# EMPLOYMENT TRIBUNALS

**Claimant:** Mr D Bell

**Respondent:** David Corry t/a Direct Mortgages

**Heard at:** Manchester **On:** 10, 11, 12, 13 and 14 February 2020

In chambers 14 and 15 May 2020

**Before:** Employment Judge Dunlop
Mrs J Byrne
Mr A J Gill

**REPRESENTATION:**

**Claimant:** Ms R Eeley, Counsel
**Respondent:** Mr J Searle, Counsel

# JUDGMENT

The judgment of the Tribunal is that:

1. The respondent failed to comply with the duty to make reasonable adjustments under ss.20 and 21 Equality Act 2010 in relation to its conduct of the suspension meeting on 15 November 2018.

2. The respondent did not discriminate against the claimant in any other way and all other elements of the claimant's disability discrimination claim (as laid out in list of issues below at paragraphs 4, 5 and 6) therefore fail and are dismissed.

3. The claimant was constructively dismissed by the respondent and his claim of unfair dismissal succeeds.

4. Any compensatory award payable to the claimant in relation to his unfair dismissal claim shall be reduced by 50% (in respect of losses sustained after the first three months) and 90% (in respect of losses sustained after the first six months).

5. The claimant's wrongful dismissal claim succeeds in part. The tribunal finds that the claimant was paid for the period from 19-30 November 2018 and this partially extinguishes his entitlement to notice pay for the remaining notice period up to 31 December 2018.

6. The claimant's claim for unpaid holiday pay fails and is dismissed.

7. The respondent's counterclaim fails and is dismissed.

8. The Anonymisation and Privacy Order dated 10 February 2020 is now discontinued and we refuse the claimant's application for anonymisation of this Judgment before it is entered onto the Register.

# REASONS

## Introduction

1. The claimant, Mr Bell, is a mortgage broker. The respondent, Mr Corry, is in the business of providing mortgage advice. He did so through several vehicles. For our purposes, the key vehicle is 'Direct Mortgages' which was a trading name for Mr Corry operating on his own account. He accepts that he employed Mr Bell personally. In this judgment, we use the term 'Direct Mortgages' to describe the business and 'Mr Corry' to describe the respondent himself.

2. Mr Bell worked for Direct Mortgages as a Senior Mortgage Consultant from 10 September 2012 until 19 November 2018 when his employment terminated by reason of resignation. He brings a claim of constructive unfair dismissal arising out of that resignation and also claims discrimination on the grounds of disability. There are related claims in respect of payments said to be owed to Mr Bell and a counterclaim in respect of payments owed from him to Direct Mortgages.

## The Hearing

3. The parties to this claim are also engaged in civil litigation. The respondent had previously applied to stay these proceedings to await the determination of that litigation. However, Mr Searle confirmed at the outset of this hearing that the stay application was not being renewed at that point, and that both parties confirmed that they were happy to proceed.

4. There was a second "housekeeping" issue which arose at the start of the hearing. On 7 February 2020, the Friday before this hearing was due to commence, Employment Judge T Ryan had made an order as a result of an application on paper for the hearing to be heard in private. That order extended only to 1.00pm on 10 February with the aim of preserving the position in order that the parties could make fuller representations as to privacy and/or anonymisation at the outset of the hearing.

5. Ms Eeley made submissions that the matter should be heard in private, that there should be a restricted reporting order, and that any final judgment should be

anonymised. Mr Searle remained neutral. The tribunal were satisfied, on the strength of those submissions, that it was appropriate to order that the hearing be heard in private. That decision was given in the tribunal, with verbal reasons. I informed the parties that we would not make a final decision in relation to the proposal to anonymise the judgment until the conclusion of the hearing. We have considered the question of anonymity as part of our deliberations, and the reasons for our conclusion are set out at the end of this Judgment.

6. The third issue arising at the outset of the hearing was clarification of the issues in the case. The result of this is reflected in the amended list of issues set out below.

7. Finally, there were 'housekeeping' issues regarding documentary evidence. A significant tranche of the respondent's documents had been disclosed very late. There was some confusion as to whether certain documents had been disclosed on 27 January or 4 February, but it was undisputed that there were then additional documents added on 6 February. This late disclosure put Ms Eeley in a somewhat invidious position. Mr Bell's position all along had been that he wished for this hearing to go ahead and he had opposed repeated applications for a stay. Whilst Ms Eeley recognised that she would have grounds to apply for a postponement of the hearing in order to properly consider these documents and her client's response to them, she demurred from making any such application. It is a matter for the parties, particularly where they are well represented as both parties have been in this case, to decide how they wish to conduct the litigation. Absent a postponement application, the Tribunal can do no more than take the case on its merits on the basis of the material presented to us.

8. There was a separate issue regarding evidence in the form of an audio recording which Mr Corry wished the Tribunal to have regard to and which Ms Eeley said should be ruled as inadmissible. No transcript had been prepared for the Tribunal to consider and Mr Bell did not wish the Tribunal (for obvious reasons) to listen to the recording before making its determination. We were told that the recording was of a conversation between Mr Bell and Rachel Cummings. (Ms Cummings was a colleague of Mr Bell at the relevant time and has provided supporting evidence for him for this Tribunal.) Mr Serle's position was that the content of the audio recording demonstrated that Ms Cummings and Mr Bell were in a sexual relationship and that that undisclosed intimacy undermined the credibility of the evidence that each of them intended to give to the Tribunal. We did not deal with this matter at the outset of the hearing but deferred it until Ms Cummings began to give her evidence. In the face of an express denial by her of any sexual relationship with Mr Bell, we considered that the content of the tape potentially was significant in assessing her credibility. Furthermore, there were significant factual disputes between Mr Bell and the respondent in respect of which Ms Cummings supported Mr Bell's case and in those circumstances the credibility of her evidence could potentially play a significant part in our decision.

9. It transpired that the one recording was actually three recordings. The Tribunal heard and had regard to all of them and an agreed transcript was subsequently produced. During the course of the hearing a further audio recording emerged. We listened to that by agreement of both counsel. It was a recording of a third party calling in and speaking to one of the currently employed mortgage advisers

at Direct Mortgages who made certain comments in relation to Mr Bell and the litigation.

10. In addition to the audio recordings discussed above the Tribunal had regard to an agreed bundle of documents. This originally comprised 796 pages with additional pages up to 813 being added during the course of the hearing. The Tribunal read those documents which were referred to in the witness statements, during cross-examination and/or in the submissions of the parties.

11. We heard from the following witnesses in this order:

    (1) On behalf of Mr Bell:

        (i) Rachel Cummings, a Mortgage Administrator and colleague of Mr Bell (no longer working for Direct Mortgage);

        (ii) Mr Bell;

        (iii) Mr Jack Brewer, Trainee Mortgage Adviser and colleague of Mr Bell (no longer working for Direct Mortgage).

    (2) On behalf of the respondent:

        (i) Leah Couper, Mortgage Administrator;

        (ii) Tracy Cooper, Office Manager;

        (iii) Jason Simpson, Field Risk Manager at Quilter Financial Planning;

        (iv) David Corry;

        (v) Mark Hamilton, Managing Partner of Aspire 2011 LLP.

12. The hearing was disrupted to some extent by the fact that Ms Eeley was at times unable to take instructions from Mr Bell on relevant matters. This occurred where he was under oath in the course of giving his evidence, but also subsequently when the Tribunal was informed that he had been unable to access medication and was struggling with his mental health. The Tribunal was reassured that Ms Eeley is an experienced representative and would ultimately have applied for a postponement had that been necessary, however with the cooperation of Mr Searle, particularly in terms of the order of witnesses, she was able to proceed with the hearing for its duration.

13. When we reached the conclusion of the five days allocated for the case we had heard all the evidence, however we had not had opportunity to hear submissions of the parties nor was there any time left for deliberation. Both parties provided written submissions and reply submissions in accordance with directions agreed at the conclusion of the hearing, and we are grateful to both counsel for the work that has gone into those documents.

**The Issues**

14. The issues to be determined were set out in the Case Management Order and further clarified in subsequent correspondence between the parties. The claimant's claim of direct discrimination was withdrawn at the outset of the hearing. One aspect of the respondent's counterclaim was withdrawn following Mr Serle's cross-examination of Mr Bell. The issues for the Tribunal to decide can therefore be summarised as follows:

***1. Time limits / limitation issues***

**1.1 Were all of Mr Bell's complaints presented within the applicable time limits? Dealing with this issue may involve consideration of subsidiary issues including: whether there was an act and/or conduct extending over a period, and/or a series of similar acts or failures; whether it was not reasonably practicable for a complaint to be presented within the primary time limit; whether time should be extended on a "just and equitable" basis; when the treatment complained about occurred; etc**

***2. Constructive unfair dismissal***

**2.1 Was Mr Bell dismissed, i.e. did the respondent breach the so-called 'trust and confidence term', i.e. did it, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously to damage the relationship of trust and confidence between it and Mr Bell? (b) if so, did Mr Bell affirm the contract of employment before resigning? (c) if not, did Mr Bell resign in response to the respondent's conduct (to put it another way, was it a reason for Mr Bell's resignation – it need not be the reason for the resignation)? If Mr Bell was dismissed, they will necessarily have been wrongfully dismissed because they resigned without notice.**

**2.2 The conduct Mr Bell relies on as breaching the trust and confidence term is:**

**2.2.1 Stating at an impromptu meeting that Mr Bell was suspended with immediate effect on 15 November 2018;**

**2.2.2 Failing to provide any justification or reasoning at this meeting for this suspension;**

**2.2.3 Stating at this meeting to Mr Bell that this would be the end of his career in financial services;**

**2.2.4 Ordering Mr Bell to leave the office immediately and without prior notice on that date;**

**2.2.5 Making Mr Bell take all of his belongings with him when he left the office on that date;**

**2.2.6 Disabling Mr Bell's work emails on that date;**

**2.2.7 Failing to contact Mr Bell to confirm the reason for or terms of this "suspension" after this date;**

**2.3 If Mr Bell was dismissed: what was the principal reason for dismissal (the respondent that it was conduct which failing some other substantial reason) and was it a potentially fair one in accordance with sections 98(1) and (2) of the Employment Rights Act 1996 ("ERA"); and, if so, was the dismissal fair or unfair in accordance with ERA section 98(4), and, in particular, did the respondent in all respects act within the so-called 'band of reasonable responses'?**

***3. Wrongful Dismissal***

**3.1 Did the respondent wrongfully dismiss Mr Bell (i.e. fundamentally breach his contract) by: -**

**3.1.1 Due to his conduct on 15 November 2018 as set out at (iii) above, breaching the implied term of trust and confidence;**

**3.1.2 Failing to pay Mr Bell either notice pay or wages for 18 or 19 November 2018**

***4. EQA, section 15: discrimination arising from disability***

**This claim required the provision of further particulars by the claimant, and was clarified at the outset of the hearing as follows:**

**4.2 Did the following things arise in consequence of the claimant's disability?**

**The claimant having reduced ability to cope with his workload resulting in him planning to leave and continue his career elsewhere.**

**4.3 Did the respondent treat the claimant unfavourably as follows:**

**4.3.1 "Suspending" the claimant and ordering him to leave the office immediately on 15 November 2018;**

**4.3.2 Ordering the claimant to take all his belongings with him on this date;**

**4.3.3 Stating on this date that that would be the end of the claimant's career in financial services;**

**4.3.4 Disabling the claimant's access to work emails on 15 November 2018; and**

**4.3.5 Failing to contact the claimant after this date to confirm what was happening.**

**4.4 If so, did the respondent treat the claimant unfavourably in any of those ways because of the fact that he was planning to leave and continue his career elsewhere?**

**4.5 If so, has the respondent shown that the unfavourable treatment was a proportionate means of achieving a legitimate aim? The legitimate aim relied upon is protection of the respondent's business.**

**4.6 Alternatively, has the respondent shown that it did not know, and could not reasonably have been expected to know, that Mr Bell had the disability?**

***5. EQA, section 19: indirect disability discrimination***

**This claim required the provision of further particulars by the claimant, and was clarified at the outset of the hearing as follows:**

**5.1 Did the respondent apply a provision, criterion or practice ("PCP") of "suspending employees as part of its disciplinary process", including requiring suspended individuals to remove their belongings from the respondent's premises, disabling their access to work emails, and failing to contact them following suspension?**

**5.2 If so, did the respondent apply the PCP(s) to Mr Bell at any relevant time?**

**5.2.1 Did the respondent apply (or would the respondent have applied) the PCP(s) to persons who were not disabled?**

**5.2.2 Did the PCP(s) put disabled persons at one or more particular disadvantages when compared with those who were not disabled?**

**5.2.3 Did the PCP(s) put Mr Bell at that/those disadvantage(s) at any relevant time?**

**5.2.4 If so, has the respondent shown the PCP(s) to be a proportionate means of achieving a legitimate aim? The legitimate aim relied upon is protection of the respondent's business.**

***6. Reasonable adjustments: EQA, sections 20 & 21***

**This claim required the provision of further particulars by the claimant, and was clarified at the outset of the hearing as follows:**

**6.1 Did the respondent not know and could it not reasonably have been expected to know Mr Bell was a disabled person?**

**6.2 Did the respondent apply a provision, criterion or practice ("PCP") of "suspending employees as part of its disciplinary process", including requiring suspended individuals to remove their belongings from the respondent's premises, disabling their access to work emails, and failing to contact them following suspension?**

**6.3 Did the respondent apply a PCP of failing to consider the claimant's requests for an adjusted pace of work as set out at para 12 of the ET1?**

**6.4 Did any such PCP put Mr Bell at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled at any relevant time, in the ways specified by Mr Bell in paragraph 39 of the Further Particulars?**

**6.5 If so, did the respondent know or could it reasonably have been expected to know Mr Bell was likely to be placed at any such disadvantage?**

**6.6 If so, were there steps that were not taken that could have been taken by the respondent to avoid any such disadvantage? The claimant relies on the following suggested steps:**

**6.6.1 Being given prior warning of his "suspension";**

**6.6.2 Being given the opportunity to be accompanied at any suspension meeting to reduce anxiety and worry;**

**6.6.3 Being given written confirmation of the reasons for suspension;**

**6.6.4 Being given written confirmation of the likely timeline for suspension;**

**6.6.5 Being given written confirmation of the likely next steps in the process;**

**6.6.6 Being given extra time to consider, understand and deal with the process of suspension;**

**6.6.7 Reduced working hours;**

**6.6.8 Flexible working hours; and/or**

**6.6.9 The ability to work from home.**

**6.7 If so, would it have been reasonable for the respondent to have to take those steps at any relevant time?**

***7. Unpaid annual leave – Working Time Regulations***

**7.1 What was Mr Bell's leave year?**

**7.2 How much of the leave year had elapsed at the effective date of termination?**

**7.3 In consequence, how much leave had accrued for the year under regulations 13 and 13A?**

**7.4 How much paid leave had Mr Bell taken in the year?**

**7.5 How many days remain unpaid?**

**7.6 What is the relevant net daily rate of pay?**

**7.7 How much pay is outstanding to be paid to Mr Bell?**

***8. Unauthorised deductions***

**8.1 Did the respondent make unauthorised deductions from Mr Bell's wages in accordance with ERA section 13 by failing to pay Mr Bell wages after 17 November 2018 and if so how much was deducted?**

***9. Counterclaim***

**9.1 Was an overpayment of wages in the sum of £1625 made to Mr Bell?**

**9.2 Was an overpayment of car allowance in the sum of £225 made to Mr Bell?**

**9.3 Was an overpayment of holiday pay in the sum of £150 (1 day) made to Mr Bell?**

**9.4 Is the Respondent entitled to recover 50% of Mr Bell's annual bonus (namely £7374)?**

**This aspect of the counter-claim was withdrawn during the Hearing.**

## Findings of Fact

### *Background*

4 Mr Corry is in business on his own account, trading as 'Direct Mortgages'. He operates as an affiliate of a network of mortgage advisors. The broader network provides support to its affiliates and charges them fees. The industry is subject to Financial Conduct Authority ('FCA') regulation and membership enables smaller entities to satisfy certain regulatory requirements. Direct Mortgages is part of an affiliate network called Apsire. Through Aspire, Direct Mortgages accesses the primary affiliate network, Intrinsic FS. Direct Mortgages is able to secure more favourable terms for its membership of Intrinsic FS due to being part of the Aspire network. During the period of time that we are concerned with, Intrinsic FS went through a name change/re-branding and is now known as Quilter Financial Planning. For the purposes of this judgment, however, we shall use the term 'Intrinsic' when referring to Intrinsic FS/Quilter.

5 The Managing Partner of Aspire is Mark Hamilton, who gave evidence on behalf of Mr Corry in this case. Mr Hamilton and Mr Corry are long-standing business associates. Notwithstanding the fact that he is in business on his own account, Mr Corry refers to Mr Hamilton as his 'Line Manager'. He stated in his witness statement that Aspire "look after" compliance issues and that he would discuss any compliance issues arising at the business with Mr Hamilton. It was notable to the Tribunal that neither Mr Corry nor Mr Hamilton included in their witness statements a clear description of the regulatory regime which applies to businesses and individuals operating in this field, nor did they refer to any professional standards document or similar documentary evidence.

***Early years of Mr Bell's employment***

6 When Mr Bell began to work for Mr Corry the Direct Mortgages business was operated in conjunction with a small chain of estate agents. Mr Bell was based across five different estate agency premises in the Manchester area. Subsequently, in May 2014, the respondent opened an office in Sale. Mr Bell was at all material times the only qualified, fee-earning staff member in the Sale office. He was supported by a Personal Assistant/Office Manager, most recently Rachel Cummings. Mr Corry would visit the office from time to time but there was little hands-on management of Mr Bell and Ms Cummings. The respondent's main offices were at Ellesmere Port where Mr Corry and Direct Mortgages' other witnesses were mainly based.

7 We find that Mr Bell and respondent had a close and friendly relationship throughout the initial years of his employment. That friendship extended to include Mr Corry's wife and Mr Bell's husband. For example, Mr Corry and his wife would look after Mr Bell's dog when he and his husband were on holiday. They also attended Mr Bell's wedding in 2015 and would go to dinner together from time to time.

8 Mr Bell has contended, and the respondent now accepts, that he was, throughout his employment, disabled by reason of the impairment of bipolar 2 disorder with anxiety. It is apparent from the medical records which the Tribunal has seen that Mr Bell has a complex mental health history and has suffered from significant mental health problems at various points in his life. There is a dispute between the parties as to how much the respondent was aware of these issues; either due to Mr Bell directly discussing such matters with Mr Corry but also due to information from Ms Cummings and indirectly due to Mr Bell's presentation and behaviour.

9 In summary, we find that Mr Bell was a successful employee who generated clients and income for the business. This was a benefit to Mr Corry, who also liked and got along with Mr Bell as a person. Given, that situation he was prepared to go to some lengths to accommodate Mr Bell being a 'high maintenance' employee who was unreliable in terms of punctuality and absences, at times irresponsible in the way he conducted himself, who suffered from a volatile personal life which sometimes impinged on his work and who was difficult to work with at times. This broad conclusion arises from the matters discussed below.

10 It was suggested that arrangements were made in the opening of the Sale office to accommodate Mr Bell's known difficulties, specifically the opening time was 10am to accommodate the fact that he often found it difficult to get up in the morning, and a water cooler was purchased in view of the fact that his medication means that he suffers from a dry mouth. We preferred Mr Corry's evidence that there was a water cooler in other offices and note that this is a normal facility to have in a workplace of this type. However, do find that the office opening times were arranged, at least in part, to accommodate Mr Bell's difficulties with early starts.

11 Initially Leah Couper was to be the Office Manager in Sale with Mr Bell, and this continued until November 2015 when she went on maternity leave. A new PA named Vicky was appointed and lasted for around six months. A replacement called Jennifer was appointed around April 2016. Jennifer eventually relocated away from the area and Rachel Cummings was moved to start in Sale in March 2017. We are satisfied that it was difficult to find an administrator who could be happy and successful at Sale, given the difficulties of working with Mr Bell, and that this was a managerial challenge for Mr Corry, eventually resolved by the appointment of Ms Cummings.

12 Mr Bell married his partner in autumn 2015. The Tribunal was referred to an email from Ms Cummings to Mr Bell in advance of his wedding on 2 October 2015. The email was copied to the respondent's office email address which the witnesses all agreed meant that it would be forwarded to the inboxes of everyone in the business. The email states:

> ***"Daniel,***
>
> ***Over lunch we collectively came up with some memories and quotes within the office that I want to re-jig in everybody's memory before you go off and get married, settle down and grow up???? Just to show how special you are to us and some of the events we have endured since you joined…"***

13 There then follows a jovial list of 25 memories of Mr Bell related to his workplace. Several of these were referred to in the course of the evidence in support of various points. In particular, the Tribunal records that one of the items was that Mr Bell had rung Ms Cummings at 12.15am one night to confess that he had tippexed out convictions from his driving licence before providing a copy (which was needed to enable him to drive a company car). Mr Bell confirmed to the Tribunal that he had indeed done this at the outset of his employment.

14 It is notable to the Tribunal both that the fact that Mr Bell engaged in this conduct but also the fact that, generally, within the small team of the respondent's employees, including Mr Corry, it was considered to be a source of amusement rather than any form of misconduct or even a matter to be treated seriously.

15 There was also a reference in this email to what is termed Mr Bell's "disappearing acts" and to examples of him being late for work.

16 The Tribunal were referred to another email sent by Mr Bell to the office account again where he sums up his time with the respondent having reached his five-year anniversary. He states in that email that he is known for his dreadful time

management. There is a response from Mr Corry which is copied to the office email address acknowledging Mr Bell's email and congratulating him on his five years.

17 In summer 2016 the claimant experienced an episode of mental health crisis which resulted in him seeking medical treatment and being referred to a particular psychiatrist whom he has relied heavily on thereafter. He attended these appointments in working time. We find in general terms that Mr Corry became aware that he was attending medical appointments and that these were for mental-health related reasons. He was happy for Mr Bell (with Ms Cummings' support) to manage his own diary, and so might not have known the details of any given appointment, but he did have a broad awareness that Mr Bell was receiving psychological support.

18 Another significant episode occurred in summer 2017 when Mr Bell presented to A&E due to suicidal ideation. Following this, he wanted to go to visit his mother who was living in Spain. It is agreed that he was permitted to take a few days on annual leave at very short notice in order to do this. It is also agreed that Mr Corry was himself on holiday at the them time. Mr Bell contends that he spoke directly to Mr Corry, which was necessary to obtain the leave at such short notice and that he fully explained the situation. Mr Corry contends that he did not receive a call, and that the leave was authorise by Tracy Cooper. Ms Cooper corroborated this account in cross-examination, stating that she had not been given any reason for the leave being requested at such short notice. Whilst Ms Cooper may have organised leave administratively, we find it improbable that she would have been able to authorise this 'emergency' leave, or that Mr Bell would have been permitted to take this time off without some sort of explanation. The trip to Spain involved the cancellation of client appointments but also Mr Bell pulling out of a hospitality trip to the Grand Prix with his colleagues. In all the circumstances, we consider that Mr Corry did authorise the leave (whether directly or indirectly) and that he had some understanding that it was needed because Mr Bell had had a crisis.

***Events in 2018***

19 In March 2018 the respondent engaged a Trainee Mortgage Adviser, Jack Brewer, to work in the Sale office. Mr Bell's evidence was that this was one of several factors resulting in increased pressure on him around this time. Mr Brewer's employment drove up the costs for the office but not its income. Mr Bell asserts that he told Mr Corry that he was feeling under stress, that it was making him anxious and may trigger another episode, but that nothing was done. We do not accept that evidence. Mr Bell and Mr Brewer evidently got on well, and other matters show that Mr Bell was well-used to asking for accommodations when he needed them and well used to them being granted. Another example of Mr Corry's favourable treatment of Mr Bell in fact occurred in July 2018 when both Mr Bell and Mr Brewer missed work following a drinking session and Mr Brewer was disciplined and Mr Bell was not.

20 Mr Bell experienced a further episode of mental health crisis in August 2018 when he drove to a motorway bridge, seemingly with the intention of harming himself, and was eventually found by the police. Mr Bell called Miss Cummings

early in the morning. He informed her specifically that his intention was to kill himself. Ms Cummings was panicked and distressed by the call. She gave detailed and compelling evidence about calling Mr Corry from her car and explaining the situation to him. She said she was very emotional during the call and, for example, explained that she had been concerned about merging onto a motorway as a relatively new driver given her upset state. Mr Corry admitted that Mr Cummings had called him to say there was 'a problem' with Mr Bell, and that he had had 'a bust up' with his husband but denied the rest of the account. We prefer Miss Cummings' evidence on this point and find that this is a clear example of Mr Corry giving incorrect evidence because he wishes to downplay the extent to which he was aware of Mr Bell's problems.

21 Mr Bell stated that this episode was triggered by increased pressures at work. We do not accept this. There is no documentary evidence about Mr Bell feeling pressured at work. We find that, when Mr Bell did experience problems, Mr Corry was accommodating and generally tried to help him. If Mr Bell had been experiencing stress at work then this would have been raised and addressed, most probably with some sort of evidential trail. We also have regard to Ms Cumming's evidence, which was that Mr Corry always sought to accommodate Mr Bell, a situation which she said continued until at least summer 2018. She said between summer and November there were no specific instances of failing to accommodate Mr Bell, but simply that there were no incidents or circumstances that arose. Most significantly, we have had regard to the medical notes provided in relation to this incident which record "*Daniel said that the events of last week came about due to stress and anxiety about his pet dog's ill health and his relationship with his husband*." We find that those personal factors were the trigger for this episode of crisis.

22 It is worth digressing briefly to comment on those medical notes which appear at 330-332 of the bundle. These were notes produced by a Mental Health Practitioner who was charged with visiting Mr Bell at home following his discharge into the care of his GP. The visit took place on 21st August 2918, five days after the alleged suicide attempt. Mr Bell accepted during cross examination that he lied to the Practitioner as he did not want him involved in his care. In particular, where it is stated in the notes that Mr Bell had returned to work "yesterday", that is said to be a lie. Mr Bell also says that the notes generally underplay the difficulties he was facing due to his desire to persuade the Practitioner that he did not need the involvement of the home visit team. It was clear from his evidence that he placed his trust in his consultant and wanted as little as possible to do with the home visit team. The respondent says that those acknowledged lies undermine Mr Bell's credibility generally, and in relation to the evidence he has given in this case.

23 We find that both Mr Bell and Mr Corry are prepared to represent matters in a way which best serves their interest, rather than with scrupulous regard to the truth. That is the case outside the tribunal (as in the case of these medical notes) and when giving their evidence. We have therefore had regard to each individual conflict of evidence separately (where it is relevant to do so) and looked for more neutral evidence e.g. from Ms Cummings (who we found to be a careful and credible witness) or from the documents. In relation to the medical notes, we recognise that these will often be a recounting of what Mr Bell has chosen to

relate, and therefore are not intrinsically any more reliable than his own evidence. However, on the specific question of what led to the episode of 16 August, we are satisfied that this was problems at home and the ill-health of Mr Bell's dog. There was no reason for him to lie about that to the Mental Health Practitioner.

24 Finally, both the ill-health of the dog, and the marital problems are mentioned in Miss Cumming's statement where she discusses this episode (paragraph 42). We are confident that the episode in August 2018 was not caused by any problems at work and, contrary to his evidence, Mr Bell was content at work during this time and not under any additional strain or pressure. On the contrary, his work may have been suffering as the problems in his personal life impacted on his mental health and overall well-being.

25 Though the respondent maintained the position that he was not aware of Mr Bell's health problems throughout the case, Mr Searle nonetheless summarised during his cross-examination of Ms Cummings the various ways in which it was said, in her evidence, that Mr Corry had adjusted working arrangements, or otherwise taken steps, to accommodate Mr Bell's condition. These ranged from paying for parking fines, shielding him from disciplinary action and adjusting access to electronic diaries so that Ms Cummings herself could keep track of him. We accept that these adjustments were made. Overall, we find that Mr Corry was happy to support Mr Bell as long as he continued to perform in his role and generate income.

26 We also find that in summer 2018 Mr Bell was actively considering setting up in business on his own account. Over the years, Mr Corry had discussed the possibility of early retirement, and one possibility was that Mr Bell would seek to take over all, or part, of the business from Mr Corry. However, he was also considering the possibility of leaving to set up in competition with Mr Corry. We do not accept that these ambitions were due to being poorly treated or struggling to cope working for the respondent. Rather, Mr Bell recognised that he was good at what he did and had an ability to generate considerable fees and saw an opportunity to gain financially from being in business on his own account.

27 Mr Bell also discussed this possibility with Miss Cummings and we find that both of them intended that she might join him at some stage, but that she had no firm plans in this regard.

28 We accept that around July 2018 Mr Corry had noticed that there was a lot of business being written in the Sale office, but that was not translating into similarly high levels of fee income. There was also an incident around the same time where an application for a Halifax mortgage had triggered an investigation into potential mortgage fraud. We accept that this was an issue that came to the attention of Mr Corry and that he was concerned about it. We are also asked by Mr Serle to find that there was culpable misconduct on Mr Bell's part in relation to this incident, along with other incident which came to light at a later date. There is further discussion as to this below.

***Suspension***

29 In August 2018 Mr Corry invited Mr Bell and his husband to a small birthday dinner, and in September 2018 he paid for Mr Bell to attend a conference. On 25th October Mr Bell commenced a period of annual leave. He went abroad and on his return held a meeting with an organisation called Openwork, which was a competitor network to Aspire/Intrinsic. That meeting was with a view to him going into business on his own account. On his return to work, on 15 November 2018, Mr Corry suspended him.

30 What was the reason for that suspension? There was no suspension letter to explain the basis for this step. Mr Corry, in the section of his witness statement entitled 'Investigation of the Sale Office' sets out several concerns that he claims to have had. We find that, whilst that may have been operating in his mind to some extent, Mr Corry's real concern was that he suspected Mr Bell was planning to leave and to set up in competition. To explain this finding, it is necessary to look in more detail at the matters Mr Corry professed to be concerned about, and to make findings about the termination meeting itself.

31 One matter which Mr Corry relies on is that it had come to his attention that Jack Brewer was carrying out interviews with clients and making 'decisions in principle' (which he was not qualified to do). He says that he became aware of this due to an email sent by Ms Cummings at 14.03 on 2 November 2018 (770) and acted on it by informing Mark Hamilton. However, we have also been shown an email chain from 6 September 2018 in which Mr Brewer sets out a proposed advice email to a client following up from a telephone conversation he has had with her. The advice is endorsed and praised by both Mr Bell and Mr Corry over email. Mr Hamilton's evidence was that he would not have allowed an apprentice in his own business to act in such a way and in his own business "it just wouldn't have happened". When asked to comment on Mr Corry's endorsement he said he could not do so. Mr Corry said that, contrary to what is suggested by his email, he was concerned that this practice was occurring in the Sale office but did not want to alert Mr Bell to his concerns as he was moving towards instigating a full investigation. We simply do not find that explanation to be credible. We find, as at early September 2018, Mr Corry was happy for the Sale office to 'bend the rules' regarding the work Mr Brewer was doing and, indeed, was encouraging this practice. Turning, then, to the 2 November email, it is unlikely that Ms Cummings would have drawn attention to the fact that Mr Brewer was conducting DIPs if she was in any doubt that this would be sanctioned by Mr Corry. This, combined with his endorsement of the work Mr Brewer was doing in early September leads us to conclude that the email from Ms Cummings did not prompt a genuine concern on the part of Mr Corry.

32 There were then three cases of concerns around mortgage applications. In relation to 'applicant 1' a concern had arisen around July 2018 (and is referred to at paragraph 34 above). The issue here was that the client appeared to be giving unrealistic information about her earnings in support of her mortgage application. The case of 'applicant 2' involved a client looking to raise money to meet tax liabilities and there was a concern about whether this had been properly disclosed to the lender. The case of 'applicant 3' involved issues around the proper disclosure of previous substance abuse by a client applying for a mortgage protection product.

33 We are sure that all these scenarios are ones which must arise for mortgage brokers from time to time. It may be that one or more of the applicants was attempting to act in a dishonest way. It may be that (and we emphasise that this is a separate question) Mr Bell failed to meet his professional standards in the way that he handled one or more of those applications. At the very least, we can be satisfied that these were matters which an employer in Mr Corry's position was entitled to want to investigate. However, we do not find that the respondent has demonstrated culpable conduct on the part of Mr Bell in respect of any of these three issues. Paragraphs 41, 42 and 43 of Ms Eeley's skeleton argument draw together the strands of Mr Bell's explanations in respect of each of these and, broadly, we accept those explanations. We also base this finding on the fact that the respondent failed to produce any specific evidence of what professional standards would apply in this sort of scenario and to demonstrate how Mr Bell was said to have fallen short. We feel under other circumstances it is more likely that Mr Corry would have dealt with these matters by openly discussing the cases with Mr Bell and setting out his expectations as to standards to be maintained going forward rather than by treating them as disciplinary concerns.

34 In any event, Mr Corry met Mr Bell to suspend him on 15th November 2018, the day of his return to work. We find that Mr Corry intended that the outcome of the meeting would be suspension (if not resignation or dismissal) and that he had pre-planned for Mr Brewer to be away from the office on that day to avoid him overhearing the meetings. There was no pre-prepared letter of suspension and no notes taken. Mr Corry has disclosed some handwritten notes which he says were taken shortly after the meeting. We accept this, but we also find that the notes are no more than a very brief summary of some of the matters discussed, and somewhat self-serving. We also find that the meeting was only a few minutes long.

35 The notes record that Mr Corry asked Mr Bell about the suspicious mortgage applications and the mortgage protection application mentioned above and that Mr Bell made 'No comment' responses. The notes also record that Mr Corry questioned Mr Bell about an email he had found in which Mr Bell sent a client list to Ms Cummings. The response recorded is "Because we are starting a business together as you are retiring". There is a then a brief note of the arrangements around the suspension itself.

36 Mr Bell's account of the meeting is that Mr Corry said to him "I know what you have been doing. So go on tell me." At this point, Mr Bell stated that he was planning to set up his own company and that Ms Cummings was intending to join him. It is therefore agreed on both accounts that Mr Bell openly stated this intention during the meeting. Mr Bell disputes that the other matters were discussed at all. We make no specific finding on this, but if they were discussed it was an exchange that took a matter of moments, with no attempt to grapple with the complexities of the three cases, or to review any of the documentation.

37 Mr Corry says in his witness statement that he had "no idea" that Mr Bell was thinking of leaving until it was revealed in the suspension meeting. We reject that. The clear implication of questioning Mr Bell about a client list email is that there is a suspicion of some sort of competitive threat, further the fact that Mr Bell quickly admitted to his intentions demonstrates that Mr Corry's questions and manner

made it clear that he already suspected what was going on. We are satisfied that this was Mr Corry's major concern and that any concerns about the mortgage applications mentioned above (or, indeed, about Jack Brewer being allowed to conduct regulated work) were retrospectively elevated in importance to provide justification for the suspension and to persuade the tribunal that Mr Bell would inevitably have been dismissed in any event.

38 Mr Bell alleges that, at the end of the suspension meeting as he was leaving the office, Mr Corry told him "I will make sure you do not work in financial services again." Ms Cummings supports this, giving evidence that she had heard the comment too. Mr Bell's resignation letter, written just a few days later (see below) also makes reference to this comment having been made. Mr Corry denies it. We find that Mr Corry did use these words (or very similar words to the same effect), that he said them in anger, and that he meant them. Mr Corry had, as we have found, considered himself a friend to Mr Bell. He had supported him and helped him (to a greater extent than he was prepared to admit to the Tribunal) and, we have no doubt, felt a degree of betrayal at Mr Bell's actions.

39 We should pause here to deal here with some email correspondence from the date of the suspension. Page 730a of the bundle contained an email apparently sent from Tracey Cooper to Mark Hamilton at 12.37 on 15 November outlining the various concerns about Mr Bell and requesting that Intrinsic investigate these, as well as proposing that Mr Bell is suspended. 730b was an email from Mr Hamilton to Katherine Rabaiotti at Intrinsic passing the information on and seeking to confirm that Mr Bell will be suspended from the Intrinsic network. There was some concern about the authenticity of these emails, but the respondent provided further documentation following the hearing which appears to resolve that concern. We are content that the emails are genuine. However, the second email states that "[Mr Corry] is going to sack [Mr Bell] for gross misconduct". This email goes well beyond the information passed on in Ms Cooper's email and demonstrates that Mr Corry had been in touch with Mr Hamilton (either verbally or through undisclosed email correspondence) and discussed his intention to sack Mr Bell. No direct mention is made of the concern that Mr Bell may be starting his own business, although a concern is expressed that Mr Bell "will attempt to steal data and client records". Given that we have found that this was a major part of Mr Corry's thought process at this time, it is either the case that he was keeping it from Mr Hamilton, or that they were, together, keeping it from Intrinsic.

40 It was some days before Mr Corry followed up the suspension meeting. He says, and we accept, that he was waiting for legal advice in relation to the letter that he was going to send to Mr Bell and that he himself was agitated about the delay and, indeed, changed his advisor shortly afterwards.

***Resignation and post-employment events***

41 The suspension meeting had taken place on Thursday 15th November 2018. By email sent at 16.41 on Monday 19th November 2018, Mr Bell resigned. The letter sets out that Mr Bell considers himself to have been dismissed by Mr Corry's actions on the 15th, but that if he is not dismissed then he feels he has no option but to resign as Mr Corry's conduct has breached the implied term of trust and

confidence. It would appear from the terminology used that Mr Bell had taken some form of legal advice in drafting this email.

42 Mr Corry replied on 21st November 2018. This draft, as noted above, was prepared in conjunction with his then legal advisors. The letter wrongly asserts that Mr Bell had admitted submitting fraudulent mortgage applications in the 15th November meeting. However (in contrast with the email from Mark Hamilton to Intrinsic) the majority of the concerns set out in the letter relate to matters indicating an intention to compete.

43 Mr Corry is an experienced businessman who was receiving legal advice. We are satisfied that he would have an awareness (at the very least) that there could be difficulties in dismissing Mr Bell purely on the basis that he posed a potential future competitive threat. He was therefore motivated to find other misconduct which could justify actions against Mr Bell. Further, he was aware that any regulatory misconduct which could be established on the part of Mr Bell might place hurdles in front of Mr Bell as he sought to establish his own business (or even gain employment with a competitor).

44 Finally, Mr Corry's letter confirmed that Mr Bell's resignation was accepted and his employment terminated on 19 November 2018. It stated that he had already received pay up until the end of November 2018 (due to the operation of the respondent's payroll). The letter states that separate correspondence would follow in relation to the recovery of 'overpayments'. Mr Bell's contract in fact states that he is paid in arrears (clause 8, page 104), and he contends that the payment he received on 17 November represented payment up to that date only, and that the payment he was due for 18 and 19 November has been withheld. Neither party provided documentary evidence in relation to Mr Bell's initial wage payment, which might have resolved this issue, but we were taken to an email exchange between Ms Cummings and Mr Corry on the termination of her employment, where she agreed with his understanding of the fact that payment was made in the middle of the month for the wages of that calendar month.

45 We accept the respondent's position that, as a matter of fact, the Direct Mortgages payroll was operated on the basis of 'two weeks in arrears, two weeks in advance' (i.e. that the payments made in the middle of each month represented salary for that calendar month) notwithstanding the reference to payment in arrears in Mr Bell's contract of employment. We therefore accept that he received payment (and associated car allowance) for the whole of the month of November.

46 There was some further correspondence between the parties which need not be considered in detail. Mr Corry accessed Mr Bell's work laptop and work phone. Allegations have been made that these devices had been 'professionally wiped' but we have heard no evidence from any forensic IT professional to confirm this and do not make any finding that it was. Further, Mr Corry managed to obtain a significant amount of data from the devices. This data included the recording of the call between Mr Bell and Ms Cummings which the respondent successfully applied for the Tribunal to admit in evidence.

47 It is necessary to make a short digression to discuss that recording. At face value, it consists of Mr Bell making lurid comments about an apparent sexual relationship between himself and Ms Cummings. However, it also implies that they share a home and own a dog together (they do not). It is also worth noting that there are two, very similar, recordings and a third much shorter recording which can best be described as a 'false start'. The explanation given by Mr Bell is that he asked Ms Cummings to participate in the recording for the gratification of another gay man he was engaged in a flirtation with. Mr Bell had led that man to believe that he was in a straight marriage and the man asked for a recording of Mr Bell and his wife. Ms Cummings supports this explanation. The Tribunal fully accept their explanation which, although highly unusual in itself, we find much more plausible than the alternative proposed by the respondent; namely that this bizarre series of recordings is evidence of a genuine intimate relationship between the two of them. In reaching this conclusion we do not rely on points both parties were at pains to make about whether Mr Bell may or may not be attracted to women as well as to men. Rather, it is the rehearsed nature of the recording (including the very fact that such a conversation was recorded) and the demonstrably 'fake' details around the dog etc. that are critical to our decision.

48 This recording was purportedly introduced to undermine Ms Cummings' credibility, on the basis that the fact of being in an undisclosed (and adulterous) intimate relationship with Mr Bell would mean that she was more likely to lie for him. We find that her evidence is not undermined as there was no such relationship. Although we are alive to the dangers of making generalisation about credibility, it is worth stating that we found Ms Cummings to be, in general terms, a more honest and straightforward witness than either Mr Bell or Mr Corry.

49 Immediately after his resignation, Mr Bell and his solicitors exerted themselves in correspondence to try to ensure a good regulatory reference from Intrinsic, which would be necessary for his proposed joining of Openwork. This action is equally consistent with a concern that there were misdeeds which would be discovered, or with a concern that Mr Corry would be acting to tarnish his reputation. On 6 December 2018 Mr Bell emailed the FCA's whistleblower address to allege misconduct against Mr Corry, specifically in relation to unauthorised personnel (Tracey Cooper and Jack Brewer) conducting regulated activities. In the email, Mr Bell presents himself as having been obliged to go along with this practice, and this having led to his decision to leave. The allegations were also copied to Intrinsic. There then followed significant further correspondence with Intrinsic regarding their internal investigations.

50 At the same time, Mr Corry was continuing to seek evidence of wrongdoing by Mr Bell. Several additional matters came to light, the most serious of which was an instance of a client mortgage fee being paid directly into Mr Bell's personal account, rather than to the business. Mr Bell now acknowledges that three separate fees, from two clients, totalling £3,997.00 were paid in this way and he has repaid that sum, without any admission of liability. We are told that the respondent suspects that other fees have been diverted, and that the civil action relating to that is a claim for around £60.000.00

51 Mr Bell's evidence was that the fees he acknowledges receiving were paid with the knowledge and agreement of Mr Corry, in lieu of a pay rise.

52 Each side has made assertions about the financial controls that were in place in the office and how these would have made such embezzlement possible (on Mr Corry's case) or impossible (on Mr Bell's). Mr Corry is supported by the other witnesses from the firm, Mr Bell is supported by Ms Cummings, although, of course, all of this evidence is secondary to the evidence of a direct conversation (or not) authorising this activity. We were not taken through the detail of financial transactions into and through the Direct Mortgage's business. Nor was any evidence given about additional transfers beyond those detailed above.

53 In another case, we would find Mr Bell's explanation difficult to accept. However, in this case Mr Corry's own relatively lax attitude to regulatory matters must be taken into account. There were various matters in this case which appeared potentially damning of Mr Bell, but which, following detailed exploration of the evidence, he was able to substantially refute. We were, for example, not at all convinced that the respondent had shown any actual misconduct by Mr Bell in relation to the various mortgage/insurance applicant issues. We are also conscious that the allegations in relation to these payments have arisen in the context of Mr Corry making every effort to find something to 'pin' on Mr Bell. Our ultimate conclusions in this matter are set out later in this judgment.

54 Further allegations were made about Mr Bell falsifying Leah Couper's signature on his own bank statements in support of a mortgage application and creating a false bank statement in his own name. In relation to the latter allegation, it was contended that this statement was used in support of a mortgage application by Mr Bell, but the respondent could not provide any basis for this contention. Mr Bell and Mr Brewer both gave evidence that this document had been created by Mr Bell to demonstrate to Mr Brewer the way in which mortgage applicant could falsify financial records. The tribunal accept this explanation and it is an example of an allegation put forward by Mr Corry which appeared, at first glance to be very serious, but which actually falls away on closer inspection. It was more difficult to reach a conclusion in relation to the Leah Cooper allegation, and this is also discussed further below.

55 Intrinsic informed Mr Bell of the closure of their investigation in a letter dated 1st February 2019. This concluded that the issues identified would normally lead to disciplinary action being taken, but that the investigation was being closed due to Mr Bell's resignation from the respondent. Mr Hamilton was adamant in giving evidence that, but for his resignation, these matters would have led to Mr Bell's dismissal. His position was that Mr Bell's continued employment by an affiliate business was untenable. However, we consider that Mr Hamilton was motivated to support and protect Direct Mortgages and Mr Corry (and, by extension, his own business).

56 The respondent also produced as a witness one Jason Simpson, who is a Field Risk Manager with Intrinsic. Mr Simpson appeared to some extent to be a reluctant witness, and was adamant that he was giving evidence on his own account only, and not in any formal capacity as a representative of Intrinsic.

57 Mr Simpson had attended the respondent's premises in March 2019 to carry out an Annual Inspection Visit on behalf of Intrinsic. From evidence presented to him at that visit he concluded that had Mr Bell not resigned he would have been

subject to disciplinary action. Mr Simpson went on to state that "my experience of issues like this is that they normally result in dismissal."

58 We do not find the views of either Mr Hamilton or Mr Simpson as to whether these issues would have led to dismissal for gross misconduct helpful.

59 On 22 January 2019 Lloyds Banking Group wrote to Mr Bell informing him that he was to be removed from its panel of mortgage advisors. He successfully appealed this decision and was notified of his reinstatement to the panel by a letter dated 27 March 2019. This letter referred to the fact that on-going monitoring would take place of business submitted by Mr Bell. The respondent contended that this was significant, whereas Mr Bell contended that the wording simply reflected the standard monitoring undertaken by Lloyds in respect of all of its advisors. It is not clear from the letter either way, and we make no finding beyond noting that Mr Bell was successful in his appeal.

60 We were also told that Mr Corry has reported Mr Bell to 'Actionfraud', a national police body dealing with reports of criminal fraud and, as already mentioned, he has launched civil litigation against Mr Bell.

## Submissions

61 As noted above, both sides presented detailed submissions in writing, and we took full account of these in reaching out conclusions below.

## Determination of the claims and counterclaim

62 Notwithstanding the order of the issues in the List of Issues, we found it more helpful to deal with the disability aspects of the case first, before moving onto the constructive unfair dismissal and the financial claims (including counterclaim).

## Disability Discrimination Claims

### *Burden of proof*

63 In respect of each of the elements of Mr Bell's disability discrimination claim s.136 EqA sets out how the burden of proof is to be applied, codifying the position established in **Igen Ltd v Wong [2005] IRLR 258** and approved by the Supreme Court in **Hewage v Grampian Health Board [2012] ICR 1054**:

> **(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 sub-section (2) does not apply if A shows that A did not contravene the provision".**

64 For the burden of proof to shift in a case of direct discrimination it is not enough for a claimant to show that there is a difference in race (or, in this case, a

disability) and a difference in treatment. In general terms 'something more' than that would be required before the respondent is required to provide a non-discriminatory explanation. This principle applies equally to discrimination because of any of the protected characteristics.

65 Further, unfair or unreasonable treatment by an employer does not of itself establish discriminatory treatment: **Zafar v Glasgow City Council [1998] IRLR 36**. It cannot be inferred from the fact that one employee has been treated unreasonably that an employee of a different relevant characteristic would have been treated reasonably. However, whether the burden of proof has shifted is in general terms to be assessed once all the evidence from both parties has been considered and evaluated. In some cases, however, the Tribunal may be able to make a positive finding about the reason why a particular action is taken which enables the Tribunal to dispense with formally considering the two stages.

***Knowledge of disability***
***Legal Principles***

66 The respondent in this concedes that, by reason of his bipolar disorder, Mr Bell was a disabled person within the meaning of s.6 Equality Act 2010 at all material times. However, Mr Corry does not concede that he had the necessary knowledge of that disability which we must find for the claim to succeed. That question of knowledge arises in respect of the s.15 discrimination arising from disability claim and the ss. 20-21 reasonable adjustments claim.

67 In respect of the s.15 claim s. 15(2) provides a defence if the respondent "*did not know, and could not reasonably be expected to know, that [the claimant] had the disability*."

68 We had regard to the EHRC 2011 Employment Code ("the Code") makes clear that an employer must do all it can reasonably be expected to do to find out whether a person has a disability (para 5.15). Paragraph 5.17 that knowledge can be imputed, where a matter is known by a respondent's employee or agent. Where an employer is 'put on notice' that an employee may have disability, but fails to make enquiries, the Tribunal must consider what the outcome of any enquiries would have been. If the employee would have sought to mislead the employer over the disability, then it may not be appropriate to impute knowledge (**A Ltd v Z, EAT 0273/2018**).

69 In respect of the ss.20-21 claim, paragraph 20, Part 3, Schedule 8, of the Equality Act 2010 provides that "(1) [*The respondent] is not subject to a duty to make reasonable adjustments if [the respondent] does not know, and could not reasonably be expected to know- (a)… (b) in any case referred to in Part 2 of this Schedule, that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement*." The effect of this is that, in reasonable adjustment cases, knowledge of the disadvantage relied on, as well as knowledge of the disability itself, must be considered.

***Discussion and conclusions***

70 The key question here is what Mr Corry himself knew. We accept Mr Serle's contention that it would not be appropriate to impute Ms Cummings' own knowledge to him, notwithstanding the fact that she was also his employee. She was never acting in a managerial capacity towards Mr Bell (quite the opposite) and to the extent he confided more to her than he did to Mr Corry, that was due to the fact that she was also a close friend, and she should be seen as acting in that capacity, rather than in her capacity as Mr Corry's employee.

71 It will be clear from the findings of fact that we believe that Mr Corry has significantly underplayed his knowledge of Mr Bell's mental health problems. Those problems had a significant and on-going impact on Mr Bell's life and the way he conducted himself at work. We accept that he may not always have been forthcoming about them, particularly at the start of employment, and that Mr Corry may not have known of a specific medical diagnosis. Overall, however we are comfortable that, at least from 2016/17, Mr Corry would have been well aware that Mr Bell had some sort of mental health condition which may amount to a disability. We are satisfied, given the closeness of the relationship by this point, that if it had been necessary for him to make any further enquiries of Mr Bell, Mr Bell would have been open about the nature of his condition and the difficulties he faced. We are therefore satisfied that from this time Mr Corry either knew, or could reasonably be expected to know, that Mr Bell had a disability.

***Discrimination arising from disability***
***Legal Principles***

72 S.15(1) EqA 2010 provides:

> ***"(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."***

73 In **Pnaiser v NHS England [2016] IRLR 170**, Simler P summarised the correct approach to establishing causation in s.15 cases. A tribunal must first look to establish whether the claimant was treated unfavourably. If so, it must determine what caused that treatment, and whether the reason (either directly or through a series of causal links) was something arising from the disability.

74 Paragrah 5.9 of The Code states that the consequences of a disability for the purposes of a s.15 claim "include anything which is the result, effect or outcome of a disabled person's disability." This may be a loose connection, as demonstrated by **Risby v London Borough of Waltham Forest EAT 0318/2015** (where the claimant was dismissed following an outburst of temper resulting from his employer's decision to book a training course in a venue which was inaccessible to him as a wheelchair user).

75 Although the employer must have actual or constructive knowledge of the disability itself, there is no requirement for the respondent to know that the

disability would, or did, cause the "something arising" which the claimant seeks to rely upon (**City of York Council v Grosset [2018] ICR 1492**).

***Discussion and conclusions***

76 The unfavourable treatment relied on is set out at section 4 of the Issues section above and relates entirely to Mr Bell's suspension. It is not disputed that Mr Corry suspended Mr Bell and took certain actions connected with that suspension as set out at 4.2.1, 4.2.2, 4.2.4 and 4.2.5. We accept that all of these matters amount to unfavourable treatment for the purposes of a s.15 claim. 4.2.3 is the allegation that Mr Corry told Mr Bell that this would be the end of his career in financial services. We have found that this comment was made, and accept that it also amounts to unfavourable treatment.

77 Turning to the cause of that unfavourable treatment: the immediate cause was Mr Corry's suspicions (confirmed by Mr Bell during the course of the meeting) that Mr Bell was planning to leave in order to go into business on his own account. Ms Eeley asks us to take that a step further and find that Mr Bell's reason for forming that intention was his reduced ability to cope with his workload which, itself, was a result of his disability.

78 Even having regard to the example of cases such as ***Risby***, we do not accept those later links which she invites us to make in the chain of causation. Whilst we accept that Mr Bell's ability to cope with work was occasionally disrupted when he experienced severe mental health episodes (such as the occasion when he went to Spain at short notice) we are content that he was generally well able to cope with the workload and was successful in his work. Secondly, we do not accept that difficulties in working for the respondent were the driver for him to consider setting up on his own. We find that accommodations were regularly made for Mr Bell to support him and make his working life easier. If he had felt that he needed to work part time or at a slower pace – as he now contends – we are content that there would have been some evidence of this. Instead, the evidence is to the contrary – for example in his resignation letter where he refers to his own exemplary performance. Finally, it does not sit easily for Mr Bell to say that he needed to reduce the intensity of his workload, yet seek to resolve that by going into business on his own account. A step which would, at least in some ways, bring additional pressures and responsibilities. Overall, we find that the reason for Mr Bell taking steps to set up in business on his account was simply that he felt he could do better. It was not related to his disability and the s.15 claim must fail.

***Reasonable adjustments***
***Legal Principles***

79 The duty to make reasonable adjustments is found primarily in sections 20 and 21 EqA, the key statutory language for the purposes of the present case, being set out in s.20(3):

> ***"…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."***

80 The duty does not apply if the employer did not know, and could not reasonably be expected to know that the employee had a disability and was likely to be placed at the disadvantage in question by the PCP (Schedule 8 paragraph 20).

81 The importance of a Tribunal going through each of the constituent parts of that provision was emphasised by the EAT in **Environment Agency v Rowan [2008] ICR 218** and reinforced in **The Royal Bank of Scotland v Ashton [2011] ICR 632**.

82 As to whether a 'provision, criterion or practice' ('PCP') can be identified, paragraph 6.10 of The Code says the phrase is not defined by the Act but "should be construed widely so as to include for example any formal or informal policy, rules, practices, arrangements or qualifications including one off decisions and actions".

83 The obligation to take such steps as it is reasonable to have to take to avoid the disadvantage is one in respect of which the Code provides considerable guidance (see paragraphs 6.23 onwards). A list of factors which might be considered appears at paragraph 6.28 and includes the practicability of the step, the financial and other costs of making the adjustment and the extent of any disruption caused, the extent of the employer's financial or other resources and the type and size of the employer. Paragraph 6.29 makes clear that ultimately the test of the reasonableness of any step is an objective one depending on the circumstances of the case. Examples of reasonable adjustments in practice appear from paragraph 6.32 onwards.

84 As to whether a disadvantage resulting from a provision, criterion or practice is substantial, Section 212(1) defines substantial as being 'more than minor or trivial'.

***Discussion and conclusions***

85 The issues in relation to the reasonable adjustments claim are set out at Section 6 of the list of issues above.

86 The first part of the claimant's reasonable adjustments claim relates to the fact and manner of his suspension. The practice of suspending employees in cases of potential misconduct – including potential misconduct related to a competitive threat – is something which can readily be accepted as a PCP. Complaints are made in respect of the requirement for the claimant to remove his belongings and the disabling of his access to work emails. Those are common ancillary matters where a suspension takes place and, again, we are prepared to accept these as being PCPs.

87 We have more difficulty in accepting that the delay in contacting the claimant for a few days after the suspension meeting can properly be said to amount to a PCP. It was something that happened in this case due to a delay in Mr Corry obtaining advice from his lawyer. It was a matter of chance, rather than a decision or action. We are unable to find that it amounts to a PCP.

88 Did the PCPs that we have found put Mr Bell at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled?

This disadvantage is described in the Further Particulars in these terms "39… *the Claimant suffered from exacerbated poor mental health, including feelings of sadness, hopelessness and desperation and disturbed thoughts about his ability to continue working at the pace he had been working at and, in relation to the suspension, the possible reasons for the suspension and potential outcomes; so much so that he could no longer bear the unknown and felt he had no other option but to write to the respondent to confirm that he felt the respondent had either dismissed him by his conduct and, if not, the claimant resigned in response to this conduct. 40. The claimant was also put at a financial disadvantage given the lack of pay after 17 November 2018 resulting from the respondent's conduct and the fact his employment terminated*."

89 The fact of being suspended (particularly without being provided with a letter or policy documents explaining the process) and the related treatment regarding removal of belongings and restriction of access to emails are matters which cause serious concern, distress and worry to the majority of employees who experience them. The reasonable adjustments claim (unlike the s.15 claim) requires a comparative approach – would these matters put Mr Bell at a substantial disadvantage by reason of his disability compared to a non-disabled employee in the same circumstances. In answering this question we have to be careful to consider the evidence and not fall back on any assumptions or preconceptions about Mr Bell's condition and its effect.

90 We consider that Mr Bell had a history of extreme reactions to matters which effected him – for example the ill health and death of his dog. He had been in stable employment with Mr Corry for a number of years and had been able to rely on Mr Corry, and others in the business, to support him. Notwithstanding the fact that he was planning to leave, we find it was likely that he would have a more significant adverse reaction to being suddenly removed from the business via a suspension than a non-disabled employee. We also find (as required for the s.20-21 claim) that Mr Corry knew, or could reasonably be expected to know, that the claimant was likely to be placed at a disadvantage in this way.

91 It is not contended by Mr Bell that Mr Corry should have refrained from suspending him as a reasonable adjustment. We are content, in any event, that this would not have been an appropriate adjustment. Mr Corry had legitimate concerns about the potential competitive threat and, given the circumstances of Mr Bell effectively being in sole charge at the Sale office, a short suspension to investigate this would have been legitimate.

92 Instead, Ms Eeley argues that other adjustments should have been made around the manner of suspension which would have ameliorated (or, to turn it around, avoided exacerbating) the effect of the suspension on Mr Bell. The adjustments contended for are set out at 6.6.1-6.6.6 of the List of Issues.

93 Some of these adjustments would not have been reasonable because they would have 'tipped off' Mr Bell about the suspension and, therefore, potentially undermined the investigation to follow. This is the case with 6.6.1 (giving prior warning) and 6.6.2 (allowing Mr Bell to be accompanied).

94 The proposed adjustment at 6.6.3 is that Mr Bell should have been given written confirmation of the reasons for suspension. It is good practice for the preparation for any suspension meeting to involve the preparation of a letter which the employee can take away setting out what has happened and what they can expect going forward. This may not be possible in cases involving incidents which occur at the workplace and result in immediate suspension, but that was not the case here. Mr Corry had ample opportunity to prepare for the meeting during Mr Bell's annual leave, and took steps to do so, by 'lining up' solicitors and by arranging for Mr Brewer to work elsewhere. He would have had opportunity to prepare a letter setting out details of the suspension and ought to have envisaged that that would be particularly important for Mr Bell given his disability. We therefore find that this was a failure to make a reasonable adjustment.

95 The proposed adjustments at 6.6.4 and 6.6.5 are being given written confirmation of the likely timeline for suspension and of the likely next steps in the process. On the same basis, we find that these are also failures to make reasonable adjustments.

96 The proposed adjustment at 6.6.6 is "being given extra time to consider, understand and deal with the process of suspension". We do not really understand when it is proposed that extra time should have been given. For the reasons stated above, we find that it was reasonable for the meeting to take place without notice. Following the meeting, Mr Bell complains that Mr Corry failed to contact him. At the point Mr Bell resigned there was no requirement on him to respond to the suspension. In the circumstances, we do not consider that this part of the reasonable adjustments claim has been made out.

97 The second part of the reasonable adjustments claim relates to an alleged PCP of "*failing to consider Mr Bell's requests for an adjusted pace of work as set out at paragraph 12 of the ET1*". Paragraph 12, in fact makes several quite vague references to working at a "slower pace" and suggests that part-time working was unacceptable to the respondent. We did not find any evidence that Mr Bell made any such requests. Ms Cumming's evidence (which we have accepted) was that Mr Corry treated Mr Bell more favourably than other employees up to the point of suspension. If requests had been made, we believe they would have been considered and accommodated if possible. For this reason, we do not accept that there was any PCP of this nature, nor do we find any failure to make reasonable adjustments.

***Indirect Discrimination***
***Legal Principles***

98 Section 19 EqA states:

> **19 Indirect discrimination**
>
> **(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.**

> **(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—**
>
> **(a) A applies, or would apply, it to persons with whom B does not share the characteristic,**
>
> **(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,**
>
> **(c) it puts, or would put, B at that disadvantage, and**
>
> **(d) A cannot show it to be a proportionate means of achieving a legitimate aim.**

99 Disability is a relevant protected characteristic, as identified in s.19(3). S.6(3)(b) EqA clarifies that reference to persons who share a protected characteristic means, in the context of disability, persons who have the same disability.

100 The concept of indirect discrimination generally has a limited role to play in disability cases, as many complaints which might be expressed in this way are more conveniently expressed as s.15 claims.

***Discussion and conclusions***

101 This claim essentially mirrors the first part of the reasonable adjustments claim. The PCPs contended for is the same and we would repeat the comments made above.

102 We are prepared to accept that the sort of disadvantage which we have found applied to Mr Bell may also have applied to other employees with the same (or similar) disabilities.

103 However, we also consider that the PCP was justified. The practice of suspending employees, along with the ancillary treatment in relation to removing them from physical and virtual access to the workplace is, in general terms, a proportionate means of achieving the legitimate aim of business protection, which is relied on by the respondent. For this reason, the indirect discrimination claim fails.

104 We consider that the concerns we have identified with the way in which this particular suspension exercise was carried out are more appropriately addressed through the rubric of the reasonable adjustments jurisdiction. (In respect of which Mr Bell has been partially successful). For the avoidance of doubt, even if the indirect discrimination claim had been successful we would not have found that it added anything of substance to the findings already made in relation to reasonable adjustments.

***Constructive unfair dismissal***
***Legal Principles***

105 Where an employee terminates his contract, with or without notice, in circumstances such that he or she is entitled to terminate it without notice by reason of the employer's conduct, this amounts to a dismissal under s.95(1)(c) Employment Rights Act 1996 ("ERA"). This form of dismissal is invariably referred to as 'constructive dismissal'.

106 In order to claim constructive dismissal, the employee must establish that:

(a) there was a fundamental breach of contract on the part of the employer

(b) the employer's breach caused the employee to resign

(c) the employee did not delay too long before resigning, thus affirming the contract and losing the right to claim constructive dismissal.

**Western Excavating (ECC) Ltd v Sharp 1978 ICR 221**

107 All contracts of employment contain an implied term of trust and confidence, requiring that the employer will not, without reasonable cause, act in a manner calculated or likely to destroy the relationship of trust and confidence between the employer and the employee (**Malik v BCCI SA 1997 ICR 606, HL**). Any breach of the implied term is repudiatory in nature.

*108* Although the breach must 'cause' the resignation, it need not be the sole or main cause, provided it played an effective part. (**Wright v North Ayrshire Council 2014 ICR 77, EAT**)

109 A constructive dismissal is not necessarily a fair dismissal. Where a constructive dismissal is found to have taken place, the Tribunal must still consider the reason for that dismissal and whether it is fair or unfair within s98(4) ERA.

***Discussion and conclusion***

110 The matters relied on by Mr Bell as amounting to a breach of the implied term of trust and confidence are as follows (taken from paragraph 2.2 of the list of issues):

**2.2.1 Stating at an impromptu meeting that Mr Bell was suspended with immediate effect on 15 November 2018;**
**2.2.2 Failing to provide any justification or reasoning at this meeting for this suspension;**
**2.2.3 Stating at this meeting to Mr Bell that this would be the end of his career in financial services;**
**2.2.4 Ordering Mr Bell to leave the office immediately and without prior notice on that date;**
**2.2.5 Making Mr Bell take all of his belongings with him when he left the office on that date;**
**2.2.6 Disabling Mr Bell's work emails on that date;**
**2.2.7 Failing to contact Mr Bell to confirm the reason for or terms of this "suspension" after this date;**

111 Save for items 2.2.2 and 2.2.3 it is not in dispute that these matters occurred. In relation to 2.2.2, it is a matter of semantics as to whether 'some' justification for

the suspension was provided. There was no clear and reasoned explanation to Mr Bell of the reasons for the suspension. In relation to 2.2.3, we have found that that comment was made.

112 We find that in all of these matters Mr Corry did act in a manner which was likely to seriously damage the relationship of trust and confidence. The key question, however, is whether he had "reasonable and proper cause" to do so. We consider that his suspension of Mr Bell was justified given his concerns about the steps Mr Bell may have been taking to prepare to compete, and, to some degree, the concerns over the mortgage and life protection applications he had made. That does not mean that those matters would (necessarily) have resulted in dismissal in due course, but suspension in order to protect the business was a reasonable step, particularly given that Mr Bell worked effectively unsupervised in the Sale office.

113 However, we find that the manner in which the suspension meeting was conducted did amount to a breach of the implied term. Mr Corry did not have reasonable and proper cause to make the threat to Mr Bell that we find was made. We also consider that he did not have reasonable and proper cause to conduct the meeting in a manner which left Mr Bell with no information as to where he stood as regards his employment and what he could expect to happen next – whether that was by way of a clear and coherent oral explanation, or by way of a suspension letter given to him either in the meeting or shortly afterwards. In considering that this conduct was a breach of the implied term, we take account of the finding we have already made that it represented a failure to make reasonable adjustments for a disabled employee.

114 We next considered whether the repudiatory breach that we have found caused Mr Bell to resign. In particular, we considered whether the manner of the suspension, as opposed to the mere fact of being suspended was an effective cause of the resignation. We had regard to Mr Bell's resignation letter (181-182) and noted that this appeared to have been written with the benefit of some legal advice, and may reflect a degree of 'positioning' on the part of Mr Bell. Notwithstanding that, we accept on the basis of the letter and the evidence of Mr Bell that Mr Corry's conduct of the meeting, and particularly the threat, were material factors in Mr Bell's decision to resign.

115 Although there was evidence that Mr Bell ultimately wished to set up in business on his own account, we were satisfied that he was not ready to do so at the point of resignation and that those plans were not an operative factor in the decision to resign at that point.

116 Mr Serle acknowledges that if there was a breach then there was no affirmation, and so on the basis of the findings above we are satisfied that Mr Bell has established a constructive dismissal.

117 We do not find the constructive dismissal to have been fair. There was no misconduct subsequently established in relation to the steps taken to complete (save, arguably, for one email sent in 2017). The mortgage application matters were, in our view, secondary in Mr Corry's mind. Although some misconduct

might ultimately have been established it would have required a significant degree of investigation which had not taken place at this point.

118 For that reason, Mr Bell succeeds in his claim of constructive unfair dismissal.

119 It was agreed with the parties that we would receive submissions and make findings on any reduction to be made to Mr Bell's compensation (in the event of a successful unfair dismissal claim) by way of ***Polkey*** and contributory fault. All other issues relating to remedy will be determined at a later date if not resolved between the parties.

120 In considering contributory fault in relation to the compensatory award, the tribunal can only take account of matters which contributed to the dismissal itself (s.123(6) ERA). This means that the most serious allegation against Mr Bell, that relating to the diversion of client payments, cannot be taken into account.

121 In relation to the matters which were at issue at the point of suspension, it is for the respondent to establish culpable conduct which contributed in some way to the dismissal. Where conduct is disputed, we must be satisfied that it actually took place – we are not merely assessing the reasonableness of the respondent's conclusions as would be the case in an unfair dismissal claim arising out of misconduct. We are satisfied that no culpable conduct has been established in relation to intention to complete. The question is less clear-cut in relation to the mortgage/insurance applications. However, as set out at paragraph 39 above, we found that the respondent had not satisfied us that there was evidence of actual misconduct on the part of Mr Bell.

122 S122(2) gives a broader discretion to make reductions to the basic award in respect of "any conduct of the complainant before dismissal" may be taken into account which makes it just and equitable to reduce the basic award. There is therefore no requirement that the conduct actually contributed to the dismissal itself. Again, this requires us to make specific findings as to whether the alleged misconduct which was uncovered after termination actually took place (and amounted to misconduct). This is an exercise which is also required for the determination of the claimant's wrongful dismissal claim.

123 We consider that the burden of proof in establishing that that conduct actually occurred, on the balance of probabilities, falls on the respondent. The matter which caused us some real concern in this respect was the question of diversion of client monies. The respondent has made out an arguable case that Mr Bell diverted these funds, for his own benefit, and without the knowledge of Mr Corry. Ultimately, however, Mr Corry has not discharged the burden of proof and established on the balance of probabilities that that was actually what happened. This conclusion is drawn from our overview of all the matters in dispute in this case and our findings that Mr Corry has, at least to an extent, sought to make good his threat of preventing Mr Bell from continuing his career in financial services and has not given evidence which we found entirely reliable in every respect. We also draw on the points summarised by Ms Eeley at paragraph 47 of her written submissions, which need not be repeated here.

124 The other points relied on by Mr Serle are, firstly, the allegedly 'fraudulent' bank statement; we have already indicated that we accept Mr Bell's explanation for this. Secondly, there is the allegation that Mr Bell forged Ms Couper's signature on other bank statements. We consider it more likely that Ms Couper's signature varies when signing a number of documents in a batch, as opposed to the careful signature on her witness statement. Without any expert evidence to support an allegation of forgery, we were not prepared to make such a finding against Mr Bell.

125 For these reasons, we make no reduction to either to compensatory or basic awards arising from contributory conduct.

126 The question of ***Polkey*** is a more difficult one. Setting aside the breach which arose due to the manner of suspension, and the termination which then resulted, Mr Bell would have faced investigation into the matters which had been identified by Mr Corry as potential disciplinary matters i.e. the mortgage/insurance application issues. We have to consider what the outcome of that investigation might have been. In constructing this hypothetical, we must remember that we are dealing with the likely response of *this* employer (acting fairly) and not a hypothetical fair employer (**Hill v Governing Body of Great Tey Primary School 2013 ICR 691, EAT**). Mr Serle urges us to accept, on the basis of the evidence of Mr Hamilton and Mr Simpson, as well as Mr Corry, that dismissal would have been the outcome. For reasons already discussed, we are not persuaded that their evidence lends weight to that of Mr Corry. We also take note of the fact that Mr Bell has not, it would appear, been subject to any regulatory discipline, having managed to successfully appeal his removal from the Lloyds panel. We also take note of the fact that Mr Corry had been prepared to overlook or condone significant potential misconduct in the past (for example the driving licence issue, the issues around Mr Brewer conducting regulated work and Mr Bell's unreliability). The Tribunal considers that, so long as Mr Bell continued to produce income for the Direct Mortgage business, Mr Corry would have continued to tolerate behaviour which may not have been considered tolerable by another employer. Having regard to our findings that the respondent has not been able to demonstrate actual misconduct even at the date of this hearing, we consider that the prospect of these matters having led to a fair dismissal is ultimately a slim one.

127 As well as the matters under investigation at the time of dismissal, we also take into account the possibility of future disciplinary action in relation to the alleged diversion of client funds, the 'falsified' bank statement and the alleged imitation of Ms Couper's signature. Again, the difficulty here is that the Respondent has not done enough to satisfy us that Mr Bell was at fault in respect of these matters.

128 The final possibility, and one which is much more pressing given his wish to start in business on his own account, is that Mr Bell would have chosen to end his employment with Mr Corry within a short period in any event. We find that he had a settled intention to set up in business on his own account (as he readily informed Mr Corry during the suspension meeting) and that he would almost inevitably have done so. Whilst he was not ready to leave in mid-November 2018,

he was close to being ready to leave and that reality was reflected in the 'atmosphere' that had developed in the Sale office over the preceding weeks.

129 One this basis, the decision of the Tribunal is that Mr Bell should be fully compensated for his losses for the first three months' following dismissal, but that any losses after this should be reduced by 50%, and any losses after the first six months should be reduced by 90%. The basic award is unaffected.

130 The calculated of the losses, as well as any arguments as to mitigation, will be dealt with at a Remedy Hearing in due course.

**Wrongful dismissal claim**

131 Given our finding that Mr Bell resigned in response to a repudiatory breach of contract by Mr Corry, it follows that the termination was not lawful within the terms of the contract and Mr Bell is entitled to be put into the position he would have been in had lawful notice been served.

132 It is not disputed that the notice period was six weeks, which would run from the summary termination on 19 November 2018 until 31 December 2018. Our findings of fact at para 51 above mean that Mr Bell did, in fact, receive payment for the initial part of the nominal notice period (until 30 November 2018) and that payment will partially extinguish his claim.

133 A wrongful dismissal claim, unlike an unfair dismissal claim, can be entirely rebutted if the employer can show that the employee was himself guilty of a repudiatory breach of contract prior to the dismissal, even where the employer only discovered the conduct at a later date (*Boston Deep Sea Fishing and Ice Co v Ansell 1888 39 ChD 339, CA*). Mr Serle urges us to conclude that the various examples of alleged misconduct against Mr Bell as made out, and that the wrongful dismissal claim can therefore be rejected. However, for the reasons set out at paragraphs 122-124 above we reject that submission and find that Mr Bell is entitled to recover the remainder of his notice pay.

134 Having regard to the findings above, we are confident that the parties will be able to calculate the damages due to Mr Bell. Should it be necessary to do so, we will make a determination as to the appropriate amount at a later date.

**Holiday Pay claim**

135 The claim for unpaid accrued annual leave occupied little time in the Tribunal. We have had regard largely to the respective positions set out in Ms Eeley's written submissions (paragraph 69) and Mr Corry's witness statement (paragraph 71). Both parties agree that at the date of termination Mr Bell had accrued 15 days' entitlement to annual leave. Mr Corry asserted that he had taken 16 days, Ms Eeley says that it was 14. The discrepancy appears to arise in relation to July 2018 where Ms Eeley asserts five days were taken. The disclosed holiday records appear to show that 7 days were taken, and this would accord with Mr Corry's calculation. We accept that the holiday records, though incomplete, are accurate in the days that they record as having been taken, and therefore reject Mr Ball's claim that he is owed one additional day.

136 Ms Eeley also suggests that there may have been some days recorded as holiday which should have been recorded as sickness absence. We have not heard sufficient evidence to allow us to make any findings that the claimant is owed additional holiday pay on this basis.

**Counterclaim**

137 Mr Corry submitted a counterclaim on the basis of overpayments allegedly made to Mr Bell at the point of termination. As will be clear from what has already been said, we accepted the respondent's position that Mr Bell did receive payment for the entire month of November. However, the purported overpayments were actually sums due to Mr Bell given our findings in relation to the wrongful dismissal claim. For that reason the counterclaim fails.

**Time Limits**

138 For completeness, we note that limitation defences had been raised by the respondent, as recorded at section 1 of the List of Issues. In the event, all the claims which we have found to be well-founded relate to matters occurring on or after 15 November 2018 and were therefore presented within the primary time limit.

**Remedy**

139 A remedy hearing has been arranged for 2 November 2020. If the parties are unable to resolve the matter between themselves before that date, then the Tribunal will determine appropriate compensation having regard to the claims which have been successful. The parties are asked to co-operate to produce an agreed document bundle and to exchange any witness statements which they wish to rely on in advance of that hearing. Sufficient copies of all documents must be brought to the hearing for the use of the Tribunal. The parties should write to the Tribunal without delay in respect of any difficulty with the hearing date (in which case, both sides should provide dates to avoid) and should write as necessary in respect of any other necessary case management.

**Anonymisation**

140 As a result of applications made on behalf of Mr Bell shortly before the hearing of this matter, and at the outset of the hearing, under rule 50 of the Employment Tribunals Rules of Procedure this hearing was held in private. A supporting order requiring the anonymisation of the Tribunal's public lists to prevent disclosure of Mr Bell's identity was also made. We were clear at the time of making those Orders that, although satisfied of the appropriateness of doing so, we were not making any decision as to the appropriateness of anonymisation of and Judgment which would ultimately appear on the Register, and that the parties would be given opportunity to make submissions as part of their closing submissions as to whether such an Order (as envisaged by Rule 50(3)(b)) was appropriate or not.

141 In her written submissions, Ms Eeley argued at some length that anonymisation should be extended to include this Judgment. Mr Serle took no position on the issue. We have rejected Ms Eeley's submissions for the reasons

set out below, and therefore make no Order for continued anonymisation and instead order that the Anonymisation and Privacy Order dated 10 February 2020 is now discontinued.

142 In reaching this conclusion we have considered, as required by Rule 50(1) whether anonymisation is necessary in the interests of justice in order to protect the Convention rights of any person. We have sought to carefully balance the rights engaged under Article 8 (right to privacy) and the Article 10 (freedom of expression) rights of any member of the public or press who wished to be informed of and comment upon these matters. We have regard to the principle of open justice and the guidance given as to the critical importance of that principle in the appellate authorities, such as those cited by Ms Eeley.

143 In summary, we accept that there are necessarily references within this judgment to Mr Bell's mental health and that is a personal and sensitive matter. However, such references are part and parcel of very many disability discrimination claims brought to the tribunals. There is nothing sufficiently exceptional about the nature of the matters discussed in this judgment which makes it appropriate to divert from the usual position that Judgments are to be fully available to the public. There was a suggestion that a failure to anonymise would pose an "appreciable risk" to Mr Bel's mental health in the future, but there has been no medical evidence directed to that point. Whilst that must always be a concern where individuals have displayed previous mental health fragility, it remains the case that Mr Bell has chosen to pursue this litigation with the benefit of legal advice and in the knowledge that it was (at the very least) possible that that would lead to some details in respect of his health becoming matters of public record.

144 We also accept that there are references to (lawful) sexual conduct which may be embarrassing to Mr Bell and/or to Ms Cummings. Given our rejection of the respondent's contention that the recorded call evidenced a sexual relationship between the two of them, we consider that there is no more than a trivial potential embarrassment to Ms Cummings (and, by extension, her husband). The interference with their Article 8 rights is minimal, and readily outweighed by the opposing considerations. It may be considered that the matter is more embarrassing to Mr Bell. Nonetheless, however, we consider that any expectation of privacy in a conversation which he instigated and decided to record (and, indeed, 'staged') is very limited. We do not consider that the privacy of Mr Bell's husband is significantly impacted by anything in this judgment, and there has been no suggestion of any children who might suffer embarrassment through anything contained here.

145 Concern was raised that open publication of the judgment may lead to Mr Bell's professional reputation being tarnished. It may the case, on review of the judgment, that there are matters that both Mr Bell and Mr Corry would prefer not be publicly disclosed. However, that mere preference is not to be equated with interference with their Article 8 rights. Further, to the extent that these matters may result in gossip with the industry and geographic area that Direct Mortgages operates in, it is, in the view of the Tribunal, preferable that such discussions are founded on the actual findings in the case, rather than on rumour and

speculation. That only underlines the fact that open justice operates to the benefit of society at large.

146 In reaching this conclusion we have fully considered all the matters that we regard as being relevant to the question at this stage of the proceedings. We would observe for completeness that there were other matters involved in the consideration as to whether a private hearing was appropriate, including matters which were ultimately not relevant to the tribunal's findings or its determination of the claims.

Employment Judge Dunlop

Date: 1 June 2020

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON

3 June 2020

FOR THE TRIBUNAL OFFICE

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