RM

EMPLOYMENT TRIBUNALS

Claimant:	**Mr E. Mismaque**
Respondent:	**Sunrise Brokers Ltd**
Heard at:	**East London Hearing Centre (by CVP)**
On:	**25-28 August, 1-4 September, 26 October 2020, and 2, 3 and 9 November 2020 (in chambers)**
Before:	**Employment Judge Massarella**
Members	**Miss M. Daniels** **Mr L. Bowman**

Representation

Claimant:	Mr N. Roberts (Counsel)
Respondent:	Mr T. Brown (Counsel)

RESERVED JUDGMENT

The judgment of the Tribunal is that: -

1. **the Claimant was unfairly dismissed;**

2. **he was a disabled person within the meaning of the Equality Act 2010 ('EqA') from October 2018 onwards;**

3. **his claim of discrimination because of something arising in consequence of disability (s.15 EqA) succeeds in relation to Issue 11(i) (failing to pay the Claimant's bonuses), Issue 11(l) (dismissal), and Issue 11(m) (failing to uphold the appeal);**

4. **his claims of unauthorised deduction from wages, direct religious discrimination, and indirect disability discrimination are dismissed on withdrawal;**

5. **all other claims of disability-arising discrimination, direct disability discrimination, failure to make reasonable adjustments, and harassment related to disability fail, either because the Tribunal lacks jurisdiction in respect of them, or because they are not well-founded.**

REASONS

This has been a remote hearing, which has not been objected to by the parties. The form of remote hearing was V: video (CVP). A face to face hearing was not held because it was not practicable.

Procedural history

1. By a claim form presented on 3 May 2019, after an ACAS early conciliation period between 5 and 18 April 2019, the Claimant complained: of disability discrimination, religious discrimination, unauthorised deduction from wages, and unfair dismissal. The disability relied on is anxiety and depression.

2. The case was listed for an eight-day hearing in person. Because of the Covid-19 pandemic, it was conducted by CVP. It was agreed at the beginning of the hearing that eight days would be sufficient for the Tribunal to read into the case, and to hear evidence and submissions on liability only.

3. Unfortunately, one of the Respondent's witnesses, Mr Edward Fennessy, became ill and was unable to complete his evidence. By consent, the hearing was adjourned to 26 October 2020, to hear the rest of Mr Fennessy's evidence and closing submissions. The circumstances of that adjournment, and the Tribunal's orders relating to it (which included a privacy order under rule 50) were set out in a separate order, sent to the parties on 26 September 2020.

4. The Tribunal deliberated, and reached its decision, on 2, 3 and 9 November 2020. The Judge apologises to the parties for the delay in sending out this judgment. This has been caused by pressure on judicial resources, and the competing demands of other cases; it also reflects the volume of evidence in the case, and the complexity of the issues.

The hearing

5. The Tribunal had an agreed bundle, running to some 1600 pages; a bundle of specific disclosure of 315 pages; a 60-page bundle of translations documents originally in French; and an agreed cast list and chronology. The Respondent lodged supplementary witness statements on the evening before trial; Mr Brown (Counsel for the Respondent) explained that these addressed matters arising out of the Claimant's witness statement.

6. The parties worked form an agreed list of issues. At the beginning of the case, Mr Roberts (Counsel for the Claimant) withdrew the claim for unauthorised deductions from wages. Without objection from Mr Brown, he also redrew issue 4(n). Shortly before the last day of the hearing, the claims of direct religious discrimination and indirect disability discrimination were withdrawn in their entirety, as were individual allegations under the remaining claims of disability discrimination. The list of issues for determination in its final state is included as an appendix to this judgment. For transparency's sake, the withdrawn claims are retained, but struck through; the redrawn version of issue 4(n) is underlined.

7. Neither disability, nor knowledge of disability/disadvantage, were conceded by the Respondent.

8. We heard evidence from the Claimant, Mr Erwan Mismaque. For the Respondent we heard from: Mr Edward Fennessy (Head of the Delta One Desk); Mr Edward Lees (former Head of Equity Brokers); Mr Robert Finegold (former co-CEO); Mr Beau Britton (EuroStoxx Broker); Ms Jacquie Daly (HR Consultant (Sunrise)); Ms Kate Halliday (former Group HR Business Partner); Ms Hayley Nicolaou (Group Head of HR, UK); Mr Nick Perks (Co-head, Credit Derivatives); Ms Alexandra Kloss (Head of IRS IDB Sales (BGC)); Mr James Sandler (Business Manager); and Mr Tim Sparkes (Business Manager).

9. Both Counsel provided extensive, and helpful, written submissions, which we read and considered; they are a matter of record, and we will not attempt to summarise them in what is already a long judgment. Counsel supplemented them with brief oral submissions, in response to each other's documents. The Tribunal is grateful to them both for their assistance throughout the hearing, and for their focused and incisive advocacy.

Findings of fact

<u>The Respondent</u>

10. The Respondent is an interdealer broker and global specialist in derivatives, covering equities, commodities and fixed income products. Interdealer brokers operate in the over-the-counter markets, providing potential buyers and sellers with the necessary information they need to execute trades; they work to find the best available price in the market for a trade, and earn commission from the execution of the trade.

11. The Respondent was acquired by BGC Partners in December 2016. Although the number of employees within the Respondent company itself was not high, its turnover and assets were substantial: the Sunrise company's accounts for 2017/18 showed profits of around $30m, and assets of around $47m; the BGC accounts for the same year showed revenues of $2b, and assets of $3.5b.

12. The Claimant commenced employment on 15 August 2012. At the material time, he was a broker on the Respondent's Delta One desk. He specialised in trading Equity Derivatives. The Claimant is French and speaks perfect English; his role included covering French-speaking clients.

13. The Claimant reported to Mr Edward Fennessy, who in turn was managed by Mr Edward Lees. The Chief Executive Officer was Mr Robert Finegold. There was a dispute as to whether Mr Fennessy was the Claimant's line manager, or merely a team leader. Whatever his title, we were satisfied that Mr Fennessy was responsible for managing the Claimant on a day-to-day basis; others in the organisation, including Ms Daly, went to Mr Fennessy with any concerns about the Claimant. Ms Daly is an HR consultant, who provided services to the Respondent one day a week from their offices; she also worked for other businesses.

The Respondent's policies

14. The Respondent had a sickness absence policy. Among other things, it provided: that the employee must notify his manager of his absence no later than 30 minutes after his usual start time; the Respondent would contact the employee from time to time during the absence; self-certification was permissible for three days, but a GP certificate was required to be sent to the HR department for any longer period, or for absence immediately before or after a period of annual leave; unauthorised absence, or absence not notified in accordance with the reporting procedure, would be dealt with by disciplinary action; the employee would not be paid during such absence.

15. These policies were not consistently adhered to by either party. For example, when the Claimant had a period of five days' absence in March 2018, he was not asked to provide a sickness certificate, by Mr Fennessy or by HR, nor did he do so; no action was taken. Mr Fennessy described his approach to managing absence as 'laid back'. In an email Ms Daly sent to Mr Sandler in March 2019 (i.e. after the Claimant's dismissal), Ms Daly observed that 'we […] need to start recording the reasons why people are off sick'. Mr Fennessy characterised the entire management process as 'generally very informal'.

16. The Respondent did not have a dedicated occupational health service. Ms Daly's evidence was that they used a private GP or specialist counselling, as appropriate. BCG did have an occupational health department but (to the Tribunal's surprise) Ms Daly's evidence was that she was not aware of it at the time. She was aware that BGC had an employee assistance scheme, whose services could be used when employees of the Respondent had welfare issues.

17. The Respondent's disciplinary procedure was a fairly standard one. Among other things, it provided as follows:

> 'Establishing the Facts
>
> Where a disciplinary issue has been identified, depending on the circumstances, the facts of the case may need to be established through an investigation. The purpose of the investigation will be to establish a fair and balanced view of the facts relating to any disciplinary allegations against you before deciding whether to proceed with a disciplinary hearing.'

and:

> 'A hearing may be adjourned if it is necessary to carry out any further investigation in light of any points that are discussed at the hearing. You will be given a reasonable opportunity to consider any new information obtained before the hearing is reconvened.'

18. Overall, we find that the culture within the Respondent organisation was an exceptionally informal one, and HR had little involvement in day-to-day matters. Most issues were dealt with verbally; notes of meetings were rarely taken and, when they were, they were not necessarily kept.

19. There was no formal policy on sabbaticals.

The Claimant's comparator in relation to the sabbatical

20. Mr Dan Lacey was also a broker. He was granted a sabbatical in 2016 for three months. His reasons for wanting a sabbatical were not health-related; the only evidence before us was that they related to 'significant personal issues' (paragraph 5 of Mr Sparkes' statement). A written agreement covering the sabbatical was made on 14 July 2016, before the sabbatical began: it included start and end dates; it provided that Mr Lacey would be paid any standard or super bonus which had already accrued; the terms did not include a requirement to agree an extension to his contract. Mr Finegold's evidence was that, whether there was an element of commercial bartering in agreeing the terms of a sabbatical depended on the reason for the request.

Historical behaviour by the Claimant

21. The Respondent contends that the Claimant had a history of unprofessional behaviour, in particular lateness and rudeness to colleagues. It was the Respondent's case that the Claimant's behaviour in 2018, which he says was consistent with the fact that he was suffering from anxiety and depression, predated that period, and was unrelated to any mental health issues.

22. This was not a conventionally disciplined workplace. We find that lateness was tolerated, provided it did not impact negatively on performance. For example, it was accepted that a late night of client entertaining would excuse a late start the following morning. A certain amount of hot-tempered behaviour, and what some might call 'banter' in an overwhelmingly male team, was also regarded as par for the course. That is apparent from the way some of the Claimant's colleagues treated him on his return to work in November 2018, without any action being taken against them. We find that the culture within the Respondent was such that poor behaviour was tolerated, provided the individual was successful.

23. Before 2018, there was some evidence of lateness on the Claimant's part, but not chronic or persistent (fewer than ten incidents over a four-year period). On one occasion the Claimant told Mr Fennessy that he was attending a family event over Christmas, and so was not available for work, but in fact went to South America on holiday. Mr Fennessy referred to another incident, when the Claimant was said to have called a colleague, Mr Brodie, a Nazi. We are not satisfied that this occurred: we heard no direct evidence about it; Mr Fennessy did not witness it; and Mr Brodie was not called. There was no evidence that any of the Claimant's behaviour was regarded as sufficiently unacceptable to warrant disciplinary action, whether formal or informal.

24. On the other hand, there is evidence that the Claimant was highly-regarded by management. In a text exchange from December 2017 between Mr Lees and Mr Snell, he was described as 'the smartest in that desk'. Mr Fennessy agreed that the Claimant was a talented broker, describing him as 'a star'.

The Claimant's bitcoin trading

25. The Claimant traded heavily, and personally, in bitcoin. The Claimant's evidence in relation to this was evasive. He claimed not to be able to recall the high and low points of his investment, which we found implausible, given his

financial acumen. We find that, in early 2018, he made a substantial paper loss.

The Claimant's deterioration in 2018

26. The Claimant's behaviour deteriorated markedly in early 2018. His timekeeping became consistently poor, and he lacked focus at work. This did not go unnoticed: on 31 January 2018, Mr Fennessy sent him home, the reasons recorded were that he was 'late every day', and he was spending too much time on personal trading.

27. In January 2018, Mr Fennessy commented to the Claimant that his face was thinner; the Claimant told him that he was feeling low, and was struggling to eat and sleep. Mr Fennessy disputed that the Claimant mentioned loss of appetite; we are satisfied that he did; Mr Fennessy is recorded as saying during the Claimant's appeal against dismissal that the Claimant had 'mentioned a loss of appetite'. There is a less clear reference in a note of Dr Sturgeon, dated 28 March 2018 ('Liked eating. Lost weight recently'). The use of the past tense is consistent with loss of appetite, although in a subsequent letter Dr Sturgeon wrote 'his appetite is unaffected'. However, because loss of appetite was later recorded by the Claimant's French therapist in a later note of 10 April 2018, we are satisfied that the preponderance of the evidence suggests that his appetite was affected, and that he lost weight.

28. Mr Fennessy accepted that the Claimant mentioned having serious problems sleeping. Together with other Respondent witnesses, Mr Fennessy told the Tribunal that he put this down to the Claimant staying up late trading bitcoin. We reject that evidence: there is no evidence that this was his view at the time. We find that the most reliable evidence is that of the Claimant's psychiatrist, who recorded in a letter dated 6 April 2018, that the Claimant 'has tried to go to bed earlier and is without initial insomnia but wakes about 4 a.m. and worried.'

29. The Claimant's absences from work increased markedly from the beginning of 2018 onwards: two days in January, one of which related to a motorcycle accident; five in February, two of which were compassionate leave for his grandmother's funeral, three for anxiety/depression; five in March, all for anxiety/depression. We accept Mr Brown's submission that, in absolute terms, this level of absence was not exceptional. In relative terms, however, it was: it prompted Ms Daly to observe that the Claimant had the highest sickness absence in the business.

30. By February 2018, the Claimant's behaviour was clearly ringing alarm bells. Mr Fennessy began to notify Ms Daly when he was absent. In an email of 16 February 2018, he noted that the Claimant was 'sick' but gave no further detail. The very fact that Mr Fennessy started to involve Ms Daly was itself an indicator of his concern. On 26 February 2018, Ms Daly emailed the Claimant, checking the reason for some of his recent absences, and giving her condolences for the death of his grandmother. She asked him whether she could help. The Claimant asked for a chat, and they took a meeting room for a discussion, the content of which Ms Daly recorded in an email of 6 March 2018 to Mr Fennessy and Mr Sandler:

> 'I talked to Erwan last week. I do think he may be depressed. I've encouraged him to go to his GP, and we've also talked about things he can do to help lift his general mood. One of the biggest issues, common in depression, is that he isn't sleep[ing], so that's affecting everything else, hence why he is withdrawn. I do think it's genuine. He was very open and he is struggling with general depressive symptoms. I will support him over the coming weeks and check in weekly on him. I did say that if he's excessive[ly] tired he should take a day sick and stay in bed. So it looks like he did that.'

31. Although Ms Daly sought to distance herself from the obvious meaning of this email, she eventually accepted that she had formed the view that the Claimant was depressed. She continued to deny that she told him this. The Tribunal found it implausible that she would encourage the Claimant to go to his GP, without saying why. All the evidence suggests that they had an open and frank discussion, indeed that Ms Daly was (at that stage, at least) sympathetic to, and supportive of, the Claimant.

32. At 07:05 on 28 February 2018, the Claimant messaged Mr Fennessy to say:

> 'Sorry man didn't find sleep again exhausted. Won't come in today.'

33. Mr Fennessy replied: 'ok fella'. We note that he did not ask for further explanation, and simply informed Ms Daly that the Claimant was 'ill today', again without further explanation. We find that that was because he understood, in part from Ms Daly's email, that the Claimant was suffering with depression.

34. The Claimant saw his GP on 6 March 2018, who recorded that he was suffering from 'insomnia and stress'. He was prescribed Zopliclone (medication for insomnia).

<u>First discussions about a possible sabbatical</u>

35. Also on 6 March 2018, the Claimant met Ms Daly and Mr Sandler, and explained that he needed to take a sabbatical from work to address his mental health issues. They said that they could arrange for him to have a month off over the summer, but the Claimant insisted that he needed longer.

36. Both Ms Daly and Mr Sandler denied that a conversation took place involving all three of them. We find that it did: we found the Claimant's evidence to be detailed and credible; and an email of the same date from Mr Sandler to Mr Daly confirmed that both were aware that a meeting of some sort would take place that day. Ms Daly, in her oral evidence, denied that there was ever a discussion of anything more than the Claimant's wanting 'a long holiday in the summer'; she later accepted that it was 'possible' that he had used the word sabbatical. We find that he did; Ms Daly refers to it in a note of 26 March 2018:

> 'I encouraged him to consider booking a short proper holiday at some stage, before making any big decision on something like a sabbatical.'

37. Further, Mr Fennessy accepted in cross-examination that, by the end of March, a sabbatical related to the Claimant's health was being discussed.

38. The Tribunal has no doubt that the Claimant's ill-health was the driving-force in his wish to take a sabbatical, and that he told Ms Daly, Mr Fennessy and Mr Sandler this.

The events of 12 March 2018

39. On 12 March 2018, the Claimant felt so unwell that he could not attend work. He sent a WhatsApp message to the Delta One Desk group chat. He saw his GP again who recorded 'ongoing anxiety and depression' and discussed a referral to a psychiatrist. The Claimant took the whole of that week off.

40. On the same day, the following message exchange took place between Ms Daly and Mr Fennessy:

> 'Fennessy: Erwan - ill this morning.
>
> Daly: OK. Do you know if he's been to see his GP yet? Has be mentioned anything to you?
>
> Fennessy: Don't know about GP – will ask tomorrow. He had a long conversation with Steve on Friday – he is v. down in the dumps.
>
> Daly: Please encourage Erwan to go to his GP if he hasn't already Eddie. I think a course of antidepressants would really help him. He's not sleeping well which is common with depression at any level, and the loss of sleep will simply exaceberate his low mood.
>
> I have been talking regularly to Steve. It's a combination of many things isn't it, none of them fixable. I'll keep an eye on him but beyond showing interest, kindness and understanding I don't think there's much we can do to help him mend. I won't take my eye off him though.'

41. The Tribunal finds that it is clear beyond any doubt from the references in this exchange to the Claimant's being 'v. down in the dumps … anti-depressants … depression … low mood' indicated that they had both formed the view by this stage that the Claimant was suffering from depression. Their attempts in their evidence to the Tribunal to suggest that they thought he was having problems sleeping, and no more, were strained and implausible.

42. When Ms Daly was later interviewed as part of the Claimant's disciplinary process, she stated that 'she didn't feel at any point there were depressive concerns'. In saying that, she gave misleading evidence in the internal process. In the same contemporaneous note, there is a reference to Ms Daly having suggested counselling to the Claimant. It was put to her in cross-examination that she would not have suggested counselling merely for sleep problems. Again, we found her answer (that she might do if somebody had sleep apnoea or chronic fatigue) implausible.

43. 'Steve' in the exchange set out above referred to Mr Brodie. The Claimant's evidence, which we accept, was that Mr Brodie spoke to Mr Fennessy about the Claimant's anxiety and depression. Mr Fennessy denied this. In his supplementary witness statement, he maintained that the remark in the exchange above: 'He had a long conversation with Steve on Friday – he is v. down in the dumps' referred to Mr Brodie telling him that the Claimant was

'down about the state of the market and about not having a girlfriend'. We reject that evidence. The passage occurs in the context of a discussion about whether the Claimant had consulted his GP; the tenor of the exchange suggests that the participants shared the same concerns.

44. Mr Fennessy's and Ms Daly's laborious attempts to put a gloss on this document, which, if accepted, would suggest they had no knowledge of the Claimant's depression, significantly undermined their credibility in the eyes of the Tribunal. Because their explanations of the earlier part of the document were so forced and contrary to a plain reading of the document, we were even less inclined to accept their attempts to persuade us that the last paragraph referred not to the Claimant's difficulties, but to Mr Brodie's. We reject that interpretation: the whole thread is about the Claimant; Ms Daly does not mark a change of topic; Mr Brodie is mentioned because he was regarded as someone with insight into the Claimant's condition; Mr Brodie may have had his own issues, but they were not the subject of this thread.

<u>The Claimant's referral to Dr Sturgeon</u>

45. On 13 March 2018, the Claimant's GP, Dr Simon Ramsden, wrote to Dr David Sturgeon, consultant psychiatrist:

> 'Thank you for seeing this 32 year old man. He saw me on 6.3.18 having recently lost a major client at his business. Of note his grandmother died 3/52 ago. He seems to have developed an acute anxiety state and insomnia as a result of these stressors. He is struggling to cope with his symptoms. I have issued limited amounts of zopiclone which allow [*sic*] some sleep. I would value your assessment.'

46. On 16 March 2018 Mr Fennessy messaged the Claimant to ask him how he was. The Claimant replied:

> 'I was in pretty bad shape until Wednesday. Getting better since then. No joke I never had it so bad.'

Mr Fennessy replied:

> 'Glad u are starting to feel better – that's good.'

47. Mr Fennessy again insisted that the exchange was merely about lack of sleep because of bitcoin trading and, again, we reject that evidence. The tone and content of the exchange provides further confirmation that Mr Fennessy knew that the Claimant was struggling with a serious health issue, and he was being appropriately supportive. We find that 'it' referred to depression; the reason why Mr Fennessy did not ask him what he meant was because he already knew the answer.

<u>The lack of a referral to OH</u>

48. On the morning of 22 March 2018, Ms Daly emailed Mr Fennessy, summarising the Claimant's recent absences and concluding:

> 'that's a lot of time out of the office. I'll see how it's looking at the end of April, after Easter break. If it's still high, I may insist he goes to the Dr and gets a proper assessment and support plan in place.'

49. In these circumstances, Ms Daly should have referred the Claimant to an occupational health specialist for advice and guidance to the Respondent as his employer; she did not do so. She accepted that she never discussed an OH referral with the Claimant, whether through BGC's own service or through an external provider; nor did she discuss reasonable adjustments with him at any point, nor refer him to the employee assistance scheme. Having initially behaved sensitively with regard to the Claimant's health difficulties, she appears, from this point onwards, to have taken a different tack, throwing the onus on the Claimant to 'get […] a support plan in place', a responsibility which usually falls on the employer.

50. Later the same day, Ms Daly emailed Mr Sandler, asking if they could speak about the Claimant before close of business. Neither Mr Sandler nor Ms Daly could recall this conversation. We find that they did meet and, given that Ms Daly had already been frank with Mr Fennessy in her email of 6 March 2018 as to her view that the Claimant was suffering from depression, we think it probable that they discussed his health, and its impact on him and on the business.

51. From around this time, the Respondent began tracking the Claimant's movements around, and in and out of, the building. Mr Fennessy also asked Mr Brodie to notify him about the Claimant's movements. This monitoring appears to have been an attempt to catch the Claimant out in some way. Having noticed that the Claimant was behaving erratically (for which, see our findings below), his managers treated it as a conduct issue, rather than a welfare issue, as they should have done. The monitoring continued until the Claimant went on leave in August 2018.

52. The Claimant met with Ms Daly on 26 March 2018. Later the same day she wrote to Mr Fennessy:

> 'I've talked to Erwan. He says he's seeing a doctor next week. I hope that's true. I have explained that his sickness absence is the highest in the business this year, and that absence is a factor taken into account when allocating bonus. So he's had that message.
>
> He did say he's feeling a bit better today, and generally sleeping a little better too. I've encouraged him to consider booking a short proper holiday at some stage, before making any big decision on something like a sabbatical. He's spending Easter with his family which might help. I think he could also do with finding a nice girlfriend!'

53. In an attempt to explain why she did not at this point ask the Claimant to provide any medical evidence, Ms Daly denied that the Claimant told her that he was seeing a GP, let alone a psychiatrist. We reject that evidence. We are satisfied that the Claimant was open and honest about his health with Ms Daly and Mr Fennessy, and later Mr Sadler, and that he told Ms Daly that he had seen his GP, and been referred to a psychiatrist. In the event, as we shall see, the Claimant was so unwell that he brought the appointment forward.

54. In cross-examination, Mr Fennessy stated that Ms Daly's assertion in her email that absence was a factor in the allocation of bonus; he accepted that he did not take issue with it at the time. He confirmed that he did later tell the

Claimant that any sabbatical would not affect his Q2 bonus. Mr Fennessy replied on 27 March 2018:

> 'thank you. Did you also highlight his timekeeping, and attendance during the working day?'

Consultation with Dr Sturgeon on 28 March 2018

55. On 28 March 2018 at 08:53, the Claimant texted Dr Sturgeon:

> 'Hi Doctor, this is Erwan. We have an appointment booked in for the 5th April. I feel like I need to see you sooner as things get worse and worse. Would it be possible to have an exceptional appointment today please for example?'

56. We accept the Claimant's account of the events leading up to this request: he felt very low, and had to stop on the way to work to try to control his negative thoughts; he had a panic attack when he arrived at work, left the office and walked to Regent's Park to calm himself. He told Mr Fennessy that he needed to see his psychiatrist.

57. Dr Sturgeon's notes of the meeting record, among other things, that the Claimant had experienced poor sleep since November/December 2017; and that he had lost self-esteem, felt sad, lonely and volatile. On 6 April 2018, Dr Sturgeon wrote to the Claimant's GP:

> 'Many thanks for referring Erwan, who I saw on 28 March 2018. As you know, he has been feeling very anxious which has been triggered by a few untoward events. He is a stockbroker and has lost a few big clients which caused him to lose his self-esteem and he may not receive a bonus for this year. Also his grandmother died at the beginning of February and he used to be close to her. He had also made some bad personal financial investments and doesn't feel happy at work […]
>
> I think his diagnosis is undoubteldy one of depression and I have prescribed Sertraline 50mg daily for him and have given him some Diazepan 2mg tablets to take in case of the start of anxiety. I have also recommneded that he take Mirtazapine 50mg at night for his sleep difficulties. I think a friend of his has recommended a French speaking therapist and he may well pursue this. When I see him again in 1 month's time we will see how that's going otherwise I may refer him to Jeremy Slaughter for help with his work problems. With many thanks for referring him.'

Mr Sandler's meeting with the Claimant on 29 March 2018

58. On 29 March 2018, Mr Sandler called the Claimant into his office and told him about a friend of his who had become depressed when dealing with certain personal issues. We find that he did this in an attempt to reach out to the Claimant, because he knew (from his conversations with Ms Daly) that the Claimant was struggling with depression. The Claimant told Mr Sandler that he was thinking about resigning.

59. Mr Sandler gave a different account of this meeting in these proceedings, which the Tribunal finds was untrue. According to Mr Sandler, the Claimant had remarked that it was 'depressing' being at work, using the word in a colloquial sense, and not by reference to his health. Mr Sandler said that he told him about his friend by way of a rebuke for using the term flippantly. The credibility of Mr Sandler's account was undermined by two things: in the letter dismissing the Claimant's appeal against dismissal, he is quoted as giving an account of the conversation much closer to the Claimant's than to his own, later account; and in cross-examination, Mr Sandler denied that the Claimant mentioned resignation, having stated in his sworn witness statement that the Claimant *did* mention resignation. We find that this was a further attempt by a witness to avoid the Respondent's being fixed with knowledge of the Claimant's anxiety and depression.

60. On 9 April 2018, Ms Daly wrote to Mr Fennessy:

> 'He told me he was seeing the Doctor so should be getting himself back on track now. He needs to start getting to work on time, requesting holiday before taking it (it should be subject to your approval), addressing the root cause of his sickness issues, and working when he's here.
>
> I did tell him that his attendance record would impact his share of the bonus pot. Whether he chose to listen is another matter but he had been told.'

61. We find that Ms Daly does not mention why the Claimant was seeing the doctor, because both she and Mr Fennessy knew that it was in relation to his anxiety and depression. That email was also forwarded to Mr Sandler who, as we have already found, also knew about the Claimant's depression.

62. We are struck by Ms Daly's tone, which now appears impatient: there is no reference to the Respondent's pastoral responsibility towards the Claimant, and no suggestion that he might be helped by being given additional support. Mr Brown rightly points out that the Claimant did not ask for any adjustments. However, an HR professional, of Ms Daly's level of experience, ought to have been turning her mind to such considerations, or at the very least seeking advice.

<u>The Claimant's appointment with Ms Jaillant</u>

63. On 10 April 2018, the Claimant attended a session with Ms Margaux Jaillant, a French-speaking Clinical Psychological. The notes of that meeting record:

> 'Love/hate relationships. Unhappy in London. Depression since January 2018. Not much sleep, no appetite. Changed employment in 2012. Romantic relationship which did not end well. Failure regarding Bitcoin project.
>
> Seeking help re: depression, finds no pleasue in anything, lack of desire, I am self-destructing. Psychiatrist 3 weeks ago, antidepressants, I am not noticing any difference. "Impression that I have made the wrong decisions, want to understand where my problems stem from".

> Requirements unclear. Things to think about. To make choices which are right for me. To move forward.'

The Claimant's meeting with Mr Fennessy on 10 April 2018

64. On 10 April 2018, the Claimant had a meeting with Mr Fennessy. The Claimant said again that he wanted to resign. Mr Fennessy would not accept his resignation. The Claimant was contractually not able to resign until June 2019. Instead Mr Fennessy told him to 'keep his head down' and 'knuckle down' until the end of June. The Claimant's evidence, which we accept, was that Mr Fennessy said that, if he did this, he would be able to take a six-month sabbatical from the end of June 2018. Although Mr Fennessy agreed to the sabbatical in principle, he also told the Claimant that a sabbatical of that length would require Mr Finegold's approval, but that he thought Mr Finegold would agree to it. Mr Fennessy accepted that the sabbatical should not have a bearing on his Q2 bonus, and that Ms Daly had been wrong to suggest otherwise.

65. The Claimant was clear, when speaking to Mr Fennessy and others, that the primary reason for his wanting to take a sabbatical was his mental health difficulties. He had told his medical advisers that he believed there caused in part by his anxieties about work. We find it was natural that he would want to take a significant break from work (indeed he had offered to resign). We find it unsurprising that he would have made plans as to how he might use the time, and that he would have discussed them with his colleagues. They may have included spending time with his family, travelling, and some recreational and sporting activities. We do not infer from this that his reasons for wanting a sabbatical were not genuine, or not health-related. He had to do something with the time, and all those activities may well have been therapeutic.

Consultation with Dr Sturgeon on 24 April 2018

66. The Claimant saw Dr Sturgeon again on 24 April 2018. On 4 May 2018, Dr Sturgeon wrote to Dr Ramsden:

> 'Just to let you know I saw Erwan for review on 25 April 2018 and was glad to find him feeling better. He is no longer waking early ruminating and has decided to take a 6-month sabbatical from his work and has left open the date that he returns should he want to. He intends to do a bit of travelling and will be seeing a French therapist for any "integrated" therapy.'

67. Dr Sturgeon gave the Claimant a prescription for six weeks of Sertraline. The Claimant next saw Dr Sturgeon on 3 July 2018.

68. The notes of the consultation include the following:

> 'Had decided to take 6/12 sabbatical & go back if he wants to. Wants to buy 2 flats in Paris to rent. May go to Buenos Aires for 3/12. French *[illegible]* recommending an integrative *[illegible]!*'

69. The Claimant accepted that in June 2018 he talked to a colleague, Mr Teboul, about the possibility of buying properties in Paris; he did not travel to Buenos Aires.

The events of May 2018

70. In around mid-May 2018, Mr Fennessy spoke to Mr Lees about the Claimant taking a sabbatical. Mr Fennessy said that he was not opposed to it, and that he thought senior management would also be agreeable. We find, on the balance of probabilities, that Mr Fennessy told Mr Lees that the Claimant was suffering from depression. We found Mr Lees' evidence as to this unsatisfactory: he was initially evasive, then (consistently with the approach of other witnesses) denied any knowledge of the Claimant's health difficulties.

71. Mr Fennessy also went to see Mr Finegold shortly after that, to ask what his thoughts were about the sabbatical. Mr Finegold's evidence was that he thought the break was for surfing and to help out with the Claimant's father's business. We accept that Mr Fennessy probably mentioned both those possibilities, but they were subsidiary factors; we think it extremely unlikely that he would not have mentioned the single most important factor in the Claimant's request to take a sabbatical to Mr Finegold, if only to underline the seriousness of the request. Mr Finegold told the Tribunal that he was not minded to grant the sabbatical, for fear that it would set a precedent. That is inconsistent with the account given by Mr Fennessey in his witness statement, which we prefer, which was that Mr Finegold said that he was happy to allow the Claimant to take a sabbatical, provided Mr Fennessy and Mr Lees approved it.

72. We also reject Mr Finegold's evidence that he needed approval from Mr Aubin of BGC for the sabbatical. Mr Finegold said that this was known to everybody in the business; none of the Respondent's other witnesses gave any evidence to that effect; many of them were clear that the final authority lay with Mr Finegold; Mr Sparkes' evidence was that Mr Finegold was the sole decision-maker. We found Mr Finegold's evidence on these issues unsatisfactory.

73. In late May 2018, Mr Fennessy and the Claimant went for a drink after work. Mr Fennessey told the Claimant not to get angry, but that there was a problem with his sabbatical. He explained that Mr Finegold would be happy if everyone else was happy, but that Mr Lees was now concerned that if the Respondent allowed the Claimant to take this time off, other brokers would want to do the same.

74. In a message exchange between Mr Fennessy and Mr Danny Brooks on 31 May 2018, Mr Brooks complained that the Claimant was 'do[ing] nothing'.

The events of July 2018

75. On 3 July 2018, the Claimant had a further appointment with Dr Sturgeon. The Claimant was unable to explain why the six-week prescription was sufficient to cover the ten-week period up to this appointment, which had been postponed; there must have been days when the Claimant went without medication. However, Dr Sturgeon gave a further prescription of sertraline, although he reduced it from 50mg to 25mg. The notes record:

> '*[Illegible]* supposed to finish work end of June – will now happen end of July. Will spend [*illegible]* May want to go back after sabbatical. Had best ¼ beginning of year than he ever had. Sleeping much better

Sertraline to 25mg ok Rx 6/52 - Will let me know when he's in London.'

76. The manuscript version of the notes record that the Claimant planned to go to Biarritz, and then on to Nicaragua for two months to perfect his surfing. The notes record the Claimant saying that he might not return to the Respondent after his sabbatical. In the event, the Claimant did go to Biarritz, but not to Nicaragua.

77. On 4 July 2018 the Claimant wrote to Mr Lees, sending his revenue figures in relation to Q2, and asking to be consulted before a final decision was made on his bonus payment. He agreed in cross-examination that he was concerned about the decision, and that Mr Fennessy might have missed some trades.

78. From the afternoon of 4 July to 11 July 2018, the Claimant was on leave.

79. In a private Bloomberg chat on 18 July 2018, Mr Fennessy reprimanded the Claimant for arriving late at work. Among other things he wrote: 'you can't keep treating me and your team so badly'. The Claimant replied: 'Ed enough'. Later Mr Fennessy told the Claimant: 'you have been behaving badly throughout the quarter, you need to grow up', to which the Claimant replied: 'ok that's your opinion'. Later still, when asking for a meeting with Mr Fennessy, the Claimant wrote: 'you're making a mistake, this will escalate badly'. Although the Claimant did not mention his health in his exchange, we find that Mr Fennessy's rebuke for the Claimant's 'bad behaviour', specifically during the quarter, and indeed the Claimant's discourtesy to Mr Fennessy in this exchange, are both consistent with the Claimant's evidence that his health continued to have an impact on his interactions with colleagues around this time.

80. Later, on 18 July 2018, the Claimant sent an email to Mr Finegold, Mr Lees and Mr Fennessy about his bonus, asking to discuss his numbers and proposing an adjustment to the final figure. Although in an earlier draft to a colleague the Claimant had concluded: 'I hope this finds you well and am always happy to discuss', he omitted this from the final email. This was the beginning of a stand-off between the Claimant and senior management.

<u>The meeting on 19 July 2018</u>

81. On 19 July 2018, the Claimant had a meeting with Mr Fennessy and Mr Lees. There are no notes of the meeting. At the beginning of the meeting, the Claimant said that he considered that Mr Fennessy had already approved his sabbatical. Mr Fennessy disagreed, and said that he had always been clear that approval was subject to senior management sign-off. The Claimant said that he needed time off because he had anxiety and depression, and was struggling to deal with this fully while working. At one point he became agitated and produced a bottle of pills; we find they were anti-depressants, which the Claimant brought to work as he took them at the beginning of his working day. We reject Mr Fennessy's and Mr Lees' evidence that they thought they were sleeping tablets: it would make no sense for the Claimant to have sleeping tablets with him at work. We are satisfied that they both knew what the tablets were, and why the Claimant had produced them: to remind them of his ongoing mental health difficulties. In a manuscript note of a meeting on 4

October 2018 between Mr Lees and Ms Nicolaou, she recorded him saying that

> '[the Claimant] told [Mr Lees] felt down and had pills – no GP note given when asked. [The Claimant] stated this why wants time off.'

82. This note provides further corroboration that the Claimant was clear in his discussion with management that he needed time off for health reasons.

83. Mr Lees said he would agree to a four-month break, from August 2018 to the start of December 2018, on condition that it was characterised as sick leave, rather than a sabbatical. That is consistent both with the evidence that Mr Lees was concerned about setting a precedent by agreeing to a sabbatical (as opposed to sick leave), and with the knowledge that we have already found that he had of the Claimant's health difficulties.

84. Mr Lees said that he would speak to Mr Sparkes to sign off the leave, as Mr Finegold was on holiday. He said that he would update Mr Finegold on his return from annual leave on 6 August 2018. The fact that he did not consider it necessary to secure Mr Finegold's approval in advance is also consistent with the latter having indicated that he would not withhold it, if Mr Fennessy and Mr Lees were content.

85. The Claimant left that meeting, thinking that a four-month leave of absence had been agreed.

86. The Claimant had pre-booked leave for two weeks from 4 August 2018. However, we know from a WhatsApp message exchange between the Claimant and Mr Lees on 3 and 4 August 2018, that Mr Sparkes declined to approve the absence; he wanted to wait until Mr Finegold returned from holiday. We find that the exchange confirms that Mr Lees was no longer objecting to the sabbatical: his tone is sympathetic, and he was offering to intervene with Mr Finegold ('to tell him everything personally'). That is consistent with his knowing that the Claimant had serious health concerns. It also confirms that the Claimant knew that approval was still provisional on Mr Finegold's approval. He was clearly anxious, and offered to change his travel plans, if Mr Lees thought it might help if he spoke to Mr Finegold himself ('I just want to do it right'). Mr Lees advised [*original format retained*]:

> 'Don't change your flight. You will probably have to come at some point to get either get it all signed off OR come and have an argument with senior management!!'

87. The Claimant replied: 'Understood. Thanks and good luck!' We were not convinced by the Claimant's attempt to persuade us that this final exchange was 'a joke', and that there was no question of Mr Finegold withholding approval. It appears to us clear that the Claimant was relying on Mr Lees to put his case for him, hence his wishing him luck, and that he knew that he needed, and did not yet have, Mr Finegold's final approval.

88. On 3 August 2018, before leaving London, the Claimant had a farewell party with a few friends. He also gave up the tenancy on his flat in London, and arranged for his post to be forwarded to a friend, with whom he had left his belongings. He accepted in cross-examination that he did not tell the

Respondent about this. He was clearly relying on Mr Lees to succeed with Mr Finegold. That he was not certain of success is revealed by a message exchange he had with Mr Brodie on 5 August 2018, in which he said that '[I] won't work this week *at least* [emphasis added].' We find that this indicates that he knew that the position was not certain beyond the following week, and that he might have to return for further discussions, as Mr Lees had suggested.

The Claimant's period in France from 5 August 2018 onwards

89. The Claimant set off for France on 4 August 2018. He travelled by ferry and spent the morning of 5 August 2018 in St Malo. He stopped off at Locmariaquer, to stay with his cousin's parents-in-law. He visited a friend in Vannes, staying overnight. He arrived on 6 August 2018 at his family's summerhouse in Noirmoutier, near Nantes, on the west coast of France.

90. It was the Claimant's evidence that he was very unwell during this period. We do not find that this activity undermines that evidence; it was natural that he should have made arrangements to take advantage of his break from work. On 9 August 2018, a prescription for four months of sertraline (50mg, a higher dosage than had been prescribed by Dr Sturgeon) was fulfilled for the Claimant by a pharmacy in Nantes; he continued to take this medication throughout his period of leave.

91. On 10 August 2018 Mr Lees messaged the Claimant, asking him to phone him. He spoke to the Claimant twice in the week of 10 August 2018, and told him that he needed to return to the office to speak with Mr Finegold, who had withheld his consent for the leave of absence. The Claimant said that he would not do so without first speaking to Mr Finegold.

92. We do not accept the Claimant's evidence that he told the Respondent that he could not return to the UK for health reasons. He had offered to come back to finalise the arrangements, when he thought the decision was going his way. Mr Lees had raised his expectations, and he was disappointed when Mr Finegold's approval was not forthcoming; he became entrenched in his position, as did Mr Finegold. Whatever the rights and wrongs of the situation, the Claimant accepted in cross-examination that from this point onwards he understood that, 'technically', he did not have the Respondent's consent for a leave of absence. We find that this was not a mere technicality.

93. On the other hand, Mr Lees volunteered in the course of cross-examination that, he 'absolutely would have done things differently … had I known about the Claimant's depression.' The Tribunal has already found that he did know.

94. Mr Lees messaged the Claimant again on 14 August 2018, asking him to call him. The Claimant replied that he had a family obligation, and asked if he could call the following day (his sister had just given birth). When they spoke the next day, Mr Lees told the Claimant that Mr Finegold would not discuss the matter over the phone, and that he needed to return to the office. We accept Mr Lees' evidence that he also told the Claimant that, if there was to be an agreement to a leave of absence, he would need to agree to an extension of his contract. They did not discuss what that would involve.

95. On 16 August 2018 Mr Lees sent the Claimant Ms Daly's details. The Claimant contacted Ms Daly the next day, asking if he could speak to her. Ms Daly summarised that conversation in an email to Mr Finegold, Mr Sparkes and Mr Fennessy, of 21 August 2018, which we find was an accurate summary. Ms Daly communicated the Respondent's proposal to the Claimant, which was as follows: that he would take unpaid leave until mid-November, using all his 2018 annual leave entitlement; he would sign a one-year contract extension; his Q2 super bonus would not be paid until the end of January 2019; if he signed the agreement (which Mr Sandler would be drafting) within 48 hours of receiving it, he would not need to return to the UK. Finally, she told him that, when he did return to work in November, it must be 'with renewed attitude – at work, on time, behaving reasonably, respecting colleagues'.

96. It was Mr Finegold, in discussion with Mr Sparkes, who insisted on these conditions being attached to the sabbatical. Ms Daly later described Mr Finegold's reasons for doing so, in her interview as part of the Claimants disciplinary procedure [*original format retained*]:

> 'Rob's key thing was to get him to sign a contract extension. Rob's point was that he can't call the shots because what does it say to everyone else – we will use this as an opportunity to provide what he wants/what we want. He was then becoming difficult to barter. Rob had said he would consider it if he signed a contract. There has got to be something from us – it was more as seeing the opportunity and a win/win.'

97. The Tribunal finds that this is consistent with the fact that the Claimant was highly-valued by the Respondent; Mr Finegold wanted to tie him into the business; he also wanted to assert his authority over him, and extract some commercial advantage from the situation for the Respondent.

98. Mr Finegold stated in cross-examination that, if he had known the Claimant had depression 'we would have done everything to help.' There is no evidence that Mr Finegold made any allowances for the Claimant's depression in the course of these interactions.

99. Ms Daly recorded that the Claimant was very unhappy with the proposal, and noted that he believed that the sabbatical had already been agreed, and that there was no basis for delaying the payment to him of his bonus. In response to this, Ms Daly expressly said that there had been no formal agreement to a sabbatical, and that if he did not agree to the proposed terms, he must return to work the following week. The Claimant said that he would think the proposal over, but that he was reluctant to agree to any extension without seeing the precise terms.

100. The Claimant accepted in his evidence that he had been paid the first half of his Q2 bonus, and that the Q2 super bonus was not due until October. He accepted that he believed he had not been paid as much for the Q2 bonus as he should have been and that he told Ms Daly that he thought his bonus had been miscalculated.

101. At the end of the call, the Claimant and Ms Daly agreed that they would speak again on Friday, 24 August 2018. When that day came, the Claimant ignored Ms Daly's attempts to contact him. It is clear from messages on that day that

she became frustrated. She wrote: 'please don't ignore me today, Erwan, we had agreed to talk today. It's important that we discuss your absence from work'. By this point, the situation had become a battle of wills between the Claimant and the Respondent. They did eventually speak; the gist of the conversation was accurately captured by Ms Daly in an email of the same date, which contained her proposed script for the call. She told the Claimant that, because he had not accepted the offer which she had communicated to him earlier in the week, he must return to work the following Tuesday, 28 August 2018. If he failed to do so, she would communicate the issue, which she characterised as 'unauthorised leave', to the BGC legal/HR team. She gave him a further opportunity to accept the proposed terms.

102. Ms Daly agreed that this was the only occasion throughout the relevant period when the Claimant did not engage with communications from her.

103. Ms Daly set out the Claimant's response in an email to Mr Finegold, who forwarded it to Mr Sparkes and Mr Sandler. The Claimant rejected the terms. He observed that it was not acceptable or fair of the Respondent to change its mind about the sabbatical. He agreed to return to the office, on condition that the Respondent agreed to his counter-proposal in relation to his bonus. A further condition was that he no longer wished to be managed by Mr Fennessy, as he had lost trust in him as a result of his conduct in relation to the sabbatical. It is plain that the Claimant felt badly let down by Mr Fennessy, who had led him to believe that, if he postponed his request for extended leave, which Mr Fennessy knew he needed for health reasons, and worked hard in the intervening months (which he had), he would be able to take his sabbatical. Instead, the Respondent had allowed him to fulfil his side of the agreement and then, after he had done so, sought to extract commercial advantage from allowing him to take extended leave.

104. There was a further message exchange later the same day in which the Claimant raised issues about unpaid expenses and complained that Mr Finegold had not replied to his email of 18 July 2018 about his bonus, and had chosen not to speak to him before he left France. He wrote:

> 'Rob should understand that I can't move my life around in the blink of an eye. I stand on my position and will only agree to a face to face meeting after a call with him where progress can be made. To be clear this would only be a meeting and I would not go back to work as condition 1 is not agreed yet.'

105. The Claimant accepted that he expressed himself bluntly and critically of Mr Finegold, the most senior person in the organisation, but he ascribed this to his depression. The Claimant asked Ms Daly to arrange for him to speak to Mr Finegold. In one message he wrote: 'if Rob is too proud to call first I have no issues making the call'.

106. The Respondent stopped paying the Claimant from 20 August 2018 onwards. The Claimant initially alleged that this was an act of direct religious discrimination; he subsequently withdrew that allegation. His evidence, both in his statement and in oral evidence, was that it had always been his understanding that the sabbatical would be unpaid.

107. From 23 August 2018, the Claimant was preparing to move to a house in Biarritz, which he did on Monday 3 September 2018. Up to then, he had been staying with his family.

108. On 26 August 2018 the Claimant sent Ms Daly a WhatsApp message, attaching two screenshots, which contained part of his exchange with Mr Lees on 3 August 2018. However, he did not include his own last message at 15:01, or Mr Lees' reply of 4 August 2018, warning his that he might have to return to the UK, if Mr Finegold did not sign off on his leave. We reject the Claimant's evidence that he did not include that exchange because he 'did not did not think she would understand the irony' (there was no irony); he omitted the part of the message which was inconvenient to him.

109. On 28 August 2018, the Claimant messaged Ms Daly, again asking to speak to Mr Finegold, and offering to make the first move himself. Ms Daly replied:

> 'Erwan I don't understand the messages. To be clear, no one has formally authorised your leave. You must please come back to work then we can sort it out. I do think it can be resolved but it has to be done properly and that means you must be back at work. You are currently AWOL 'absent withhout leave'. If you don't come back it's going to get serious as BGC will take it over from us. I'm going to email you about your pay and other things so please check your private email sometime this afternoon.'

<u>The turning-point in the Respondent's approach</u>

110. On 5 September 2018, Ms Daly sent the Claimant a further email, noting that she was disappointed that he had chosen to persist with his unauthorised absence. She wrote:

> 'Since you are choosing to remain absent without permission, technically in breach of your contract, the Company feels there is no alternative but to now pass this message to the BGC legal department.'

111. However, she sent it to his work email by mistake, and the Claimant did not receive it. We infer that the lack of a response from the Claimant prompted a change in the Respondent's attitude, and its approach. It marked a new phase: the matter was indeed referred up to BGC from this point onwards; there was no further negotiation by the Respondent with the Claimant, with a view to binding him into the organisation; the Respondent turned to the path of disciplinary action.

112. Towards the end of September, the Claimant (who did not know that a suggestion of breach of contract had been made) attended the Ryder Cup, an event which he had arranged for three long-term clients. It was a three-day event; the Claimant attended only the first day.

113. On 27 September 2018, Ms Nicolaou (of BGC) wrote to the Claimant:

> 'I write on behalf of Sunrise Brokers LLP (the "Company") regarding your unauthorised absence from work since 14 August 2018.

During your unauthorised absence, you have been contacted frequently by Jacquie Daly who informed you your leave was not authorised and requested you now return to work. However, you have not complied with this request and to date you remain absent from the office.

Your actions are in breach of the terms of your empoyment with the Company. I ask that you now return to work by no later date than 03 October 2018.

The Company are withholding payments of any discretionary bonus that you may have been eligible to receive, and reserve to right to cancel such payment should you fail to return to work.

Please note that the company may view persistent unauthorised absence from work as a repudiatory breach of contract and could result in disciplinary action, including dismissal without warning.

I hope that you will return to work, and hope to hear that you are in work on 03 October 2018. If you wish to discuss this matter, please contact me by telephone […]'

114. The Claimant replied to Ms Nicolaou on 3 October 2018, copying in Mr Amar, Mr Finegold, Mr Fennessy, Mr Sandler and Ms Daly:

'After nearly 6 years of dedicated work at Sunrise Brokers, I was struck by a severe depression right at the start of 2018. I lost appetite for life in general and my performances at work nosedived. To fight my illness, I consulted with psychologists and psychiatrists prescribing me with medication, which I currently still have to take. Nevertheless, I needed a more radical change to achieve a breakthrough in my battle against depression.

In February, I discussed with Jacquie Daly and James Sandler about taking a sabbatical leave from work from the end of Q2 2018. On the 10th April, after another conversation with my head of desk Edward Fennessy, it was agreed that I would take a 6-month sabbatical from the end of June. The terms were very specific in that my bonus amount and schedule as well as my position on the desk would not be affected by that leave.

In Q2 2018 I turned a corner at work and ended up producing my best quarter ever with revenues north of £515k. My pay structure entitles me to bonus of at least £240k (details below) with payments split equally in July and October. Having only received £70,649 in July, I expect a minimum payment of £169.4k from Sunrise/BGC at the end of October.

It would be a trauma if Sunrise/BGC were to discount/withhold/cancel my bonuses or dismiss me. Even while absent from my desk, I keep strengthening my position in the equity markets and stand ready to produce solid revenues again from the end of this year. In September alone I hosted a client at my home for a week, attended another one's birthday party, and went to the Ryder Cup in Paris with a few others.

> I sincerely hope this is just a misunderstanding and Sunrise/BGC will honour their end of the deal as agreed in April. As for myself, I look forward to regaining my position on the equity finance desk at the end of the year.'

115. Ms Nicolaou stated that this was the first time she had been made aware that the Claimant may have been experiencing any mental health issues. Even if that is right, this email put her squarely on notice of the fact that the Claimant had depression, and was still taking medication for it. Despite this, Ms Nicolaou did not reply to the Claimant's email herself, nor did she take any of the usual steps, such as referring him to OH.

116. Further, Mr Roberts made the point in closing made the point that, if it was true (as the Respondent's witnesses asked the Tribunal to believe) that the Claimant had never previously told his managers about his depression, it was a bold move on his part to copy this email to these same people, who could so easily have contradicted him. They did not do so.

117. A meeting took place on 4 October 2018 between Ms Nicolaou, Mr Finegold, Mr Fennessy and Mr Lees, at which the Claimant's absence was discussed. Ms Nicolaou made no mention of this meeting in her witness statement. There are notes of it, prepared by her, which we find accurate (so far as they go), but from which most of the attendees sought to distance themselves at the hearing. In a particularly significant passage, she recorded the following:

> 'EL [Mr Lees] – promoted EM [the Claimant] in April. EM told EL he felt down and had pills – no GP note given when asked. EM stated this why wants time off.'

118. Neither Ms Daly, Mr Fennessy, nor Mr Lees gave evidence that they had asked the Claimant for a GP note. This note clearly records, however, Mr Lees telling Ms Nicolaou (in front of Mr Finegold and Mr Fennessy, who are not recorded as taking issue with his account) that the Claimant had told him, before his leave of absence, that he had health issues, and this was why he wanted the leave. Any experienced HR professional ought to have realised that a referral to OH would have been appropriate at this point.

119. Ms Nicolaou did not disclose this note (or the information contained in it) to anyone, neither to the Claimant, nor to Ms Heba Salem (HR Business Partner at BGC) or Mr Sparkes, who were later charged with investigating the Claimant's leave of absence, and the reasons for it. She accepted in her evidence that she should have done so, and that the notes were relevant to the question of whether the Claimant's managers knew about his ill-health before his period of absence.

120. Ms Nicolaou instructed Ms Salem to conduct an investigation. On 29 October 2018, Ms Salem emailed the Claimant follows. She wrote:

> 'I would like to invite you to a meeting on Thursday 1 November at 10 am at the Sunrise offices so we can discuss your current unauthorised absence and agree a way forward. Please note, however, that if we are unable to reach away forward your absence will remain unauthorised and the business may commence formal disciplinary action.'

121. The email clearly suggested that cooperation from the Claimant at the meeting could avoid disciplinary action. There was no suggestion by Ms Salem that the meeting would itself constitute an investigatory meeting as part of a disciplinary procedure, which is what happened. We further find that the language of the email reveals that Ms Salem had already concluded that the Claimant's absence was unauthorised (one of the central issues she was charged with investigating), before she had spoken to the Claimant.

122. On 1 November 2018, the Claimant had a meeting with Ms Salem. At his request, it took place by phone. At the meeting, Ms Salem told the Claimant that its purpose was to explore whether matters could be resolved amicably, so as to avoid disciplinary action, which would necessitate his returning to the office. At the end of the meeting, Ms Salem told him that she would report back to management, and then revert to him. In fact, this was already an investigatory meeting under the disciplinary procedure.

123. At the meeting, Ms Salem asked the Claimant whether he had seen occupational health; the Claimant asked her what occupational health was. Any reasonable HR professional would have immediately taken steps to refer him to OH.

124. Ms Salem asked the Claimant if he could provide medical evidence or a letter from his doctor. We heard no evidence as to what questions she was seeking answers to, and whether they included issues relevant to disability. The Claimant said that he could. Later the same day, he contacted Dr Sturgeon, who agreed to provide a letter. This was the first time anyone from the Respondent organisation had asked the Claimant for any kind of medical evidence.

125. Later the same day, the Claimant had a message exchange with Mr Enrico Vlaic, a client of his and a trader at BNP Paribas, in which the Claimant referred to his depression and linked it with his need for a sabbatical. He stated: 'I spend time with family and change my mind', which we understand to mean that he was finding time with his family to be therapeutic. It was put to the Claimant that this exchange was manufactured by him to 'create a narrative'. We reject that suggestion: the Claimant was not to know at the time that it would be scrutinised.

126. Ms Salem also conducted interviews with Ms Daly on 6 November 2018, and with Mr Fennessy on 3 December 2018. Notes were taken at these meetings by Ms Amber Fitzgerald; they were then summarised into bullet points and included with Ms Salem's report. Only the original notes of Ms Daly's interview were in the bundle. The summary notes of that interview omitted relevant information, relating to the Claimant's health, which had been contained in the original notes. The summary of the interview with Mr Fennessy also contains no references to his knowledge of the Claimant's ill-health. We infer that that is either because he deliberately downplayed that knowledge, or references were deliberately omitted.

127. On 6 November 2018 a meeting took place, organised by Mr Sparkes, which Mr Sandler, Ms Daly and Ms Salem all attended. Mr Sparkes could not recall attending the meeting, let alone what was discussed. To hold an off-the-record meeting between the supposedly independent investigator, Ms Salem, and

key protagonists, before Ms Salem had completed her investigation was plainly inappropriate, all the more so as Mr Sparkes would go on to be appointed as disciplinary officer.

128. On 12 November 2018, the Claimant wrote to Ms Salem, asking whether she had made progress since his last call and proposing a meeting on 27 November 2018. Ms Salem replied the same day, informing the Claimant that he must return to work by 19 November 2018, or he would face disciplinary action. Ms Salem wrote in the email:

> 'the company have made many attempts to resolve this issue and it has been confirmed to you since the start of your absence your sabbatical leave was not approved and that your absence was and continuous [*sic*] to be unauthorised. Therefore, the company requires you to return to work on 19 November 2018. Failure to do so will result in a formal disciplinary action against you: the outcome of which could be the termination of your employment.'

129. Again, she withheld from him the fact that she was already conducting a disciplinary investigation. This email confirms again that Ms Salem (and 'the company') had already determined the central issue of whether the Claimant's absence was authorised.

130. On 15 November 2018, Dr Sturgeon wrote a letter 'To Whom It May Concern'.

> 'I first saw Erwan at the end of March 2018. He told me that he was feeling very anxious and this had been triggered by a few events in his work as a stock broker. He had lost a few clients and this greatly disminished his self-esteem. His grandmother, to whom he felt very close, had died in February this year and that was having a big impact on him.
>
> He reported several biological features of anxiety and depression and I prescribed antidepressant medication for him and also medication to help his sleep which was greatly disturbed.
>
> I saw him in April and in July. He talked about the possibility of his having a sabbatical from work and I felt this would be advisable until he felt better given his previous levels of stress and anxiety. During this time I advised him to decrease his medication to half the dose and I will be seeing him for review in the near future.'

131. The Claimant asked for the words 'until he felt better' to be added to the final version. We are satisfied that Dr Sturgeon would not have agreed, had the change not accurately reflected the situation.

132. Ms Salem replied:

> 'The letter does not give any clear parameters or advice around your ability to attend work aside from a sabbatical being advisable. It does not state that you couldn't return to work during your unauthorised absence.'

133. If Ms Salem felt that further information was required, she should have asked the Claimant to go back to Dr Sturgeon; she did not do so. Given the content of the letter, she ought immediately to have referred the Claimant to OH.

134. On Friday 16 November 2018, the Claimant wrote to Mr Fennessy as follows:

> 'Dr Sturgeon in his letter states: "He talked about the possibility of his having a sabbatical from work and I felt it was advisable until he felt better given his previous levels of stress and anxiety". To be clear, I would already be back at work and earning money if I felt better and prepared for it. I propose to mediate the return date to the 3rd of December. I feel this is a very reasonable timeframe and hope you will too. How does that sound to you?'

135. The Claimant tried to call Mr Fennessy several times on that day. He also tried to call Mr Finegold. Neither of them took his calls. Mr Fennessy's evidence was that he was 'advised not pick up calls'. On 17 November 2018, Mr Fennessy messaged the Claimant, giving his excuses and concluding: 'you OK to catch up on Monday?' The Claimant understood the message to mean that Mr Fennessy wanted to speak to him before he came in. He agreed that Mr Fennessy did not say that the Claimant should not come into work on Monday.

<u>The Claimant's return to work on 19 November 2018</u>

136. On 18 November 2018, the Claimant flew back to London from Nantes. He attended work at three in the afternoon on Monday 19 November 2018. It was the Respondent's evidence that, when he arrived at the office, he was laughing and high-fiving colleagues. Although the Claimant denied this, we find that it happened, but shows nothing: he may have been responding to cues from others, or simply showing bravado.

137. On 19 November 2018, Mr Finegold emailed Ms Daly and Mr Sandler, copying in Mr Sparkes, telling them that the Claimant had called him seven times on Friday and left a message asking to speak to him. He concluded: 'let's discuss'. Mr Sparkes was unable to explain why he was copied into that email. Later the same day, Mr Sparkes emailed Ms Salem:

> 'He turned up. Ring when u get a mo please.'

138. On 20 November 2018, Ms Daly emailed Mr Fennessy:

> 'As per our conversation just now. Please do not take any calls or reply to any messages from Erwan. Matters regarding his extended unauthorised absence are coming to a head, and we need to avoid you being inadvertently dragged in to an HR matter that BGC are now dealing with.'

139. Ms Daly also emailed Mr Lees asking him not to take any calls from the Claimant. These emails show the Respondent's management closing ranks.

140. On 27 November 2018, the Claimant had his British citizenship ceremony. On the same day he saw Dr Sturgeon, who prescribed a further course of

antidepressants, increasing the dose to 50mg, and arranging to review him in two months' time.

The work assigned to the Claimant on his return

141. On his return to work, the Claimant was assigned a desk away from the trading desk. Mr Sandler required him to undertake training, by way of self-study. The Claimant accepted that there was a certain amount of outstanding training as at that date, which was mandatory, and for regulatory purposes. Yet when he had completed that training, Mr Sandler gave him a large number of internal documents to read, including BGC's code of conduct, which others were not required to read. Mr Sandler's evidence was that this was an instruction from 'senior management and compliance', although he was unable to recall who that was.

142. Mr Sandler accepted that Mr Lacey, who was away for around three months, was not required to read policies when he returned from a sabbatical. Mr Sandler further accepted that it should have taken no more than five working days to read the necessary policies. The Claimant was still reading policies when Mr Sandler emailed Ms Halliday on 19 December 2018.

143. We reject the Respondent's evidence that the explanation for this was that the Claimant did not take the exercise seriously. Mr Sandler's evidence was that the purpose of this exercise was to integrate the Claimant back into the workplace. We reject that explanation: at no point between his return in November 2018 and his dismissal on 7 January 2019 was the Claimant allowed to resume his work as a broker; there was no evidence of any attempt to return his clients to him, or to encourage him to reconnect with them; his Bloomberg account was not reactivated. It is difficult to see how requiring an individual to spend several weeks reading policies could be a productive use of any employee's time; for as long as the Claimant was reading policies, he was not generating revenue for the Respondent. We find that the Respondent artificially prolonged this exercise, as a justification for not returning him to his ordinary work, while the disciplinary process played out.

144. We find that a subsidiary purpose of the exercise was to put the Claimant in his place: Mr Sandler accepted that he went so far as to test the Claimant about the content of the various policy documents, including on one occasion in front of Mr Derek Wilks, Sunrise CFO. Moreover, the Claimant was not allowed to sit at his usual desk, but was seated on his own away from others. His colleague, Mr Britton, accepts that as he walked by the Claimant he referred to him as a 'naughty boy 'and said that he was sitting on the 'naughty step'. Mr Britton's evidence was that the Claimant laughed along with this. We find that he may well have done, to maintain a semblance of dignity.

Ms Salem's investigation report

145. Ms Salem produced an investigation report, which she sent to Mr Sparkes on 6 December 2018. Her recommendation in the report was that the Claimant attend a formal disciplinary hearing.

146. Ms Salem's report was inadequate in several respects. By way of example only, she omitted relevant information, including the letter from Dr Sturgeon referred to above, and the Claimant's response to Ms Nicolaou's, email in

which he referred to his ill health. She was hampered by the fact that she had not been provided with important information, including the email exchanges from the early part of 2018, in which Ms Daly referred to the Claimant's depression, and the notes of the meeting of 4 October 2018, in which Mr Lees referred to the Claimant's health difficulties.

147. Rather than deciding whether there was a case to answer (the proper function of an investigating officer), Ms Salem purported to reach definitive conclusions, including that the Claimant had been absent without leave.

148. Ms Salem was not called by the Respondent to explain the deficiencies in her process or her report; the only explanation provided for that was that she was no longer an employee; there was no application for a witness order.

The disciplinary process

149. The report was passed to Mr Finegold, who directed that a disciplinary hearing should be convened, with Mr Sparkes as the disciplinary officer. On 7 December 2018, the Respondent wrote to the Claimant, inviting him to a formal disciplinary hearing on 11 December 2018, relating to his absence from work. This gave him two working days to prepare, which was insufficient notice, given the nature of the charges, and the fact that the existence of the disciplinary process had been concealed from him up to this point.

150. The allegations were as follows:

> 'Allegation one: Potential gross misconduct through taking unauthorised leave from 20 August 2018 to 20 November 2018 constituting a breach of contract and implied terms [*sic*] of trust and confidence.
>
> Allegation two: Potential gross miscondcut through failure to follow reasonable management instruction and refusing to comply with requests to return to work.
>
> Allegation three: Potential misconduct through failure to follow the Company's holiday booking procedure.'

151. The letter was accompanied by a copy of the investigation report produced by Ms Salem. The Claimant was understandably shocked to receive this letter, given that he had not been told that a disciplinary investigation was on foot, in which he had unwittingly participated.

152. Mr Sparkes was charged with deciding whether the sabbatical was approved, and whether management instructions given to the Claimant were reasonable. As part of that, he would have to form a view of the relevance of the Claimant's depression. Mr Sparkes had had considerable personal involvement in the earlier process, into which he was enquiring: Mr Lees had consulted him about the Claimant's request for a sabbatical in around June 2018; he had been involved in the setting of terms, which had been proposed to the Claimant; when the Claimant did not come back from annual leave in August, he had been involved in the discussions with management, and with HR about what should be done. Indeed, it is clear from his witness statement (at paragraph 11), that Mr Sparkes had already formed the view in August 2018 that the Claimant's absence was not approved, several months before

he was appointed to conduct the disciplinary hearing, in which that was a central issue. Mr Finegold accepted in cross-examination that he knew Mr Sparkes was of this view, when Mr Sparkes was appointed to deal with the matter.

The disciplinary hearing

153. Notes were taken at the disciplinary hearing. We find that they were improperly edited after the event to exclude material which was helpful to the Claimant, in particular references to his ill-health. By way of example, the manuscript notes record the Claimant saying that, when he raised the possibility of a sabbatical, he was in a 'dark place'; they record the Claimant stating that he was 'not fully recovered now'; and they record him stating that the purpose of his extended absence was to 'heal, get better'. All of those references were omitted from the typed version of the hearing notes.

154. The hearing was adjourned so that a number of witnesses could be spoken to further, between 18 and 21 December 2018: Ms Daly, Mr Fennessy and Mr Lees. Neither Mr Sandler nor Mr Finegold were interviewed. Ms Halliday accepted in cross-examination that she took notes of the interviews, and then wrote them up; the original notes only exist in relation to Ms Daly. Again, there are material omissions between the original notes in the summary of Ms Daly's evidence: for example, Ms Daly's reference to the Claimant's 'low mood' was replaced by reference to his being 'fatigued'; references to Mr Sparkes' earlier involvement were also deleted. Ms Halliday accepted the Claimant was never shown the original notes, only her summary. We find that material which might be helpful to the Claimant was deliberately removed.

155. On 12 December 2018, the Claimant provided Mr Sparkes with a transcript of his WhatsApp messages with Mr Lees and Ms Daly. An email of the same day from Ms Daly to Ms Halliday reveals that she had 'just met with [Mr Sparkes] so he's updated me on Erwan'. Mr Sparkes accepted that he had a separate, unrecorded conversation with her, even though she was a witness in the matter.

156. On 12 December 2018, the Claimant moved desks without asking Mr Sandler's permission, because he was finding the comments made by his colleagues upsetting. Mr Sandler instructed him to return to the desk he had assigned to him. The Claimant complied within a few minutes.

157. On 13 December 2018, Mr Sparkes emailed Ms Halliday about her further investigations. He wrote to her:

> 'You might want to talk to James as well. I think he had discussions about a sabbatical with EM too. I think once you have the talk with JD it will become more apparent as to the decisions that EM took were calculated knowing his absence wasn't approved.'

Mr Sparkes' highlighting of potential evidence which would be unhelpful to the Claimant was an improper intervention by a supposedly impartial decision-maker, and suggests bias on his part.

158. On 17 December 2018 Mr Sparkes wrote to Ms Halliday about the Claimant:

> 'He has taken his full holiday entitlement correct and I think that he should be in over the holiday week given is not been in for the last three months. I am happy for you to run it past Ed F but I don't think we should let him on the desk unless we absolutely have to. I would rather he went awol again and we would have even better grounds. I'm loath to let him take any more time off.'

159. Although Mr Sparkes denied it, we find that the reference to 'even better grounds' was to better grounds for dismissal, and suggested that the outcome of the disciplinary procedure was predetermined. Ms Halliday, who had her own obligations as an HR officer, accepted in cross-examination that this email was 'somewhat inappropriate', but insisted that she did not think it had anything to do with the eventual outcome. We disagree.

160. On 28 December 2018, Mr Sparkes sent two emails to Ms Halliday, the first of which was copied to Mr Finegold, Mr Lees, Mr Sandler, Mr Fennessy, Ms Daly:

> 'Just to keep you all up to date Erwan was in the office both yesterday from one 1.00pm until just after 4.00pm and is in the office again this morning having come in around 8.15. I thought he was having this time offers unpaid [leave] for family reasons but clearly he can't tell the truth on anything.'
>
> 'Could I also have permission to have all of EM's email traffic from his computer looked [at]. Given that you think he poses no risk to the business I want to make sure he hasn't accessed, copied or sent any confidential information outside of the organisation whilst he's been sitting away from the desk. I need to monitor him.'

161. We find that the first of these emails suggests that Mr Sparkes had a closed mind about the Claimant's honesty and integrity in the middle of the disciplinary process.

162. On 3 January 2019, the Claimant wrote to Ms Halliday asking for an update on the disciplinary process. Later the same day, Ms Ali replied informing him that the reconvened hearing would take place on 7 January 2019, giving him one working day to prepare. We find that was insufficient notice.

<u>The resumed disciplinary hearing and the dismissal</u>

163. In a manuscript note of the dismissal meeting, Mr Sparkes is recorded as saying that he accepted that the Claimant thought that he had been promised a sabbatical in exchange for continuing to work through to the end of July. That statement was deleted from the typed version of the notes. The notes reveal that Mr Sparkes made almost no reference to, or enquiries about, the Claimant's health difficulties in the course of the meeting.

164. Mr Sparkes adjourned the meeting to have a discussion with Ms Halliday. Mr Finegold then entered the room. In the course of an appeal interview, Mr Finegold said that he thought he talked to them 'about unrelated matters', and that he left when they told him they were in the middle of the disciplinary hearing. Mr Finegold accepted in cross-examination that he knew that they were there for the disciplinary meeting, but could not remember what they

talked about when he joined. Mr Sparkes's witness statement (at paragraph 36) accepts that Mr Finegold asked about the outcome of the disciplinary hearing and he 'briefed him' about the decision he had already reached. We find that Mr Finegold's presence is consistent with an inappropriate involvement on his part in the disciplinary process.

165. When the meeting resumed, Mr Sparkes told the Claimant that he was dismissed.

166. Ms Halliday wrote to the Claimant on 10 January 2019, confirming that he had been dismissed with notice for misconduct, breach of contract, breach of trust and confidence and failure to follow reasonable management instructions. He was put on gardening leave during his notice period, which ended on 7 April 2019. We were taken to a draft of the dismissal letter, which contained substantial track changes. The Respondent's witnesses were unable to identify who had made them; Ms Halliday 'did not recall', but accepted that it might have been Ms Nicolaou. On the balance of probabilities, we find that it was. References to points made by the Claimant in his defence were excised.

167. Mr Sparkes accepted in cross-examination that the Claimant's depression might provide some explanation as to why he needed a sabbatical; and that, in order to decide whether he was guilty of misconduct, he needed to understand the reasons why the Claimant did not return to work, and that depression 'may be' relevant to that. In his letter of dismissal, no reference was made to the Claimant's health at all. We find that he treated it as irrelevant to his decision.

168. We also note that the third disciplinary charge, of failing to follow the holiday booking procedure, was upheld, notwithstanding the fact that Mr Sparkes accepted that no one, including the Claimant, had been asked about that issue in the course of the disciplinary process; the Claimant had not even been shown a holiday booking procedure.

169. The Respondent's disciplinary policy provides that the sanction of dismissal would usually only be appropriate for misconduct during the probationary period, or for further instances of misconduct, where the employee was subject to other active warnings, or for gross misconduct. The Claimant had no previous disciplinary warnings. Mr Sparkes gave a number of accounts as to what his conclusion was: he stated initially that his decision was that the Claimant had committed serious misconduct, not gross misconduct. It was put to Mr Sparkes that, in that case, the dismissal fell outside the range of sanctions provided for by the Respondent's policy; he agreed with that proposition, and said that he had acted 'on instructions from the HR department'. He then said that 'we decided it was an act of misconduct, but it was an act of gross misconduct, I'm not sure if the draft is right'. He then positively asserted that it was gross misconduct; in re-examination, he stated that he did not know the difference between serious and gross misconduct. Two things emerged from this confused evidence: that Mr Sparkes did not understand the disciplinary policy; and that HR went beyond its proper advisory role, and influenced the decision to dismiss.

<u>The appeal against dismissal</u>

170. The Claimant attended an appeal hearing on 7 February 2019.

171. Although his open involvement in the process had finished, Mr Sparkes continued to involve himself in it behind the scenes, after the decision to dismiss. In an email of 15 February 2019, he wrote to Ms Nicolaou:

> 'As discussed this morning please see Jacquie's notes. I'm free and available most of next week to go through next steps when you are ready'.

172. Mr Sparkes did not refer to those communications in his witness statement to the Tribunal. When pressed in cross-examination, he was unable to say what the 'next steps' were. They plainly involved a further group conference, because on 19 February 2019, Mr Sparkes wrote again to Ms Nicolaou, setting up a meeting with her, Mr Finegold, Mr Lees, Mr Fennessy, Mr Sandler and Ms Daly, to discuss the Claimant.

173. The appeal meeting was conducted by Ms Alexandra Kloss (Head of IRS IDB Sales); Ms Nicolaou was the HR adviser in charge of the appeal stage; Ms Amber Fitzgerald (HR Asst at BGC) took notes. Although Ms Nicolaou was attending the hearing in an advisory capacity only, she intervened in the hearing some 130 times, speaking twice as often as Ms Kloss.

174. Ms Nicolaou did not tell Ms Kloss that Mr Lees had told her that the Claimant had mentioned his mental health difficulties at the meeting of 4 October 2018. Nor did Ms Nicolaou disclose her notes of that meeting at any stage, including to Ms Kloss or to the Claimant, although she accepted that, in hindsight, they contained important information, and would have helped the Claimant in his appeal.

175. We had before us notes of the appeal meeting. Again, these notes had been altered by way of track changes, including the addition of whole sections of text. Ms Nicolaou was asked in cross-examination whether she was the author of the track changes. Her initial position was that she didn't recall making them; later in her evidence she denied doing so. We find that she did: she was the HR Officer in charge of the appeal stage; she had the necessary access to the notes, and knowledge of the case; we doubt that Ms Fitzgerald would have embarked on such an exceptionally unwise exercise, at least not without the express authorisation of Ms Nicolaou. We reject Ms Nicolaou's somewhat half-hearted suggestion that a senior business partner might have done so; we found it implausible that anyone who was not present at the meeting would have risked tampering with the notes.

176. The material nature of the changes may be illustrated by two examples. A passage in which the Claimant described walking along Regent's Canal, and experiencing suicidal thoughts, had been deleted altogether. Ms Nicolaou agreed in cross-examination that he had said this, and characterised its deletion as 'an administrative error'. At one point in the notes, a statement was ascribed to the Claimant: 'the return was not in line with the management instructions and looks to have further exasperated [*presumably 'exacerbated'*] the situation'. It is inconceivable that the Claimant would have spoken these words.

177. We found Ms Nicolaou to be an evasive witness; her evidence as to the matters referred to above was wholly unconvincing.

178. On 11 March 2019, Ms Kloss conducted investigation meetings with Mr Finegold, Mr Fennessy, Mr Lees, Ms Daly, and Mr Sandler. The content of those further investigations was not shared with the Claimant before the conclusion of the process.

179. Ms Kloss gave her decision, dismissing the appeal, in an 11-page letter dated 30 April 2019. Ms Kloss's evidence was that she discussed the outcome with Ms Nicolaou, who drafted the letter; her only comments on the draft were by way of picking up typographical errors. Much of the material in the appeal outcome letter is not based on the appeal meeting notes, or the subsequent investigatory notes, and thus fell outside the direct knowledge of Ms Kloss, who was unable to explain how she had come by the information. It ascribed to the Claimant comments which even the expanded, track-changed version of the notes did not contain, such as a statement that Dr Sturgeon was a personal friend of the Claimant's. In all the circumstances, the Tribunal infers that Ms Nicolaou had direct input into the decision to dismiss the appeal, and the reasoning is almost entirely hers.

180. In the course of the outcome letter, the decision-maker concluded: that managers had not known in the first half of 2018 that the Claimant was suffering from depression, or any kind of mental health condition; that he had not told Ms Daly, nor had she suggested to him, that he was suffering from depression; that he had done nothing to raise issues which might give the Respondent concern about his well-being; that his negative feelings were an account of his bad investments in bitcoin; that his absences from work were 'in line with industry standards'; and that there was no medical evidence that the Claimant needed a sabbatical for health reasons. We agree with Mr Roberts' characterisation of this outcome as a one-sided summary, which set out to diminish any evidence of the Claimant's mental health difficulties, and of the Respondent awareness of it. We also observe that it foreshadows the narrative advanced by the Claimant's witnesses at the hearing before us.

<u>The Claimant's bonus</u>

181. The Claimant had been allocated a standard bonus of £70,649, which had been paid to him in July 2018. He was also entitled to a superbonus in the same amount, which was payable under his contract at the end of October 2018. It was never paid.

182. Mr Finegold confirmed that it was his decision to withhold the Claimant's bonuses. He accepted in cross-examination that the assessment of the bonus was made by reference to performance in that quarter, and that there was no discretion in the policy as to the timing of the payment of that bonus. He further stated that, had they known that the Claimant was unwell, they would have paid his Q2 super bonus 'on time or earlier'. The Respondent (including Mr Finegold) did know that the Claimant was unwell: they had known since at the first half of 2018; it was confirmed to them again in writing by the Claimant, in the letter of 3 October 2018. Ms Kloss considered whether he ought to be paid this sum; she was sympathetic to the fact that the Claimant had not been paid his bonus, and wanted to uphold that aspect of his complaint at the appeal stage. However, she was advised by Ms Nicolaou not to do so.

183. No bonus was allocated to the Claimant in respect of Q3, despite the fact that the Claimant worked for part of the quarter. The Respondent led no evidence about this decision.

Findings of fact in relation to the issue of disability

184. We have already made some findings as to the Claimant's health, and its effect on him in 2018. We summarise them in this section, and supplement them with some additional findings of fact.

185. The Claimant suffered from poor sleep from November 2017 onwards; this was recorded by Dr Sturgeon, when he saw the Claimant in March 2018 (para 57). By the beginning of January 2018, the lack of sleep was having a very significant impact on his daily life, including tiredness during the day, which interfered with his ability to function at work.

186. The Claimant's timekeeping deteriorated from January 2018 (para 26); it continued to be a source of concern to the Respondent in March/April 2018 (paras 54 and 60), in July 2018 (para 79) and August 2018 (para 95); it led to covert monitoring, which continued until August 2018 (para 51).

187. We have found (para 27) that from January 2018, the Claimant's appetite was significantly affected. His ability to exercise to the same extent that he usually did was also significantly affected.

188. After the death of his grandmother in early February 2018, he also began to avoid some social events, because he found interaction difficult and draining.

189. In February 2018, he absented himself from work altogether, because of his mental health difficulties: he had three days' sickness absence in February, and a further week in March 2018 (para 29), all of which were by reason of his mental health difficulties. He saw his GP on 6 March 2018. The notes record that he had 'insomnia and stress'. He was prescribed the sleeping medication, zopiclone.

190. We accept his evidence that he had particularly bad days, when he felt overwhelmed and struggled to get out of bed. That is consistent with the increasing concerns on the Respondent's part as to his timekeeping.

191. Also by this point, he had begun to experience some suicidal thoughts (referred to in Dr Sturgeon's notes on 28 March 2018). His account of this was concrete and compelling: he described feelings of hopelessness, which he dealt with by taking long walks in the evenings, in an attempt to calm himself down.

192. He attended his GP again on 12 March 2018, when a diagnosis of 'ongoing anxiety and depression' was recorded, and he was referred to Dr Sturgeon. He was again prescribed zopiclone. The referral stated that he appeared to have developed 'an acute anxiety state and insomnia' and he was 'struggling to cope'. We find that the reference to 'acute anxiety state' is consistent with the Claimant's evidence (which we accept) that, by this point, he was experiencing panic attacks. He would leave the office when he had an attack; that is consistent with Mr Fennessy's evidence that there were 'quite a lot' of occasions when C left the office during the working day, and then came back.

193. On 28 March 2018, he saw Dr Sturgeon for an urgent appointment, after he had a panic attack at work. Dr Sturgeon made a diagnosis 'undoubtedly of depression'. He prescribed sertraline (50mg) for depression, diazepam (2mg) 'in the case of the start of anxiety', and mirtazapine (50mg) for his insomnia. The fact that the Claimant considered resigning from his job is, in our judgment, itself indicative of the substantial nature of the effects the Claimant was experiencing.

194. When the Claimant saw Ms Jaillant on 10 April 2018, he continued to describe problems with his sleep and his appetite, and she noted that he 'finds no pleasure in anything' and was 'self-destructing'. As Ms Jaillant recorded, he was not yet noticing any difference as a result of the antidepressant medication. There was, however, an improvement in the ensuing months, we infer, as the medication took effect. The Claimant described that he began to feel some effects of the sertraline from later in the month, but we accept his evidence that some of the adverse effects continued, albeit at a lesser intensity. He saw Dr Sturgeon again on 25 April 2018, who recorded an improvement in his condition. However, he maintained the sertraline prescription at 50mg.

195. Although the Claimant was able to perform effectively at work, we accept his evidence that his mental state had a substantial impact on his ability to maintain good relations with colleagues, which manifested itself in irritability and, on occasions, inappropriate conduct. That conduct was noted, and commented on: see the Bloomberg exchange of 18 July 2018 (para 79), and Ms Daly's communication with the Claimant on 21 August 2018 (para 95). We have found that these behavioural issues did not predate 2018 (para 21 onwards); they were not, as Mr Brown submitted, 'constitutional'.

196. There were continuing concerns about the Claimant's timekeeping and attendance at work. From April 2018, Mr Fennessy instigated tracking of the Claimant's movements, which continued up to the beginning of his leave in August. In a conversation with the Claimant in August 2018, Ms Daly told the Claimant that he needed to return 'with a renewed attitude – at work, on time, behaving reasonably, respecting colleagues.'

197. We also accept his evidence that, through May and June 2018, he preferred to spend holidays and weekends with his family in France, rather than socialising with friends in London, as he found this comforting. In May 2018, he enrolled in a mindfulness course at the West London Buddhist Centre, and also attended regular acupuncture appointments, both in an attempt to manage the effects of his mental health difficulties. We find that the Claimant was adopting coping strategies to help him through this period of work.

198. The Claimant saw Dr Sturgeon again on 3 July 2018, when his sertraline prescription was reduced to 25mg, although we note that on 9 August 2018, by which time he was in France, the Claimant was prescribed a four-month supply of sertraline at the higher dose of 50mg. We accept his evidence that he continued to take this medication throughout the period of his leave.

199. Much was made in cross examination of references in the documents to plans the Claimant made to buy property in Paris, and to make a trip to South America (paras 68-69), as indicators that he cannot have been as unwell as

he suggested. Similar points were pursued in relation to the activities which the Claimant engaged in during his absence from work over the summer. We do not find that the fact that the Claimant made positive plans demonstrated that he was not suffering from anxiety and/or depression. Our focus must be on what the Claimant could not do, rather than on what he could do, or thought he could do. We regard it as natural for a person struggling with mental health difficulties to set himself positive goals; the purpose of the sabbatical was for the Claimant to have an extended period of recuperation. In any event, we note that he did not carry through his more ambitious projects; indeed, he did not travel outside France during his period of leave. Although he attended the Ryder Cup with clients, which he had previously committed to doing, he only stayed for the first day. We regard these as further indicators that he was still managing his condition, and being careful as to what he took on.

200. That the Claimant felt better when he was in France was hardly surprising, since by stepping away from work, one of the principle stressors had been removed. Nonetheless, we accept his evidence that he continued to have difficulty sleeping, and experienced severe mood swings. Further, he found that he had to manage his condition, by focusing for the most part on activities which were relaxing and therapeutic, such as spending time with his family, walking, fishing and, from around September, surfing, although there were days when he did not feel well enough to engage in those activities. To use the Claimant's contemporaneous expression (para 125): 'I spend time with family and change my mind'.

201. When the Claimant returned to work in November, we accept his evidence that he experienced increased anxiety, which became worse when he learnt that he was to face disciplinary action: both his sleep and his appetite were once again significantly affected, and that he avoided socialising with friends in London. We note that, when he has saw Dr Sturgeon again on 27 November 2018, Dr Sturgeon again prescribed sertraline at 50mg. That prescription was maintained at the appointment on 29 January 2019.

The law: disability discrimination

Time limits

202. S.123(1)(a) EqA provides that a claim of disability discrimination must be brought within three months, starting with the date of the act to which the complaint relates.

203. The three-month time limit is paused during ACAS early conciliation: the period starting with the day after conciliation is initiated, and ending with the day of the ACAS certificate, does not count (s.140B(3) EqA). If the ordinary time limit would expire during the period beginning with the date on which the employee contacts ACAS, and ending one month after the day of the ACAS certificate, then the time limit is extended, so that it expires one month after the day of the ACAS certificate (s.140B(4) EqA).

204. S.123(3)(a) EqA provides that conduct extending over a period is to be treated as done at the end of the period. In *Hendricks v Commissioner of Police of the Metropolis* [2003] ICR 530, the Court of Appeal held that Tribunals should not take too literal an approach: the focus should be on the substance of the

complaint that the employer was responsible for an ongoing situation or a continuing state of affairs, in which an employee was treated in a discriminatory manner.

205. S.123(1)(b) EqA provides that the Tribunal may extend the three-month limitation period, where it considers it just and equitable to do so. That is a very broad discretion. In exercising it, the Tribunal should have regard to all the relevant circumstances, which will usually include: the reason for the delay; whether the Claimant was aware of his right to claim and/or of the time limits; whether he acted promptly when he became aware of his rights; the conduct of the employer; the length of the extension sought; the extent to which the cogency of the evidence has been affected by the delay; and the balance of prejudice (*Abertawe Bro Morgannwg University Local Health Board v Morgan* [2018] ICR 1194).

The burden of proof

206. The burden of proof provisions are contained in s.136(1)-(3) EqA:

> **(1) This section applies to any proceedings relating to a contravention of this Act.**
>
> **(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.**
>
> **(3) But subsection (2) does not apply if A shows that A did not contravene the provision.**

207. Their effect was conveniently summarised by Underhill LJ in *Base Childrenswear Ltd v Otshudi* [2019] EWCA Civ 1648 at [18]:

> **'It is unnecessary that I reproduce here the entirety of the guidance given by Mummery LJ in *Madarassy*.[1] He explained the two stages of the process required by the statute as follows:**
>
> **(1) At the first stage the Claimant must prove "a *prima facie* case". That does not, as he says at para. 56 of his judgment (p. 878H), mean simply proving "facts from which the Tribunal could conclude that the Respondent 'could have' committed an unlawful act of discrimination". As he continued (pp. 878-9):**
>
> > **"56. … The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a Tribunal 'could conclude' that, on the balance of probabilities, the Respondent had committed an unlawful act of discrimination.**
> >
> > **57. 'Could conclude' in section 63A(2) [of the Sex Discrimination Act 1975] must mean that 'a reasonable Tribunal could properly conclude' from all the evidence before it. …"**
>
> **(2) If the Claimant proves a *prima facie* case the burden shifts to the Respondent to prove that he has not committed an act of unlawful discrimination – para. 58 (p. 879D). As Mummery LJ continues:**

[1] *Madarassy v Nomura International plc* [2007] ICR 867, CA

> **"He may prove this by an adequate non-discriminatory explanation of the treatment of the complainant. If he does not, the Tribunal must uphold the discrimination claim."**
>
> **He goes on to explain that it is legitimate to take into account at the first stage all evidence which is potentially relevant to the complaint of discrimination, save only the absence of an adequate explanation.'**

208. In *Deman v Commission for Equality and Human Rights* [2010] EWCA Civ 1279, Sedley LJ observed at [19]:

> **'the "more" which is needed to create a claim requiring an answer need not be a great deal. In some instances it will be furnished by a non-response, or an evasive or untruthful answer, to a statutory questionnaire. In other instances it may be furnished by the context in which the act has allegedly occurred.'**

209. The Court of Appeal in *Anya v University of Oxford* [2001] ICR 847 at [2, 9 and 11] held that, in a discrimination case, the employee is often faced with the difficulty of discharging the burden of proof in the absence of direct evidence on the issue of the causative link between the protected characteristics on which he relies and the discriminatory acts of which he complains. The Tribunal must avoid adopting a 'fragmentary approach' and must consider the direct oral and documentary evidence available and what inferences may be drawn from all the primary facts.

210. In *Hewage v Grampian Health Board* [2012] ICR 1054 at [32], the Supreme Court held that the burden of proof provisions require careful attention where there is room for doubt as to the facts necessary to establish discrimination, but have nothing to offer where the Tribunal is in a position to make positive findings on the evidence one way or the other.

<u>The definition of disability</u>

211. S.6(1) EqA provides:

> **A person (P) has a disability if –**
>
> **(a) P has a physical or mental impairment, and**
>
> **(b) the impairment has a substantial and adverse long-term effect on P's ability to carry out normal day to day activities.**

212. 'Substantial' is defined in s.212(1) EqA as 'more than minor or trivial', and is a low threshold.

213. The 'long-term' requirement is developed in para 2, Sch.1 to the EqA, which provides, so far as relevant:

> **(1) The effect of an impairment is long-term if –**
>
> **(a) it has lasted for at least 12 months,**
>
> **(b) it is likely to last for at least 12 months, or**
>
> **(c) it is likely to last for the rest of the life of the person affected.**
>
> **(2) If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur.**

214. 'Likely', in this context and elsewhere in the provisions defining disability, means 'could well happen', rather than 'more likely than not to happen' (*Boyle v SCA Packaging Ltd* [2009] ICR 1056, HL).

215. Sch.1, para 5(1) EqA provides (the doctrine of deduced effects):

> **(3) An impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if:**
>
> **(a) measures are being taken to correct it, and**
>
> **(b) but for that, it would be likely to have that effect.**
>
> **(4) 'Measures' includes, in particular, medical treatment and the use of a prosthesis or other aid.**

216. The Guidance gives non-exhaustive examples of day to day activities:

> **'[D2] In general, day-to-day activities are things people do on a regular or daily basis, and examples include shopping, reading and writing, having a conversation or using the telephone, watching television, getting washed and dressed, preparing and eating food, carrying out household tasks, walking and travelling by various forms of transport, and taking part in social activities. Normal day-to-day activities can include general work-related activities, and study and education related activities, such as interacting with colleagues, following instructions, using a computer, driving, carrying out interviews, preparing written documents, and keeping to a timetable or a shift pattern.'**

217. The Tribunal's focus should be on what the employee cannot do (or what they can do with difficulty) rather than on what they can do. The EqA does not create a spectrum running smoothly from those matters which are clearly of substantial effect to those matters which are clearly trivial. Unless a matter can be classified as within the heading 'trivial' or 'insubstantial', it must be treated as substantial (*Aderemi v London and South Eastern Railway Ltd* [2013] ICR 591 EAT at [14-15]).

218. The Code of Practice on Employment in 2011 includes a summary in relation to the definition of disability, at paras 2.8–2.20. Paragraph 2.20 further refers the reader to App. 1 to the Code.

219. Under the heading 'What is a "substantial" adverse effect?', paras 8–10 of the appendix provide:

> **'8. A substantial adverse effect is something which is more than a minor or trivial effect. The requirement that an effect must be substantial reflects the general understanding of disability as a limitation going beyond the normal differences in ability which might exist among people.**
>
> **9. Account should also be taken of where a person avoids doing things which, for example, cause pain, fatigue or substantial social embarrassment; or because of a loss of energy and motivation […]'**

220. The statutory *Guidance on matters to be taken into account in determining questions relating to the definition of disability* (2011) contains the following guidance as to the interaction between the 'impairment' requirement and the issue of 'substantial adverse effects':

> **'A3. The definition requires that the effects which a person may experience must arise from a physical or mental impairment. The term mental**

or physical impairment should be given its ordinary meaning. It is not necessary for the cause of the impairment to be established, nor does the impairment have to be the result of an illness. In many cases, there will be no dispute whether a person has an impairment. Any disagreement is more likely to be about whether the effects of the impairment are sufficient to fall within the definition and in particular whether they are long-term. Even so, it may sometimes be necessary to decide whether a person has an impairment so as to be able to deal with the issues about its effects.'

[…]

B4. An impairment might not have a substantial adverse effect on a person's ability to undertake a particular day-to-day activity in isolation. However, it is important to consider whether its effects on more than one activity, when taken together, could result in an overall substantial adverse effect.

[…]

C7. It is not necessary for the effect to be the same throughout the period which is being considered in relation to determining whether the 'long-term' element of the definition is met. A person may still satisfy the long-term element of the definition even if the effect is not the same throughout the period. It may change: for example activities which are initially very difficult may become possible to a much greater extent. The effect might even disappear temporarily. Or other effects on the ability to carry out normal day-to-day activities may develop and the initial effect may disappear altogether.'

221. In *J v DLA Piper UK LLP* [2010] ICR 1052 EAT, Underhill P gave the following guidance at [40]:

'(1) It remains good practice in every case for a Tribunal to state conclusions separately on the questions of impairment and of adverse effect (and, in the case of adverse effect, the questions of substantiality and long-term effect arising under it) as recommended in *Goodwin*.

(2) However, in reaching those conclusions the Tribunal should not proceed by rigid consecutive stages. Specifically, in cases where there may be a dispute about the existence of an impairment it will make sense, for the reasons given in paragraph 38 above, to 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 to consider the question of impairment in the light of those findings.

[…]'

222. In the same case, Underhill P. made the following observations about the doctrine of deduced effects at [57]:

'*Secondly*, there is the question of deduced effect. This was, as we have noted, the only way the case was pleaded, though it seems that the parties subsequently proceeded on the basis that "actual" adverse effects were also relied on. The Tribunal dealt with that issue by saying simply that "the Claimant did not adduce any clear or cogent evidence of this", referring to its observations about Dr Morris's evidence which we have set out at para 30 above. If, as we think, the Tribunal intended simply to discount Dr Morris's evidence because she was not a psychiatrist, that approach is wrong, for the reasons already given: we accept the contention to this effect at para 6.4 of the notice of appeal. But it may have meant only that her evidence was too brief to be "clear or cogent". If so, the point is debatable. Strictly speaking, the question that needed to be addressed was whether, on the hypothesis that the Claimant's ability to carry out normal day-to-day activities was not, as at June 2008, substantially affected, there would have been such an effect but for her treatment. Since Dr Morris did not accept

> **that hypothesis, it is not surprising that she did not directly answer the question, saying only that without treatment the Claimant's condition would be "much worse". In view of our decision in the previous paragraph we need not decide the point, though we are inclined to think that the report can just about be read as supporting a "deduced effect" case. It is, even if so read, extremely brief, but there is nothing particularly surprising in the proposition that a person diagnosed as suffering from depression who is taking a high dose of antidepressants would suffer a serious effect on her ability to carry out normal day-to-day activities if treatment were stopped: the proposition could of course be challenged, but in the absence of such challenge—there being none in Dr Gill's report—it is unclear what elaboration was required. Nor do we understand the relevance of the Tribunal's observation that Dr Morris's report was written in November/December 2008: it was clearly referring back to events at the material time.'**

223. If there is material before the Tribunal to suggest that measures were being taken that may have altered the effects of the impairment, then it must consider whether the impairment would have had a substantial adverse effect in the absence of those measures (*Fathers v Pets at Home* Ltd, EAT 0424/13).

224. There remains a valid distinction to be drawn between a normal reaction to adverse and tragic life events, and something that is more profound and develops into an impairment: *J v DLA Piper* at [42]. Underhill P observed:

> **'We accept that it may be a difficult distinction to apply in a particular case; and the difficulty can be exacerbated by the looseness with which some medical professionals, and most laypeople, use such terms as "depression" ("clinical" or otherwise), "anxiety" and "stress". Fortunately, however, we would not expect those difficulties often to cause a real problem in the context of a claim under the Act. This is because of the long-term effect requirement. If, as we recommend at paragraph 40(2) above, a Tribunal starts by considering the adverse effect issue and finds that the Claimant's ability to carry out normal day-to-day activities has been substantially impaired by symptoms characteristic of depression for 12 months or more, it would in most cases be likely to conclude that he or she was indeed suffering "clinical depression" rather than simply a reaction to adverse circumstances: it is a common-sense observation that such reactions are not normally long-lived.**
>
> **We should make it clear that the distinction discussed in the preceding paragraph does not involve the restoration of the requirement previously imposed by para. 1(1) of Schedule 1 that the Claimant prove that he or she is suffering from a "clinically well-recognised illness."'**

<u>Knowledge of disability</u>

225. Knowledge of disability is relevant to the claims under ss.15 and 20 EqA. The burden is on the Respondent to show that it did not know that the Claimant was disabled (actual knowledge), or that it ought not reasonably to have known that he was disabled (constructive knowledge).

226. There is a further requirement in a reasonable adjustments claim: that the employer knew, or ought reasonably to have known, that the disability was likely to ('could well') put the Claimant at a substantial (more than minor or trivial) disadvantage in comparison with non-disabled persons.

227. For these purposes the required knowledge, whether actual or constructive, is of the facts constituting the employee's disability, namely (a) a physical or mental impairment, which has (b) a substantial and long-term adverse effect on (c) his ability to carry out normal day-to-day activities. Provided the

employer has actual or constructive knowledge of the facts constituting the employee's disability, the employer does not also need to know that, as a matter of law, the consequence of such facts is that the employee is a 'disabled person'. The responsible employer must make his own factual judgment as to whether the employee is or is not disabled. In doing so, the employer will rightly want guidance from occupational health. When seeking outside advice from clinicians, the employer must not simply ask in general terms whether the employee is a disabled person within the meaning of the legislation, but pose specific *practical* questions directed to the particular circumstances of the putative disability. The answers to such questions will then provide real assistance to the employer in forming his/her judgment as to whether the criteria for disability are satisfied. (*Gallop v Newport City Council (No.1)* [2014] IRLR 211 at [36-44]).

228. The relevant case law was summarised by HHJ Eady QC (as she then was) in *A Ltd v Z* [2020] ICR 199 EAT at [23].

> **'23. In determining whether the employer had requisite knowledge for section 15(2) purposes, the following principles are uncontroversial between the parties in this appeal:**
>
> **(1) There need only be actual or constructive knowledge as to the disability itself, not the causal link between the disability and its consequent effects which led to the unfavourable treatment: see *York City Council v Grosset* [2018] ICR 1492, para 39.**
>
> **(2) The Respondent need not have constructive knowledge of the complainant's diagnosis to satisfy the requirements of section 15(2); it is, however, for the employer to show that it was unreasonable for it to be expected to know that a person (a) suffered an impediment to his physical or mental health, or (b) that that impairment had a substantial and (c) long-term effect: see *Donelien v Liberata UK Ltd* (unreported) 16 December 2014, para 5, *per* Langstaff J (President), and also see *Pnaiser v NHS England* [2016] IRLR 170, para 69, *per* Simler J.**
>
> **(3) The question of reasonableness is one of fact and evaluation: see *Donelien v Liberata UK Ltd* [2018] IRLR 535, para 27; none the less, such assessments must be adequately and coherently reasoned and must take into account all relevant factors and not take into account those that are irrelevant.**
>
> **(4) When assessing the question of constructive knowledge, an employee's representations as to the cause of absence or disability-related symptoms can be of importance: (i) because, in asking whether the employee has suffered substantial adverse effect, a reaction to life events may fall short of the definition of disability for Equality Act purposes (see *Herry v Dudley Metropolitan Borough Council* [2017] ICR 610, *per* Judge David Richardson, citing *J v DLA Piper UK llp* [2010] ICR 1052), and (ii) because, without knowing the likely cause of a given impairment, "it becomes much more difficult to know whether it may well last for more than 12 months, if it has not [already] done so", *per* Langstaff J in *Donelien* 16 December 2014, para 31.**
>
> **(5) The approach adopted to answering the question thus posed by section 15(2) is to be informed by the code, which (relevantly) provides as follows:**
>
> > **5.14 It is not enough for the employer to show that they did not know that the disabled person had the disability. They must also show that they could not reasonably have been expected to know about it. Employers should consider whether a worker has a disability even where one has not been formally disclosed, as, for example, not all workers who meet the definition of disability may think of themselves as a 'disabled person'.**

> **5.15 An employer must do all they can reasonably be expected to do to find out if a worker has a disability. What is reasonable will depend on the circumstances. This is an objective assessment. When making inquiries about disability, employers should consider issues of dignity and privacy and ensure that personal information is dealt with confidentially.**
>
> **(6) It is not incumbent upon an employer to make every inquiry where there is little or no basis for doing so: *Ridout v TC Group* [1998] IRLR 628; *Secretary of State for Work and Pensions v Alam* [2010] ICR 665 .**
>
> **(7) Reasonableness, for the purposes of section 15(2) , must entail a balance between the strictures of making inquiries, the likelihood of such inquiries yielding results and the dignity and privacy of the employee, as recognised by the code.**

Failure to make reasonable adjustments: s.20-21 EqA

229. S.20 EqA provides as relevant:

> **(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.**
>
> **(2) The duty comprises the following three requirements.**
>
> **(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.**
>
> **(4) The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.**
>
> **(5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.**

230. S.21 EqA provides as relevant:

> **(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.**
>
> **(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.**
>
> **[…]**

231. The reasonableness of an adjustment falls to be assessed objectively by the Tribunal (*Morse v Wiltshire County Council* [1998] IRLR 352).

232. In *Rider v Leeds City Council* EAT 0243/11, the EAT held that the carrying out of an assessment as to what reasonable adjustments might be made in respect of a disabled employee was not, of itself, capable of amounting to a reasonable adjustment. In *Smith v Salford NHS Primary Care Trust* UKEAT/0507/10, the Employment Appeal Tribunal held that:

> '**Adjustments that do not have the effect of alleviating the disabled person's substantial disadvantage … within the meaning of the Act. Matters such as consultations and trials, exploratory investigations and the like do not qualify.'**

Direct disability discrimination

233. S.13(1) EqA provides:

> **A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.**

234. The conventional approach to considering whether there has been direct discrimination is a two-stage approach: considering first whether there has been less favourable treatment by reference to a real or hypothetical comparator; and secondly going on to consider whether that treatment is because of the protected characteristic, here race/religion.

235. More recently, the appellate courts have encouraged Tribunals to address both stages by considering a single question: the 'reason why' the employer did the act or acts alleged to be discriminatory. Was it on the prohibited ground or was it for some other reason? This approach does not require the construction of a hypothetical comparator: see, for example, the comments of Underhill J in *Martin v Devonshires Solicitors* [2011] ICR 352 at para 30.

236. In *Hewage v Grampian Health Board* [2012] ICR 1054 at [32], the Supreme Court held that the burden of proof provisions require careful attention where there is room for doubt as to the facts necessary to establish discrimination, but have nothing to offer where the Tribunal is in a position to make positive findings on the evidence one way or the other.

237. The protected characteristic need not be the main reason for the treatment. It must have a 'significant influence' on the reason for the treatment: *Nagarajan v London Regional Transport* [1999] IRLR 572 [576].

238. In *Reynolds v CLFIS (UK) Ltd* [2015] ICR 1010, the Court of Appeal confirmed that a 'composite approach' to an allegation of discrimination is unacceptable in principle: the employee who did the act complained of must himself have been motivated by the protected characteristic (para 36).

Discrimination arising from disability: s.15 EqA

239. S.15 EqA provides as follows:

> **(1) A person (A) discriminates against a disabled person (B) if—**
>
> **(a) A treats B unfavourably because of something arising in consequence of B's disability, and**
>
> **(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.**
>
> **(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.**

240. The correct approach to a claim of this sort was considered by the Court of Appeal in *City of York Council v Grosset* [2018] IRLR 746 *per* Sales LJ (at para 36 onwards):

> **'36. On its proper construction, section 15(1)(a) requires an investigation of two distinct causative issues: (i) did A treat B unfavourably because of an (identified) "something"? and (ii) did that "something" arise in consequence of B's disability.**

> **37. The first issue involves an examination of A's state of mind, to establish whether the unfavourable treatment which is in issue occurred by reason of A's attitude to the relevant "something" ...**
>
> **38. The second issue is an objective matter, whether there is a causal link between B's disability and the relevant "something" ….'**

241. In *Pnaiser v NHS England* [2016] IRLR 170, Simler J accepted that:

> **'just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a S.15 case. The "something" that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.'**

242. The Code of Practice offers the following explanation of what is meant by 'something arising in consequence of disability' for the purposes of s.15 EqA:

> **[5.9] The consequences of a disability include anything which is the result, effect or outcome of a disabled person's disability. The consequences will be varied, and will depend on the individual effect upon a disabled person of their disability. Some consequences may be obvious, such as an inability to walk unaided or inability to use certain work equipment. Others may not be obvious, for example, having to follow a restricted diet.**

243. The meaning of 'unfavourable treatment' was considered by the Supreme Court in *Trustees of Swansea University Pension and Assurance Scheme v Williams* [2019] ICR 230 (at para 27):

> **'… in most cases (including the present) little is likely to be gained by seeking to draw narrow distinctions between the word "unfavourably" in section 15 and analogous concepts such as "disadvantage" or "detriment" found in other provisions, nor between an objective and a "subjective/objective" approach. While the passages in the Code of Practice to which she draws attention cannot replace the statutory words, they do in my view provide helpful advice as to the relatively low threshold of disadvantage which is sufficient to trigger the requirement to justify under this section.'**

244. It is then necessary to look to the employer's defence of justification. S.15(1)(b) EqA provides that the unfavourable treatment may be justified, if it is a proportionate means of achieving a legitimate aim. To be proportionate, the conduct in question must be both an appropriate means of achieving a legitimate aim and a reasonably necessary means of doing so (*Allonby v Accrington & Rossendale College & Others* [2001] ICR 1189 CA).

245. Justification requires the Tribunal to conduct an objective balancing exercise between the discriminatory effect and the reasonable needs of the employer (*Ojutiku v Manpower Services Commission* [1982] ICR 661 CA per Stephenson LJ at 674B-C, and *Land Registry v Houghton & Others* UKEAT/0149/14 at [8-9]). It will be relevant for the Tribunal to consider whether any lesser measure might have achieved the employer's legitimate aim (*Naeem v Secretary of State for Justice* [2014] ICR 472).

246. The time at which justification needs to be established is the point when the unfavourable treatment occurs (*Trustees of Swansea University Pension and Assurance Scheme v Williams* [2015] ICR 1197 EAT at [42]). When the putative discriminator has not considered questions of proportionality at that time, it is likely to be more difficult for them to establish justification, although

the test remains an objective one (*Ministry of Justice v O'Brien* [2013] UKSC 6 at [47-48]).

Harassment related to disability

247. Harassment related to disability is defined by s.26 EqA, which provides, so far as relevant:

> **(1) A person (A) harasses another (B) if-**
>
> > **(a) A engages in unwanted conduct related to a relevant protected characteristic, and**
> > **(b) the conduct has the purpose or effect of—**
> >
> > > **(i) violating B's dignity, or**
> > > **(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.**
>
> **…**
> **(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—**
>
> > **(a) the perception of B;**
> > **(b) the other circumstances of the case;**
> > **(c) whether it is reasonable for the conduct to have that effect.**
>
> **(5) The relevant protected characteristics are—**
> **…**
> **race**
> **…**

248. The use of the wording 'unwanted conduct *related to* a relevant protected characteristic' was intended to ensure that the definition covered cases where the acts complained of were associated with the prescribed factor as well as those where they were caused by it. It is a broader test than that which applies in a claim of direct discrimination (*Unite the Union v Nailard* [2018] IRLR 730).

249. Elias LJ in *Land Registry v Grant* [2011] ICR 1390 (at para 47) held that sufficient seriousness should be accorded to the terms 'violation of dignity' and 'intimidating, hostile, degrading, humiliating or offensive environment'.

> **'Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment.'**

250. The EAT in *Betsi Cadwaladr University Health Board v Hughes* [2014] UKEAT/0179/13/JOJ (at para 12), referring to the above, stated:

> **'We wholeheartedly agree. The word "violating" is a strong word. Offending against dignity, hurting it, is insufficient. "Violating" may be a word the strength of which is sometimes overlooked. The same might be said of the words "intimidating" etc. All look for effects which are serious and marked, and not those which are, though real, truly of lesser consequence.'**

Unfair dismissal

251. Section 94 of the Employment Right Act 1996 ('ERA') provides that an employee with sufficient qualifying service has the right not to be unfairly dismissed by her employer.

252. Section 98 ERA provides so far as relevant:

> **(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –**
>
> **(a) the reason (or, if more than one, the principal reason) for the dismissal, and**
>
> **(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.**
>
> **(2) A reason falls within this subsection if it— ...**
>
> **(b) relates to the conduct of the employee ... ...**
>
> **(4) ... where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –**
>
> **(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and**
>
> **(b) shall be determined in accordance with equity and the substantial merits of the case."**

253. In *Orr v Milton Keynes Council* [2011] ICR 704 Aikens LJ summarised (at para 78) the correct approach to the application of section 98 in misconduct cases:

> '**(1) The reason for the dismissal of an employee is a set of facts known to an employer, or it may be a set of beliefs held by him, which causes him to dismiss an employee.**
>
> **(2) An employer cannot rely on facts of which he did not know at the time of the dismissal of an employee to establish that the "real reason" for dismissing the employee was one of those set out in the statute or was of a kind that justified the dismissal of the employee holding the position he did.**
>
> **(3) Once the employer has established before an employment Tribunal that the "real reason" for dismissing the employee is one within what is now section 98(1)(b), ie that it was a "valid reason", the Tribunal has to decide whether the dismissal was fair or unfair. That requires, first and foremost, the application of the statutory test set out in section 98(4)(a).**
>
> **(4) In applying that subsection, the employment Tribunal must decide on the reasonableness of the employer's decision to dismiss for the 'real reason'. That involves a consideration, at least in misconduct cases, of three aspects of the employer's conduct. First, did the employer carry out an investigation into the matter that was reasonable in the circumstances of the case; secondly, did the employer believe that the employee was guilty of the misconduct complained of; and, thirdly, did the employer have reasonable grounds for that belief."**
>
> **[I interpose that Aikens LJ was here summarising the well-known test described in British Homes Stores Ltd v Burchell [1978] IRLR 379.]**
>
> **If the answer to each of those questions is 'yes', the employment Tribunal must then decide on the reasonableness of the response of the employer.**
>
> **(5) In doing the exercise set out at (4), the employment Tribunal must consider, by the objective standards of the hypothetical reasonable employer, rather than by reference to its own subjective views, whether the employer has acted within a**

> **'band or range of reasonable responses' to the particular misconduct found of the particular employee. If it has, then the employer's decision to dismiss will be reasonable. But that is not the same thing as saying that a decision of an employer to dismiss will only be regarded as unreasonable if it is shown to be perverse.**
>
> **(6) The employment Tribunal must not simply consider whether they think that the dismissal was fair and thereby substitute their decision as to what was the right course to adopt for that of the employer. The Tribunal must determine whether the decision of the employer to dismiss the employee fell within the band of reasonable responses which 'a reasonable employer might have adopted'.**
>
> **(7) A particular application of (5) and (6) is that an employment Tribunal may not substitute their own evaluation of a witness for that of the employer at the time of its investigation and dismissal, save in exceptional circumstances.**
>
> **(8) An employment Tribunal must focus their attention on the fairness of the conduct of the employer at the time of the investigation and dismissal (or any appeal process) and not on whether in fact the employee has suffered an injustice.'**

254. In *Turner v East Midlands Trains Ltd* [2013] ICR 525, Elias LJ (at paras 16–17) cited paragraphs (4) to (8) from that extract in Aikens LJ's judgment in *Orr* and added:

> **'As that extract makes clear, the band of reasonable responses test does not simply apply to the question whether the sanction of dismissal was permissible; it bears upon all aspects of the dismissal process. This includes whether the procedures adopted by the employer were adequate: see Whitbread plc (trading as Whitbread Medway Inns) v Hall [2001] ICR 699; and whether the pre-dismissal investigation was fair and appropriate: see J Sainsbury plc v Hitt [2003] ICR 111.**

255. In *Sarkar v West London Mental Health NHS Trust* [2010] IRLR 508, the Court of Appeal held that the Tribunal was entitled to hold that a dismissal had been unfair because the employer had performed a *volte face* in initially treating the matter under one process that could not result in dismissal, but then changing it to a process that could (and did) result in dismissal.

256. An employee has the right to see the evidence against him. This applies equally at the appeal stage. In *Pudney v Network Rail Infrastructure Ltd* [2006] UKEAT/0707/05/DA, the appeal officer conducted interviews but did not disclose them to the employee. The EAT overturned a finding of fairness and found the employee had been unfairly dismissed. It noted [35]:

> **'In our judgment, it is only in exceptional circumstances that it could be said to be within the band of reasonable responses for an employer to avoid giving the employee notice of the charge and giving him an opportunity to know what evidence there was against him. It follows that it is outside the band of those responses for an employer to take a decision to dismiss based on material which has not been disclosed to the employee or at least upon which he has had the opportunity to make comment.'**

257. Human Resources are supposed to provide advice; they should not improperly influence the decision maker's decision: *Ramphal v Department for Transport* [2015] IRLR 985 EAT at [55]:

> **'In my opinion, an Investigating Officer is entitled to call for advice from Human Resources; but Human Resources must be very careful to limit advice essentially to questions of law and procedure and process and to avoid straying into areas of culpability, let alone advising on what was the appropriate sanction as to appropriate findings of fact in relation to culpability insofar as the advice went beyond addressing issues of consistency. It was not for Human Resources to**

> **advise whether the finding should be one of simple misconduct or gross misconduct.'**

Contribution

258. Where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it will reduce the amount of the basic and compensatory awards by such proportion as it considers just and equitable having regard to that finding (s.123(6) ERA). In order for a deduction to be made, the conduct in question must be culpable or blameworthy in the sense that, whether or not it amounted to a breach of contract or tort, it was foolish or perverse or unreasonable in the circumstances (*Nelson v BBC (No.2)* [1980] ICR 110).

Polkey

259. Where a Tribunal finds that a dismissal was unfair, it must go on to consider the chance that the employment would have terminated in any event, had there been no unfairness (the *Polkey* issue).

260. Guidance as to the enquiry the Tribunal must undertake was provided in *Whitehead v Robertson Partnership* UKEAT [2002] 7 WLUK 539 at [22].

> **'[…] it is, we think, incumbent upon the Employment Tribunal to demonstrate their analysis of the hypothetical question by explaining their conclusions on the following sub-questions:**
>
> **1. what potentially fair reason for dismissal, if any, might emerge as a result of a proper investigation and disciplinary process. Was it conduct? Was it some other substantial reason, that is a loss of trust and confidence in the employee? Was it capability?**
>
> **2. depending on the principal reason for any hypothetical future dismissal would dismissal for that reason be fair or unfair? Thus, if conduct is the reason, would or might the Respondent have reasonable grounds for their belief in such misconduct even although the Employment Tribunal found as a fact that misconduct was not made out for the purposes of the contribution argument; alternatively, if for some other substantial reason, was that a sufficient reason for dismissal: similarly, capability.**
>
> **3. even if a potentially fair dismissal was available to the Respondent, would he in fact have dismissed the Appellant as opposed to imposing some lesser penalty, and if so, would that have ensured the Appellant's continued employment?'**

Conclusions: disability

Did the Claimant have a mental impairment, which substantially adversely affected his ability to carry out normal day-to-day activities?

261. Taking into account our findings of fact, as recorded above, the Tribunal is satisfied that the Claimant's day-to-day activities were adversely affected, to a more than minor or trivial extent, from January 2018 onwards, having regard to his ability to sleep, his appetite, his timekeeping, his motivation, the stability of his mood, his ability to function at work, his ability to interact appropriately with colleagues, his avoidance of some social activity, and his susceptibility to panic attacks. Those effects varied in severity during the period, and were not

all present all the time but, taken together, we are satisfied that the Claimant's day-to-day activities were affected throughout 2018.

262. Mr Brown urges us to find that any adverse effects were a reaction to life events, rather than by reason of a more profound impairment. On the balance of probabilities, we are satisfied that the adverse effects were no mere reaction to adverse life events, taking into account the fact that they had already lasted nine months by October 2018; they had continued during the Claimant's absence from work; and they had continued for many months after the life events on which Mr Brown relies (the death of the Claimant's grandmother, his bitcoin losses etc.).

263. Taking into account the substantial, adverse effects described above, together with the recorded diagnoses, we are satisfied, on the balance of probabilities, that the substantial adverse effects arose from the mental impairments of anxiety and depression, which the Claimant had from January 2018 onwards. The cause of the impairments appears to have been complex and multifactorial; the fact that one of the contributing issues may have been concerns about poor investments does not undermine our conclusion. We remind ourselves that our focus should be on the adverse effects themselves, rather than on seeking to establish their cause.

264. We reached these conclusions without reliance on the doctrine of deduced effects.

265. Nonetheless, we are obliged to consider that doctrine, and we do so in the alternative. Mr Brown submits that, absent specific medical evidence, no conclusion can safely be reached. We disagree. There was material before us to suggest that measures were being taken that may have altered the effects of the impairment, in the form of witness evidence from the Claimant: at paragraphs 21, 23, 59, 75 - although we disregard the first part of para 23, which he accepted was information that was not within his knowledge.

266. We infer from the fact that the Claimant continued to experience some substantial, adverse effects in October 2018, despite the fact that he had been taking anti-depressants and engaging with other therapies for many months, that he 'could well' have experienced more serious adverse effects, if he had discontinued those treatments. That appears to us to be an obvious inference, and is consistent with our own understanding of the common effects of anxiety and depression, and which does not require expert evidence.

<u>Were the adverse effects long-term?</u>

267. We have identified the start of the substantial adverse effects as the beginning of January 2018: the Claimant's sleep had already been affected in the previous two months, and by January his appetite was also affected; a starting-point of January is consistent with the fact that, by February, the effects had progressed to being severe.

268. By the time the Claimant began his period of leave at the beginning of August 2018, the effects had lasted seven months, but it was always possible that the absence from work might have had the desired result of leading to a resolution of the effects. We do not find that the long-term condition was satisfied at that point.

269. By the time the Claimant wrote to the Respondent on 3 October 2018, in response to Ms Nicolaou's instruction of 27 September 2018 to return to work, the adverse effects had already lasted nine months, and were continuing, notwithstanding the benefits of the extended period of absence, the medication and other treatments. We conclude that, at that point, the effects 'could well' have lasted for a further three months, all the more so given that he was now subject to additional stressors in relation to his employment: he was in dispute with his employer, and faced the possibility of disciplinary action, up to and including dismissal.

270. Accordingly, we conclude that the Claimant satisfied the long-term requirement at the beginning of October 2018, and that he was a disabled person within the meaning of the Equality Act, by reason of anxiety and depression, from that point onwards.

271. If we are wrong about that, by the time he consulted Dr Sturgeon again on 27 November 2018, the effects had already lasted nearly eleven months. We infer from the fact that he consulted Dr Sturgeon, who increased the sertraline prescription to 50mg, that at that point the effects 'could well' last for a further month, thereby satisfying the test.

272. By the time the decision to dismiss was taken on 7 January 2019, the effects had already lasted 12 months, thereby satisfying the statutory test, without the need to consider likelihood.

<u>Knowledge of disability</u>

273. We have already made a number of findings of fact, which are relevant to the Respondent's knowledge of the Claimant's disability:

273.1. Mr Fennessy was aware of the Claimant's loss of appetite, and difficulty sleeping, by the end of January 2018;

273.2. Ms Daly told Mr Fennessy and Mr Sandler that she believed the Claimant was suffering from depression, and alluded to its effects, in her email of 6 March 2018; on the same day, the Claimant told Ms Daly and Mr Sandler that he was struggling with his mental health;

273.3. on 12 March 2018, Ms Daly and Mr Fennessy's message exchange confirmed that they both believed he was suffering from depression, and discussed its impact on him;

273.4. on 16 March 2018, the Claimant messaged Mr Fennessy about his depression and its impact on him;

273.5. on 22 March 2018, Ms Daly and Mr Sandler discussed the Claimant's depression and its impact on him;

273.6. on 29 March 2018, Mr Sandler attempted to reach out to the Claimant about his depression;

273.7. in mid-May 2018, Mr Fennessy spoke to Mr Lees and Mr Finegold about the proposed sabbatical, and told them about the Claimant's depression;

273.8. at the meeting on 19 July 2018, the Claimant told Mr Fennessy and Mr Lees that he needed the time off because of his anxiety and depression, and showed them his anti-depressants;

273.9. by this point, Mr Fennessy and Ms Daly (at the very least) knew that the Claimant was being treated for depression;

273.10. in his email of 3 October 2018 to Ms Nicolaou, copying in Mr Finegold, Mr Fennessy, Mr Sandler and Ms Daly, the Claimant reminded them that had been suffering from depression since 'right at the start of 2018', and that he continued to take medication;

273.11. on 4 October 2018, a meeting took place between Ms Nicolaou, Mr Finegold, Mr Fennessy and Mr Lees, in which Mr Lees accepted that the Claimant had told him that he 'felt down and had pills'.

274. In the light of these findings, we are satisfied that, by October 2018, the Respondent had actual knowledge that the Claimant had suffered an impediment to his mental health since January 2018, and that it had had a more than minor or trivial effect on his day-to-day activities, which could well last a further three months.

275. If we are wrong about that, the burden is on the Respondent to show that that it was unreasonable for it to be expected to know that the Claimant had a disability. We have already found that the Respondent ought reasonably to have referred the Claimant to OH in March 2018, and again at the beginning of October 2018, and again in mid-November 2018. These were only the most obvious trigger points; Ms Daly, Ms Nicolaou and Ms Salem ignored them.

276. Ms Salem put the onus on the Claimant to provide further information, which he did. When she received it, on or around 15 November 2018, she considered that it was not adequate, but took no steps to remedy the position, or otherwise to follow up on the information it contained. The problem appears to have been that she did not specify what practical questions she wanted Dr Sturgeon to answer. Indeed, absent any direct evidence from her, it is not even clear to us that she had turned her mind to the issue of disability, as opposed to the issue of whether the Claimant was fit to return to work.

277. We are not satisfied that the Respondent has shown that it could not reasonably have been expected to know about the Claimant's disability. Quite the contrary, we conclude that it turned a blind eye to the information which it already had; indeed, as will be apparent from our findings above, the Respondent's managers went further and consistently downplayed and/or denied evidence of their knowledge of the Claimant's health difficulties during the internal disciplinary proceedings (and, indeed, before the Tribunal).

278. In all the circumstances, we conclude that the Respondent has not discharged the burden on it to show that it had neither actual nor constructive knowledge of the Claimant's disability by October 2018.

279. We acknowledge Mr Brown's submission that knowledge of disability must be personal to the alleged discriminator. However, we are satisfied that, had HR taken reasonable steps to discover the position from OH, it ought then reasonably to have communicated the outcome to managers charged with

taking decisions about the Claimant, including Mr Finegold, Mr Sparkes, Mr Lees and Mr Fennessy. Further, we think it probable that all those individuals shared the knowledge they already had about the Claimant's health difficulties.

280. This is not a case where the employee failed to cooperate in providing information to the employer: when the Claimant was asked about his health difficulties, he was open about them; when Ms Salem requested a letter from his doctor, he acted promptly. There is no suggestion that the Claimant would have limited the sharing of information about his health for reasons of confidentiality.

281. We conclude, on the balance of probabilities that, if the Respondent had referred the Claimant to OH before October 2018, as it ought reasonably to have done, the Claimant would have given the same account he gave to the Tribunal, including references to the diagnoses of his GP and Dr Sturgeon. We think it more likely than not that OH would have advised that the Claimant satisfied the test for disability by October 2018. Consequently, we are satisfied that the Respondent, including the relevant managers, were fixed with constructive knowledge at the beginning of October 2018.

282. Of course, had OH been consulted in January 2019, before the decisions to dismiss, and to reject the appeal, we are satisfied that they would have advised the Respondent that the substantial adverse effects had already lasted more than 12 months.

Failure to make reasonable adjustments (s.20 and 21 EqA)

Claims relating to the period before the Claimant met the test for disability

283. Because we have found that the Claimant was not a disabled person, within the meaning of the Equality Act 2010, before October 2018, the following claims cannot succeed: Issues 23(d), 23(e) and 23(f), insofar as they relate to April 2018.

284. With regard to Issue 23(a) ('allowing the Claimant to take an extended period of sickness absence'), we understood this to relate to the original decision not to permit the Claimant to take extended leave, which was finally taken on or around 24 August 2018. Because the Claimant was not a disabled person at that stage, no duty to make adjustments arose.

285. The position may have been different, had an allegation been made of a failure to make reasonable adjustments in October 2018, when the Claimant was a disabled person. Separate allegations of direct discrimination and disability-arising discrimination were pursued in relation to that period, which we deal with below.

The PCP relied on by the Claimant

286. With regard to the remaining reasonable adjustment claims, it is not in dispute that the Respondent applied the PCP relied on by the Claimant at all material times: 'requiring employees to attend work and/or requiring employees to carry out their duties'.

Did the application of the PCP put the Claimant at a particular disadvantage, by comparison with people without his disability?

287. We accept that requiring the Claimant to return to work in November 2018 put the Claimant at a substantial disadvantage: being at work, in circumstances where he had asked to take a longer period of leave, and was still suffering from anxiety/depression, caused him greater anxiety than would have been experienced by people without his disability. We are also satisfied that the Respondent had actual knowledge of the disadvantage: the Claimant had informed them several times about his need for a complete break, and reminded them of his need 'for a more radical change to achieve a breakthrough in my battle against depression' in his letter of 3 October 2018.

Did the Respondent take reasonable steps to remove the disadvantage?

288. We accept Mr Brown's submission that there was no evidence that allowing the Claimant to work part-time or reduced hours in November 2018 would have eliminated any disadvantage. Although not determinative of the issue, we note that he Claimant did not seek those adjustments. Accordingly, the claims at Issues 23(c) ('permitting a phased return to work following C's absence in November 2018') and 23(d) ('allowing C to work part-time until he felt well enough to work full time in November 2018') fail.

289. Similarly, we accept that there was no evidence before us that working remotely would have eliminated the disadvantage. Accordingly, the claim at Issue 23(e) also fails.

290. As for Issue 23(f) ('allocating a senior member of staff C as a mentor to support him in November 2018'), there was no evidence that the Claimant wished to have a mentor assigned to him, or that it would have removed any disadvantage. If anything, the evidence suggests that he was chafing from the monitoring he was experiencing under Mr Sandler's supervision, and he wished to resume his own work, unsupervised, as soon as possible. Accordingly, that claim fails.

291. There are then three adjustments, which the Claimant contends would have been reasonable, but which the Tribunal concludes are not capable of amounting to reasonable adjustments in the light of *Rider* and *Smith* (see above at para 232). The making of enquiries, or an assessment of evidence, merely serves to identity the disadvantage, and possible ways of eliminating it; it does not remove the disadvantage. Consequently, the claims at Issues 23(b) ('referring C to Occupational Health') and 23(h) ('accepting C's medical evidence or taking further steps to assist C in obtaining acceptable medical evidence') are not well-founded.

292. As for the adjustment contended for under Issue 23(g) ('not disciplining the Claimant on 7 January 2019'), this claim is conceptually unsound: not dismissing the Claimant would have done nothing to remove the disadvantage caused by the PCP of requiring the Claimant to attend work and carry out his duties. This claim also fails.

Discrimination because of something arising in consequence of disability (s.15 EqA)

Claim relating to the period before the Claimant met the test for disability

293. Dealing first with Issue 11(h) ('refusing to allow C to be absent from work'), we understood this to be a complaint in relation to the same decision referred to under Issue 23(a) ('allowing the Claimant to take an extended period of sickness absence'), which was definitively taken on or around 24 August 2018. Because the Claimant was not a disabled person at that stage, the claim cannot succeed.

The 'something arising in consequence of disability'

294. The Claimant relied on three matters as 'arising in consequence of disability': his stated need to take time off work; his absence from work; and his symptoms, in particular his low mood and anxiety, which affected his interactions and communications with others.

295. We have focused on the second of those factors. We are satisfied that the Claimant's absence from work, including the period from October 2018 onwards, arose in consequence of his disability. His absence from work was closely connected to his his mental health difficulties: in order to achieve a long-term resolution, the Claimant had concluded that he needed a sustained break from work; his need for a break was so pressing, that he had seriously considered resignation as an alternative. In reaching that conclusion, he had the support of Dr Sturgeon, who confirmed in his letter of 15 November 2018 that he had regarded a sabbatical as advisable.

296. Although it is not a necessary element of the cause of action that the Respondent knew about connection, in this case it did: Mr Fennessy had, initially at least, positively encouraged the Claimant to address his health concerns by taking leave, rather than by resigning.

Unfavourable treatment

297. The Respondent subjected the Claimant to the following unfavourable treatment, in part at least, because of his absence:

    297.1. Issue 11(g): 'instructing the Claimant to return to work [insofar as it relates to the period from October 2018 onwards]';

    297.2. Issue 11(i): 'refusing to pay him his Q2 bonus [payable in October 2018], and bonus for Q3';

    297.3. Issue 11(k): 'proceeding with disciplinary action against him [on or around 7 December 2018]';

    297.4. Issue 11(l): 'dismissing him [7 January 2019]'; and

    297.5. Issue 11(m): 'not upholding C's appeal against dismissal or his grievance'.

298. All the treatment alleged was unfavourable; it is clear from the *Williams* case that it is a relatively low threshold of disadvantage.

Was the treatment 'because of' the 'something arising'?

299. As for the causation issue in the 'because of' limb of the test, we find some similarity between the facts of the present case, and those in *Hall v Chief Constable of West Yorkshire Police* [2015] IRLR 893, in which the employee went off sick, stating that she was suffering from stress relating to a heart condition. Suspicious that she was not genuinely sick, the Respondent placed her under covert surveillance and instigated disciplinary proceedings, before summarily dismissing her for gross misconduct following a hearing conducted in her absence. An employment tribunal found the dismissal unfair, but rejected the s.15 EqA claim, holding that the cause of the unfavourable treatment was the employer's genuine but erroneous belief that the employee was falsely claiming to be sick. The EAT overturned this decision, stating that s.15 EqA was intended to reverse the effect of the House of Lords decision in *London Borough of Lewisham v Malcolm* [2008] IRLR 700, HL, and loosen the causal connection required between the disability and any unfavourable treatment. Thus, the Tribunal had erred by requiring the employee's disability to be the cause of the force's actions, and by enquiring into its motivation for the unfavourable treatment. A section 15 claim could succeed where the disability had a significant influence on, or was an effective cause of, the unfavourable treatment.

300. In the case of each of the five allegations referred to above, it is not in dispute that the Claimant's absence from work operated on the minds of the putative discriminators. The fact that there were other reasons in play, specifically the Respondent's view of the Claimant's refusal to follow instructions to return to work, does not affect that conclusion. The 'something arising from disability' was part of the reason for the unfavourable treatment.

Justification

301. The pleaded aims relied on by the Respondent were:

301.1. 'the smooth running of the business; and

301.2. 'the maintenance of appropriate standards.'

302. In his written closing submissions, Mr Brown sought to redefine those aims as: 'prudent financial management, the maintenance of discipline and motivation of employees'. Mr Roberts objected that the first and third of these had neither been pleaded, nor included in the list of issues, and no evidence had been led by the Respondent in relation to them. The Claimant would be prejudiced, if the Respondent were to be allowed to alter its position in this way. We agree, and we do not permit the Respondent to rely on the additional aims.

303. There was no dispute that the pleaded aims were legitimate. We then considered whether the unfavourable treatment was capable of achieving those aims. We concluded that Issue 11(i) (refusing to pay the Claimant his bonuses) was not capable of contributing to the smooth running of the business: quite the contrary, it gave rise to an ongoing dispute between the Claimant and the Respondent, in which the Respondent adopted a position which even Ms Kloss later regarded as untenable. As for the maintenance of appropriate standards, withholding a bonus, to which the Claimant was entitled, ran counter to that aim, since it suggested that the Respondent did not consider itself bound by its contractual obligations. Consequently, the

Respondent's justification defence fails at this stage, and this claim is well-founded, subject to considerations of time limits, which we deal with below.

304. By contrast, we concluded that Issues 11(g), (k), (l), and (m) were all capable of achieving the aim of maintaining appropriate standards. The Respondent regarded the Claimant's absence as unauthorised, which was potentially a disciplinary matter. Requiring an employee to return to work, instigating a disciplinary process, and dismissing him were all actions which were capable of maintaining standards in relation to absence from work. We do not consider that the separate aim of maintaining the smooth running of the business adds anything, and so do not consider it separately.

305. We then considered whether the unfavourable treatment was a proportionate means of achieving the aim of maintaining standards. Was it reasonably necessary?

306. We concluded that the requirement that the Claimant returned to work (Issue 11(g)) was reasonably necessary: the Respondent wished to conduct an investigatory and disciplinary process, which it could not reasonably do in his absence. Given that it concluded that there was a case to answer, the Respondent was entitled to escalate the matter to a disciplinary hearing (Issue 11(k). Ignoring the Claimant's refusal to follow an instruction not to take an extended period of leave altogether might have been perceived as undermining the Respondent's authority. Accordingly, those claims are not well-founded.

307. We concluded that the position was different in relation to the decision to dismiss (Issue 11(l)), and the dismissal of the appeal (Issue 11(m)). We are not satisfied that either was a proportionate measure.

308. We took into account the evidence of the Respondent's own witnesses that they would have acted differently, had they known that the Claimant was suffering from ill-health: Mr Finegold stated in cross-examination that, if he had known the Claimant had depression, 'we would have done everything to help.'; Mr Lees' evidence was that he 'absolutely would have done things differently', if he had known the Claimant had depression. We have found that they did know that the Claimant had depression before the Claimant went on leave in August 2018; it was restated in the Claimant's letter of 3 October 2018, and was followed up by the letter from Dr Sturgeon of 15 November 2018. No one within the Respondent organisation did anything to help.

309. In all the circumstances, we accept Mr Roberts' submission that it is not proportionate for an employer to dismiss an employee for being absent for the exact period that it accepts it would have allowed him to take (see para 83 above), if it had had known he needed to take leave for health reasons, when, as a matter of fact, it did know that.

310. As for the fact that the Claimant disregarded the instruction to return to work, we remind ourselves that, in this context, the band of reasonable responses does not apply, and the Tribunal is required to make its own judgment as to whether the treatment (the sanction of dismissal, upheld on appeal) was reasonably necessary, in order to achieve the legitimate aim.

311. The discriminatory impact on the Claimant of dismissing him, and not upholding his appeal, could not have been greater. We balanced that against the Respondent's business need to maintain standards. We acknowledge that there was a potential disciplinary issue in relation to the Claimant's conduct in not returning to work when instructed to do so, which the Respondent was entitled to address. However, there were alternatives to dismissal, which would have had a lesser discriminatory impact: the Respondent could have marked its disapproval of the Claimant's conduct by way of a written warning, or even a final written warning.

312. In his witness statement, Mr Sparkes addressed the issue only in the most general of terms, saying that he considered alternative sanctions, but felt that a warning 'was not sufficient' and that 'appearing to condone such serious insubordination would set a very bad precedent'. In the Tribunal's judgment, the imposition of a warning, or final written warning, would not have given the appearance of condoning the Claimant's conduct; both are very serious sanctions.

313. We concluded that the Respondent has not discharged the burden on it to prove that it was reasonably necessary to dismiss the Claimant, and to reject his appeal, in order to achieve the aim of maintaining standards.

314. Consequently, we have concluded that the dismissal, upheld on appeal, was disproportionate, and the Claimant's claims in respect of Issues 11(l) and (m) succeed.

Direct disability discrimination (s.13 EqA)

315. For the reasons already given, the acts complained of by Issue 4(m) ('refusing to allow C to be absent from work') and Issue 4(l) ('repeatedly instructing that C return to work' insofar as it relates to the period before October 2018) must fail, because the Claimant was not a disabled person at the material time.

316. As for the remaining claims of direct disability discrimination, in each case we are satisfied that we can make a positive finding as to the 'reason why' the Respondent acted as it did. Consequently, we did not consider it necessary to apply the burden of proof provisions, as Mr Roberts invited us to do.

317. We have concluded that the reason why the Respondent instructed the Claimant to return to work in October 2018 (Issue 4(l)) was because he had refused to agree to Mr Finegold's commercial conditions for taking leave, and had nonetheless gone on to take leave, in circumstances where he knew that consent had been withdrawn. The reason why it refused to pay him his bonuses (Issue 4(n)) was two-fold: because he was absent without leave, and because the Respondent had decided not to pay the Claimant any further bonuses, even if he was entitled to them, pending the outcome of the disciplinary process, which they knew was likely to result in a decision to dismiss.

318. We have concluded that the reason why the Respondent kept him away from his own desk (Issue 4(g)), refused to allow him to access his work and forced him to read compliance material (Issue 4(h)), and forced him to return to his newly assigned desk, when he attempted to move (Issue 4(i)) was because the Respondent had decided to prevent him from going back to his own team,

while they completed a disciplinary process, which they knew was likely to result in a decision to dismiss.

319. We have concluded that the reason why the Respondent decided to proceed with disciplinary action (Issue 4(p)), to dismiss the Claimant (Issue 4(q)), and to dismiss his appeal against dismissal and his grievance (Issue 4(r)), was because he had refused to agree to Mr Finegold's commercial conditions for taking leave, and had nonetheless gone on to take leave, in circumstances where he knew that consent had been withdrawn.

320. None of those reasons for the treatment were necessarily good reasons, but the treatment was not 'because of' the Claimant's disability; his disability was merely the background against which the treatment took place.

Harassment related to disability (s.26 EqA)

321. We have already found that the following unwanted conduct took place: moving the Claimant to a different desk on his return to work (Issue 16(d)); refusing to allow the Claimant access to his work and forcing him to read compliance material (Issue 16(e)); and forcing the Claimant to move back to his newly assigned desk when he attempted to move (Issue 16(g)).

322. We are also satisfied, on the balance of probabilities, that it had the effect of creating a humiliating environment the Claimant: it marked the Claimant out, in a very public way, as a miscreant, of whom the Respondent was making an example; it exposed him to the ridicule of the colleagues; it deprived him of the dignity of carrying out the work he was employed to do, in circumstances when he was not formally suspended.

323. However, we are not satisfied that there was evidence from which we could reasonably conclude that the treatment was 'related to' the Claimant's disability. It was related to his absence from work, and his decisions to refuse the Respondent's commercial terms, and ignore instructions to return to work. Although we have found that the first of these arose out of his disability, we have concluded that that the connection, although sufficient in the context of a s.15 claim, is too loose to satisfy the test for harassment.

Time limits

324. Any acts or omissions, which occurred before 6 January 2019 (the day before the oral communication to the Claimant of the decision to dismiss him on three months' notice) are out of time.

325. No evidence was led by the Claimant in support of an application to extend time on a just and equitable basis. Consequently, Mr Roberts' focus was, necessarily, on a submission that the acts or omissions before the cut-off date amounted to conduct extending over a period, leading up to and including the dismissal, and the rejection of the appeal/grievance (Issues 11(l) and (m)), both of which are in time.

326. We accept that submission. We are satisfied that the Respondent's conduct from October 2018 onwards formed part of an 'ongoing state of affairs' (to use the language of *Hendricks*), in which it went through a disciplinary process, the likely outcome of which it knew would be a decision to dismiss, and in the

course of which no bonus payments would be made to him, and he would not be permitted to resume his normal work. We are satisfied that this conduct formed part of a single trajectory, the outline of which is already to be seen in Ms Nicolaou's letter of 27 November 2018, which required the Claimant to return to work, informed him that bonus payments would be withheld, and warned him of the possibility of disciplinary action, up to and including dismissal.

327. Consequently, the Tribunal accepts jurisdiction in relation to the claim in relation to the failure to pay bonuses (Issue 11(i)), which we have upheld on its merits, and that claim succeeds.

Unfair dismissal

328. A dismissal which is discriminatory will not automatically be unfair, although that will usually be the case. Although there is authority (*Bolton St Catherine's Academy v O'Brien* [2017] IRLR 547) that there is convergence between the proportionality test in a disability-arising claim, and the reasonableness test in an unfair dismissal claim, we have conducted a separate analysis of the unfair dismissal claim below.

329. The reason relied on by the Respondent for the dismissal was a potentially fair one: the Claimant's conduct in being absent without leave, and failing to follow management instructions to return to work. It must follow from our findings of fact above that the Respondent had reasonable grounds for believing that the conduct had occurred. However, a careful and thorough investigation was required into the surrounding circumstances, which were highly relevant.

330. In our judgment, the investigation and disciplinary procedure were flawed in a number of respects:

330.1. when Ms Salem interviewed the Claimant on 1 November 2018, she did not warn the Claimant that she was conducting a meeting which would later be treated as the disciplinary investigation meeting. On the contrary, it was suggested to the Claimant that, if he cooperated with her, and returned to work, there would be no disciplinary action; that was untrue (para 121 onwards);

330.2. relevant information was not provided to Ms Salem (para 119); she then omitted other relevant information from her report (para 146);

330.3. Ms Salem exceeded the remit of an investigating officer by reaching definitive conclusions, rather than focusing on whether there was a case to answer (para 147);

330.4. Ms Salem attended an off-the-record meeting on 6 November 2018, of which no notes were taken, with key protagonists, before completing her report (above at para 127); the dismissing officer, Mr Sparkes, had an off-the-record meeting, of which no notes were taken, with Ms Daly, after she was interviewed and before he made his decision (para 155); Mr Sparkes set up an off-the-record group conference with senior management, which included Ms Nicolaou and Mr Finegold, after he had given his decision and before the appeal took place (para 171-172);

330.5. relevant information was edited out of the following meeting notes and other documents, to remove material which supported the Claimant's case: the investigatory meeting conducted by Ms Salem with Ms Daly (para 126); the notes of the disciplinary meetings of 11 December 2018 (para 153) and 7 January 2019 (para 163); Ms Halliday's interview with Ms Daly (para 154); the dismissal letter (para 166); and the notes of the appeal meeting (para 175-176);

330.6. Ms Nicolaou failed to disclose to the Claimant or to Ms Kloss her notes of the meeting of 4 October 2018 (para 174);

330.7. contrary to the Respondent's own policy, the Claimant was not given a reasonable opportunity to consider the outcome of further investigations carried out by the Respondent, either at the disciplinary (para 154) or appeal (para 178) stages;

330.8. Mr Sparkes' personal involvement in the events about which he was charged with making findings made him an inappropriate decision-maker (para 152); some of his contemporaneous communications disclosed actual bias, alternatively the appearance of bias, against the Claimant on his part (paras 157 and 160); others indicated that his decision was predetermined (above at para 158);

330.9. Mr Sparkes' decision was improperly influenced by HR (para 169); at the appeal hearing, Ms Nicolaou exceeded her proper advisory role by her interventions (para 173); she also overstepped the bounds of propriety by having direct input into the outcome of the appeal/grievance, including overruling Ms Kloss on the issue of the Q2 superbonus (para 179);

330.10. Mr Sparkes upheld an allegation of failing to follow the holiday booking procedure; no such procedure was shown to the Claimant, nor was the allegation put to him (para 168).

331. Taking all these factors together, we have concluded that both the investigation, and the disciplinary procedure more widely, were so flawed that they fell outside the band of reasonable responses.

332. Further, and on the balance of probabilities, we accept Mr Roberts' submission that the decision that the Claimant should be dismissed was predetermined, that Mr Finegold was influential in determining that decision, and that the decision was well-known to a number of people. In addition to the factors set out above, we considered: the lack of any plausible explanation for the number of off-the-record discussions between participants in the process; the downplaying by all participants, including Mr Sparkes and Mr Finegold, of knowledge of the Claimant's health difficulties, which we agree with Mr Roberts was systematic; the artificial rationale for the restriction on the Claimant's activities on his return to work; the fact that Mr Sparkes felt comfortable emailing his view that the Claimant was a liar to Mr Finegold, three witnesses and two HR officers, on 28 December 2018, at a point when the disciplinary hearing had been adjourned for further investigation, and ostensibly before he had reached his decision, without challenge from any of them; and Mr Finegold's presence at the adjournment of the final meeting.

333. Had the disciplinary process been conducted in good faith, highly relevant mitigating factors would have been taken into account: the fact of the Claimant's anxiety and depression; the fact that management knew about it, and knew that it was the principal reason why he wanted to take leave; the fact that Mr Fennessy had encouraged the Claimant to take a sabbatical, proposing it as a *quid pro quo* for his agreeing not to resign, and to work through Q2; the fact that Mr Lees agreed to the Claimant's taking a four-month period of leave, provided it was characterised as sickness absence; and the fact that Mr Finegold initially signalled his agreement, provided Mr Fennessy and Mr Lees approved, only to change his mind at the last minute, with the purpose of extracting commercial advantage for the Respondent from the situation.

334. We have further concluded that all the participants in the disciplinary process, including Mr Sparkes deliberately downplayed their knowledge of the Claimant's health difficulties and omitted from their accounts evidence of these mitigating factors, which were favourable to the Claimant. As a result, no proper consideration was given to them and, in our judgment, the Respondent did not act reasonably in treating the Claimant's conduct as sufficient reason to dismiss him.

335. Accordingly, we have concluded that the dismissal also fell outside the band of reasonable responses in these respects, and was substantively unfair.

Credibility

336. In his closing submissions (at paragraph 16), Mr Brown makes the point that 'given the extent of stark disputes of fact, it is difficult to imagine a Tribunal judgment reconciling the parties' evidence: one side or other has not been truthful.' In the Tribunal's view, that is a realistic assessment, although (self-evidently) made in the context of inviting us to find that it was the Claimant who had not been truthful.

337. It will be apparent from our findings above that, having heard all the evidence, and had the opportunity to hear from, and observe, the Respondent's witnesses, we came to the conclusion that on many of the central issues, it was they who were not telling the truth, sometimes in the face of the most contradictory contemporaneous evidence.

338. As for the Claimant, we have been critical of his conduct in certain respects; we were also troubled by his willingness to advance claims (in particular, those of religious discrimination), only to abandon them without their having been seriously pursued. His evidence was not without flaws, and the occasional strained interpretation. Generally, however, we found him to be thoughtful, measured and, ultimately, credible.

Remedy

339. Although we heard evidence and submissions as to contribution, we have not determined that issue at this stage; we will hear further submissions (but no further evidence) as to whether the award in respect of unfair dismissal and/or discrimination should be reduced, by reason of any blameworthy conduct on the part of the Claimant.

340. The parties may also make further submissions, if appropriate, as to whether compensation should be reduced on a *Polkey/Chagger* basis.

341. The parties must write to the Tribunal within 21 days of the promulgation of this judgment, providing dates to avoid for a two-day remedy hearing. If they consider that longer is required, they should explain why, and propose agreed directions. A separate case management order will then be sent out.

Employment Judge Massarella

10 March 2021

APPENDIX: PARTIES' FINAL LIST OF ISSUES

The Claims

1. The Claimant ('C') claims:

   (a) direct disability discrimination (section 13 Equality Act 2010 "EA");

   ~~(b) direct religious discrimination (section 13 EA);~~

   (c) discrimination arising from disability (section 15 EA);

   ~~(d) indirect disability discrimination (section 19 EA);~~

   (e) failure to make reasonable adjustments (section 21 EA);

   (f) harassment relating to disability (section 26 EA);

   (g) unfair dismissal (section 98 Employment Rights Act 1996 "ERA"); and

   (h) ~~unauthorised deductions from wages (section 13 ERA).~~

Disability

2. Was C disabled at the material times by virtue of anxiety and depression?

3. Did the Respondent (R) have knowledge of, or should R have had knowledge of, C's disability?

Direct disability discrimination

4. Did R treat C as follows:

   ~~a. Mr Fennessy telling C to "keep his head down" and "knuckle down" when discussing his mental health condition;~~

   ~~b. in an interview following the Claimant's appeal against dismissal, Mr Lees describing C's mental health condition as him "sulking over losing money";~~

~~c. Ms Daly's comment to C in their telephone conversation on 21 August 2018 that he should return to work with a "renewed attitude" and "behave reasonably";~~

~~d. Ms Daly's comment that "patience is running very thin here";~~

~~e. Ms Daly referring to C's "difficult behaviour" in an email to Mr Sparkes and Mr Sandler dated 11 February 2019;~~

~~f. refusing to accept C's medical evidence as set out at paragraph 50 Grounds of Claim [16 November 2018~~];

g. moving C to a different desk on his return to work;

h. refusing to allow C access to his work and forcing him to read "compliance material" [21 November 2018];

i. forcing C to move back to his newly assigned desk when he attempted to move [10 December 2018];

~~j. Mr Sparkes' repeated questioning of why C had not obtained approval in writing for his leave of absence after C explained that he was depressed at the relevant time?~~

~~k. subjecting C to remarks about his disability on his return to work as set out at paragraph 58 Grounds of Claim;~~

l. repeatedly instructing that C return to work;

m. refusing to allow C to be absent from work;

n. ~~refusing to pay C his full Q2 bonus and bonuses for Q3 and Q4~~ refusing to pay C his Q2 Super Bonus - as designated to him by R of £70,649 - and bonus for Q3;

~~o. refusing to pay Cs salary from 20 August 2018 to 20 November 2018;~~

p. proceeding with disciplinary action against C [on or around 7 December 2018];

q. dismissing C; and

r. not upholding C's appeal against dismissal or his grievance?

5. If so, did that amount to less favourable treatment than Daniel Lacey and/or a hypothetical comparator.

6. If so, was that because of C's disability?

~~Direct religious discrimination~~

~~7. Did R treat C as follows:~~

~~a. refusing to allow C to be absent from work;~~

~~b. refusing to pay C his full Q2 bonus and bonuses for Q3 and Q4;~~

~~c. refusing to pay Cs salary from 20 August 2018 to 20 November 2018;~~

~~d. proceeding with disciplinary action against C [On or around 7 December 2018];~~

~~e. dismissing C; and~~

~~f. not upholding C's appeal against dismissal or his grievance.~~

~~8. If so, did that amount to less favourable treatment than Daniel Lacey and/or a hypothetical comparator.~~

~~9. If so, was that because C did not observe Judaism?~~

Discrimination arising from disability

10. Did the following arise in consequence of C's disability:

    a. C's stated need to take time off work;

    b. C's absence from work;

    c. his symptoms, in particular his low mood and anxiety, which affected his interactions and communications with others?

11. If so was C treated as follows:

    ~~a. Mr Fennessy telling C to "keep his head down" and "knuckle down" when discussing his mental health condition;~~

    ~~b. in an interview following the Claimant's appeal against dismissal, Mr Lees describing C's mental health condition as him "sulking over losing money";~~

    ~~c. Ms Daly's comment to C in their telephone conversation on 21 August 2018 that he should return to work with a "renewed attitude" and "behave reasonably";~~

    ~~d. Ms Daly's comment that "patience is running very thin here";~~

    ~~e. Ms Daly referring to C's "difficult behaviour" in an email to Mr Sparkes and Mr Sandler dated 11 February 2019;~~

    ~~f. subjecting C to remarks about his disability on his return to work as set out at paragraph 58 Grounds of Claim;~~

    g. instructing C to return to work;

    h. refusing to allow C to be absent from work;

    i. 'refusal to pay C his Q2 Super Bonus - as designated to him by R of £70,649 - and bonus for Q3';

    ~~j. refusing to pay Cs salary from 20 August 2018 to 20 November 2018;~~

    k. proceeding with disciplinary action against C [On or around 7 December 2018];

    l. dismissing C; and

    m. not upholding C's appeal against dismissal or his grievance?

12. If so, was that unfavourable treatment?

13. If so, was it done because of that which arose in consequence of C's disability?

14. If so, did such treatment pursue a legitimate aim: the smooth running of the business, and maintenance of appropriate standards?

15. If so, was such treatment proportionate to achieving that aim?

Harassment relating to disability

16. Did R engage in the following conduct:

~~a. Ms Daly's comment to C in their telephone conversation on 21 August 2018 that he should return to work with a "renewed attitude" and "behave reasonably";~~

~~b. Ms Daly's comment that "Patience is running very thin here";~~

~~c. refusing to accept C's medical evidence as set out at paragraph 50 Grounds of Claim [16 November 2018];~~

d. moving C to a different desk on his return to work;

e. refusing to allow C access to his work and forcing him to read "compliance material" [21 November 2018];

~~f. subjecting C to remarks about his disability on his return to work as set out at paragraph 58 Grounds of Claim;~~

g. forcing C to move back to his newly assigned desk when he attempted to move;

~~h. Mr Sparkes' repeated questioning of why C had not obtained approval in writing for his leave of absence after C explained that he was depressed at the relevant time?~~

17. If so, was such conduct unwanted?

18. If so, was it related to disability?

19. If so, did it have purpose or effect of violating C's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for C?

Failure to make reasonable adjustments

20. Did R have the following provisions, criteria or practices (PCPs):

a. requiring employees to attend work and/or requiring employees to carry out their duties;

~~b. refusing to allow employees to take extended time off work to recover from illness;~~

~~c. disciplining employees for taking sickness absence [7 January 2019];~~

~~d. refusing to accept medical evidence submitted in support of absence from work relating to mental health conditions, or refusing to accept medical evidence which is not in a prescribed form [16 November 2018]?~~

21. If so, did any or all of the above PCPs place C at a substantial disadvantage compared with persons who were not disabled?

22. If so, was R aware, or ought it reasonably to have been aware, of the substantial disadvantage?

23. If so, did R fail to make reasonable adjustments, such as:

    a. allowing C to take an extended period of sickness absence;

    b. referring C to Occupational Health [April 2018 and November 2018]; -

    c. permitting a phased return to work following C's absence [November 2018];

    d. allowing C to work part-time until he felt well enough to work full time [April 2018 and November 2018];

    e. allowing C to work remotely [April 2018 and November 2018];

    f. allocating a senior member of staff C as a mentor to support him [April 2018 and November 2018];

    g. not disciplining C [7 January 2019];

    h. accepting C's medical evidence or taking further steps to assist C in obtaining acceptable medical evidence [16 November 2018].

~~**Indirect Disability Discrimination**~~

~~24. Did R have the following PCPs:~~

~~a. refusing to allow employees to take extended time off work to recover from illness;~~

~~b. disciplining employees for taking sickness absence [7 January 2019];~~

~~c. refusing to accept medical evidence submitted in support of absence from work relating to mental health conditions, or refusing to accept medical evidence which is not in a prescribed form [16 November 2018]?~~

~~25. If so, did or would R apply these PCPs to employees who did not have the same disability as C?~~

~~26. If so, did the PCPs put persons with the same disability as C at a particular disadvantage?~~

~~27. If so, did the PCP put C at a particular disadvantage?~~

~~a. persons with C's disability are more likely to require extended time off;~~

~~b. persons with C's disability are more likely to take sickness absence;~~

~~c. persons with C's disability are more likely to rely on medical evidence in various circumstances (e.g. in explaining sickness absence).~~

~~28. If so, was the application of each PCP in pursuit of a legitimate aim: the smooth running of the business and maintenance of appropriate standards?~~

~~29. If so, was the PCP proportionate to achieving that aim?~~

Unfair dismissal

30. Was C dismissed for conduct?

31. If so, did R have a genuine belief in C's alleged misconduct?

32. If so, did R hold that belief in C's alleged misconduct on reasonable grounds? -

33. If so, did R carry out a reasonable investigation?

34. If so, did R conduct a fair procedure?

35. If so, was dismissal within the reasonable range of responses for a reasonable employer?

~~**Unauthorised deductions from wages**~~

~~36. Did R make unauthorised deductions from C's wages, contrary to section 13 ERA, in respect of the matters pleaded at paragraphs 11 to 15 and 98 [96] to 100 [98] of the Grounds of Claim?~~

Time Limits – Equality Act 2010

37. Was the given claim presented within the primary limitation period?

38. If not, did that act form part of conduct extending over a period the end of which was within the primary limitation period?

39. If not, is it just and equitable to extend the limitation period?

~~**Time limits – unauthorised deductions**~~

~~40. Was the given claim presented within the primary limitation period?~~

~~41. If not, did the deduction form part of a series of deductions the last of which is within the primary limitation period?~~

~~42. If not, was it no reasonably practicable for the claim to be brought in question?~~

~~43. If so, what further period would it have been reasonable for the claim to have been brought?~~