



EMPLOYMENT TRIBUNALS

Claimant: Mr D Courtney

Respondent: Macdonald Hotels (Management) Ltd

**Heard at: Newcastle (via CVP Video link) On: 09 & 10 November 2020
(deliberations 11 November 2020)**

**Before: (1) Employment Judge A.M.S. Green
(2) Ms D Newey
(3) Mr S Wykes**

Representation

Claimant: In person

Respondent: Mr R Dunn - Counsel

JUDGMENT

The unanimous decision of the Tribunal is that the claimant's claims for direct disability discrimination, discrimination arising from disability and failure to make reasonable adjustments are dismissed.

REASONS

Introduction

1. For ease of reading, we refer to the claimant as "Mr Courtney" and the respondent as "Macdonald".
2. We conducted a remote final hearing on liability and remedy via the CVP video platform. We worked from a digital bundle. Mr Courtney and Mr Marco Truffelli (Macdonald's Regional Managing Director for North East Scotland at the relevant time) adopted their witness statements and gave oral evidence. Mr Dunn produced a written skeleton argument which he adopted during his closing oral submissions. Mr Courtney also made closing oral submissions. Given the fact that he was not represented, to further the overriding objective, we gave Mr Courtney additional time to prepare his closing submissions after we had heard from Mr Dunn.

3. In reaching our decision we have considered the oral and documentary evidence, Mr Dunn's skeleton argument and the parties' closing submissions. We have also considered the EHRC Code of Practice in Employment (the "EHRC Code"). The fact that we have not referred to every document produced should not be taken to mean that we have not considered it.
4. Mr Courtney was unrepresented and was faced with the challenging task of preparing and presenting several different disability discrimination claims. The Tribunal was impressed with the professional and proficient way in which he conducted his claims, and we were satisfied that he acted in accordance with the overriding objective.

The claims and the response

5. Mr Courtney originally claimed ordinary unfair dismissal, direct disability discrimination, discrimination arising from disability and failure to make reasonable adjustments. His claim for ordinary unfair dismissal was dismissed by Employment Judge Sweeney upon withdrawal at a private preliminary hearing on 19 December 2019. This was because he did not have the required two years' service to claim ordinary unfair dismissal.
6. Mr Courtney suffers from anxiety, stress, and depression which he says is a disability for the purposes of Equality Act 2010, section 6 ("EqA"). Initially, Macdonald did not accept that Mr Courtney was disabled. However, they now concede that he is disabled but they say that they did not have knowledge of his disability at the relevant time.
7. All Mr Courtney's claims are based upon the same factual matrix surrounding his dismissal as General Manager of the Linden Hall Hotel near Morpeth in Northumberland ("Linden Hall"). He claims that his line manager, Mr Truffelli, knew that he was disabled because he had told him. Mr Courtney went on sick leave on 3 May 2019 and was signed off until 7 June 2019 and was due to return to work on 11 June 2019. On 4 June 2019, Mr Truffelli invited Mr Courtney to a meeting in Edinburgh. Mr Courtney says he thought it might be a return to work interview. During the meeting, Mr Truffelli told Mr Courtney that he was underperforming and that a decision had been made to dismiss him shortly after an earlier management meeting on 4 April 2019 which Mr Courtney had attended. The dismissal would have been implemented earlier but for the fact that Mr Courtney had gone on sick leave in early May. At the meeting on 4 June 2019, Mr Truffelli confirmed the decision to dismiss which took effect on 11 June 2019. Mr Courtney was paid three months pay in lieu of notice.
8. In his claim of direct discrimination under section 13 EqA, Mr Courtney says that he was dismissed because he was a disabled person with anxiety, stress, and depression. He says that a non-disabled person in circumstances not materially different to his would not have been dismissed. He did not identify an actual comparator. Therefore, his claim is based on a hypothetical comparator namely a non-disabled General Manager with less than two years' service who was under performing.
9. Regarding his claim of discrimination arising from disability under section 15 EqA, Mr Courtney says that he was dismissed because of his worsening

symptoms of extreme anxiety resulting in absence from work and the belief that there would be future absences and the effect in Macdonald's mind that this would have on his ability to perform his role. This is the "something" that led to the decision to dismiss him: the absence and belief of future absence and performance concerns arose in consequence of his disability.

10. In his claim for failure to make reasonable adjustments under section 20 EqA, Mr Courtney has identified several matters which he says are a practice, criterion, or provision ("PCP") which placed him at a substantial disadvantage. These are set out below in the section identifying the issues which the Tribunal must determine.
11. Macdonald denies that it discriminated against Mr Courtney because of his disability for the following reasons:
 - a. In relation to the direct discrimination claim and the claim of discrimination arising from disability Macdonald says that they dismissed him because he was not performing to the required standard and when the decision was made to dismiss him, they did not know that he was disabled. Alternatively, if Mr Courtney's absence was the "something" which triggered his dismissal, Macdonald contends that they had a legitimate aim of having a General Manager capable of effectively managing Linden Hall to ensure an acceptable level of financial performance. Dismissal was a proportionate means of achieving that legitimate aim.
 - b. Regarding the claim for failure to make reasonable adjustments, Macdonald's primary position is that they did not have the requisite knowledge of Mr Courtney's disability. Furthermore, they state that Mr Courtney has failed to identify a PCP which is the prerequisite for making such a claim. On the hypothesis that Mr Courtney has identified PCP(s) the proposed adjustments were not reasonable and did not need to be implemented.

The issues

12. These are the issues that the Tribunal must determine.

EQA, section 13: direct discrimination because of disability

- a. It is not in dispute that Macdonald subjected Mr Courtney to the following treatment: dismissal.
- b. Was that treatment "less favourable treatment", i.e. did Macdonald treat Mr Courtney as alleged less favourably than it treated or would have treated others ("comparators") in not materially different circumstances? Mr Courtney relies on the following hypothetical comparator: a non-disabled General Manager of less than two years' service who was underperforming.
- c. If so, was this because of Mr Courtney's disability?

EQA, section 15: discrimination arising from disability

- a. Did the following thing(s) arise in consequence of Mr Courtney's disability: his sickness absence leave from 3 May 2019 until 7 June 2019?
- b. Did Macdonald treat Mr Courtney unfavourably by dismissing him because of his sickness absence and the potential for further periods of sickness absence?
- c. If so, has Macdonald shown that dismissing Mr Courtney was a proportionate means of achieving a legitimate aim? Macdonald relies on the following as its legitimate aim: having a General Manager capable of effectively managing Linden Hall to ensure an acceptable level of financial performance.
- d. Alternatively, has Macdonald shown that it did not know, and could not reasonably have been expected to know, that Mr Courtney had the disability?

Reasonable adjustments: EQA, sections 20 & 21

- a. Did the Macdonald not know, and could it not reasonably have been expected to know Mr Courtney was a disabled person?
- b. Did Macdonald have the following PCP(s):
 - The requirement that Mr Courtney perform all aspects of his role as General Manager.
 - The requirement that he should return to work after his sickness absence without any adjustment to his hours or duties.
 - The failure to follow its performance management procedure.
 - The requirement that Mr Courtney should return to work whilst he was still on sick leave.
 - The failure to extend Mr Courtney's sick leave.
 - The failure to remove certain duties from Mr Courtney.
 - The failure to allow Mr Courtney to return to work before he was dismissed.
 - The failure to assist Mr Courtney by requiring Mr Truffelli to be based at Linden Hall for a few days.

- c. Did any such PCP put Mr Courtney at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled at any relevant time?
- d. If so, did Macdonald know, or could it reasonably have been expected to know Mr Courtney was likely to be placed at any such disadvantage?
- e. If so, were there steps that were not taken that could have been taken by Macdonald to avoid any such disadvantage? The burden of proof does not lie on Mr Courtney; however, it is helpful to know what steps he alleges should have been taken and they are identified as follows:
 - Removing some of his duties.
 - Agreeing a phased return to work.
 - Follow the performance management procedure.
 - Allowing him to stay on sick leave.
 - Extending his sick leave.
 - Allowing him to return to work.
 - Arranging for Mr Truffelli to be temporarily based at Linden Hall to help and support Mr Courtney,
- d. If so, would it have been reasonable for Macdonald to have to take those steps at any relevant time?

Burden and standard of proof; assessing evidence and credibility

13. EqA, section 136 provides that once Mr Courtney has proved facts from which the Tribunal could decide that an unlawful act of discrimination has taken place, the burden of proof 'shifts' to Macdonald to prove a non-discriminatory explanation.
14. The standard of proof is on a balance of probabilities.
15. The Tribunal can only decide whether a party has discharged the evidential burden of proving their case once the evidence is complete and thus only after it has come to some conclusion about the quality of the evidence presented. This assessment involves ascribing weight to items of evidence to decide what influence (if any) such items bear on the matters to be decided. The question of the weight to be attached evidence is one for the Tribunal to decide as a fact-finding body or "industrial jury".
16. We remind ourselves that if there is a preponderance of evidence on one side, as against a lesser amount of equally good or bad evidence on the other, a Tribunal may well be impressed simply by the volume of evidence in favour of one party. Put simply because, say, five witnesses are called to give evidence on the same point does not necessarily enhance a party's case.

Generally, it is quality not quantity that matters most when assessing the weight to be given to the parties' evidence.

17. We had the benefit of hearing oral evidence and we remind ourselves that in determining credibility, factors such as the demeanour of a witness and the coherence of his or her evidence should be considered. We also remind ourselves that there is no requirement for any evidence given to be corroborated. It is simply for the Tribunal to assess, as a matter of common sense and judgment, the extent to which it finds the evidence of the witness satisfactory reliable.

Findings of fact

18. By way of general observation, we found Mr Truffelli to be a reliable witness. He answered all the questions that he was asked, and he appeared to be sincere. We also found Mr Courtney to be generally reliable. We have highlighted below one area of his evidence which was unsatisfactory, but this does not materially detract from the overall positive impression that he gave to us. He is an articulate and thoughtful person with a significant degree of emotional investment in his claims.

Mr Courtney's disability

19. Before we address Mr Courtney's employment history with Macdonald, we think it is important to set out the key facts of his disability namely, severe anxiety, stress, and depression. The fact of his disability is not disputed. What is disputed is whether Macdonald had actual or constructive knowledge of Mr Courtney's disability at the relevant time when it decided to dismiss him. If Macdonald knew or ought reasonably to have known that Mr Courtney was disabled, the timing of when that knowledge was acquired is central to his claims. We discuss this below.
20. Mr Courtney has lived with anxiety, stress, and depression in some form since he was 16 years old. He has been diagnosed by his GP and a consultant psychiatrist with the following conditions:
 - a. Severe anxiety and stress.
 - b. Depression and low mood, suicidal intention.
 - c. TATT ("Tired All The Time").
21. Mr Courtney takes prescription medication to manage his conditions and he has received counselling. He first started taking medication on 4 December 1997 and he has had to continue this regularly for many years.
22. In his witness statement, Mr Courtney describes the effect of his medical conditions. He says that they create high levels of anxiety, stress, and depression which in turn causes pain often in the form of headaches or a numbing freezing sensation from the waist up to his head. His conditions have caused him to shut down and he says that "my mind just goes blank and feels like I'm in space with no thoughts and regularly just staring into nothingness". He says that his headaches are extremely severe and are similar to having a constant migraine with his arms and the sides of his body feeling like they want to explode with constant aching.

23. Mr Courtney is in a relationship. His condition affects his relationship with his partner in respect of matters of intimacy. From the evidence it is clear that she is supportive of him. He regularly contacts his partner when he is away from her using WhatsApp and he has provided some examples of those exchanges to illustrate what goes through his head on a daily basis such as crying in the car on the way to work and being full of fear and anxiety for the day ahead [134 & 135]. For example, on 13 February 2019, Mr Courtney sent a message to his partner at 10 AM saying:

Crying in the car on the way to work full of pain and anxiety is not the best way to start a day.

At 10:24 AM Mr Courtney sent another message to his partner saying:

It's work. Really really struggling. It's got to me, pains been getting worse than last week now.

24. Mr Courtney describes how his condition affects his ability to drive. He says that he has difficulty particularly with overtaking when his anxiety is severe and at heightened times this can cause him to freeze when driving and forces him to pull over to the hard shoulder. He used to drive from his home to Linden Hall via the A1. He describes that there were many occasions when the road was busy with traffic and he felt very claustrophobic particularly when his car was hemmed in between lorries. He regularly had to take longer routes to work as a precaution to make sure that he did not start the working day with heightened pain and headaches. The fact that he had to take different routes to work meant that he had to get up earlier than he normally would, and this impacted him by making him feel tired and lethargic. Eventually, he had to rent a room near to Linden Hall to reduce the amount of time spent driving. This clearly shows how difficult he was finding things in the struggle to manage his condition.
25. Mr Courtney also describes how his anxiety and depression makes it difficult for him to concentrate which has a negative impact on his ability to focus on various tasks relating to his work. He says that he found himself constantly questioning what the right answer was and had difficulty in being able to form a clear or concise analysis to give a clear opinion. He describes that this was more profound when he was working at the time producing detailed budgeting for Linden Hall and he was unable to concentrate without going numb for prolonged periods of time throughout the day. The budgets would change regularly.
26. Mr Courtney self-medicates daily by taking ibuprofen, paracetamol, and Panadol to help reduce pain and the headaches that were taking hold of his body. However, these had little or no effect on his symptoms.
27. Mr Courtney has been having counselling with Guitty Bonner. Ms Bonner is a Psychotherapeutic Councillor. She has produced a letter dated 22 May 2020 [64]. We note that Mr Courtney first started his counselling sessions with Ms Bonner on 12 July 2017 presenting with extreme anxiety and low mood. She notes that Mr Courtney's anxiety had clearly been a part of his life for many years and he had sought her help because his mental health had deteriorated

resulting in irrational fears coupled with depression rendering him dysfunctional to carry out his work. She cites one main example of this namely, his inability to sit behind a car wheel and drive. Ms Bonner last saw Mr Courtney on 8 January 2019 after a total of 31 sessions. She states that whilst he had to cancel some of his sessions, Mr Courtney engaged positively in the process and did well when viewed in the light of the enormity of his life's setbacks and managed to overcome his fear of driving. His progress depended upon the regularity of his attendance. If he missed appointments, his condition deteriorated. She notes that Mr Courtney's hold on keeping his mental health in a relatively good state was very fragile so that any threat to his sensitive stability would result in a setback. She regarded Mr Courtney's dismissal from work after only just returning from a period of leave ordered by his GP given his fragile emotional and mental health to be "particularly unfair, uncaring, unnecessary and therefore I venture to say, callous act on behalf of his employers".

28. Mr Courtney told the tribunal that he was still receiving counselling every week. He is currently not taking medication and has been referred for Cognitive Behavioural Therapy. When he described the impact of his condition to the Tribunal, he got upset and required some time to compose himself.
29. We have no doubt that Mr Courtney's disability is debilitating and upsetting for him. He has been struggling to cope with his condition since he was 16 years old. He is now 42 years old and has been living with his condition for 26 years which is more than half his life.

Mr Courtney's employment history with Macdonald

30. Mr Courtney started working for Macdonald on 11 December 2017. He began working as General Manager at Linden Hall in June 2018. Prior to that, he worked as the General Manager at the Marine Hotel in North Berwick and at the Houston House Hotel near Bathgate. Both of those hotels were part of the Macdonald Group at the time. Before he joined Macdonald, he had been employed as a general manager for eight years. It is fair to say that he was experienced in managing hotels before he joined Macdonald.
31. Between June 2018 and 31 October 2018, Simon Jackson was Mr Courtney's line manager. Mr Jackson was Macdonald's Chief Operating Officer. Mr Courtney was also managed by Ruaridh Macdonald, Macdonald's Deputy Chief Executive for nearly 3 months. Mr Truffelli was hired and appointed Regional Managing Director. Initially, his region was North East Scotland but because of the way in which the hotels were split he also was responsible Linden Hall, and he became Mr Courtney's line manager. Mr Truffelli started working for Macdonald on 31 October 2018 and left the company in February 2020.
32. When Mr Truffelli joined Macdonald, he had four hotels in his portfolio. These were the Marine in North Berwick, Russacks in St Andrews, the Cardrona in Glasgow, and Linden Hall. In April 2018, his role expanded to Regional Managing Director for all of Scotland except for Macdonald's resort hotels. This meant that he acquired an additional five hotels taking his portfolio up to nine. Linden Hall was the smallest hotel in his portfolio.

33. Mr Truffelli was responsible for helping to grow the region by supporting and guiding the General Managers. He was also responsible for managing the region as a whole. He reported to Macdonald's board every week and discussed the financial performance of each hotel within his region. The General Managers joined these meetings by telephone to discuss progress. These meetings could be stressful and often the General Managers were asked pointed questions by the board members particularly if their hotel's performance was down. He also visited Linden Hall several times.
34. Linden Hall is set in a 460-acre estate. It has an 18-hole golf course, banqueting facilities, a spa comprising 4 treatment rooms, steam room and sauna. It has a leisure centre. The hotel has 50 rooms. At the time when Mr Courtney was managing Linden Hall, there were 83 employees.
35. Mr Courtney worked between 50 and 80 hours per week. He did not have any difficulties with those hours because he understood that these came with the role. He was responsible for managing Linden Hall and his duties were various ranging from budgeting, sales, business development targeting corporate clients. He also looked at menus and was responsible for greeting guests and clearing tables when they were short of staff. He described his work as "firefighting". This was put down to staff shortages or simply employees failing to turn up to work their shifts.
36. One of the principal sources of income for Linden Hall was weddings. Typically, these were booked up to 18 months in advance. The wedding income had declined over the years and Macdonald was keen for Mr Courtney to bring in more wedding business because it was lucrative. He felt that he was unable to meet what he believed to be Macdonald's unrealistic expectations for several reasons. First, as part of a general cost-cutting exercise, Macdonald had centralised wedding booking by establishing a call centre for prospective customers to book and arrange their wedding. This lacked the essential personal touch and local dimension that Mr Courtney believed was essential in promoting Linden Hall and other hotels in the group as a wedding venue. Previously, Linden Hall had its own dedicated member of staff on site who was responsible for taking bookings and promoting the hotel for weddings. Mr Courtney believed that the centralised system of booking was ineffective, and this hampered his ability to generate new business. He also believed that over the previous few years, several new competitors had entered the wedding market in Northumberland and their offerings were more attractive than Linden Hall. Despite this, Macdonald wanted Linden Hall to generate the levels of bookings that it had enjoyed at its height some 10 years previously. Mr Courtney thought that was unrealistic, and he felt that his words went unheeded.
37. From the evidence, it is clear that Linden Hall needed refurbishment which required Macdonald to commit to capital investment. It was also clear that Mr Courtney was frustrated by the fact that Macdonald would not or could not commit to that investment. Mr Courtney was concerned that the lack of refurbishment made Linden Hall less attractive for wedding parties in comparison to what was being offered by the local competitors.
38. We heard evidence that Macdonald needed to raise more money and to cut costs which explains why it had not committed to the capital investment to refurbish Linden Hall. In his evidence, Mr Truffelli told the Tribunal that Macdonald was marketing 27 hotels in the group for sale. Linden Hall was

one of the hotels on offer in the sale portfolio. Ultimately, the deal fell through in or around November 2019 and offers were made to purchase the hotels in St Andrews, Oxford and North Berwick.

39. Mr Courtney was also frustrated by the fact that he believed that he had little autonomy in the running of the hotel as many functions had been centralised. He gave examples of this including staff recruitment and training which had been taken away in 2018. There had also been a regional marketing and a regional sales manager which was centralised. He believed that the board imposed unrealistic budgets on him and ignored his suggestions. He felt pressurised during the weekly meetings with management.
40. Matters came to a head in November 2018 when Mr Courtney handed in his resignation. In his witness statement, he explains why he did this by saying that it was:

due to the toxic nature of the company, lack of refurbishment and continued cuts to the team and the product I decided to find a company that put its people first.

41. When Mr Courtney handed in his resignation, Mr Jackson personally called him asking him to reconsider his decision. In his witness statement, Mr Courtney says that Mr Jackson thanked him for the work that he was doing at Linden Hall for changing its culture and in particular, its financial performance. He was offered a pay increase of a further £3000 to stay on as General Manager which he accepted, and he retracted his resignation.
42. Mr Truffelli was aware of Mr Courtney's attempted resignation. He had only recently joined Macdonald and as soon as he started working, it was made clear to him that Linden Hall was underperforming and a few weeks later, he learned that Mr Courtney had attempted to resign. He was concerned that this was something to do with him because he had only recently started, and he discussed matters with Mr Courtney. In his witness statement Mr Truffelli states that Mr Courtney assured him that it was nothing to do with him but that he was sick of working for Macdonald. This was during a long telephone conversation which involved a:

tirade from Daniel about how much he hated working for the company. He was very negative and felt that the company was just interested in squeezing profits where it could

43. Mr Truffelli was wary of Mr Jackson's approach to Mr Courtney given the latter's very negative attitude towards Macdonald and he was not convinced that a small pay rise would change it.
44. Mr Truffelli expanded on what he had said in his witness statement when he was questioned by the Tribunal. Given the strength of Mr Courtney's feelings towards the company, he questioned why the board had asked him to reconsider his resignation. He understood that they were heading towards the Festive Season and Linden Hall was the hotel furthest away in the region. Mr Jackson believed that it would be beneficial not to have a vacancy at that time. Mr Truffelli respected the decision but questioned how a General

manager who had such strong negative feelings towards the company to want to resign and then receive a small pay rise would change their mind and would revert to leadership of the property. At that time, the board was questioning Linden Hall's underperformance on a weekly basis during the intense telephone meetings with the region's General Managers. Neither Mr Courtney nor Mr Truffelli in their evidence regarding the resignation gave any indication that stress and anxiety had played a material part.

45. On 26 January 2019, Mr Courtney sent Mr Truffelli a text message to tell him that he had been up all night being sick and that he could not stop shaking or sweating in the morning. He told him that he would be a little later going in to work that morning than normal [139]. Mr Truffelli replied that he was sorry to learn that Mr Courtney was unwell and offered to travel down to Linden Hall. Mr Courtney replied that it was very kind of him to offer that, but it was not necessary. It was simply a matter of "dosing up on medicine and fluids". He simply wanted to make Mr Truffelli aware that he would be in slightly later than normal. Mr Truffelli replied to thank him and also to "shout if you need anything. Take care Marco". On 28 January 2019 Mr Truffelli sent another text message to Mr Courtney asking how he was feeling to which he replied, "still fragile but a lot better than Saturday thank you". A natural reading of that text message exchange does not lead to the conclusion that Mr Courtney had told Mr Truffelli about his anxiety or any form of mental health condition. At that stage, Mr Truffelli did not know and could not reasonably be expected to know about Mr Courtney's disability. It is also clear that Mr Truffelli was being supportive and had offered to help Mr Courtney.
46. We believe that Mr Courtney was already having doubts about his abilities as a General Manager because on 14 February 2019, he sent a text message to his partner stating "maybe I'm not cut out for this stressful hotel manager staff xx Teaching or counselling might be the answer" [136]. His partner replied that she thought it was definitely time to rethink his options. He also texted his partner about cancelling a holiday to Switzerland to save money which would help their finances if he left Macdonald.
47. On 27 March 2019, Mr Courtney sent a text message to his partner at 13:03 hours [137] which stated, amongst other things "told Marco today I'm struggling Pains etc..." To which she replied "Oh good! He should know!xx". It is suggested by Mr Courtney that this is evidence that Mr Truffelli knew about his disability. In his witness statement, Mr Truffelli states that he recalled speaking to Mr Courtney about pains but there was no reference made to his mental health. We have no reason to doubt what Mr Truffelli said on this and his evidence was not challenged under cross-examination. Mr Courtney told the Tribunal that he had a conversation with Mr Truffelli during which he suggested that Mr Courtney should see his GP. He was asked what else Mr Truffelli could have done to which he replied that he felt cut off and he had buried his head in the sand and that, in retrospect, he should have done more. This suggests that he had not opened up to Mr Truffelli about his mental health. Indeed, he goes so far as to say in his statement that there was a culture at Macdonald that viewed ill health as a weakness which, by implication discouraged candour on the part of employees. Despite this he said that Mr Truffelli knew that he was struggling.

48. It cannot be said that Mr Truffelli knew or ought reasonably to have known about Mr Courtney's disability on 27 March 2019. As far as he was concerned, this was a physical problem and not a mental health matter. He had been sympathetic and supportive, and he had suggested that Mr Courtney should go and see his GP. He had offered to come down to Linden Hall, but his offer had been rejected. The fact that Mr Courtney admitted to burying his head in the sand and not opening up adds credence to this.
49. In Mr Truffelli's opinion, it had become clear that Linden Hall was underperforming, and swift and decisive action was required. There were several instances where Mr Truffelli had concerns:
- a. On 24 January 2019 Mr Truffelli emailed Mr Courtney at 23:33 hours expressing concern that he had only just learned about a potential issue with the stock-take at Linden Hall which he described as being totally unacceptable. He required a full written briefing on this "horrendous result" and Mr Courtney's assessment of its causes and how he planned to rectify it [114]. Mr Courtney responded on 25 January 2019 by email at 18:21 hours stating that their year-to-date showed a deficit of £139.66 on £465,040 worth of sales. There appear to have been an erroneous inclusion in the previous stock count.
 - b. Mr Truffelli criticised Mr Courtney for failing to improve the hotel's appearance.
 - c. Mr Courtney was repeatedly questioned about the issues with the wedding business and the decline in bookings which he accepted. Indeed, in his disability impact statement at paragraph 16.2 he concedes that the board at Macdonald was fixated on the matter.
 - d. There were weekly calls used to communicate feedback to Mr Courtney on his performance.
 - e. By 27 March 2019, it was anticipated that there would be a £78,000 shortfall in banqueting revenue at Linden Hall. Most of this was linked to the decline in wedding sales [125].
 - f. Mr Truffelli tried to encourage Mr Courtney to be more optimistic about Linden' Hall's potential and to encourage his team to do the same but it fell upon "deaf ears". Although there were other properties in his portfolio that required refurbishment, they were performing much better than Linden Hall.
 - g. Mr Truffelli regularly spoke to Mr Courtney about his concerns.
50. On 4 April 2019, Mr Truffelli arranged a meeting at the Linden Tree, which is part of Linden Hall, to discuss the hotel's performance and the sales opportunities. Gina Clark, Macdonald's Regional Director of Sales, prepared an action plan [124]. Mr Truffelli states in his witness statement that Mr Courtney "shot down the ideas" such as targeting universities, associations, and other events bookers as ways of generating additional business for the hotel. Instead, Mr Courtney focused on the negatives and appeared to be unwilling to take a positive view of the next steps. The purpose of the meeting had been to help Linden Hall. Mr Truffelli goes on to say:

41. *During a break, I had a frank conversation with Daniel about my concerns. I feel that this sales meeting was to some extent the straw that broke the camel's back. I reiterated my concerns about the lack of wedding bookings and his management of the hotel. We had basically missed the boat in terms of wedding bookings by April and so I wanted to hear from him what we could do instead with the space. I found Daniel to be very negative in his response. He blamed the poor financial performance on lots of things, including new competitors, and a lack of investment, and he wasn't willing to accept any responsibility for the hotel's failings. Daniel says he told me how unwell he was and that he was suffering from anxiety. That is not correct. He did not tell me that he was suffering from anxiety.*

42. *Everyone was around a table adding ideas as to how we could sell and promote Linden Hall, except Daniel. He was not receptive to the ideas being suggested by the Sales team.*

43. *There are three aspects to hotel management on a simple level: the product, the people and then the profit. If you get the product and the people right, you get the profit. Daniel was very focused on the product, i.e. the hotel, not being up to scratch and he was unable to see how we could improve the financials of the hotel. I could see there were numerous selling points which were waiting to be exploited. For example, the summer was not far away and the hotel has fantastic 450 acre estate with an 18-hole golf course. The hotel itself is a Georgian mansion with spa facilities.*

44. *It is easy to make a profit if you have the perfect product but at Linden Hall, the aim was to build a close-knit team for support to achieve the best results possible. This was the aim of the meeting on 4 April-to drive energy and come up with ideas for how we would improve the situation. We were trying to be positive and suggest ways to move forward but Daniel was entrenched in his view and there was very little that can be done to improve the situation. I found this very disappointing.*

51. Shortly after the meeting on 4 April 2019, the decision was made to terminate Mr Courtney's employment. We have no doubt on the evidence presented, that the operative reason for that decision was Mr Courtney's performance. At that time, neither Mr Truffelli nor Macdonald knew or ought reasonably to have known that Mr Courtney was disabled. They simply knew that he was suffering from pain, had been sick and had been sweating. There was no reference or discussion about depression or anxiety.
52. On 20 April 2019, Mr Truffelli's father died. Mr Truffelli had to travel to Italy as a consequence. He told the Tribunal he was "tracking back and forth" between UK and Italy until the end of May. He told the Tribunal that period of time was "rather tumultuous" and from this it is reasonable to infer that this impacted on the timing of the decision to implement Mr Courtney's dismissal.
53. On 3 May 2019, Mr Courtney was signed off sick initially for the period 3 May 2019 to 16 May 2019 for stress and anxiety [127]. This was the first time that Mr Courtney had taken sick leave whilst working for Macdonald. His sick leave was further extended to 7 June 2019. Mr Courtney sent one copy of the

sicknote to Marie Macfarlane at HR and the other to Darren McErlaine who worked at Linden Hall and was responsible for payroll.

54. There was conflicting evidence about whether Mr Truffelli knew at the time that Mr Courtney had been signed off with stress and anxiety. Mr Truffelli told the Tribunal that he was aware that Mr Courtney was signed off sick, but he had not seen the sicknotes until they were incorporated into the hearing bundle. After being cross-examined, Mr Courtney told the Tribunal that on the morning of 3 May 2019 he telephoned Mr Truffelli to tell him that he was signed off work because of stress and anxiety. He says that he told him that he had been taking a beta-blocker for the previous two weeks, but these had not helped him. He then says that Mr Truffelli told him to get well. The reason that he had given copies of the sicknote to Ms Macfarlane and Mr McErlaine was because Mr Truffelli did not have a fixed office. He also said that when he submitted his second sickness absence note, he had a brief conversation with Mr Truffelli to tell him that had been signed off for a further two weeks and again, Mr Truffelli said he hoped that he would get well. What Mr Courtney told the Tribunal contradicted what he had said when he was cross examined by Mr Dunn the previous day. This inconsistency was put to him by Mr Dunn. When he had been cross examined, it had been put to him that the earliest date on which Mr Truffelli would have known about his disability was 20 May 2019 (see below) to which Mr Courtney agreed. Mr Courtney simply said that he could not recollect what he had said when cross examined. We also note that Mr Courtney does not refer to this conversation on 3 May 2019 in his witness statement. Had that conversation taken place, given its importance about knowledge of his disability, we would have expected Mr Courtney to have referred to it in his statement. We have to say that we found this aspect of Mr Courtney's evidence an unreliable embellishment and we prefer Mr Truffelli's evidence. We find as a matter of fact that as of 3 May 2019, Mr Truffelli did not know that Mr Courtney was signed off with stress and anxiety. He simply knew that he was signed off sick.
55. On 20 May 2019, Mr Courtney sent a text message to Mr Truffelli to advise him that he had been signed off for a further two weeks to help overcome/relieve the chronic anxiety headaches that he got during the day [138]. We believe that this is the earliest date on which Mr Truffelli had actual knowledge of Mr Courtney's disability. It clearly points to his headaches having a mental health cause (i.e. anxiety). Mr Courtney is disabled because of his anxiety, amongst other things.
56. On 30 May 2019, Mr Truffelli sent a text message to Mr Courtney in which he said that he wanted to set a date for them to meet before he returned to work. He also asked Mr Courtney to give him "a few suggestions" [138]. On 4 June 2019, Mr Truffelli sent another text message to Mr Courtney asking if they could meet in Edinburgh on the same day [139]. Mr Courtney agreed and gave an estimated time of arrival of 11 AM. He did not provide any suggestions as requested.
57. It seems that Mr Courtney thought that he was being invited to a return to work interview. However, his suspicions must have been aroused because he decided covertly to record the meeting that he had with Mr Truffelli. The parties have agreed the written transcript of that recording which has been produced to the Tribunal [141-144]. Although the recording was recorded covertly, this does not automatically render it inadmissible in evidence and no objection to its production has been made by the parties.

58. On reading the transcript, the purpose of the meeting is clear. It was simply to enable Mr Truffelli to tell Mr Courtney that Macdonald had decided to dismiss him. The decision had been delayed because Mr Courtney had gone on sick leave. It was clearly a difficult meeting and we are impressed by the fact that Mr Truffelli acted as humanely as possible in conveying the news to Mr Courtney. Ironically, this is borne out by the fact that Mr Truffelli had no idea that his words were being recorded. Furthermore, our own observations of Mr Truffelli were that he appeared to be a sincere and humane person. Indeed, Mr Courtney accepted in his evidence that Mr Truffelli was not a bad man. We also note that during the meeting, Mr Truffelli offered to help Mr Courtney by putting him in touch with head-hunters and also to work with him on his CV. The reason given for the dismissal is clear, namely, Mr Courtney's performance.

59. On 11 June 2019 Mr Truffelli wrote to Mr Courtney confirming termination of his employment [147-148]. His effective date of termination of employment was 11 June 2019. He referred to the meeting of 4 June and stated:

... I explained to you that prior to your absence, I intended to have this discussion with you about your poor performance as the General Manager of Linden Hall. We have had a number of discussions about your performance. Unfortunately they have not resulted in the improvement required. I decided to wait until you were feeling better before initiating that discussion. You confirmed at the outset of our meeting on 4 June that you are feeling better and that you were fit to return to work.

I set out the concerns we have regarding your performance:

Poor managerial control.

Lack of drive and developing Linden Hall.

We discussed that your performance gradually deteriorated after you gave notice of your intention to resign from your employment with Macdonald Hotels in December 2018. I am aware that the motivation for your resignation at the time was that you didn't feel that you fitted in with the culture of the organisation. I had not long started in my role and I gave you an opportunity to withdraw your resignation, which you did, in the hope that we could build a successful working relationship. At that time we discussed your role in my expectations regarding your performance going forward. We then discussed my concerns informally on 4 April 2019 when I highlighted numerous areas that were not acceptable, especially the pub, and, during the meeting with Sales and Revenue the same day, I was disappointed with the drive in planning for an improved hotel performance and future planning.

I explained to you at our meeting on 4 June that I had shielded you from many operational and commercial deficiencies of the hotel, which is unsustainable in the long term. You accepted this. I also made it

clear to you during our meeting that these performance concerns are completely unrelated to your recent absence from work.

We agreed that you would be better suited to working in a different role. There are no alternative roles available at Macdonald Hotels and therefore I said I would help you in sourcing employment elsewhere by introducing you to various contacts within the local hospitality sector. I asked you to send me your up-to-date CV to enable me to begin this process. Please do send me your CV as soon as you can.

...

60. By a letter dated 18 June 2019 Mr Courtney appealed the decision to dismiss him [149-150]. He stated amongst other things:

Grounds of appeal

I made you aware that I was suffering with symptoms of severe anxiety and stress for which I was receiving medication and subsequently required a period of sickness absence from work. When I tried to explain to you the issues, I had at work which triggered my symptoms, you showed no interest and offered no support. Owing to your failure to support me, my symptoms worsened necessitating time off work. During my sickness absence there was virtually no communication with you. However, immediately on my return to work you terminated my employment.

Although I was still unwell, I felt under pressure from you to return to work. Instead of holding a return to work interview and explore what reasonable adjustments could have been put in place to support me, such as a phased return to work, identifying my concerns which were causing me to be stressed and unwell and try to find ways of relieving my stress, you terminated my employment without warning.

You gave concerns about my performance as the reason for terminating my employment, yet the reasons relied on had never been mentioned to me. If you had concerns about my performance, you should have discussed them with me and dealt with them in accordance with the Company's procedures set out in the Employee's Handbook.

I believe the real reason why employment was terminated is because of my worsening symptoms of extreme anxiety and work-related stress and the adverse effect this was having on my ability to perform my role. I therefore consider you have discriminated against me and consequently I have lost my job. You are also in breach of contract by failing to follow the Company's policies and procedures set out in my contract of employment. I consider I ought to be compensated for the loss of my job and consequential financial losses and for work-related stress.

61. Mr Truffelli responded to Mr Courtney's letter by an email dated 22 June 2019 [151]. He stated, amongst other things:

We have considered the basis of your appeal and we would like to reiterate that the decision to terminate your employment was in no way connected to your absence or your ill health. As you know, the decision was made after a number of concerns were raised regarding your

performance as the General Manager of Linden Hall. The performance concerns arose prior to you reporting any ill health.

We do not accept that the decision to terminate your employment was an act of discrimination nor was it in breach of your employment contract. The policies you refer to do not form part of your terms and conditions of employment.

...

Based on the above, we have decided not to allow your appeal.

62. On 3 July 2019, Mr Courtney responded to Mr Truffelli's email [152] stating that having spoken to his solicitor and ACAS he had been informed that Macdonald were unable to refuse this appeal. He alleged that he had been invited to a "disguised" return to work meeting and dismissed with no basis. He awaited a date for his appeal.
63. Marie Macfarlane responded to Mr Courtney's email on 23 July 2019 [152]. She stated that Mr Truffelli was out of the office and reiterated Macdonald's position which was they would not be arranging an appeal.

Applicable law

Direct discrimination

64. EqA, section 13 provides that a person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

Discrimination arising from disability

65. EqA, section 15(1) provides that 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.
66. EqA, section 15(1) goes on to state that section 15(1) does not apply if A shows that A did not know and could not reasonably have been expected to know that B had the disability.
67. In assessing whether Macdonald had actual or constructive knowledge of Mr Courtney's disability we are guided by paragraphs 5.14 and 5.15 of the EHRC Code which state:

5.14 It is not enough for the employer to show that they did not know that the disabled person had the disability. They must also show that they could not reasonably have been expected to know about it. Employers should consider whether a worker has a disability even where one has not

been formally disclosed, as, for example, not all workers who meet the definition of disability may think of themselves as a “disabled person”.

5.15 An employer must do all they can reasonably be expected to do to find out if a worker has a disability. What is reasonable will depend on the circumstances. This is an objective assessment. When making enquiries about disability, employers should consider issues of dignity and privacy and ensure that personal information is dealt with confidentially.

Example: *A disabled man who has depression has been at a particular workplace for two years. He has a good attendance and performance record. In recent weeks, however, he has become emotional and upset at work for no apparent reason. He has been repeatedly late for work and has made some mistakes in his work. The worker is disciplined without being given any opportunity to explain that his difficulties at work arise from a disability and that recently the effects of his depression worsened.*

The sudden deterioration of the work is time-keeping and performance and the change in his behaviour at work should have alerted the employer to the possibility that these were connected to a disability. It is likely to be reasonable to expect the employer to explore with the worker the reason for these changes and whether the difficulties are because of something arising in consequence of the disability.

68. In establishing unfavourable treatment, there is no requirement to have a comparator.

69. We are reminded that in **Secretary of State for Justice and anor v Dunn EAT 0234/16** four elements must be made out for Mr. Courtney to succeed:

- a. There must be unfavourable treatment.
- b. There must be something that arises in consequence of the claimant's disability.
- c. The unfavourable treatment must be because of (i.e. caused by) the something that arises in consequence of the disability; and
- d. Macdonald cannot show that the unfavourable treatment is a proportionate means of achieving a legitimate end.

70. Unfavourable treatment is what the alleged discriminator does or says, or omits to do or say, which then puts the disabled person at a disadvantage. Dismissal can amount to unfavourable treatment.

71. The discriminatory treatment must be something arising in consequence of Mr. Courtney's disability not his disability itself. There must be something that led to the unfavourable treatment and this “something” must have a connection to Mr. James' disability. In **Basildon and Thurrock NHS Foundation Trust v Weerasinghe 2016 ICR 305, EAT** Mr. Justice Langstaff, the then President of the EAT, explained that there is a need to identify two separate causative steps in order for a claim under section 15 EqA 2010 to be made out. The first is that the disability had the consequence of ‘something’;

the second is that the claimant was treated unfavourably because of that 'something'. According to Langstaff P, it does not matter in which order the tribunal approaches these two steps: 'It might ask first what the consequence, result or outcome of the disability is, in order to answer the question posed by "in consequence of", and thus find out what the "something" is, and then proceed to ask if it is "because of" that that A treated B unfavourably. It might equally ask why it was that A treated B unfavourably, and having identified that, ask whether that was something that arose in consequence of B's disability'.

72. In **Dunn** Simler J state:

[Counsel for the claimant asserts] that motive is irrelevant. Moreover, he submits that the claimant did not have to prove the reason for the unfavourable treatment but simply that disability was a significant influence in the minds of the decision-makers. We agree with him that motive is irrelevant. Nonetheless, the statutory test requires a tribunal to address the question whether the unfavourable treatment is because of something arising in consequence of disability... [I]t need not be the sole reason, but it must be a significant or at least more than trivial reason. Just as with direct discrimination, save in the most obvious case, an examination of the conscious and/or unconscious thought processes of the putative discriminator is likely to be necessary.

The enquiry into such thought processes is required to ascertain whether the 'something' that is identified as having arisen as a consequence of that claimant's disability formed any part of the reason why the unfavourable treatment was meted out.

73. We are also reminded that in **Hall v Chief Constable of West Yorkshire Police 2015 IRLR 893, EAT**, the EAT clarified that a claimant needs only to establish some kind of connection between the claimant's disability and the unfavourable treatment. A section 15 claim could succeed where the disability had a significant influence on, or was an effective cause of, the unfavourable treatment. The EAT's approach in **Hall** clearly required an influence or cause that operates on the mind of a putative discriminator, whether consciously or subconsciously, to a significant extent and so amounts to an effective cause. Anything less would be insufficient.

Duty to make reasonable adjustments

74. The EqA 2010 imposes a duty on employers to make reasonable adjustments to help disabled employees and former employees in certain circumstances. The duty can arise where a disabled person is placed at a substantial disadvantage by:

- a. An employer's PCP.
- b. A physical feature of the employer's premises.
- c. An employer's failure to provide an auxiliary aid.

75. Mr Courtney must first identify the PCP which was applied with precision. We remind ourselves that in **Griffiths v SSWP [2017] ICR 160 CA**, Elias J held that [44-47]:

When considering the question of reasonable adjustment, it is critical to identify the relevant PCP concerned and the precise nature of the disadvantage which it creates by comparison with its effect on the non-disabled. The importance of this is that until the disadvantage is properly identified, it is not possible to determine what steps might eliminate it.

76. We are also mindful that in **Nottingham City Transport v Harvey UKEAT/0032/12/JOJ**, Langstaff J held that:

It is not sufficient merely to identify that an employee has been disadvantaged, in the sense of badly treated, and to conclude that if he had not been disabled, he would not have suffered; that would be to leave out of account the requirement to identify a PCP [17]

“Practice” has something of the element of repetition about it. It is, if it relates to a procedure, something that is applicable to others than the person suffering the disability. Indeed, if that were not the case, it would be difficult to see where the disadvantage comes in, because disadvantage has to be by reference to a comparator, and the comparator must be someone to whom either in reality or in theory the alleged practice would also apply [18]

A one-off application of the Respondent's disciplinary process cannot in these circumstances reasonably be regarded as a practice; there would have to be evidence of some more general repetition, in most cases at least [20].

77. An employer will not be obliged to make reasonable adjustments unless it knows or ought reasonably to know that the individual in question is disabled and likely to be placed at a substantial disadvantage because of their disability.

78. The EHRC Code, paragraph 6.19 states, amongst other things, that:

For disabled workers already in employment, an employer only has a duty to make an adjustment if they know, or could reasonably be expected to know, that a worker has a disability and is, or is likely to be, placed at a substantial disadvantage. The employer must, however, do all they can reasonably be expected to do to find out whether this is the case. What is reasonable will depend on the circumstances. This is an objective assessment. When making enquiries about disability, employer should consider issues of dignity and privacy and ensure that person information is dealt with confidentially.

79. The EHRC Code, which the Tribunal must consider, if it appears relevant, contains a non-exhaustive list of potential adjustments that employers might be required to make. Paragraph 6.33 of the EHRC Code sets out examples of steps that might be reasonable for employers to have to take this includes the

following example:

Allocating some of the disabled person's duties to another worker

Example: An employer reallocates minor or subsidiary duties to another worker as a disabled worker has difficulty doing them because of his disability. For example, the job involves occasionally going onto the open roof of the building but the employer transfers this work away from a worker whose disability involves severe vertigo.

80. It is for the Tribunal objectively to determine whether a particular adjustment would have been reasonable to make in the circumstances. It will consider matters such as whether the adjustment would have ameliorated the disabled person's disadvantage, the cost of the adjustment in the light of the employer's financial resources, and the disruption that the adjustment would have had on the employer's activities.

Discussion and conclusions

81. We do not accept that Mr Courtney has established his claim for direct discrimination for the following reasons:

- a. The evidence clearly shows that after the meeting on 4 April 2019 Mr Truffelli had made his mind up that Mr Courtney's performance was unacceptable, and the decision was made to dismiss him. At that juncture, Mr Truffelli did not know Mr Courtney was disabled although he was aware that he had been suffering from physical symptoms such as headaches, sweating and being sick. We do not think it reasonable to impute constructive knowledge of disability as there was nothing to suggest that Mr Courtney's problems as perceived by Mr Truffelli were psychological.
- b. Prior to 4 April 2019 Macdonald's board have become increasingly concerned about Mr Courtney's performance which was something that Mr Courtney himself eventually conceded whilst giving his evidence to the Tribunal. We think it more probable than not that Mr Truffelli would have implemented the decision to dismiss earlier than he did but for the fact that he had to return to Italy after his father's death.
- c. The next intervening event was when Mr Courtney went on sick leave on 3 May 2019 initially for two weeks, but which was extended until 7 June 2019. Mr Truffelli decided to wait until Mr Courtney's sickness absence was due to end and this is why he invited him to the meeting on 4 June 2019 to notify him of the decision that he was to be dismissed because of his poor performance. As previously commented upon, the transcript of the covert recording indicates that Mr Truffelli wanted to act as humanely as possible under the circumstances and this fact is acknowledged by Mr Courtney who regarded him as not being a bad person. This was also our perception of Mr Truffelli.
- d. The fact that Mr Truffelli knew about Mr Courtney's disability on 20 May 2019 makes no difference. This is because he had already formed the firm intention to dismiss Mr Courtney because of his performance as

far back as 4 April 2019 at a time when he did not know that Mr Courtney was disabled.

82. Turning to Mr Courtney's claim of discrimination arising from disability we find as follows:

- a. Macdonald had constructive knowledge of his disability. The earliest date that Macdonald could possibly have known that Mr Courtney was disabled was 3 May 2019. This was the date that he submitted his first sick note where he stated that his reason for his absence was stress and anxiety. This was the first time that Mr Courtney had taken sick leave during his employment with Macdonald. At that point, in accordance with the guidance in the EHRC Code, Macdonald should have been alerted to make further enquiries to determine whether Mr Courtney was disabled. Alternatively, Macdonald should have made enquiries on or after 20 May 2019 when Mr Courtney alerted Mr Truffelli that he was extending his sick leave.
- b. The unfavourable treatment was Mr Courtney's dismissal which took effect on 11 June 2020.
- c. Mr Courtney has not established that the something arising from his disability (i.e. his sickness absence and the risk of further absence) was the operative reason for his dismissal. The operative reason for his dismissal was his underperformance. The decision to dismiss had been made on 4 April 2019 prior to Macdonald and Mr Truffelli knowing about Mr Courtney's disability.
- d. Given that Mr Courtney has not established a causal link between the something arising from his disability and the unfavourable treatment, there is no requirement for the Tribunal to consider justification based on a proportionate means to achieve a legitimate aim.

83. Turning to the claim for failure to make reasonable adjustments, we agree with Mr Dunn's analysis set out in his skeleton argument and expanded upon in his closing submissions. Therefore, we find the following:

- a. The only potential PCP which was identified by Mr Courtney is set out in the case management summary produced by Employment Judge Sweeney where it is recorded that the PCP was the requirement for Mr Courtney to perform all aspects of his role. Mr Dunn's position is that this cannot be a valid PCP because it applies solely to Mr Courtney and not to non-disabled people so there can be no comparative disadvantage. Alternatively, it may fail because it is only one off in nature. That is Mr Dunn's proposition which we agree with. However, if we are incorrect in our conclusion and it is a PCP, we do not think that it would be reasonable for Macdonald to make the adjustments to Mr Courtney's role as suggested by him. Mr Courtney had suggested several adjustments including removing weekly calls and budgeting worries. Mindful of the example provided by paragraph 6.33 in the EHRC Code we do not accept that this would be reallocating a minor or subsidiary duty. It would, be quite the contrary, as budgeting and weekly meetings with management were fundamental aspects of Mr

Courtney's Role as General Manager. Removing these duties would render the role ineffective.

- b. Agreeing a phased return to work. The evidence clearly shows that Macdonald were not intending to allow Mr Courtney to return to work on 11 June 2020. They were not applying this as a PCP against which there could be an adjustment. This is not a case where, for example, there was a return to work interview during which the employer tells the employee that they require them to return to work full-time and where the employee requests a phased return to work which is refused either triggering a resignation or a dismissal if the employee refuses to come back on a full-time basis. That did not happen in Mr Courtney's case. There was no requirement for Mr Courtney to return full-time and in the absence of that PCP, there can be no duty to make a reasonable adjustment.
- c. Follow the performance management procedure. With respect to Mr Courtney this cannot be a PCP for the simple fact that Macdonald did not operate a formal performance management procedure as conceded by them to him in correspondence [89]. His criticism of this failure would be relevant if he were advancing a claim of ordinary unfair dismissal.
- d. Allowing him to stay on sick leave. This cannot be a PCP for the simple reason that it is not something within the gift of Macdonald. This was a matter for Mr Courtney and his GP. If he wanted to stay on sick leave, he would have to have produced a sick note to that effect. On the facts, he was ready and willing to return to work on 11 June 2019.
- e. Extending his sick leave. This cannot be a PCP for the same reason stated above. On the facts, he was ready and willing to return to work on 11 June 2019.
- f. Allowing him to return to work. This cannot be a PCP in this case because Macdonald had already decided to dismiss him for performance issues. His criticism here would be relevant if he were advancing a claim of ordinary unfair dismissal.
- g. Arranging for Mr Truffelli to be temporarily based at Linden Hall to help and support Mr Courtney. This cannot be a PCP in this case because Macdonald had already decided to dismiss him because of performance issues. Notably, Mr Courtney only referred to Linden Hall, and so this putative PCP cannot apply to any non-disabled General Managers. Furthermore, the comparative disadvantage to Mr Courtney is unclear. The evidence points to the opposite. Mr Truffelli supported Mr Courtney remotely and visited him regularly. Mr Courtney never asked for further visits. In fact, when Mr Truffelli offered, Mr Courtney turned down that offer [139]. It is entirely unclear what Mr Courtney means by a 'few days' and how that would have avoided any substantial disadvantage. When Mr Courtney says this should have occurred, seemingly prior to his absence, this was prior to 3 May 2019, which was at a time when Macdonald and Mr Truffelli had no actual or constructive knowledge of Mr Courtney's disability.

84. We appreciate that this will be a difficult decision for Mr Courtney. On a human level, we are fully conscious of the fact that he has lived with the debilitating burden of his disability for many years. However, our duty as a Tribunal, is to reach our decision on the case that was presented to us and not on a case that could have been presented to us; that is what we have done.

Employment Judge A.M.S. Green

Date 16 November 2020