THE EMPLOYMENT TRIBUNALS

BETWEEN

Mr Zane Jensen Claimant

and

Inspired Thinking Group Limited Respondent

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT: London Central ON: 26 - 30 November, 3 – 7 December 2018 and (in chambers) 14 January, 6 & 8 February and 7 August 2019

EMPLOYMENT JUDGE: Mr Paul Stewart MEMBERS: Mr David Kendall and Mr Jim Carroll

Appearances:

For Claimant: Ms Zoë Baker, friend of Claimant

For Respondent: Mr Patrick Keith of Counsel

JUDGMENT

The unanimous judgment of the Tribunal is:

1. The Respondent discriminated against the Claimant on the grounds of disability in choosing to dismiss him;
2. The dismissal was unfair;
3. The Claimant did not to any extent cause or contribute to his own dismissal; and
4. All other complaints are dismissed as:
    a. they are out of time, and
    b. we decline to exercise our discretion to extend time.

By a majority,

5. Had a fair procedure been adopted, the Claimant would have been dismissed within the same time frame as he was, in fact, dismissed.

REASONS

1. We heard evidence for the Claimant given by him and Mr Roy Peters. We were provided with a statement from Mr James Bates who had moved to Australia. For the Respondent, we heard evidence from Mr Joe Waghorn, Ms Helen Hadley, Mr Dan Martin, Mr Stephen Cloves, Mr Chris Heath and Mr Mark Lovett.

Facts

2. The Claimant started employment with Creator Mail Ltd as a Front End Developer on 23 April 2014. That undertaking was acquired by the Respondent in February 2016 and was renamed ITG Creator Limited. Currently, the undertaking is known as ITG (London) Ltd. Since acquisition, it has remained a wholly owned subsidiary of the Respondent. The Claimant's employment thus transferred to the Respondent and continued until his dismissal on 18 August 2017. The letter of dismissal stated the termination was on the ground of capability due to ill-health.

3. By a claim form dated 2 January 2018, the Claimant claimed that the dismissal was unfair and thus contrary to s98 Employment Rights Act ("*ERA*") 1996. He also made the following complaints under the Equality Act ("*EqA*") 2010:

   a) Section 13: Direct disability discrimination
   b) Section 15: Discrimination arising from disability
   c) Sections 20–21: Failure to make reasonable adjustments
   d) Section 26: Harassment
   e) Section 27: Victimisation.

4. The Claimant suffers from Dissociative Disorder Not Otherwise Specified (*DDNOS*). The Respondent has conceded that this constitutes a disability for the purposes of the Equality Act 2010. In his statement, the Claimant asserts he has known about his Dissociative Disorder for about 10 years but did not have the diagnosis of DDNOS until the summer of 2016 and only had it confirmed in writing on 13 January 2017.

5. Before he started his employment with Creator Mail Ltd in 2014, the Claimant lived and worked in Oxford. There, he paid privately for therapy from a psychologist who suggested to him in or about 2012 that the symptoms from which he suffered fitted a diagnosis of Dissociative Disorder.

6. In his statement, the Claimant sets out at paragraphs 6 to 11 the triggers which bring on the symptoms of DDNOS, what the symptoms are and the after effects of a dissociative episode. This evidence was not challenged.

7. In the Claimant's statement, he set out a Chronology of Events starting at paragraph 19 and terminating at paragraph 297 which rehearsed certain difficulties he had experienced at work because of his condition. Initially, the Claimant's line manager was Mr Adam Anthony and the HR Manager with whom the Claimant had dealings was Ms Sue Fuller. One of Ms Fuller's emails sent and received on 15 March 2016 triggered symptoms which caused the Claimant to visit his GP and receive a fit note certifying he was unfit for work until 6 April that year.

8. During the period he was off sick, the Claimant visited, and got advice from, a solicitor at the Islington Law Centre. The solicitor drafted a letter for the Claimant

to send to the Respondent leaving the Claimant to fill in details.

9. This letter became the basis of an email which the Claimant sent on 4 April 2016 to Ms Sue Fuller, then the HR Manager of ITG Creator, ahead of a welfare meeting to be conducted that day. In his email, the Claimant set out that he suffered from what he termed was "dissociation disorder" describing it as:

> a recurrent condition which can be triggered by a variety of situations and incidents; most commonly a relapse is caused by ambiguity in communication and stress.

10. The Claimant asserted that the effects of the condition on his ability to carry out normal day to day activities were such that it met the definition of a disability under the Equality Act 2010 and he requested that a number of reasonable adjustments be made to his role as these would enable him to return to work, maintain his health and reduce the likelihood of a relapse.

11. This listing of reasonable adjustments, and the meeting itself, led to Ms Fuller writing to the Claimant on 8 April 2016 confirming the Claimant's requests to have been discussed with Mr Nico Friis, "our Creative Director", and to "have all been agreed and we are taking the following actions". She then set out the Claimant's requests for reasonable adjustments with a commentary on each request indicating the Respondent's position.

12. Leaving aside the reasonable adjustment which relates to a phased return to work from the Claimant's period of sick leave, the letter reads as follows (*with the comments of the Respondent being reproduced in italics*):

> 2. Working from home; this was withdrawn though I am unclear why this decision was taken or how long my productivity had been measured. I particularly need to be able to work from home when my sleep has been disturbed. This would enable me to manage my condition thereby reducing the likelihood and frequency of relapses and sick leave.
>
> *This is agreed but we would ask that you, or your representative, please notify your Line Manager, Joe Waghorn, Head of Front End Development, as soon as is reasonably possible on those days when you are due to attend the office in good time to allow us to reschedule workloads*.
>
> 3. I would request the performance or other issues to do with my employment raised with me using the following procedure:
>
> a. Initially to raise the issue verbally as soon as you become aware of the problem (you will recall the difficulties caused to me by receiving a performance report raising a number of issues which had never previously been mentioned to me).
>
> b. Within 48 hours confirm details of the above conversation by email to me.
>
> c. Provide me with an opportunity to respond and raise any questions or concerns within 48 hours of the above written confirmation.
>
> d. Provide a clear, neutral, written explanation of the purpose and possible outcomes of any meeting arranged to be provided at least 48 hours in advance of any proposed meetings.
>
> e. Adopt a neutral tone in all written communications, including emails.
>
> *This is been conveyed to and discussed with, Joe Waghorn, and he will ensure that the process as set out above if followed as far as is reasonably practicable.*

4. Regular meetings with my line manager to discuss any issues with my work (as in point 3) or any concerns that I have once per fortnight.

Joe Waghorn will arrange for you to attend a review meeting with him every two weeks.

I would request that before my return to work an email is sent toward staff informing them not to ask me if I am okay now or to ask me about my absence. These questions cause a lot of stress and anxiety and make it very difficult to return to the workplace.

The email will be circulated to all staff this afternoon.

5. Relocate my desk to within the design area. I believe this will provide me with a more supportive atmosphere by reducing the sense of isolation that I experience in my current location.

We have several options for this which we would like to discuss with you on Tuesday and decide on which is most suitable for you. Charitably, we can relocate your desk in readiness for your return on Tuesday and you can advise if this is suitable. Please can you can you confirm to me which you would prefer before Tuesday.

6. Provide a designated, agreed colleague to act as an initial point of contact if I am starting to experience symptoms that may lead to a relapse. I would need to explain to the nature and details of my condition and therefore it would need to be someone with whom I can feel a high degree of trust. I wish to propose that an appropriate person would be Roy Peters.

Roy Peters has kindly agreed to act as your point of contact and support when you feel you need to call on him. Roy will keep you and I updated when he will be out of the office for reasons of annual leave, client visits, training, sick leave so that you will be aware of when he is not available in the office. I would be happy to replace him on those occasions if this is agreeable to you.

Occupational Health

I would also request that you refer me for an occupational health assessment to ensure that you have all the relevant information needed in order to appropriately manage my situation in accordance with the Equality Act.

We are in the process of arranging this with Peninsula and I will arrange to meet with you to go through the process once we I have received the information from them.

We look forward to your return on Tuesday and if there is anything else I can help you with in the meantime please do let me know.

13. On 6 April 2016, the Claimant learned officially that Mr Adam Anthony was leaving the company and that Mr Joe Waghorn was going to be his new Line Manager. Mr Waghorn had been a member of the same team as the Claimant but had left employment with the Respondent in March 2014. Prior to his departure, he had not been aware of any health-related issues with the Claimant. In April 2014 he returned to employment with the Respondent as a member of Mr Anthony's team and, on Mr Anthony's departure, he was promoted to be the Head of Front End Development.

14. Ms Fuller continued to interact with the Claimant up the end of October when, apparently without warning, she went on a period of sick leave which lasted until February 2017 when her employment terminated. Ms Helen Hadley had become

the Head of HR for the Respondent in September 2016. Ms Hadley was based in Birmingham and Ms Fuller, based in London, had reported to her. Ms Hadley took over the interaction of HR with the Claimant, but the unexpected nature of Ms Fuller's illness had not provided Ms Hadley with the opportunity of having a handover session with Ms Fuller.

15. Later in April 2016, the Claimant had his first appointment with the clinical psychologist who, in January 2017, was to provide the Claimant with a diagnosis in writing for the first time.

16. On 22 April 2016, the Claimant was working at his desk in the office when the CEO of the Respondent – Mr Mark Brennan – approached his desk and stood behind the seated Claimant. While reaching down to stroke, and run his fingers through, the Claimant's pony-tail, he said:

> Alright Blondie, I just wanted you to know I've got experience of mental health issues in my family, just wanted you to know we're going to support you.

17. This contact with Mr Brennan made the Claimant feel uncomfortable. At the next fortnightly meeting with Mr Waghorn, the Claimant reported the incident to him. Mr Waghorn asked whether he wished to make a formal complaint about the CEO but, in the words of the Claimant:

> I did not feel supported enough to do this and I felt that if I did this I would be fired.

18. The Claimant had three days off work because of his mental health at the end of May and then on 21 – 24 June 2016. He had consented to have, and had, an occupational health assessment on 6 July 2016.

19. At a catch-up meeting with Mr Waghorn on 3 August 2016, the Claimant discussed and agreed the report that had subsequently come from the OH assessment on 6 July 2016. Under "Current Situation", the OH Physician, Dr C J Schilling, reported:

> Mr Jensen is now very positive as a consequence of the chances that have occurred at work and the support that he has had.

20. The Claimant was considered to be "fit for his full range of duties" while, under the heading Adjustments and Rehabilitation, it was noted:

> Mr Jensen will need to have time off for his psychotherapy which isn't very frequent. He says that things have changed significantly at work with the new office arrangements and the facility to be able to work from home if he has had a bad night or is feeling unwell. He says that this is not something he will take advantage of; he is very committed to trying to get into the office as often as possible.

21. And under Future Outlook, the Physician observed:

> The future outlook is excellent, now that things have been "sorted out".

22. At the same meeting, there was discussion about the possibility of the Claimant reducing his hours, as the Claimant put it, "to support me to attend work". The Claimant wanted to avoid travelling through London on public transport in the rush hour. Mr Waghorn and the Claimant agreed to trial reduced hours for a short period during which the Claimant's salary would be maintained. The trial worked well but, after it finished, the reduced hours did not continue because, in October

2016, the Claimant discovered that the Respondent was proposing to reduce his salary pro rata. The Claimant was not prepared to accept such a reduction.

23. Around mid-October, invitations to the Respondent's Christmas party to be held in Birmingham were emailed to staff. The Respondent was proposing to book hotel rooms for all staff from London who would be attending the event. Staff were expected to share rooms. The Claimant wanted to attend but was fearful of having nowhere private to go to should he feel unwell or if he felt at risk of dissociation. He emailed one of the organisers requesting to learn the distance from the hotel to the venue where the party was to be held explaining that, for health reasons, this might determine on whether he could attend the party and requesting that he have a "room to myself for health reasons". The organiser responded with an indication that he would let the Claimant know as soon as he could.

24. The Claimant chased for further information from another of the party organisers on 4 November and received an email back the same day informing him that the venue was a 2-minute walk from the hotel and that the organiser would sort out a single room for him.

25. On 8 November, the Claimant emailed the same organiser saying:

> Hi, Gordon
>
> Sorry I've been on holiday; is this happening or am I too late for my single room?
>
> Thanks
>
> Zane

Gordon replied within 5 minutes to say:

> You're not too late – I had you down on the list, so should hopefully have something sorted for you!

To which the Claimant said:

> OK great, thanks let me know when it definite.
>
> Thanks again
>
> Zane

26. No further communications on the subject of the Christmas party were made until 1325 hours on 23 November 2016 when Mr Mark Benson, the CEO of the Respondent, sent out a round robin email informing staff in the London area of the address of the hotel and indicating, by means of a table with two columns, the 44 names of those who were booked into the hotel on the first column and, in the second column, the name of their sharer, that is, the person that they were expected to share a room with. In respect of four individuals, one of whom was the Claimant, the words "Single occupancy" in red appeared in the column which, for everyone else, contained the name of the sharer.

27. At 1816 hours on the same day, Mr Waghorn wrote an email to Ms Hadley and Ms Fuller within the HR department:

> Hi Helen / Sue / HR,

> I need to bring your attention to an incident that happened earlier today with Zane and his dissociative disorder.
>
> As part of the arrangements for the Xmas party, Mark sent an email to all those attending regarding the hotel arrangements. When Zane saw this email, he saw that his name had been highlighted with a red message 'single occupancy'.
>
> This had a negative effect with Zane, as he felt it had been done deliberately, as if he had done something wrong with this request, although with his condition he deems it important that he should have his own room. And as others were in on this email, he felt as though they would question why he doesn't want to share a room.
>
> Because of all of this, he declined into a dissociative state, and he had to be taken home, and his workload had to be covered for the rest of the day, and most likely will need to be for the rest of the week.
>
> Apologies Helen, I'm not sure of your awareness of the history of this, but happy to discuss further with you as required,
>
> Joe Waghorn

28. The following day at 0717 hours, the Claimant emailed Mr Waghorn indicating (as Mr Waghorn had predicted) that he was not fit to work that day but "all being well I'll be working from home tomorrow." Mr Waghorn forwarded the Claimant's email to the same people he had emailed the previous day. Ms Hadley queried whether the working from home on Friday had previously been approved. Mr Waghorn confirmed that it had. Ms Hadley then wrote:

> Fine – then check in with him tomorrow, I'm not convinced much work is going to be done tomorrow!! Oh, I'm a cynic!

29. The Claimant in his witness statement described the receipt of the CEO's round robin email in this way:

> 121. When I opened the email, I saw that my name had been listed in this way, Joe Waghorn saw the email and said, "Why has he put them in red?" I heard other people around the office who also reading the email talking and jeering about the named people with single occupancy rooms.
>
> 122. One of my colleagues, George, asked me why I had a single room. I felt trapped and exposed. In identifying me by name and highlighting the single occupancy rooms in red the email had disclosed my confidential arrangement and put me in a position where I felt I was able to be mocked by some of my colleagues and not feel able to give them a reason without disclosing further confidential health information. I felt under such pressure that I began to dissociate at my desk.
>
> 123. I sent a text message to my friend Zoë to let her know I was dissociating at work.
>
> 124. I do not recall anything about this dissociation. I know that both Joe and Roy looked after me for a while, then put me in a cab and sent me home.
>
> 125. In the evening I suffered the after effects of the dissociation. I was unable to face food due to nausea, I was extremely fatigued and I had to go to bed to recover. I felt exhausted and lightheaded. This was the second dissociation at work that I had suffered since the reasonable adjustments have been agreed.
>
> 126. On 24th November 2016 I emailed Joe to let them know I was sick because of dissociation had impacted negatively upon my sleep and on my mood.

> 127. I returned to work on 25th November 2016. I worked from home on this day because I had a telephone appointment with my psychologist at 10 a.m. I returned to working in the office on Monday 28th November 2016.

30. As it happens, the Claimant did not attend the party in Birmingham because, having worked late (to about 1930 hours) on 1 December 2016, he had a disturbed night's sleep which caused him to email Mr Waghorn at 0851 hours on 2 December 016 indicating his sleep had been "severely disturbed" and, that if it was okay with Mr Waghorn, he needed to work from home that day. He also announced that it meant he would not be attending the party.

31. The Claimant continued his narrative in his statement:

> 132. On 5 December I was away from work on annual leave, and I attended an appointment with my psychologist Dr George Robson. I was given a diagnosis more specifically Dissociative Disorder Not Otherwise Specified (DDNOS) with traits of Borderline Personality Disorder (BPD). This came as a shock to me; it was a lot to take in as I hadn't considered the idea that another illness was affecting me. BPD is highly stigmatised and misrepresented in the media, and due to this I decided not to immediately reveal my diagnosis; I needed to understand what this diagnosis would mean from me before talking to others about it. I also felt it would give ITG an excuse to use it against me.
>
> 133. I returned to work as expected on Monday 12th December 2016 after my week of annual leave. Although I had decided not to mention my new diagnosis, I did tell Joe that I have another unexpected diagnosis I was dealing with. I also mentioned that my psychologist was putting me forward for long-term group treatment (two years).
>
> 134. Joe Waghorn told me I was going to get an email from Helen Hadley and he said it was "just an introduction email and nothing to worry about". I received an email from Helen Hadley and I read it when it arrived.
>
> 135. I realised the email was not just an introductory email. In it, Helen made assertions regarding my "reaction" to the Christmas party email. She claimed that "we were very concerned by your reaction" and this shocked me because my 'reaction' is a symptom of my Dissociative Disorder, which I cannot control and that is the reason for the adjustments that I had agreed in previous meetings. This made me feel as though I wasn't even being ill correctly.
>
> 136. Helen referred to my sickness absences and "a high number of working from home days". I had been reassured by Joe in our fortnightly meetings that the quality of my work from home was not in question and so it was a surprise to me that this seemed to be an item for discussion as occasional working from home was part of the adjustments that Sue and Nico had agreed in April 2016. This made me feel that my sickness levels (which I knew had improved in the past six months) were still unacceptable, or that perhaps there was in fact a problem with my work at home that Joe had not told me about. I felt threatened that these problems were being sprung on me and I was immediately frustrated and disorientated due to the conflicting nature of what both Joel and Helen had told me.
>
> 137. The letter also proposed within the agenda that I would be referred for a second Occupational Health assessment (with a new provider) and this was less than six months after my previous assessment by Health Assured that had declared me fit for work. This proposal made me feel like Helen did not trust the first assessment, or that a second assessment might be able to cast doubt on my fitness to work and that might be a reason for me to be dismissed. The thought of having another occupational health assessment so soon without a fair run with the agreed adjustments was very upsetting for me, as I find that the stress of repeatedly going over the details on my condition and its symptoms (even if with medical professions)

very stressful and it can trigger my secondary symptoms such as insomnia and depression. I had been told that I could expect a yearly occupation health report for the purposes of reviewing my health condition, its management and my adjustments which I considered reasonable.

138. The contents of the letter caused me immediate distress. I was supposed to be working and I had been interrupted from my work to read an email from the person I haven't met before who was telling me how concerned she was that I had reacted to something that she was not a witness to. I felt attacked and this was made worse by the sender, Helen Hadley, being the head of HR for the company. She was in the position of authority to dismiss me from my employment. I felt that in this email she was making the case to do that. I did not know whether Helen had been made aware of my health condition or the agreed reasonable adjustments. I felt that my few sickness absences were being conflated with my working from home "absences" and my annual leave. I started to dissociate, so I sent a text message to my friend Zoë Baker to let her know.

139. Joe Waghorn was in an external meeting from 3 p.m. and so was out of the office. Nico Friis was out of the office. Roy Peters was out of the office that week on annual leave. Nobody else in the building knew about my condition. I managed to walk down and sit in the Atrium which is the place in the building where I had told Joe I would go if I needed some quiet time or felt that I might dissociate.

140. I remember James Bates finding me and sitting next to me in the Atrium. Zoë came to collect me from work and I went home. I do not recall much more about what happened that day.

32. The actual contents of the email from Ms Hadley at 1512 hours on 12 December 2016 which had caused this reaction in the Claimant were as follows:

Hi Zane,

Don't think we've actually met. I'm Helen and I'm the Head of HR for ITG group, I have been working out of the Pimlico office twice per week for the last couple of months and have been covering for ITG Creator is Sue's absence.

Myself and Joe would like to meet with you on Thursday 15th December at 12:30 pm to discuss the below with you. I will send a private calendar request shortly however, I wanted to share the agenda of the meeting with you in advance. Please let me know if you have any questions.

Proposed agenda,

Reason for meeting: The meeting is being held to discuss your ongoing health condition and absences from work to include working from home.

Whilst we understand you are managing your health condition, you recently became distressed after an email was sent to select group of staff about the Xmas party; I am aware you felt this email had been intentional and you went home sick in the afternoon and then had the following day (24th Nov) off work; I understand you then worked from home on Friday, 25th November. As Joe has explained to you, the email was in no way intentional and did not single you out and we were very concerned by your reaction.

Having reviewed your absences since your last occupational health assessment it is appears you have had at least one episode of sickness per month totalling 6.5 days since August; you have also had a high number of working from home days. Whilst these have been suggested as a reasonable adjustment following your occupational health assessment, we would also like to discuss this with you and propose the following agenda:

Attendees:

> Zane Jensen (employee)
> Joe Waghorn (line manager)
> Helen Hadley (HR manager - in Sue's absence).
>
> Time 12 30 p.m.
> Date 15th of December 2016
> Location: White room behind reception
>
> Items to be discussed
>
> - How is Zane after his holiday – feeling better after the period of sickness?
> - Christmas party email and the impact this has had on Zane / impact on rest of team
> - Review of sickness absence since August 2016
> - Review of working from home days to include holiday booked / prior notice given to the line manager
> - Request to make a second referral to Occupational Health (Different provider to previous report)
>
> I trust you find the agenda is acceptable, please let me know if you have any questions and l look forward to meeting you on Thursday 15th at 12:30 pm
>
> Kind regards, Helen

33. The Claimant was too ill to attend work on 13 December. He emailed Mr Waghorn to let him know that was the case.

34. The following day, he was too ill to write an email himself so, with the assistance of Ms Baker, he composed an email which he sent to Mr Waghorn on 14 December 2016 at 0828 hours which said:

> Hi Joe,
>
> I'm sorry but currently I am not well enough to come to work. As you know, the impact of the dissociation causes me considerable mental and physical fatigue and this take some time from which to recover. Additionally, the email from Helen which caused me to dissociate has made me feel particularly wary of meeting with Helen before I have had the opportunity to speak with you about the issues I wish to address. I should explain that the email caused me to dissociate not because of detailed items for the meeting agenda, but because it did not use neutral language and dredged up a number of issues that I thought had been resolved through our previous discussions.
>
> As much as I believe that this was unintentional, it is evident I will need to provide further guidance for Helen / HR about the importance of neutral language in communicating with me directly, and if this is in any question, a protocol for HR to send all written communication is via third party such as yourself. I am seeing my GP today to seek further advice

35. His contact with his GP was to lead to him being given a "fit note" saying he was unfit for work until 28 December 2016.

36. Mr Waghorn was not able to reply until 1641 hours on 14 December. He said:

> We're sorry to hear you're unwell as a result of the email sent to you, this was not our intention. I had actually agreed the mail in advance of Helen sending this to you as all of the points raised are items that we do need to discuss with you. The meeting

> was arranged so that we could review the situation with regards to your sickness absence levels and working from home days and assess with [*sic*] either party needed to make any adjustments. The meeting would have been an opportunity for you to ensure both Helen and I were in possession of all the available facts and facilitate open discussion.
>
> I note from your email below that you have been to see your GP, could you please let me know whether you feel able to attend for the rest of the week. If you were signed off you will need to submit a medical note covering your further period of absence.

37. Mr Waghorn experienced a degree of frustration on learning of the Claimant's descent into a dissociative state. If he managed to keep indications of his frustration out of that email to the Claimant, they appeared in his email to Ms Hadley on Monday, 12 December 2016 at 2038 hours when he said:

> Hi Helen,
>
> I've been in a client meeting this afternoon, but it sounds like Zane left the office because he dissociated upon receiving [*your*] email.
>
> Personally, I see nothing unreasonable in the content, as this is his opportunity to voice his objection, particularly as you have opened up the invite to respond should he have any questions. He was unlikely to be working tomorrow which will result in me picking up the BAU [*Business As Usual*].
>
> I honestly feel that this is becoming a blackmail situation, how can we resolve this issue if we cannot even send an agenda (at his request), without there being reprisals?
>
> Don't know where to turn with this one any more, I'm prepared to support Zane in any way that I can, but I can't help make this better if he is not prepared to face it himself.
>
> Happy to discuss this further with you whenever is convenient?
>
> Joe

38. In his statement, Mr Waghorn described his frustration in these terms:

> 39. … I was becoming increasingly concerned with the situation and felt it was becoming increasingly difficult to manage Zane. It was reaching the point that I felt scared to try to raise issues with him for fear that this would cause him to disassociate [*sic*]. I felt extremely under pressure and stressed at the time. I felt that I was managing the situation to the best of my ability but whatever I tried to do (including what I thought was supportive for Zane), this was not working. It felt like if concerns were raised to Zane, he would dissociate but if these weren't raised, the situation would not improve. A large proportion of my time was spent reviewing communications to be sent to Zane, worrying about whether he would be off sick and how to plan for this, or [*whether he*] would need to work from home and I wasn't there to ensure he was ok.

39. The Claimant was signed off work by his GP until Wednesday 28 December, on which day he emailed Mr Waghorn and Ms Hadley with this message:

> Dear Joe / Helen
>
> I intend to return to work in a full-time capacity after my period of sick leave on Thursday 29th January [*sic*] 2016. I am writing to make a number of requests that I feel need to be met before I can feel safe and to minimise the risk of further harm to my health.

> 1. I would like you to give me permission to work from home until all the following requests are agreed. I understand from previous reviews and meetings that working from home does not affect my productivity or ability to perform my duties so I believe that this is reasonable, given the circumstances.
>
> 2. I would like ITG Creator to review the agreement for reasonable adjustments to support my health condition that were agreed in the letter from Sue Fuller dated 8th April 2016. Please refer to this prior to any communication. I would like to draw attention to three incidences [*sic*] in the past three months where ITG Creator unfortunately failed to meet all of the agreed adjustments which directly caused me to be absent from work and had an adverse impact upon my personal life. One of these incidences [*sic*] was caused by a failure to handle information with due care, which could have been avoided.
>
> 3. I would like to meet with my manager and HR in order to review the reasonable adjustments and the incidents previously mentioned and to create a risk assessment document and a communication protocol in order to make the workplace a safer environment. This is in the hope that I can further improve my attendance and reduce the risk of absences due to incidents at work. I would like to agree a phased return to working in the office.
>
> 4. An email as before, from HR sent to all relevant staff to request that they do not ask me about my recent absence.
>
> I have been in contact with a company called Remploy who I hope can provide more support for both ITG Creator and myself in the future.

40. Mr Waghorn responded to the Claimant's email on 3 January 2017. He indicated that he was happy to permit the Claimant to work from home for the rest of the week but he wanted to set up a meeting on Monday 9th January 2017 with the Claimant, HR and himself.

41. On 5 January 2017 at 1402 hours, Mr Waghorn sent out a letter that had been primarily drafted by Ms Hadley and vetted by Mr Waghorn to ensure the language was neutral. 43 minutes later, the Claimant emailed Mr Waghorn a terse email:

> I am unwell and cannot work anymore today.

42. On 6 January, the Claimant again emailed Mr Waghorn with the news that he was unfit for work that day and he would be unable to attend the meeting on Monday 9 January because:

> … such a meeting will take a preparation which I am unable to do when ill, also given the circumstances I feel it will be safest to have this meeting off site.

43. The Claimant also attached a sick note for the period up to 28 December. In response the same day, Mr Waghorn thanked the Claimant for the sick note and provided him with an update regarding sick pay. Because the Claimant had had periods of absence in excess of 4 weeks (for which period the Claimant had received full pay) his pay reverted to statutory sick pay.

44. On 9 January 2017, the Claimant emailed Mr Waghorn confirming he was unfit for work that day and thanking Mr Waghorn for the information concerning sick pay. The same day at 1347 hours, the Claimant emailed Dr Robson, the clinical psychologist with the Islington Practice Based Mental Health Team attached to the Claimant's GP practice, informing him that he had dissociated the previous week:

> … after receiving another email bringing the support I receive at work into question. Remploy are now involved and I am meeting a representative tomorrow so I thank you for that.
>
> My workplace are already asking me to go through another occupational health assessment and are asking for access to some health records for the occupational health company. I do not know how this works or if anything is down on my records? Is DDNOS on my records? I gather from our last conversation that BPD would not be as I do not fit all the criteria for it?

45. The Claimant reported sick on 10 and 11 January, informing Mr Waghorn on the latter occasion that he had a doctor's appointment on 12 January. After that appointment, he reported that he had been signed off until 26 January, a copy of which fit note he forwarded later. The fit note asserted that the signing doctor had assessed the Claimant's case on 12 January 2017 and, because of the following condition "Mental health review", advised the Claimant that he was not fit for work until 26 January 2017.

46. On 13 January 2017, Dr Robson emailed the Claimant and confirmed that he had recorded in the Claimant's medical records the diagnosis of Dissociative Disorder Not Otherwise Specified and also made reference to traits of Borderline Personality Disorder [*BPD*].

47. On 25 January 2017, the Claimant informed Ms Hadley and Mr Waghorn that he had a doctor's appointment the following day but that, in the meantime, his representative from Remploy would be in touch.

48. The Claimant had had a telephone attendance with Ms Ewa Sojka of Remploy on 9 January 2017 (the same day that he indicated he was too unwell to attend the meeting that Mr Waghorn had arranged for him) after Access to Work had referred him to them. The result of that was the production of a Support Plan dated 10 January 2017 which set out quite a full resumé of the Claimant's mental health condition, how it was affecting him, the support he was receiving from his employer and provided an outline of the agreed support and provisional timescales.

49. Under the heading "Employer support", the plan recorded:

> In August last year, he had an assessment with an OH provider, who recommended some reasonable adjustments for him. They however have not been implemented yet.

50. We note that the assessment referred to must have been that undertaken by Dr C J Schilling on 6 July 2016 and referred to at paragraphs 18 to 21 above. This assessment came some 3 months after Ms Fuller had set out the reasonable adjustments that had been agreed with the Claimant. Dr Schilling had merely recorded the several adjustments that the Respondent had agreed with the Claimant.

51. The agreed support and provisional timescales section of the plan had three key actions:

> 1. To try and improve the support Zane received in the work place, Ewa will assist him in communicating with his HR representative to raise her awareness about his conditions and challenges and to make her aware how her actions are

impacting on his mental health as well as to negotiate the implementation of recommended reasonable adjustments. Ongoing throughout the support period.

2. To help Zane better deal with stress, anxiety and depression, and to minimise the impact on his mental-health in his workplace, Ewa will provide him with a range of coping tools and techniques and sign post him to some condition management websites. To be completed by the end of March 2017.

3. To ensure that Zane is receiving the support required to sustain employment, and progress the recommended actions, Ewa will contact Zane fortnightly for updates on progress, and to discuss any further interventions that might be necessary. Throughout the six months support period.

52. As part of the first action plan, Ms Sojka wrote to Ms Hadley on 27 January 2017 introducing herself and her role:

> My name is Ewa Sojka, I work for Remploy MHSS (Mental Health Support Services). Remploy is working in partnership with Access to Work, under DWP, to deliver services to people who struggle with mental health conditions.
>
> I am contacting you because I am a support worker of Zane Jensen.
>
> Part of our role is to raise our clients' employers' awareness about their conditions and struggles and to discuss possible support for them while at work. In Zane's case, also to discuss how his sustained return to work can best be accommodated.
>
> Because Zane suffers from mental health conditions, which are chronic, he is covered under the Disability Discrimination Act 1995 and the Equality Act 2010, which makes his employer obliged to make reasonable adjustments for him.
>
> Could you please get back to me so we can decide what will be the best way to move forward in regard to supporting Zane?
>
> Looking forward to your reply.
>
> Kind regards,
>
> Ewa Sojka

53. Ms Hadley responded on 31 January 2017 to Ms Sojka indicating a welcome for any support she could provide in order to facilitate the Claimant's return to work. She set out the reasonable adjustments which had been agreed with the Claimant but pointed out that, while these had been in place since April 2016, the Claimant's absences remained high – totalling 24.7 days from April to December and a further 22.5 days in January 2017. She continued:

> As his employer we completely understand the need to support Zane and we feel we have been extremely supportive of him. However, his absences do have sustained impact on service delivery and the morale of the rest of the team. Episodes can be triggered unknowingly by seemingly innocuous events – we know with hindsight that they impact on Zane but we cannot pre-empt the outcome of every business communication sent to him particularly if the communications are sent via third parties.
>
> Also, we need to discuss the impact on Zane's working from home with him. As a business we have implemented a blanket policy that WFH days should be booked in advance; not requested on the morning of the day that they are taken. Whilst we understand that Zane has requested the option to work flexibly – and we are supportive of this, we do need some parameters in place so we are treating each employee fairly and consistently.

> We have attempted to arrange several meetings with Zane to discuss the adjustments we have in place to ensure that these are supportive and fit for purpose: all of these meetings have been supported by an agenda and all declined by Zane and have resulted in him being signed off sick. It is becoming difficult for us to communicate with Zane as even though we are adhering to the reasonable adjustments agreed back in April, every communication appears to cause a trigger.
>
> Whilst we do not want to cause Zane undue stress, as his employer we do need to be able to communicate with him from time to time about his performance, well-being as well as about work. We also need to review the adjustments that are in place as they do not appear to be having any positive impact.
>
> You mention below that Zane is covered by the Equality Act, this was only confirmed to us as being 'likely' in his occupational health assessment.

54. Ms Hadley then concluded the letter with an invitation to Ms Sojka to supply suitable dates for a return to work meeting with the Claimant.

55. In fact, the return to work meeting did not occur until 23 February 2017. In attendance at that meeting held in a lounge of the Double Tree Hotel were the Claimant (accompanied by Ms Sojka), Mr Waghorn and Ms Hadley. There were no notes taken of the meeting apparently because, when at the introductory stage Ms Hadley was apologising for misunderstandings in the past, the Claimant demonstrated what was, to Ms Hadley, such an unnerving show of anger that she was not only distracted from making notes of the meeting but she considered her personal safety to be at risk.

56. The Claimant asserts, but we do not accept, that the reason for his agitation was because Ms Hadley had asked the rhetorical question: "How could I be expected to know about the reasonable adjustments?", a comment that moved the Claimant close to tears. It seems more likely to us that the Claimant found the very fact that Ms Hadley was apologising to be a trigger for pent-up emotion to come to the surface. We do not doubt he was close to tears but we also do not doubt that his behaviour and body language did make Ms Hadley fearful at one point and caused Mr Waghorn to intervene to lower the temperature of the meeting.

57. During the meeting, the Claimant repeated an earlier request for risk assessment and, in due course on 7 March, he was offered a risk assessment meeting to be held, again in a lounge of the Double Tree Hotel, on 9 March 2017 and attended by the Claimant, Ms Hadley and Mr Waghorn. The meeting covered various identified risks: Threatening Behaviour; Tiredness; Email Communications; and the Office Environment. A protocol was suggested should there be a trigger that resulted in the Claimant dissociating and a procedure agreed upon that should be followed to get the Claimant home. In the discussion, the Claimant had mentioned he had observed incidents which he equated with casual racism in the workplace and Ms Hadley encouraged him to report the same in future. The Claimant asserts, but we were not persuaded, that Ms Hadley in the meeting presented a joking, smiling face when addressing Mr Waghorn but an irritated visage when addressing the Claimant.

58. In the aftermath of that meeting, the Claimant observed two more racial incidents which he raised with Mr Waghorn at the next fortnightly meeting he had with him. One of these incidents concerned comments made by Mr Paul Kearney who was

the CEO of ITG Creator. The first concerned a remark he made when presenting an "Employee of the Month" award to one of the Claimant's colleagues, a man of Middle Eastern descent with a beard. In the first part of his presentation speech, Mr Kearney had told an anecdote from his military service in the Middle East. He then gestured to a photograph of the employee that had been Photoshopped so as to make him appear in a mock Tudor outfit and said: "In my previous life, I'd have had a problem with you".

59. The second incident occurred on 22 March 2017 when news of a terrorist attack on Westminster came through and pictures of the attackers were shown online. People in the office looked at these pictures and then made comments to the colleague of Middle Eastern descent that suggested some expectation that there would be a family resemblance between the terrorist and that colleague.

60. When the Claimant related these two incidents to Mr Waghorn, he agreed that anecdotes about military service in the Middle East were unsuitable at an all staff meeting. Mr Waghorn told the Claimant to "leave it with me".

61. In March, the Claimant found himself under financial pressure because he had not been paid a full salary for two months. That led him to obtain a letter from Dr Robson supporting an application for a Freedom Pass that the Claimant wanted to make.

62. At some stage in March, the Claimant had requested of Ms Hadley that she raise with senior management his request that he be paid full pay and not statutory sick pay for the period of time over 4 weeks that he had been absent. He considered this to be a reasonable request as, in his eyes, his extended absence from work had been caused by the arrival of Ms Hadley's email on 12 December 2016 and continued by the arrival of Mr Waghorn's email of 5 January 2017.

63. On 31 March 2017, the Claimant heard from Ms Hadley that she had discussed his request with senior management and that it had been refused. The Claimant then spoke to Mr Waghorn and referred to his financial difficulties as background to a request that he be permitted to work from home on the week commencing 3 April 2017. Mr Waghorn indicated he would confirm with those senior to him whether that might be possible. That afternoon, however, he and Mr Friis told the Claimant that he did not have permission to work at home that week. With the reason for the Claimant having made his request being financial, this did not diminish the Claimant's worry about how he could afford the following week's travel to and from work. Mr Friis at the end of the meeting twice made the comment to the Claimant that he should "Try not to be ill next week". The Claimant's overt response to this remark was "I'm mentally ill, not irrational" but Mr Friis' remark was interpreted by the Claimant as indicative of Mr Friis having very little understanding of the illness the Claimant suffered from.

64. All of this led to the Claimant submitting a grievance on 2 April 2017 addressed to Mr Waghorn. In essence, the grievance consisted of the assertion that Ms Hadley had breached the reasonable adjustments through her email on 12 December leading to the Claimant being off work because of ill health for a period that took him over the company threshold of four weeks of sick pay and onto the much lower rate of Statutory Sick Pay and thus:

> … it was appropriate that ITG Creator takes responsibility for the incidents that led up to and include this period of sick leave, and I believe that it is reasonable to request that ITG Creator does not count the days of sickness absence that were triggered by their failure to abide by the agreed reasonable adjustments. If the agreed adjustments had been met, I would not have been absent for the majority of the recorded sick leave this past year.
>
> I have recently asked Helen Hadley, head of HR, to review my situation and she has consulted senior management and has informed me that my request has not been granted. However, given that it was Helen Hadley's introductory email that caused this situation to escalate, I believe that there may be a conflict of interest in both presenting my situation to senior management and influencing the decision.

65. With Ms Hadley's role in handling the Claimant's concerns being called into question, she handed over the handling of his grievance to Mr Emile Fontenoy whose title within the Respondent was HR Business Partner. Mr Fontenoy arranged for Mr Dan Martin, the Respondent's Chief Technology Officer, to deal with the Claimant's grievance. Mr Martin was based at the Respondent's premises in Birmingham. While Mr Martin knew of the Claimant and that he had been off sick, he did not have any knowledge of the reasons why or the details of his absence.

66. On 5 April 2017, Mr Paul Kearney sent to all members of the office staff an email entitled "Timesheets – results and who is on the naughty step". The gist of the message that Mr Kearney wished to communicate was the need for staff to fill in their timesheets, timesheets being the basis upon which the Respondent might charge, and receive appropriate payment from, their customers. The manner in which he sought to communicate that message was to list 34 members of staff who had not filled in timesheets adequately and, ahead of the list, exhort those on the list with comments which included:

> - PLEASE – Nobody wants to put punitive measures in place, so please take the plunge and get your hours recorded.

67. This email was noticed by Mr Waghorn before the Claimant saw it. Mr Waghorn recognised that the email might have a deleterious effect on the Claimant and, as the Claimant recorded in his statement:

> 207. … immediately took me aside and check whether I was okay. I misunderstood what Joe saying about the email and read the email.
>
> 208. When I read the email in full, I realised that I had been named in the email as one of the employees who had not filled in timesheets. In the previous weeks I had been on a phased return and so my working hours have been sporadic. As I read through the email, I felt that expression "naughty step" was been used to shame staff into compliance, and the intention of the email was to shame the named staff in front of the whole office. I had not done anything wrong because my timesheets were incomplete due to my phased return. I also didn't feel confident in using the new time tracking software, as it was the fourth different solution we had used in the office and I had only just returned to work. The emotive language and formatting of the email that Mr Kearney sent me made me feel I was being told off in front of everybody.
>
> 209. I dissociated immediately at my desk. I don't know what happened next. Roy Peters came over to check that I was okay and he texted my housemate Zoë to come and collect me from work. I do not recall much of the rest of the day. Zoë collected me from the offices at Horseferry Road and escorted me home. I spent the rest of the day recovering; I could not face food and I had to go to bed when I got home.

> 210. On Thursday 6th and Friday 7th April 2017 I was too ill to attend work because I had dissociated on the 5th April. I emailed Joe Waghorn, Emile Fontenoy and Helen Hadley to let them know.
>
> 211. On Monday 10th April 2017, I returned to work in the office.

68. In his evidence, the Claimant said:

> I did perceive a threat in this email – cognitively I can see now that this is not threatening but then, once I start dissociating, rationality goes out the window – I have very few cognitive functions – I move around but I shut down.
>
> It's nothing like stress – it is like someone having a fit and being out of play for a while.
>
> It was threatening – clear reference to being dismissed "nobody wants to put punitive measures in place"

69. An invitation had been sent to the Claimant to attend a hearing of his grievance on 10 April 2017 and so, on the morning of his return to work, the Claimant, accompanied by a "Companion" - his colleague and friend, Mr James Bates - attended a meeting with Mr Martin who was accompanied by Mr Fontenoy, whose role was described as "HR Support / Minutes".

70. The meeting lasted 27 minutes. After Mr Fontenoy had made introductions, Mr Martin invited the Claimant to explain his concerns in more detail. Mr Martin told us:

> 10. … Zane told me that he felt that the reasonable adjustments which had been previously agreed in April 2016. He said that Helen's "excuse was that she didn't mean to breach [the agreed adjustments]" but that as far as Zane was concerned this was "not a legal argument". I asked Zane to explain to me exactly what he was saying had been agreed and how this had been breached. Zane told me that it was agreed that, if there was an issue with performance, this was to be raised with him verbally in the first instance, however on Monday 12 December 2016 Helen Hadley had sent him an introductory email without prior notice. In addition, it had also been agreed that all emails should contain neutral language, and that as far as Zane was concerned "there was no neutral language in this email". By way of example Zane explained that in the first line of the email Helen had made the comment "I don't think we've actually met", and that by doing this Zane considered "she instantly has not following the adjustments", and that this has caused him to be ill. Zane explained to me that as a result of this email he was "sick for 10 days".
>
> 11. I re-read the email which Helen had sent to Zane, in light of what Zane had explained to me. I have to be honest and say that my initial thoughts where that Helen was trying to help and to be understanding. I said this to Zane, so that he would be able to respond to my thoughts and comments. Zane told me that this was not the way that he saw the email. He also took issue with the fact that the email had not been spell checked / proof read given that there was an error in the email which read "I am the Helen". Zane commented that none of the issues set out an email had been raised with him verbally. I therefore asked him to clarify to me what the agreed procedure was raising issues with him. Zane explained that Joe Waghorn lets him know when "things will happen".

71. Mr Martin got the Claimant to explain how he felt that Ms Hadley had influenced senior management in the decision regarding his sick pay entitlement. The Claimant explained it was inappropriate that she spoke to senior management "as she was the one which had caused the original breach". Mr Martin appears also to have learned of the effect which Mr Kearney's email had had on the Claimant.

72. Mr Martin did not uphold the grievance. He explained his decision to the Claimant on 13 April 2017 and a letter of that date, written before his meeting with the Claimant that day, sets out his reasoning for not upholding the four points which he considered constituted the Claimant's grievance. In rejecting the first grievance, he considered the language that Ms Hadley had used in her email of 12 December 2016 had been neutral, balanced and was intended to be supportive. He added this:

> In addition, I do not consider all the adjustments proposed by you and documented in Sue's letter from April 2016 to be 'reasonable' and in line with the ACAS guidelines which, I should advise, are just guidelines and do not constitute a legally binding document. It is clear that the adjustments you have suggested are not practical and they do not appear to be working. In an organisation such as ITG, the ability to communicate effectively via email and in person is critical. As is the need to communicate matters instantaneously; it is not always practicable to give advance notice of the details of every discussion. Clear and quick communication is instrumental for a modern business to operate effectively, and the adjustments you are requesting impose a disproportionate burden on the company, which is not viable. As such, I do not consider the adjustments you have suggested to be 'reasonable adjustments' in accordance with the Equality Act.
>
> The email you received last week from Paul Kearney is another example. You featured on the list of 34 people– you were not singled out as you suggested.
>
> You were clear in our meeting that you understood the emails you received from both Paul Kearney and Helen Hadley had been, in your own words, 'accidents' so it is difficult to understand how these emails contributed to your sickness. It is also apparent that there is a great deal of subjectivity in receiving email communications; what you may interpret as aggressive or unsupportive is not necessarily how others may read them or what the author intended.

73. The other three points were dismissed with Mr Martin finding it not be reasonable for the Respondent to pay for the Claimant's further sickness absence: he did not accept the absences were caused as a direct result of a breach of reasonable adjustments. He found no evidence to suggest that Ms Hadley had influenced senior management and he did not accept that the Respondent should pay damages for the Claimant having suffered a "depressive episode" and a loss of earnings as a result.

74. This outcome meeting took an unexpected turn for the Claimant. As he explained it in his statement:

> 216. I was given the outcome in writing however the meeting transitioned into an "off the record" meeting. Emile was keen for James [*Bates – the Claimant's Companion*] to leave, but I asked James to stay in the room with me. I did not know what this was about and it had not been notified on the meeting agenda so I was not expecting this request at all. This unexpected meeting was another failure to make adjustments as per my needs. I felt ambushed and vulnerable because I did not know what this part of the meeting was about. Dan Martin explained that he was making a settlement offer and said to me that if I did not sign this settlement agreement that I would be put through the capability process with the likely outcome being that I would be dismissed. At the end of the meeting, Emile asked me for my staff ID badge and I gave it to him. In a state of shock, I picked up my bag and left with James.

75. After the meeting, the Claimant and James went to a coffee shop and the Claimant contacted his house mate, Ms Baker, believing himself to be on the point of dissociating. In the event, after waiting a while and realising he was not,

as he put it, going to fully dissociate, he was able to walk to Pimlico tube station to meet Ms Baker. Later over the Easter Bank Holiday weekend, he became ill with reactive symptoms to what had happened during the meeting: he felt very low and he had trouble sleeping and completing day to day activities. He viewed the turn of events as indicative that he would never return to work and he would be dismissed if he did not agree to a settlement. Before the meeting, he had successfully returned to full time work and he now started to think he had made a grave mistake in raising a formal grievance.

76. The Claimant then remained off work on paid discretionary leave and never returned to his duties before ultimately, as this narrative will set out, he was dismissed with 8 weeks' money in lieu of notice by letter dated 18 August 2017. We were supplied with a bundle of "without prejudice" correspondence which followed this meeting and continued up to 10 May 2017 when negotiations broke down with the Respondent being unwilling to pay the settlement sum that the Claimant wanted. Both parties were content that we were made privy to this correspondence.

77. Mr Fontenoy wrote to the Claimant on 21 April 2017 informing him of the time limits of any appeal from the decision on his grievance and reminding him that he and the Respondent were engaged in "without prejudice" correspondence from which the Claimant could withdraw but, if he did, then the discretionary paid leave that the Claimant was on would cease and he would be expected "to return to work with immediate effect, at which point a capability process will commence".

78. The Claimant duly appealed the grievance decision by a letter dated 24 April 2017 which extended into 18 pages. The appeal comprised arguments as to why Mr Martin reached the wrong decisions on the Claimant's grievance but it also raised two new grievances. The first of these new grievances was about the 5-day time frame within which the Claimant had to appeal the grievance outcome and the refusal of Mr Fontenoy to the Claimant's request for an extension. The second grievance raised concerned Mr Martin's decision to review whether those adjustments that had been accepted, up to that point, as reasonable were, indeed, reasonable.

79. The Respondent invited Mr Stephen Cloves, an independent HR consultant who had not previously been instructed by the Respondent, to hear and determine the appeal. Mr Cloves met with the Claimant on 31 May 2017 and we have seen the note he made of that meeting. Following the meeting, he conducted conversations with Ms Hadley, Mr Waghorn and Mr Martin and viewed the documents he had identified as requiring his attention. Although he made notes of the conversations he had with these individuals, he did not keep the notes disposing of them as part of his preparations to comply with the General Data Protection Regulation (GDPR) and neither did he hand over his notes to the Respondent.

80. He provided his decision on the appeal in a 4-page letter dated 23 June 2017. He classified into three the matters on which the Claimant in his 18 pages had articulated he wished to appeal. He rejected the appeal on all three grounds, being quite concise about two of them: in respect of the failure to pay full pay instead of SSP, he relied on there being company policy which formed the basis for the Respondent's decision and, in respect of the failure to pay compensation

for the distress caused, he relied on there being no precedent for such compensation. He did not deal with what effectively were the two new grievances that the Claimant had incorporated into his appeal against the outcome that Mr Martin had determined on his grievance.

81. In respect of the allegation made by the Claimant in his first ground of appeal – that he was the victim of "ordinary direct discrimination" on the grounds of disability, he was more verbose. In rejecting this allegation, he said:

> I do not agree that you are receiving less favourable treatment; the company is trying to accommodate you in many ways. This includes all the items on the reasonable adjustment which is, in my opinion, not the actions of the company with a culture of discrimination.
>
> When we discussed your appeal (whilst this is separate to an allegation of direct discrimination), we also discussed the reasonable adjustments that have been put in place to assist and support you. The Equality Act says that employers should think about making reasonable adjustments if an employee is at a substantial disadvantage compared to other employees who do not suffer from disability.
>
> Having reviewed the situation, I can see that there have been numerous conversations regarding your condition and the reasonable adjustments that could have been put in place to support you. I do not consider that there has been a failure to implement reasonable adjustment in your case. Having said that, however, I do believe that this situation needs to be reviewed and addressed; there appears to me to be a lack of understanding and clarity regarding the adjustments which had been agreed. As a result, despite the adjustments being in place and despite there being a genuine belief by the company that these are being adhered to, events have still triggered you to suffer dis-associative episodes.
>
> As part of my investigation I believe that there are number of areas of misunderstanding or lack of clarity regarding the reasonable adjustments which have been put in place as follows:
>
> - "neutral language" – I don't believe that you and the company have the same understanding of what is meant by neutral language. You have raised concern in relation to emails that been sent to you, that you consider do not contain neutral language. Having spoken to those involved, I believe that they have been very careful in the language that they have used in communicating with you and in the majority of cases I agree that the language that has been used is neutral. By way of example, Helen's email to you dated 12th of December 2016 caused you to suffer an episode. I have reviewed the email and consider that it contains neutral language. In addition, when I discussed Helen's email with Joe, he felt that the email was okay to send and it complied with the reasonable adjustment which had been agreed with you. However, this email did cause a trigger so even with the adjustments in place the result was your illness being triggered. However, I do acknowledge that on occasion emails been sent which had not neutral language (for example the email from Paul Kearney with the subject heading "[CONFIDENTIAL] Timesheets – results and who is on the naughty step". Having reviewed that the email however, I believe that the content was meant to be tongue in cheek, and that it was an email sent to all employees and not in relation to your employment. I do not consider that the company was in breach of this agreement with you. This brings me onto the second point that I believe needs to be clarified.
>
> - Matters regarding "your employment" – I don't believe that there is a clear understanding of what is meant by matters concerning your employment. Indeed, when we met to discuss your appeal, on the one hand you told me that you would only need to be forewarned in relation to a minority of emails

> sent to you during the course of your work. On the other hand, however, the emails that have triggered episodes for you have been what I would consider fairly routine or general emails. I therefore believe that there needs to be further discussion to agree what emails will trigger an episode, and therefore need a conversation with you in advance of being sent.
>
> However, we all agree (you, Helen, Joe, Dan and me) that this despite the adjustments there are still triggers happening. I do feel that despite adjustments they are simply not effective.
>
> I also spoke to Dan about your concern regarding what you consider to be the threat of the removal of the adjustments that have been put in place. He confirmed that nowhere in his letter or in the meeting was the removal of the adjustment suggested or discussed. He did say that he felt strongly that the adjustments needed reviewing. For the reasons set out above, I have to agree with his thoughts. I do not believe that the adjustments which are currently in place are working for either you or the company; despite the adjustments that have been agreed, you are continuing to experience episodes and then having (not insignificant) periods of absence due to ill-health.
>
> I am recommending therefore that the adjustments are reviewed as a matter of urgency. To be clear, I am not recommending their removal but their review in order to ensure that any adjustments are clear and will work.

82. As a result of the recommendation made by Mr Cloves, the Claimant was invited by Mr Fontenoy in a letter dated 6 July 2017 to meet Mr Chris Heath, the Respondent's Commercial Director (with Mr Fontenoy in support in the role of HR Support / Minutes) on 27 July 2017 at the Double Tree Hilton Hotel:

> to discuss reasonable adjustments and how we can implement and maintain these to support your return to work.

83. Mr Fontenoy finished the letter saying this:

> I do hope that you will be able to attend the meeting and that you see that we are trying to take positive steps to support your return to the business. Whilst this will be our focus in the meeting, I do also need to make you aware that in the event that we are not able to reach a solution which involves your sustained return to work, supported by appropriate reasonable adjustments, consideration may be given to other options including for example the termination of your employment. We do however sincerely hope that this will not be necessary and that we can agree a way forward which all parties clearly understand.
>
> If you any queries concerning the content of this letter, please do not hesitate to contact me.

84. The meeting on 27 July 2017 lasted for 1 ¾ hours. The Claimant formed the view at the meeting that Mr Heath, whom he described as being very direct, was attempting to goad him to see what it would take for the Claimant to dissociate. We were not satisfied that this was the case. The purpose of the meeting was to have a conversation about the reasonable adjustments as set out by Mr Fontenoy. Necessarily, that entailed Mr Heath having to ask questions the better to understand what was required and why it was required. That was always going to be a difficult conversation for the Claimant and, as Mr Heath was direct, it seems more likely that his direct manner got interpreted by the Claimant as an attempt to goad him.

85. We have been shown the notes Mr Fontenoy took, both in their original state and as adjusted with input from the Claimant. The latter version extends to 45 pages.

Mr Heath took time to consider the matter before writing to the Claimant on 18 August 2017. In a long letter – some 7 pages – Mr Heath first set out a potted history of how the Claimant's dissociative disorder led him to require adjustments, a number of which were agreed, but that such adjustments had failed to prevent the Claimant needing to work from home for a certain number of days as well as be absent from work through illness for a larger number of days. Some of those absences were caused by actions perceived by the Claimant to be breaches of the adjustments agreed upon, all of which had led to the Claimant being currently absent from the business as "agreement had not been reached in relation to the adjustments which should be put in place, the risk assessment had not been completed, and your grievance was outstanding."

86. Mr Heath went on to list the adjustments which the Claimant required in order to return to work and the incidents which the Claimant considered to have been caused by breaches on those adjustments which had been agreed. He then discussed the adjustments that the Claimant required, dividing them into two camps, those "that had already been achieved and put in place or can be easily accommodated" and those that the Respondent had attempted to put in place but which "have caused difficulty on a practical basis". He then set out his conclusion:

> Taking into consideration the above, I have concluded that the adjustments that you require to your role are too onerous and cannot be accommodated. I explained when we met that, if this was my conclusion, one of the options that I would consider was the potential termination of your employment. I asked you whether there was anything that you would like me to consider in this regard. You confirmed that "it doesn't feel great".
>
> Your employment will terminate on the grounds of capability due to ill-health with effect from 18 August 2017.
>
> Your last day of work will be recorded as 18th of August 2017 and you will receive eight weeks' payment in lieu of notice. Your final salary will be paid to you on 31st August 2017.

87. The Claimant was informed he had a right of appeal, a right which he exercised. His letter of appeal was dated 24 August 2017 and started in the following manner:

> The letter I received from Mr Heath dated 18 August 2017 was the latest and possibly one of the last acts of discrimination I have been subjected to at the hands of ITG Creator. It is effectively ultimate punishment for being a disabled employee and, furthermore, raising grievances about the way I have been treated by my employer and senior management.
>
> The decision to dismiss me from my post was justified through Mr Heath's consideration of the needs of the company, ITT Creator. This decision is perverse, ill considered, uninformed and illegal. The needs of the company are not mutually exclusive from my own needs. It is Mr Heath's superficial understanding of the relevant issues that have resulted in him making the decision which will not hold up under any robust and rigorous scrutiny.
>
> In his letter of Mr Heath states:
>
> > … The adjustments that you require to your role are too onerous and cannot be accommodated… your employment will terminate on the grounds of capability due to ill-health with effect from 18 August 2017.

> I believe this epitomises the nature of his lack of understanding of the issues and whilst he is correct, the issues are complex, this should not be a barrier to justice and equality.
>
> My grounds of appeal can be summarised under the following;
>
> 1. Systematic failures in the application of the policies and procedures of ITG Creator
> 2. Victimisation and harassment
> 3. Disability discrimination
> 4. Unfair and wrongful dismissal

88. The Respondent's Chief Financial Officer, Mr Mark Lovett, heard the appeal on 23 October 2017 at the Double Tree Hilton Hotel. The Claimant was accompanied by Mr Roy Peters. He informed the Claimant of the outcome of his appeal on 1 November 2017: he rejected the appeal. He informed the Claimant that his

> remit was to review the decision made by Chris Heath to terminate your employment on the grounds of capability against your grounds of appeal and conclude whether I agree with the original decision made by Chris, or if it should be revoked. During the hearing, we discussed four incidents in which you say ITG breached reasonable adjustments which had been put in place. It is not within my agreement to consider your complaint in this regard because these have already been investigated in the grievance that you raised and a conclusion reached in relation to those allegations by different managers as part of the grievance and your appeal of that grievance.

89. Mr Lovett went through the points made by the Claimant under the four grounds of appeal and provide reasons as to why he rejected each one. He upheld Mr Heath's decision that the Claimant's employment should be terminated on the grounds of capability due to ill-health. As he told us:

> This was not a decision that I took lightly. I considered the further adjustments that Zane required, but I could not see that these were reasonable balanced with the impact that this would have upon the business and other members of the team.

90. With the rejection of his appeal, the Claimant in due course made this application to the Employment Tribunal.

The Law

Unfair dismissal

91. The dismissal has been admitted. Thus, it is for the Respondent to establish the reason for dismissal, that it is for a reason falling within section 98(2) of the Employment Rights Act 1996 or some other substantial reason. We then have to be satisfied that the dismissal was fair having regard to the matters set out in section 98(4) of that Act.

92. The Respondent argues that, if we find the dismissal to have been procedurally unfair, the Claimant's compensation should be reduced by 100% having regard to the power so to reduce his compensation contained in section 123(6) of the Act.

93. In addition, the Respondent argues in favour of a Polkey reduction, that being a deduction made from a compensatory award in an unfair dismissal case to reflect the chance that although a dismissal was procedurally unfair it would have happened in any case, see Polkey v AE Dayton Services Ltd [1988] 1 AC 344]

94. We adopt, without repeating, all that counsel for the Respondent set out in his written submission concerning the law in respect of the following:

a) Section 13: Direct disability discrimination

b) Section 15: Discrimination arising from disability

c) Sections 20–21: Failure to make reasonable adjustments

d) Section 26: Harassment

e) Section 27: Victimisation.

Discussion

95. We were provided with a detailed List of Issues that had been agreed between the parties and we found following and working through that list to be helpful. The list starts with recording that it was conceded that the Claimant suffered from a disability. The list continues with questions grouped under specific heads and we will give our conclusions immediately following each question.

Direct Discrimination (s.13 Equality Act 2010)

2. *Was the Claimant treated by the Respondent less favourably because of his disability with respect to the following alleged acts and/or omissions:*

a) *Did the Respondent fail to raise alleged poor performance directly with the Claimant at the time of occurrence or in yearly reviews?*

96. We found that the Respondent had not raised poor performance directly with the Claimant either at the time of occurrence or in yearly reviews. There was no evidence from which we could deduce that a hypothetical comparator, not disabled, would have been treated differently or that any other employee, not disabled, was treated differently.

b) *Did the Respondent fail to follow the company return to work procedures after spells of sickness, whether relating to or not relating to his disability?*

97. We found that the Respondent failed to follow its return to work procedures given that the first time a Return to Work Form was filled in for the Claimant was in March 2017. There did not appear to have been any attempt to record the reasons for the Claimant's absences, to discover whether they were the result of his disability or some other reason. There was no evidence from which we could deduce that a hypothetical comparator, not disabled, would have been treated differently or that any other employee, not disabled, was treated differently.

c) *Did the Respondent fail to deal with his grievances dated 4 April 2017 and 24 April 2017 in a fair and proper manner?*

98. We concluded the Respondent did fail to deal with the Claimant's grievances of those dates in a fair and proper manner. Mr Martin, investigating the Claimant's grievance of 2 April 2017 (mistakenly dated 4 April in the Agreed List of Issues), failed to take and retain appropriate notes from his interviews with witnesses Ms Hadley and Mr Waghorn, which is contrary to the ACAS Guidance. Further, Mr Martin who was charged with investigating the Claimant's grievance concerning the conflict of interest did not discover in his investigation that Ms Hadley, as she accepted in her evidence before us, had not informed Mr Kearney that the illness

which had kept the Claimant away from work was a mental health illness.

99. As to the grievance dated 24 April 2017 which, of course, was the appeal against Mr Martin's decision, our investigation into this issue was handicapped by the fact that Mr Cloves did not keep notes of the conversations he had had with the people he interviewed. He also did not reach any conclusions on the new grievances which the Claimant had appended onto his appeal.

100. We did not, however, consider the failings we identified in the manner the Respondent dealt with the Claimant's grievances would not have revealed themselves in dealing with a hypothetical comparator who was able-bodied.

d) *Did the Respondent attempt in April 2017 to pressure the Claimant into leaving his employment after he raised a grievance?*

101. We consider the Respondent did attempt in April 2017 to pressure the Claimant into leaving his employment. There had been no indication given to the Claimant ahead of the grievance meeting conducted by Mr Martin on 13 April 2017 that there would be a "without prejudice" addendum to the meeting. As regards what was said in that part of the meeting, there was a slight conflict in the evidence. The Claimant asserts that Mr Martin told him that if he did not sign this settlement agreement that he would be put through the capability process with the likely outcome being that he would be dismissed. Mr Martin's version of what he said was to the effect that, if the without prejudice discussion did not lead to a compromise, the Respondent would do a capability assessment which could lead to dismissal: he denied asserting the capability assessment would likely lead to the Claimant's dismissal. To us, there seemed little difference between the effect of what the Claimant claimed was said and the effect of what Mr Martin asserted was said. Either way, the prospect of dismissal on the grounds of capability was held out as at least a possible consequence of not reaching a compromise for the termination of the Claimant's employment. The whole of the "without prejudice" part of the meeting appears to us to have been directed at achieving an agreed termination of the Claimant's employment: the consequence of the Claimant not agreeing termination was that he was at risk.

e) *Did the Respondent fail to act in a timely fashion during the Claimant's time spent on "discretionary leave" from 13 April 2017 to 18 August 2017?*

102. The "without prejudice" discussions between the Respondent and the Claimant continued until 10 May 2017. The Claimant remained on discretionary leave until his dismissal on 18 August 2017. We consider the Respondent could have acted sooner but chose not to. However, there was no evidence from which we could deduce that a hypothetical comparator, not disabled, would have been treated differently.

f) *Did the Respondent fail to notify the Claimant of, or follow, the company's capability procedure before moving to dismissal?*

103. The Respondent's capability procedure provided for capability concerns to be discussed first in an informal manner with the employee being given time to improve. No informal discussion took place and the Claimant, being on discretionary leave, was never given the opportunity to improve. Failure to improve after having been given such an opportunity would lead to a written warning. Again, this did not happen in the Claimant's case.

g) *Dismissal from employment in August 2018?*

104. We consider the Claimant's dismissal on the grounds of capability was unfavourable treatment.

105. In respect of all of these instances of unfavourable treatment at issues (d), (f) and (g), the comparator relied upon by the Claimant is a hypothetical comparator, a person lacking the Claimant's disability. We consider an employee, lacking the disability that the Claimant had but with a medical history that had given rise to a record of attendance similar to that of the Claimant, would have been treated more favourably. Assuming such an employee had raised grievances about the way in which the Respondent had determined to pay statutory sick pay arguing that the actions of an individual HR manager had been responsible for the Claimant suffering a period of illness, we do not think such an employee, in having his grievance rejected, would have found himself on discretionary leave for the purpose of negotiating a termination of his employment with the threat of capability dismissal being used to pressure him into a compromise acceptable to the Respondent. Neither do we think such an employee would have found himself dismissed on the grounds of capability without the Respondent making the effort to follow their own procedure on capability.

Failure to make reasonable adjustments (s.21 Equality Act 2010)

106. We were not satisfied that the Respondent operated either provision, criterion or practice relied upon by the Claimant – that of requiring staff to work in the London office or that of requiring staff not to have any time off sick. The Respondent had a Birmingham office where employees worked: clearly, they could not have been required to work in the London office and we also heard that the Claimant and his immediate colleagues were required to attend the office or, if they wished to work from home, to discuss with, and obtain the agreement of, management ahead of working from home so that workloads could be covered. There was no PCP that staff were required not to have time off sick. If there were, there would have been no contractual provision for sick pay – which there was.

Victimisation (s.27 and s.39(4)(c) Equality Act 2010)

8. Is the Claimant's grievance of 4 April 2017 a protected act for the purposes of Section 27 (2) of the Equality Act 2010?

107. We were satisfied – and the Respondent concedes - that the Claimant's grievance of 4 April 2017 was a protected act.

108. In going on to consider whether the Claimant suffered certain suggested detriments because he had done the protected act, we bear in mind the guidance provided to us by Underhill J (President) in **Amnesty International v Ahmed** [2009] I.C.R. 1450 albeit that the issue he was considering was the "but for" test in direct discrimination recommended Lord Goff's speech in **James v Eastleigh Borough Council** [1990] ICR 554. His guidance seems apposite in respect of victimisation where we have to determine whether a particular detriment was occasioned because the Claimant had done a protected act. At paragraph 37, the Underhill J said this:

> The fact that a claimant's sex or race is a part of the circumstances in which the treatment complained of occurred, or of the sequence of events leading up to it, does not necessarily mean that it formed part of the ground, or reason, for that treatment.

> That point was clearly made in the judgment of this tribunal in **Martin v Lancehawk Ltd** (unreported) 15 January 2004. In that case the (male) managing director of the respondent company had dismissed a (female) fellow employee when an affair which they had been having came to an end. She claimed that the dismissal was on the ground of her sex because "but for" her being a woman the affair would never have occurred. At para 12, Rimer J referred to the tribunal's finding that the dismissal was "because of the breakdown of the relationship" and continued:
>
> > "the critical issue posed by section 1(1)(a) [is] whether Mr Lovering dismissed Mrs Martin 'on the ground of her sex', an issue requiring a consideration of why he dismissed her. As we have said, we interpret the tribunal as having found that the dismissal was because of the breakdown of the relationship. That, therefore, was the reason for the dismissal, not because she was a woman. We accept that, but for her sex, there would have been no affair in the first place. It could, however, equally be said that there would have been no such affair 'but for' the facts (for example) that she was her parents' daughter, or that she had taken up the employment with Lancehawk. But it did not appear to us to follow that reasons such as those could fairly be regarded as providing the reason for her dismissal."
>
> See also **Seide v Gillette Industries Ltd [1980] IRLR 427 ,** where an employee who had been moved to a different department to escape anti-Semitic harassment fell out (for non-racial reasons) with his colleagues in his new department and was disciplined: it was held that the fact that but for the earlier harassment he would not have been in the department where the problem arose did not mean that the action of which he complained was taken on racial grounds. Lord Goff was not of course considering issues of this kind; but these examples illustrate that the ultimate question must remain whether the act complained of was done on the proscribed ground (or for the proscribed reason) [10] .

109. So, with that guidance in mind, we go on to consider the issues which follow our acceptance that the Claimant had done a protected act.

> *9. If the answer to the above is yes, do the following alleged acts, if upheld, amount to a detriment(s) to the Claimant caused by the Respondent because of the Claimant having done the said protected act:*
>
> a) *Failing to make the agreed reasonable adjustments to the way that employees of the Respondent communicated with him by email?*

110. The meeting to inform the Claimant of the outcome of his grievance resulted in the Claimant being placed on leave. Thereafter, there was no attempt on the part of the Respondent to comply with the agreed reasonable adjustment of giving the Claimant verbal forewarning of the arrival of any email relating to his employment, all sent to the Claimant's personal email address. We considered this to be a detriment to the Claimant. However, we did not think it was caused by the Respondent because of the Claimant having done the said protected act.

> b) *Failing to investigate the Claimant's grievance(s)?*

111. Mr Martin did investigate the Claimant's grievances but Mr Cloves, when considering the Claimant's appeal against the outcome of his grievance did not deal with what amounted to two new grievances raised by the Claimant and nor did the Respondent deal with them. We consider the Respondent's failure amounted to a detriment to the Claimant. However, we were not satisfied that the cause of this failure was the Claimant having done the said protected act. We acknowledge that Mr Cloves did speak to Mr Martin and established that Mr Martin had not made a threat, as perceived by the Claimant, of removing of the

adjustments that were in place. This discussion led Mr Cloves into expressing his agreement with Mr Martin's view that the adjustments needed reviewing. But the grievance was about Mr Martin moving beyond his remit of considering the Claimant's grievance into considering and expressing a view about whether the agreed adjustments were reasonable. The fact that Mr Cloves agreed with the view expressed by Mr Martin does not mean it was appropriate to ignore the actual grievance.

c) *Failing to uphold the Claimant's grievance(s)?*

112. We were not persuaded that the failure on the part of Mr Martin to uphold the grievances is a detriment caused by the Claimant having done the protected act. The Claimant submitted Mr Martin, had he investigated "more vigorously", might have upheld the Claimant's complaints and the Respondent might have changed its course of action in the light of the alleged failures to make reasonable adjustments for the Claimant. We accept Mr Martin might have been more energetic in his investigation, but we could not see the expenditure of more energy on the part of Mr Martin would necessarily that would have led to any different outcome. Mr Martin's conclusions on the Claimant's grievance seemed to be within the range of reasonable responses that a reasonable employer could have arrived at.

d) *Claiming within the grievance findings that the agreed "reasonable adjustments" were not reasonable*

113. We were not persuaded that Mr Martin's "foray", as the Claimant describes it, into the topic of reasonable adjustments, was a detriment caused by the Claimant having done a protected act. It seems to us that, in the light of the experience gleaned from the operation of the adjustments that had been agreed to (and which had resulted in the Claimant's grievance), Mr Martin was entitled to express his opinion as to whether such adjustments were reasonable.

e) *Taking the Claimant's staff ID and revoking his email access after revealing the grievance investigation outcome?*

114. We did think this to be a detriment. It was an action on the part of the Respondent that affected the Claimant's employment. The Respondent could have, but did not, give any warning to the Claimant that:

a) part of the grievance outcome meeting would be devoted to a discussion, without prejudice, designed to resolve differences between the parties;

b) the Claimant would be placed on paid leave for a period while negotiations for an agreed termination took place; and

c) the Claimant would be required to hand over his staff ID and would have his email access revoked during that period of discretionary leave.

115. One of the reasonable adjustments agreed by the Respondent in its letter of 8 April 2016 was that performance or other issues to do with the Claimant's employment were to be raised with him using the procedure set out at paragraph 3 of that letter, see paragraph 12 above. As the object of the adjustments was to prevent the Claimant experiencing a dissociative episode, the way in which Mr Martin (and Mr Fontenoy) decided to introduce the steps outlined above to the

Claimant was reckless. It resulted in the Claimant both sustaining a period of illness over the Easter Bank Holiday weekend and entertaining legitimate fears that the outcome, whether agreed or not, of this period of discretionary leave would be the termination of his employment.

116. However, we were not satisfied that these detriments were visited on the Claimant by the Respondent because he had done the protected act.

f) *Pressure on the Claimant by way of threatening capability procedures in order to force him to accept a settlement agreement and thus to terminate his employment?*

117. We think the threat of using capability procedures was designed to force him to accept a settlement agreement and thus to terminate his employment was a detriment. However, we were not satisfied the Respondent acted in this way because the Claimant had done the protected act.

g) *The Respondent refusing extra time, beyond the original 5-day deadline, for the Claimant to submit his grievance appeal?*

118. We did consider this refusal of the Claimant's request – a request which, in the light of the Claimant's disability, was eminently reasonable - to be a detriment on the Claimant. However, we were not satisfied it was done by the Respondent because he had done his protected act.

h) *Failure to appoint a suitable person to investigate the additional grievances raised in the grievance appeal letter.*

119. We do not accept there was a failure on the part of the Respondent to appoint a suitable person to investigate the additional grievances raised in the grievance appeal letter. We considered Mr Cloves to be a suitable person for that task.

i) *Failure to uphold the grievance appeal.*

120. We did not think Mr Cloves' failure to uphold the grievance appeal was a detriment caused by the Claimant having done the protected act. Mr Cloves' reasoning for not upholding the appeal appeared to us to be well within the range of reasonable responses of a reasonable employer.

j) *The Respondent stating within the grievance outcome in April 2017 that the reasonable adjustments agreed in April 2016 and reiterated by the Claimant in his grievance letter were unreasonable?*

121. This we considered really to be a repeat of the point at (d) above: we repeat our view that, in the light of the experience gleaned from the operation of the adjustments that had been agreed to (and which had resulted in the Claimant's grievance), Mr Martin was entitled to express his opinion as to whether such adjustments were reasonable.

k) *Failure to supply all of the requested "Subject Access Request" documents?*

122. We did not feel that we knew sufficient information about the Subject Access Requests made by the Claimant to state a view on this issue. The Claimant in his submissions invited us to find that certain documents had been disclosed after disclosure had initially been refused on the basis that they were the subject of legal professional privilege. On disclosure, it was evident that legal professional

privilege did not apply. The Claimant postulated that there were three possibilities as to how this happened, the possibilities being, to quote the Claimant:

i) These two documents existed but Mr Fontenoy believed in error they were subject to legal privilege and so could be withheld (as stated by Mr Egerton in a letter received on 26 November 2018, pages 530.3 and 530.4), despite the advice he was given by the ICO in the handling of SARs in December 2017 (page 791) in which case Mr Fontenoy demonstrated considerable incompetence.

ii) Mr Fontenoy actively withheld these two documents from the SAR in contravention of the Data Protection Act because he did not want the Claimant to have them, or

iii) The documents did not exist at the time of the SAR; and Mr Fontenoy created them retrospectively in order to provide "evidence" on which the Respondent's witnesses could rely in the tribunal.

123. There may be other explanations but the first explanation as advanced by the Claimant - suggesting Mr Fontenoy to be incompetent – would not necessarily mean that the failure to supply all of the requested "Subject Access Request" documents was a detriment visited upon the Claimant because he had done the protected act. The other two possibilities involved Mr Fontenoy acting in a somewhat Machiavellian manner. In the absence of evidence from the Claimant satisfying us as to which was the most likely possibility and of any evidence from Mr Fontenoy, we could not discount the first explanation and therefore are not able to hold that the failure to supply all of the requested "Subject Access Request" documents was a detriment visited upon the Claimant as a consequence of him having done his protected act.

l) *In the "review meeting", Chris Heath, Commercial Director, ITG and Chair, goading the Claimant as to whether he would dissociate which the Claimant believes were repeated attempts to trigger his Dissociative Disorder?*

124. We were not satisfied that Mr Heath did repeatedly attempt to goad the Claimant so as to trigger his Dissociative Disorder, therefore we reject this as being a detriment.

m) *Allowing unreasonable delays whilst the Claimant was on "discretionary leave" from 13 April 2017 until 18 August 2017?*

125. We did think there were unreasonable delays whilst the Claimant was on "discretionary leave" – not from 13 April 2017 but from 10 May 2017 until 18 August 2017. On 10 May 2017, the Respondent indicated in the without prejudice correspondence that it did not find the last offer made by the Claimant to be acceptable "and therefore our 'without prejudice' correspondence will cease at this point." The delay which followed seemed to us to be a detriment when the Claimant was, all the while, asserting he was fit to resume work. However, we were not satisfied that such delay was because the Claimant had made the protected act.

n) *Dismissing the Claimant on the grounds of capability due to ill health?*

126. We thought the dismissal of the Claimant on the grounds of capability due to ill health was not a detriment visited on the Claimant because he had done a protected act.

o) *Failure to uphold the Claimant's appeal against his dismissal.*

127. We did not think the failure of Mr Lovett to uphold the appeal against dismissal was a detriment visited upon the Claimant by reasons of his having done a protected act.

> p) *Did employees connive to actively manage the Claimant out of the business?*

128. We were not satisfied on the evidence we heard that the employees of the Respondent connived to manage the Claimant out of the business. The Claimant originally used the verb "conspired". We don't think there was a concerted operation to remove the Claimant from the business: rather the attractions of dismissal - thereby avoiding the difficult job of agreeing a set of adjustments with the Claimant - appealed to more than one person who had to consider the Claimant's grievance or the adjustments that had been agreed.

> q) *Actively withhold unredacted documents from the Claimant?*

129. The way in which this issue is framed suggests there to be some plan in place to make life difficult for the Claimant by withholding unredacted documents. We were not satisfied that such was the case.

Discrimination Arising in consequence of Disability (s.15 Equality Act 2010)

> *10. Was the Claimant treated unfavourably because of something arising in consequence of his disability, in particular, do the following alleged acts and/or omissions support his claim?*
>
> > *a) The Respondent failed to record the Claimant's sickness absences due to his disability separately from his normal sickness absences and his working from home days and this meant that the Respondents were not able to make reasonable adjustments to accommodate his sickness absences that were a consequence of his disability. The Claimant submits that he has been treated unfavourably because of something arising in consequence of his disability (namely, the need to take a period of disability-related sick leave, and work from home).*

130. We agree that there was a failure on the part of the Respondent to record the Claimant's sickness absences due to his disability separately from his normal sickness absences. However, we were not satisfied that this meant the Respondent was not able to make reasonable adjustments to accommodate sickness absences that were a consequence of the Claimant's disability or that the Claimant was treated unfavourably. We do not understand there to have been, in April 2016, some agreement that sickness absences that were a consequence of the Claimant's disability should be recorded separately from other periods of sickness absence.

> > *b) The Respondent failed to recognise the improvements in the Claimant's number of sickness absences between April 2016 (following the Claimant's request for "reasonable adjustments") up until 12 December 2016. With reference to the calendar supplied by the Claimant, it is submitted that the Claimant's sickness absences and the frequency of his working from home days had improved significantly during this period. The Claimant submits that he has been treated unfavourably because of something arising in consequence of his disability (namely, the need to maintain adequate attendance at work and be fit to carry out his duties).*

131. We were not satisfied that the Claimant was treated unfavourably in this respect.

We also consider that the need to maintain adequate attendance at work and be fit to carry out his duties does not arise in consequence of his disability.

> *c) The Respondent failed to make an adjustment to the Claimant's total sickness absence to disregard a spell of sickness absence between 5 January 2017 and 9 March 2017 that he alleges was directly caused by the Respondent's failure to make one of the reasonable adjustments (specifically, failure to give adequate verbal notice of incoming emails regarding his employment). The Claimant submits that he has been treated unfavourably because of something arising in consequence of his disability (namely, the need to take a period of disability-related sick leave).*

132. We accept the Respondent did not distinguish the period of sickness absence between 5 January 2017 and 9 March 2017 from other non-disability related sickness. That period of absence may have been caused by a failure to give adequate verbal notice of incoming emails regarding his employment, but we do not see that to be a reason to treat such absence differently from, say, absence caused by an industrial injury.

> *d) The Respondent failed to pay a salary beyond the Claimant's contractual entitlement after the Claimant exceeded the contractual entitlement of 20 days of sickness pay, when he had been forced to take unnecessary sickness absence earlier in the year, and the majority of the rest of the sickness absences had been a result of the Respondent failing to make adjustments and had triggered his Dissociative Disorder. The Claimant suffered considerable financial hardship as a result of the Respondent's failures to act. The Claimant submits that he has been treated unfavourably because of something arising in consequence of his disability (namely, the need to take a period of disability-related sick leave).*

133. We did not consider this was an instance of discrimination arising in consequence of disability. The Claimant was entitled to what he had contracted for by way of sick pay. To have it otherwise would entail more than simply making reasonable adjustment, it would be re-writing the contract. If the loss has been caused by discriminatory action on the part of the Respondent, that may be reflected in the remedy to be awarded by a tribunal. But it does not seem to us that the application of contractual term regarding sickness pay should be regarded as discrimination arising in consequence of disability.

134. We are fortified in our conclusion by the quotation cited by counsel for the Respondent of the judgment of Hooper LJ in the case of **O'Hanlon v Commissioners of HM Revenue & Customs** [2007] EWCA Civ 283:

> 67. In our view, it will be a very rare case indeed where the adjustment said to be applicable here, that is merely giving higher sick pay than would be payable to a non-disabled person who in general does not suffer the same disability related absences, would be considered necessary as a reasonable adjustment. We do not believe that the legislation has perceived this as an appropriate adjustment, although we do not rule out the possibility that it could be in exceptional circumstances. We say this for two reasons in particular:
>
> 68. First, the implications of this argument are that Tribunals would have to usurp the management function of the employer, deciding whether employers were financially able to meet the costs of modifying their policies by making these enhanced payments ... On what basis can the Tribunal decide whether the claims of the disabled to receive more generous sick pay should override other demands on the business which are difficult to compare and which perforce the Tribunal will know precious little about? The Tribunals would be entering into a form of wage fixing for the disabled sick ...

> 69. Second, as the Tribunal pointed out, the purpose of this legislation is to assist the disabled to obtain employment and to integrate them into the workforce ... The [Disability Discrimination] Act [1995] is designed to recognise the dignity of the disabled and to require modifications which will enable them to play a full part in the world of work, important and laudable aims. It is not to treat them as objects of charity which, as the Tribunal pointed out, may in fact sometimes and for some people tend to act as a positive disincentive to return to work.

135. Moving on with the agreed list of issues:

> *e) The Respondent threatened the Claimant that in the event he did not wish to conclude any settlement agreement with the Respondent that the capability procedure would commence. The Claimant submits that he has been treated unfavourably because of something arising in consequence of his disability (namely, the need to maintain adequate attendance at work and be fit to carry out his duties).*

136. We do consider the threat of the commencement of the capability procedure was an instance of discrimination arising in consequence of disability. The threat was born out of the adoption by the Respondent of the approach that it was easier to terminate the employment of the Claimant, either by negotiation or otherwise, rather than work at making such adjustments that would avoid the disadvantage experienced by the Claimant because of his disability.

> *f) The Respondent failed to follow a fair procedure or process in establishing the Claimant's capability for work prior to his dismissal. It is submitted that;*
>
> *i) The Claimant was not notified that a capability procedure was being implemented;*
>
> *ii) The Claimant had in his possession an outdated disciplinary / capability procedure that had been provided to him when he was first employed in 2014;*
>
> *iii) The Respondent did not supply the Claimant with an updated capability procedure or policy;*
>
> *iv) The Claimant was not made aware of any areas of improvement, targets or even given an option to improve as he had been put on "discretionary leave";*
>
> *v) The Respondent had not carried out a recent occupational health assessment;*
>
> *vi) The Respondent did not identify grounds for dismissal besides that the adjustments requested were "onerous";*
>
> *vii) The Respondent failing to have due regard to the reasonable adjustments that the Claimant required.*
>
> *The Claimant submits that he has been treated unfavourably because of something arising in consequence of his disability (namely, the need for the Respondent to assess his capability at work).*

137. Counsel for the Respondent says these allegations are misconceived. The Claimant, he says, was not treated in the manner described in the seven allegations because of the need for the Respondent to assess his capability at work. The example he uses is the first allegation: the assertion that the Claimant was not notified that a capability procedure was being implemented <u>because</u> of

the need to assess the Claimant's capability. That, he says, is misconceived. Similarly misconceived is the idea that the Claimant had in his possession an outdated disciplinary / capability procedure that had been provided to him when he was first employed in 2014 because of the need to assess the Claimant's capability.

138. We agree: the facts contained in the seven allegations may be true, but they did not occur because of the need to assess the Claimant's capability even if that is said to be in consequence of the Claimant's disability

> *g) The Respondent failed to train staff in the implementation of the Claimant's alleged agreed and / or proposed adjustments, failed to act to reduce risk of the Claimant suffering a dissociative episode and or his condition being exacerbated whilst working, and failed to make Joe Waghorn, Helen Hadley, Nico Friis, Emile Fontenoy, Dan Martin, Paul Kearney, Chris Heath, Mark Lovett and Mark Brennan accountable for failures to act. The Claimant submits that he has been treated unfavourably because of something arising in consequence of his disability (namely, the need to maintain adequate attendance at work and be fit to carry out his duties;*

139. We agree with counsel for the Respondent that the requirement that the Claimant maintain adequate attendance at work and be fit to carry out his duties does not arise in consequence of the Claimant's disability: the idea that it does is misconceived.

> *h) The Respondent failed to communicate or train staff in implementation of the company policies, including the Grievance Policy, the Equality and Diversity Policy, the Capability Policy and the Equal Opportunities Policy. The Claimant submits that he has been treated unfavourably because of something arising in consequence of his disability (namely, the need to maintain adequate attendance at work and be fit to carry out his duties);*

140. We repeat the point made in the previous paragraph. The requirement that the Claimant maintain adequate attendance at work and be fit to carry out his duties does not arise in consequence of the Claimant's disability: the idea that it does is misconceived.

> *i) Failure to produce and use a risk assessment document as recommended by external consultant Stephen Cloves in May 2017. The Claimant submits that he has been treated unfavourably because of something arising in consequence of his disability (namely, the need to maintain to carry out adequate attendance at work and be fit to carry out his duties);*

141. Again, we have repetition of the misconception displayed here. It is also worth noting that there was a draft risk assessment was produced by Ms Hadley dated 20 July 2017, at pages 551 – 554 of the bundle.

> *j) Dismissing the Claimant on grounds of capability on 18 August 2017. The Claimant submits that he has been treated unfavourably because of something arising in consequence of his disability (namely, the need to maintain adequate attendance at work and be fit to carry out his duties).*

142. Once more we repeat the point: the requirement that the Claimant maintain adequate attendance at work and be fit to carry out his duties does not arise in consequence of the Claimant's disability.

11. Were the above acts/omissions a proportionate means of achieving a legitimate aim?

143. We have not found in favour of there being any discrimination arising from disability. In case we are wrong on those findings, we do not accept any steps that are determined as constituting unfavourable treatment constitute a proportionate means of achieving either of the legitimate aims contended for by counsel for the Respondent, namely:

i) Treating all employees in a fair, proportionate and consistent manner.

ii) Insuring regular and reliable employee attendance so that adequate resources are available at a reasonable cost to enable the provision of a high-quality efficient and effective service.

Harassment (s.26 Equality Act 2010)

144. We think it helpful if, before discussing the issues which arise under this head, we remind ourselves of the wording of section 26 of the Act:

> **26 Harassment**
>
> (1) A person (A) harasses another (B) if—
>
> (a) A engages in unwanted conduct related to a relevant protected characteristic, and
>
> (b) the conduct has the purpose or effect of—
>
> (i) violating B's dignity, or
>
> (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
>
> (2) A also harasses B if—
>
> (a) A engages in unwanted conduct of a sexual nature, and
>
> (b) the conduct has the purpose or effect referred to in subsection (1)(b).
>
> (3) A also harasses B if—
>
> (a) A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,
>
> (b) the conduct has the purpose or effect referred to in subsection (1)(b), and
>
> (c) because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.
>
> (4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—
>
> (a) the perception of B;
>
> (b) the other circumstances of the case;
>
> (c) whether it is reasonable for the conduct to have that effect.
>
> (5) The relevant protected characteristics are—
>
> …
>
> disability;
>
> …

145. And we remind ourselves of the guidance that counsel for the Respondent referred us to, that given by Underhill J in **Richmond Pharmacology Ltd v Dhaliwal** [2009] ICR 724**,** at paragraph 22:

> *... not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and*

> *tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase.*

146. We then move on to the issues raised under this section.

> *12. Did the Respondent engage in unwanted conduct related to the Claimant's disability, specifically:*
>
> *a. Disclosing details of the Claimant's confidential health condition to senior managers such that on 22 April 2016 a manager addressed the Claimant regarding his disability openly in the office?*

147. This refers to the incident set out in paragraph 16 above. We accept that it was not harassment to disclose the details to Mr Brennan given that he is the CEO of the Respondent. However, we find Mr Brennan's remarks and actions to be unwanted conduct related to a relevant protected characteristic. It may be that, as the Claimant acknowledged, Mr Brennan did not intend his actions and remarks to have the purpose of violating the Claimant's dignity or of creating a degrading and humiliating environment for the Claimant. However, his actions and remarks had that effect. In our view, his actions and remarks constituted harassment within the meaning of section 26 of the Equality Act 2010. We bear in mind the provisions of section 26(4) of the Act: we accept the evidence of the Claimant that he did perceive Mr Brennan's actions to have been objectionable. Given that the Claimant was working in an open plan office and given that he had previously requested that a return to work be preceded by an email being circulated to staff asking them not to ask him if was okay now or to ask him about his absence because such questions cause a lot of stress and anxiety, we consider it was reasonable for the conduct of Mr Brennan to have had that effect.

> *b. Sending an email to 49 employees regarding the Christmas party arrangements in November 2016 highlighting the Claimant's name in red text in amongst a list of others office staff, disclose into those 49 staff that the Claimant had a special arrangement for a single room which led to a query from another employee to the Claimant regarding this arrangement which caused the claimant to dissociate at work?*

148. We accept the evidence of the Claimant that the effect of this email was to cause him to dissociate. However, when all the circumstances of the email are taken into account – and here we list those that, in our view, are the most relevant:

i) the Claimant had an uncommon condition;

ii) the Claimant wanted the fact he had this condition not to be common knowledge;

iii) Mr Benson, the person sending the email, likely had no idea (even knowing, as he did, that the Claimant had mental health problems) that his chosen method of informing 49 London staff of the accommodation arrangements for 44 staff attending the Christmas party in Birmingham, would result in the Claimant, one of the 4 staff listed as "Single Occupancy", dissociating; and

iv) the fact that, as the Claimant attested, once he starts to dissociate, rationality goes out the window;

- we reach the view that it was not reasonable for the conduct complained of to have the effect that it did have. For that reason, we do not find that broadcasting, to London staff, the fact that the Claimant required a room of his own to be harassment.

> *c. Head of studio Nico Friis advising the Claimant in a meeting on 31 March 2017 to "try not to be ill on Monday"?*

149. We find that the remark of Mr Friis did have the effect of creating a humiliating environment for the Claimant. Telling a person susceptible to bouts of any illness to try not to be ill the following week is, on any view, a patronising and ill-thought out remark to make. In this instance, we know that Mr Friis knew the Claimant to suffer from DDNOS because we have the note of the meeting (page 410 of the bundle) held between Mr Waghorn, Mr Friis and Mr Fontenoy at 1630 hours on 31 March 2017. At this meeting, held before Mr Waghorn and Mr Friis went to speak to the Claimant, Mr Friis asked, when informed by Mr Waghorn that the Claimant was not happy to have received Ms Hadley's email earlier that day, "Did he dissociate?" We formed the view that it was reasonable for the advice given by Mr Friis to have had the effect it did and we concluded it was harassment.

> *d. Sending an office email to office employees using non—neutral language and tone that specified individuals by name, including the claimant, as not having performed at the expected level, and directly causing the claimant to suffer dissociative episode?*

150. This refers to the "naughty step" email sent by Mr Kearney on 5 April 2017. We accept the Claimant did dissociate upon reading the email because the reference to him being one of those who had not carried out the task required of them created a humiliating environment for the Claimant. But, having regard to the circumstances of the email and the factors we set out in paragraph 142 above (substituting Mr Kearney for Mr Benson as regards the absence of any idea as to what effect the email might have on the Claimant), we conclude it is not reasonable for the conduct complained of to have the effect on the Claimant that it had.

> *e. Declaring the Claimant's alleged agreed and / or requested adjustments as unreasonable, within the grievance outcome hearing on 13 April 2017?*
>
> *f. Declaring the Claimant's alleged agreed and / or requested adjustments as "onerous" in the letter of dismissal on 18 August 2018?*

151. In respect of both of these issues, we were not satisfied that these declarations constitute harassment. It seems to us that the Respondent was entitled to form a view as to whether what had been agreed as reasonable adjustments were, in the light of experience, just that. Similarly, it was entitled to form the view that the agreed adjustments were onerous. We are not satisfied that the declarations by themselves had such an effect on the Claimant as to bring them within the definition of harassment. In any event, we do not regard as reasonable for the conduct to have such effect.

> *13. Was the conduct (at paragraph 12 above) related to the Claimant's disability?*

152. We found there to be harassment in respect of the remarks and actions of Mr Brennan on 22 April 2016 and of the repeated question of Mr Friis on 31 March 2017. We considered this conduct related to the Claimant's disability.

14. If so, did the Respondent take all reasonable steps to prevent the individuals from doing the discriminatory act(s)?

153. There was no evidence to indicate that the Respondent took steps to prevent the individuals from doing the discriminatory acts. That being the case, we cannot say that the steps taken by the Respondent were reasonable.

15. Did the alleged have the purpose or effect of creating an intimidating, degrading and humiliating environment for the Claimant?

154. We thought so.

Unfair Dismissal (s.98(4) ERA 1996)

16. What was the reason (or principal reason) for the Claimant's dismissal?

155. With the onus being on the Respondent to show the reason for the dismissal, counsel for the Respondent asserts:

> … that the reason for dismissal was the Claimant's capability, specifically the parties' inability to agree reasonable adjustments that would allow the Claimant safely to return to work.

156. We were initially troubled as to whether, conceptually, the parties' inability to agree such reasonable adjustments represented capability but doubts were resolved by consideration of the wording of section 98(2) of the Employment Rights Act 1996:

> (2) A reason falls within this subsection if it –
>
> (a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do.

157. We accepted that a dismissal that follows a failed negotiation on what adjustments might be reasonable for the employer to make so as to avoid the substantial disadvantage that an employee suffers by reason of his disability is related to the employee's capability.

158. We went on to consider section 98(4) of the Act:

> Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) —
>
> (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
>
> (b) shall be determined in accordance with equity and the substantial merits of the case.

159. The words of the statute must be borne in mind when considering the next of the list of issues:

17. Did the Respondent have a genuine belief on reasonable grounds, following a reasonable investigation, that the Claimant was unable to carry out his role?

18. Did the Respondent follow a fair procedure?

> *19. Was the dismissal within the range of reasonable responses of a reasonable employer?*

160. The Claimant asserts that after he rejected a settlement and asked to return to work, the Respondent contrived a case to dismiss him under the guise of "capability due to ill health", by grossly exaggerating the scope of the adjustments that he needed and then claiming that the adjustments were "onerous".

161. Counsel for the Respondent asserts that:

> It follows from the above [*see paragraph 150 above*] that Chris Heath did have a genuine belief at the time of the dismissal that the Claimant could not return to work. That belief was based on reasonable grounds and followed a reasonable investigation. The dismissal was therefore substantively fair, and the Respondent carried out a fair procedure in any event.

162. We do not agree. The Respondent made no attempt to follow the provisions of its own Capability Procedures. It might be said that there had been informal oral and written warnings given to the Claimant that, if either the attempt at negotiating adjustments considered to be reasonable were to fail or the attempt to agree terms of termination were to fail, then dismissal on the grounds of capability might follow. However, there was no reference to Occupational Health asking whether the Claimant was fit to work with whatever adjustments were agreed. The last reference to Occupational Health had taken place in on 6 July 2016 when the future outlook was said to be "excellent, now that things had been sorted out" and the response give to the first specific question asked was "Mr Jensen is fit for his normal hours and duties required of his post. There was no opportunity given to the Claimant, after such warnings (if they can be deemed to be warnings) to show that he was capable of doing the job.

163. So, for those reasons, we consider that the Respondent did not act reasonably in treating the reason relating to the Claimant's disability as being a sufficient reason for dismissing the Claimant. It should be noted that we prefer the wording of section 98(4) to that of agreed issues.

> 20. If the Claimant was unfairly dismissed, should compensation be reduced on account of Polkey / contributory fault?

164. Two of us are of the view that a reference to Occupational Health setting out what little of the 8 April 2016 adjustments were still accepted as reasonable, together with a short history of when, why and how the Claimant had dissociated would have resulted in Occupational Health coming to the conclusion that the Claimant was not fit to work. One of us dissents from that view. He maintains the likely result of a reference to Occupational Health would have been an assessment that he was fit to work, given

a) the July 2016 assessment that the Claimant was fit to work and

b) the fact that the Claimant has been working in his present job, doing similar work to that done for the Respondent, for – at the time of drafting his submissions – six months.

165. The majority view is that a fair procedure entailing an OH assessment would have been conducted within the same time frame as actually led to the Claimant's dismissal. Applying Polkey, we consider the Claimant would have been dismissed

at or around the same date as he was dismissed.

166. We did not think that it was appropriate to regard the Claimant, whose disability was conceded, as having contributed to his own dismissal even if, as was the case, for understandable reasons he failed to explain that the lack of verbal warning was the actual reason he dissociated and, on a number of occasions, he referred to the Christmas party email as a breach of reasonable adjustments.

Jurisdiction

167. We now address the issue of whether we lack jurisdiction on some of the issues raised.

168. The effective date of termination was 18 August 2017. The Claimant contacted ACAS for the purposes of early conciliation on 8 November 2017 and ACAS issued its certificate on 8 December 2017. As the primary limitation expired during the period that ACAS was engaged in attempting to find early conciliation, the limitation period is extended by section 140B (4) to one month after the issue of the ACAS certificate – i.e. to 8 January 2018.

169. That means, as Mr Keith for the Respondent conceded, the dismissal was within time. It also means that any acts or omissions that are the subject of complaint and which occurred on or before 9 August 2017 are, at first sight, out of time.

170. Apart from the complaint of unfair dismissal, all the claims made by the Claimant come within the jurisdiction of the Employment Tribunals and are subject to the time limits set out in section 123 of the Equality Act 2010:

> **123 Time limits**
>
> (1) Subject to sections 140A and 140B, proceedings on a complaint within section 120 may not be brought after the end of—
>
> (a) the period of 3 months starting with the date of the act to which the complaint relates, or
>
> (b) such other period as the employment tribunal thinks just and equitable.
>
> …
>
> (3) For the purposes of this section—
>
> (a) conduct extending over a period is to be treated as done at the end of the period;
>
> (b) failure to do something is to be treated as occurring when the person in question decided on it.
>
> (4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—
>
> (a) when P does an act inconsistent with doing it, or
>
> (b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

171. Given our finding of the lack of any connivance between the managers of the Respondent in determining to dismiss the Claimant, we do not find the acts or

omissions complained of prior to dismissal as being conduct extending over a period.

172. When we come to consider whether it is just and equitable to extend time, we remind ourselves of the guidance given by Auld LJ In **Robertson v Bexley Community Centre** [2003] IRLR 434 (CA):

> 25. It is also of importance to note that the time limits are exercised strictly in employment and industrial cases. When tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse. A tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule. It is of a piece with those general propositions that an Appeal Tribunal may not allow an appeal against a tribunal's refusal to consider an application out of time in the exercise of its discretion merely because the Appeal Tribunal, if it were deciding the issue at first instance, would have formed a different view. As I have already indicated, such an appeal should only succeed where the Appeal Tribunal can identify an error of law or principle, making the decision of the tribunal below plainly wrong in this respect.

173. The Claimant's written evidence extends over 42 pages and 309 paragraphs. In it, he provided evidence, among other things, of how the arrival of certain earlier emails, for example, those of Ms Hadley and Mr Waghorn in December 2016 and January 2017, had caused him to dissociate. Of the period when he was waiting to return to work following the breakdown of the "without prejudice" negotiations on 9 May 2017, not knowing whether he would be dismissed, he described how his mental health was deteriorating, how he struggled to maintain a regular sleep pattern, how he was getting to the point where he was not leaving the house much and how he had begun to experience symptoms of Irritable Bowel Syndrome. He was so ill he asked his friend Ms Baker to write a letter on his behalf to ask about progress on 18 August. So that was the state he was in upon receipt that same day of the email from Mr Fontenoy attaching the letter of dismissal.

174. We have no doubt that his mental health was not improved by the arrival of the dismissal letter. However, his health did not prevent him from submitting, with the assistance of Ms Baker, a long letter (extending into 15 pages of double-spaced type) 6 days later appealing the decision to dismiss. Nor did his health prevent him from writing a letter (4 pages single-spaced type) dated 17 September 2017 arguing that the way his Subject Access Request had been handled was defective or from submitting an early conciliation form to ACAS on 8 November 2017.

175. Mr Keith has drawn our attention to the headnote in the EAT decision of **British Coal Corporation v Keeble** [1997] IRLR 336. There, an Industrial Tribunal, without hearing evidence, declared it just and equitable to hear applications that 22 months out of time.

> On appeal to the EAT, however, the matter was referred back to the tribunal to determine in each case whether it had jurisdiction to hear the complaint out of time. The EAT suggested that the tribunal would be assisted by the factors mentioned in s.33 of the Limitation Act 1980, which deals with the exercise of discretion by the courts in personal injury cases. This requires the court to consider the prejudice

> which each party would suffer as the result of the decision to be made and also to have regard to all the circumstances of the case and in particular to:
>
> (a) the length of and reasons for the delay;
>
> (b) the extent to which the cogency of the evidence is likely to be affected by the delay;
>
> (c) the extent to which the party sued had cooperated with any requests for information;
>
> (d) the promptness with which the plaintiff acted once he or she knew of the facts giving rise to the cause of action; and
>
> (e) the steps taken by the plaintiff to obtain appropriate professional advice once he or she knew of the possibility of taking action.

176. Applying those principles, we have not been assisted by the Claimant properly to know the reasons for the delay. We have no direct evidence from the Claimant as to when he knew of the possibility of taking action and of the steps he took, if any, to obtain appropriate professional advice.

177. However, we do know from the second sentence of the grievance the Claimant submitted dated 2 April 2017 that the Claimant had sought advice on his situation, and he believed that he had:

> been discriminated against under the Equality Act 2010. This is mainly because ITG Creator have unintentionally failed to comply with a duty to make reasonable adjustments for my long-term health issues, which class as a disability. I do not believe that ITG creator have fully considered the legal ramifications for failing to comply with this duty and so am raising a formal grievance in order to start negotiations for a solution.

178. Further, we know from the 'without prejudice' correspondence which both parties agreed could be seen by us that the Claimant obtained an appointment with an employment solicitor on 27 April 2017 to consider the offer of a settlement agreement being made by the Respondent. Furthermore, judging by the way that the case has been researched and argued by the Claimant, it is difficult to believe that the Claimant was in any doubt that he had the makings of a case for disability discrimination upon which an appointment in April 2016 would have allowed him to explore further.

179. As regards the cogency of the evidence, we have heard the evidence and formed a view on it in deciding the facts. The likelihood of evidence from one side or the other being less cogent appears less important a factor in such circumstances.

180. In all the circumstances of the case, we are of the view that the Claimant has not provided us with sufficient evidence to persuade us that it is just and equitable to extend time. Our ruling in that regard means that all the claims save for the actual dismissal are out of time.

Conclusion

181. This has been a difficult case not only for the parties but also for us in determining it. We are grateful to both Mr Keith and to Ms Baker for their hard work attempting to make things easier for us. We are sorry the gestation period for this decision has been so long.

182. That said, our findings are that had jurisdiction only to deal with the complaints that arise out of the decision to dismiss. We thought that decision was an act of direct discrimination. Further, the dismissal was unfair. However, by a majority, we thought a fair procedure would have led to a dismissal within the same time frame as the unfair procedure led to his actual dismissal. We do not consider the Claimant to have contributed to his dismissal.

183. We leave the parties to agree, if possible, such remedy as flows from our judgment. In the absence of agreement, we give permission to either party to seek a listing for a hearing on remedy which we provisionally opine would need a hearing of no more than one day.

EMPLOYMENT JUDGE

3 September 2019

DECISION SENT TO THE PARTIES ON

04/09/2019

FOR SECRETARY OF THE TRIBUNALS