Case No: 2302297/2018
2503459/2018

EMPLOYMENT TRIBUNALS

Claimant: Mr. Pubbi
Respondent: Your-Move.co.uk

Heard at: London South, Croydon
On: 9-13 September 2019, 8 November and the 9-10 December 2019 (in chambers)

Before: Employment Judge Sage
Members: Ms. Grayson
Ms. Oldfield
Representation

Claimant: In person

Respondent: Mr. Bryan of Counsel

RESERVED JUDGMENT

1. The Claimant's claim for wrongful dismissal is dismissed upon withdrawal.

2. The Claimant's claims under section 15 and 20 of the Equality Act are not well founded and are dismissed.

3. The Claimant's claim for unfair dismissal is not well founded and is dismissed.

REASONS

1. By a claim form presented on the 20 June 2018 the Claimant claimed disability discrimination (failure to make reasonable adjustments and discrimination arising). By a further claim form presented on the 22 November 2018 the Claimant claimed disability discrimination

(discrimination arising) and unfair dismissal and wrongful dismissal. The Respondent conceded that the Claimant suffered from a disability by reason of his social phobia. The Respondent submitted that all non-dismissal claims were out of time. The Respondent defended both claims.

Preliminary issues.

2. The Respondent raised an issue in relation to the Claimant's bankruptcy on the 29 January 2018 saying that he could not pursue proprietary rights in relation to money claims. He could only pursue personal claims such as unfair dismissal, claims for injury to feelings and a declaration in respect of his claim for discrimination.

3. In reply the Claimant conceded that he would withdraw his claim for wrongful dismissal and would limit his claims for injury to feeling and a declaration in respect of his discrimination claim.

4. The Tribunal considered the Respondent's application and the case law and statutory provisions referred to us including the cases of Khan v Trident Safeguards Limited and other [2004] EWCA Civ 624, Grady v Prison Service [2003] EWCA Civ 527 and Beckham v Drake [1849] 11 HLC 579 and it was concluded that in the light of the Claimant's concession and the fact that all the claims now being pursued by the Claimant were personal claims, his claims could proceed. His claim for wrongful dismissal would be dismissed upon withdrawal.

5. Although the Respondent in their preliminary application made an application to strike out some of the Claimant's claims because they were out of time, it was agreed that this would be an issue more properly considered by the Tribunal after hearing all the evidence.

The Issues

6. The issues were agreed to be as follows:

7. Under **Section 15 of the Equality Act 2010** the Claimant relied upon the following unfavourable treatment:

(a) Awarding the lowest grade for his 15 December 2017 appraisal. The something arising in this head of claim is the Claimant's sickness absence in December 2016 to April 2017 (**Issue A**);

(b) Offering to redo the appraisal around December 2017 and then withdrawing the offer on the 9 January 2018. The something arising is the Claimant's fear of negative judgment and anxiety (**Issue B**);

(c) Raising direct questions to him during a conference call without providing notice that these queries may be raised in January 2018. The something arising relied on is the Claimant's fear of negative judgment and anxiety (**Issue C**);

(d) Causing or permitting a ratcheting of negative language and sentiment in the course of email correspondence relating to the appraisal, resulting in the Claimant taking sickness leave from work on the 23 January 2018, ignoring an email from the Claimant on the 22 January 2018 outlining he was feeling unwell. The something

arising relied upon by the Claimant is his fear of negative judgment and anxiety which causes him to respond to the actual or perceived negative judgment in a negative way, including with some confrontational language (**Issue D**).

(e) Carrying out an HR check on the Claimant on the 8 February 2018. The something arising is that the 'Claimant's disability means he is likely to be checked more than someone without his disability (because employers are known to check on employees while on sick leave to check that their sickness is genuine)' (**Issue E**).

(f) Dismissal of the Claimant. The something arising is that 'the Claimant's disability prevented him from disclosing his bankruptcy to a person who was non-neutral (or he perceived to be non-neutral). He claims he was awaiting the appointment of a grievance manager who would be neutral (or he would perceive as neutral) **(Issue F**).

8. Did the 'somethings arising above arise in consequence of the Claimant's disability of social phobia? The Respondent accepts that the following arose out of his social phobia:

(a) The Claimant's fear of negative judgment and anxiety and
(b) His sickness absence in December 2016- April 2017.

9. Did the Respondent treat the Claimant unfavourably as set out above? The Respondent accepts that it dismissed the Claimant and that dismissal is unfavourable treatment.

10. If so, was the unfavourable treatment because of something arising in consequence of his disability as referred to above?

11. If so, was the unfavourable treatment a proportionate means of achieving a legitimate aim?

Failure to make reasonable adjustments.

12. **Issue G** was having conference calls with a number of different individuals on the line.

13. The substantial disadvantage relied upon was that this created considerable anxiety and fear of judgment for people with Social phobia which in turn negatively impacts on workplace performance.

14. **Issue H** was the PCP relied on is the annual appraisal process including relying on 'monies banked' for performance purposes;

15. The substantial disadvantage relied on was that this failed to take into consideration periods of sickness caused by disabilities and ongoing treatment (including the Claimant's cognitive behavioural therapy (CBT) up to November 2017). The Claimant had a period of sickness which was caused by his disability which was considered a factor in his low appraisal rating. He also had a period of CBT up to November 2017 which counted against him. Additionally the Respondent's reliance on 'monies banked' is a retrospective measure, which fails to take into account periods of

sickness. Whereas conversion allows for a fairer assessment of performance given periods of absence.

16. Has the Respondent applied the PCP above?

17. If so, has that PCP put the Claimant at a substantial disadvantage as set out above in relation to a relevant matter in comparisons to persons who are not disabled?

18. If so, has the Respondent taken such steps as it is reasonable to have to take to avoid the disadvantage? In particular, the Claimant contends for the following adjustments:
    (a) Discussions prior to any conference calls, in which the Claimant was told who would be on the call and what questions he was likely to be asked (in particular if further information beyond his name and branch location was required)
    (b) Reasonable allowances on any performance related issues due to health, with the caveat that, if performance dropped below a bare minimum level where there was likely to be a continued and sustained loss for the business, then this could not be supported indefinitely.
    (c) For the purposes of the Claimant's performance, he was to be assessed on 'conversion of quality appointments' for a large duration of the year as opposed to solely 'monies banked'.
    (d) Not providing monthly 1-2-1 meetings to help support and discuss overall performance.
    (e) A review of the Claimant's return to work adjustments would take place 6 months after they were implemented in April 2017.

19. The Claimant submits that the unfavourable treatment above at paragraphs A to D above also amounts to failure to make reasonable adjustments.

20. Did the Respondent know at the material time(s) that the Claimant was likely to be placed at the substantial disadvantage relied upon?

21. If the Respondent did discriminate, have they taken all reasonable steps to prevent acts of discrimination occurring (section 109 Equality Act)?

Unfair dismissal

22. Did the reason for the Claimant's dismissal fall within Section 98(1) (b) of the Employment Rights Act 1996?

23. If so was the dismissal fair in accordance with the requirements of Section 98(4) of the Employment Rights Act 1996?

24. If the Claimant is entitled to compensation, should the amount be reduced (or in the case of (c) below be uplifted) to reflect:
    (a) Any contributary fault;
    (b) A polkey reduction;

(c) Any failure by either party to follow the ACAS Code of Practice?

Time Limits

25. Is the allegation above (in relation to the HR check carried out on the 8 February 2018) out of time?
26. In so far as the allegations in claim 1 occurred before 21 January 2018, are they out of time?

27. Would it be just and equitable to extend time?

Witnesses

Witnesses before the Tribunal were as follows:
The Claimant
And for the Respondent in the order of appearance:
Mr S Cox Operations Director of Embrace Finance
Mr A Scrivens Area Training Manager
Mr S. Duncan Regional Financial Services Director of Embrace Financial Services
Mr. A Trantum Operations Director of Embrace Financial Services.
Mr J Harvey Senior HR Operations Support Adviser
Mr N Price Regional Supervision Manager for PRIMIS (First Complete)
Ms Martin Risk and Governance Director.

Findings of fact

28. The Claimant was employed as a Financial Consultant by the Respondent from the 26 May 2015. The Tribunal were told that the Respondent was part of the LSL Group of Companies. The Respondent is an estate agency which also arranges mortgages and offers various insurance products.

29. First Complete/PRIMIS is a subsidiary of LSL Property Services PLC and is a network of over 2000 brokers and advisers who are authorised and regulated by the Financial Conduct Authority (FCA). They are responsible for regulating the quality of advice provided by the Appointed Representatives to customers in respect of Mortgage and other protection policies. First Complete/PRIMIS carries out the 'fit and proper' tests on all advisers within its jurisdiction. This includes an assessment of an advisers honesty and integrity, competence and capability and financial soundness and they authorized and terminated licenses for those advisers to practice. Because the network is regulated by the FCA they are subject to detailed rules and regulations.

30. The Respondent acts as an Appointed Representative of First Complete/PRIMIS and guidelines and terms and conditions of all its Advisers are governed by the terms of the Network. Mr Price who at the time of the Claimant's employment was employed by PRIMIS as a National Compliance Manager for Estate Agency Financial Advisers told the Tribunal that in his role it was common knowledge that being bankrupt would have implications on an employee's employment in a financially regulated role.

31. It was noted that the HR policies and support were provided under the umbrella of LSL Property Services which covered 4,000 employees within the group. The Respondent had a disciplinary procedure which was seen at page 688.

32. The Tribunal saw the Claimant's employment contract at page 108 of the bundle. We were taken to paragraphs 2.3.4 which stated in outline that the employee should 'honestly and properly carry out your work for the Company and make every reasonable endeavour to promote the Company's interests. You shall carry out your duties in a loyal and efficient manner and not do anything to harm the Company, group or its business reputation'. The Tribunal was also taken to paragraphs 2.7.1 which required the employees to abide by and adhere to 'internal guidelines and procedures and any statutory or regulatory requirements applicable to your relevant business and role at all times'. This contract was signed by the Claimant.

33. As part of the onboarding process the Claimant completed a Financial Services Employment form (page 697L-O) which stated that he "*will be subject to regular checks (typically annually) to verify ongoing fitness and propriety, as part of the Company's obligation in financial monitoring*". The Claimant also signed a declaration to "*accept that if I make any misrepresentation or fail to disclose any relevant fact to the employing company LSL Property Services plc shall have the right to terminate, suspend or vary any appointment which they may have granted, if any of the information I have given on this form changes before the application process is completed, I will advise LSL Property Services plc immediately*". The Claimant was taken to this in cross examination and he accepted that he was now aware that the Respondent would carry out checks on his fitness and propriety. He told the Tribunal that he was only aware of the checks carried out at the start of employment, not of the right to carry out ongoing checks. The Claimant accepted that he signed this document which obliged him to comply with the regulatory requirements. He denied however that it required him to disclose his bankruptcy to the Respondent. The Tribunal find as a fact that the Respondent was entitled to carry out checks on the Claimant's fitness and propriety during his employment. The Claimant was also required to inform the Respondent of any relevant change in his circumstances as part of the Respondent's ongoing verification of his fitness and propriety. This would include informing the Respondent of entering into bankruptcy.

34. The Claimant's evidence at paragraph 114 of his statement was that he was previously employed by Lloyds Banking Group and in this role, he was on the FCA register and was described as an Approved Person. Whilst employed at Lloyds the Claimant was under what he described as 'much stricter regulations' and there was a 'fitness and propriety policy' in place which required disclosure of significant changes in finance and required annual self-disclosure to reflect significant changes. The Claimant

had an understanding and recognition of the importance of these high standards required in the financial sector.

35. The Claimant in his role at the Respondent was not directly regulated by the FCA (page 697P), however he was expected to complete the 'fitness, propriety and suitability' assessment as part of the onboarding process. The assessment was undertaken by First Complete. The Tribunal saw a letter from Ms. Howard dated the 21 May 2015 (page 697P) confirming that they were 'currently undertaking our standard assessment of your fitness, propriety and suitability as required by the Financial Conduct Authority'. The Claimant accepted in cross examination that the Respondent was entitled to carry out regular checks and the evidence was consistent that the Claimant was required in his role to comply with the FCA standards.

36. The Tribunal saw that on joining the Respondent the Claimant completed a medical declaration and confirmed his disability of social phobia (page 121). The Respondent conceded that the Claimant was disabled at the relevant time, and they were aware of his disability. The Claimant told the Tribunal that the adverse effects of the disability are that he fears social situations that involve interaction with others and being judged. It causes anxiety and fear, and this is exacerbated when he is under excessive stress. It is also common for him to suffer from depression and anxiety.

37. The Claimant told the Tribunal that he was involved in the selling of what was called 'Lets Protect' policies to tenants and this was an area he specialized in. The Claimant was known as the 'Let's Protect Guru' or 'King'. Initially the Claimant also sold mortgages, however he ceased working in this area after reasonable adjustments were made. It was the evidence of Mr Price that his license only extended to providing advice on life cover, critical health cover and other insurance policies. Mr Price's evidence was that the Claimant worked within the FCA regulations and had to work under their guidelines and professional advice. He came within what was described as the First Complete/PRIMIS framework and would be subject to a dedicated Area Compliance Manager, would be governed by the network terms and conditions and would have quarterly compliance meetings. The Claimant's files would have been checked on a regular basis by the network.

38. Although not directly relevant to the issues in the case, the Tribunal noted that the Claimant had requested adjusted working patterns in April 2016 to assist with childcare issues. Reduced hours were agreed at the time, but this was not confirmed by Ms Thompson (his line manager) to be a permanent change (and HR later confirmed that they had no records to confirm a change in hours on the 21 March 2017 see page 164). He then raised a grievance in December 2016 against Ms Thompson which was heard by Mr Burke. The grievance was partially upheld. The Tribunal noted that in the grievance (page 124) the Claimant claimed that he had been subjected to sex and disability discrimination. He also accused Ms Thompson of making a number of inaccurate statements and of acting unprofessionally. The Tribunal noted that after he raised the grievance he went off on sick leave in December 2016 and did not return until April

2017. At some stage the Claimant also raised a whistle blowing complaint. The Claimant accepted in cross examination that he was able to raise and pursue grievances and appeals in the workplace.

39. The Claimant attended a meeting with Occupational Health "OH" on the 24 January 2017 and the referral was at pages 141-3, it was recorded that the Claimant was having issues with his manager Ms. Thompson and reference was made in this document to his disability. The outcome of the OH referral was dated the 10 March 2017 (see pages 157-157C of the bundle). The report confirmed that once a phased return was discussed and agreement was reached on targets, the Claimant would be able to return to work.

Update Meeting.

40. Mr Cox who at the time was the National Financial Services Director called a meeting with the Claimant on the 20 March 2017; the minutes were on pages 158-163 taken by Mr Scrivens who at the time was the Area Training Manager. The minutes reflected that all the issues that had been highlighted by OH were discussed. It was suggested to the Claimant that he would become their 'Lets Protect' specialist as this role would fit in with his family friendly working needs and would complement his skills set.

41. There was a discussion about the Claimant's disability in the meeting and he spent some time explaining about his disability and "how everyday situations made him anxious". There followed a discussion about reasonable adjustments (page 161). The Claimant told Mr Cox that he found contributing in meetings difficult however he stated that he "understood that team meetings were an important part of the business and would be happy to attend them". It was therefore agreed that his manager would be made aware of this and the Claimant "was never asked to participate picked in (sic) in a meeting."

42. The Claimant confirmed that he felt reassured with what had been discussed and agreed. Mr Cox told the Tribunal that he set the target using conversions for the first three months after the Claimant's return from sick leave to assist him (as this was a measure used for new starters). It was agreed that he would move to banked income later. Mr Cox emphasised the importance of striking a work/life balance.

43. The meeting went on to discuss targets for when he moved on to banked income. Mr Cox suggested that the Claimant "*should aim to bank £5000 per calendar month*" (page 160) for months 4-6. Mr Cox told the Tribunal that the company employed about 200 people in this role at the time and it cost about £5,000 per month for each FTE Adviser therefore there was an expectation that each adviser should bank this sum net each month to cover their costs. The Claimant accepted in cross examination that Mr Cox had taken into account his sick leave when setting the targets. The Claimant was reassured by Mr Cox that if he had two consistent quarters of poor performance, it would be reviewed. He was told by Mr Cox that if he was "*not performing after the six-month period, then we would review what we do as a Company to help and improve his performance"* (page 162). At the end of the meeting the Claimant asked

for the details of the meeting to be confirmed in writing and Mr Cox agreed to send a copy of the minutes and an outline of the key points.

Written confirmation of the reasonable adjustments.

44. The Claimant emailed to confirm the details of the reasonable adjustments that had been discussed on the 3 April 2017 (pages 175-9) and Mr Cox added his responses on the 5 April 2017. The email exchange showed that there was agreement over a number of adjustments to assist his return and to accommodate his disability going forward. It was noted that the issue in relation to conference calls was that he would need to attend conference calls, as they did not wish the Claimant to miss out on key professional development issues and Ms. Thompson was informed that for the next 10 weeks (at least), they would avoid him having to contribute to the call. It was noted that the agreed adjustment was time limited and was not a requirement that he should not be required to contribute to such calls in the future (page 177). The Tribunal noted that the Claimant raised a concern that his disability made it more difficult for him to make eye contact in meetings. Mr Cox reassured him that this had been discussed with Ms Thompson and she was aware that if this occurred, it was not an indication of his lack of interest (page 176).

45. The requirement to send emails appeared to be on the Claimant to indicate his understanding of the contents of meetings with management after they had taken place "to avoid confusion at a later stage" (page 176). The Respondent agreed that the Claimant could attend weekly medical appointments during working hours, for a 10-week period on the understanding that it was not paid leave. The Claimant was also advised that if he needed to notify his manager of absence due to illness "*this should be done via a phone call in accordance with company policy"* (see page 177).

46. The Tribunal also noted that in his email he raised the issue that his social phobia can "contribute to poor work performance" and asked for his medical condition to be taken into account when reviewing this. The Respondent's reply to this request was as follows "*we will make reasonable allowances on any performance related issues due to health (as we would do with any member of staff) on the caveat that if the performance drops below a bare minimum level where we are likely to be making a continued and sustained loss as a business then this cannot be supported indefinitely*". Mr Cox went on to emphasise that "*in the matter of Compliance Standards, as explained there can be no allowance as these are in place to protect advisers, customers and the company as well as comply with the Regulators guidelines*". The Claimant accepted that Mr. Cox's responses were helpful and supportive. The Tribunal find as a fact that this response confirmed that the Claimant was subject to compliance standards and regulators guidelines that were in place to protect the company and its customers. The Claimant did not challenge this at the time.

The Return to Work Meeting

47. The return to work meeting on the 10 April 2017 was conducted by Mr Cox (see page 180 of the bundle). The document was signed by both parties. The Claimant was on a phased return to work on reduced hours. It was also confirmed that it was "agreed to reauthorize protection license but not mortgages", this suggested that his authorisation was revisited and the right to advise on mortgages was deleted. It was agreed that the Claimant would receive a monthly review and a "3 monthly milestone review". It was confirmed that he would work on 'conversions' for the first three months and then during the second three-month period he would work on the target of banked income of £4650 per calendar month. The Claimant accepted in cross examination that he agreed to this adjusted target and made no complaints at the time.

48. It was the Claimant's evidence that after the return to work meeting, he attended a mediation meeting with Ms. Thompson and Mr Cox. The Claimant stated (paragraphs 37-9) that during this meeting they discussed the adjustments and he received an apology from Ms. Thompson, and afterwards they shook hands. He stated that they agreed that she would respond in writing (text or email) when acknowledging his communications and she would hold monthly meetings with him.

49. The Claimant pursued an application for flexible working which was granted on the 20 September 2017 and was confirmed in a letter dated the 26 September 2017 (see page 195 of the bundle). The Claimant signed the letter in agreement to the change in his contractual terms. After the change the Claimant was then reduced to a point 7 contract. As the Claimant was now working on a part time basis his costs to the business fell from £60,000 per annum to £42,000 per annum.

The Appraisal.

50. The Claimant attended an appraisal on the 15 December 2017 conducted by Ms Thompson with Mr Scrivens in attendance. This was his first appraisal since joining the Company. Mr Scrivens told the Tribunal that he had 22 appraisals to conduct, all had to be completed in the last few weeks of the year or in the first 6 weeks of the new year. Mr Scrivens accepted in cross examination that the appraisee should be sent the form in advance to complete and self-grade, then the manager would agree or disagree with the employee's view. However, Ms. Thompson had not sent the Claimant the form in advance and he had not been given an opportunity to provide his self-assessment. When Mr Scrivens arrived, Ms Thompson completed the form grading him as 'improve performance' which the Claimant felt was negative and he disagreed with the grade. It was the Claimant's view that the appraisal meeting provided a 'purely negative outlook' of him. Mr Scrivens did not share the Claimant's view.

51. The Tribunal find as a fact that the adjusted annual target was reflected in the appraisal document. The Claimant would only bank £17,000 in sales by the end of the year which fell considerably short of the adjusted target. The Claimant returned to work at the end of April and had to get up to speed on the Preview system, his return to duties was on the 8 May. The Claimant's performance was therefore only measured at the time of his

appraisal on a total of 5 months' work (August to December) using the measure of banked income. The time spent on his phased return and on conversions was not considered against the measure of banked income.

52. The figures reflected that he would not hit his adjusted target and would also not cover his costs to the business, the Claimant was on notice that such a situation could not be supported indefinitely but he was also aware that he would be supported to help him meet his targets.

53. The appraisal document showed that Ms. Thompson wrote in the comments box "health and family issues" as mitigation, however the Claimant felt that this comment was extremely unfair and discriminatory.

54. The Claimant raised a complaint about the appraisal process and grade on the 22 December 2017 indicating that he wished to appeal the rating given as it "*contradicts what I have been told before and I disagree with a lot of the guidance reasons for the ratings you have given me*" (page 206). The Tribunal noted that Ms. Thompson emailed the Claimant in reply on the 22 December 2017 (page 206 of the bundle) informing him that she was 'happy to redo' the appraisal. Mr Scrivens emailed the Claimant on the 2 January 2018 referring to his 'appraisal appeal', although he used the word appeal he confirmed that this meant that the Claimant wanted the grade to be reviewed.

55. The Claimant emailed Ms. Thompson and Mr Scrivens on the 6 January 2018 at page 208 saying that he found the grading of Improve performance to be very insulting and completely unfair and wanted to appeal. He made specific reference in paragraph 2 of this email that "*for the majority of the year since returning to work from sickness, my performance was agreed to be based on my conversion of quality appointments*…". It was put to the Claimant in cross examination that he did not refer to discrimination in this email which he accepted but did not accept that this was because he did not feel at that time that he had suffered discrimination. He then wrote to Ms. Thompson on the 8 January 2018 (page 220-1) to indicate that he was feeling '*victimised and singled out*'. It was put to him in cross examination that this was negative language but the Claimant replied saying that this was how he felt.

56. The next communication was on page 218 dated the 9 January 2018 where the Claimant emailed Ms Thompson to point out that, in his view the grading issued to him was "*without proper cause*" and it made him feel undervalued as an employee and it negatively affected his health. The Claimant went on to refer to the grading "*destroying trust and confidence*". It was put to the Claimant in cross examination that he was employing legalistic terms and the words used in this email were inflammatory; he denied this was the case. Mr Scrivens replied to this email indicating he and Ms. Thompson were both keen to meet with him on the 17 January 2018 but stated that the grading he was given stood (page 234). The Claimant's response to this email was seen on pages 233 where he expressed his 'extreme disappointment with the response' (in respect of the decision that the grading given in the appraisal would stand). The Claimant accepted that this response could be seen to be negative in tone. The Tribunal find as a fact that Mr Scriven's response was

conciliatory, encouraging further dialogue of the problem in a meeting as compared with the negative and confrontational language adopted by the Claimant.

57. The Claimant emailed Ms. Thompson on the 10 January 2018 questioning his business plan from the view of his achievable targets and Mr Scrivens agreed to discuss this with the Claimant. The Claimant then emailed Mr Scrivens and Ms. Thompson using strong language accusing Ms. Thompson of lying. He accepted that he could have used a less confrontational tone, but he insisted in Tribunal that the use of the word was justified. In the Claimant's witness statement, it was his view that he was being "direct rather than rude" (paragraph 67). This was not the first time that the Claimant had accused Ms Thompson of being untruthful as seen in his previous grievance in December 2016.

58. Ms. Thompson replied to the Claimant on the 11 January 2018 (page 242) indicating that she found his emails from the 6-10 January 2018 to be unprofessional and disrespectful. The Claimant was taken to his reply in cross examination (page 243) and he accepted that he did not refer in this email to his disability being a reason for him adopting this tone. The Claimant apologized if she felt that his tone was inappropriate, but he did not accept that it was. The Claimant told the Tribunal that the reason he found the emails distressing was because Ms. Thompson copied in HR and Mr Cox the Director.

59. The Claimant conceded in cross examination that nowhere in his ET1, his statement or in his grievance did he refer to his disability being the cause of his use of negative language. He also accepted that his ET1 was drafted by lawyers. The Tribunal find as a fact and on the balance of probabilities that the Claimant's use of confrontational language was not something that arose from his disability. It was not mentioned in the OH reports or in the Claimant's explanation to the Respondent as to how his disability affected him. The Tribunal referred to the evidence referred to above at paragraph 36 and 41 above which is restricted to fear of social situations and a reluctance to make eye contact, there was no evidence to suggest that it negatively impacted on the Claimant use of language in written form used in emails sent to his colleagues.

60. A meeting was set up for the 17 January 2018 but there appeared to be some confusion about where it was to take place. Mr Scrivens told the Tribunal that due to a breakdown in communications, he and Ms Thompson had the meeting scheduled to take place at 10am in the Chessington Divisional Office but the Claimant had it scheduled for 11 am in Hampton Hill. Consequently, the meeting did not proceed that day.

The evidence in relation to the conference call.

61. The Claimant in the agreed list of issues above referred to a conference call that was alleged to have taken place in January 2018. The Claimant was unable to be specific as to the precise date of the meeting when he was asked about this in cross examination. He told the Tribunal in answers to its questions that it took place about six months after his return to work. The Claimant complained that he was asked to contribute

on a conference call which he said was a breach of the agreed reasonable adjustment, which he found to be distressing. The Claimant in cross examination said that Ms. Thompson was "*directing so many questions to me. I found this extremely distressing and I was struggling with my anxiety*". He conceded in answer to the Tribunal's questions that Ms. Thomson may have forgotten to give the Claimant advanced notice of the questions that would be put to him in the conference call.

62. Mr Scrivens was asked about conference calls in supplementary questions and he confirmed that for the period from April 2017 to January 2018 they had been held quarterly and then on an ad hoc basis where they were used to cascade information to a large number of people. Mr Scrivens had no knowledge of a conference call that took place around January 2018.

63. The Claimant in his closing submissions narrowed the date of this call to "in or around the 15 January 2018" (see paragraph 45 of his submissions). The Claimant was also vague about who was in attendance during this call, he stated in his closing submissions at paragraph 53 that in attendance were 'other managers or directors' but no names were provided. The Claimant also failed to provide details of the questions he was asked in the meeting in his grievance or in his witness statement. In cross examination the Claimant conceded that the questions asked were positive in nature asking how he had done so well converting appointments to sales and he was asked if he had any tips to pass on to new staff. There was nothing that was alleged to be hostile or derogatory in the questions asked or in the manner in which the questions were put. There was no evidence to suggest that this was unfavourable treatment of the Claimant and he conceded that all the questions put to him portrayed him in a positive light.

64. Ms Thompson emailed the Claimant on the 18 January 2018 (page 249) explaining the reason why she wished to meet with him, which was to discuss the appraisal grading and to discuss his concerns. In this email she explained that there was no appeal against an appraisal grade. It was also noted that there were three possible grades that could be awarded, improve performance, effective/good performance and high. She confirmed that at the meeting it would be the Claimant's "*opportunity for [you] to advise me of why you feel improve performance was not correct for 2017*". The Claimant said in cross examination that although this complied with the reasonable adjustment to put matters in writing, he felt that Ms Thompson was refusing to put what he described as the 'full reasons' in her email. When this email was put to Mr Scrivens in cross examination, he denied that this was a withdrawal of her offer to 'redo' the appraisal, he felt that the email confirmed that Ms Thompson wanted to 'redo and amend the grade'. It was Mr Scrivens understanding that the reason for the meeting was for the Claimant to discuss his concerns about the grade. Mr Scrivens was asked in cross examination if the Claimant put in an appeal against his grade and he replied that in his view it was a choice of language he said "*I used the word appeal but could have chosen the word review, he wanted to review his grade*".

65. The Tribunal were taken to an email dated the 19 January 2018 (page 267) where Ms Thompson provided the written reasons for the grade given in the appraisal for 2017 and an explanation of the targets (this was copied to HR, Mr Scrivens and Mr Cox). In this document Ms Thompson stated that he had banked income of £15,900 against what she described as a "*cost base of £44,000*" and a "*minimum banked target of £12,000 over September to December as per our 1:1 in August 2017 of which you achieved £5825*". Although the Claimant accepted that his request for a written outcome had been provided as a reasonable adjustment, he stated that this took 2-3 weeks. The Tribunal noted that the process followed in relation to the Claimant's complaints about the way his appraisal had been conducted was confused. The initial offer to redo or to appeal the appraisal outcome changed after written reasons had been provided when the Claimant was informed that there was no appeal process in respect of appraisals.

66. The Claimant was signed off sick from the 23 January 2018 and he emailed Ms Thompson (page 268) to inform her that his health was not good and his "underlying health condition is exacerbated" so he was unable to attend work. Ms Thompson did not reply to acknowledge this which appeared to be a failure to comply with the agreed reasonable adjustment.

67. The Claimant entered into bankruptcy on the 29 January 2018 (after having applied on the 26th). The circumstances that led to the decision to go into bankruptcy was that he had been off sick and on nil pay and this resulted in financial difficulties. The Claimant did not inform the Respondent of his bankruptcy.

The Claimant's grievance.

68. The Claimant raised a grievance on the 1 February 2018 (see pages 271-8) which he sent to Mr Cox. The Claimant made reference to being 'singled out' in a recent 'call in' meeting and stated that questions were directed at him; he stated that this was distressing as he should have been given prior notice of the questions he was to be asked (as had been agreed in the discussion about reasonable adjustments). He also stated that Ms Thompson copied in Mr Cox and HR to an email which he stated was intimidating and he alleged that Ms Thompson "*knew that this type of communication would exacerbate my social phobia*". The Claimant complained that Ms Thompson had called him "unprofessional and disrespectful" in her email dated the 11 January 2018, he described this email as "intimidating" and felt that it was pure "victimisation". The Claimant alleged that Ms Thompson subjected him to victimisation "as she has a personal grudge against me for raising a previous grievance against her alleging sex discrimination". The Claimant went on to suggest that the "*implied term of mutual term (sic) of trust and confidence had been seriously damaged*" and he claimed that this had again worsened his social phobia symptoms. Although this grievance was presented only a matter of days after his bankruptcy, he made no mention of this in his grievance. The Claimant accepted that he did not inform the Respondent

of his bankruptcy stating that there was no obligation to disclose this. He stated that he wanted to disclose this to an impartial person.

The Google Search.

69. It was not disputed that a new employee called Mr. Harvey in HR had discovered that the Claimant had been made bankrupt when carrying out an internet search on the 8 February 2018. Mr Harvey accepted in cross examination that he did not search the Claimant's name under the fitness and propriety rules but told the Tribunal that the Company conducted Google searches regularly of the information that was in the public domain. Mr Harvey confirmed that he did not initially want his name revealed to the Claimant as it made him uncomfortable as he was new to the role.

70. Mr Harvey confirmed that at the time he conducted the search, he was aware the Claimant was off sick and a formal grievance hearing was being arranged. This evidence was partially corroborated by an email on page 282 of the bundle from Ms Hayes to the Claimant on the 8 February 2018 asking to speak with the Claimant about arranging his grievance hearing. As he sat in close proximity to all other HR officers, in what he described as a 'pod', it was credible that he heard the Claimant's name and the arrangements being made for his grievance to be heard. The Claimant alleged that Mr Harvey conducted the search because he was off sick for a disability related reason. Mr Harvey denied that he was aware of the Claimant's disability or that he was off sick for a disability related reason at the time he did the search. The Tribunal find as a fact and on the balance of probabilities that the evidence of Mr Harvey is preferred to that of the Claimant. Mr Harvey's evidence was partially corroborated by the email referred to above and as he sat near Ms Hayes he may have overheard the Claimant's name. There was no evidence to suggest that Mr Harvey was aware of the Claimant's disability or his disability related absence at the time the search was conducted.

71. When the Respondent learnt of the Claimant's bankruptcy, his authorization with the company First Complete Limited was terminated with immediate effect on the 13 February 2018 (and as a result he could no longer hold himself out as an Adviser). The Tribunal saw the letter on page 286A dated the 9 February 2018 from Ms. Howard to Mr Cox, confirming that they would not consider the Claimant to be a 'fit and proper person' if he had been found to have entered into a bankruptcy order. It was also found to be relevant that he had failed to disclose this first to the Respondent and to the Network as this had "implications regarding his honesty and integrity". Ms Howard stated that "failing to disclose this is contravening section 2.1 of the FCA Handbook (FIT 2.1.3)". The Claimant when taken to this email did not accept that this was the policy of the Network as it referred to the FCA Handbook. However, the Tribunal find as a fact that the approach followed by the network reflected that they applied a systematic response on learning of the bankruptcy coupled with the failure to disclose. It was concluded that in those circumstances the Claimant was not considered to be a fit and proper person. Mr. Cox was asked about this in cross examination and he said that if someone had

been made bankrupt, he would expect them to report it to the Network immediately. He stated that if someone was working as a financial adviser where financial soundness is of paramount importance and bankruptcy was seen as a '*profound example, it would be a dereliction of duty'* not to report it. Mr Cox said it was his role to inform the Network of a change in circumstances.

72. On the 14 February 2018 Ms. Hayes emailed the Claimant asking for him to contact her as a matter to urgency, he replied saying he was on sick leave and would prefer not to be contacted by email. She then followed this up with more details saying that it had come to light that he had been declared bankrupt and that the Respondent would need to suspend his access to systems while this was investigated. She emphasized the seriousness of the matter and stated that it would be preferable to speak on the phone. He replied by email on two occasions firstly asking how they found out (page 308) and then (page 314) he stated that he was contemplating how and when to approach the Respondent but *"this was an awkward time with me currently on sick leave*". He then enquired what standard checks had been carried out that led to this discovery. The Claimant told the Tribunal in cross examination that his disability prevented him from disclosing his bankruptcy as he was wanting to seek out a neutral person, he accepted that he did not wish to do this straight away as it was not at the forefront of his mind.

73. Mr Scrivens confirmed in cross examination that the Claimant's diary had been blocked out and Ms. Thomson had told him on the 19 February 2018 (pages 329-30) that the Claimant was leaving. He accepted in cross examination that the Claimant was not dismissed until the 17 July 2018. Although the Claimant has suggested that Ms Thompson's email saying that he had left when he had not, was evidence to suggest that his dismissal was a foregone conclusion, the Tribunal saw no evidence that this was the case. Even though this was the erroneous view of Ms Thompson, this matter was dealt with in the Claimant's grievance and she was asked to apologise for her actions. It was also noted that those subsequently appointed to deal with the disciplinary process were independent and had no previous line management responsibilities for Ms Thompson or of the Claimant.

74. Although the investigation was minimal, limited to taking statements from Ms Howard (see page 341-2) and talking to the Claimant and sending him some questions to answer (see page 363-4), little else was required as the allegations were solely in relation to the Claimant's failure to disclose his bankruptcy. The Tribunal saw that the reason he gave for failing to inform the Respondent of his bankruptcy was that he was going to do so but at the time he was on sick leave. He did not state that the reason he failed to inform them was due to something arising from his disability. The Claimant did not indicate that further statements should be taken or that any additional investigations were necessary. His main complaint was that Ms Todd was not independent and he was not asked why he had gone into bankruptcy. The Tribunal find as a fact that there was no evidence that the investigation was bias or lacked independence. The fact that Ms Todd had dealt with a previous grievance did not suggest that her handling of the investigation was flawed. Even if that was the

case, she performed no decision-making function within the process and there was no suggestion that she had any input into the decision taken by Mr Price.

75. Mr Price was asked by Ms Todd to conduct the disciplinary hearing on the 1 March 2018 (page 372). He replied that he was "aware of the case, I assume it is Kentan Pubbi" from the brief description that Ms Todd provided of the case.

76. Mr Price said in cross examination that he took the decision to proceed to a disciplinary hearing and this decision was taken after considering all the information presented to him. It was confirmed to the Tribunal that Mr Price was in possession of the pdf of the investigation, the disciplinary policy and the invitation to the hearing when he took the decision. Mr Price was not privy to the outcome of the grievance in relation to the disciplinary investigations.

77. The Claimant was invited to a disciplinary hearing by a letter dated the 7 March 2018 (sent by email at 12.51) to be heard on the 13 March 2018 (page 466). The letter was signed by Ms. Todd on behalf of Mr Price. The charges the Claimant faced were that he "failed to notify the Company you have been declared bankrupt; failed to be able to operate within the role of Financial Consultant due to the loss of your authorization with First Complete Limited; the above resulted in a fundamental breakdown of Trust and Confidence between yourself and the Company". The Claimant was asked to notify them if any reasonable adjustments were required for the hearing.

The Claimant's second grievance.

78. The Claimant raised a grievance dated the 7 March 2018 which was seen on pages 473-6 complaining about Ms. Todd and Ms. Hayes. This was sent by email at 4.20pm, after receipt of the invitation to the disciplinary hearing. The Claimant sent this to Ms Knipe of HR; she was not responsible for the Claimant's area of the business, so she forwarded it to Ms Hayes. When Ms Hayes received this, she agreed that it would be inappropriate for her to deal with it as she was the subject of the grievance, so she forwarded the matter on to Ms Scott to deal with.

79. The focus of the second grievance was that his previous grievance had been ignored. The Claimant stated that he intended to tell someone about his bankruptcy face to face but at the time he was off sick and was not given the name of the investigation's manager. The Claimant complained that Ms. Thompson was ignoring him because of his previous grievance dated the 1 February 2018. The Claimant did not state in his grievance that his failure to disclose his bankruptcy was in some way related to his disability (or was for something arising from his disability). The Claimant alleged that the check carried out by Mr Harvey "could be a form of racial discrimination" but he did not state that it was disability discrimination.

80. The Claimant asked for a referral to be made to OH as at the relevant time of his bankruptcy he was signed off sick due to his disability of social

phobia. The Tribunal noted that the Claimant referred to a number of potential legal claims in this grievance including race and disability discrimination, whistleblowing and victimization which suggested that he had legal assistance in the preparation of this grievance or had a good understanding of employment law principles.

81. The disciplinary hearing was postponed to allow the grievances to be heard.

The Grievance Hearing.

82. The Claimant was invited to a grievance hearing by a letter dated the 21 March 2018 (page 480) to be heard on the 3 April 2018 by Mr Duncan who was an independent manager (Regional Financial Services Director). The Claimant was advised of the right to be accompanied. Mr Duncan told the Tribunal that he felt that the Claimant came across in the meeting as calm and confident and able to present his grievance in a structured manner. Mr Duncan followed up some points after the meeting and he interviewed Ms Thompson and spoke to HR a few times.

83. The grievance outcome was seen on pages 506-9 and it was partially upheld. It was decided that the Claimant's targets should be adjusted, and it was recommended that his appraisal be done by a different manager and there should be a review of the business plan. The Tribunal noted that Mr Duncan found as a fact that Ms Thomson 'agreed to redo the appraisal and then decided not to' (page 501).

84. Although the Claimant accepted that his grievances were dealt with, he did not accept it was reasonable for them to delay by five and a half weeks before taking any action. Mr Duncan concluded that although the appraisal process followed 'left something to be desired' he did not conclude that this was an act of discrimination. Mr Duncan concluded that there was no evidence that the Claimant was promised monthly reviews at page 506 of the bundle. Mr Duncan was asked about this in cross examination and it was put to him that he could have asked Mr Cox about this but Mr Duncan replied that he could not recall the Claimant mentioning him and he had assumed that all the documentation sent to him was complete. The Tribunal however have found as a fact that Mr Cox mentioned monthly reviews in the Claimant's return to work meeting on the 10 April 2017 (see above at paragraph 47). He accepted in his outcome he referred to the Claimant's bankruptcy and he explained that this was to put the investigation into some context. Mr Duncan recommended that there be an apology from Ms Thompson in respect of the email dated the 13 February 2018 sent by her which wrongly stated that the Claimant had left the Company.

85. Mr Duncan commented that after his written outcome was delivered to the Claimant, his demeanour changed from being polite to confrontational. Mr Duncan referred specifically to the Claimant's email sent in response to the outcome of the grievance dated the 23 April 2018 at pages 509A-B where he suggested to Mr Duncan that some grievance points had been ignored and he felt that the investigation was poor. Mr Duncan replied the

following day informing the Claimant that the matter should be pursued by way of appeal.

86. The Claimant presented his appeal against the grievance outcome dated the 28 April 2018 (pages 510-524) which was heard by Mr Trantum, who was an independent manager and one that was 'outside of the organisation' (he confirmed that at the time he conducted the appeal he worked for Grays Financial Services as Managing Director and he was a director of LSL Property Services PLC). The Tribunal noted in this appeal the Claimant provided some further detail about his CBT appointments at page 513, he stated that the time spent on conversions was to coincide with his CBT treatment however his therapist then recommended further treatment which involved "another 2 weeks of CBT and then a further 10 weeks of counselling". The Tribunal noted that no dates and times were provided of when these additional appointments took place and there was no evidence that the Claimant discussed these with Ms Thompson and no evidence that further adjustments were required.

87. Mr Trantum was asked in cross examination about the monthly one to one meetings; he accepted that he did not think the reasonable adjustment was 'followed through' and there was a disconnect in communications. He did not however believe that it was victimization. Mr Trantum confirmed that he asked Ms Thompson why she had copied in HR or Mr Cox to their communications and she stated it was because there had been a deterioration in their relationship and she always copied in Mr Cox and HR "so there was an audit trail". She also did this to avoid the Claimant accusing her of not sending replies. Ms Thomson felt that the Claimant had been disrespectful to her and accused her of lying. Mr Trantum told the Tribunal that he felt that this was a fair process and left an audit trail.

88. Mr Trantum did not speak to Ms Todd in HR, who the Claimant alleged was not independent. He felt there was no need to conduct any enquiries into this matter as he felt that the protocols were followed to the letter. The Tribunal also noted that as part of his investigations he also interviewed Mr Scrivens (page 679) and Mr Duncan (page 678).

89. Mr Trantum did not uphold the Claimant's appeal but supported all the recommendations previously made (page 595-6 dated the 29 June 2018). Although the Claimant maintained that he was daunted in the appeal, it was Mr Trantum's evidence that the Claimant presented in a manner that was amicable and professional. Mr Trantum accepted in cross examination that it was an unfortunate accident that an email was sent out wrongly stating that the Claimant was a 'leaver' (pages 330 and 327 on the 19 February 2018), which was triggered by an email from Ms Thompson, he felt that an apology was needed for this incident.

90. Mr Trantum confirmed in cross examination that "*if a member of staff is bankrupt, they should raise it with First Complete straight away and they would immediately terminate authorization, that would then immediately trigger an investigation which would then trigger a disciplinary hearing*". He accepted that the company would look at alternative roles such as customer service if they could no longer perform their role.

91. The Claimant was sent to OH by HR and the report produced was dated the 26 June 2018 seen at page 590-3 of the bundle. The Claimant's disability was described in the report in the following terms ".. *his medical condition makes everything more difficult. He sometimes has nightmares and is continually worrying about his work situation. He has a reduced appetite and tries to avoid going out of the house as much as possible; for instance, he will only go to the local shops and of course, he does have to look after his young children*". There was nothing in the report to suggest that the Claimant's disability impacted in the way he communicated with others (in writing) or in his ability to make disclosures to 'non-neutral' persons. The report stated that the grievance and disciplinary process should be finalized as soon as possible. The report suggested a reasonable adjustment should be for the Claimant to be accompanied by a family member or a friend. The report did not identify any adjustments that were required to be made to the disciplinary process and accepted that a number of adjustments had already been put in place in respect of working hours and performance targets.

92. The Claimant alleged that Mr Price was not independent as he had been aware of the Claimant's bankruptcy; he confirmed in cross examination that he possibly saw the email at 286A and he saw the emails at pages 371-2. It was put to him that as he had seen these emails, he was not independent, and he denied this saying he was aware of the Claimant's bankruptcy, but this did not impact his impartiality. Mr Price also stated that he was qualified to hear the case as he worked in the financial services sector. Mr Price confirmed in re-examination that he had no previous involvement with the Claimant. The Tribunal find as a fact that Mr Price was independent as he had previously had no managerial responsibility for the Claimant and was employed in a separate organization. Knowledge of the Claimant's bankruptcy would not have impacted upon that independence.

93. Mr Price confirmed he received the Network termination letter, the disciplinary policy, the investigation and the invitation letter on the 6 July 2018 and previously sent to the Claimant in March (see above at paragraph 77). Mr Price accepted in cross examination that HR did not realise that the contracts for Appointed Representatives were not issued to the Estate Agency Division and the Respondent did not dispute that the documents at pages 386-459 were irrelevant to the issues and were removed from the investigation pack. He stated that for him the relevant fact was that the bankruptcy had not been disclosed.

The disciplinary hearing.

94. The Claimant was called to a disciplinary hearing by a letter dated the 5 July 2018 on the 13 July 2018 (pages 600A-B), the charges remained the same as those in the letter dated the 7 March 2018 (see above at paragraph 77). The letter warned that the charges, if proven, could result in dismissal. The Claimant accepted in cross examination that he could be represented by his brother in law, who was a solicitor, and accepted that this went beyond the requirements of the ACAS Code of Practice.

95. Mr Price heard the disciplinary case and his notetaker was Mr J. P Rae who was a Representative of the Respondent. The Claimant maintained that Mr Rae had a significant input into the meeting, which was denied. The notes were not agreed but the Claimant had an opportunity to make amendments to the notes to indicate areas of dispute. Mr Price denied unfairly interrupting the Claimant in the hearing. It was noted by the Tribunal that the Claimant's evidence to the disciplinary hearing was that he was under no obligation to inform the Respondent of his bankruptcy.

96. Mr Price accepted that he asked the Claimant in the hearing if he understood the 'fit and proper' test which appeared in the FCA Guidelines and Handbook and accepted he did not provide a copy of these documents to the Claimant. Mr Price asked this question because he wanted to gain an understanding of what this standard meant to the Claimant. The Claimant said in the hearing that the "*FCA document is a massive Handbook, which I haven't read and if you are referring to it, I would like to have it here and have a look*". Mr Price then clarified that he was only referring to the definition of fit and proper person which he explained "*we as a Network have to abide by*". Although the Claimant complained that a document referred to in the hearing had not been provided to him, the Tribunal were satisfied that this did not undermine the fairness of the process. The document had no direct relevance to the charges faced by the Claimant or to his ability to answer those charges, it was a general question to test the Claimant's understanding of the rules that applied to all advisers.

97. Mr Price stated that the FCA sets guidance and the industry sets guidance for itself and clarified that he "*made clear [in the hearing] that within PRIMIS if you are bankrupt you are no longer fit and proper*". He clarified that the network meant PRIMIS. The Claimant's evidence before Mr Price was that he was not obliged to inform the Respondent of his bankruptcy but he was going to inform them but was waiting for a neutral person (page 611), he stated that he intended to tell an impartial member of staff as soon as one was available.

98. Mr Price accepted that at one stage in the hearing, Mr Rae "jumped in with a question" and the Claimant objected and wanted his objection to be minuted, which it was. Although the Claimant objected to Mr Rae's involvement, the Tribunal were satisfied that Mr Price was the decision maker, there was no evidence to suggest that this was devolved to Mr Rae or anyone else.

99. Mr Price knew that the Claimant had been off sick but did not know the details of his disability but was aware that reasonable adjustments had been made for him. Mr Price accepted that in the meeting the Claimant referred to his social phobia and he was told that conversations were difficult for him and this was brought to his attention. Although the Claimant maintained that the process was unfair because he was not specifically asked about mitigation, Mr Price accepted that this was not put to him as a specific question, but the Claimant made a number of submissions in relation to mitigation and he had an opportunity to present any evidence he felt to be relevant in the hearing.

100. The Claimant put to Mr Price in cross examination that the allegations he faced changed and the words "deliberate and intentional" were added to the charges (page 645), Mr Price denied this saying that the three charges remained the same. In reply to cross examination he explained that the facts showed that the Claimant "*went bankrupt and had no license, you failed to inform the Company. You had the opportunity to explain and I concluded that someone with your experience who had experience of proprietary checks, you knew it was important to disclose and I concluded that it was deliberate and intentional*". Mr Price confirmed that anyone who acted in this way would face disciplinary charges of gross misconduct. Mr Price accepted in cross examination that at the time of the Claimant's dismissal there was no written fitness or proprietary policy. However, the termination of the Claimant's authorisation was carried out by First Complete on the 13 February 2018 (page 323) who came to the conclusion that the Claimant was no longer considered to be a 'fit and proper person'.

101. The Claimant was informed by email dated the 16 July 2018 that the decision was to summarily dismiss him for gross misconduct (page 641). The reasons were not provided in this email but in a letter dated the 17 July 2018 (pages 645-8). The Tribunal find as a fact that the outcome letter set out all the points raised by the Claimant in mitigation. It was concluded that the Claimant's conduct was intentional and deliberate.

102. It was put to the Claimant that the key outcome of the disciplinary hearing was that he had chosen to withhold information about his bankruptcy as he had a number of options available to him to disclose but failed to do so. The Claimant told the Tribunal that "my option was to tell the neutral grievance manager" and therefore he denied that he had chosen to withhold the information. Mr Price confirmed in cross examination that charges one and two were matters of fact and the third charge was a matter for him to decide and he concluded that the Claimant "*had an opportunity to disclose pre or at the time, whether that would change I don't know. I believe trust and integrity had gone*".

103. The Tribunal noted that Mr Price carefully considered all the evidence before him in respect of the Claimant's ability to disclose his bankruptcy to the Respondent. On page 646 in the dismissal letter he concluded that *"I have carefully considered your point regarding the stigma attached to a bankruptcy order, coinciding with your disability. Whilst I fully appreciate that bankruptcy would not be a pleasant process, this still does not exempt you from communicating with the Company regarding your official declaration*". This quote reflected that Mr Price had considered the possible adverse impact that the Claimant's disability had on his ability to disclose. After hearing all the evidence he concluded that it did not exempt or exclude the Claimant from taking the necessary steps to disclose. He also concluded that the Claimant's evidence that he was waiting for a 'neutral person' was not credible because he found that Ms Hayes Head of HR contacted the Claimant on the 14 February 2018, who was independent, but he failed to disclose this to her. He concluded that the Claimant had no intention of disclosing his bankruptcy until the facts were put before him.

104. It was put to Mr Price in cross examination that there was no obligation to disclose bankruptcy (as he had said in the hearing) and he replied "*you refer to the lack of policy and I understand that but I believe it is common knowledge in the industry. I felt that someone who had been in the industry for so long would know that. I felt that the trust had gone*". Mr Price accepted that he felt that the Claimant had acted irresponsibly throughout the process. The Tribunal noted that at the Tribunal hearing the Claimant continued to suggest that he was under no obligation to disclose his bankruptcy to the Respondent.

105. Mr Price was asked in cross examination about the sanctions he considered, and he confirmed that he considered all sanctions including a final written warning, but the Claimant was unable to hold a license under First Complete. He concluded that the only option was dismissal.

106. The Claimant then lodged an appeal on the 25 July 2018 (pages 655-656) and he specifically referred to reference being made to the FCA guidelines which were not provided at the time. He also referred to what he described as the 'lack of policies' saying that there was no policy that required an employee to disclose bankruptcy and nothing to state that the facts that had led to his dismissal amounted to a conduct issue. The Claimant also referred to procedural breaches including failure to follow the ACAS Code in both the grievances and disciplinary process.

The Appeal hearing

107. The appeal was heard by Ms. Martin an independent manager. Prior to Ms Martin hearing the appeal she had no dealings with the Claimant. Her role was in Risk and Governance and prior to that role she was head of Compliance Policy for LSL Financial Services Division. The appeal was heard on the 7 August 2018. The evidence of Ms. Martin was that the Claimant was confident, professional and articulate and able to make eye contact with her in the appeal. She also found that he was well prepared for the meeting and was able to answer all questions asked of him in a "measured and thoughtful manner". The Claimant was unable to comment on Ms Martin's observations when it was put to him in cross examination, it was his view that he was daunted in this meeting.

108. Ms. Martin upheld the decision to dismiss (page 673-6). The Tribunal saw the letter dismissing the appeal dated the 14 August 2018. In her statement at paragraph 12 Ms Martin stated that she found that the Claimant was made bankrupt on the 29 January 2018 and was contacted by the Respondent after they discovered this on the 14 February 2018. She concluded that the Claimant had a sufficient opportunity to disclose this to the Respondent and he voluntarily chose not to do so. Although she stated that the Claimant had told her that it was his intention to bring the matter to the attention of a neutral party dealing with the grievance, she concluded that it was 'more likely than not' that the Claimant was aware that he should have notified the Respondent of his bankruptcy. She did not believe that waiting for a neutral person was a valid reason to delay disclosure.

109. Ms Martin considered the Claimant's point about the FCA Handbook and his submission that it did not contain a rule that the occurrence of bankruptcy meant that a person would fail the fit and proper test. She also considered his submission that there was no 'rule' that required him to disclose his bankruptcy. She concluded that these points did not assist his case as the Respondent and PRIMIS set their standards higher than that required by the FCA rules and guidance. Ms Martin also considered the Claimant's wider experience and his prior employment in the regulated sector for a number of years and concluded it was likely he would have been subject to the application of structured training and supervision programmes which would have enforced the high standards required of those performing a regulated activity. She concluded that he did not require a formal procedure to inform him of the requirement to disclose and that "rather you were already aware that it should be made and chose not to approach your employer". The Tribunal noted that the appeal outcome was long and detailed and dealt with every point the Claimant took to the appeal. It was sufficiently detailed and thorough to overcome any minor procedural defect in the disciplinary procedure.

The Law

Section 98 Employment Rights Act 1996
General

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a) the reason (or, if more than one, the principal reason) for the dismissal, and
(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—

(b) relates to the conduct of the employee,

(4) [Where] the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
(b) shall be determined in accordance with equity and the substantial merits of the case.

Section 15 Equality Act 2010
Discrimination arising from disability

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

(a) A treats B unfavourably because of something arising in consequence of B's disability, and
(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

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

Section 20 Equality Act 2010
Duty to make adjustments

(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

(2) The duty comprises the following three requirements.

(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

Section 21 Equality Act 2010
Failure to comply with duty

(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.

(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

Section 136 Equality Act 2010
Burden of proof

(1) This section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

Closing submissions

110. These were in writing and were taken into account and will be referred to in our decision where relevant.

Decision

The unanimous decision of the Tribunal is as follows:

Decision in relation to the time points

111. The first issue for the Tribunal is whether the claims are in time. Turning to the first claim where early conciliation was entered into on the 20 April 2018, therefore any act before the 21 January 2018 will be prima facie out of time. The dates of allegations A and H was the 15 December 2017, the date of allegation B was the 9 January 2018, the date of allegation C was the 15 January 2018 and the Respondent informed the Tribunal that the date of allegation D, the last email from Ms Thompson was 19 January 2018 (therefore this is when the time will start to run) all

are therefore out of time. However, the Tribunal noted that in the Claimant's reply to the Respondent's submissions, he referred to an email from him dated the 23 January 2018 which would make this head of claim in time.

112. The Respondent has referred the Tribunal to the cases of *Robertson v Bexley Community Centre [2003] IRLR 434* which stated that the onus is on the Claimant to convince the Tribunal to extend time and the case of *Abertawe Bro Morgannwg University v Local Health Board UKEAT/0305/13/LA* it was held to be an error of law for the Tribunal to assume the reasons for delay. The Tribunal noted that the Claimant in his statement at paragraph 227 submitted that the appraisal and HR meetings amounted to a continuing act. The Respondent rejected the proposition that these allegations amount to a continuing act and relied on the case of *Hendricks v Metropolitan Police Commissioner [2003] ICR 530* which is authority for the proposition that for a continuing act argument to succeed the out of time acts must be linked with the in time dismissal allegations. The Tribunal must assess the substance of the complaints to see if they amount to continuing acts. The Tribunal have noted above that the dismissal was unrelated to the issues in relation to the appraisal and the conference call and those who were involved in the disciplinary process were different to those who conducted the appraisal.

113. The dismissal manager Mr Price was independent and had no previous involvement with the case as was Ms. Martin the Appeals Manager. The HR person who carried out the Google search, Mr Harvey was again independent and had no involvement in any of the earlier acts in relation to the appraisal and the conference call and no involvement in the disciplinary process. There was no evidence to support the Claimant's contention that the acts relied on in the first ET1 were continuing acts.

114. In the Claimant's closing submissions at paragraph 171 he acknowledged that the reason for the delay in presenting his first claim is a relevant factor for the Tribunal, but he has failed to provide any evidence or submissions as to why any extension of time should be given to him on the grounds that it is just and equitable. In the response to the Respondent's submissions the Claimant stated that he relied upon there being a continuing act as a subsequent email dated the 23 January 2018 was 'inextricably related to the appraisal' and as Ms Thompson failed to reply this was the last act of discrimination which resulted in the claims above of A, B, D and H being in time. However on the evidence a failure to respond to an email informing the employer of sickness absence did not suggest that the issues A, B, C were continuing acts. It does however extend time on issue D as part of the unfavourable treatment identified was that Ms Thompson ignored the Claimant's emails and this one was ignored, D is therefore in time, but the others are not

115. In the absence of any evidence or submissions to support the Claimant's case that time should be extended for the out of time allegations, we conclude that all allegations in the first claim save for D, are out of time. However, the Tribunal considered that should we be wrong on this point, we decided to err on the side of caution and deal with each

of the detriment allegations on their merits, despite our conclusion that they are all out of time.

116. In relation to the Claimant's second claim, early conciliation was entered into on the 9 October 2018, therefore any act that took place before the 10 July 2018 is prima facie out of time. Allegation E above was an incident that occurred on the 8 February 2018, five months before the limitation date. This was out of time and the Claimant made no specific submission on this point, but in his reply he dealt with this issue at paragraphs 11-14 stating that issue E is inextricably linked with his dismissal, which is in time. The Claimant submitted that E amounted to a continuing act or in the alternative suggested that it would be just and equitable to extend time. The Tribunal have heard no evidence on why it would be just and equitable to extend time. Although the act is out of time, the Tribunal accept that it is inextricably linked to the subsequent dismissal which is in time. The Tribunal therefore conclude that although this cannot be identified as a continuing act, we conclude that it is just and equitable to extend time.

117. Although the Tribunal have found that most of claims save for the dismissal claim and D, E and F to be out of time, we have concluded that although they should stand dismissed, we have decided that if we are wrong on our conclusion, we decided that they should be dealt with on their merits, for the sake of completeness.

The issues before the Tribunal.

118. The Tribunal noted that in the Claimant's submissions he withdrew issue G (paragraphs 134-137) on the ground that there was no evidence to support this claim in the bundle or presented at the hearing. He made reference in his replies to the Respondent's submissions at paragraph 8 to the withdrawal of issue G which he stated was done "mistakenly and regrettably due to his lack of legal knowledge of law". The Tribunal was unsure of whether this was an unequivocal withdrawal so we decided that it would also be safer to deal with this allegation on the merits.

119. It became apparent during the closing submissions that the document that was marked 'Agreed issues – 24 June 2019' at pages 96-99 of the bundle and replicated above at paragraphs 6-27 above, was not agreed. The Respondent's position on the disputed issues are at dealt with under the heading 'Other Allegations' at paragraphs 64-66 of their closing submissions. The Respondent submits that the matters referred to in paragraphs 7(a)-(e) (pages 98-9 of the bundle or in our decision above at paragraphs 18(a) to (e)) are referred to as matters that the Claimant suggested were steps that the Respondent should have taken as adjustments. The Tribunal noted that the matters referred to above at 18(a)-(c) were adjustments that were made by the Respondent and we refer above to our findings of fact. The other matters did not relate to the issues above at G and H being the agreed issues in respect of the Claimant's claim for failure to make reasonable adjustments.

120. The list of issues extended the claims for failure to make reasonable adjustments to allegations A-D arguing in the alternative that the claims

under section 15 are also pursued in the alternative as allegations of failure to make reasonable adjustment claims (see above paragraphs 7 (a) to (d) and read in conjunction with paragraph 19). Allegation C and G are understood and the issues are clearly set out (although G is not supported by evidence as confirmed by the Claimant in his closing submissions). In the Claimant's reply at paragraphs 32 to the Respondent's submissions he clarified the PCP he relied upon, which he stated should have been picked up at the preliminary hearing which the Tribunal accept was regrettable. The Claimant confirmed at paragraph 33.1-3 of his reply that for allegation A and B the PCP is the appraisal process and 'relying on money banked for performance purposes' and for D it is 'having communications with his line manager, including by email or telephone as the line manager worked at a different location'.

121. The Respondent stated that these claims were not pursued in the hearing and they do not accept that it was clear that the Claimant was pursuing these heads of claim. In response the Respondent has responded that the Claimant has not shown how the PCP put him at a substantial disadvantage and that his claims in respect of A must fail because adjustments were made to his targets. The Respondent stated that B must fail because the Respondent had implemented the reasonable adjustment of organising a further appraisal related meeting (which did not take place) and in respect of D the Claimant has failed to say in what way the Respondent failed to make reasonable adjustments.

122. Although it appeared to be unsatisfactory to be dealing with this matter in closing submissions rather than at the start of the hearing, the Tribunal concluded that it was appropriate to consider all the claims presently pursued as Section 15 claims as those argued in the alternative as failure to make reasonable adjustments. The Tribunal concluded that there was no prejudice to either side and concluded that to deal with it in this way was consistent with the overriding objective (especially with regard to costs, proportionality and adopting a fair process). As no additional facts were needed and this was an argument pursued in the alternative, the Tribunal were therefore satisfied that both parties had been able to make their legal submissions and we have both sides of the argument before us.

123. The Tribunal first considered **issue A** which is above at paragraphs 7(a) relating to the grade he was assigned in the appraisal in December 2017. It was conceded that at the relevant time the Claimant was off sick due to a disability related reason. The Respondent in closing submissions stated that the grade assigned to him of 'Improved Performance' was not unfavourable treatment as no disadvantage flowed from the grade and the Claimant was not subjected to capability proceedings.

124. The burden is on the Claimant to show unfavourable treatment and in his submissions on this point at paragraphs 6-28 he complained that "no target allowance" was made to take into account his sickness absence. However, the Tribunal above has found as a fact that an allowance was made for his sickness absence and adjustments were made to take account of this. He was returned on a phased basis and then spent 3 months on conversions (when he was not assessed on banked income) before working to a reduced target for the final five months of the year.

The evidence showed that the Claimant was not covering his costs to the Respondent, this was a situation that he accepted could not continue indefinitely (see above at paragraph 18b). The grading applied was therefore consistent with the facts, the Claimant needed to improve his performance, and this was a matter that needed to be discussed in his appraisal. The Claimant was therefore made aware that an improvement was needed.

125. The Claimant appeared to object to the reference made in the appraisal document at page 204 to 'health and family issues' as in the same box there was also a reference to him being a cost to the business. The Claimant stated at paragraph 9 of his submissions that this evidence suggested that Ms Thompson had not factored in his personal circumstances. However, at paragraph 10 of his submissions he then stated that Ms Thompson had used the health and family issues to justify the grading. These submissions appeared to be contradictory. It was impossible to interpret the words in the appraisal document to mean anything other than the Claimant's personal circumstances had been taken into account in their discussions and they had been factors that had adversely impacted on his performance throughout the year. There was nothing to suggest that these words were anything other than issues that had been raised and considered and we accept that they were the backdrop to their discussions which resulted in the 'Improved Performance' rating. We conclude therefore that the reference to health and family issues was not evidence of unfavourable treatment for a reason related to his disability.

126. Although the Claimant was off sick for a disability reason for 4 months there was no evidence to suggest that his sickness absence was the reason for the grade awarded. The Respondent considered his personal circumstances and gave him time to settle back into his role by returning him on conversions for three months giving him time to attend treatment and then working on a reduced target. There was no evidence to suggest that the grade was awarded to the Claimant because he had been off sick for a disability related reason. On the evidence the Tribunal concludes that the burden of proof does not shift to the Respondent. Allegation A is not well founded and is dismissed.

127. Although the Claimant in his closing submissions pursued this head of claim in the alternative as a failure to make a reasonable adjustment, the Tribunal found as a fact that the target had been adjusted and a number of reasonable adjustments had been made (not only in respect of financial targets but also in relation to his phased return and to work on conversions). The PCP relied upon was the 'annual appraisal process, including relying on money banked for performance purposes'. The Claimant made no complaint after his return to work meeting about the failure to make reasonable adjustments and there was no evidence before the Tribunal to suggest that, prior to the annual appraisal, the Claimant had been put at a substantial disadvantage. There was no evidence to suggest that the appraisal grade placed the Claimant at a substantial disadvantage as no negative consequences flowed from the grade, it was made clear to him in the reasonable adjustment meeting (see above at paragraph 43) that this grade would result in the Company reviewing what

help and support could be provided to improve his performance. The Claimant accepted that performance that dropped below a bare minimum could not be sustained indefinitely and this had been emphasised in the reasonable adjustment email sent by Mr Cox (see above paragraph 46 and pages 175-9 of the bundle). There was no evidence to suggest that the annual appraisal process of the measure of banked income used for the latter part of the year placed the Claimant at a substantial disadvantage. The Claimant's claim that **A** amounts to a failure to make reasonable adjustments is not supported on the facts and is dismissed.

128. Turning to issue **B**, above at paragraph 7(b), the Tribunal have made findings of fact about this above and we firstly refer to paragraph 56 above where Mr Scrivens stated that the grading would stand but the meeting was in place to discuss the appraisal. The Tribunal then referred to our findings at paragraphs 54 where we concluded on the facts that the offer to review the appraisal had not been withdrawn. The issue for the Tribunal is whether the Respondent had offered to 'redo' the appraisal and whether this had been withdrawn on the 9 January. From the correspondence and documents we have been taken to and the oral evidence given by Mr Scrivens, the Tribunal accept that the clear offer made by Ms Thompson to redo the appraisal had been significantly watered down and replaced with an offer to review the process. This was unfavourable treatment of the Claimant.

129. However, there was no evidence to suggest that the reason for this (the something arising) was due to his fear of negative judgement and anxiety. Ms Thomson did not appear to have a good understanding of the Respondent's policies and procedures and failed to follow the correct procedure in the appraisal. The Tribunal also noted that the errors identified in the handling of this process had been corrected by Mr Duncan in the outcome of the grievance (and appeal), as we have found as a fact above at paragraph 83 above where it was accepted that the grievance should be redone by a different manager reinstating Ms Thompson's original offer. The Claimant's claim in respect of issue **B** is not well founded on the facts and is dismissed.

130. In respect of the Claimant's claim pleaded in the alternative that **B** was a failure to make a reasonable adjustment, he stated that the PCP was the appraisal process and relying on money banked for performance purposes. We have concluded above that the appraisal process was adapted to include a phased return to work and did not rely on money banked for the first three months. We have already concluded that this PCP (which was the same PCP relied upon for **A**) did not place the Claimant at a substantial disadvantage and comprehensive adjustments had been put in place to the process to prevent any disadvantage suffered by his absence on sick leave.

131. Although the factual scenario relied on in issue **B** was different as it involved the offer to redo the appraisal which was then withdrawn and replaced with an offer to discuss and review, there was no evidence to suggest that the Claimant was placed at a substantial disadvantage either because of the PCP or the decision to downgrade the offer to one of review or to discuss the appraisal grade. Both gave the Claimant an

opportunity to voice his concerns about the grade and the offer remained on the table for a meeting to discuss this. As the Tribunal concluded that the grade merely signalled the need to provide the Claimant with more support, there was no evidence to suggest that withdrawing the offer to redo the appraisal being replaced by an offer to review it, resulted in a substantial disadvantage to the Claimant. The Claimant's claim that **B** is a failure to make reasonable adjustments is not well founded on the facts.

132. The Tribunal now turn to the issue **C** above at paragraph 7(c) in relation to the conference call in January 2018 where the Claimant alleged that questions were asked of him without notice. The first point the Tribunal noted was that the Claimant was unable to identify with certainty when this incident occurred; he also accepted in closing submissions that there was no evidence to support his claim. The Claimant's evidence about this incident was vague and only clarified in his closing submissions. Although the Tribunal accept that there may have been a conference call where questions were asked, the complaint that he pursued in his grievance was general in nature, not going into specific details. The Claimant's claim in respect of section 15 is that Ms. Thompson raised these questions due to his fear of negative judgement and anxiety. There was no evidence to suggest that this was the case. If such questions were asked, the Tribunal concluded that it may have been due to an oversight by Ms. Thompson as this event was said to have taken place many months after his return to work. It was also noted that the questions asked put him in a positive light with his colleagues, which the Claimant accepted (see above at paragraph 63). The Tribunal therefore conclude on the evidence that this was not unfavourable treatment. The Claimant also failed to show that the reason for the treatment was for something arising in consequence of his disability. There was no evidence to suggest that questions were put to the Claimant in this call because of his anxiety and fear or negative judgement. The Tribunal conclude that the burden of proof does not shift to the Respondent on this issue.

133. Turning to the Claimant's claim in the alternative that **C** is pursued as a claim for failure to make reasonable adjustments, he stated at paragraph 33.3 of his replies to the Respondent's submissions that the PCP was 'having conference calls with a number of different individuals on the line, including having to contribute in these calls'. The Tribunal firstly considered if this was a PCP applied by the Respondent and above, we found as a fact (paragraph 44) that the Claimant was required to attend conference calls for his development. It was also agreed that for a limited period of time (10 weeks) they would 'avoid' him having to contribute to the calls until such time as he felt confident. There was no evidence to suggest that during this time he was asked to contribute to the calls. The adjustment in place was time limited and was to remain in place until he felt more confident to contribute. The vague evidence before the Tribunal about the timing of the conference call was January 2018, eight months after the adjustments had been agreed. There was no evidence to suggest that the Claimant had asked for this adjustment to be extended beyond the 10 weeks or that further time was required for him to build up his confidence. There was no evidence to suggest that the Claimant was placed at a substantial disadvantage by being asked questions that placed him in a positive light as he accepted in answers given in cross

examination. As the Claimant has failed to show he was placed at a substantial disadvantage, this head of claim is not well founded on the facts and is dismissed.

134. Turning to the issue **D** above at paragraph 7(d), that Ms Thompson 'caused or permitted' what he described as a ratcheting of negative language and sentiment in the course of emails sent relating to the appraisal. These emails have been referred to above at paragraphs 54-58. Our findings reflected that the Claimant had accepted in cross examination that in many of these emails he was the one who used confrontational and hostile language. Although Ms Thompson stated that she found his language to be unprofessional and disrespectful (in response to him accusing her of lying), it was noted that the Claimant apologised but made no connection with the tone he adopted in these emails to his disability either in his reply or in his subsequent grievance. The Tribunal also noted that there was no evidence to suggest that the Claimant's disability caused him to use inappropriate or confrontational language and this connection was not made in any of the OH reports. The evidence referred to above showed that the inflammatory language was used by the Claimant and not by any of the Respondent's witnesses. On the contrary Mr Scrivens communicated with the Claimant during this period in a positive and supportive light indicating that they were keen to meet with the Claimant to discuss his concerns.

135. There was no evidence to suggest that the Respondent either caused or permitted a 'ratcheting' of negative language and sentiment in the email exchanges. Although Ms Thompson may not have replied to all of his emails, there may have been many reasons for this, but no evidence has been put forward by the Claimant to suggest that this was unfavourable treatment because of something arising from his disability. Although Ms Thomson failed to respond to his email on the 23 January 2018, there was no evidence to suggest that this was because of something arising from his disability namely his fear of negative judgement and anxiety.

136. In the alternative the Claimant has suggested that it was the practice for Ms. Thomson to copy in others (from HR) in an attempt to belittle him and as a result he felt undermined. It was noted by the Tribunal that the Claimant and Ms Thompson had not enjoyed a positive working relationship for some time and the deterioration dated back to early 2017. The Tribunal conclude on the evidence that Ms Thompson copied in HR when communicating in writing with the Claimant, because in the past the Claimant had accused her of being untruthful and of acting unprofessionally (paragraph 38) and she needed to keep HR in the loop should a further formal complaint be pursued. Ms Thompson also explained that she copied in others to prove that replies had been sent to the Claimant's emails, as he had complained about this in the past. The Claimant having failed to show evidence from which we could conclude that he has been treated unfavourably because of something arising from his disability, this head of claim must therefore be dismissed.

137. In respect of the Claimant's claim that **D** amounted to a failure to make reasonable adjustments, he stated that the PCP was 'having

communications with his line manager including by email or telephone'. If there was a PCP applied by the Respondent, it did not place the Claimant (or those with the same disability) at a substantial disadvantage as the adjustment was made to the Claimant's working environment for his benefit and was agreed in the return to work meeting. The Claimant was required to communicate in writing with his manager as she worked in a different location and it was put in place to ensure any possible misunderstandings were avoided. This did not place the Claimant at a substantial disadvantage because of his disability. As the facts relied upon by the Claimant do not support this claim and there was no evidence that he was placed at a substantial disadvantage in comparison with someone who was not disabled, this head of claim is not well founded and is dismissed.

138. The Tribunal next turn to issue **E** which was the Google search undertaken by Mr Harvey in HR. The Claimant at paragraph 105 of his closing submissions stated that it was a fact that "people with disabilities are likely to be off sick more", however he has not provided any evidence to support this submission and the Tribunal has seen no research that supports this. There was also no corroborative evidence that employers were more likely to check on those with disabilities when they are off sick (as alleged by the Claimant in his submissions) as opposed to when someone is off sick for a non-disability related reason. The Claimant did not pursue this argument via his grievance submitted on the 7 March 2018 (above at paragraph 78-79); in his grievance he alleged that the Google search of his name could be evidence of racial discrimination not of disability discrimination.

139. Mr Harvey's evidence was that he conducted a Google search of the Claimant as he was aware that his colleagues had been referring to arranging a grievance hearing (paragraph 69-70). There was no evidence that he was aware of the Claimant's disability or that he was absent for a disability related reason at the time the check was conducted. The Claimant had accepted in cross examination that he was aware (see above at paragraph 33) that the Respondent was entitled to carry out regular checks to ensure fitness and propriety and he had signed a document to this effect. The Google search was a reasonable way of conducting this enquiry (even though Mr Harvey accepted that this was not his role).

140. The first question for the Tribunal is whether it was unfavourable to carry out a check on publicly available information and we conclude that it was not. There was no evidence to suggest that Mr Harvey had conducted a Google search because the Claimant was absent due to a disability related reason and his evidence was that he was only aware that a grievance hearing was being arranged. This was supported by documentary evidence above (see page 281-2). Secondly the legal test requires the Tribunal to consider whether it was because people with a disability are more likely to be subject to these checks, this we have already concluded was not supported by any evidence. The Claimant has failed to show any facts from which we can conclude that he has been

treated unfavourably because he was off sick for a disability related reason. This head of claim is not well founded and is dismissed.

141. The next claim is above at issue **F** where the Claimant stated that his dismissal was unfavourable treatment because of something arising from his disability. The first issue for the Tribunal is to establish the something arising from disability; the Claimant stated that his disability prevented him from disclosing his bankruptcy to a person who was non-neutral. The Claimant has failed to provide any evidence to suggest that this was something related to his disability of social phobia.

142. The Tribunal have found as a fact above that the Claimant's evidence as to why he failed to disclose his bankruptcy was not consistent and at times was contradictory. The Claimant firstly asserted that he was under no obligation to disclose this to the Respondent and there was no written policy that required him to do so. The Tribunal also refer to our findings of fact above at paragraph 72 where the Claimant said that he failed to inform the Respondent of his bankruptcy and that he was prevented from disclosing this due to his disability. The Tribunal noted that only 13 days earlier he had been able to send a detailed grievance email to Mr Cox articulating clearly a number of complaints. In his subsequent grievance dated the 7 March 2018 (above at paragraph 78-80) he stated that he intended to tell someone but was not given the name of the investigation manager. The Claimant did not state in his grievance that his disability prevented him from disclosing his bankruptcy.

143. The Claimant informed the Respondent on the 14 February 2018 that he was contemplating "how and when" to inform them of his bankruptcy but he merely stated that this was an awkward time for him as he was off sick. The first time the Claimant appeared to make the connection between something arising from his disability and his failure to inform the Respondent of his bankruptcy was in the disciplinary hearing. There was no evidence to suggest that there was anything arising from his disability that prevented the Claimant from informing the Respondent about his bankruptcy, he seemed capable of communicating in writing with the Respondent and submitted a complex grievance only 2 days after he was made bankrupt. There was also no evidence to suggest that he had made efforts to try and seek out a neutral person to disclose this information, if that had been his intention.

144. The Tribunal therefore conclude that the Claimant was not prevented by his disability from disclosing his bankruptcy. The Claimant's primary position appeared to be that he was under no obligation to disclose, when the Respondent discovered his bankruptcy, he stated that he intended to inform them but at the time he was off sick. He also stated that he was waiting for a neutral person. There was no consistent evidence to suggest that he was prevented or unable to disclose due to his disability. The Tribunal therefore conclude on all the evidence that his dismissal was not an unfavourable act due to something arising from his disability. This head of claim is not well founded and is dismissed.

145. Turning to the issue at **G** above in relation to the claim that the Respondent failed to make reasonable adjustments in relation to conference calls, we refer above to our findings of fact above at paragraph 61-3 and conclusion in relation to allegation **C** relating to the conference call above at paragraph 132. We concluded that there was no consistent evidence to support this head of claim. Similarly, there was no evidence to suggest that the Respondent failed to make reasonable adjustments. An adjustment had been agreed by Mr Cox to accommodate the Claimant's disability (which the Claimant accepted) for an initial period of 10 weeks and the Tribunal took into account that the allegation was in relation to a single instance in January 2018, over 9 months after his return to work . If there had been a conference call where the adjustment had not been followed to the letter (although there was no consistent or credible evidence to suggest this) the Claimant has failed to provide sufficient evidence to support this claim which he accepted in his closing submissions. This head of claim is not well founded and is dismissed.

146. Turning to the last issue above at **H** (above at paragraph 14), where the Claimant alleged that the Respondent failed to make reasonable adjustments to the appraisal process and relied on money banked for the purposes of performance. The Claimant stated that the Respondent 'failed to take into account his sickness absence,' however the Tribunal has found as a fact that this was taken into consideration when looking at the adjustments made for his return to work. The agreement was that the Claimant had the benefit of a phased return (after taking OH advice), he would then spend three months on conversions, it was only then that he would move on to money banked. This was agreed as was the adjusted target.

147. The Claimant was also given time to attend CBT during working hours (from May to November 2017 as confirmed in the OH report at page 591). The Claimant accepted in his grievance appeal that the time on conversions was to enable him to go to his CBT and counselling appointments. The evidence therefore showed that although banked income was used as a measure of performance in the appraisal process, it was only for the latter part of the year. During that time, he was on adjusted targets and only assessed using this measure once he had time to ease back into the role after his sickness absence. The Tribunal conclude that reasonable adjustments were made to overcome the disadvantage arising from being off sick for a disability related reason.

148. The PCP relied on in issue **H** was to hold an annual appraisal where performance was assessed using money banked to assess performance. It was agreed the Claimant would be assessed on conversions during his return to work for the first three months and then put on a lower agreed target. The Claimant accepted that these adjustments were agreed with Mr Cox in cross examination. The Claimant submitted that the money banked targets failed to take into account his sickness absence. The Tribunal concluded that this was incorrect as the Claimant was not assessed for the periods he was off sick and the targets were adjusted on his return and those financial targets only began after he had completed a

time on conversions. The Tribunal found as a fact that adjustments were made to the appraisal process and to targets to alleviate the disadvantage suffered by the Claimant on his return to work, however the Claimant failed to meet those targets.

149. The rating the Claimant received of Improve Performance was entirely consistent with the facts before the Respondent and was consistent with Mr Cox's response in relation to the discussion on this reasonable adjustment (page 176). The Claimant was aware that a below bare minimum performance could not be sustained indefinitely therefore it was important for this matter to be flagged up at the earliest possible opportunity for the Claimant to take steps to improve. Mr Cox also reassured the Claimant in the update meeting on the 20 March 2017 (see above at paragraph 42-3) that if he was underperforming over a six-month period, they would look at ways to improve his performance. The assessment that the Claimant needed to improve therefore suggested that further steps would be taken to support the Claimant and this the Tribunal conclude was to his advantage, even if he did not agree with the score. There was no evidence that the Claimant suffered a substantial disadvantage as the grade was consistent with the performance and highlighted the need for support measures to be put in place and carried no adverse consequences. This head of claim is not well founded on the facts and is dismissed.

150. Turning to the claim of unfair dismissal, the Tribunal have found as a fact that the Claimant had worked in regulated roles in the financial sector prior to working for the Respondent and was aware of the fitness and propriety tests. He also confirmed in cross examination that he was aware, having been taken to the documents, that the Respondent would carry out regular checks on his fitness and propriety and not only at the onboarding stage (see above at paragraph 33). We heard compelling evidence from Ms. Martin and Mr Price of the importance of financial soundness of advisers in sales roles in the financial sector and this was also the consistent view of Mr Trantum. The Tribunal also noted that Mr Cox also impressed upon the Claimant the importance of the compliance standards when reasonable adjustments were discussed and agreed. The Claimant had before him consistent and credible evidence to show that the standards relating to fitness and propriety were considered to be of paramount importance to the Respondent. The Tribunal were told that where an employee is employed to sell financial products on commission, any financial distress could lead to a lack of objectivity in the advice given. We heard that the fitness and propriety rules were introduced to protect consumers and we again saw consistent evidence to support this. The Tribunal accept the evidence of Mr Price that non-disclosure of bankruptcy would be a material issue for the Respondent.

151. It was the Claimant's evidence to the Tribunal that he was going to disclose his bankruptcy however he put to the Respondent that he was under no obligation to do so in the disciplinary and in the appeal hearing. We preferred the consistent evidence of the Respondent that the Claimant was aware of the obligation to disclose and he did not need a written procedure or a policy to inform him of the importance of doing so. He had been informed at the onboarding stage that the Respondent was an

appropriate representative of First Complete, who was regulated by the FCA and the fitness and propriety test was conducted by them. Later when the Claimant's bankruptcy was discovered his authorisation was terminated thus making it impossible for him to continue to act as an adviser.

152. The Respondent has shown a potentially fair reason to dismiss and we accept that it was misconduct. The Tribunal also found as a fact that the charges that the Claimant faced were potentially so serious to be capable of amounting to offences of gross misconduct, taking into account the role the Claimant performed, the sector in which he worked, and the standards imposed by the Respondent of its advisers.

153. The Tribunal concluded from the facts that the disciplinary process followed overall was fair. The charges were set out in the invitation to the disciplinary hearing. The Claimant was warned that dismissal was a possible outcome. Reasonable adjustments were offered and made to the process and the Claimant was allowed to bring his legally qualified brother in law to assist him in the hearing as an adjustment.

154. The Tribunal also took into account that the disciplinary process was halted for three months to allow the grievance hearing and appeal to be heard. There appeared to be no criticism of the manner in which the grievance was handled, and the Tribunal conclude that the grievance outcome was fair and found partially in the Claimant's favour.

155. The Claimant had an opportunity to make all representations he wished to put forward and we are satisfied that they were considered, and an outcome delivered on all the points he raised. The Claimant complained that his mitigation was not considered however we have found as a fact above that this was dealt with in the hearing and the conclusions appeared in the decision letter. The Claimant also suggested in closing submissions that his dismissal was a foregone conclusion due to the email sent by Ms. Thompson to indicate he had left the business in February 2018. We have dealt with this point above and have concluded that the Claimant's grievance on this point was upheld and Ms. Thompson was required to provide an apology for her conduct. The Tribunal also considered that those dealing with the disciplinary and appeal were independent having no line management responsibility for Ms. Thompson or the Claimant. There was no evidence to suggest that Mr Price or Ms Martin had predetermined the outcome or that they were partial in any way. Both handled the process fairly and the conclusions reached were detailed and were formed after a thorough analysis of the evidence before them. There was therefore no evidence to suggest that dismissal was a foregone conclusion or that the outcome was in some way predetermined.

156. We were satisfied that Mr Price considered alternatives to dismissal (as did Ms Martin). The Respondent was entitled to conclude on the evidence that the Claimant's actions were culpable, the evidence suggested on balance that he was not going to voluntarily disclose his bankruptcy. Having reached that conclusion the Respondent was then entitled to conclude that the Claimant had breached the duty of trust and

confidence and therefore dismissal was considered to be the appropriate sanction in all the circumstances.

157. The Claimant referred in his closing submissions to the failure to disclose the occupational health report (which was in the bundle at page 590 dated the 26 June 2018), which the Respondent received on the 18 July 2018. Although there was no evidence that this report was disclosed to Mr Price or Ms. Martin, there was nothing in the report which was material to the facts and issues before the hearing and appeal. The OH report indicated that a reasonable adjustment should be made to allow him to be accompanied by a member of his family and this adjustment was put in place. There was no evidence to suggest that the failure to share the OH report with others resulted in a procedurally unfair dismissal or that it resulted in the Claimant being disadvantaged in the disciplinary process.

158. The Claimant was able to make all representation he felt to be appropriate at each hearing in relation to his disability and the impact that this had on his ability to disclose and to this extent he was not materially disadvantaged during the process. The Tribunal also found as a fact that Mr Price and Ms Martin found that the Claimant was professional and articulate in the hearings and presented his case thoroughly and with an attention to detail. Although the Claimant maintained that his disability made it difficult for him to make eye contact with others, that was not something that was apparent in the disciplinary or appeal process and it was not something that the Tribunal witnessed in the Hearing. Although the Claimant said he was daunted in the disciplinary hearings, they did not detect this. The Tribunal also found the Claimant to be engaged and well prepared and was well able to present his case before the Tribunal and we conclude that the observations made by Mr Price and Ms. Martin appeared to be an accurate and fair comment on the Claimant's ability to cope in what must have been a stressful situation.

159. The Tribunal were reminded by the Respondent that the Tribunal is not entitled to substitute their view for that of the Respondent. Our role is limited to considering whether the dismissal fell within the band of reasonable responses open to this employer. We conclude that the decision to dismiss, although harsh fell well within the band of reasonable responses considering the responsible position held by the Claimant and the strict rules applied by the Respondent to their financial advisers. We heard that the Respondent applied a high standard of conduct to its financial advisers and expected them to comply with the FCA rules even if they had not been expressly referred to in any policy or contractual document. The Respondent was entitled to expect a high standard of propriety from its employees and this had been communicated to the Claimant at the start of his employment and during the discussion regarding reasonable adjustments and in compliance meetings. The Tribunal has also found as a fact above at paragraph 46 that Mr Cox made it clear to the Claimant on the 3 April 2017, when discussing what was described as 'poor work performance' that there could be no relaxation of Compliance standards as they were in place to protect customers and the Company, had the Claimant been in any doubt as to what they were and whether they applied to him he could have asked but did not do so. The Respondent was entitled to conclude on the evidence before them and on

the balance of probabilities that the allegations were proven, and dismissal was a reasonable response.

160. The dismissal is therefore procedurally and substantively fair.

Employment Judge **Sage**

Date: 31 January 2020