EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr T Skinner	**V**	**Smith & Williamson Corporate Services Limited**

Heard at: London Central **On**: 3, 4, 5, 6, 7 and 10 February 2020

Before: Employment Judge Joffe
Ms T Breslin
Mr J Carroll

Representation

For the Claimant: In person

For the Respondent: Mr S Purnell, counsel

RESERVED JUDGMENT

1. The claim for unfair dismissal under sections 94 and 98(4) Employment Rights Act 1996 is dismissed.
2. The claims of discrimination under s 15 Equality Act 2010 are dismissed

3. The claims of discrimination under s 13 Equality Act 2010 are dismissed.
4. The claims of discrimination under ss 20 and 21 Equality Act 2010 are dismissed.
5. The claims of discrimination under s 26 Equality Act 2010 are dismissed.

REASONS

Claims and issues

1. The claimant brings claims of unfair dismissal and disability discrimination. The issues were agreed at a case management hearing in front of EJ Nicolle on 15 October 2019 and are as set out below. We have recast them in some respects to better reflect the tests we have to apply but they are in substance the same as the parties' agreed list.

2. The name of the respondent was amended by agreement from Smith & Williamson to Smith & Williamson Corporate Services Limited at the outset of the hearing.

Time limits / limitation issues

(i) Were all of the claimant's discrimination complaints presented within the time limits set out in sections 123(1)(a) & (b) of the Equality Act 2010 ("EQA")? Dealing with this issue may involve consideration of subsidiary issues including: whether there was an act and/or conduct extending over a period; whether time should be extended on a "just and equitable" basis; when the treatment complained about occurred; etc.

Unfair dismissal

(ii) What was the principal reason for dismissal and was it a potentially fair one in accordance with sections 98(1) and (2) of the Employment Rights Act 1996 ("ERA")? The respondent asserts that it was a reason relating to the claimant's conduct.

(iii) If so, was the dismissal fair or unfair in accordance with ERA section 98(4), and, in particular, did the respondent in all respects act within the so-called 'band of reasonable responses'? The tribunal will consider:

a) Whether the respondent had a genuine belief the claimant was guilty of the misconduct alleged;
b) Whether the respondent had conducted such investigation as was reasonable;
c) Whether the respondent had reasonable grounds for its belief;
d) Whether the procedure followed was fair;
e) Whether dismissal was a fair sanction.

Remedy for unfair dismissal

(iv) If the claimant was unfairly dismissed and the remedy is compensation:

a. if the dismissal was procedurally unfair, what adjustment, if any, should be made to any compensatory award to reflect the possibility that the claimant would still have been dismissed had a fair and reasonable procedure been followed / have been dismissed in time anyway? See: Polkey v AE Dayton Services Ltd [1987] UKHL 8; paragraph 54 of Software 2000 Ltd v Andrews [2007] ICR 825; W Devis & Sons Ltd v Atkins [1977] 3 All ER 40; Crédit Agricole Corporate and Investment Bank v Wardle [2011] IRLR 604;

b. would it be just and equitable to reduce the amount of the claimant's basic award because of any blameworthy or culpable conduct before the dismissal, pursuant to ERA section 122(2); and if so to what extent?

c. did the claimant, by blameworthy or culpable actions, cause or contribute to dismissal to any extent; and if so, by what proportion, if at all, would it be just and equitable to reduce the amount of any compensatory award, pursuant to ERA section 123(6)?

Disability Discrimination

Disability

(v) Was the claimant a disabled person in accordance with the Equality Act 2010 ("EQA") at all relevant times (i.e. from the first investigation meeting on 30 October 2018 to his dismissal on 9 April 2019) because of the following condition: general [presumably an error for 'generalised'] anxiety disorder?

EQA, section 15: discrimination arising from disability

(vi) Did the following thing arise in consequence of the claimant's disability: a panic attack at an investigation meeting on 30 October 2018?

(vii) Did the respondent treat the claimant unfavourably as follows: relying on evidence obtained at the investigation meeting?

(viii) Did the respondent treat the claimant unfavourably in that way because of the claimant's panic attack?

(ix) If so, has the respondent shown that the unfavourable treatment was a proportionate means of achieving a legitimate aim?

(x) Alternatively, has the respondent shown that it did not know, and could not reasonably have been expected to know, that the claimant had the disability?

Reasonable adjustments: EQA, sections 20 & 21

(xi) Did the respondent not know and could it not reasonably have been expected to know the claimant was a disabled person?

(xii) A "PCP" is a provision, criterion or practice. Did the respondent have the following PCP(s):

a. Failing to delay or postpone the disciplinary investigation?
b. Failing to postpone the disciplinary procedure so that the Respondent could obtain medical advice on;

i. the Claimant's culpability in relation to the allegations; and

ii. the Claimant's mental capacity to fully engage in the disciplinary process?

(xiii) Did any such PCP put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled at any relevant time, in that the application of the PCPs led to the disciplinary procedure and dismissal?

(xiv) If so, did the respondent know or could it reasonably have been expected to know the claimant was likely to be placed at any such disadvantage?

(xv) If so, were there steps that were not taken that could have been taken by the respondent to avoid any such disadvantage?

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

EQA, section 13: direct discrimination because of disability

(xvii) It is not in dispute that the respondent subjected the claimant to the following treatment:

a. The disciplinary process
b. Dismissal

(xviii) Was that treatment "less favourable treatment", i.e. did the respondent treat the claimant as alleged less favourably than it treated or would have treated others ("comparators") in not materially different circumstances? The claimant relies on the following comparator: Mr David Bevan and/or hypothetical comparators.

(xix) If so, was this because of the claimant's disability?

EQA, section 26: harassment related to disability

(xx) Did the respondent engage in conduct as follows:

a. In April 2018 Daniela Glover saying “mental health issues only exist in the West”,

b. Disciplinary Investigation conducted by Nicola Young, 30th October 2019,

c. Disciplinary Meeting conducted by Suzanne White, 7th January 2019,

d. Outcome Meeting conducted by Taz Quayum, 9th January 2019,

e. Appeal Meeting, John Erskine, 11th March 2019,

f. Upholding the decision and for a different reason to the one originally dismissed for, ‘Appeal Decision’, John Erskine, 2nd April 2019

(xxi) If so was that conduct unwanted?

(xxii) If so, did it relate to the protected characteristic of disability

(xxiii) Did the conduct have the purpose or (taking into account the claimant’s perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect) the effect of violating the claimant’s dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

Findings of fact

The hearing

3. We heard from the claimant and, for the claimant, Mr Peter Turnbull, Ms Emma Walker and the claimant’s wife, Ms Jane Cartwright. Ms Walker and Mr Turnbull are former employees of the respondent. For the respondent, the following witnesses gave evidence: Mr John Erskine, managing partner of the financial services division, Mr Tas Quayum, chief operating officer of the professional services division, Ms Gill Somerset, group head of HR, Daniela Glover at relevant times head of department of the financial services team, Nicola Young, associate director HR for financial services and Suzanne White, HR director.

4. We had a bundle of over 600 pages, including documents inserted during the hearing, and we read those pages to which the parties directed us.

5. We had originally agreed with the parties that they would return for an oral judgment and reasons but that date had to be vacated due to the current pandemic. There has been delay in preparing this reserved judgment and reasons in part because of issues created by remote working and we apologise to the parties for that delay.

Background

6. The respondent provides various services to clients; its financial services division provides investment management, financial planning and banking services and its professional services division provides assurance and accountancy services.

7. The claimant commenced employment with the respondent on 26 January 2015 as an associate director in the financial services team. That team initially sat within the professional services division but moved to the financial services division in May 2018. The claimant's line manager was Ms Glover. Ms Walker and Mr Turnbull were more junior employees in the department. Peter Maher, to whom we refer below, was director and head of financial services and was line managed by Mr Erskine.

8. We should record that Ms Walker is a co-founder of the financial services company the claimant has set up since his dismissal and that Ms Walker and Mr Turnbull live at the same address.

Facts relevant to disability

9. We had very limited medical evidence. We were provided with no GP records for the relevant period despite EJ Nicolle having directed at the case management hearing that the claimant should disclose relevant records. In total we had the following medical evidence:

- Letter dated 23 January 2019 from Laura Amy Stevenson, CBT therapist;
- A report dated 4 March 2019 from Penny Glazebrook, a therapist;
- A short printout of GP consultations from 29 May 2019 to 3 June 2019
- A report of an appointment the claimant had on 19 December 2018 with Lucy Hatfull, a community mental health nurse, attached to a 'care plan' dated 13 November 2019.

10. We had an impact statement from the claimant which set out the claimant's account of his impairment and its effects and a supporting statement from his wife (in addition to her main witness statement for the hearing).

11. The claimant said in his impact statement that he had no history of mental health issues. He had however said in his claim form that he had suffered from anxiety and depression since he was ten years old, sometimes manifesting as panic attacks.

12. The claimant said in his impact statement that he had his first panic attack walking down the street in August 2012. He noticed something was wrong with his heartbeat. He later identified this experience as a panic attack.

13. The claimant described his panic attacks as starting as a feeling of dread and a tingling sensation in his arms. His cognitive ability would be impaired. He

would suddenly be unable to recall what the subject of the conversation was or what had been said previously. His mind would go blank, he would be unable to speak and he would experience an intense rush of adrenaline.

14. Until 2015, the claimant said in his impact statement, he had panic attacks only and no other experience of anxiety.

15. The claimant said that from 2015 onwards, he noticed an underlying and perpetual sense of dread.

16. After the 2012 panic attack, the claimant did not have a second panic attack until August 2014, when he was in a client meeting for a previous employer. The meeting had to be suspended.

17. The claimant said that he had a third panic attack in a meeting in January 2015[1], by which time he was employed by the respondent. He left the meeting for ten minutes and then returned. He says that his hands were shaking due to an abundance of adrenaline.

18. The claimant said that he had further panic attacks on the following dates:

- January 2016
- August 2016
- August 2017
- August 2018
- September 2018.

19. The claimant told us that from 2015 onwards, he was moderating his behaviour to avoid a panic attack. He said that he stopped speaking in team meetings, had a crippling fear of leading team meetings, became withdrawn and rarely offered an opinion unless speaking directly to someone and that he would decline invitations to attend networking or training events. The claimant did not provide any specific examples of these events or effects.

20. After the January 2016 attack, the claimant told us that he had six sessions of counselling which he said were not helpful. This was counselling with Ms Glazebrook.

21. The effects the claimant reported from 2015 were that:

- He was quieter in social gatherings
- He was no longer actively seeking new friendships
- Friends and family were asking him if anything was wrong
- He had rapid weight loss

[1] This seems to have been March 2015 as discussed below.

- He found socialising tiring
- He preferred time alone and away from others
- He was avoiding social situations and interaction with others
- He was unable to sleep without listening to the radio through headphones. His quality of sleep was poor and he felt very tired during day

22. We had regard to further evidence from other witnesses, the limited medical material and evidence from the surrounding context.

23. We noted that Ms Glazebrook in her 4 March 2019 report said that the claimant 'presented with social anxiety and panic attacks in the workplace' .

24. Ms Cartwright said that listening to the radio all night was a feature of his behaviour when she met her husband (in April 2011). She described him from 2015 as suffering from insomnia, being tired during the day, and subject to migraines.

25. Ms Cartwright said that when the claimant had times of high anxiety, he seemed very distant, was distracted and so took a long time to complete simple tasks. She also described him as a sociable person; she could tell when his anxiety was high because at those times he avoided contact with others.

26. In the absence of any very substantial medical evidence, other contextual evidence which seemed to us to be relevant to our considerations was:

- The claimant's wife's evidence that he had been working incredibly long hours with the respondent; this included working twelve hours per day at times and often weekends.
- Evidence that the claimant's son was born in late 2016 and was significantly unwell for a period. Their second son was born in October 2018.
- The claimant had no time off work with the respondent due to mental health issues (or indeed any health issues) during the period prior to the disciplinary investigation.
- The claimant did not attend his GP with mental health issues prior to the disciplinary investigation.
- The claimant was not prescribed any medication for mental health impairments during the period up to the disciplinary investigation.
- It appears that the claimant's mental health had no effect on his work bar the panic attack incidents. His evidence and that of the respondent was that he was very good with clients and at selling.
- There was evidence of socialising over the period of the claimant's employment by the respondent – he went out with his team, to work Christmas dinners, on visits to Ms Glover's house, and socialised after work conferences. In evidence he put forward to the disciplinary investigation he

said '…I drink at least twice a month with S & W staff, regularly attend sporting events where we are drinking all day…'

27. The claimant experienced a more significant mental health impairment after the disciplinary proceedings commenced.

28. On 19 December 2019, the claimant saw Lucy Hatfull, a community mental health nurse. The problem was described as a 'transient psychotic episode' and a referral was made to the Early Intervention in Psychosis Team. That referral was subsequently declined by the claimant. Ms Hatfull said that the claimant appeared to have had a transient psychotic episode for one week triggered by an intense workload, lack of sleep and stress after the birth of his second child. She said that he had never had a psychotic experience before but had a 'long history of anxiety'. The claimant reported multiple delusions and hallucinations, and accepted that he had 'lost his mind' .

29. Ms Hatfull also reported the claimant was prone to binge drinking and said that he was: 'Very good at fooling people and making them believe that he is fine'.

30. When the claimant was assessed by Ms Stevenson on 23 January 2019, she reported that his paranoid symptoms had subsided as he was able to sleep and he was no longer experiencing hallucinations.

31. The 29 May 2019 GP entry records that the claimant had 'had a breakdown at Christmas' but was now 'in good shape – exercising, reduced alcohol, meditation.'

Facts relevant to the respondent's knowledge of the claimant's impairment

32. The claimant did not declare that he had a disability when he commenced employment.

33. The claimant then had a panic attack in February or March 2015 in a client meeting when Ms Glover was present. She was assessing him at the time and we were provided with her observation notes. Under 'Areas for Improvement', she recorded 'He was a little nervous but this was our first meeting'.

34. The claimant asked to leave the meeting, saying it was to use the toilet. He returned after fifteen minutes and carried on with the meeting.

35. The claimant had a discussion with Ms Glover afterwards, for thirty minutes or so. His evidence to the Tribunal was that he told her that he suffered from panic attacks, about four months apart, and a general sense of anxiety and dread at all times.

36. Ms Glover's evidence was that the claimant did not mention any existing condition. Her impression was that he had been nervous and the impression she had after speaking with him was consistent with that. She says she would have had a plan for dealing with it if there had been reference to a mental health condition. She said that she would have referred the claimant to HR; she had experience of managing another member of staff with mental health issues.

37. On the issue of what was said by the claimant at that time about his mental health, we preferred Ms Glover's evidence, which was consistent with the contemporaneous notes.

38. On 8 January 2016 the claimant had a meeting with clients which Ms Glover did not attend. The claimant left the meeting and left the building. He told a colleague, Sherry, that he had had an asthma attack.

39. The claimant emailed Ms Glover at 16:30 and said:

    'Sorry to have let you and Rohan down. Sherry was lovely and v helpful. I managed to panic within a panic attack and tell her a fib, for which I must apologise. Walked for about a mile and stepped into a pub. I've been there all afternoon. Perhaps this is the point where you put your hand up and say – I'm struggling a bit. I don't know which is more frightening.

    Perhaps I could come an hour early on Sunday? I have a plan.' This was a reference to the fact that the claimant and his wife were invited to Ms Glover's house for lunch that Sunday.

40. Ms Glover replied shortly after telling the claimant he had not let anyone down and offering to pop into the pub to give the claimant directions to her house. The claimant replied that he was probably 'not fit for public consumption' and said he would speak to Ms Glover on the phone.

41. That Sunday, the claimant and his wife had lunch at Ms Glover's house as planned. There were significant differences in the evidence we heard as to what discussion took place about the claimant's condition and indeed the details of the social event. Ms Cartwright said that she discussed the incident with Ms Glover in her kitchen and that Ms Glover said she was worried about the claimant and would keep an eye on him at work. Ms Cartwright said it would have been difficult to have the conversation without referring to panic attacks, but did not have a positive recollection of referring to panic attacks.

42. Ms Glover did not recall any conversation about the claimant's condition or panic attacks on the day and says she would not have discussed the claimant's condition with his wife in those circumstances.

43. We saw an email from the claimant to Ms Glover dated 10 May 2017 which was about a number of issues, including the claimant's remuneration, and included a paragraph about winning clients which contained this passage

'Winning clients is a means to an end. An incredibly stressful means I might add. I don't enjoy this. Every new client equals anxiety, occasionally an attack.'

Incidents involving Mr Bevan / 2016 Christmas party

44. There appears to have been some background of ill feeling between Mr David Bevan, an associate director, and the claimant. Ms Walker gave evidence about an occasion in May 2015 when she says that Mr Bevan was intoxicated and behaved aggressively at a pub, including breaking a window. This incident did not involve the claimant.

45. Mr Turnbull and Ms Walker gave evidence about an incident which took place at a team Christmas party in December 2016. Mr Bevan was intoxicated and made some abusive remarks about and towards the claimant and was aggressive towards the claimant. At some point Mr Bevan threw food in the direction of the claimant and Ms Walker, which struck Ms Walker

46. A few days after the incident, Ms Walker and Mr Turnbull were called into a room with Mr Bevan and Mr Maher and Mr Bevan apologised, although neither Mr Turnbull nor Ms Walker thought the apology was sincere or satisfactory. Neither Mr Turnbull nor Ms Walker reported the matter to HR. Ms Walker said that Mr Maher and Mr Bevan were good friends and played golf together and that Mr Maher would have been protecting Mr Bevan.

47. The claimant also had a discussion about the evening with Mr Bevan, Ms Glover and Mr Maher, during which he said that Mr Maher 'gave him a dressing down' and he did not recollect being told that he could refer the matter to HR.

48. Ms Glover's account was that she was aware that there was an incident which was investigated by Mr Maher. He gathered statements and spoke to everyone involved. She attended a meeting to support the claimant. Ultimately Mr Maher did not get to the bottom of exactly what had happened but everyone stated their case. There was no involvement by HR. None of the HR witnesses we heard from were aware of the incidents at the time and the only evidence we had from the respondent on these matters was Ms Glover's evidence.

The claimant's relationship with Ms Glover

49. We heard evidence from the claimant and his witnesses that Ms Glover bullied others in the department and from the claimant that he spoke to Mr Maher about this. He said that he felt Mr Maher must have spoken to Ms Glover about his allegations because his relationship with her deteriorated after that (this seems to have been some point in early 2018). He said that he confronted Ms Glover about bullying Ms Walker and Mr Turnbull at some point and they exchanged insults. The evidence we heard about what the alleged bullying consisted of

and who exactly was bullied was unclear. It was said to be some junior members of the team (including Ms Walker and Mr Turnbull) and a secretary and it appeared to relate to how Ms Glover spoke to these individuals.

50. Ms Glover said that she initially got on very well with the claimant but that their relationship did deteriorate over time. She said that the claimant was difficult to manage. Although he was very good with clients; his written work was not meeting the required standard; however he was confrontational in response to criticism and he became antagonistic to her and others in the team. She said that there were no discussions with the claimant about her bullying staff and nor did Mr Maher suggest to her that the claimant said that she had bullied staff. She denied bullying staff.

Compliance breach

51. The claimant also recounted a compliance breach which was raised with him by Mr Turnbull at some point, it appears some time in 2017. A colleague was not sending a particular category of advice letter within the mandated deadlines. The claimant raised the issue with Ms Glover and she told him that 'compliance and the board' had been informed. The claimant suggested to the Tribunal that Ms Glover was disgruntled with him because of the raising of compliance mistakes and allegations of bullying and that she had subsequently behaved opportunistically in reporting him to HR in relation to the matters which led to his disciplinary.

52. Ms Glover told the Tribunal that the colleague's compliance issues were errors of timekeeping but not of advice and were not a major issue. They had to be and were reported to the Board. She was not disgruntled with the claimant about this issue.

Discussions with Ms Glover about mental health

53. The claimant alleged in his claim form that Ms Glover said to him some time between December 2017 and 2018 that she 'did not believe in mental health' and it was 'made up by westerners and a western problem'. The claimant said that he was shocked by that and he said that he sent her an email with an article about suicide rates in Sri Lanka, Japan, Thailand and South Korea. We did not see this email and were told the respondent had looked for but not been able to find it.

54. Ms Glover told the Tribunal that she believed that the conversation was one during which she and the claimant were discussing Tibetan Buddhist culture. Ms Glover is a practising Buddhist She and the claimant had discussed Buddhism and she had taken him to visit the temple she attends. She said that

she told the claimant that in the Tibetan Buddhist language there is no word for depression, rather there are constructs around states of mind and how they are navigated through meditation. She said that she would not have said that mental illness only existed in the West as she had personal experience of the effects mental illness can have. She had a friend in Sri Lanka whose husband had committed suicide. She said that she had not received the email described by the claimant.

55. Mr Turnbull's evidence was that the claimant had told him what Ms Glover had said one the same day and had showed him an article he had sent or was planning to send to Ms Glover. Ms Walker said that she also was told by the claimant about the remark by Ms Glover and that she remembers being blind copied into or forwarded an email about suicide rates in the East. Ms Cartwright said that the claimant told her at the time that Ms Glover had made a comment to the effect that people in the East did not suffer from mental health problems and said that he had sent her a link to the article described.

Ms J

56. Ms J was a financial planning assistant and junior member of the department who reported to the claimant The claimant said in his claim form that he had placed her on a Performance Improvement Plan and that Ms J was upset by that. In his evidence he said that Ms J was very bright but had a terrible attitude to work and was not a team player. He said that he had informal discussions with her about her attitude and that he set out a six point improvement plan for her in August 2018.

57. Ms Glover's evidence was that she was not aware that the claimant was raising performance issues with Ms J. She was aware that the claimant had spoken to Ms J in an inappropriate way and she was asked by HR to attend a meeting at which the claimant apologised to Ms J. It was apparent from the evidence we heard that the claimant was raising performance issues with Ms J and that she was also complaining about his behaviour towards her in the run up to the relevant events but that there were no formal performance processes in place. These would have needed the involvement of HR and there was no such involvement.

Events leading to the claimant's dismissal

58. On 5 October 2018, the claimant and other colleagues attended the respondent's annual financial services conference. There was a dinner and an extended evening social event.

59. On 10 October 2018, Ms Glover reported in an email to Amanda Samme, HR director, that she had heard that the claimant had been involved in

inappropriate behaviour after the conference. That behaviour involved Ms J, and also Jessica Lennox, assistant to the office manager. The behaviour was inappropriate conversations and the claimant allegedly following Ms J into the ladies' bathroom. Ms Glover had not herself witnessed any behaviour but had heard about it from Lynda Wilson who was the office manager and also Ms Lennox's aunt. Mr Maher is Ms Wilson's partner.

60. Ms Samme reported the matter to Ms White as Ms Samme felt conflicted as a result of some prior communications with the claimant which were not described to us.

61. Ms White interviewed Ms Glover on 15 October 2018 and Ms Young attended to take notes.

62. Ms Young and Ms White decided that the concerns were serious and decided to conduct an investigation. Ms Young conducted that investigation and updated Ms White as to her progress. We saw notes of Ms Young's investigation meetings.

63. On 18 October 2018, Ms Young interviewed Ms Wilson. Ms Wilson reported that the claimant had had altercations with Mr Bevan in the past. She described the claimant on the evening of 5 October 2018 as having been drunk. Ms Wilson explained what had been reported to her by Ms Lennox about the claimant's behaviour towards Ms Lennox and Ms J.

64. Ms Young interviewed Ms Lennox and Ms J on 19 October 2018.

65. Ms Lennox said that the claimant initiated a conversation with her about a hypothetical scenario where she was approached by a man on the dancefloor. The claimant said that he would want to 'get with' the prettiest girl and described Ms Lennox as a 7 out of 10. When Ms Lennox asked the claimant to explain what he meant by this he stated that she would in his "top three".

66. Ms Lennox said that later in the evening the claimant came over to the table where Ms Lennox was sitting, sat next to her and asked her what would happen if he and she were the last two people on earth and "procreated".

67. Ms J said that the claimant made comments to her about attending sex parties, which he referred to as "the Mop", during his teenage years. She said that the claimant discussed touching "girls' labia" at these parties, commenting that girls may have found the parties to be uncomfortable if it was their first sexual encounter. She said the conversation made her feel uncomfortable and was an uninvited conversation.

68. Ms J said that the claimant asked her why she had spent time talking to David Bevan, saying "he is the devil", making a hissing sound, and making a comment to her along the lines that the claimant helped to pay her mortgage, and Mr Bevan does not, and that she should not speak to Mr Bevan. She felt threatened

by the tone and content of the conversation and felt that the claimant was telling her whom she could and could not speak to.

69. She said that whilst at the bar area, the claimant had repeatedly grabbed her cheeks and said she had "marzipan cheeks". She said that she made it clear that she was not comfortable with this and took his hands off her, although she did not actually say anything.

70. She said that towards the end of the evening the claimant followed her into the ladies' toilets and did not leave when she asked him to do so on two occasions. She said she felt very uncomfortable. Kirsten Rodger from the Glasgow office had entered whilst the claimant was in the bathroom.

71. Ms J was unsure she wanted the matter pursued formally and said that she had felt it best to try and keep the matters informal.

72. On 23 October 2018, Ms Young spoke with Kirsten Rodger on the telephone. Ms Rodger was a senior consultant in the Glasgow office who had been named as someone who had witnessed the claimant in the ladies' bathroom. Ms Rodger confirmed that this had occurred.

73. Ms Young concluded that she needed to meet with the claimant to obtain his version of events and she prepared some questions. She interviewed him on 30 October 2018. In the course of that interview:

- The claimant denied that he had spoken to Ms Lennox about who his top three women would be or told her that she was a seven out of ten;
- The claimant denied he had had a conversation with Ms Lennox about procreating;
- The claimant said that he had had a lot of alcohol and his memory was hazy so he could not say that he had never had the conversations described;
- The claimant denied having spoken to Ms J about attending sex parties in college;
- The claimant said that he had accidentally entered the women's bathroom. He was distracted because he was speaking to a colleague, Len Clarke. Mr Clarke had stopped him and he had turned around immediately.

74. The claimant sent Ms Young an email after the interview in which he said that he remembered saying that in a work rugby team, he would play Ms Lennox at position seven and Ms Pulfer, another colleague, at position ten. This was by way of explanation of the 'seven out of ten' incident.

75. Ms Young said that the claimant seemed composed during the interview and quite relaxed. His answers were mostly quite short.

76. The claimant's evidence was that he entered the initial stages of a panic attack during the interview and became evasive and confused. He said that he was trying to avoid the panic attack by giving as short answers as he could. Ms Young told us that she saw no signs of distress. She told us that she herself had experienced anxiety and panic attacks.

77. On 31 October 2019, Ms Young interviewed Steve O'Donnell, fund administrator, as he had been mentioned by both the claimant and Ms Lennox as a witness to events. Mr O'Donnell said that he witnessed various incidents, including the claimant describing Ms Lennox as a seven out of ten and asking Ms Lennox how, if they were the last man and woman on earth, they would repopulate the earth. He described the claimant as being 'particularly drunk' . The following day Ms J had told him about the claimant following her into the toilets.

78. On 31 October 2018, Ms Young interviewed Len Clarke. Mr Clarke did not recall the claimant going into the ladies' bathroom when he was with the claimant, which he said was early in the evening.

79. On 5 November 2018, Ms Wilson raised with Ms Young a further incident which had come to her attention involving a consultant from the respondent's Salisbury office, Ellie Price. Ms Price had told Ms Wilson that the claimant had upset her at the conference.

80. Ms Young telephoned Ms Price the same day. Ms Price told Ms Young that she had met the claimant for the first time at the conference. After midnight, she had been speaking with him at the bar and he had leaned over and given her his room number or suggested that she should come to his room. She felt she had been propositioned and that it was 'a bit sleazy'. She had felt shaken and vulnerable but also said the conversation was 'something and nothing' and that she wondered if she had been too sensitive.

81. Ms Young raised this issue with the claimant at a further meeting on 6 November 2018. The claimant said that he had talked to Ms Price about coming back to his room for an after party. He said he had had a similar event at the previous conference and he had probably invited Mr Turnbull and Ms Walker also.

82. Ms Young spoke with Ms Price again that same day. Ms Price said there had not been a discussion of an after party but said that 'she could possibly have misconstrued what he said.'

83. Ms Young drafted an investigation report which she sent to Ms Somerset. Most of the report was dated 2 November 2019 but there was an appendix prepared later, covering the incident with Ms Price. Ms Young's view was that

the recollections of the witnesses she interviewed (apart from the claimant) were clear and consistent and she found their accounts credible.

84. Ms Somerset concluded that a disciplinary process should be pursued. Mr Maher was initially selected to hear the disciplinary, based on his seniority. Ms Glover was considered unsuitable because she had been involved in bringing the allegations to the attention of HR.

85. On 7 December 2018, Mr Maher sent the claimant a letter inviting him to a disciplinary hearing on 12 December 2018 and setting out seven allegations described as 'harassment and/or threatening or bullying behaviour'. He enclosed the investigation report and interview notes.

86. The allegations were, in summary:

- Making comments to Ms J about having attended sex parties called 'the Mop' during his teenage years and having touched 'girls' labia', commenting the girls may have found the parties uncomfortable as they were their first sexual encounter;
- Asking Ms J why she spoke to Mr Bevan, saying Mr Bevan was the devil and making a hissing sound, commenting to Ms J that he helped to pay Ms J's mortgage and Mr Bevan did not and that she should not be talking to Mr Bevan;
- Repeatedly grabbing Ms J's cheeks and saying that she had 'marzipan cheeks';
- Following Ms J into the ladies' bathroom and not leaving when Ms J asked him to do so on two occasions;
- Describing Ms Lennox as a seven out of ten and saying she would be in his 'top three';
- Asking Ms Lennox what would happen if they were the last people on earth and procreated;
- Giving Ms Price his room number and/or suggesting she came to his room.

87. The claimant was told he could be accompanied at the disciplinary hearing and that dismissal was a possible outcome.

88. On 10 December 2018, the claimant wrote to Mr Maher asking for a change of chair as Mr Maher was connected with two individuals involved in the investigation. This was a reference to Mr Maher's personal relationship with Ms Wilson, who in turn was Ms Lennox's aunt.

89. On 11 December 2018, Ms White emailed the claimant to say that there would be a change of chair and a change of date. On 12 December 2018, she emailed to say that the disciplinary would be held on 17 December 2018 and the hearing would be chaired by Mr Quayum. Mr Quayum was sufficiently

senior to be considered suitable and was felt to be sufficiently independent from financial services to allay the claimant's concerns.

90. Ms White provided Mr Quayum with relevant paperwork and prepared a script for Mr Quayum. She highlighted areas of conflicting evidence and suggested questions. Mr Quayum had not conducted a disciplinary hearing before and so Ms White provided more detail than she would usually have done.

91. On 14 December 2018, the claimant emailed Ms White to say that he would be represented by a trade union representative from Unite. He also said that he wanted to disclose that he suffered from anxiety which, if severe, manifested itself in panic attacks. He said that he had disclosed this to the respondent 'both verbally and in writing'. He said that he had a range of coping methods and could contain his disorder the vast majority of the time. . He said that he asked only to be given a moment if he appeared to struggle. In the very unlikely event that he suffered a panic attack (which he said had occurred only three times in his life), he said that he would appear as if cold and his cognitive ability would be affected. He asked that he be given time to recover and that 'we do not leave the room. We must carry on and not stop.'

92. Ms White asked HR assistant manager, Jade Mundy, to check the claimant's personnel file to see if there was any record of the claimant suffering from anxiety and panic attacks. Ms Mundy said there was nothing on the file to that effect. Ms White also asked Ms Samme, who confirmed that there was no record of the claimant disclosing these issues. Ms White spoke to Ms Glover, who described the incident when the claimant had appeared nervous shortly after commencing work in 2015.

93. On 17 December 2018 at 3:32 am the claimant emailed Ms White saying he was not feeling very well. He asked that a medical practitioner independently verify his current state of mind. He said that he believed stress and anxiety had impaired his judgment and that he believed he was not currently fit to answer questions. On receipt of this email, Ms White formed the view that the disciplinary hearing should not go ahead. Before she had responded to the email, she received another at 9 am in which the claimant said that he was feeling much better that morning and would like the meeting to go ahead.

94. Ms White responded that the meeting could go ahead if the claimant was sure he was well enough but that, if there was any doubt on his part, the respondent was very happy to defer the meeting and refer the claimant to 'our Company doctor'. She encouraged the claimant to talk it through with his union representative.

95. The claimant replied that he would like the meeting to go ahead so he could clear his name. He then sent through a long statement which he had prepared over the previous weekend.

96. The statement said that two people were seeking to settle scores. Ms J was said to be disgruntled that the claimant was attempting to deal with her poor

performance and to sense that a performance review with HR was imminent. Another individual (which was later clarified as being Mr Bevan) was said to be trying to 'capitalise on events due to a longstanding grudge'.

97. The statement then went in detail through the evidence of the various witnesses, taking issue with various points. There was reference to Mr Bevan's behaviour in the past.

98. There was a very detailed account of the 'seven out of ten' conversation with Ms Lennox in which the claimant said that Ms Lennox asked him to rate her. The claimant said that there was a separate conversation earlier in the evening about what rugby positions he would play various members of the respondent's staff at. The claimant also gave a detailed account of the procreation discussion in which he accepted that he had said that if he and Ms Lennox were the last people on earth they would have to procreate.

99. The claimant also said that there were two occasions when he mistakenly went to enter the ladies' bathroom, one early in the evening when he was with Mr Clarke and another, late in the evening, when he accidentally walked into the bathroom. He says no one else was there until Ms Rodger entered at which stage he realised his mistake, apologised and left.

100. Although the claimant denied the 'sex parties' comments, he asserted that in a conversation with Ms Lennox about his family that evening he told her that he did not miss his old life pre-children although "it's all a bit different from threesomes at uni".

101. In relation to the 'marzipan cheeks' remarks, the claimant said that he went to greet Ms J as she arrived as he did not want her to feel left out. He said that she looked lovely, and that he liked her dress and make up. He said that he motioned to, but did not touch, her face and he said that he liked the colour of her makeup on her cheekbones and that it looked like marzipan.

102. When the claimant arrived to attend the disciplinary meeting, he was met by Ms White and Ms Mundy. He appeared to be agitated and stressed and was at times incoherent. He said that he had not been sleeping and asked if the police were outside and would be waiting for him. When the claimant's union representative arrived, Ms White explained the situation and asked his representative to speak with the claimant. Ms White then told the claimant that she was not comfortable with the meeting going ahead and asked the claimant to see a doctor. She said he should see his GP that day and that the meeting would be reconvened when the claimant was well enough to attend.

103. There was then a series of emails between the claimant and Ms White about his health and whether and when the claimant had visited his GP. It appears that the claimant told Ms Glover that he had been certified fit to work on 18

December 2018 but he subsequently told Ms White in an email dated 19 December 2018 that he had not fully revealed his state of mind to his GP. He said that he had been experiencing intense feelings of paranoia and, over the weekend, delusional thoughts, and that these had reached a peak in the hours before the disciplinary meeting. His aim was to be fully fit for a disciplinary hearing on 7 January 2019; He said that if the respondent could refer him to private medical services, that would be appreciated.

104. Ms White reminded the claimant in her reply on 1 December 2018 that he had the benefit of private medical cover as part of his employment package and that she could consider referring him to the 'Company doctor.

105. On 20 December 2018, the claimant wrote to Ms White to say that he had been seen by a specialist nurse at a crisis centre on 19 December and that he was considered to pose no threat to himself or others. He said he had been referred to an early intervention clinic and expected the clinic to make contact with him the next day

106. The claimant saw his GP on 21 December 2018 and was signed off with stress until 7 January 2018.

107. On 2 January 2019, the claimant wrote to Ms Glover to say that he had a medical assessment the following day but expected to return to work the following Monday. He said that he had accepted an appointment for an operation on his left Achilles tendon on 1 February. Ms Glover wrote to Ms White to say that the claimant had previously told her that this operation would be followed by at least four weeks of immobility and expressed concern that it would be difficult for her team to cope with the claimant being off for that period. The claimant wrote to Ms White in similar terms to his email to Ms Glover, explaining in more detail about his planned operation.

108. On 3 January 2019, the claimant wrote to Ms White saying that his referral that day had been to a specialist unit which dealt some of the symptoms he had experienced. He said the view of the unit was that any treatment they could offer would be ineffective as the event was episodic and he had not experienced any symptoms before or since, other than those which were typical of recovery. He said he had been referred back to a generic mental health centre. He said that he had been told that it would not be uncommon for someone is his position to take several months off work to recover. The claimant said that his view was that prolonging the time before the hearing

was complete would be counter-productive and cause more anxiety. He said that the unit accepted that but recommended the claimant refer himself back to his GP if he was unable to sleep properly for three consecutive nights. He said he was being referred for cognitive behavioural therapy and would be returning to work the following Monday.

109. Ms White accordingly emailed the claimant on 4 January confirming that the disciplinary hearing would be rescheduled for 7 January 2019.

110. We saw detailed notes of that hearing, which was attended by the claimant, Mr Quayum, Ms White and Ms Mundy as note-taker. Although the claimant suggested that the typed notes were not accurate, he did not direct us to any particular material inaccuracy in the notes. He raised the issue of the accuracy of the notes during his subsequent appeal hearing and asked for Ms Mundy's handwritten notes (which were not provided and had apparently been destroyed) but did not respond to an invitation to amend the notes. In those circumstances we accepted the notes as an accurate but not verbatim account of the hearing.

111. There was an initial discussion about the claimant's health and in particular what he had said about his anxiety and panic attacks. Ms White made it clear that the claimant should let them know if he needed to stop the meeting. The claimant said he would prefer to carry on with the meeting with Ms White and Mr Quayum remaining in the room. The claimant said he was happy to attend without his Unite representative.

112. Ms White asked the claimant if the statement he had previously submitted was his full and final response or whether he wished to add anything. The claimant said that he had prepared the statement the weekend before 17 December on the advice of his union representative. Although he had not slept when he had written the statement, he said it was an honest account of what had happened and he was happy to use it.

113. The claimant was asked about differences between his statement and what he had said in his investigation interview with Ms Young, during which he had said his memory was hazy. The claimant said that in the interview with Ms Young, he had a lot going on and he was called to a meeting and asked to remember things without time to prepare. He had been asked questions quickly with no context and so had had a hard time recalling events. The claimant did not say in the disciplinary meeting that he had suffered a panic attack during the investigation meeting.

114. The claimant expanded on his allegation that Ms J was aggrieved with him because he was pursuing a capability process against her and that is why she

had made allegations against him and said that he thought she had manipulated others to complain about him.

115. The claimant said that he was drunk at the point he had a conversation with Ms Price and that he had invited her back to his room after a long conversation about her new role. He had invited others back for an after party.

116. Ms White told the Tribunal that the claimant was fully engaged and eloquent during the meeting. Mr Quayum said that he did not have doubts about the claimant's fitness to represent himself

117. After the meeting, Mr Quayum decide to conduct further investigations in order to put points raised by the claimant directly to some of the witnesses. He spoke to Ms Rodger, Ms Lennox, Mr O'Donnell, Ms Price and Ms Pulfer (another employee who was said to have been present for some of the alleged incidents) and made notes of his conversations. He told us that he wanted to put the claimant's interpretation of events to the witnesses. The witnesses essentially stood by their versions of events. Ms Price confirmed that she felt shaken and vulnerable after her encounter with the claimant, that there had been no mention of other people being invited to the claimant's room and that 'it was clear to her that she had been propositioned by the claimant'. Ms J had left the respondent's employment by this point and was not spoken to by Mr Quayum.

118. Mr Quayum also reread the investigation notes after the hearing.

119. To further investigate the claimant's allegation that Ms J had conspired with others to make allegations against him. Ms White obtained and reviewed Ms J's instant messages from October to December 2018.

120. On 8 January 2018, Ms White sent Mr Quayum Ms J's instant messages to review.

121. So far as relevant these show Ms J referring to events of the evening after the financial services conference, Ms J's desire to leave the claimant's team, that the claimant took Ms J to lunch after the conference and that she was hoping for but did not receive an apology from the claimant. Ms J had given notice at some point during the relevant period and, amongst other remarks in the instant messages, said 'Let's just hope my future boss doesn't follow me into bathrooms'.

122. Mr Quayum concluded that:

- it was likely the claimant had made the remarks about Mr Bevan being the devil;
- It was likely that the marzipan cheeks incident had occurred as described by Ms J. The fact that the claimant had changed his account from a denial to a

detailed and different version of events caused Mr Quayum to doubt his veracity;
- He preferred Ms J's version of the bathroom event which was corroborated by Ms Rodger's account;
- He preferred Ms Lennox's version of the 'seven out of ten' and 'top three' remarks. The claimant had given contradictory accounts – an initial denial, then the email account that the remarks were about rugby positions, then the claim that there were two conversations and that Ms Lennox had asked to be rated;
- He did not accept the claimant's account that the 'procreation' remark was part of some philosophical debate;
- Given other evidence about the claimant's behaviour, he also accepted that the claimant had made the remarks alleged to Ms J about sex parties;
- He concluded that Ms Price had no reason to lie and that the description she gave of the claimant's behaviour was consistent with other behaviour of the claimant that evening. He concluded that the claimant had propositioned Ms Price.

123. Mr Quayum concluded that the allegations amounted to harassment and/or threatening and bullying behaviour. He concluded that the appropriate sanction was dismissal. Bearing in mind that the claimant had recently had a new child and that the previous few months had been stressful for the claimant and his family he decided to dismiss on notice although he considered that summary dismissal would have been justified. Mr Quayum told the Tribunal that if the claimant had shown contrition, he probably would have awarded him a final written warning.

124. On 9 January 2019, Mr Quayum reconvened the meeting to deliver his decision to the claimant. He gave the claimant a dismissal letter drafted by Ms White and amended and approved by Mr Quayum. The letter set out the claimant's right to appeal Mr Quayum's decision.

125. On 15 January 2020, the claimant wrote to Ms Somerset setting out grounds of appeal. In summary, his grounds were that:

- The decision to dismiss him was predetermined;
- The dismissal was substantively and procedurally unfair. There were inconsistencies in existing evidence;
- There were two witnesses he had asked to be interviewed who were not;
- There was a difference in treatment from other employees who had been guilty of bullying, harassment, intimidation and damage to public property. The difference in treatment was evidence of disability discrimination.
- Ms J raised false allegations because he put her on a Performance Improvement Plan;

- There was a failure to make reasonable adjustments –
    - There was no independent medical examination to see if the claimant was fit to participate in the disciplinary process;
    - He was hazy in the original meeting due to anxiety; this was discrimination arising from disability;
- He was not suspended; this was inconsistent with the allegations amounting to gross misconduct;
- The company telling clients he was on garden leave and not returning to company showed the outcome was predetermined.

126. The claimant said that he would present new witness statements and wanted to present questions for existing witnesses. He requested various documents and requested 14 days to prepare his case.

127. On 23 January 2020, Ms Somerset, group head of HR, responded:

- Supplying documents she could see were relevant and asking about the relevance of the other documents requested;
- Asking for further information and evidence about the claimant's alleged disability;
- Saying that the respondent was willing to allow the claimant 14 days to prepare his appeal and requesting full details by 29 January. After that an appeal hearing would be arranged.

128. Ms Somerset was particularly concerned to explore with the claimant the issue of disability. She was aware of the circumstances in which the first disciplinary hearing had been postponed but was also aware that the claimant had not requested any specific further adjustments. Ms Somerset reviewed the claimant's personnel file and found no information about disability and no sickness absence prior to the first disciplinary hearing.

129. On 22 January 2019, the claimant wrote to Ms Somerset saying that he had heard that there were rumours circulating internally about his dismissal, saying that these rumours destroyed the possibility of a fair appeal hearing and asking a pre-agreed statement be made to staff. Ms Somerset concluded that such an email would not be appropriate and would only draw further attention to the issue. She wrote to the claimant saying that any rumours would not affect the appeal process.

130. On 29 January 2019, the claimant wrote explaining why he said particular documents were relevant to his appeal and setting out further detail of his grounds of appeal.

131. Ms Somerset did not consider that all of the documents requested by the claimant were relevant but did provide the claimant with copies of Ms J's instant messages.

132. Also in his letter, the claimant said that he would provide his medical notes which would demonstrate that he experienced a period for 'extreme mental distress, paranoia, anxiety and psychosis' during the disciplinary process.

133. On 1 February 2019, the claimant wrote to Ms Somerset to say that he was having his Achilles tendon surgery that day and would then spend a month recovering in Cardiff with his family. Ms Somerset replied the same day confirming that the appeal hearing would take place when the claimant was back in London.

134. The claimant sent Ms Somerset a further appeal letter on 5 February 2019, The claimant referred again to his disability and said that his disability went to the heart of his appeal. He said that he had been talking out of character because of his disability in his interview with Ms Young. The claimant said that he would read his appeal statement at the hearing. He asked that his appeal be heard by someone independent of the respondent.

135. Ms Somerset had asked Mr Erskine to hear the appeal. Ms Somerset felt he was both sufficiently senior and also sufficiently independent of the incidents and individuals involved to hear the appeal. She concluded that it was not necessary or appropriate to appoint someone outside of the respondent organisation to hear the appeal. She informed the claimant in an email dated 7 February 2019 that Mr Erskine would hear the appeal and that if he considered that the additional documents requested by the claimant were relevant during the hearing, they would be considered. She again asked the claimant to provide medical records he wished to rely on.

136. There was other correspondence between the claimant and Ms Somerset. On 14 February 2019, the claimant asked whether the respondent accepted that he was disabled and said that, if it did not, he would provide the relevant medical evidence. Ms Somerset replied that the respondent did not have evidence which enabled it to determine that the claimant was disabled and said that it would therefore be helpful to see the medical records he had referred to.

137. On 25 February 2019, the claimant wrote to Ms Somerset asking her to comment on the compliance issues discussed at paragraphs 51 and 52 above and enquiring whether he currently held whistle-blower status in the company. Ms Somerset had no knowledge of the issues the claimant had raised and sent him a copy of the whistleblowing policy and referred his email to the respondent's group head of legal. Ms Somerset understood that the points were investigated but she was not informed of the outcome as there was no requirement for HR involvement.

138. On 8 March 2019, the claimant emailed Ms Somerset saying that he had generalised anxiety disorder and would be producing some medical records. He said that the disorder affected his cognitive ability in stressful situations and specifically his memory, and, insofar as Mr Quayum had relied on inconsistencies between his first statement other statements he made, the respondent should have made adjustments. He attached the letter from Ms Glazebrook described above, which referred to the claimant's therapy sessions in January 2016 and said that when the claimant had severe panic attacks in meetings, they would affect his memory. The attacks would always occur in the first few minutes of a meeting 'and never after 10 minutes speaking'. He did not submit any further medical evidence.

139. The claimant also submitted statements from Mr Turnbull and Ms Walker. Ms Walker gave evidence to the effect that she left the financial services conference evening event at 12:30 and did not believe the claimant was inebriated at that time. She had chatted to the claimant from about 9:30 to 11 pm. She also said that she had had a conversation with a colleague, Jenny Quan, on 7 December 2018. Ms Quan had told her that Mr Maher had said that 'young chap' had left due to gross misconduct allegations. In January 2019, Ms Quan had told her that rumours about the claimant were 'spiralling out of control' and that they included rumours of sexual harassment at the Christmas party.

140. Mr Turnbull gave evidence that he spoke to the claimant between about 9 pm and 11 pm after the financial services conference and did not think the claimant was drunk. He said that on 3 December 2018 he had heard a rumour that a member of the financial services department had been subject to an allegation of inappropriate behaviours. He had heard that Mr Maher had said that a 'young chap had recently left the department due to inappropriate behaviours.'

141. On 10 March 2019 the claimant emailed Ms Somerset an audio file titled 'Emma- FS incident' which Ms Somerset said was inaudible. In his email the claimant said that previous acts of misconduct had not been investigated properly or at all and that he had been told he could not report the incident to HR. He said that the audio file was evidence of an incident during which food was thrown and struck Ms Walker.

142. Late on 10 March 2019, the claimant submitted a long 'Statement of Appeal' which Ms Somerset and Mr Erskine reviewed before the hearing. Amongst other things, the statement asserted that the claimant had been in the initial stages of a moderate panic attack during the investigation meeting with Ms Young and his cognitive ability had been impaired. It was unfair for Mr Quayum to rely on what he said during that interview.

143. In relation to the compliance issues, the claimant said that he was told by a colleague that the colleague involved in the compliance issues would have been sacked but was not because he had mental health issues. He said that

he had not been treated in the same way as a colleague (Mr Bevan, not named in the statement) in relation to incidents in May 2015 and the 2016 Christmas party. The claimant complained that he was being treated differently from that colleague. The claimant took issue with the accounts of the other witnesses and pointed to what he said were inconsistencies in their evidence. The claimant said it was unfair that Ms Walker and Mr Turnbull had not been interviewed and said that their evidence showed he was not drunk on the evening of the financial services conference. Mr Quayum should therefore not have concluded that he was 'extremely drunk'. He said that he had not been fit to attend the 7 January 2019 disciplinary hearing and that the respondent should have referred him to 'an Occupational Therapist and/or its own doctor'.

144. The claimant attended the appeal hearing with his trade union representative. He appeared confident and coherent to Ms Somerset although she said that she was careful to assess his fitness. He was told that if he needed a break he should ask for one.

145. The hearing was recorded and we saw a transcript of that recording. Mr Erskine had been provided with all of the documentation which Mr Quayum had seen which included all of the investigation interviews, the claimant's letters of appeal and his additional material including Ms Glazebrook's letter and the statements of Mr Turnbull and Ms Walker.

146. Mr Erskine approached the appeal on the basis that he was not conducting a re-hearing but was considering the grounds of appeal and any new information or evidence which was available.

147. The claimant had not brought a copy of his appeal statement and Ms Somerset printed copies for the claimant and his representative. Each ground of appeal was worked through in the hearing. Mr Erskine said that the claimant was coherent and put his points robustly. He found him evasive on the issue of disability. The claimant said that he had been diagnosed with the disability before the financial services conference but he had not produced any supporting medical records.

148. After the hearing, Mr Erskine reviewed the statement of appeal document . He decided he wanted to double check that the witnesses did not want to change their statements. He telephoned Ms Price, Ms Pulfer, Ms Lennox, Ms Rodger and Mr O'Donnell. He did not speak to Ms J, who of course had left the respondent's employment by this point. He had brief conversations with the witnesses during which they all confirmed they did not wish to change anything in their statements. Ms Rodger had mentioned a colleague in Glasgow, Scott Blanche, in her original interview and Mr Erskine also spoke to Mr Blanche. Mr Blanche said that around 3 – 3:30 am, two women had spoken to him about being uncomfortable to pass the claimant in the corridor on their way to bed as he was 'clearly very drunk and a big lad'. Mr Blanche said that the claimant was 'well gone, incoherent' and that he spoke to him

and told that him that he should go to bed. The claimant was provided with a copy of that evidence on 2 April 2019.

149. Mr Erskine spoke to Mr Quayum and asked whether his decision to dismiss the claimant had been influenced by Ms Glover or Mr Maher. Mr Quayum confirmed he had not spoken to either individual nor been influenced by them in his decision-making.

150. Mr Erskine decided not to speak to Ms Walker or Mr Turnbull as he considered they did not have evidence to give which was relevant to the allegations.

151. Mr Erskine concluded that the appeal should be dismissed. Ms Somerset prepared a draft of an appeal response letter based on a discussion between Mr Erskine and Ms Somerset and Mr Erskine amended and approved the letter, which was sent to the claimant on 29 March 2019.

152. Mr Erskine's conclusions in brief were that:

- He was satisfied that the decision to dismiss was not predetermined. He found no evidence that Mr Quayum had been influenced by Mr Maher, Ms Glover or anyone else;

- The claimant had raised an issue of delay in the disciplinary process. Mr Erskine found that after the investigation was completed, the claimant had been on paternity leave and that it had been appropriate to wait until he returned to work to invite him to a disciplinary hearing. Delays after that had been because of the claimant's ill health;

- The claimant said that his disciplinary should have been suspended because he had raised a grievance, The 'grievance' the claimant was referring to was a conversation he said that he had with Mr Maher in February 2018 saying there was low morale in the team and a reference to a bullying culture in his initial statement. Mr Erskine found that this was not a formal grievance which required investigation prior to the disciplinary process being concluded the information was non-specific and had no obvious relevance to the disciplinary proceedings;

- the claimant had said he was not fit to attend the 7 January 2019 hearing. Mr Erskine found that the claimant had told Ms White that prolonging the time before the hearing was going to be counterproductive, had returned to work and had said he wanted the disciplinary process to go ahead. He had been asked to provide medical evidence on a number of occasions to support his contentions and did not do so. No medical evidence was provided to suggest that claimant was not fit on the day of the disciplinary hearing. There had been nothing to suggest to Ms White or Mr Quayum that the claimant was not fit on 7 January 2019.

- The claimant had complained that he should have been paid in lieu of notice rather than being put on garden leave. Mr Erskine could see no unfairness in that decision nor any relationship with the claimant's alleged disability;
- The claimant suggested that the failure to suspend for an offence leading to his dismissal was a breach of ACAS guidelines. Mr Erskine concluded that there had not been a requirement to suspend in the claimant's case and that it did not create unfairness or show that the outcome was unreasonable. The claimant had not been suspended because he was not at the time considered to be a threat to the business or other employees. The claimant had also suggested that Ms J should have been suspended; Mr Erskine thought it would have been bizarre to suspend the person who made allegations;
- The claimant said that he had been treated differently from the colleague involved in the compliance issue, who had had his disciplinary sanction downgraded because of his mental health condition. Mr Erskine concluded that he had no evidence that the claimant had a disability at the time of the disciplinary process. Ms Somerset had looked at HR records and said that it was not correct that the colleague had had a disciplinary sanction downgraded due to his mental health condition. The circumstances of the compliance issue were not comparable to the claimant's situation;
- The claimant alleged that Ms J made false allegations against him because he had placed her on a performance improvement plan. Mr Erskine reviewed the evidence including the instant messages and found no evidence that the allegations were fabrications nor that they had been raised maliciously / as part of a conspiracy. He found no evidence that Ms Glover had raised allegations against the claimant because of his alleged whistleblowing in relation to the compliance issue. He was influenced by the fact that the allegations were not made by Ms J alone but involved a number of unrelated individuals, including Ms Price and Ms Rodger, who had not met the claimant before. He concluded that it was extremely unlikely that all of these people had colluded to make false statements about the claimant and that it was more likely than not that the events alleged had happened as they described;
- The claimant said there had been a failure to make adjustments for his disability. This had two aspects; he said that the statement he gave to Ms Young should have been disregarded by Mr Quayum and that there should have been adjustments at the disciplinary hearing on 7 January 2019.
    a. Mr Erskine concluded that it was difficult to see what adjustments could have been made by Mr Quayum and Ms White in circumstances where they had no information about the claimant's condition on the day and no knowledge of his perception that he as not fit to proceed with the hearing. The claimant had failed to provide medical evidence and had urged that the hearing go ahead;

b. Ms Somerset asked Mr Quayum whether he would have reached a different decision had he disregarded the initial investigation interview. Mr Quayum said that he would not have done and Mr Erskine agreed with that view. There were inconsistencies throughout the claimant's evidence. One example of that was that the claimant had accepted at the disciplinary hearing that he was drunk but maintained at the appeal hearing that he was not drunk.

- The claimant was concerned that the appeal outcome was predetermined. Mr Erskine said it was not and that he based his conclusions on the evidence which he had considered.

153. Mr Erskine told the Tribunal that he considered any inconsistencies in the statements of other witnesses were negligible compared with inconsistencies in the claimant's own account. He described the claimant as having 'followed a policy of prevarication and obfuscation' during the hearing and said that the fact that he did not believe the claimant's evidence had caused a complete breakdown in trust and confidence.

154. In his letter when discussing whether dismissal was a fair sanction. Mr Erskine said :'The Employee Handbook clearly states that sexual harassment is gross misconduct which may result in summary dismissal.'

Submissions

155. The claimant and Mr Purnell made oral submissions and Mr Purnell provided us with written submissions. We have carefully taken into account all of the parties' submissions but refer to them below only insofar as is necessary to explain our conclusions.

Law

Unfair dismissal

156. The test for unfair dismissal is set out in section 98 of the Employment Rights Act 1996. Under section 98(1), it is for the employer to show the reason (or, if more than one, the principal reason) for the dismissal, and that it is either a reason falling within subsection (2), eg conduct, or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

157. Under s98(4) '… the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) 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 shall be determined in accordance with equity and the substantial merits of the case.'

158. Tribunals must consider the reasonableness of the dismissal in accordance with s 98(4). Tribunals have been given guidance by the EAT in British Home Stores v Burchell [1978] IRLR 379 as to the approach to fairness in misconduct cases. There are three stages:
(1) did the respondent genuinely believe the Claimant was guilty of the alleged misconduct?
(2) did the respondent hold that belief on reasonable grounds?
(3) did the respondent carry out a proper and adequate investigation?

159. Tribunals must bear in mind that whereas the burden of proving the reason for dismissal lies on the respondents, the second and third stages of Burchell are neutral as to burden of proof and the onus is not on the respondent (Boys and Girls Welfare Society v McDonald [1996] IRLR 129, [1997] ICR 693).

160. We have reminded ourselves that the question is whether dismissal was within the band of reasonable responses open to a reasonable employer. It is not for us to substitute our own decision.

161. The range of reasonable responses test (or, to put it another way, the need to apply the objective standards of the reasonable employer) applies as much to the question of whether an investigation into suspected misconduct was reasonable in all the circumstances as it does to other procedural and substantive aspects of the decision to dismiss a person from his or her employment for a conduct reason. The objective standards of the reasonable employer must be applied to all aspects of the question whether an employee was fairly and reasonably dismissed. (Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23, CA)

162. In reaching their decisions, tribunals must also take into account the ACAS Code on Disciplinary and Grievance Procedures. By virtue of section 207 of the Trade Union and Labour Relations (Consolidation) Act 1992, the Code is admissible in evidence and if any provision of the Code appears to the tribunal to be relevant to any question arising in the proceedings, it shall be taken into account in determining that question. A failure by any person to follow a provision of the Code does not however in itself render him liable to any proceedings.

163. We also had regard to the case of Hadjioannou v Coral Casinos Limited [1981] IRLR 352 in which the EAT said that a complaint of unreasonableness based on inconsistency of treatment might arise in the following circumstances:

a) where an employee has been led by an employer to believe that certain conduct will not lead to dismissal
b) where the evidence that other cases have been dealt with more leniently supports a complaint that the reason stated for dismissal by the employer was not the real reason
c) where decisions made by an employer in truly parallel circumstances demonstrate that it was not reasonable for the employer to dismiss.

164. The attitude of an employee to the conduct may be a mitigating or aggravating feature when the employer is determining sanction: Paul v East Surrey District Health Authority [1995] IRLR 305.

Disability

165. A person has a disability if he or she has a mental or physical impairment which is long term and has a substantial adverse effect on his or her ability to carry out normal day to day activities (S.6 and Schedule 1 Equality Act 2010). The term 'normal day to day activities' includes the ability to participate in professional working life.

166. 'Substantial' is defined in S.212 (1) EqA as meaning 'more than minor or trivial'. In considering whether there is a substantial adverse effect on normal day-to-day activities, the focus should be on what the person cannot do and not what he or she can do: Goodwin v Patent Office [1999] ICR 302, EAT.

167. Schedule 1, paragraph 2(1) provides that the effect of an impairment is long-term if it has lasted for at least 12 months, or is likely to last for at least 12 months, or is likely to last for the rest of the person's life. When looking at whether an effect is 'likely' to last for at least 12 months, a tribunal should consider whether 'it could well happen': Boyle v SCA Packaging Ltd (Equality and Human Rights Commission intervening) [2009] ICR 1056, HL.

168. A tribunal may, in a case where there is a dispute about the existence of an impairment, 'start by making findings about whether the Claimant's ability to carry out normal day-to-day activities is adversely affected (on a long-term basis), and consider the question of impairment in the light of those findings': J v DLA Piper UK LLP [2010] ICR 1052. It is good practice for a tribunal to state conclusions separately on the question of impairment and adverse effect, but the tribunal should not proceed to those conclusions in rigid consecutive stages.

169. An impairment must be treated as having a substantial adverse effect if measures are being taken to treat or correct it and but for those measures, it would be likely to have that effect: para 5(1), Schedule 1 Equality Act 2010.

Discrimination arising from disability

170. In a claim under s 15, a tribunal must consider:

- Whether the claimant has been treated unfavourably;
- Whether the unfavourable treatment is because of something arising in consequence of the employee's disability;
- Whether the employer knew, or could reasonably have been expected to know, that the employee or applicant had the disability relied on.

171. There are two aspects to causation:

- Considering what caused the unfavourable treatment. This involves focussing on the reason in the mind of the alleged discriminator;
- Determining whether that reason was something arising in consequence of the claimant's disability. That is an objective question and does not involve consideration of the mental processes of the alleged discriminator: Pnaiser v NHS England and anor 2016 IRLR 170, EAT.

172. An employer has a defence to a claim under s 15 if it can show that the unfavourable treatment was a proportionate means of achieving a legitimate aim.

173. Assessing proportionality involves an objective balancing of the discriminatory effect of the treatment and the reasonable needs of the party responsible for the treatment: Hampson v Department of Education and Science [1989] ICR 179, CA.

174. If there is a link between reasonable adjustments said to be required and the disadvantages or detriments being considered in the context of indirect discrimination and/or discrimination arising from disability, any failure to comply with the reasonable adjustments duty must be considered 'as part of the balancing exercise in considering questions of justification': Dominique v Toll Global Forwarding Ltd EAT 0308/13. The EAT commented that it was difficult to see how a disadvantage which could have been alleviated by a reasonable adjustment could be justified.

Failure to comply with a duty to make reasonable adjustments

175. Under s 20 Equality Act 2010, read with schedule 8, an employer who applies a provision, criterion or practice ('PCP') to a disabled person which puts that disabled person at a substantial disadvantage in comparison with persons who are not disabled, is under a duty to take such steps as are reasonable to avoid that disadvantage. Section 21 provides that a failure to comply with a duty to make reasonable adjustments in respect of a disabled person is discrimination against that disabled person.

176. In considering a reasonable adjustments claim, a tribunal must consider:

- The PCP applied by or on behalf of the employer or the relevant physical feature of the premises occupied by the employer;
- The identity of non-disabled comparators (where appropriate) and
- The nature and extent of the substantial disadvantage suffered by the claimant.

Environment Agency v Rowan [2008] ICR 218, EAT.

177. The concept of a PCP does not apply to every act of unfair treatment of a particular employee. A one-off decision can be a practice, but it is not necessarily one; all three words connote a state of affairs indicating how similar cases are generally treated or how a similar case would be treated if it occurred again: Ishola v Transport for London [2020] EWCA Civ 112.

178. A claimant bears the burden of establishing a prima facie case that the duty to make reasonable adjustments has arisen and that there are facts from which it could reasonably be inferred, in the absence of an explanation, that the duty has been breached. There must be evidence of some apparently reasonable adjustment which could be made, at least in broad terms. In some cases the proposed adjustment may not be identified until after the alleged failure to implement it and this may exceptionally be as late as the tribunal hearing itself: Project Management Institute v Latif [2007] IRLR 579, EAT. There is no specific burden of proof on the claimant to do more than raise the reasonable adjustments that he or she suggests should have been made: Jennings v Barts and the London NHS Trust EAT 0056/12. The burden then passes to the respondent to show that the disadvantage would not have been eliminated or reduced by the proposed adjustment and/or that the adjustment was not a reasonable one.

179. By section 212(1) Equality Act 2010, 'substantial' means 'more than minor or trivial'.

180. When considering what adjustments are reasonable, the focus is on the practical result of the measures that can be taken. The test of what is

reasonable is an objective one: Smith v Churchills Stairlifts plc [2006] ICR 524, CA. The Tribunal is not concerned with the processes by which the employer reached its decision to make or not make particular adjustments nor with the employer's reasoning: Royal Bank of Scotland v Ashton [2011] ICR 632, EAT.

181. Although the Equality Act 2010 does not set out a list of factors to be taken into account when determining whether it is reasonable for an employer to take a particular step, the factors previously set out in the Disability Discrimination Act 1995 are matters to which the Tribunal should have regard:

- The extent to which taking the step would prevent the effect in relation to which the duty was imposed
- The extent to which it was practicable for the employer to take the step
- The financial and other costs that would be incurred by the employer in taking the step and the extent to which it would disrupt any of its activities
- The extent of the employer's financial and other resources
- The availability to the employer of financial or other assistance in respect of taking the step
- The nature of the employer's activities and the size of its undertaking
- Where the step would be taken in relation to a private household, the extent to which taking it would (i) disrupt that household or (ii) disturb any person residing there

This is not an exhaustive list.

Knowledge

182. An employer is not subject to a duty to make reasonable adjustments if it did not know or could not reasonably be expected to know:
- That the employee has a disability; and
- That the employee is likely to be placed at a disadvantage by a PCP: Schedule 8, para 20(1)(b) Equality Act 2010.

183. An employer has a defence to a claim under s 15, if it did not know or could not reasonably have been expected to know of the employee's disability: s 15(2) Equality Act 2010.

184. Lack of knowledge that a disability caused the 'something arising in consequence' of which the employee was subjected to unfavourable treatment

is not a defence to a claim under s 15: City of York Council v Grosset [2018] ICR 1492, CA.

185. An employer must do all it can reasonably be expected to do to find out whether an employee has a disability: EHRC Employment Code, para 5.15.

EQA, section 13: direct discrimination because of disability

186. In a direct discrimination case, where the treatment of which the claimant complains is not overtly because of the protected characteristic, the key question is the "reason why" the decision or action of the respondent was taken. This involves consideration of mental processes of the individual responsible; see for example the decision of the Employment Appeal Tribunal in Amnesty International v Ahmed [2009] IRLR 884 at paragraphs 31 to 37 and the authorities there discussed. The protected characteristic need not be the main reason for the treatment, so long as it is an 'effective cause' O'Neill v Governors of St Thomas More Roman Catholic Voluntarily Aided Upper School and anor [1996] IRLR 372.

187. For an individual to be an actual comparator for the purposes of a direct discrimination claim, there must be no material difference in their circumstances: s 23 Equality Act 2010. Whether the situations of a claimant and his or her comparator are materially different is a question of fact and degree: Hewage v Grampian Health Board [2012] ICR 1054, SC.

188. The exercise under s 13 must be approached in accordance with the burden of proof provisions applying to Equality Act claims. This is found in section 136: "(2) if there are facts from which the Court could decide, in the absence of any other explanation, that person (A) contravened the provision concerned, the Court must hold that the contravention occurred. (3) but subsection (2) does not apply if A shows that A did not contravene the provision."

189. Guidelines were set out by the Court of Appeal in Igen Ltd v Wong [2005] EWCA Civ 142, [2005] IRLR 258 regarding the burden of proof (in the context of cases under the then Sex Discrimination Act 1975). They are as follows:

(1) Pursuant to s.63A of the SDA, it is for the claimant who complains of sex discrimination to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the claimant which is unlawful by virtue of Part II or which by virtue of s.41 or s.42 of the SDA is to be treated as having been committed against the claimant. These are referred to below as 'such facts'.

(2) If the claimant does not prove such facts he or she will fail.

(3) It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of sex discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that 'he or she would not have fitted in'.

(4) In deciding whether the claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.

(5) It is important to note the word 'could' in s.63A(2). At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.

(6) In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts.

(7) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw in accordance with s.74(2)(b) of the SDA from an evasive or equivocal reply to a questionnaire or any other questions that fall within s.74(2) of the SDA.

(8) Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant and if so, take it into account in determining, such facts pursuant to s.56A(10) of the SDA. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.

(9) Where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of sex, then the burden of proof moves to the respondent.

(10) It is then for the respondent to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.

(11) To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since 'no discrimination whatsoever' is compatible with the Burden of Proof Directive.

(12) That requires a tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not a ground for the treatment in question.

(13) Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the tribunal will need to examine

carefully explanations for failure to deal with the questionnaire procedure and/or code of practice.

190. The tribunal can take into account the respondent's explanation for the alleged discrimination in determining whether the claimant has established a prima facie case so as to shift the burden of proof. (Laing v Manchester City Council and others [2006] IRLR 748; Madarassy v Nomura International plc [2007] IRLR 246, CA.)

191. The fact that conduct is unreasonable or unfair is not, in itself, sufficient to trigger the transfer of the burden of proof (*Bahl v Law Society* [2003] IRLR 640) but unexplained unreasonable treatment may be sufficient.

Harassment

192. Under s 26 Equality Act 2010, a person harasses a claimant if he or she engages in unwanted conduct related to a relevant protected characteristic, and the conduct has the purpose or effect of (i) violating the claimant's dignity, or (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. In deciding whether conduct has such an effect, each of the following must be taken into account: (a) the claimant's perception; (b) the other circumstances of the case; and (c) whether it is reasonable for the conduct to have that effect.

193. By virtue of s 212, conduct which amounts to harassment cannot also be direct discrimination under s 13.

194. In Richmond Pharmacology Ltd v Dhaliwal [2012] IRLR 336, EAT, Underhill J gave this guidance in relation to harassment in the context of a race harassment claim:

> 'an employer should not be held liable merely because his conduct has had the effect of producing a proscribed consequence. It should be reasonable that that consequence has occurred. The claimant must have felt, or perceived, her dignity to have been violated or an adverse environment to have been created, but the tribunal is required to consider whether, if the claimant has experienced those feelings or perceptions, it was reasonable for her to do so……..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 discriminatory grounds) it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase.'

195. An 'environment' may be created by a single incident, provided the effects are of sufficient duration: Weeks v Newham College of Further Education EAT 0630/11.

Time limits

196. Under s 123 Equality Act 2010, discrimination complaints should be presented to the Tribunal within three months of the act complained of (subject to the extension of time for Early Conciliation contained in s 140B) or such other period as the tribunal considers just and equitable. The onus is on a claimant to convince the tribunal that it is just and equitable to extend the time limit: Robertson v Bexley Community Centre t/a Leisure Link 2003 IRLR 434, CA.

Conclusions

197. It seemed to us appropriate to consider the complaints of disability discrimination first since findings of disability discrimination might, but would not necessarily, influence our considerations when looking at the different test for unfair dismissal.

Issue: Was the claimant a disabled person in accordance with the Equality Act 2010 ("EQA") at all relevant times (i.e. from the first investigation meeting on 30 October 2018 to his dismissal on 9 April 2019) because of the following condition: general anxiety disorder?

198. In the absence of a clear diagnosis and medical evidence we carefully considered the evidence we had as to the effect on the claimant's day-to-day activities of his mental health, with a view to considering whether he had an impairment. There was no diagnosis of the pleaded condition – 'general (presumably 'generalised') anxiety disorder' but we considered separately and in the round the conditions we had evidence for - the claimant's panic attacks, his anxiety and the episode he suffered from in December 2018.

199. We took the approach of looking at the other elements of the test for disability, as an aid to considering whether the claimant had an impairment or impairments.

Substantial adverse effect on day-to-day activities

200. The claimant's panic attacks clearly had a substantial adverse effect whilst they were occurring, but, given their infrequency (a year apart at some points in the period from 2015), we did not take the view that the Claimant's panic attacks could on their own be regarded as having a substantial adverse effect on his day-to-day activities.

201. We looked at the evidence of substantial adverse effect of anxiety on the cliamant's day-to-day activities and, in particular, on the claimant's ability to socialise and to perform the tasks which he was required to perform at work, which involved having meetings with clients and doing presentations. We did not find it easy to reconcile the claimant's account in his impact statement with the evidence as to what was actually occurring in his life and how he was performing at work and we formed the view that the claimant had overstated, consciously or unconsciously, the effects and in particular their frequency.

202. We concluded that the claimant had not satisfied us that the anxiety had a substantial adverse effect on his day-to-day activities. We bore in mind that the claimant was working very hard over this period and coping with the arrival of two babies. Nonetheless he appears to have socialised at least a reasonable amount and to have performed very effectively at work, particularly in relation to clients and selling. It was unsurprising that he had feelings of anxiety at times and felt less like socialising, but overall we were not able to conclude that these effects went further than a spectrum of normal reactions to a busy and stressful life.

203. The episode in December 2018 clearly had a substantial adverse effect on the claimant's activities whilst it was continuing, given the evidence as to how the claimant presented and his own evidence about his paranoia and hallucinations.

Impairment

204. We considered that the tendency to panic attacks might well amount to an impairment but we did not feel we could categorise the claimant's anxiety as an impairment given the findings we have made as to its effects. The episode in December 2018 was clearly an impairment whilst it lasted.

Long term

205. The claimant's tendency to panic attacks and tendency to feelings of anxiety appear to have been long term in the required sense but do not amount in our view to a disability for the reasons stated. Looking separately at the psychotic / delusional episode in December 2018, that clearly had a substantial adverse effects on the claimant's day-to-day activities whilst it was occurring

but all of the evidence we had suggested that it was limited in time. There was no evidence to suggest that it was likely to be long term in the required sense or likely to recur.

206. We looked at the claimant's mental health issues in the round, given that we found two did not have a substantial adverse effect but were long-term and that the remaining issue did have a substantial adverse effect but was not long-term. In the absence of medical evidence which suggested that substantial adverse effects were likely to recur, we were not able to draw those conditions together in such a way as to find that the claimant was disabled as a result of all three viewed together .

207. Although we did not find that the claimant was disabled, we nonetheless went on, for the sake of completeness, to look at the other elements of the claims which he has made

Issue: Has the respondent shown that it did not know, and could not reasonably have been expected to know, that the claimant had the disability?

208. Had we found that the tendency to panic attacks of itself amounted to a disability, we would also have concluded that Ms Glover knew or ought reasonably to have known of that disability from January 2016 when the claimant went AWOL after a panic attack and sent her an explicit email about the event. From that stage she knew that the claimant had had panic attacks and reasonable further investigation seems likely to have revealed that he had some history of having those attacks, ie that the condition was long term.

Section 15

Issue: Did the following thing arise in consequence of the claimant's disability: a panic attack at an investigation meeting on 30 October 2018?

208. It appeared from the case as presented, that the claimant was also saying that the nature of the evidence he gave in the meeting was 'something arising', in particular that he gave short answers and said that he did not remember matters he subsequently said that he did recall.

209. We were not satisfied that the claimant suffered a panic attack in the investigation meeting nor that his evidence was affected by any such panic attack. There were a number of reasons why we did not accept that:

- Ms Young's account of his behaviour and demeanour in the meeting;

- More significant, however, was the fact that the claimant did not tell anyone at the time or throughout the disciplinary process (until the appeal stage) that he suffered from a panic attack during the investigation meeting. He did not suggest that he had suffered a panic attack in the email he sent to Ms Young the next day. He did not suggest that he had suffered a panic attack in the investigation meeting in the email he sent on 14 December 2018 in which he disclosed that he suffered from panic attacks. He did not say he had a panic attack in the statement he sent for the purposes of the disciplinary hearing on 17 December 2019. At the disciplinary hearing itself, when asked about why what he said in the investigation meeting differed from the more detailed account in his statement, he said that he was asked to remember things without time to prepare and had been asked quick questions with no context, so it was hard to recall events, ie an entirely different reason for the evidence given at the investigation meeting.

210. In circumstances where he was drawing the panic attacks to the respondent's attention at the time, it seemed to us inconceivable that the claimant would not have mentioned having one in the investigation meeting if this was the explanation for his evidence.

211. Further issues set out under this head were:

- Did the respondent treat the claimant unfavourably as follows: relying on evidence obtained at the investigation meeting?
- Did the respondent treat the claimant unfavourably in that way because of the claimant's panic attack?

212. It seemed to us that the case the claimant was pursuing is more accurately encapsulated as:

Did the respondent treat the claimant unfavourably by relying on the evidence which the claimant gave at the investigation meeting and drawing unfavourable inferences from inconsistencies between that evidence and the claimant's other accounts?

213. Clearly Mr Quayum did draw unfavourable inferences from those inconsistencies at the disciplinary hearing, whether or not he would, as he told us, have arrived at the same conclusions over all had he not considered those inconsistencies. Finding inconsistencies and expressing a view in the dismissal letter that the claimant had been inconsistent was itself unfavourable treatment even if Mr Quayum would have concluded that the claimant had been guilty of gross misconduct without having made that finding.

214. Essentially, however the claim was articulated, it failed because we were not persuaded that the claimant had had a panic attack or that the evidence which he gave was influenced by a panic attack. The claimant's different accounts continued to contain new inconsistencies as the process wore on; one example is that his account to the appeal hearing as to his state of inebriation was inconsistent with earlier accounts

Reasonable adjustments

Issue: Did the respondent have the following PCPs:

a. *Failing to delay or postpone the disciplinary investigation*
b. *Failing to postpone the disciplinary procedure so that the Respondent could obtain medical advice on;*
    i. *the Claimant's culpability in relation to the allegations; and*
    ii. *the Claimant's mental capacity to fully engage in the disciplinary process.*

215. As formulated these do not amount to PCPs but one-off decisions in the claimant's own case. Obtaining medical advice would be a potential reasonable adjustment if we were satisfied that there was a relevant PCP rather than part of the PCP itself.

216. If the PCPs are reformulated as a requirement to attend an investigation / disciplinary process, if accused of an offence, in a timely way, we are satisfied that the respondent had a PCP to that effect.

Issue: Did any such PCP put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled at any relevant time, in that the application of the PCPs led to the disciplinary procedure and dismissal?

217. We were not satisfied that the claimant was disadvantaged by a failure to postpone the disciplinary investigation. We were not persuaded that the claimant suffered a panic attack or the beginnings of a panic attack in the investigation meeting. Even if we had been satisfied that the claimant had suffered a panic attack, we had no evidence to suggest that the claimant would have been advantaged by having that meeting delayed.

218. Similarly, there was no evidence that the claimant was not able to fully engage in the disciplinary hearing itself. The claimant was saying that the hearing should go ahead on 7 January 2019 and that his medical advisers had agreed with his position. We could see no substantial disadvantage to the claimant in the respondent not delaying the disciplinary process.

219. We note that at no stage did the claimant suggest to the respondent or to the Tribunal that his behaviour on 5 October 2018 was connected with his mental health conditions so it is difficult to understand how medical advice could possibly have informed the respondent's consideration of the claimant's culpability.

Issue: If so, did the respondent know or could it reasonably have been expected to know the claimant was likely to be placed at any such disadvantage?

220. Even if we had concluded that the claimant had suffered a disadvantage, we would not have concluded that the respondent could reasonably have known of any such disadvantage.

221. The knowledge that Ms Glover had was that the claimant had suffered from panic attacks in some client-facing situations. Ms White had the further information provided in the emails we have outlined above and she made all the efforts she reasonably could to obtain further information from the claimant. Suggestions about obtaining medical evidence came from the respondent and were not responded to by the claimant who instead told the respondent that it was in his interest to go ahead with the hearing and his medical advisers agreed with his view. We could see no evidence that would reasonably have suggested to the respondent that the claimant would be disadvantaged by a failure to delay the disciplinary process, either the initial investigation meeting or subsequent stages.

Issues: If so, were there steps that were not taken that could have been taken by the respondent to avoid any such disadvantage?

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

222. Given our findings on the issues of disability, disadvantage and knowledge, it was unnecessary for us to consider these further issues.

Direct discrimination

223. The treatment complained of is the disciplinary process and dismissal.

Issue : Was that treatment "less favourable treatment", i.e. did the respondent treat the claimant as alleged less favourably than it treated or would have treated others ("comparators") in not materially different circumstances? The

claimant relies on the following comparator: Mr David Bevan and/or hypothetical comparators.

224. We considered the evidence which we had about Mr Bevan, which consisted of the incidents which the claimant, Ms Walker and Mr Turnbull gave evidence about and how these were dealt with by the respondent.

225. We had no evidence from the respondent about these matters apart from the evidence which Ms Glover gave in cross examination.

226. There were clearly some resemblances to the claimant's situation – Mr Bevan was allegedly drunk at work events and behaved aggressively towards others although not apparently in a sexualised way, He was dealt with informally, rather than being investigated formally, and made some sort of apology.

227. The claimant's conduct on the other hand, was investigated formally and that led to a disciplinary process and dismissal.

228. We proceeded on the basis that Mr Bevan was an appropriate comparator and looked at whether there was evidence from which we could reasonably conclude that the claimant's disability (had we found he was disabled), was the reason for the difference in treatment.

Issue: If so, was this because of the claimant's disability?

229. Apart from the difference in treatment, we could not find any evidence which pointed to the claimant's mental health condition (had we found it to be a disability) as a reason for the difference in treatment. Although it would in most circumstances be unreasonable to deal with different employees accused of similar offences in very different ways, the claimant and his witnesses themselves supplied reasons why the treatment was different. These related to Mr Maher's friendly relationship with Mr Bevan. So although it may have been unreasonable not to deal with Mr Bevan's misconduct more formally, there was an explanation for it.

230. Furthermore, there was nothing at all in the evidence which appeared to us to connect that which the respondent was aware of about the claimant's mental health conditions with the decisions to investigate his conduct, to discipline him in relation to that conduct, and ultimately to dismiss him.

231. Had we found that the claimant was disabled, we would not have found that there were facts from which we could reasonably conclude that he was treated less favourably than Mr Bevan or a hypothetical comparator because of that disability.

Harassment related to disability

Issue: Did the respondent engage in conduct as follows:

in April 2018 Daniela Glover saying "mental health issues only exist in the West",

232. We had to reach a conclusion on what had in fact been said by Ms Glover. There was no documentary evidence which supported either Ms Glover's version or the claimant's. To some extent the claimant's account was supported by the contemporaneous complaints he made to Ms Walker, Mr Turnbull and Ms Cartwright.

233. Nonetheless, we concluded that Ms Glover's account was closer to what in fact had been said. We found her evidence on the point credible because her account was consistent with what she described about her beliefs and was consistent with what she told us had been her experiences of mental health issues. We had no reason not to accept her evidence in relation to those beliefs or experiences.

234. We found that the claimant's account was likely to be the interpretation he put on what Ms Glover had said and that it was likely he had reported that interpretation to others as being what she had in fact said. Throughout the disciplinary process, he demonstrated a tendency to have a more detailed and fixed recollection of what had happened historically as time went on and then to staunchly defend his current version of events. He also had a tendency at times to present the version of events which at a particular moment he felt would be most helpful or to edit facts which would be unhelpful. His differing accounts of his level of inebriation on 5 October 2018 were a salient example of this tendency. The sending of an email about suicide rates in the East was an explicable response by the claimant to either account of the conversation.

235. For all of these reasons, we preferred Ms Glover's account of this conversation.

236. We considered whether the remarks we found Ms Glover made satisfied the test for harassment.

Issue: If so was that conduct unwanted?

237. We accepted that the claimant took offence at what Ms Glover said, given the interpretation he put on it. In that sense, the conduct was unwanted by him.

Issue: If so, did it relate to the protected characteristic of disability

238. The comments made by Ms Glover, insofar as they related to depression, which is an impairment which may be but is not always a disability, seemed to us to 'relate to disability' within the meaning of s 26.

Issue: Did the conduct have the purpose or (taking into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect) the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

239. We were satisfied that Ms Glover did not have a prohibited purpose. She was chatting about religion and philosophy with the claimant in the context of what was then a friendly work relationship. We find that, although the claimant may have felt that the remarks violated his dignity or created a harassing environment for him, it was not reasonable for the remarks to have that effect. They were innocuous remarks made within the context of a friendly relationship which were of general application and not directed at the claimant or his personal impairments or conditions.

Issues: Did the respondent engage in conduct as follows:

Disciplinary Investigation conducted by Nicola Young, 30th October 2019,

Disciplinary Meeting conducted by Suzanne White, 7th January 2019,

Outcome Meeting conducted by Taz Quayum, 9th January 2019,

Appeal Meeting, John Erskine, 11th March 2019,

Upholding the decision and for a different reason to the one originally dismissed for, 'Appeal Decision', John Erskine, 2nd April 2019

If so was that conduct unwanted?

If so, did it relate to the protected characteristic of disability

Did the conduct have the purpose or (taking into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect) the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

240. Clearly all of these events bar the last occurred. Mr Erskine's letter did not change the nature of the charges; it simply used the characterisation 'sexual harassment' as a label for those charges at one point. The claimant did not point to particular features of the disciplinary processes which he said were

harassment related to disability and so we had to form a view as to whether those processes in any particular met the statutory test.

241. Clearly the disciplinary proceedings were unwanted by the claimant. Had we found the claimant's mental health conditions to be a disability, we would not have found that the instigation or pursuit of disciplinary proceedings was 'related to' that disability. Any features of the proceedings which did relate to the claimant's mental health condition were in our view benign and intended to assist the claimant – for example postponement of the original disciplinary hearing and offers of breaks.

242. We could see nothing about the proceedings which had either the prohibited purpose or the prohibited effect. Disciplinary proceedings are inevitably received by employees as unpleasant events, but if conducted properly and in accordance with ACAS guidance, as this process was, they are unlikely to have an effect which meets the s 26 test.

Time points

Issue: Were all of the claimant's discrimination complaints presented within the time limits set out in sections 123(1)(a) & (b) of the Equality Act 2010 ("EQA")? Dealing with this issue may involve consideration of subsidiary issues including: whether there was an act and/or conduct extending over a period; whether time should be extended on a "just and equitable" basis; when the treatment complained about occurred; etc.

243. Given our findings on points of substance, we did not have to consider the time points.

Unfair dismissal

Issue: What was the principal reason for dismissal and was it a potentially fair one in accordance with sections 98(1) and (2) of the Employment Rights Act 1996 ("ERA")? The respondent asserts that it was a reason relating to the claimant's conduct.

244. Although the claimant offered something of a smorgasbord of other reasons for his dismissal – alleged resentment by Ms Glover either over alleged bullying allegations or about the raising of compliance issues, a campaign by Ms J to make allegations because of performance proceedings, some kind of campaign by Mr Bevan / Mr Maher – we concluded that we were satisfied both that:

    - the reason for dismissing him in the minds of the decision-makers, Mr Quayum and subsequently Mr Erskine, was the claimant's conduct on 5 October 2018;

- there was no evidence on the basis of which we could properly conclude that the evidence of others which led to those decisions was materially influenced by ulterior motives.

Issue: If so, was the dismissal fair or unfair in accordance with ERA section 98(4), and, in particular, did the respondent in all respects act within the so-called 'band of reasonable responses'? The tribunal will consider:

a) Whether the respondent had a genuine belief the claimant was guilty of the misconduct alleged;
b) Whether the respondent had conducted such investigation as was reasonable;
c) Whether the respondent had reasonable grounds for its belief;
d) Whether the procedure followed was fair;
e) Whether dismissal was a fair sanction.

245. We considered the Burchell limbs in the following order:

Was the investigation reasonable?

246. We considered that Ms Young's initial investigation was a reasonable one. She interviewed seven witnesses in addition to the claimant, one of whom (Mr Clarke) was put forward by the claimant as being a source of exculpatory evidence. To a large extent those witnesses corroborated one another's accounts of particular incidents.

247. It was reasonable for Ms Young to conclude that the matter should be referred for a disciplinary hearing.

248. Mr Quayum considered all of this material together with the claimant's statement and his representations at the disciplinary hearing. We considered that the further investigations he made were reasonable. He spoke again to the witnesses who were still employed by the respondent. We found it was within the range of reasonable responses for him not to seek to interview Ms J, who had left the respondent's employment, given the large number of other witnesses to the incidents, some of whom corroborated incidents Ms J related. Had Ms J been the only or even the primary witness, we can conceive of circumstances in which a reasonable investigation would have involved contacting her at the disciplinary stage, but those were not the facts of this case.

249. The claimant was critical of Mr Quayum's failure to interview Ms Walker and Mr Turnbull. We found that it was also reasonable for Mr Quayum not to have sought to interview Mr Turnbull or Ms Walker at this stage since neither

the claimant nor other witnesses had suggested that they would have material evidence to give.

250. We concluded that the investigation into the claimant's suggestion that Ms J was making false allegations because he was pursuing a performance process with her was also reasonable. Her instant messages for the relevant period were obtained and viewed.

251. It seemed to us that it was reasonable not to conduct further investigations into whether Mr Bevan was orchestrating the allegations in circumstances where the claimant had not produced any evidence to show that he was and the circumstances did not suggest that he had any such involvement.

Did the respondent have reasonable grounds for its belief?

252. Mr Quayum had on the one hand a body of witnesses giving a consistent account of the claimant's behaviour over the course of the evening. Although the claimant sought to raise what he said were material inconsistencies in those accounts during the hearing, we did not find that any of the matters he raised and put to witnesses were material and we were unable to criticise Mr Quayum's conclusion that the witnesses were materially consistent and presented a picture of consistently inappropriate behaviour by the claimant. In a large number of cases, the claimant was not disputing what had been said but was taking issue with detail, context and interpretation.

253. Mr Quayum had on the other hand, the claimant's varying accounts of what had happened and what he remembered having happened. An example he highlighted was the three differing accounts the claimant gave of the allegation by Ms Lennox about being rated seven out of ten by the claimant. We considered that a reasonable manager in Mr Quayum's position could take the view that the claimant's account was not credible.

254. Mr Quayum also bore in mind that a number of the witnesses had no connection with the claimant and could not have had any axe to grind with him. He reasonably concluded that the allegations, which in many ways were of a similar character to one another, had not been fabricated.

255. It was reasonable for Mr Quayum to conclude that Ms J's account had not been fabricated, given the corroboration of other witnesses, the fact that it was not Ms J who had instigated the investigation (and in fact she had been hesitant about being involved in it) and the content of her instant messages.

Did the respondent have a genuine belief?

256. There was no suggestion that Mr Quayum himself had some axe to grind or any ulterior motive and we found no evidence to support the view that his reasonable belief was not also his genuine belief.

257. There was some third hand evidence that Mr Maher was suggesting the claimant was going to be dismissed before a decision to that effect was made. Even if we took that evidence at its highest, in the absence of any evidence suggesting that Mr Quayum or Mr Erskine had been improperly influenced or that their decisions had been predetermined, we did not make findings to that effect. We noted that Ms Glover was anticipating the claimant's return to work at some point at the beginning of January 2019 which appeared to be inconsistent with a suggestion that the claimant's dismissal had been decided upon by early December 2018.The fact that there may have been rumours circulating about the claimant did not seem to us to cast light on the mental processes of the senior managers who made the decisions in relation to his dismissal.

Issue: was the procedure followed fair?

258. We considered the procedure which we have set out in our findings of fact was within the band of reasonable responses. There were full opportunities for the claimant to state his case and to be represented, he was provided with the evidence which had been gathered and the delays which occurred were explicable and appropriate.

259. We concluded that Mr Erskine reasonably took the view that there was no extant grievance which required to be considered before the disciplinary process.

260. We considered that the fact that the respondent did not suspend the claimant did not create procedural unfairness nor did it suggest that the conduct alleged was not or could not properly have been considered to be gross misconduct. Suspension, as has been emphasised in a number of authorities, should not be a kneejerk response to misconduct allegations.

The appeal as part of the disciplinary process

261. We reminded ourselves that we should look at the appeal as part of the disciplinary process in the round. Was there anything about the appeal which rendered the otherwise fair dismissal unfair?

262. We have set out above the process followed by Mr Erskine and the further investigations made.

263. The points raised by the claimant as to the appeal in his claim form did not seem to us to support a case that the appeal rendered the dismissal unfair:

- Not providing documents relevant to the claimant's defence;

  The claimant did not draw to our attention any documents which he had not received which were relevant to his defence and which we considered the respondent should in fairness have provided to him.

- Not following up with Mr Turnbull and Ms Walker

  The claimant produced statements but did not suggest that either Ms Walker or Mr Turnbull should be interviewed. Mr Erskine reasonably took the view that there was no need to speak to either. Both went to bed much earlier than the claimant and were not with him during significant parts of the evening; they gave evidence about earlier parts of the evening and their views on how intoxicated the claimant was at that point. As Mr Erskine said to us, it was perfectly possible for their statements to be true and the statements of other witnesses to be true.

- Not investigating Ms Glover's conduct – the claimant's allegation she opportunistically reported allegations

  It was reasonable for Mr Erskine to conclude that there was no need to investigate Ms Glover when Ms Glover was reporting allegations made by others which were found not to have been fabricated.

- Upholding the appeal on a different basis from the original charge – 'sexual harassment' rather than 'harassment and/or threatening or bullying behaviour. *As recorded above, Mr Erskine did characterise the claimant's conduct as 'sexual harassment' at one point. It seemed to us that this was a fair characterisation of at least some of the incidents and did not alter the nature of the charges*

Issue: was dismissal a fair sanction?

264. We considered it was within the band of reasonable responses to dismiss the claimant for what was found to be a sequence of inappropriate behaviours, some of them with sexual content and much of the behaviour directed towards more junior female employees. It was serious conduct on any view. Mr Quayum was entitled to take into account the fact that the claimant had not shown any contrition but instead had denied wrongdoing and made allegations against a number of other employees. In those circumstances, it is difficult to see how the respondent could have any confidence that there would be no recurrence of that sort of misconduct.

Parity of treatment

265. We gave careful consideration as to whether the difference in treatment of Mr Bevan's alleged drunken misbehaviour gave rise to unfairness. We were unable to find sufficient similarity between the matters the claimant was

dismissed for and the compliance issue discussed above for any argument based on parity of treatment to arise. We considered the Hadjioannou categories in relation to the Mr Bevan incidents:

False sense of security

266. It was no part of the claimant's case that the handling of the Mr Bevan incidents led him to believe that the respondent would overlook drunken misbehaviour generally. Even if he had thought that, there was nothing about the incidents involving Mr Bevan which would have induced a reasonable employee to believe that drunken misbehaviour with sexual content would be condoned by the respondent.

Not real reason for the dismissal

267. We did not derive from the evidence we heard about Mr Bevan a conclusion that the claimant's conduct was not the real reason for his dismissal. The more natural inference from the evidence we heard was that there may have been insufficient investigation of Mr Bevan's conduct in the past for reasons Ms Walker thought were to do with Mr Bevan's friendship with Mr Maher. We did not in any event have evidence which, taken together with evidence about the Mr Bevan incidents, led us to conclude that misconduct was not the real reason for the claimant's dismissal.

Not fair to dismiss for that reason

268. It may be that Mr Bevan's conduct should have been more rigorously investigated or dealt with by the respondent. We are conscious that there was no investigation and that we did not have Mr Bevan's own account of events . However, we cannot derive from the fact that Mr Bevan may have been dealt with with inappropriate leniency a conclusion that the claimant's otherwise fair dismissal was unfair.

Conclusion

269. For the above reasons, the claimant's claims are dismissed.

Employment Judge Joffe
London Central Region
11th March 2021

[Originally promulgated on 1 June 2020 without anonymisation]

Sent to the parties on:
11/03/2021

For the Tribunals Office