper line management structures; and the inherent undesirability of formal recording of routine interactions.

42. There were aspects of the claimant's evidence which failed to represent reality. The claimant asserted for example that because he left work early for counselling for a six week period in August/September 2015, his colleagues noticed that he was absent, knew why he was absent, and inferred that he had a mental health disability. In fact, the claimant received this counselling only on days when he was working at home, would therefore not have been seen to leave work early, and his early finishes were not readily visible.

43. The claimant brought to the case expectations of how he should be managed which were unrealistic: he can, for example, have had no realistic or legitimate expectation that he should be involved or consulted every time a colleague wanted to talk to a manager about the pressures of working with him. In that context, the evidence showed a marked contrast between his expectations of how he should have been treated and his treatment of others. We noted a striking instance in a short exchange with Ms Weekes on 17 September (206). In reply to Ms Weekes' email saying, "As you are aware I am unable to carry the heavy amount of consultation returns due to my ongoing medical issues," the claimant replied, "I had no idea about your back problem but I suggest you discuss this with John who is your manager. John can then advise you as to what you do with your

scanning responsibilities." One can only speculate about how the claimant would have responded if he had been the recipient, not the sender, of an email which was equally curt and dismissive about a health issue.

44. The claimant's evidence and submissions at time verged on the absurd in their unrealism. We refer for example to his complaints that Mr Amirhosseini welcomed him back to work on 24 July.

45. The claimant gave no countervailing weight or analysis to factual matters which did not support his case. We noted for example that although his complaint was that a large number of colleagues were hostile to him because of a mental health disability, in part because of his absences due to physical disability, he did not analyse the undisputed facts which were that the interviewing panel which appointed him was aware of his physical disability and undertook pre-employment occupational health assessment; that his initial line manager was disabled and known to be disabled; and that Mr Nere, with whom he had the exchange on 3 September, gave evidence of the significant support which he had had from the respondent through many years of chronic disability.

46. The claimant in general showed a striking lack of insight. We mean by this a failure to perceive, reflect upon, analyse and understand the impact of his behaviour on others, including the impact of the language of his emails. We noted that in almost every instance, he maintained that failure in these proceedings, despite the passage of time and the weight of evidence which he had had the opportunity to consider.

47. The claimant and Ms Mallick at times used language so imprecisely as to create a risk of misleading. They both used the words 'stress', 'depression', 'anxiety', 'mental health', and 'disability' as if they formed an unalterable sequence, each of which followed inescapably from the other. The words are not synonymous, and do not necessarily follow in a sequence.

48. In general, we find that the respondent's witnesses gave evidence which was logical, measured and consistent with email and other records created at or close to the time of the events. It is no criticism of any other witness to say that we found the evidence of Mr Dryden, Ms Weekes and Mr Yusuf particularly impressive. They conveyed to us their sense of the difficulties of working with the claimant in a manner which appeared thoughtful and balanced. While each plainly had strong feelings about the events before us, we find that they did not allow their feelings to influence their evidence to the tribunal.

Legal framework

49. We briefly set out the legal framework. The claimant's complaints of discrimination were brought solely under the disability provisions of the Equality Act 2010. The claimant must prove that he was a person to whom section 6 of the Act applied at the material time. The material time was

when the acts of discrimination were alleged to have occurred, and although the pleaded list referred to March 2016, the reality of the evidence was that the acts complained of ran from 8 June 2015 to early January 2016, by which time Mr Kennedy had refused the claimant's application to reconsider his suspension.

50. Section 6 provides as follows so far as material:

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

51. Schedule 1 of the same Act provides guidance on the determination of disability. The burden of proof rests on the claimant to show that he met the section 6 definition, and we do not accept Ms Mallick's submission that it was for the tribunal to undertake an inquisitorial enquiry.

52. The issue before us related to the claimant's mental disability, and we were referred in submission to Herry v Dudley MBC [2016] UKEAT/0100/16, in which the Employment Appeal Tribunal in short stated:

> "Unhappiness with a decision or a colleague, a tendency to nurse grievances, or a refusal to compromise (if these or similar findings are made by an employment tribunal) are not of themselves mental impairments: they may simply reflect a person's character or personality. Any medical evidence in support of a diagnosis of mental impairment must of course be considered by an employment tribunal with great care…"

53. This hearing did not proceed on the alternative footing that section 6 protection is afforded even if a claimant is not a disabled person within that definition, but is perceived to be.

54. The claimant brought claims under multiple provisions of the Act, applying different sections of the Act to the same factual event on a number of occasions. He complained of direct discrimination contrary to section 13, which states that:

> "A person discriminates against another if, because of a protected characteristic, A treat B less favourably than A treats or would treat others."

55. When considering the application in particular of section 13, it is necessary to bear in mind the necessity set out in section 23 for like with like comparison:

> "On a comparison of cases for the purposes of section 13… there must be no material difference between the circumstances relating to each case."
>
> (Section 23(2) did not on the facts of this case appear to arise.)

56. Relying on authority, such as Amnesty International v Ahmed [2009] IRLR 884, Mr Smith reminded the tribunal that in a case of direct discrimination, the question for consideration is often usefully summarised as enquiry into the reason why the treatment complained of took place. We found that approach particularly useful.

57. Section 136 provides:

> "If there are facts from which the court could decide. In the absence of any other explanation, that a person contravened the provision concerned, the court must hold that the contravention occurred."

It is trite that the tribunal must first find facts from which it could infer that unlawful discrimination had taken place; thereafter, the burden shifts and the tribunal must consider whether the respondent's explanation is adequate and stands free of the protected characteristic.

58. Save for the application of section 6, the above principles apply equally to the claims of direct discrimination on grounds of physical and mental disability.

59. The claimant also brought claims of harassment under section 26 of the Act. The section provides that: "A person harasses another if [he] engages in unwanted conduct related to a relevant protected characteristic" which has the purpose or effect of violating dignity or creating a hostile environment. The claimant in cross-examination stated that his case was based on purpose.

60. The task of the tribunal is, as before, to find facts and whether the action complained of relates to the protected characteristic. It must not be over-sensitive, and it must not trivialise the language of the legislation. In considering the effect, it must have regard to section 26(4) which requires a balance of the subjective perception of the claimant, the other circumstances of the case, and the objective assessment of reasonableness conducted by the tribunal.

61. The claimant brought claims under section 15 which provides: "A person discriminates against a disabled person if A treats B unfavourably because of something arising in consequence of B's disability" and the respondent cannot then justify the treatment. In such a case, it is important to analyse the reason for the treatment complained of; to decide whether it was indeed something arising in consequence of disability; and then to consider the separate steps of justification. The tribunal must find that the treatment complained of was unfavourable and that it was in fact because of something arising in consequence of disability.

62. Analysis of justification requires the tribunal to find as fact whether the treatment was causally related to an aim of the respondent; was the aim a legitimate one; and was the treatment proportionate to the aim, i.e. no more discriminatory than necessary (we refer to the judgments of

Baroness Hale in Homer v West Yorkshire Police [2012] UKSC 15, and confirmed in Essop v Home Office [2017] UKSC 27).

63. The claimant also brought claims of victimisation under section 27. The section provides that: "A person victimises another person if A subjects B to a detriment because B does a protected act." Section 27(2) defines a protected act in very wide terms indeed. It is clear, notably from section 27(2)(c) and (d) that a claimant need only engage the concept of any form of discrimination to enjoy victimisation protection. Section 27(3) provides: "Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or if the allegation is made, in bad faith." We take the word "false" to mean inaccurate or untrue, without implying deliberate falsehood. We take the words "in bad faith" to mean for a malicious purpose, or for some purpose other than the furtherance of the complaint in question.

64. Although the respondent raised a limitation defence throughout the pleading, Mr Smith said almost nothing about it and did not pursue the point with any enthusiasm.

65. The claim was also brought under the public interest disclosure (whistleblowing) provisions of the Employment Rights Act 1996. The two material sections are section 43B of that Act which defines a qualifying disclosure as one which "means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following." There are then six categories, of which the claimant's allegations appeared at best to engage categories (a), (b) and (d), which we summarise as commission of a criminal offence; breach of a legal obligation; and endangerment to the health and safety of any individual.

66. Subject to that definition, the claims were brought under section 47B which provides that "a worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure."

Mental health / disability

67. We now deal with our findings on whether the claimant at the material time met the section 6 definition of disability as a result of his mental health. We also deal with the related question of if so, did the respondent know of it, or could the respondent reasonably have been expected to know?

68. At or about the time of taking up post, the claimant concluded a period of five sessions of CBT. On 30 December 2014, the therapist, Mr Cox, wrote to the claimant, copied to his GP [96]. The letter aimed to summarise the treatment and discharge the claimant from it. The claimant placed huge weight on it. Mr Cox wrote that he wanted to describe "work on your feelings of anxiety, stress and low mood".

69. The letter describes the nature of the work. It recorded the following: "Questionnaires completed at each session indicate that your levels of anxiety and depression, which initially decreased somewhat, rose towards the end of therapy. Overall, levels of anxiety symptoms remained in the severe range, while depressive symptoms rose from the moderate to moderately severe range. These scores were in line with your reports of anxiety increasing as you started your new job."

70. The letter concluded with recommendations for ways of maintaining improvement. It closed the referral to Mr Cox's service. We note that a few words of the original letter were redacted in our copy.

71. The claimant completed an application form in which he indicated that he had a physical disability and made no reference to mental health (69).

72. There was some dispute as to the claimant's absences which he described as attributable to stress. The claimant was absent from work for three working days between Thursday 12 and 16 March 2015. At the time, he recorded the reason as "fatigued and experiencing back pain" [107 to 107A]. On 8 June, Mr Amirhosseini recorded the absence as attributable to stress [116]. We find that that was incorrect information given to Mr Amirhosseini by the claimant, inconsistent with what he wrote on the day of absence.

73. The claimant was off work on 30 March. He emailed Ms Barnes, his then line manager, that the reason was "I am feeling quite stressed today due to non work related issues." [110]. The claimant was absent for one day on 1 June, and the contemporaneous emails were incomplete [112] but subsequently recorded that absence as attributable to abdominal pain [116].

74. The claimant had an occupational health referral in late July, following his return from an arthritic-related absence. In taking history, OH recorded: "Anxiety and depression Nil meds" [474S]. On 10 August, the claimant emailed Mr Dryden, his then line manager, to say "I am unable to attend work today due to work related stress" [163]. Mr Dryden replied straight away and the same morning wrote to the claimant "HR have suggested that you might benefit from a stress risk assessment … Let me know if you would like me to arrange this." [164]. That was a good example of what Mr Smith in submission referred to as best practice by management. The claimant did not take up the offer until later in September.

75. As a result of the physical disability, the claimant was from late July permitted to work at home on Wednesdays. The claimant was off work due to work-related stress on 21 August and on his return reported to Mr Dryden that he would shortly begin "six counselling sessions to help me deal with work-related stress associated with the grievances I have registered with the council" [218]. He asked if he could finish work early on Wednesday afternoons. His core hours continued until 4.00 pm, and we accept that he finished at 3.30 pm on five of the Wednesdays and at 3.00

pm on a sixth. These were all days when the claimant was working at home. Mr Dryden agreed to all of these arrangements, and did not ask for any documentary verification of the counselling. We have not seen any such documentation.

76. On 21 September, Mr Dryden referred the claimant for a stress-related assessment (the date follows straight after the kicking incident to which we refer below). However, after a meeting with the OH advisor, Mr Ciccone, Mr Ciccone reported to Mr Dryden: "Unfortunately he did not wish to open up about the issues that were causing him stress and upset. He stated that he will talk to me about these at another time but wanted to get them resolved before doing so." [371]. Nothing further came of this. In the event, the claimant was not referred to OH for stress until after his suspension at the end of December 2015.

77. After the claimant was suspended, and almost after the events with which we were concerned, we noted the following. The claimant's GP, Dr Turner, wrote To Whom It May Concern on 8 January 2016. Although in time the first document before us signed by a doctor, it takes the matter no further forward, as it simply repeats the claimant's feelings and narrative. It contains no diagnosis, and no indication of treatment. [410].

78. Another GP, Dr Hannan, wrote on 3 June 2016 that the claimant complained of stress and low mood, and had been referred to the mental health team. Dr Hannan confirmed that in April 2016 the claimant had begun taking antidepressants.

79. At the start of this hearing the claimant produced a letter dated 5 May 2017 (ie less than a week before the start of this hearing) which Dr Hannan addressed to whom it may concern. Ms Mallick confirmed on 16 May that she had seen the letter. Dr Hannan wrote,

> "I can confirm that Mr Kenbata has been assessed by our psychiatrist in order to explore his difficulties with interacting with other individuals. After the comprehensive assessment, it is felt that Mr Kenbata does not have any particular psychiatric condition that needs the treatment of a psychiatrist. However, his difficulties seem to stem more around his patterns of behaviour and interactions with others. As a result, it has been suggested that Mr Kenbata commence a course of Cognitive Analytical Therapy. It is hoped that this may help him understand his patterns of behaviours and help him to cope with triggers from others which can lead to him behaving in a manner which can be preserved [sic] as aggressive or difficult."

80. The first Med3 which stated that the reason for absence was stress at work was dated 12 May 2016 [442]. We take it that that was what was referred to, not entirely accurately, when the claimant on 8 August 2016 told OH that his GP had certified him with a stress-related disorder [474A].

81. The claimant's witness statement contained a portion dealing with the alleged impact on him of his mental disability. After describing acrimonious

disputes at previous workplaces, and with his trade union, the claimant wrote, about the period in 2014:

> "I found myself very isolated, disillusioned, depressed and exhausted. Day to day activities such as seeing family, friends, neighbours, were off limit, I found professional communications just as difficult and kept myself to myself because of my depression and anxiety. Cleaning, tidying, shopping, leisure activities such as reading, walking or exercise were also well beyond my capability and as a result I didn't allow family to visit me or meet with friends. I constantly felt like a punching bag for people in all walks of life and continuously dreaded where the next tragedy was coming from. I also felt hopeless and helpless to do anything about it even with the help I received from IAPT."
> [WS pages 4 to 5]. (IAPT was Mr Cox's team.)

82. Mr Cox's letter at 96-97 made no mention of any aspect of this. The claimant made no reference to it in any document which we saw which came into existence during the employment events with which we were concerned. When asked by the judge what impact his mental health disability had had on day to day activities during the period with which we were concerned, the claimant after some thought stated that he had stopped going to church or watching television, neither of which was specifically referred to in the above.

83. We accept the guidance in Herry, which drew to our attention the distinction between stress and clinical illness. While we accept that those are general words, their relevance to our task has been that we do not accept the simplistic equation which invited us to infer from the use of the word 'stress' that there was a logical chain which proved disability as a result of mental health.

84. Ms Mallick's submission on section 6 was that it was not incumbent on the claimant to identify his symptoms but that it was the task of the tribunal to investigate all matters "by social diagnostic analysis, rather than medical evidence, taking a more holistic task." She said that we should look at the claimant's explanation and all the circumstances of the conduct, to see if his conduct was a symptom of disability. She submitted that the ultimate task of the tribunal was to stand back and look at all the circumstances collectively. So far as impact was concerned, she invited the tribunal to look at what the claimant says "rather than any medical or psychiatric report." She submitted that the tribunal should look at long term evidence of what has happened since the events before us as evidence of the likelihood of recurrence. She submitted that the claimant would be helped by post suspension evidence. She also invited us to look at what she said "must be a connection between physical disability and mental health", submitting that there must be clearly be a relationship between the claimant's mental disability and his admitted disability of polyarthritis. In that context, she went on to make the submission that the occupational health report of 24 July 2015, which described the claimant's rare physical condition, and went on to say "As previously mentioned, fatigue remains a significant issue for this gentleman, especially in the afternoons" should be

taken as an indication of a mental health disability. The report contains no reference to any non-physical condition. [145].

85. There was dispute in closing as to whether the tribunal could consider subsequent events in the claimant's health record in assisting it assess whether he met the section 6 definition of disability. Mr Smith counselled us strongly in favour of the judgment of the Court of Appeal in McDougall v Richmond College [2008] IRLR 227 pointing out that its judgment had the logical sense of expecting an employer to act upon information available to it at the time of the acts of discrimination. We respectfully agree that that is the correct approach. In closing, Ms Mallick referred in emotive language to the continuing impact on the claimant of his suspension. We accept that he remains suspended and we accept that that has an emotional impact upon him. The duration of the suspension was not a matter which we were asked to consider in the list of issues. However strong its emotional drive, it is not a matter which we have considered.

86. We ask first whether there was evidence of impairment. We bear well in mind Mr Smith's reminder that section 6 status is a matter to be proved by the claimant. We reject Ms Mallick's approach. If Ms Mallick is asking the tribunal to make good the absence of medical evidence, we decline to do so. There may be cases where the tribunal can draw upon the factual evidence, and its own life experience, to reach such a conclusion, but this is not one of them. The evidence before us was that in the material period of about 11 months, the claimant had approximately three days absence which at the time he attributed to stress; no absence which was described by a doctor as attributable to depression or anxiety; no evidence of relevant medication; and emails from the claimant (not independently verified) of a counselling commitment. We find no evidence of mental impairment.

87. The claimant's description of his condition in 2014, suggestive of a complete collapse of functioning, was nowhere referred to in other evidence, and was notably absent from Mr Cox's discharge letter, and from Dr Turner's letter (96, 410). The claimant struggled to think of a substantial adverse effect on day to day activities, and we do not accept his uncorroborated evidence either that he stopped his normal day to day (or regular) activities of television and church-going, or that if he did so, his reasons were attributable to any form of mental impairment. We find no cogent evidence of effect on day to day activities.

88. Although it is not necessary for us to do so, we go on to find that if the claimant did have a mental disability, (a) the respondent did not know of it and (b) the respondent could not reasonably have beern expected to know of it. The claimant relied on what he claimed were his absences due to stress, which we have found were a handful of days over a year. He relied further on conversations on 8 and 24 June, which we go on to find did not take place. We separately set out our reasons for rejecting the assertion that the claimant's attendance on Wednesday counselling sessions would have alerted colleagues to any mental health issues.

89. Ms Mallick cross examined to the effect that the claimant's behaviour must have alerted the respondent to a mental disability. Despite requests from the tribunal, neither she nor the claimant made clear whether that approach implied acceptance that complaints against the claimant of bad behaviour at work were well founded. They side stepped the point by submitting that if the claimant was thought to speak or behave in any untoward way, others discriminated against him in response on the basis of their stereotypes of his actual mental disability. Our finding is that others found the claimant to be a difficult and demanding colleague, whose language and behaviour were at times challenging. We can see no basis for the submission that as a result of such events the respondent knew, or could reasonably have been expected to know, of a mental disability.

90. We add further, for avoidance of doubt, that Ms Mallick did not put to us an alternative case, which was that the claimant was not disabled, but was perceived as such, and was therefore discriminated against because of that perception. Mr Smith's submissions referred to J v DLA Piper [2010] ICR 1052, which he asserted remained authority on the point. Neither party referred to Peninsula Business Services v Baker (UKEAT/0241/16). Although it is not strictly necessary for us to decide the point, our over-arching finding is that there was no evidence that the claimant was perceived to have a mental disability, and no evidence which linked any of the issues in dispute with any such perception.

91. We find issue 3 against the claimant.

Stereotyping

92. Many of the listed issues rested on the claimant's assertion that he had been treated by the respondent in accordance with stereotypical views of his mental disability. Miss Mallick explained that this element of the case rested on alleged stereotypes of the claimant's actual disability, and that there was no part of the case which rested on an allegation of perceived disability.

93. We note that one logical consequence of this line of argument is that the claimant argues that he did not in fact behave or speak inappropriately; but that if a number of colleagues and managers thought otherwise, that was because of stereotyping, and was itself evidence of discrimination, not of how the claimant had in fact conducted himself.

94. We accept that detrimental treatment of an individual by reason of a stereotypical view of, or associated with, a protected characteristic is in principle a detriment for the purposes of s.39 of the Equality Act.

95. We understand the claimant's argument, although poorly analysed before us, to run (1) The claimant had through his stress / depression / anxiety a mental health disability; which (2) was well known to colleagues, through their own observation, and / or through talk with each other, and / or as a

result of the wilful indiscretion of Mr Amirhosseini; (3) There is a general stereotype in society that people with stress / depression / anxiety are prone to aggressive and violent behaviour; which (4) general stereotypical view was held by named discriminators; who (5) each responded to events in the workplace in accordance with his or her stereotypical views of the claimant's disability, rather than (6) by treating the claimant fairly as an individual, in accordance with the merits of the specific event.

96. Adopting the same approach, we find that (1) was not the case; and that having heard the evidence, we reject all four elements of (2). Miss Mallick advanced (3) as if it were a self-evident truth which required no proof. We disagree. We accept as a generalisation that there is social stigma against mental illness and the mentally ill. We had no evidence upon which to find that the claimant's alleged disability attracted the stereotypical views alleged. Other than the claimant's bare assertions, there was no evidence, in any instance before us, that came close to making good (4) or (5). We reject each of those points in full in every instance and in relation to each named discriminator. We accept the evidence of each of Mr Dalsania, Ms Weekes and Mr Yusuf of having had no knowledge of the claimant's health or health issues, including of any disability.

The claimant's appointment

97. The claimant's application for employment indicated a successful career and education and engineering. He had an MSc degree and several years' experience in practice. He was born in 1982, and in his application considered that he had a disability [69] which he defined as polyarthritis. The claimant was interviewed by a panel made up of Ms Barnes, Mr Amirhosseini, and Mr Fazekas. They interviewed and appointed with knowledge of the claimant's polyarthritis disability. That was some indication of the unlikelihood of the latter two discriminating against the claimant on grounds of the disability known to them when they made his appointment. The respondent entirely properly referred the claimant for pre-employment occupational health assessment. The report of Ms Savage (3 December 2014, [83]) should be read in full. Ms Savage found the claimant medically fit for the role, and recommended workstation assessment, desk assessment and allowances for the time taken to complete tasks.

98. The claimant was a traffic engineer, and reported initially to Ms Barnes. Ms Barnes left the respondent at the end of March. She had an arthritic condition which was a disability. The claimant's work place was in the Brent Civic Centre, where, we were told, over 2,000 employees of the respondent work, and where office space was described graphically by Mr Smith as being of the size of the side of Wembley Stadium. The claimant worked in a very large open plan space. There was a hot desking policy, so that individuals did not necessarily work in the same place or with the same colleagues on a continuing or consecutive basis.

99. The claimant was absent for one day on 25 March, which he attributed to chronic fatigue. As stated above, he reported sick for one day on 30 March due to non-work-related stress. In informing Ms Barnes of his absence, he emailed as follows:

> "I would be grateful if this could be treated confidentially and we don't have any discussions at our desk with colleagues around about it which is my preference with all health and wellbeing related issues."

100. Ms Barnes, against whom the claimant specifically said he made no allegation of discrimination, replied:

> "I don't wish to stress you further but I must advise you that this will be your 3rd sickness absence in a rolling 3 month period and as such results in a trigger in line with Brent's Attendance Policy and Procedure. … As Amir will be managing you in the interim I've copied him in to this email." [110].
>
> We heard of no follow up to this before late July.

<u>The June conversations</u>

101. The claimant was managed by Mr Amirhosseini as interim line manager for three months. We accept that taking post on an interim basis, Mr Amirhosseini was not as fully briefed in his line management responsibilities and direct reports as might have been the case if he were on permanent appointment. The claimant, as stated, had an absence on 1 June.

102. On 4 June, Mr Amirhosseini had a private meeting with the claimant of some significance [113 to 114]. Mr Amirhosseini's note records that the meeting was to discuss three issues, two of which were his sickness and his workload. Mr Amirhosseini noted that the claimant's absence on 1 June had triggered three occasions of absence in three months, and noted the possibility of an OH referral. He approved leave. A separate page [114] recorded a discussion about the SSWR area of work (see below) and indicates that that was an issue under consideration in the context of workload. We accept that the meeting of 4 June took place in a quiet space. We do not accept that the claimant felt threatened by Mr Amirhosseini as he said in evidence.

103. Following his private meeting with the claimant on 4 June, Mr Amirhosseini was required to update the respondent's online OH record [116]. He did so on 8 June (and again on 24 June, as a result of a system change) by recording the three most recent absences [116]. We have commented above on the inaccuracy of the record of the first recorded absence in March. We note also the absence of any reference to the day of absence on 25 March. We infer that Mr Amirhosseini relied upon the information given to him by the claimant and did not check it independently. We do not fault him for this.

104. The claimant asserted that he specifically asked that the task of completing this record be done in a private space. Mr Amirhosseini denied that the claimant made any such request. He said that if he had done, he would have respected the request. He explained that his system was to ask the employee to sit next to him while he was completing the form online, but that as the form mainly consisted of dropdown menus, he would not need to ask aloud for a reason for absence but would put the cursor on a menu and ask for confirmation. He described that his workstation at the time was not readily overviewed or overheard.

105. The claimant asserted that in the preliminaries to this procedure, Mr Amirhosseini shouted across the work space words to the effect: "Your absence on 30 March was due to stress wasn't it?". The sting of the complaint was that by doing this, Mr Amirhosseini alerted colleagues to the nature of the claimant's health, in breach of his request for confidentiality, and, in his words in evidence, "maliciously to embarrass me". Mr Amirhosseini denied that any such event had taken place. The claimant asserted in evidence that some 20 or so colleagues had been in the vicinity when Mr Amirhosseini shouted out these words. He agreed that none had come forward to give evidence, and that no colleague to whom Ms Wane had spoken during her grievance investigation had supported this assertion.

106. The claimant's evidence continued that Mr Amirhosseini insisted on the claimant sitting next to him in the open plan area to complete the form, and asked him questions about it in a manner which could be, and was indeed, overheard, thereby again deliberately violating his request for privacy and confidentiality. Mr Amirhosseini denied that that was how the matter had taken place. He said that he completed the forms at his desk in accordance with standard procedure and that the claimant made no request to the contrary.

107. We prefer the evidence of Mr Amirhosseini. We find that he did not shout out the words complained of or any like them; we find that on both dates he completed the forms discreetly at a desk, and without any objection from the claimant; we find that any objection on grounds of privacy would have been respected.

108. In so saying, we note that Mr Amirhosseini had respected the claimant's privacy on 4 June by having a private meeting with him, and we can see no reason for him to have lost that respect a few days later. Mr Amirhosseini seemed to us a measured witness, aware of the responsibilities of person management, and unlikely to shout out a confidential health question in a busy work space.

109. The absence of corroborative evidence, particularly in light of the claimant's assertion that there were potentially 20 such witnesses, troubled us. If Mr Amirhosseini had shouted as alleged, he would in our view have given rise to questions of principle to which any employee (and certainly any trade union representative) would have been alert. It seemed to us

unlikely that an action of the type described by the claimant could have gone unremarked.

110. Furthermore, page 116 seemed to us consistent with Mr Amirhosseini's description of a document which could be completed by drop down menu and a series of yes/no questions, and which did not require audible questions about personal information.

111. In rejecting this part of the claim, we also therefore reject the consequent assertion that the claimant's susceptibility to stress (which he described as disability) thereby became public knowledge.

112. The findings set out in this section of the reasons are determinative of issues 4.1, 4.2, 6.1, 6.2 and 7.1, as we find that the factual basis of the issues has not been made out.

Conversation on 24 July

113. The claimant was absent due to polyarthritis for two weeks in July 2015. He invited us to consider as an evidential matter, but not as a freestanding issue, an allegation that on 24 July, when he had just returned, Mr Amirhosseini (by then no longer his line manager) spoke to him and said words to the effect "Are you back now?" or "Welcome back" and/or "Are you in any pain?" and/or "Keep smiling" and/or "Are you still feeling OK no pains, that's good". We have drawn the quoted words from the claimant's evidence and from his grievance of 5 August 2015 [314]. In closing, Ms Mallick criticised Mr Amirhosseini for speaking to the claimant on his return when he was no longer his line manager; he had, she submitted, no business to do so. Mr Amirhosseini recalled saying "Welcome back" and denied saying any more. His evidence was "I always greet staff when they return from sickness".

114. We find that Mr Amirhosseini, noting the claimant's return, spoke some general form of words of welcome. It was an example of management best practice. It was absurd to criticise him, as Ms Mallick did in closing, for having "no business" to speak to the claimant because he was no longer his direct report: it would be a sad workplace where formalism trumped common decency. We find that Mr Amirhosseini saw that the claimant was back at work after sick leave; that he said words of welcome; that that was his common practice; and that there is no basis whatsoever for faulting his actions or words. It follows that we do not find that this event assists us to decide if there was any form of disability discrimination.

Attendance management procedure

115. The next issue before us related to Mr Dryden, who had taken responsibility as the claimant's line manager in mid-July. Mr Dryden had long service with the respondent. This was his first managerial role, and not only did he assume a range of new managerial responsibilities, he also had to personally cover for his previous post, while it was being filled.

116. On 23 July, while still on certificated sick leave for backache and joint pains [141F], arrangements were made for the claimant to have a sickness review meeting on his return on 27 July. In preparation, he was seen by Mr Ciccone on 23 July, who on 24 July reported to Mr Dryden [144]. Mr Ciccone found the claimant fit for his role and made four recommendations [145]. There was no issue as to three of them, one of which was the immediate implementation of working from home on Wednesdays. The fourth was for desk assessment.

117. The claimant had a meeting with Mr Dryden on 27 July, following which Mr Dryden wrote to explain that his absence levels had hit a trigger point under the Council's attendance management procedures [146]. We find that they had done so. (We heard of no follow up to Ms Barnes' parallel notification of 30 March. We also note that the absences set out in Mr Dryden's letter were, if anything, under-recorded, and related entirely to "back and muscular pain and associated fatigue".) He informed the claimant about Mr Ciccone's recommendations and set a target of "no more than three days' absence in a rolling three months period until 26 October". In the event, the claimant met the target.

118. We accept that Ms Daley advised Mr Dryden that the absence trigger points had been met, and that although he was line manager, Mr Dryden had no discretion not to trigger the procedure. The claimant complained that he had not had the benefit of discretion, ie the disapplication, or extension or postponement of the procedure in light of his disability. Ms Daley's evidence was that the discretion of the HR director was to be exercised on referral (by her, as the relevant HR partner) and only in exceptional circumstances. She did not regard the circumstances as exceptional, and did not make the referral.

119. We find that Mr Dryden's role in these matters was little more than implementing HR policy, and that any discretion which existed was not exercised by him.

120. In evidence, but not in the list of issues, the claimant said that it would have been a reasonable adjustment to exercise discretion in his favour, ie not to trigger the policy. That claim was not before us, and we make no finding on the point.

121. The claimant complained that placing him on attendance management was (a) harassment on grounds of his physical disability; and (b) the same on grounds of his mental disability, and s.15 discrimination arising from his sickness absence (issues 6.3, 7.1 and 10).

122. In rejecting the harassment claims, we remind ourselves that the relevant procedure was an established, mathematical management tool, which had been properly applied to the claimant. He met the triggers (and had indeed done so several months earlier). We struggle to apply the language of s.26. We find that the decision related to absence, not the

protected characteristic. We accept that the claimant opposed it. We do not accept that it violated dignity or created an intimidating etc environment; or, in light of all the circumstances, that it was reasonable to have that effect.

123. We agree that properly analysed the claim is a s.15 claim. The claimant was placed on the procedure because of something arising in consequence of disability, ie his absence record. We accept Mr Dryden's evidence on justification, which seemed to us to embody common sense good practice. The policy and its application aim to further the aim of managing attendance levels so that services can be delivered. The stage 1 trigger was no more than initial monitoring, and was proportionate to the aim. The claim fails.

SSWR

124. A portion of this case related to SSWR work, which was an area of work which was short term and visible to the public. The topic of the SSWR work was discussed with the claimant on 4 June in the context of workload. It was therefore common ground that by that date the two were related issues.

125. An agency worker, Mr Saad Hassan, began working for the respondent on 18 June [369]. There was a backlog of some 200 SSWR tasks, and these were originally given to Mr Hassan as priority to work on. There remained continuing SSWR works which were being undertaken by a group of five workers (Mr Smith, Mr Darby, Mr Yusuf, Mr Tennant and the claimant). We were referred to an email sent by the claimant on 8 June, acknowledging a new starter [220H].

126. In July and early August, the claimant seems to have had some conflict with Mr Hassan and possibly other colleagues about allocation of work: it was one of a number of indications of the claimant's possessiveness about tasks which he considered to be his [133, 151].

127. Mr Dryden and Mr Fazekas gave evidence that it was discussed in work groups and team meetings that the management of the SSWR work was under consideration, and that in due course a decision was taken to make Mr Hassan's appointment permanent, and to allocate all SSWR work to him, not just the backlogs, and with the exception only of work so far advanced by others that it would make no sense to reallocate it. We accept that that was common knowledge and the general understanding at the time. We also accept that certainly, in the course of July at the latest, it became known that Mr Hassan would become or had become an employed member of staff, with full responsibility for all SSWR work. We are confident that the claimant was up to date after his sick leave by 27 July.

128. We found significant two emails sent on 3 and 4 August by the claimant to Mr Amirhosseini, copied to Mr Dryden and Mr Fazekas. The claimant's

email of 4 August [150] is more revealing than the claimant perhaps realised. It indicates that by the morning of that day, the claimant had been told that even SSWR work to which he felt committed would be passed over, and he raised concerns from an entirely personal point of view, asking whether it was only his SSWR work that was being transferred, and why he had not been informed or consulted. (The answer might have been that he had recently returned from two weeks' health-related absence, but that is not important for the present purpose.)

129. As the claimant has complained that SSWR work was reallocated because he made a protected disclosure on 5 August, we record our finding that by 4 August, the claimant knew that all SSWR work was to be reallocated, and had before making a protected disclosure asked whether he was being singled out (which he was not). The document shows both the claimant's knowledge at the time, and his emotional engagement with the issues.

130. In evidence, the claimant asserted that he knew on 4 August that he was being removed from all his SSWR sites, and that subsequently, after his protected disclosure, he was removed from SSWR project work altogether. We do not find that that is a true distinction. The claimant's complaint on 4 August was that he was ceasing to undertake SSWR work. He knew that that was the case before he made his disclosure on 5 August. Indeed, it was part of the grievance which he raised on that day, and could therefore not be causative of a preceding event.

131. Issue 23.1 fails because we find that the alleged detriment pre-dated the disclosure relied upon; and that the detriment alleged to have post-dated the disclosure was not a distinct or further event.

Grievance of 5 August

132. On 5 August 2015, the claimant submitted a formal grievance. He sent it to Mr Dryden who was then his line manager, copy to Mr Fazekas, and it was against Mr Amirhosseini [314]. It raised four points of complaint. The first complaint was that Mr Amirhosseini had, contrary to his wishes, completed his health assessment record in the open plan area on 8 June and had shouted across the room to him that the absence on 30 March had been stress-related. We accept that the first limb took place but not that it was a breach of confidentiality or that the claimant objected at the time. We have not found that the second limb of this allegation occurred.

133. The second point of the grievance was that when, as a result of a change of OH provider, it was necessary for Mr Amirhosseini to input the same material again on 24 June, the same procedure was repeated. We have not found that that has been proved to us. The third allegation related to the words used to the claimant by Mr Amirhosseini on 24 July on his return to work from sickness. We have found that the words used were unobjectionable. The fourth and final complaint related to SSWR, and complained of "Why Amir finds it necessary to interfere… by outsourcing

my work without consultation". Mr Amirhosseini did not interfere; he implemented a management decision to which he was party but not the senior party. We accept Mr Dryden's evidence that the team had common knowledge of the rearrangement, and that the claimant had some knowledge of it from early June, even if not of the detailed implementation.

134. The grievance concludes with the following paragraph:

> "Amir was on the three person interview panel I was recruited by in December 2014. I find it offensive and unpleasant that he is using the information concerning my disability that has been trusted to him in my interview and in his subsequent role as my temporary line manager to intimidate, harass and bully me in this way. I request this grievance is formally investigated."

135. When we consider whether this grievance was a protected disclosure for the purposes of section 43B, we find that it was not. In light of our previous findings about the events of 8 and 24 June, and about 24 July, and about SSWR, we do not consider that the claimant can have had a reasonable belief that any legal obligation was being broken, or that his health and safety was at risk, or that any other part of the section 43B test was made out. He had a number of workplace grievances which he was entitled to ask to be investigated, but no more than that. That being so, we do not find that he had a reasonable belief that the complaint was, or was made, in the public interest. It was no more than a routine workplace complaint between colleagues.

136. The test under section 27(3) Equality Act is different. The claimant may bring himself within the protection of the Equality Act by the reference to disability, unless section 27(3) applies which states as follows:

> "Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith."

We understand bad faith to mean either that the allegation was made in knowledge of its falsehood or that it was made for an improper purpose. We need make no finding on whether the claimant's belief was reasonable. Our finding is that the claimant believed at the time in the allegation, insofar as it related to his physical disability only. We accept therefore, and not without misgivings in light of the totality of our findings, that the grievance of 5 August 2015 was a protected act for the purposes of the Equality Act only. We find issues 22.1 and part of issue 24 in favour of the claimant.

<u>Email of 2 September</u>

137. The next matter to which we turn can be relatively shortly stated. Ms Weekes is employed as a consultation officer, which she described as a role to "assist engineers and other officers in the transportation service to prepare documentation necessary for public consultations". She has worked for Brent since 2009.

138. The specific matter before us was that on 19 August, Ms Weekes sent the claimant what she called "a gentle reminder" attaching emails about outstanding work, and on 24 August received from him [194] a response which could have been less sharp and more helpful. Ms Weekes forwarded it to Mr Fazekas with a copy to Mr Dryden stating that "The tone of his response is not necessary and I will like this noted". Mr Fazekas emailed Ms Weekes to advise her on how to deal with a professional matter which the claimant had raised and then asked her to meet him. They had a meeting which Mr Fazekas confirmed by email: "From our conversation I understand that you found the tone of Benyam's email rather condescending, but that you do not want to take any action at this time. Let John or I know if you are unhappy with the tone of any future emails and we'll discuss and take action to resolve. " [193].

139. Subjected to forensic cross-examination by Ms Mallick, Ms Weekes agreed that the particular email sent by the claimant on 24 August at 11.53 was not particularly objectionable and she had difficulty identifying what in particular was condescending about it. She explained, in a manner which was absent from her witness statement, that the email was just one item in a chain of difficult interactions with the claimant, and she cited examples of what we would describe as bullying behaviour towards her in the workplace. The general burden of her evidence was corroborated by Mr Yusuf's description of the claimant's behaviour towards her.

140. The question before us is whether Ms Weekes reported and described the matter because of the claimant's disability. Her evidence, which we accept, was that she knew nothing of any issue relating to the claimant's health, let alone any disability. We ask if she genuinely felt that the email was condescending. We find that she did.

141. We find that Mr Fazekas acted in accordance with good management practice by asking a respected colleague to speak to him about something which was troubling her at work, by confirming the gist in email, and by respecting her desire not to take matters any further.

142. This short sequence was the basis of issues 5.5, 7.6, 13, 23.6, 23.7, 23.8 and 25.6. Issue 5.5 fails because we find that Mr Fazekas and Ms Weekes described the claimant as condescending because that was their honest opinion, wholly unrelated to any disability, physical or mental howsoever pleaded. (We have separately recorded our finding that Ms Weekes had no knowledge of any health issue involving the claimant). Issues 23.6 and 23.7 were that because of his grievance of 5 August Mr Fazekas 'encouraged complainants [sic] about the claimant to come to him, rather than to their line manager' and discussed the matter 'without consulting the claimant'. We find that the reason why Mr Fazekas asked to meet Ms Weekes was because he sensed that she was upset, and rightly thought that it would be good practice to speak to her. The word 'encourage' seems to us over-pitched. Mr Fazekas was under no obligation to consult the claimant: the idea is near-absurd. We find that his

decisions were proper responses to events before him, wholly unrelated to the grievance of 5 August.

143. A later issue arose before us for consideration, which was a report made by Ms Weekes on 27 October about the claimant's alleged behaviour. We deal with that in sequence below. We record meanwhile that there continued to be disharmony between them, eg in the correspondence of 17 September [206 to 207]).

Email of 3 September

144. A considerable amount of time was spent at this hearing on the emails of 3 September.

145. Mr Nere was and is a senior traffic engineer. At the time in question, he had 15 years' service with Brent (the claimant had nine months) and 18 years' professional experience (the claimant had about 10). Mr Nere had had a chronic disability since an accident many years previously. He considered that he had been well supported by the respondent in managing his disability.

146. On 1 September at 11.27, the claimant texted or emailed Mr Nere [191] to say that he had just received a call from a Brent resident

> "about the delay in responding to his phone calls requesting an update on the above consultation. He advises that you are never at your desk and never seem to respond to his calls and he has been chasing you for several weeks. I understand he has now contacted you but can you please keep the resident updated on the consultation as he seemed very concerned about your "failure" to respond."

147. Mr Nere replied 15 minutes later to say that he was in a seminar but had spoken to the resident.

148. On 3 September, Mr Nere wrote to the claimant "to clarify". He then explained that the resident had called his number four times in three minutes when he was in a seminar; that he had phoned the resident during the tea break 20 minutes later; and he had dealt with the resident's issues. He then wrote this:

> "I was surprised to see your comments about my failure to respond to a resident. When I called the resident he never complained about failure to respond, he was actually satisfied when I told him that I was not able to respond to his call earlier that day because I was in a seminar. Please note it is standard to take the resident's name as well as a contact number when taking messages. If you receive a call regarding myself or one of colleagues and their "failure" to respond to calls/messages, please escalate these incidents to a team leader/Sandy".

149. The claimant's better course would have been to send a one or two word acknowledgement and close the issue. Instead, 12 minutes later, he replied [190]:

> "Solomon – The last time I looked Sandy [Mr Fazekas] was a Project Development Manager not a team leader. I copied the resident's complaint to John Dryden who is a team leader and you were informed of this by Sandy along with everyone else, please check your emails.
>
> The calls are recorded … so if you ask Karen, she may let you listen to the call. He was angry and frustrated and wouldn't give me his name. The resident repeatedly complained about your "failure" to answer his calls. I was just letting you know.
>
> Instead of sending me unnecessary emails repeatedly denying responsibility, you might want to reflect on how you have dealt with the resident or even apologise to me for my having to deal with frustrated residents [sic] which you should have dealt with a lot sooner before irritating the resident."

150. Mr Nere, with commendable restraint, forwarded the email to Mr Fazekas with the words "I'm not happy with the attitude and tone of the email from a work colleague." He then met Mr Fazekas.

151. The claimant's case was that Mr Nere's emails did not represent his (Mr Nere's) genuine belief. He submitted that Mr Nere's email to Mr Fazekas was based on a stereotype of the claimant's mental disability. In evidence the claimant conceded that his email might have been inappropriate, but Ms Mallick did not accept this in cross examination or closing submission. Mr Fazekas' evidence was that he found the claimant's email to be, among other things, "rude, unnecessary, condescending, disrespectful and unhelpful". We agree. We find each of those words well-used.

152. We accept that Mr Nere had no knowledge of any health or disability issue affecting the claimant. We find no evidence that Mr Nere's complaint to Mr Fazekas was in any respect tainted in the slightest by any extraneous factor. There was no evidence that by agreeing to meet Mr Nere, Mr Fazekas' actions were likewise tainted. We repeat our findings above about the pleaded use of the word 'encourage' and the claimant's assertion that he should have been consulted before Mr Fazekas spoke about the matter to Mr Nere. On the contrary, we find that Mr Fazekas followed best practice in offering an open door to an upset colleague. We are particularly confident in reaching these findings, not just in reliance on the oral evidence of Mr Nere and Mr Fazekas, but drawing upon our own objective interpretation of the email trail.

153. Issues 5.6, 23.6 and 23.7 fail because the reason why Mr Nere and Mr Fazekas wrote what they wrote was that each expressed his honest opinion, based on objective fact, and wholly untainted by any extraneous issue. Mr Fazekas' response to Mr Nere was wholly untainted by the grievance of 5 August.

<u>Incident on 18 September</u>

154. On 21 September, the claimant wrote an email to Mr Dryden which stated the following:

> "Please note that Sayed has intentionally kicked me when I told him to move his leg from underneath my seat on Friday afternoon. I know this sounds minor but I don't see how he can justify kicking someone from underneath the desk intentionally. Can this please be discussed with him as I am conscious acts of violence/aggression towards colleagues however minor should be addressed with the workers concerned". [209B].

155. Mr Dryden acknowledged the email immediately and sought the advice of HR.

Ms Wane's inquiry

156. HR passed the matter to Ms Wane, because she was at that point investigating the claimant's grievance of 5 August. Ms Wane and Ms Daley agreed that their investigation of the claimant's grievance would include the kicking allegation, which they thought was serious enough to warrant some enquiries.

157. When the claimant was interviewed by Ms Wane and Ms Daley on 29 September, accompanied by Mr Stewart of GMB, he replied [359]:

> "He did not expect to be discussing this at the meeting as he has not and did not want to raise this as a formal grievance. Ms Daley informed the claimant that due to seriousness of allegation, it would have to be investigated by Council due to processes and policies in place to protect staff."

158. The claimant mentioned Mr Dalsania and Mr Dryden as potential witnesses.

159. Allegations about the process on 6 and 9 October are scattered, neither chronologically nor logically, throughout the pleadings. The first two in logical sequence relate to the complaint that without prior notification to the claimant, Ms Wane and Ms Daley embarked upon investigation of matters unrelated to the grievance of 5 August 2015. We agree that they did so. They formed a professional managerial judgment that the claimant's allegation of 21 September, which was that a colleague had deliberately made violent physical contact with him, merited investigation, irrespective of the views of the alleged victim. That was a legitimate exercise of managerial and professional judgment, which we find was untainted by any extraneous factor. A moment's thought shows that the alternative, namely that an allegation of violence in a workplace was not important enough to merit at least enquiry, will show the flaw in the argument. We accept that it would have been better practice if the claimant and Mr Stewart had before 29 September been told in writing that the scope of the meeting would extend to that matter.

160. Mr Yusuf was interviewed on 6 October. Ms Wane explained that he was being interviewed about an allegation of kicking the claimant [373]. Ms Daley's note (which we accept as broadly accurate) records that Mr Yusuf said that he was working with his earphones on to reduce background

noise and distraction when "suddenly the claimant stamped on his leg – causing a cut on his leg (small leg injury shown to Ms Wane and Ms Daley during meeting). The claimant then shouted "Move your legs from my area" and Mr Yusuf "replied asking him to speak politely".

161. Mr Yusuf then volunteered additional allegations, set out under the heading "Further incident" at 373, including an allegation about a computer terminal, and wider allegations of the claimant's intimidatory and rude behaviour to colleagues, among whom he mentioned Ms Weekes by name. In particular, we note the following: "Paulette had issues with BK. SY witnessed when BK walked over to Paulette's desk and threw papers down towards Paulette on her desk in a rude way. SY stated that Paulette looked upset by this." Ms Weekes in evidence to us confirmed that that had taken place. The final line at page 373 reads as follows: "SY agreed to formally report the incidents as advised by JD." Mr Yusuf also said that he "did not want to report the incident as he did not want to cause any trouble and does not like complaining." He "concluded that he was embarrassed by the whole situation and wants to be able to get on with his work." He also suggested that Mr Dalsania be interviewed.

162. We find that Mr Yusuf was a witness of truth. He gave a compelling brief piece of evidence when asked why he had made no complaint or report of the incident at the time: "I didn't complain. I was embarrassed. It's what kids do at school. I didn't want anyone to be aware of it. I wasn't worried abut the kick, I was worried about what people would think of in engineering."

163. In preferring Mr Yusuf's evidence to that of the claimant, we attach weight to the following: we heard no evidence of Mr Yusuf having any professional or interpersonal difficulties with any other colleagues; the allegation against him would have been in our understanding wholly out of character. We heard evidence of the claimant having many difficulties in relationships with colleagues, and the allegation against him was consistent with those. We noted the history between the two, in which Mr Yusuf appeared repeatedly to ask the claimant to be less overbearing in his emails. We attached considerable weight to the evidence of Mr Dalsania, who gave measured evidence which was that while he had not seen the physical contact between the two, he was aware of a number of circumstantial factors, all of which pointed in favour of Mr Yusuf's account and against that of the claimant. Accordingly, we find that it has been proved to us on balance of probabilities that the claimant made deliberate physical contact with Mr Yusuf on 18 September 2015. We are unable to go so far as to decide whether the word 'stamp' or 'kick' would be more accurate.

164. So that there is no doubt about it, we reject in full the breadth of the claimant's pleaded allegation that "Mr Yusuf made up a series of lies." We find that Mr Yusuf made up nothing and that he told no lies, either to the respondent or to this tribunal.

165. In response to the account of the kicking incident, we find that Ms Wane properly advised Mr Yusuf to make a formal report. We find that that was a proper and legitimate exercise of managerial judgment, so that a serious allegation of personal violence (precisely the allegation originated by the claimant) could be investigated (this time, against the claimant). We go further and find that she was professionally bound to do so, in light of the respondent's duties of care towards Mr Yusuf, and its general duty to provide all staff with a safe and dignified working environment. Ms Wane and Ms Daley cannot be faulted in the slightest for having done so.

166. The list of issues included a complaint that Ms Wane and Ms Daley then failed to inform the claimant about Mr Yusuf's complaint or how the matter would be progressed. We can see no basis for that complaint. They were under no duty to inform the claimant of anything until such time as Mr Yusuf had formalised a complaint in writing and a decision had been taken to progress it. That in fact happened later in the year when Ms Wane produced her report with its recommendations. In accordance with their own managerial judgment, they had to leave scope for the possibility that whatever he said to them on 6 October, Mr Yusuf would decide not to progress the matter.

167. Ms Wane and Ms Daley knew that the incidents about which they were hearing took place in an open plan space, which had two logical consequences. First, because of hot desking, it was not possible to identify the precise desk where events had taken place or who was sitting closest to the event, as seating arrangements change day by day. Secondly, however, there might well have been eye witnesses.

168. Both the claimant and Mr Yusuf had mentioned Mr Dalsania, who accordingly was interviewed on 9 October [375]. He described a sequence which was consistent with Mr Yusuf's account and at odds with the claimant's, stating that he heard a loud noise, and then heard the claimant say "move your feet from my work area" and Mr Yusuf reply "please can you ask politely and you don't need to stamp on my feet". Mr Dalsania also mentioned incidents between the claimant and other colleagues. [375]. We accept that Mr Dalsania was a witness of truth, who gave measured, restrained evidence about events well over a year in the past, in a previous workplace, involving former colleagues.

169. Ms Wane and Ms Daley interviewed Mr Dryden on 14 October. He had by that time been the claimant's line manager for three months. Mr Dryden was questioned about the substance of the claimant's grievance against Mr Amirhosseini, and set out his understanding of the factual background. The complaint about Mr Dryden's response focused on two matters. The first related to an informal discussion which he had conducted earlier with Mr Amirhosseini and the claimant. The note records the claimant asking for a written apology and the following:

> "JD [Mr Dryden not Ms Daley] stated that AA stated to BK that he was sorry if he had done something to upset BK as he did not intend to upset him. JD states

> that AA went on to say that he didn't recall saying anything to upset BK but if he had he was sorry for the way BK had taken it." [365].

170. We attach no weight to that record, which we accept to be accurate. If the claimant asks us to find that Mr Amirhosseini was there conceding that he had done something improper, that is not a reasonable interpretation. It is quite clear that Mr Amirhosseini is using a form of words familiar in professional contexts, to say that he denies having done what is alleged, but if he has inadvertently caused upset, he regrets it. No more turns on the point.

171. Of greater substance was the conclusion of Mr Dryden's interview:

> "JD stated that he feels wary and intimidated by BK as he is aware through BK's actions towards other staff and requests from management, that BK can make issues from small things and can make trouble for staff if he's not happy about something… JD has raised the issue of BK's relationship with other staff in his 1:1, stating to BK that he is aware of issues that have occurred between him and other staff. JD has reminded BK to work well and amicably with colleagues at all times and to be aware of how his actions could be interpreted. BK said nothing to these remarks during the 1:1." [365].

172. The record of the claimant's one to one with Mr Dryden on 8 September [196 to 198] is broadly corroborative. It contains the sentence: "JD reminded BK of the need for good relationships between work colleagues."

173. Mr Dryden was cross-examined on the basis that those remarks were lies, based on the claimant's disability or on stereotypes arising from them. Mr Dryden stated in evidence that he did not understand or perceive the claimant's susceptibility to stress as a disability, but that he there gave his honest expression of how he felt. He considered that he had given a fair and honest response, based on incidents with a number of staff, in which the claimant had been what he called in evidence, in a telling phrase, 'the common denominator'. We accept that Mr Dryden gave an honest assessment of his opinion of the experience of working with the claimant as line manager over a period of time. We find that in doing so, he expressed himself in a manner untainted by any extraneous consideration.

174. The above events engaged issues 5.3, 5.7, 5.8, 5.9, 5.10, 5.18, 5.19, 16.1, 16.2 and 23.5. We deal with the points relatively briefly. We find that all the matters complained of were wholly untainted by any of the extraneous matters. Issue 5.7 fails because the factual basis (that Mr Yusuf made up lies) is not made out. Issue 5.8 fails for the same reason, as modified. Issues 5.3 and 5.10, and 23.5, which attack the integrity of Mr Dryden's account to Ms Wane, fail for the same reason. In finding that all three told Ms Wane the truth as they knew it, we also find that in their answers to her, disability issues played no part whatsoever. Issues 5.18 and 5.19 (also 16.1 and 16.2) fail because we accept that Ms Wane and Ms Daley dealt with the matters before them in the exercise of management judgment and discretion, untainted by any extraneous consideration in any respect.

Emails of 27 and 28 October

175. We then turn to significant events of 27 and 28 October. We note that in issue 5.13 the former is inaccurately dated 27 November.

176. We have accepted that early in September, Ms Weekes reported her concerns about the claimant's behaviour towards her. We have noted in the bundle a further instance of tension between them in mid-September. At 14.50 on 27 October, Ms Weekes emailed the claimant, "Hi – Can I have the project code for the Dollis Hill Scheme so that the scanning can be completed. Regards." [247]. We assume that what was being asked for was the equivalent of a telephone number. The claimant's reply at 15:01 was: "I suggest you check the programme for the code and updated the project status sheet with the expenditure particulars. I am still waiting for confirmation on whether the report which you commissioned has been funded from last year's budgets as it was not on the project status sheet for 14/15 so would prefer that you take responsibility for expenditures associated with your role and updating the sheet for the scheme. Please speak with … if you need help with this."

177. The claimant failed to answer a straightforward routine enquiry, and instead took the opportunity to offer a gratuitous criticism of the work of an experienced colleague, while concluding with the suggestion that she might need help. He again invited a colleague to 'take responsibility.'

178. Ms Weekes spoke to Mr Dryden (as the claimant's line manager) and at 15.44 wrote an email of complaint to him, copied to Mr Fazekas, subject head 'Complaint'. It may be read in full but opens:

> "I would like to formally reiterate that I am extremely upset as the ongoing behaviours of BK and the way he communicates with me. After any interaction with him, I am left stunned at the way he is so rude and makes me feel as though I am beneath him. I know that I have reported his behaviour towards me before and expressed concern at his manner towards me, however it is ongoing."

179. Ms Weekes at 15.45 forwarded that email to Mr Kennedy. At about the same time (27 October 15.39), the claimant emailed Mr Dryden

> "A resident called to complain that he has been emailing [Mr Nere] … and that he hasn't received a response… Can you please arrange for someone to discuss this with Solomon… You will recall that when I got a similar complaint regarding residents [sic] not receiving a response from Solomon he requested that I raised the matter with a team leader rather than informing him of the residents complaint as I did on that occasion." [248].

180. That was a clear reference to Mr Nere's email of 3 September which had concluded: "If you receive a call regarding myself or one of my colleagues and their "failure" to respond to calls/messages, please escalate these incidents to a team leader/Sandy." [191]

181. The email about Mr Nere reached Mr Dryden at about the same time as the email from Ms Weekes and at 15.56, he forwarded the claimant's email about Mr Nere to Mr Fazekas, with the text simply [248], "See below… Relentless!!". Mr Fazekas at 16.28 forwarded Mr Dryden's email to Mr Kennedy, and wrote, "For information, [the claimant] is putting John and his team under considerable pressure through his behaviour. This includes recently refusing to comply with the policy of moving his special chair, upsetting Paulette and now the email below criticising Solomon."

182. These exchanges were covered in some detail in evidence. The first matter was Ms Weekes' email of 15.44. When cross-examined, the claimant said about the email:

> "Ms Weekes may have had genuine concerns, they were exaggerated. I wasn't clear what the issues were… I don't accept she genuinely felt what she said. It was not an honest account. She may have been upset. I don't believe she believed I was rude. I am not in a position to know if she felt beneath me. I can see she is basing it on previous events. I don't know if she felt I was discourteous. I don't think she believed I was disrespectful, she is lying. The words "intolerable and stressful" it was an exaggeration based on her perception. I don't know if she felt stressed. I don't accept it was unrelated to [my] depression."

183. That was remarkable evidence, in which the claimant confidently offered a detailed analysis of another person's thought processes, which he based on e mail exchanges.

184. We find that Ms Weeks' email at 15.44 was an honest and indeed moderate expression of her genuine distress at the claimant's behaviour towards her. It is difficult not to draw the inference that he was picking on her. We find that the cross-examination of Ms Weekes, to the effect that if she had felt as she did she would have approached the claimant to talk things over with him, was wholly misplaced. We accept that it was precisely because of the claimant's behaviour towards her that Ms Weekes felt unable to approach the claimant directly and we do not criticise her in the slightest. We accept that she knew nothing of the claimant's health or any disability. For a number of reasons, we find that Ms Weekes has given the respondent and the tribunal an honest account of her feelings, untainted by an extraneous consideration. The single starkest reason is that on our objective reading of the claimant's emails to her, they were unremitting in their lack of courtesy and respect. We attach great weight to the moderation and restraint with which Ms Weekes expressed herself in her complaints. We found her an impressive and reliable witness in the tribunal.

185. If Mr Dryden is criticised for discussing Ms Weekes' concerns on 27 October in a short meeting, such criticism is likewise misplaced. It would have been a dereliction of his duties as a manager if he had not agreed to meet Ms Weekes, in response to her evident distress as he perceived it.

186. When asked about the use of the word 'relentless', Mr Dryden gave the following evidence. His embarrassment and discomfort in giving the evidence were striking. The judge's note reads as follows:

> "I began as his line manager. By 27 October managed for three to four months. It was my first role as manager in Brent. I had a learning curve. My [previous] post was vacant and I left it vacant and I had to cover. I had a great deal to do. I began to feel issues, incidents, requests to do with the claimant were effectively. I had raised with Mr Fazekas in proportion with others, was an unusual level making a very big demand on my time. The volume of stuff I was dealing with meant I was not giving equal attention to others and affecting my ability to do my job. I had told Mr Fazekas before. Here were a lot of events with Mr Kenbata compared with other staff."

187. It was clear to the tribunal that in giving this evidence, Mr Dryden felt embarrassed by a sense that he had not risen to the challenge of his new role. While it is not a matter for us, we can see no basis for any such self-criticism.

188. We accept that that was honest evidence, truthfully given, and accurately captured Mr Dryden's genuine opinions at that time. They may be summarised as follows: the claimant was such a demanding direct report that his behaviour and language interfered significantly with Mr Dryden's ability to carry out his job; which led to inequality of resource in relation to other direct reports; and was inherently disproportionate. We find that Mr Dryden's use of the word relentless, whether intended as a statement of fact or as a comment, was a legitimate expression to his line manager of his genuine assessment, wholly untainted by any extraneous consideration.

189. Mr Fazekas was Mr Dryden's line manager, and they held one to ones. Mr Fazekas also seemed to us to have a good general understanding of what was happening within his team. As a result, Mr Fazekas was aware of the pressures placed on Mr Dryden. We accept that his comment that the claimant was putting the team under pressure was well founded in fact, and a legitimate expression of his honest opinion. He quoted three examples, but could have quoted more. We find that he like Mr Dryden drew the matter to the attention of his line manager because he rightly considered himself duty-bound to do so, untainted by extraneous consideration.

190. Issues 5.11, 5.12 and 5.13 all fail because we find that each of Ms Weekes, Mr Dryden and Mr Fazekas stated the truth as each saw it, and set out his or her honest opinion, based on several months of working with the claimant. We find that none of the three persons, and none of their words or actions, were in any respect tainted by any extraneous factor.

<u>Allegation of 28 October</u>

191. There was no evidence that at the end of the working day on 27 October the claimant knew that Ms Weekes had written a complaint email about

him and copied it to Mr Kennedy. He did know that he had had a run in with Ms Weekes and that he had sent his email at 15.01. At 9.25 a.m. the next day, the claimant wrote to Mr Fazekas an email which he relied upon as a protected disclosure. The document [253A-B] should be read in full. It attached an email dated 6 July from Mr Fazekas to the claimant and others, including Ms Weekes, about a consultation scheme at Dollis Hill, in which Mr Fazekas had written "The consultation/printing costs are high so once we have amended, Paulette is going to get other prices."

192. In his email of 28 October, the claimant wrote that "other prices were not obtained… and a single supplier was invited to price the printing… This is in line with standard practice in the short time I have been working with the transportation service."

193. The claimant then went on to say:

> "Given the volume of consultations… I find the reasons for this approach difficult to understand particularly when we seek multiple prices for other services and when you have given assurances that alternative quotations will be obtained. As you know, local authorities are under a legal obligation to provide value for money in the procurement of services and I am sure Brent Council will have its own procurement regulations designed to ensure we comply with the law.
>
> I have also been in the office when Paulette has been on the phone to these suppliers and often hear her thanking the printers for the gifts they have given her. Yet at a recent team meeting Paulette was adamant that she had nothing to declare within the terms defined in the Brent Council's gifts and hospitality policy and procedures… I am obviously not making any allegations that Paulette has received gifts and failed to declare them as I am not in a position to confirm this and the information I do have is not conclusive. However, I am concerned at the mismatch between what Paulette said at the team meeting and what she say in conversations with the printers.
>
> I would be grateful if you'd look into these issues and provide me with an appropriate response. I respectfully request that this email is treated confidentially and is not shared with anyone else in transportation to minimise the risk that I may suffer detrimental treatment for making this disclosure which would of course be unlawful."

194. Mr Fazekas acknowledged this on 4 November [253A]. After some delay, Mr Moore, was appointed to investigate, supported by Ms Basham of HR. Mr Moore was a senior manager in another area of service. He reported on 26 May 2016 that the printing service in question was of such small value that it was below the competitive tendering requirement; and that his enquiry indicated that there had been no breach of the gifts policy. He implied that any gift which Ms Weekes might have received (we did not need read the report to confirm that she actually had done so) had been of such small value that it fell within the category of token item (e.g. promotional stationery, box of chocolates) which did not require to be declared.

195. Mr Moore attached weight to an email trail which we also found significant [165-166] relating to precisely the same print job. On 6 August, the claimant had asked Ms Weekes to obtain quotes. On 11 August, Ms Weekes had forwarded the quote in question to the claimant. A few minutes later, the claimant had written to Mr Dryden and Ms Weekes about the quote [165], "This seems reasonable… Can you please advise Paulette to proceed."

196. The claimant had found the quote to be reasonable on 11 August; he had made a formal report of it on 28 October. There was no evidence of a change in the claimant's circumstances or knowledge between the two dates. It was not formally put to the claimant in cross-examination that he had written the email of 28 October as a continuation of his dispute with Ms Weekes the previous day, and we can make no finding to that effect. We find that the apparent inconsistency in the claimant's view of the quote, and his delay in reporting his concerns, were not satisfactorily explained to us.

197. As the claimant himself had approved the quotation several weeks before his complaint, we find that the claimant cannot have had a reasonable belief that the quotation was obtained inappropriately, let alone corruptly. He therefore cannot have had a reasonable belief that his report was in the public interest. We add that his reference to legal protections was at odds with his disingenuous comment that he was not making an allegation: we find that the claimant made an allegation of corruption against a colleague in which he can have had no reasonable belief. That being so, the allegation was not a protected disclosure within the section 43B definition, and the claimant enjoyed no legal protection in consequence of it. We reject item PD1 in issue 24 (misdated 4 November in the list).

198. We accept, for the sake of completeness, that the claimant's first ET1 of 6 November, was a protected act and protected disclosure. There was no evidence before us about who knew about the claim or its contents, or when. It was stamped as received by the respondent on 9 November.

Ms Wane's conclusions

199. The final sequence of events with which we were concerned began on 27 November. Before we deal with those events, we depart from chronology. As stated above, Ms Wane conducted her investigation into the claimant's grievance of 5 August, and into the matters which arose as a result of Mr Yusuf's allegations, during October and November. By late November, she had prepared a draft report, and asked HR to consider it [270F]. Her final report, of 22 December, was a thoughtful and professional analysis. It rejected the grievances of 5 August, and recommended disciplinary investigation against the claimant. As she said in her witness statement [WS17] Ms Wane had identified a common theme of bad interpersonal behaviour on the part of the claimant relating to a number of colleagues.

200. In summary, Ms Wane recommended that disciplinary action should be taken. By the time that recommendation was received, the claimant had been suspended. We deal with the circumstances of the suspension below. Mr Robert Anderton was appointed to investigate the disciplinary allegation; he undertook a number of interviews in February 2016. Following his investigation, Ms Read was appointed to conduct a disciplinary hearing, which took place between November 2016 and February 2017, and of which the outcome was given on 20 February 2017 [609] leading to a written warning.

Incident of 27 November

201. We remind ourselves of where matters stood on 27 November, which was the crucial date before us. The claimant had by then been in post for just under a year. Although the bundle contained indications of early teething troubles in familiarising himself with his new role, we heard no evidence which suggested that he was anything other than a competent engineer, commensurate with his education, qualifications and experience.

202. By the end of November, he had fallen into disputes of varying gravity with a number of colleagues, notably Mr Yusuf, Ms Weekes and Mr Amirhosseini. He had presented grievances, and by that date the draft report was under consideration, in which his grievances were rejected. Allegations had been made by and against him in relation to a kicking incident, and Ms Wane's recommendation of a disciplinary investigation against the claimant was also under consideration. By that date, the claimant had been managed for over four months by Mr Dryden, who was so concerned by the demands of managing the claimant that he felt himself unable to carry out the full responsibilities of his substantive role. The claimant was also known to be a demanding direct report by Mr Amirhosseini and Mr Dryden, and by the layers of management above them, Mr Fazekas and Mr Kennedy. It was accepted and always had been that the claimant had a physical disability, and arrangements had been put in place to accommodate the disability, including working at home one day a week, and provision of a special chair (in relation to which the claimant had been excused the general requirement to put away his personal chair at the end of each working day, dealt with below). The claimant had on 5 August 2015 made a protected act and a protected disclosure of disability discrimination, and had on 28 October submitted what he clearly thought was a protected disclosure, which had been referred to HR for guidance.

203. At 12.36 on 27 November, Mr Yusuf emailed Mr Amirhosseini and Mr Fazekas. The subject was "Complaint". The text of the email in its entirety was: "Benyam has just called me sick and spat on me. Please investigate." [262].

204. At 12.51, Mr Fazekas forwarded Mr Yusuf's email of 12.36 to Mr Kennedy for information, stating that he would look into the matter. At 12.57, Mr Kennedy forwarded the email trail to Ms Simpson in HR, with this comment: "I'm concerned that Benyam's behaviour is becoming worse.

Sandy will investigate the allegation but please advise if there is any other action you suggest we take in view of the ongoing issues." Ms Simpson, who in fact reported to Mr Whyte (also of HR), replied at 14.50. [256]. Ms Simpson's email shows that this event was seen as a continuation and culmination of matters which had arisen in the grievance investigation, and which were shortly to become the subject of a disciplinary investigation.

205. At around 1.00 p.m., Mr Yusuf went to see Ms Wane, whom he had met the previous month in the course of the grievance enquiry, and who he knew was the person dealing with the kicking allegation. In a statement written the same day, Ms Wane described Mr Yusuf as "unsettled" and that they had a private conversation when Mr Yusuf repeated the spitting allegation. She described Mr Yusuf as "Sayed appeared very distressed". She wrote that after he had made the allegation to her "he brought his arms up to cover his face and appeared very angry and frustrated". Ms Wane reported that she told him to speak to Mr Amirhosseini to report the incident [270A]. Ms Wane immediately reported the incident to Ms Simpson of HR, and on her advice wrote the statement now at 270A [270C].

206. Shortly after the incident, Mr Yusuf met Mr Amirhosseini, who found Mr Yusuf in a distressed state. At 13.08 he emailed Mr Yusuf, with copies to Mr Fazekas and Mr Dryden: "I am sorry to hear that. After speaking to you I could see you are very upset and very shaken. I would suggest you go home now and work from home for rest of today." [262].

207. At 13.09, the claimant emailed Mr Dryden, copy to Mr Kennedy, and the subject was "Kicking by Sayed" because he used Mr Dryden's email of 21 September in reply to his kicking complaint, as the basis of his reply. He wrote [255A]:

> "I wonder if you have dealt with this issue please. Sayed has been staring me down and being quite confrontational in his demeanour towards be [sic] ever since I complained informally about his kicking me and again when I returned from lunch today at 12.30 p.m. If it can't be dealt with as soon as possible I am close to making a formal complaint on the matter (all be it reluctantly) as it can't be right a colleague continually attempts to make me feel threatened and uncomfortable time and again."

208. The first sentence was curious, as the claimant knew that the issue of the kicking allegations was under consideration by Ms Wane.

209. At 14.27, Mr Yusuf wrote a formal complaint to Mr Amirhosseini, copied to Mr Fazekas and Mr Dryden. He wrote:

> "As I was leaving the printer room, passing the exit door, I saw Benyam entering from the exist [sic] door, he started following me and walking behind me very closely and said "You are sick" to me. When I turned around he spat on me and walked straight to his desk and continued giving me a very bad look. I immediately asked Saad, who was there at the time, if he has seen what happened, but he said no. Then I looked around, but I could not see non of my

> mangers [sic] to report the incident to. So I reported the issue to Karenna, who asked me to report the issue to my mangers, I have also asked Solomon and he said that, he saw him (Benyam) walking behind me but did not hear nothing. I feel intimidated, bullied and always threatened by Benyam. I am always anxious when he is around and I cannot focus in my work. I cannot continue working in such environment as it is really affecting me both physically and emotionally." [261 to 262].

210. At 14.50, Mr Fazekas forwarded Mr Yusuf's complaint to Mr Kennedy, identifying it as of high importance, and stating the following [261]: "Please see the email below from Sayed regarding the incident reported earlier today. As discussed, I have serious concerns about Benyam's behaviour."

211. In evidence, Mr Nere told the tribunal that while he did not see the alleged spitting incident, he saw the claimant and Mr Yusuf immediately afterwards, and stated "Mr Yusuf was standing there shaking".

212. Ms Simpson of HR had been notified of the incident by Ms Wane. At 15.03, she emailed Mr Kennedy to refer him to the link which would enable Mr Yusuf to log the incident online as a workplace health and safety incident, which would be entered on Brent's database [264]. At 17.33, Mr Kennedy forwarded that email and link to Mr Amirhosseini, who at 17.54 replied (copy to Mr Fazekas):

> "I will advise Sayed to do that. However, I am getting increasingly concerned about Benyam's behaviour. I am really worried he might cause some serious damage if we don't act quickly. I am seriously concerned!". [264].

213. At 18.30, Mr Kennedy emailed the claimant, referring to a conversation they had just had, and stating [267]:

> "As you will be aware from our telephone conversation, I have received a serious allegation regarding your conduct. As such, you are required to attend a formal meeting at 1.00 p.m. on 30 November. I have sent you a meeting invite."

214. The claimant replied 15 minutes later to ask for confirmation [266] to which Mr Kennedy replied at 21.42:

> "To clarify our telephone conversation, I have instructed you to attend a formal meeting at 1p.m. on [Monday] 30 November, a meeting invite has been sent to you. You are not to report for work prior to the meeting. At the meeting I will decide if you should be suspended." [266].

<u>Suspension</u>

215. In the event, the claimant and Mr Stewart had a meeting with Mr Kennedy, who was accompanied by an HR adviser, at which the claimant was suspended. The letter of suspension of 2 December should be read in full (although it appeared in muddled format in the bundle at, we take it, 273 to 274 and 271C). The letter was in conventional format for such an

occasion, setting out the reason for suspension and confirming that suspension was not a disciplinary step.

216. The letter set out conditions of suspension which mirrored those in the respondent's disciplinary procedure, and were essentially an instruction to remain away from the workplace, from colleagues, and not to use "Council systems" which included email. The claimant was told that the allegations upon which the suspension was based were those of calling a colleague sick and spitting at a colleague. Mr Kennedy wrote [273]:

> "These actions, if proven, are contrary to the expected standards of behaviour for an officer of the Council and seriously call into question the essential mutual trust and confidence in you as an employee. At the meeting you denied that you called Sayed sick or that you spat at him. You stated it was a misunderstanding and that there was history between the two of you. It was explained to you that these points would be further explored as part of the disciplinary investigation meeting. In the circumstances I consider that you should be suspended. In reaching this decision, I considered whether your duties could be performed from another location within the Council, however due to the nature of the allegations against you and the need to protect both parties during the course of the investigation, I did not consider this to be a practical option."

Discussion of events of and after 27 November

217. This sequence of events was the basis of a large group of issues: 5.1, 5.2, 5.14, 5.15, 5.16, 5.17, 7.3, 7.4, 23.2, 23.3, 23.8, 25.2, 25.3, and 25.5. Overall, our factual findings are that the claimant abused Mr Yusuf as alleged; that the event became quickly known; that it was swiftly escalated because it was seen as serious; and that managers and HR responded reasonably, and in accordance with their honest belief in the truth as each understood it. We find that extraneous considerations of any form of disability, or of any form of discrimination, or of any protected act or disclosure, played no part whatsoever in any aspect of this sequence.

218. The claimant alleged that acts of discrimination began with Mr Yusuf staring at him as described, and then lying about the spitting allegation.

219. We find that it has been proven on the balance of probabilities that the claimant spat at Mr Yusuf. We do not find that it has been proven that Mr Yusuf intimidated the claimant by staring him down. In rejecting the claimant's allegation against Mr Yusuf, we rely on our earlier findings as to the claimant's credibility. We also note that the timing of the claimant's allegation came some 30 minutes after the spitting, a matter which was within the claimant's knowledge at the time. There was no evidence of Mr Yusuf ever having initiated or provoked unwanted contact with the claimant, and on the contrary we accept that he sought to avoid such contact, simply getting on with his job.

220. We have accepted the reliability and integrity of Mr Yusuf as a witness of truth. Factors to which we attach considerable weight have included his modesty and restraint in not reporting the kicking allegation, and the stated

reasons for doing so. We find important the fact that he reported the spitting event immediately after it happened, so that it was fresh in the mind and recollection of anyone who might be involved. Mr Yusuf's distress was observed by three reliable and truthful witnesses, Mr Nere, Ms Wane and Mr Amirhosseini. The latter two documented their observations almost immediately. The accumulation of Mr Yusuf's account; the emails which he wrote at once; the descriptions given of Mr Yusuf's state as seen by Ms Wane and Mr Amirhosseini; and the claimant's lengthening history of dispute with colleagues together rendered the spitting allegation immediately and inherently plausible.

221. The claimant raised issues in which he challenged the integrity and reliability of the responses to the event which we have found above, including those of Ms Wane (he did not accept that her statement at 270A represented her genuine view) and those of Mr Amirhosseini, Mr Fazekas and Mr Kennedy. He asserted that Mr Amirhosseini discriminated against him by describing the allegations as serious and expressing his concerns as to the claimant's future behaviour, when, he said, Mr Amirhosseini should simply have referred the matter to HR and sent Mr Yusuf home without making any further comment. He asserted that Mr Amirhosseini discriminated against him by "advocating" his suspension. He claimed that Mr Fazekas discriminated against him by not just informing Mr Kennedy of what had happened but by attributing fault to the claimant, asserting that Mr Fazekas identified the claimant as a troublemaker because of extraneous factors.

222. We reject all these points. The claimant did not, either at the time or in evidence before us, seem to appreciate that the spitting allegation was of an order of gravity as to warrant an appropriate managerial response. It represented an escalation into an event which could not be perceived or explained away as an accident, and which was a form of physical contact. It was aggravated by the verbal abuse of the allegation of sickness. Mr Yusuf's visible distress was a legitimate factor in the consideration.

223. We find that in the decisions, comments and email trails just described on 27 November, Mr Amirhosseini and Mr Fazekas expressed themselves appropriately, describing their genuine and fair assessments of what each had seen, and wholly untainted by any extraneous consideration.

224. When it came to Mr Kennedy's decision to suspend, the claimant raised three matters. The first was the decision to suspend; the second was the conditions of suspension, and the third was the failure to respond to the claimant's requests for informal resolution. We consider these as three separate matters. In so saying, we note that Ms Mallick told the tribunal that the claimant remains suspended. We accept that that is the case and we also accept that it cannot have been in the contemplation of Mr Kennedy in the last days of November 2015 that the claimant would be still suspended in May 2017. While we understand the emotive drive of the continuing suspension, its duration and continuance were not matters before the tribunal.

225. Mr Kennedy gave evidence, which we accept, that the decision to suspend was his and his alone. While he sought advice from HR, their role was advisory and his was executive.

226. Mr Kennedy gave evidence that he was in general terms aware of the claimant's background at work as a person with a history of conflict. Mr Kennedy was challenged as to why he had expressed the view "I am concerned that Benyam's behaviour is becoming worse" and in any event before any further enquiry. He answered that through one to ones with Mr Fazekas, he was aware of something of the claimant's history and of concerns that had been raised by other staff about the claimant's behaviour. Mr Kennedy summarised the position as giving rise to concern that the claimant was intimidating those around him.

227. It was a recurrent theme of this part of the case that there had been no comparable management comment or response, or indeed suspension, in reply to the claimant's allegation of 13.09 that Mr Yusuf had been staring him down. Mr Kennedy stated that he thought that the nature of the two incidents was quite different, and for reasons already summarised, we agree. If Mr Yusuf had indeed stared threateningly at the claimant, it was a unique incident, and there was no evidence of Mr Yusuf having had a poor working relationship with anyone other than the claimant. It was in any event not alleged that there had been any physical interaction. Mr Yusuf's allegation of spitting was an allegation of physicality; it was one of a series of allegations brought against the claimant of intimidatory and inappropriate behaviour at work, originating with a variety of colleagues in different contexts; and it was circumstantially supported by three others who had seen Mr Yusuf in a distressed state. We agree that both as a matter of general common sense, and in light of section 23 of the Equality Act, the two incidents were not comparable.

228. The claimant relied on three other incidents which he alleged were comparable. One was his complaint of 21 September that Mr Yusuf had kicked him. We accept that there were a number of clear points of distinction which took that allegation beyond s.23. The claimant reported the incident three days after it took place, not at once; no one saw the claimant to be upset or shaken; the claimant asked for it to be resolved informally; and when the allegation was indeed investigated, it was found to be baseless. The other two were the grievance against Mr Amirhosseini of 5 August, and the allegation of impropriety against Ms Weekes of 28 October. Neither of these was an allegation of physical contact, or of immediate threat; both relied in part on records which were capable of examination; and neither led to any other person being seen to be distressed. None of the these matters meets the 'like with like' requirement of s.23, and none of the comparisons is apt.

229. We find that the reason why Mr Kennedy suspended the claimant was the inherent gravity of the allegation against him for reasons already stated; and the desirability of removal of the claimant from the workplace pending

an investigation. We find that that is standard practice in large employers. It was put to Mr Kennedy that he could have sought to relocate the claimant. We saw little to nothing in that line of argument. The claimant was a specialist engineer, and his specialism involved working with the team around Mr Dryden and Mr Amirhosseini. There was no evidence of appropriate alternative employment. Furthermore, the claimant's interpersonal relationship issues went far beyond just the single individual who had alleged being spat at. We do not fault or criticise Mr Kennedy for failing to displace management of the claimant to a different area or team.

230. In evidence, the claimant asserted that he had been suspended in part at least because of the protected disclosure of 28 October. Even if that were a protected disclosure, we find that it had no bearing on the decision to suspend. In closing, Ms Mallick put the point higher (but differently) and submitted that disability was the only reason for suspension. We disagree. The claimant was suspended because of plausible reports of physical intervention with a colleague.

231. The claimant asserted that the conditions attached to his suspension were imposed contrary to the terms of employment of the respondent. When shown the relevant suspension procedure, which rendered imposition of the terms imposed on him mandatory in every suspension [491], the claimant asserted that "practice is different and there may be supervised access to emails". Half of that statement is correct. We accept that supervised access to emails was within the discretion of HR (not exercised in the case of the claimant). Other than that, there was no evidence to support the proposition that the respondent's practice on suspension differed from its stated policy and we do not accept that it was. We add that the terms of suspension which we saw are in our experience standard in a large organisation. There was no reason to believe that by applying to the claimant the standard terms of its own written procedures the respondent discriminated against him in relation to any extraneous matter.

232. On 16 December, the claimant wrote to Mr Kennedy to ask in essence for reconsideration of the decision to suspend him and asking whether the matter could be reviewed with a view to informal resolution. [289]. This was refused. Mr Kennedy's evidence was straightforward: "I did not feel informal resolution was appropriate due to the seriousness of the allegations." The claimant's evidence on this point did him little credit. He refused to concede that the allegation of spitting warranted formal investigation, stating "it depends on the practice and policy". He also submitted that informal resolution had been refused because of the protected disclosures of 5 August and 28 October.

233. We find that Mr Kennedy's rejection of informal resolution was a legitimate and proportionate response to a serious workplace incident, bearing in mind the responsibility of the respondent to provide a safe working environment to all its employees, notably including Mr Yusuf. Furthermore, the language of the claimant's request [289] was so powerfully suggestive of a lack of insight into the gravity of the allegation

as to render Mr Kennedy's assessment unimpeachable. We find that it was a decision untainted by extraneous considerations and objectively warranted in the circumstances.

234. In particular, in requesting informal resolution, the claimant made desperately bad points, stating that neither Mr Yusuf nor Mr Amirhosseini nor Ms Weekes had been suspended in reply to his complaints or allegations against them. None of these was a comparable situation. Mr Yusuf was not the subject of formal process on 21 September because the claimant expressly asked for that not to be the case, and when the matter was looked into, Mr Yusuf was believed and the claimant was not. The complaints against Mr Amirhosseini were management grievances, complaining about decision making. There was no reason to believe Mr Amirhosseini posed a threat to the physical safety of the work environment. The complaint against Ms Weekes was one which was, as the claimant knew at the time, flawed by reason of the matters summarised above.

Online report

235. It will be recalled that the respondent had a procedure for online recording of health and safety incidents. Mr Yusuf logged the incidents of 18 September and 27 November onto the system on 17 December. His reports in turn generated a record, which was sent to management. Mr Yusuf logged the events in response to being advised by Mr Kennedy and HR of his right to do so, and of the existence of the system for doing so.

236. The claimant alleged that he had not been advised to use this system, and that there was therefore a difference in treatment, which he attributed to the protected status of disability. It is correct that the claimant was not advised of the existence of this system in response to his allegations against Mr Yusuf of 21 September and 27 November.

237. We find that the reasons why managers advised Mr Yusuf, but not the claimant, to log the issues and how to do so, were untainted by any extraneous consideration. The claimant's 21 September report included a request that the matter should be dealt with informally, and was not written in language which suggested inherent seriousness. His report of 27 November was about staring, which, on its face, did not indicate a health and safety event. The reported events were therefore not strictly comparable.

238. A secondary reason why there was a distinction in treatment was that management reasonably perceived that Mr Yusuf did not present a threat of harm to any colleague, such that database recording would be prudent. We find that there were concerns, genuinely held, and reasonably formed on the objective facts, that the claimant might present a threat. We find that it was reasonable management judgment to advise Mr Yusuf of his right to place the matter on the database. The information placed on the

database by Mr Yusuf [281 to 286] was expressed in moderate language, and was, in our judgment, soundly based in fact.

239. Issues 5.4, 7.5 and 23.4 relate to this event. They fail because we find that the advice given to Mr Yusuf, and Mr Yusuf's decision to act upon it, were proper and reasonable exercises of judgment, offered and accepted honestly, and without taint in the slightest of any extraneous issue. We add that the situations relied upon for comparative purposes do not in our view meet the 'like with like' requirements of s.23.

Recommendation by Ms Wane

240. The final matter in chronology of which we heard was the recommendation by Ms Wane, in the report sent to the claimant on 4 January 2016 rejecting his grievance, that matters proceed to a disciplinary investigation. Ms Wane confirmed that the recommendation was hers alone and we find that it was based upon her professional and honest assessment of the evidence before her, untainted by any extraneous matter. Issue 25.4 therefore fails.

Reasonable adjustment claims

241. We here deal with the claims of failure to make reasonable adjustments, which we find convenient to set out separately.

242. The claims arose under section 20(3):

> "Where a provision, criterion or practice of A 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."

243. We note in that subparagraph the necessity to find first the existence of a PCP; secondly, the substantial disadvantage; and thirdly that the duty is to take steps reasonable to avoid the disadvantage, and not a general duty to address a health issue.

244. The first claim (issue 19.1) was of failure to carry out health assessment and provide an ergonomic chair. That was brought as a claim in relation to the claimant's physical disability.

245. We refer to our fact find above. Ms Savage's pre-employment assessment recommended work station and desk assessment. The claimant took up post in December 2014 and no such assessment was conducted. The claimant was until 30 March managed by Ms Barnes, herself with an arthritic disability, and against whom the claimant expressly told us that he made no claim or complaint of disability discrimination. There was no evidence that the claimant requested work station assessment.

246. Following the claimant's absence in July 2015, Mr Dryden moved swiftly to arrange an occupational health assessment, which was undertaken promptly. The recommendation of home working on Wednesdays was implemented at once. OH advised that there be a desk assessment (145), for which Mr Dryden at once referred to the respondent's health and safety function (148). Desk assessment took place on 4 August (161), leading to a report (172).

247. The resulting report should be considered carefully. It clearly gives guidance as to the use of a mouse, and indicates that the existing chair with which the claimant had been provided, and which was not ergonomic, was serviceable, if properly set up and used. It then suggested further review.

248. The next step that we saw was that the claimant asked Mr Dryden to authorise the purchase of an ergonomic chair, and by 8 September Mr Dryden did so (197). There was no further expert evidence to indicate that this was necessary, and it is difficult to avoid the inference that Mr Dryden agreed to the chair for the sake of a quiet life. The claimant specified the requirements of the chair by 22 September (197), and we understand that it was purchased at some cost and was in use by October.

249. Mr Smith in submission reminded us that this part of the claim was inherently flawed, because it was a complaint of a failure to carry out assessment, which according to the EAT in Tarbuck v Sainsbury's [2006] IRLR 664**,** cannot succeed as a claim for reasonable adjustment.

250. We find that that point is well made. We find with the claimant that there was delay in carrying out the assessment, but we find that that delay did not constitute a failure of reasonable adjustment. Mr Dryden moved with commendable speed once he considered that the issue had arisen. Thereafter, the claimant was speedily provided with the ergonomic chair. There was in our judgment no evidence that provision of the ergonomic chair was a reasonable adjustment which would assist alleviate the disadvantage. In any event, we reject the submission of a failure to provide it; it was provided swiftly.

251. The second reasonable adjustment (issue 19.2) was of a failure after 27 November to pursue "informal resolution" with Mr Yusuf "as recommended by… Mr Fazekas". We could find no such recommendation by Mr Fazekas, beyond the broad general proposition that informal resolution of disputes in the workplace is desirable.

252. We understand this claim to refer to the claimant's mental health, and therefore it fails both on the issue of disability and on the issue of knowledge. That said, our finding is as stated above that Mr Kennedy's decision that the matter was too serious for informal resolution was a legitimate and reasonable management decision. In all the circumstances already described, we find further that there was no evidence that informal resolution would have assisted the claimant to overcome any

disadvantage. In so finding, we note that the claimant was, by December 2015, in forms of conflict or dispute with a number of colleagues with whom he was the common denominator (to repeat Mr Dryden's apt phrase); that being so, we do not consider that informal resolution with a single individual was a reasonable adjustment.

253. Issue 19.3 related to use of the chair. The background fact is very shortly stated. When the respondent moved a large number of staff to its present premises, and adopted hot desking, it adopted procedures and protocols which were designed to facilitate hot desking. One such procedure was that any item of equipment which was for the personal use of an individual was to be put away in a designated area at the end of the working day (232, 237). As we understood it, Ms Barnes had a chair for her personal use and adopted this procedure, as the claimant would have seen for the three or so months of their working together. We accept that there were exemptions and exceptions, and that not all staff operated on a hot desking basis.

254. When the claimant's chair was delivered, he did not follow this policy, and by email of 21 October [232] refused to do so, setting out arguments to the effect that to do so would make him feel "singled out" or "segregated". The logic of that particular objection was unclear, as the claimant was being asked to do what everybody else did (and which he had seen Ms Barnes do) and was in fact asking for an exemption from the standard procedure. We did not understand the claimant to say that he was physically incapable of moving the chair (which was on wheels), or that he had difficulty in doing so. We did not understand moving the chair to be physically more demanding than pushing a supermarket trolley or a suitcase on wheels. The claimant refused to follow the policy, and after a few emails, management agreed to excuse him from doing so. It may have been another example of management seeking a quiet life. When asked to identify the disadvantage to which the policy put him, as he had in fact never obeyed it, the claimant stated that he was at the disadvantage of being subject to a management instruction and policy for a period of one to two weeks in October; or that he had to ask colleagues to put away his chair.

255. We accept that the policy applied to the claimant was that of putting away his designated chair. It has not been shown that it put the claimant to substantial disadvantage, either inherently or in operation in practice; and we accept further, if we have to do so, that the policy was justified as a proportionate and non-discriminatory means of achieving the legitimate aim of operating hot desking in a manner which was both practical and fair. The claim fails.

256. It follows that all claims are dismissed. The claimant is reminded that as the tribunal file shows that he acts in person, correspondence from the tribunal will be sent to him only, at the correspondence address which he has supplied to the tribunal.

_____
Employment Judge R Lewis

Date: 1 July 2017……

Reserved Judgment and Reasons

Sent to the parties on: .....

.....
For the Tribunal Office

APPENDIX

IN THE WATFORD EMPLOYMENT TRIBUNAL

B E T W E E N:

BENYAM KEBATA

Claimant

- and -

LONDON BOROUGH OF BRENT

Respondent

LIST OF ISSUES
FOR THE FINAL HEARING ON 10 – 24 MAY 2017

A. Jurisdiction

1. Which, if any, of the claimant's specific complaints / claims are *prima facie* out of time, having regard to ss. 123 (1) (a) and 123 (3) of the Equality Act 2010 ("**EqA**") and the ACAS Early Conciliation provisions in s. 140B EqA; and/or s. 48 (3) (a) of the Employment Rights Act 1996 ("**ERA**") and the ACAS Early Conciliation provisions in s. 207B ERA?

2. In respect of those complaints that are *prima facie* out of time, does the Tribunal nevertheless have jurisdiction to determine them, applying s. 123 (1) (b) EqA and/or s. 48 (3) (b) ERA?

B. Disability status

3. Did the claimant, at some or all of the material times, suffer from a mental impairment (namely depression, stress and anxiety) that had a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities?[1]

[1] The Respondent accepts that the Claimant was a disabled person at the material times, by virtue of a *physical* impairment – specifically, the medical condition polyarthritis. However, the Respondent denies that the Claimant suffered from a *mental* impairment that had a long term and substantial adverse effect on his

C. Direct disability discrimination

4. Did the respondent, because of the claimant's *physical* disability, treat him less favourably than it treated or would treat others, in the following alleged respects?

   4.1. Mr Amir Hosseini, on 8 June and 24 June 2015, discussing with the claimant in an open plan office the claimant's health issues, after the claimant had verbally and by email asked that his health issues were not discussed in an open plan office in front of his colleagues.

   4.2. Mr Amir Hosseini's repeated insistence that the claimant help complete an Occupational Health Referral Form at his desk, in an open plan office in front of colleagues, instead of it being completed in a private meeting room.

5. Did the respondent, because of the claimant's *alleged mental health* disability – specifically, the respondent's alleged stereotypical perceptions of persons with stress and depression – treat him less favourably than it treated or would treat others, in the following alleged respects?

   5.1. On 26 November 2015, Mr Amir Hosseini informally investigating spitting allegations against the claimant and encouraging a formal grievance to be raised by Mr Yusuf, supported by Mr Nere.

   5.2. On 29 November 2015, Mr Kennedy and Human Resources suspending the claimant from work, in circumstances comparable to those where the claimant had complained about his colleagues, but they had not been suspended; and/or placing overly strict conditions of suspension on him, including preventing the claimant from accessing emails despite ongoing investigations. The comparable circumstances are stated to be complaints against Mr Amir Hosseini on 4 August 2015, Mr Sayed Yusuf on 21 September 2015 and 26 November 2015, and Ms Weeks on 4 November 2015.

   5.3. By Mr Dryden perceiving the claimant as someone who made

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ability to carry out normal day-to-day activities (or, in the alternative, that it had actual or constructive knowledge of such disability).

trouble for people he was not getting on with and communicating the same to the grievance investigator on 9 October 2015.

5.4. By recording alleged violent incidents against the claimant on the Violence/Assault Records of the Council's online Accident/Incident system, naming the claimant as the assailant and providing a formal report to the Head of Service, whilst failing to take any action in respect of the incidents of violence and aggression the claimant reported on 21 September 2015 and 26 November 2015.

5.5. On 2 September 2015, Mr Fazikas and Ms Weeks, both in emails and in a meeting, portraying the claimant as being condescending in an email he had sent to Ms Weeks.

5.6. On 3 September 2015, Mr Fazikas and Mr Nere, both in emails and in a meeting, portraying the claimant as someone with a problematic attitude and tone.

5.7. On 6 October 2015, Mr Yusuf making up a series of lies about the claimant, based on his perception of the claimant as a threatening and aggressive person – specifically, allegations that the claimant had stamped on his foot and toe; that he had pushed a computer terminal onto his mobile phone and broken its screen; that he found the way the claimant walked around intimidating; that the claimant threw paper onto Ms Weeks' desk so as to upset her; and that the whole team had similar issues with the claimant, providing examples of what he saw as inappropriate email correspondence between the claimant and Mr Nere, Ms Weeks and Mr Hassan.

5.8. On 9 October 2015, Mr Dalsania stating that he perceived the claimant as being rude; that he (Mr Dalsania) had been told by Mr Yusuf that the claimant had stamped on Mr Yusuf's feet; that the claimant came across as aggressive in his manner towards people; and that the claimant was rude towards his team mates and upset them.

5.9. On 14 October 2015, Mr Dryden informing Ms Wade and Ms Daley that he perceived the claimant as being intimidating, someone who made issues from small incidents, and as a trouble maker.

5.10. On 14 October 2015, Mr Dryden giving an inaccurate account of an informal grievance meeting.

5.11. On 27 October 2015, Mr Dryden complaining to Mr Fazikas that the claimant was being relentless or making relentless complaints about colleagues, without the claimant's knowledge.

5.12. On 27 October 2015, Mr Fazikas forwarding Mr Dryden's email to Mr Kennedy, adding that the claimant was putting Mr Dryden's team under considerable pressure with his behaviour, including by upsetting Ms Weeks, criticising Mr Nere and refusing to relocate his special chair.

5.13. On 27 November 2015, Ms Weeks emailing Mr Dryden to complain about the claimant sending her what she perceived to be a rude, disrespectful and discourteous email.

5.14. On 27 November 2015, Mr Yusuf approaching the claimant with a threatening appearance and looking at the claimant in a threatening manner.

5.15. On 27 November 2015, Mr Yusuf lying that the claimant had spat at him and called him sick.

5.16. On 27 November 2015, Mr Hosseini emailing Mr Kennedy to advocate the claimant's suspension from work.

5.17. On 27 November 2015, Mr Fazikas emailing Mr Kennedy to express his concerns about the claimant's behaviour towards his colleagues.

5.18. Ms Wade and Ms Daley investigating matters unrelated to the claimant's grievance in the grievance investigation, and instructing Mr Yusuf to complain about him on 6 October 2015.

5.19. Ms Wade and Ms Daley failing to inform the claimant about the complaint made against him, or to advise him as to how the matter would be progressed.

D. <u>Harassment related to disability</u>

6. Did the respondent subject the claimant to unwanted conduct related to his *physical* disability, as alleged below?

   6.1. Mr Amir Hosseini on 8 June and 24 June 2015, discussing with the claimant, in an open plan office, the claimant's health issues after the claimant had verbally and by email asked that his health issues not be discussed in an open plan office in front of his colleagues.

   6.2. Mr Amir Hosseini's repeated insistence that the claimant help complete an Occupational Health Referral Form at his desk in an open plan office in front of colleagues, instead of it being completed in a private meeting room.

   6.3. By putting the claimant on a formal Attendance Management Programme on 27 July 2015.

7. Did the respondent subject the claimant to unwanted conduct related to his *alleged mental health* disability, as alleged below?

   7.1. On 8 June 2015, Mr Amir Hosseini shouting out in an open plan office to the claimant, in front of colleagues, ''*You were absent due to stress on 30 March weren't you Benyam*", despite the claimant's repeated request to keep his personal health issues private.

   7.2. By putting the claimant on a formal Attendance Management Programme on 27 July 2015.

   7.3. On 26 November 2015, Mr Amir Hosseini informally investigating spitting allegations and encouraging a formal grievance to be raised by Mr Yusuf, supported by Mr Nere.

   7.4. On 29 November 2015, Mr Kennedy and Human Resources suspending the claimant from work, in circumstances comparable to those where the claimant had complained about his colleagues, but they were not suspended, and/or placing overly strict conditions of suspension on him, including preventing the claimant from accessing emails despite ongoing investigations. The comparable circumstances are stated to be complaints against Mr Amir Hosseini on 4 August 2015, Mr Sayed Yusuf

on 21 September 2015 and 26 November 2015, and Miss Weeks on 4 November 2015.

7.5. By recording alleged violent incidents against the claimant on the Violence/Assault Records of the Council's online Accident/Incident system, naming the claimant as the assailant and providing a formal report to the Head of Service whilst failing to take any action in respect of the incidents of violence and aggression the claimant reported on 21 September 2015 and 26 November 2015.

7.6. As set out in paragraphs 5.5 – 5.11 of the list of issues above.

8. If the respondent did act in the manner complained of, did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

9. If not, did the conduct have the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

- In considering whether the conduct had such effect, the tribunal will take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

E. <u>Discrimination arising from disability</u>

10. In placing the claimant on a formal Attendance Management Programme on 27 July 2015, did the respondent treat the claimant unfavourably because of something arising in consequence of his physical and/or alleged mental health disability?

- For the purpose of this complaint, the "*something arising in consequence of*" the claimant's physical disability is said to be: sickness absence as a consequence of back pain.

- For the purpose of this complaint, the "*something arising in consequence of*" the claimant's alleged mental health disability is said to be: sickness absence as a consequence of depression, stress and anxiety.

11. If so, can the respondent show that the treatment was a proportionate means of achieving a legitimate aim, namely:

    11.1. Seeking to ascertain and understand the reasons for the claimant's absence from work, and to support him to return to work;

    11.2. Seeking to understand and ascertain the extent to which the claimant remained capable of performing his contracted role, or potentially other roles within the respondent (having regard to the reasons for his absence from work);

    11.3. Dealing with the claimant's absence and aiming to reduce his level of absence, whilst promoting the health, safety and well-being of the claimant; and/or

    11.4. Encouraging good levels of attendance at work by the claimant and/or the respondent's workforce more generally?

12. Further or alternatively, can the respondent show that it did not know, and could not reasonably have been expected to know, that the claimant had the particular mental health disability relied on by the claimant for the purpose of this claim?

13. As set out in paragraphs 5.1 – 5.17 of the list of issues above, did the respondent treat the claimant unfavourably because of something arising in consequence of his alleged mental health disability – specifically, the claimant demonstrating symptoms of anxiety and depression and/or the alleged perpetrators' stereotypical perceptions of the claimant's alleged mental health disability?

14. If so, can the respondent show that the treatment was a proportionate means of achieving a legitimate aim, namely:

    14.1. Reporting genuine concerns about the claimant's behaviour / conduct;

    14.2. Seeking to monitor and/or manage the claimant's behaviour;

    14.3. Seeking to protect the claimant's colleagues from inappropriate behaviour, whether actual or perceived; and/or

14.4. Seeking to ensure the effective running of the claimant's team?

15. Further or alternatively, can the respondent show that it did not know, and could not reasonably have been expected to know, that the claimant had the particular mental health disability relied on by the claimant for the purpose of this claim?

16. Did the respondent treat the claimant unfavourably because of something arising in consequence of his alleged mental health disability – specifically, knowledge of the claimant attending counselling sessions for work related stress and/or the claimant demonstrating symptoms of withdrawal, anxiety and depression and/or Ms Wade's and Ms Daley's stereotypical perceptions of persons with the claimant's alleged disability, as alleged below?

16.1. Ms Wade and Ms Daley investigating matters unrelated to the claimant's grievance in the grievance investigation, and instructing Mr Yusuf to complain about him on 6 October 2015.

16.2. Ms Wade and Ms Daley failing to inform the claimant about the complaint made against him, or to advise him as to how the matter would be progressed.

17. If so, can the respondent show that the treatment was a proportionate means of achieving a legitimate aim, namely:

17.1. Investigating concerns about the claimant's behaviour / conduct;

17.2. Seeking to conduct a proper / thorough investigation into the claimant's grievance and/or matters involving the claimant;

17.3. Seeking to protect the claimant's colleagues from inappropriate behaviour, whether actual or perceived;

17.4. Seeking to protect the rights of the claimant's colleagues (e.g. in respect of confidentiality); and/or

17.5. Seeking to ensure the effective running of the claimant's team?

18. Further or alternatively, can the respondent show that it did not know, and could not reasonably have been expected to know, that the claimant had the

particular mental health disability relied on by the claimant for the purpose of this claim?

F. Failure to make reasonable adjustments

19. Did the respondent apply the following provisions, criteria and/or practices ("**PCPs**"), as defined by the claimant in his Further and Better Particulars document dated 7 July 2016 ("**FBPs**")?

Practice re OH referral and Attendance Management Policy

19.1. "Ignoring or failing to take any practical steps towards delivering upon the pre-employment health assessment recommendations of Occupational Health professionals that a work station assessment is undertaken and that I am provided with an ergonomic chair to alleviate the disadvantage I suffered as a result of my disability" ("**the First PCP**").

Attendance Management /Grievance / Disciplinary Policy

19.2. "Mr Kennedy and HR refused the informal resolution of the complaints my colleague Mr Yusuf raised against me despite this being the most practical route to resolve the complaint as recommended by my trade union representative Mr Stewart and my manager's manager Mr Fazikas" ("**the Second PCP**").

Management Practice

19.3. "Requiring me to move my ergonomic chair from my desk and place it in a communal breakout area at the end of every day" ("**the Third PCP**").

20. Did the application of any such provision put the claimant, as a disabled person, at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, specifically:

20.1. In relation to the First PCP, the claimant says: "I was at a significant

disadvantage to my colleagues without a disability as I suffer from considerable back and joint pains as well as fatigue when using non-ergonomic chairs because of my disability. I would often get to a stage in the early afternoon where it was not possible for me to continue working and I would have to leave work or go on a site visit in a company car. This caused me physical pain daily and often disrupted my working day."

20.2. In relation to the Second PCP, the claimant says: "The investigation of the complaint has now taken over six months because I have been unable to participate to the respondents hostile approach to resolving the complaints including restricting access to their systems, withholding information, making un-particularised allegations of offending colleagues and failing to put in place adjustments recommended by Access to Work. I am taking antidepressant medication and suffer a constant sense of despair and hopelessness and have suffered a number of mental health crisis [sic] where I am unable to function and in effect become bed ridden. I experience physical pains in my head and body because of the stress the respondent is putting me under."

20.3. In relation to the Third PCP, the claimant says: "It is likely that if my chair is left in place my colleagues would be considerate of the need for me to make use of the ergonomic chair and sit elsewhere on the days when I am expected to be working. The removal of the chair to the breakout area meant that colleagues did not have to be considerate of the need for me to use the chair and wouldn't sit elsewhere I would then have to wheel the chair some distance to a different location when it was possible to do so or go without the chair and suffer the adverse effects of being without a chair for a number of days. I could have to sit on any one of six floors and it would be quite difficult to use the busy lifts or corridors to push the chair to a given location. The minimal consideration colleagues would have afford [sic] me if the chair was left in place was denied to me and I suffered a substantial disadvantage as a result. My colleagues would be free to use the chair on Wednesdays when I work from home as a number of them indicated a preference to use the chair and I gave them permission to do so."

21. If the claimant was put at a substantial disadvantage (as alleged), did the

respondent fail to take such steps as it was reasonable to have to take to avoid the disadvantage?[2]

G. Victimisation

22. Has the claimant done a protected act(s)? The claimant relies on his:

22.1. Presenting a grievance on 5 August 2015; and

22.2. Presenting his legal claim, under case number 3303074/2015, to the Tribunal on 4 November 2015.

23. If the claimant did do a protected act(s), did the respondent subject him to detrimental treatment because he had done so, specifically:

23.1. Mr Amir Hosseini and other members of management removing the claimant from working on projects, from the short sections of Waiting and Loading Restriction Programmes.

23.2. Mr Amir Hosseini, on 26 November 2015, formally investigating spitting allegations and encouraging a formal grievance to be raised by Mr Yusuf supported by Mr Nere, against the claimant.

23.3. On 29 November 2015, Mr Kennedy and Human Resources suspending the claimant from work, in circumstances comparable to those where the claimant had complained about his colleagues, but they were not suspended, and/or placing overly strict conditions of suspension on him, including preventing the claimant from accessing emails despite ongoing investigations.

23.4. By recording alleged violent incidents against the claimant on the Violence/Assault Records of the Council's online Accident/Incident system, naming the claimant as the assailant and providing a formal report to the Head of Service.

23.5. By Mr Dryden perceiving the claimant as someone who makes trouble for people he was not getting on with and communicating the

[2] The steps that the claimant says the respondent ought to have taken are set out on pages 8, 9 and 10 of the claimant's FBPs.

same to the grievance investigator on 9 October 2015.

23.6. On 2 and 3 September 2015, Mr Fazikas encouraging complainants about the claimant to come to him, rather than to their line manager.

23.7. On 2 and 3 September 2015, Mr Fazikas discussing complaints about the claimant without consulting the claimant.

23.8. As set out in paragraphs 5.5 – 5.11 of the list of issues above.

H. Whistleblowing detriment

24. Did the claimant, as set out below, make:

24.1. A disclosure of information;

24.2. To his employer;

24.3. Which, in his reasonable belief, was made in the public interest; and

24.4. Which, in his reasonable belief, tended to show that the respondent had;

24.4.1. contravened the Public Services (Social Value) Act 2012, the Small Business, Enterprise and Employment Act 2015, the Public Contracts Regulations 2015, and the Bribery Act 2010 (in respect of "**PD 1**" below)?

24.4.2. breached the implied term of mutual confidence in his contract of employment (in respect of "**PD 2**" below)?

24.4.3. endangered his health and safety (in respect of "**PD 2**" below)?

- With regard to the claimant's alleged protected disclosures, he relies on two matters:

PD 1: "On 4.11.15 I made a public interest disclosure to Mr Fazikas and Mr Kennedy by emailing them my concerns about potential financial irregularities in the procurement of printing services from a high street retailer. The issue was that a colleague was placing printing orders for public consultation documents without comparing costs with the council's "in-house" term printing services provider or securing quotes from a selection of "high street" retailers.

I explained that it was obviously in the public interest to ensure a selection of quotations were obtained as the council has a legal responsibility to deliver value for money, given the scale of consultations undertake, through proper procurement processes. I also raised concerns about potentially undeclared gifts being received by the procuring officer who was making use of the same high street retailer for all the departments' project consultation printing tasks in the said circumstances."

PD 2: Presenting a grievance on 5 August 2015.

25. If the claimant did make a protected disclosure (as aforesaid), was he subjected to any detriment by the respondent or another worker because he had done so – specifically:

25.1. On 26 November 2015, Mr Amir Hosseini informally investigating spitting allegations against the claimant and encouraging a formal grievance to be raised by Mr Yusuf, supported by Mr Nere.

25.2. On 29 November 2015, Mr Kennedy and Human Resources suspending the claimant from work.

25.3. On 1 December 2015, formally confirming the Claimant's suspension from work.

25.4. On 4 January 2016, recommending that the Claimant face a disciplinary procedure.

25.5. Between 29 November 2015 and 29 March 2016, Mr Kennedy and Human Resources failing to adopt an informal resolution procedure in respect of the Claimant's alleged conduct.

25.6. As set out in paragraphs 5.5, 5.6, 5.11, 5.12, 5.17, 5.18 and 5.19 of the list of issues above.

26. If any act of detriment was done by a worker of the respondent, can the respondent show that it took all reasonable steps to prevent that worker from doing that thing, or from doing anything of that description?