Case No: 1306872/2020

EMPLOYMENT TRIBUNALS

Claimant: Mr S Shoker

Respondent: Optivo

Heard at: Midlands West

On: 15, 16, 17, 18, 19 and 22 November 2021
9 and 10 February 2022
(in chambers) 14, 15, 16 March 2022 and 23 May 2022
(for judgment) 24 May 2022

Before: Employment Judge Faulkner
Mr T Liburd
Mr D McIntosh

Representation: **Claimant** - in person
Respondent - Ms C Goodman (Counsel)

JUDGMENT

1. The Respondent did not contravene section 39 of the Equality Act 2010 by directly discriminating against the Claimant because of disability. The Claimant's complaints of direct disability discrimination are therefore dismissed.

2. The Respondent did not contravene section 39 of the Equality Act 2010 by failing to comply with the duty to make reasonable adjustments in relation to the Claimant. The Claimant's complaints of failures to make reasonable adjustments are therefore dismissed.

3. The Respondent did not contravene section 40 of the Equality Act 2010 by harassing the Claimant related to his disability. His complaints of harassment are therefore dismissed.

4. The Respondent did not contravene section 39 of the Equality Act 2010 by discriminating against the Claimant because of something arising in consequence of his disabilities. The Claimant's complaints of discrimination arising from disability are therefore also dismissed.

REASONS

Judgment and reasons were given orally on the last day of the Hearing of this Claim. These reasons are provided in response to a written request from the Claimant dated 4 June 2022. The parties were advised that there would be a delay in their being provided because Employment Judge Faulkner was on leave, and in any event the Claimant's written request was not forwarded to Employment Judge Faulkner until 23 June 2022. There was a further delay whilst the Claimant's application for a privacy order was determined.

Complaints

1. The Claimant's complaints were of direct disability discrimination, harassment related to disability, failure to make reasonable adjustments and discrimination arising from disability.

Issues

2. Although there had been multiple Case Management Hearings over many months, at the start of this Final Hearing the list of issues was still not agreed by the parties. As a result, half of the first day was devoted to discussing a definitive list. What is set out in the Appendix to this document represents what was finally agreed. We made clear that it was not for the Tribunal, certainly not at this late stage and in a case that had been so extensively case-managed, to direct that the way in which the complaints were put be revised. The Claimant had been given ample opportunity to discuss them at the earlier Hearings and to obtain advice should he have deemed it necessary. Even as finally agreed, the list of issues was in several respects not as the Tribunal would have worded it, but it would clearly not have been a profitable exercise to discuss each point in turn and thus use up further hearing time, nor indeed would that have been fair to the Respondent, as we will return to. The numbering in the Appendix corresponds to that adopted throughout the Hearing, for ease of reference.

3. To set the context for the decisions we made in respect of the outstanding disagreements between the parties in respect of the list of issues, it is necessary to provide a summary of the procedural history of this case, which is as follows:

3.1. Employment Judge Dimbylow produced a framework for the list of issues at the first Case Management Hearing on 26 October 2020.

3.2. The Claimant then produced, on 9 November 2020, a long letter which can be seen at pages 57a to 57i of the Hearing bundle, attempting to set out a list of the issues he wished the Tribunal to determine.

3.3. At the second Case Management Hearing on 14 December 2020, Employment Judge Miller produced the first part of a bespoke list of issues, but ran out of time to complete it. The Claimant was ordered to provide further details against a template that Employment Judge Miller provided.

3.4. Employment Judge Gaskell picked up the matter at two further Case Management Hearings on 7 June and 5 August 2021 respectively. After the first

of those Hearings, pursuant to his Orders, a matrix was prepared by the Respondent and commented on by the Claimant. This formed the basis of further discussion at the second of those Hearings. Employment Judge Gaskell at that stage stated that what was set out in the matrix represented the issues between the parties, but because the Respondent had permission to present an Amended Response, it was also ordered to prepare a list of issues which would stand as a definitive list for the Tribunal at the Final Hearing.

3.5. Employment Judge Gaskell made clear that, whilst the Claimant was permitted to comment on what the Respondent had produced, he was not to add any new allegations or provide any further specificity in respect of existing allegations. What Employment Judge Gaskell ordered most certainly did not therefore invite the Claimant to further clarify his complaints.

4. In determining the outstanding matters in respect of the list of issues, in other words where disagreement still remained between the parties after our lengthy discussion, we took account of the following key principles:

4.1. A list of issues is a key case management tool, particularly for the proper conduct of complex cases.

4.2. A tribunal is not required to stick slavishly to a list if it would in doing so be impaired in its duty to hear a case in accordance with the law and the evidence.

4.3. Earlier case management orders can be revisited either by agreement between the parties or if there has been a material change of circumstances.

4.4. If something stands out as necessary to determine, it should be determined especially where there are unrepresented parties, even if not in a list, though the Tribunal should not enter the arena on either party's side.

5. We turn now to the specifics of what remained in dispute between the parties as to the list, and how we resolved those matters.

6. First, the Claimant sought to add into the opening paragraph of issue 3.1.7 a reference to Mr Macauley shouting and not letting him finish sentences, so that this would apply to all of the sub-paragraphs within that issue. Despite two requests by the Claimant that we permit this amendment, we were not prepared to do so. In our judgment, it infringed the order of Employment Judge Gaskell and, as the Respondent submitted, would have expanded the range of the Tribunal's enquiry and therefore of the matters the Respondent was required to deal with. That said, we made clear that this decision would not prevent the Claimant from arguing in respect of any of the matters within issue 3.1.7 that Mr Macaulay conducted himself in an interrogative, hostile and impatient manner, as this was already within the wording of this particular issue, so that it might be difficult to avoid hearing evidence about raised voices or Mr Macauley not letting the Claimant finish sentences. We were not prepared to consider that as an allegation of discrimination of itself however, apart of course from in respect of allegation 3.1.7.5 where the allegation of shouting was expressly within the list already.

7. We saw little, if any, prejudice to the Claimant in refusing this amendment. If he could prove the facts on which he relied within paragraph 3.1.7 and that what

he had proven was less favourable treatment because of disability, that was likely to be enough to prove his case, and conversely if he could not, proving that Mr Macauley raised his voice or did not let him finish sentences was unlikely to make the difference in doing so.

8. Simply in an endeavour to be pragmatic, we were prepared to permit the Claimant to add to issue 3.1.7.2 the words "and made to rescind them" on the basis that this effectively seemed to be what Mr Macauley deals with at paragraph 21 of his witness statement, so that although a little more specificity of an existing allegation, the Respondent was ready to deal with it.

9. As to issue 3.1.7.4 we agreed with the Respondent that adding the words "after being sent an email at 6.15 am [or 6.50 am] on 9 April asking for a meeting that same day" went beyond the Order of Employment Judge Gaskell, albeit not substantially and albeit being mentioned in the Claimant's 9 November 2020 letter and in the original Claim Form. The references in those documents do not mean of course that this was plainly an allegation of discrimination the Tribunal was being asked to determine and particularly as the email in question was not in the bundle, so that this would be something that the Respondent may have had some difficulty dealing with at this stage, we were not prepared to amend the list to include it. We permitted the reference to the alleged words of Mr Macauley on the occasion in question, as Ms Goodman effectively agreed that Mr Macauley could deal with it in evidence as something far more memorable than an email. We did not however permit an expanded version of that comment to be part of the list; what we permitted reflected what was included in the Claim Form and the Claimant's statement, again on the basis that the Respondent could properly be said to have been on notice of it.

10. At issue 3.1.9 the Claimant sought to add the words, "repeatedly refuse to provide the Claimant the support he required including". We were not prepared to permit that wording to be incorporated within the list, as it was far too general for the Respondent to deal with and for the Tribunal to determine. In any event, a number of the other complaints of direct discrimination could be construed as alleging a failure to support the Claimant, so that again there was no substantial disadvantage to him arising from our decision.

11. Finally, we were not prepared to permit issue 6.1.8 to be amended by the addition of the words "and portraying him as someone incapable of carrying out his role, rather than the workloads being excessive". That was again precisely the greater specificity which Employment Judge Gaskell ordered should be avoided. We acknowledged of course that it would not be possible or desirable to avoid references to the Claimant's performance in the workplace altogether, because a number of the allegations of direct discrimination included such references, but we were not prepared to consider this as a distinct allegation of discrimination arising from disability. We saw no material change since Employment Judge Gaskell's Order meriting any departure from it.

Hearing

12. Employment Judge Dimbylow had discussed adjustments for the Claimant at the Case Management Hearing referred to above. We revisited those at the outset of this Hearing. The Claimant requested no more than mid-session and lunch breaks, which of course were accommodated.

13. We heard evidence from and read statements prepared by the Claimant, Mr Gordon Macaulay, the Respondent's Head of Property Services (Midlands) who has been with the business and its predecessors for almost 20 years, and Jane Campbell, its Director of Legal Services. The parties had agreed a bundle of well over 1,000 pages. We made clear that it was for the parties to draw our attention to documents they wanted us to read and consider in making our decision, whether or not mentioned in the statements, as otherwise even more time would have been required for the hearing of the case whilst we carried out further reading. Page numbers below are references to the bundle. Alphanumeric references are to paragraphs within witness statements, for example SS25 refers to paragraph 25 of the Claimant's statement and GM12 refers to paragraph 12 of Mr Macaulay's statement.

14. Certain additional documents were admitted during the course of the evidence. The Respondent's probation policy and probation procedure were admitted on day 6 by agreement. The Claimant also wanted to include on day 6 an email exchange between Mr Macaulay and Mr Cox regarding the latter's absence from work, as what he regarded as an example of Mr Macaulay being long-winded and over-technical in email communication. The Claimant's point was that he was seeking to show that he was treated inconsistently with how the Respondent treated others in that he had been criticised for his communication but Mr Macaulay had not. He also said the email trail showed Mr Cox was difficult to manage.

15. The Respondent opposed this application. Due principally to the fact that in our unanimous view the emails showed nothing like what the Claimant asserted, in the interests of proportionality – and given the late stage at which they were introduced – we did not admit them. They did not seem to us to go to any of the issues in the case, at least not directly and helpfully.

16. As late as day 7 of this hearing, the Claimant sought to introduce a further document. This was an extract from a posting on social media in which an individual who is not fully identified made comments about the Respondent and disability discrimination. We did not see how it would assist the Claimant's case, or the Tribunal's decision-making process and accepted Ms Goodman's submission that it was not possible for the Respondent to deal with it at that late stage, for example by putting it into context. It was certainly not for us to say whether the Respondent should or should not respond to it; we accepted it could potentially be put at a disadvantage by the document being admitted. The Claimant's application was refused.

17. We also repeatedly made clear that the evidence we would consider would be the statements, the documents we were taken to on the basis set out above, and what we heard in oral evidence, and that if there were gaps in a party's case, that is if some of the issues set out above were not covered by that evidence, it was not for the Tribunal to fill those gaps. We asked fairly extensive questions of the witnesses, given the number of allegations, but made clear before doing so that this was to enable us to understand the case being put to us. It was not our role to invite a party to fill in gaps in their evidence, thereby helping them make their case and creating complications and potential unfairness in that the other party may then have wished to cross-examine a witness further or indeed fairly point out that there was other evidence they may have sought to adduce had

they known the Tribunal would proceed in that way. Whilst we helped the Claimant formulate questions of the Respondent's witnesses (though he needed little such assistance) we had to be careful not to cross the line from providing assistance to providing advocacy.

18. Finally, we should record that even on first sight of this case, it was plain to us that it would not be completed in 6 days. As can be seen, there were around forty allegations of direct discrimination alone, around sixty allegations in total. Particularly given that the list of issues was still disputed, that the Tribunal clearly needed reading-in time, and that substantially more than a day of deliberations would be required to deal with all of the allegations fairly and properly, let alone to deliver judgment and deal with remedy if appropriate, it became necessary to add five more days to the listing. Ms Goodman's very busy schedule was the principal reason for the long delay in our reconvening after the initial six days.

Facts

19. We reached our findings of fact, where there were disputes between the witnesses, on the balance of probabilities. Of course, we were not present during any of the discussions in relation to which those disputes arose and so could not know for certain what took place. We could only resolve the evidential disputes by weighing up the evidence to which we were taken and reaching conclusions accordingly. So as to keep some themes together, what follows may not be a wholly chronological account in every respect, though it is substantially so.

The formation of the Midlands Fire Safety team

20. The Respondent is a large housing association, with over 1,400 employees nationally. The Claimant has expertise and several years of experience in fire safety, a crucial issue for the Respondent, particularly after the Grenfell tragedy. He joined the Respondent on 16 December 2019 as Fire Safety Contracts Manager for the Midlands. This was a new role and indeed a new team was put together to cover fire safety for the Midlands, based in King's Heath. Dave Cox carried out site surveys and reported on compliance, Jayne Boulter provided administrative support and (with Mr Cox) monitoring of the compliance system and the Claimant oversaw delivery of fire safety, and was also responsible for managing contractors and the team.

21. The Claimant was the first appointment to the team, by external recruitment. At the same time, a restructure was taking place. Mr Cox was a maintenance manager working for Mr Macauley at the time. He wanted to work four days a week and so was interested in the role of surveyor. As for the administrative role, this was mentioned to a number of the Respondent's employees, including Ms Boulter. Mr Macaulay's evidence was that both she and Mr Cox were happy to take the roles. We had no reason not to accept that evidence. There was no formal recruitment process, just a discussion between the two employees and Mr Macaulay. There may have been a more formal process in other regions such as London where Mr Macaulay suspects there was a larger number of candidates. Neither employee was put on a probation period as they were already employed.

22. Mr Cox was not fire safety qualified, though he did have 40 years' experience in surveying; Mr Macaulay thought that he would thrive working under the Claimant's technical expertise. As for Ms Boulter, she was regarded as an

experienced assistant, having worked in gas safety for several years, in a similar role to that which she was to undertake in the new team. Mr Macauley had not worked with her before, but describes her as strong-willed, confident and good at her job. The Claimant says that she was expected to assign tasks from the Respondent's risk register (known as Riskhub) to Direct Labour Operatives ("DLOs"), but in his view she did not know what she was doing. In her previous role in gas safety, as well as assigning appointments and ensuring that customers were available for them, she had to ensure servicing was carried out and chase up any property access issues, liaising with the Respondent's legal team if necessary. In the new team, she had to note from fire risk assessments what work was needed and assign DLOs to do it, sometimes having to clarify for the DLO the location of a particular item that needed working on. Mr Macaulay does not accept that she needed some knowledge of relevant fire safety regulations to do so. That seemed to us likely to be correct based on how the role was described to us and what she had done previously. Mr Macaulay says he obviously wanted the team to succeed because it would have reflected badly on him if it did not, as the person who had put it together. That also seemed to us overwhelmingly likely to have been the case.

23. The team generally, and the Claimant personally, were very busy from the outset and it is agreed the Claimant had to hit the ground running as Mr Macaulay recorded in a one-to-one meeting later on – see for example page 188. Mr Cox, who worked 4 days a week, went off on authorised leave not long after the team was formed, and then on sick leave. As a result, Mr Macaulay gave the Claimant another Project Surveyor for 3 days per week, a Mr D Khan. The Claimant accepts that Mr Khan was available to help with some of the work, but says that he needed support, so that the Claimant had to go out on site visits with him. The Claimant's point was that this added to his workload, although we noted that Mr Khan had similar experience to Mr Cox and that at page 1,050 there is a note of unsolicited feedback on Mr Khan's work provided by the Claimant in which he said that Mr Khan had made a very positive contribution in "learn[ing] very quickly various aspects of assessing fire risks in buildings and writing detailed and thorough reports". The Claimant was also assisting and assessing the work of a new DLO, Karl. He accepts that there was a lot of work in all of the regions. As for Mr Macaulay's workload, he was contending, particularly in March and April 2020, with appraisals, accounts, his direct management responsibilities, and the effects of the Covid-19 pandemic. His usual 75 emails a day went to over 100 during this period. He was managing two other new managers in addition to the Claimant.

24. At issue 3.1.13, the Claimant says that he was often given same day deadlines because of his disability. His evidence was that this was not done to put pressure on him; rather, his point is that more resource was needed, and that Mr Macaulay should have considered how the workload would affect him. Whilst as already noted, it is agreed that he and the team were very busy from the start, as far as the evidence we were taken to is concerned, we were not shown anything relating to the Claimant being given same-day deadlines, nor any communications from him raising any such concerns.

25.The Claimant also says (issue 3.1.1 and SS25) that he was asked by Mr Macaulay to leave early from the first few management team meetings he attended on 3, 9 and 17 January 2020 respectively. Mr Macaulay says (at GM15.4) that he has no recollection of this being the case, though he may have

asked other managers to stay on a call if specific relevant issues needed to be discussed with them that did not involve the Claimant. The Claimant does not accept that Mr Macaulay would only keep people back in meetings if he had something specific to discuss with them, as everyone was busy and says he felt uncomfortable at being asked to leave, though he did not raise this at the time. He says that these actions were because of his disability on the basis that somehow (he implies through Mr Macaulay) his disability became common knowledge, as evidenced he says by the comment made by Mr Cox, "Steve's got the disability spot", which we return to below. His conclusion is that Mr Macaulay discussed his disability with other managers, such that it was not leaving the meeting that was the detriment; it was these consequences. The Claimant agrees he had told Donna Ashmore, Direct Services Manager, that he had autism spectrum disorder ("ASD") (see her interview with Ms Campbell at page 805), though he says no-one else was around at the time of that discussion. It seemed very likely to us that the Claimant was asked to leave meetings early; we will come back to whether this amounted to disability discrimination in our analysis. There is however no evidence that Mr Macaulay discussed the Claimant's disabilities with colleagues, except for Human Resources as we will come to. To the contrary, as our later findings will show, Mr Macaulay was careful not to discuss these matters with anyone other than the Claimant and Human Resources.

Discussions regarding the Claimant's health

26. At the start of his employment (page 174) the Claimant completed the Respondent's equality, diversity and inclusion form. He ticked the box to say that he considered himself a disabled person and mentioned anxiety and depression and that he was awaiting an assessment for ASD and ADHD. At page 175 there is a further form, in all likelihood from the Respondent's Occupational Health ("OH") adviser, saying that the Claimant was fit for work. On 23 December 2019, Jackie Ward in the Respondent's HR team, acknowledged the form (page 177) and said to the Claimant that she would like to discuss it with Mr Macauley, to understand what reasonable adjustments would need to be put in place. The Claimant replied the same day, page 178, to say that all was going well, and that he was happy for Mr Macaulay to see the form, adding, "if needed I can discuss with him further". The Claimant agrees that there was no burning need for any adjustments at that point.

27. Later the same day (page 179), Ms Ward sent to Mr Macaulay the form the Claimant had completed, including in her email the phrase "this gentleman has been diagnosed with a mental health issue". She told Mr Macaulay that the information must remain private and that they would need to understand the adjustments required. She also attached a "Wellness Plan" to be used to record anything agreed with the Claimant, and said that if the Claimant wanted a stress risk assessment it could be arranged through the Respondent's Health & Safety team, adding that an OH referral might be needed once the Claimant had undertaken his ASD assessment. The Claimant agrees that in discussion with Mr Macaulay at a meeting on 3 January 2020, he indicated that he wanted to keep information about his health private.

28. The Claimant completed the Wellness Plan after that meeting (pages 180-1). In answer to the question "How does your mental health condition affect you? How might this impact on your work?", he wrote that he lived with depression and

anxiety and that it was generally self-managed, although he had benefitted from IAPT (Improving Access to Psychological Therapies), CBT (Cognitive Behavioural Therapy) sessions and counselling in the past; he also mentioned that he was currently on medication which he took periodically. The form also stated that the trigger for the Claimant's condition was long-term stress. In relation to required support or adjustments, he wrote, "Just to be understanding, not to treat me any differently. I am very robust and resilient and have managed health issues successfully over many years". In answer to a question about what the Respondent should do if his health deteriorated, the Claimant stated, "Be understanding and supportive". He also mentioned that he had been referred for an ASD assessment and had been on a waiting list "to assess if [he] might be on the spectrum". Mr Macaulay signed the Wellness Plan on 6 January 2020.

29. The Claimant says that Mr Macaulay knew that he was a disabled person from this point, although he also says Mr Macaulay knew very little because he did not ask the Claimant about it. He also says that during this meeting, Mr Macaulay informed him that he had been told by Ms Ward that the Claimant should have declared his disabilities during the recruitment process. The Claimant says that this was direct discrimination (issue 3.1.2) because he believes Mr Macaulay wanted to make him think he had made an error and that was not true. He believes Mr Macaulay was concerned about the extra work he would now have to do to support the Claimant, though he accepts that by the end of the meeting on 3 January he and Mr MacAulay were agreed that nothing further was required – the Claimant says he did not want to seem needy.

30. Mr Macaulay is positive he did not refer to Ms Ward's comment in this meeting, given that it came before an email exchange with her on 7 January 2020 in which this was raised (see below). We were satisfied that Mr Macaulay's evidence was much to be preferred on this point, given the date of this email. We therefore found that the comment was not made. Mr Macaulay also says he does not recall the Claimant saying in this meeting (as alleged at SS17) that he "may communicate differently and [could] have difficulty in connecting with people". There was little for us to go on in resolving this particular evidential conflict, but on balance, we concluded that this was not said either, given that it is not mentioned in any of the documents we have already referred to, such as the Wellness Plan, nor is it mentioned by Mr Macaulay in any of his extensive communications around this period when he was clearly seeking detailed guidance from HR. On 6 January 2020 (page 183) Mr Macaulay forwarded the completed Wellness Plan to Ms Ward and asked whether they could get an OH assessment carried out for the Claimant, stating, "This may speed up his assessment process [i.e., the ASD assessment]".

31. The Claimant says that Mr Macaulay said to him on 6 January 2020 words to the effect of, "Don't let Jayne bully you", then added, "maybe that's too strong a word". Mr Macaulay's evidence is that he described Ms Boulter as a confident person and good at her job. He told us that if he did say what was alleged, he was expressing no more than that, not that Ms Boulter would in fact bully the Claimant. In light in particular of the comment Mr Macaulay is recorded as making in the context of Ms Boulter's subsequent grievance (page 484) we found on balance that he did make the comment alleged by the Claimant, though we equally accept that he was in no sense telling the Claimant that Ms Boulter would bully him; he was simply reflecting on her assertive personality.

32. On the next day, 7 January 2020, also at page 183, Mr Macaulay emailed Ms Ward, "Also Jackie, would Optivo have expected that this [referring to the Claimant's medical information] be disclosed at interview or application stage?". Mr Macaulay says that he asked this question because if he had been made aware of the Claimant's needs at the outset, he could have put in place anything that was required then, rather than from this later point, when they had lost time on what they could have been doing. He denies that had he known about the Claimant's mental health, this would have made a difference to his recruitment decision, telling us that the Claimant was the best candidate at interview by a considerable margin. He also says at GM5 that even if the Respondent had known that he had little or no managerial experience, the Claimant would still have been hired. We will return to these matters in our analysis.

33. Ms Ward replied to Mr Macaulay (page 182) that it would have been preferable for the Claimant to disclose the medical information at interview, going on to say that he did disclose his position on the medical application form, that the conditions looked like they were under control, but that the new role could cause anxiety for him. She then raised the question of what "supportive and understanding", mentioned by the Claimant, looked like and said that they could refer him to OH to understand what adjustments were needed once the ASD assessment had been done. She went on to say that it was concerning the Claimant had been waiting some time for the assessment so that it would be supportive to understand the adjustments required now and "referring to OH asap would be best practice". She gave Mr Macaulay a link and instructions for making the referral.

34. Ms Ward went on to say that Mr Macaulay could request the Respondent's Health & Safety team to complete a stress risk assessment and suggested who to email to progress that. She said that Mr Macaulay should ensure the Claimant was appointed a buddy, had a training plan and regular one-to-one meetings to check his progress, and should also understand what extra support he needed. She stated, "If a colleague discloses a disability, we need to provide evidence" of support "and any reasonable adjustments put in place". Finally, Ms Ward reminded Mr Macaulay of the need to complete 12-week and 22-week probation review meeting forms and attached the relevant documents to that end. Mr Macaulay told us that in the light of Ms Ward's comments he had no reason to believe the Claimant was not a disabled person.

35. The Claimant levels a number of strident criticisms at Mr Macaulay regarding his responses to, or as the Claimant sees it, failures to respond to, Ms Ward's comments and advice as summarised above. We consider those below, as they arise in the chronology of events we seek to record. The Claimant says it was not an oversight that Mr Macaulay failed to carry out a number of the actions advised by Ms Ward; he thinks Mr Macaulay did not want to have to entertain dealing with them. Mr Macaulay cannot recollect having mental health or wellbeing training, though he did do some mental health awareness training in the latter part of 2021. He also believes that he did some equality and diversity training some time ago, which we had no reason to dispute.

36. Although the Claimant and Mr Macaulay had one-to-one meetings each month, as well as weekly catch-up meetings during lockdown, the Claimant says that Mr Macaulay failed to have regular reviews with him regarding his health, after their discussion on 3 January referred to above. This failure is said by the

Claimant to have been an act of direct discrimination because it would have been reasonable to consider his disability. Mr Macaulay says that the Claimant's health and wellbeing was a standard item on their meeting agenda, discussed at whatever length was required and that if there was a note on his record of the meeting (many of which records are included in the bundle), it was discussed with the Claimant, even if carried over from a previous meeting. Clearly that was not always the case, as we will come to, but broadly speaking we accepted what Mr Macaulay describes as accurate and of course if a matter appeared on a meeting note, it was something that either party could speak to if they wished, regardless of how it got there. Whenever the Claimant did not make reference to his health, despite speaking at length about other issues, Mr Macaulay took the Claimant to be happy on that front.

37. Mr Macaulay's note of the one-to-one meeting on 13 January 2020 said that the Claimant's wellbeing was discussed and that Mr Macaulay was to advise Ms Ward on their discussions, noting "SS happy with proposed actions" (page 186-7). The Claimant says that this is no more than a vague reference to the topic, whilst Mr Macaulay accepts that there is nothing in the Claimant's own note of this meeting which referred to wellbeing.

38. On 16 January 2020, Mr Macaulay emailed Ms Ward again (page 184) in reply to her email of 7 January. Mr Macaulay stated, "So I take it that we cannot refer to OH until ASD assessment has taken place … I have spoken to Steve re his interpretation of supportive and understanding and he has confirmed that this is an open-door policy to his manager (which he has) as well as being in a pleasant working environment where issues can be discussed. Steve currently feels that this is the case and he is very happy to have started at Optivo". The Claimant agrees that this is the sort of thing he would have said. We find therefore that it is an accurate record of what he did say to Mr Macaulay at some point prior to this email, and in all likelihood on 13 January. Ms Ward replied (page 210), "We can refer to OH now to understand what support we can put in place now and may need to do another referral when Steve has had his appointment. Apologies for any confusion". According to Mr Macaulay (GM14), after the initial discussions in January, "there was nothing else that we had discussed or that Steve had identified in terms of support that was not in place but Steve knew he could ask for further support if he needed it".

39. It is agreed that Mr Macaulay did not complete a risk assessment for the Claimant. Mr Macaulay's evidence on this point was that Ms Ward had said that such an assessment could be done, not that it should be done; he accepts that he decided not to do it, adding that the Claimant had only been in post for a week or so (if the Christmas break is taken into account) when Ms Ward first raised it and that it then went off his radar. At GM15.1 he stated, "we had had an open and full discussion about what support he might need [and] Steve confirmed he was happy with what we had discussed".

40. Mr Macaulay could not say whether he and the Claimant specifically discussed a stress risk assessment. The Claimant does not recall asking Mr Macaulay to complete one, as his main focus was on getting an OH referral done first, though he says a risk assessment could have been done further down the line. The Claimant's case on why the Respondent's failure in this regard was direct discrimination (issue 3.1.3.1), as best we could understand it, is that he was an extra burden for Mr Macaulay. He says he later came to realise Mr

Macaulay did not accept him as part of the team in the long-term when, as the Claimant says, Mr Macaulay treated colleagues who complained about the Claimant with more regard than he treated the Claimant himself, the complaints creating even more work for Mr Macaulay. He accepted that Mr Macaulay would "quite possibly" have treated him the same had he had a genuine health issue that was not a disability, but says that Mr Macaulay should have organised the risk assessment from 17 January 2020 when he says he first brought issues about the team to Mr Macaulay's attention – SS41.

41. The Claimant says that during one or more of their discussions Mr Macaulay referred to the Respondent's "CORE values" as "fluffy stuff", which the Claimant says indicates that the Claimant's wellbeing was not a priority. Mr Macaulay says he may have said to the Claimant that some colleagues perceived the CORE values as fluffy stuff, but as far as he is concerned, they are important to the business. He has regularly run many reminder sessions about the values. Whilst again we had little to go on, given that fact and given Mr Macaulay's position in the business, on balance we preferred Mr Macaulay's account.

42. It seems clear that monthly one-to-one meetings between the Claimant and Mr Macaulay continued until 8 June 2020 – see page 408 – although the Claimant says they focused more on work issues than his health and that Mr Macaulay talked at him rather than with him. Whilst it is natural that the meetings focused largely on work issues, we concluded that there was no evidence that Mr Macaulay invariably talked at the Claimant rather than with him, other than the Claimant's general assertion. Particularly in the early days, as the evidence we have already recounted shows, Mr Macaulay is likely to have wanted to build up a good working relationship with the Claimant. Mr Macaulay told us that any time off the Claimant needed, such as for GP appointments, was never refused, which we accepted.

43. As noted above, another of Ms Ward's recommendations was the identification of a buddy for the Claimant. The Claimant says it was direct discrimination not to identify one because it is not coincidental that a number of requests and suggestions Ms Ward made to Mr Macaulay were not actioned. He accepts that he did not want his disability openly disclosed, but says a buddy could have kept matters confidential. Again, he says that this was perceived by Mr Macaulay as too much work. Mr Macaulay took this as a generic arrangement, rather than something specifically to accommodate the Claimant's disability. He says that he was in effect the Claimant's buddy himself, advising him on any issues the Claimant raised with him, although Ms Campbell accepts that this is something Mr Macaulay could reasonably have spoken with the Claimant about, which it appears he did not. The Claimant and Mr Macaulay were sat fairly close to each other in the office, and Mr Macaulay had made clear he had an open-door policy.

Team issues and delay in making an OH referral

44. Issue 3.1.7.1 is that on 20 January 2020 Mr Macaulay reprimanded the Claimant in front of his colleagues. The Claimant says that he had asked Ms Boulter to use Microsoft Teams, she had raised concerns about it and when this was discussed with Mr Macaulay he raised his voice, and in a harsh tone objected that he did not want to use another system either. The Claimant says that this comment was because of disability, because it was a green light to the

Claimant's team to go to Mr Macaulay instead of to him, as the Claimant was perceived as odd and technical. Mr Macaulay told us that he cannot recall this meeting or any discussion of Teams, though he says he would have had no reason to question the use of a helpful tool. The evidence overall, specifics of which we will come to below, show that Mr Macaulay had various struggles with information technology. That said, and whilst we have the Claimant's assertion as to what was said, we do not accept the Claimant's account. This was early in the working relationship, the Claimant had already reported a good working environment generally as we have noted, and as we will come to, Mr Macaulay later voluntarily reported to his own manager an occasion on which he had raised his voice to the Claimant in a private conversation, very much suggesting it was a highly unusual occurrence. Moreover, the Claimant did not raise this in a letter he sent to Mr Macaulay just a couple of weeks or so later on 10 February 2020 – see below. We conclude that the comment was not made.

45. The Claimant set objectives for Ms Boulter on 21 January 2020, which can be seen at pages 213c to 213e. Ms Boulter appears to have agreed them with the Claimant (though in his letter of 10 February 2020 to Mr Macaulay – see below – the Claimant said Ms Boulter did initially query the objectives with him, casually) and then complained about them to HR. The Claimant and Mr Macaulay discussed them at a meeting on 6 February 2020, at which the Claimant says Mr Macaulay "scripted" what he wanted, so that the Claimant had to withdraw what he had written and rewrite them. The Claimant effectively accepted in evidence that Mr Macaulay's point was that the objectives were not written in the Respondent's style and were too detailed, but adds that Mr Macaulay was very angry Ms Boulter had gone to HR over his head. The Claimant says Mr Macaulay's voice was raised, that he was animated, and that this made him feel he had done something wrong. He asserts that Mr Macaulay behaved in this way because of the Claimant's disability (issue 3.1.7.2), Mr Macaulay perceiving the Claimant as a troublemaker because of how he came across, due to what the Claimant describes as his mannerisms and neuro-diversity. Mr Macaulay for his part told us that the objectives were far more detailed than would usually be expected and covered subjects which would not usually be included in an objectives document. He denies being aggressive at all, saying that he was trying to help the Claimant to help himself by getting the objectives in the right format, but could not please everybody. No other colleague has ever accused him of being aggressive or angry. According to the Claimant's letter of 10 February 2020 (see below and at page 229) Mr Macaulay then suggested that he, the Claimant and Ms Boulter meet to re-write the objectives. In the same letter, the Claimant said that Ms Ward had spoken with him about the issues in the team – this appears to have been facilitated by Mr Macaulay.

46. Again, we preferred Mr Macaulay's account of his discussion with the Claimant about the objectives, not least because as our subsequent findings of fact will show, he continued to engage with the Claimant following this meeting in an attempt to help him craft objectives in the Respondent's style, including as just noted the two of them and Ms Boulter meeting to rewrite them. This is indicative of a patient, constructive approach, rather than the one described by the Claimant.

47. On 10 February 2020, Mr Macaulay emailed Ms Ward (page 248) saying that the Claimant would like to avail himself of an OH referral and asking for advice on

how to "get the ball rolling". On the same day (page 222), Ms Ward emailed Mr Macaulay a link enabling the referral to be made.

48. On 11 February 2020, Mr Macaulay held a "clear the air meeting" with the Claimant and Ms Boulter. Prior to the meeting, Mr Macaulay asked them both to list up to six main issues they were experiencing with the other. Ms Boulter's reply (page 218) said, "Listen to staff, using 1000 words when three will do, talking over people, not enough work to do, simplify things, we do not need our experience and knowledge questioned". The Claimant accepts Mr Macaulay showed him Ms Boulter's email ahead of their meeting.

49. The Claimant did not agree with this approach to the meeting, though he agrees Mr Macaulay welcomed both parties' concerns. He says Mr Macaulay knew what he was doing in welcoming complaints from Ms Boulter. What he means is that it could be used as a tool to demean him and control him, and as an excuse to later extend his probation period or dismiss him, although he accepted that this would have added to Mr Macaulay's workload, which is something he accepts Mr Macaulay would have wanted to avoid, as we have already noted. He accepts Mr Macaulay collected information about the issues, but says he should have sought advice.

50. The Claimant describes Ms Boulter's concerns as subjective and changeable. He accepts he uses too many words, but cannot recall her saying to him that he did so, nor that he made things too complex or any of the other matters set out in her email, though he knew she was very unhappy from the start of their working together.

51. On 10 February 2020 (pages 223-4), the Claimant sent his own list of concerns to Mr Macaulay. These were that Ms Boulter did not seem to want to approach him, she gave him a hostile response when he tried to discuss work-related issues, she made mistakes and was dismissive of him when he raised them, was sometimes condescending, and needed to understand that he had to have a tight grip on Fire Safety works. He expressed a concern that the team and its work would be affected if she had no confidence in him. He agrees that this shows he understood that Ms Boulter felt he did not trust her experience, and accepts that she accused him of micro-management.

52. He later drafted a letter to Mr Macaulay on the same date (pages 225-230) giving more details. He said in the letter that when he asked her to do something Ms Boulter would snap at him for interrupting her or give him uncomfortable looks, sometimes just completely ignoring him; it was clear, he said, that he was the subject of negative gossip in the office. He gave some examples of what he described as clear errors in her work, adding that because she was also doing work for another team, she had difficulty in prioritising her workload. He also said that Ms Boulter felt there was some micro-management. He said that on 21 January she had told him she could be a "bit of a mare". Whilst the Claimant was on leave, he said, she overrode an action he had allocated to her and when he raised this with her on his return, she dismissed it and said she would "wind her neck in".

53. The Claimant reminded Mr Macaulay in this letter that on 3 February 2020 he had told him he was finding it increasingly difficult to deal with Ms Boulter's behaviour. He said she had snapped at him on 5 February 2020 when he asked

her how she was getting on with actions he had assigned to her; he mentioned discovering on 6 February when meeting with Mr Macaulay that Ms Boulter had complained to HR about the objectives he had set for her, having made no attempt to discuss this directly with him; he recorded that Mr Macaulay was very dissatisfied with the objectives; and he said he was particularly upset at some of Mr Macaulay's comments towards him and felt they were somewhat unfair, noting that in all other organisations he had worked in, objectives had been set in a similar fashion.

54. He then referred to Mr Macaulay saying on 7 February that he wanted to reassure the Claimant he wanted him to be successful, the Claimant adding that he accepted that without question. He went on to say that he appreciated the intention was to put matters to bed so that they could focus on their work, but that Mr Macaulay's proposal, that is for the Claimant and Ms Boulter to meet with him, could be demeaning as it suggested the Respondent may lack confidence or trust in his ability to undertake his role as the team manager. The approach to the meeting would in his view give Ms Boulter a further cause to undermine him should she decide to object to any management decisions he made in future.

55. The Claimant concluded the letter by saying, "As a result of this current situation, I have been extremely upset. The matter is affecting my health as I feel the ground has not been a level playing field and I feel somewhat helpless in being able to offer a fair solution. When we previously discussed about making reasonable adjustments, as a result of my mental health, this is certainly such an instance where I believe that better understanding of my position can be considered. I would also like to take up your previous offer of a referral to occupational health to help me consider available options at this time". He says that this was his attempt to discuss his mental health with Mr Macaulay. He had no absences from work due to health reasons at any time.

56. Issue 3.1.9 concerns the allegation that Mr Macaulay asked the Claimant several times to withdraw the letter, with the Claimant seeking to reassure him that its purpose was to try to resolve the issues. The Claimant told us that he put the letter on the desk in a second-floor meeting room and told Mr Macaulay he needed to read it, but Mr Macaulay pushed it back and said, "withdraw it". The Claimant says he is not saying this was less favourable treatment, it was just background information, showing that Mr Macaulay was unwilling to listen to his concerns. Mr Macaulay's account is that the letter was handed to him, he asked about it and the Claimant gave a brief overview of it. He says that he undertook to read it but not at that point because he was about to start a meeting; he says he did not ask the Claimant to withdraw the letter because he had not even read it. We thought it highly unlikely that Mr Macaulay asked for the letter to be withdrawn. As he said, he had not even read it, and moreover he had requested the Claimant's comments and was prepared to hold a meeting with him and Ms Boulter to try and resolve the matters that both of them were invited to raise. That is all inconsistent with an insistence that the letter be withdrawn.

57. The letter did not mention that Mr Macaulay reprimanded the Claimant on 20 January, as alleged within issue 3.1.7.1. The Claimant says that this was because he was trying to work with Mr Macaulay and not accuse him of things. We did not accept that explanation; he raised other direct criticisms of Mr Macaulay in the letter, and there is no reason why he could not have raised this matter also, had it happened as he alleges.

58. Notwithstanding this correspondence, the Claimant alleges (issue 3.1.18.3) that he was not permitted to formally raise concerns about Mr Cox and Ms Boulter. This is essentially his case that he was made to withdraw the objectives he had prepared for the latter; he says that Mr Macaulay advised him that any concerns should be raised "as and when", which made him reluctant to record subsequent issues as they arose. This was discrimination, he says, because Mr Macaulay was more concerned for the welfare of the other team members than about addressing the issues the Claimant had with them. We will address those points in our conclusions. Mr Macaulay says that the Claimant never raised with him that the difficulties he was having with his staff were related to his disability; he says the issues were always about the team members, and not about the Claimant's ability to cope with them. That must be right – there was no evidence drawn to our attention to suggest that the Claimant raised any such point or made any such connection in discussions with Mr Macaulay. Mr Macaulay said many times that his regular advice to the Claimant was to seek support from HR to manage his team members. This seems to be supported by what the Claimant said during the investigation of his grievance, namely that Mr Macaulay had told him to speak to People Services (the Respondent's name for HR) – page 645 – and is also supported by what was said in one of Ms Campbell's investigation interviews with Mary Pond of HR, recorded at page 794.

59. Mr Macaulay describes the clear the air meeting as a pep talk, focused on trying to help the team understand what they should be delivering, and the need to be respectful and work as a team. Before the meeting, he went through with the Claimant the items Ms Boulter had raised with him. He did not before the meeting go through the Claimant's points with Ms Boulter. His explanation for that difference in approach is that the Claimant was a manager and needed to know. His purpose in approaching the meeting as he did was to get a clear understanding of the issues, but the Claimant says that it meant Mr Macaulay treated the situation as "two squabbling colleagues" (SS61 and issue 6.1.3) rather than taking on his concerns about Ms Boulter, thus undermining him. At SS64 he states, "Mr Macaulay used the vexatious complaints against me as a means of coercive control rather than allow me to manage my staff and address the misconduct". The Claimant's case is that Mr Macaulay's conduct turned Mr Cox and Ms Boulter against him and meant that their behaviour went unaddressed. Effectively, he is saying that Mr Macaulay's conduct disempowered him from being able to manage them. Mr Macaulay described this to us as "nonsense". Again, we will come back to these arguments in our analysis.

60. On 17 February 2020 Mr Macaulay noted in a record of a one-to-one discussion with the Claimant (page 188) that the clear the air meeting had gone well, saying at page 189, "team building in progress … [after meeting] all seems ok". Page 188 also notes, "Wellbeing discussed and GM to advise JW on our discussions, SS happy with proposed actions. GM to put SS in touch with Occ Health once KW [the Office Manager] back from leave – SS happy with this". The Claimant says again that he does not recall a meaningful discussion about health and wellbeing on this occasion and that "happy" reflects that he simply did not object. Given the other correspondence we have seen, and the fact that the Claimant had access to the meeting notes to add any concerns about what Mr Macaulay had recorded, we did not accept his evidence that Mr Macaulay's note is in any way an inaccurate record of the outcome of their discussion. Mr

Macaulay says that after this discussion, the Claimant said he did not want "KW" doing the referral, and so Mr Macaulay then took up the matter with HR himself. That evidence was not challenged by the Claimant. Mr Macaulay accepts the referral is a line manager's responsibility and says it was an oversight on his part to go back to HR at this point, when Ms Ward had already sent him the relevant link and instructions. He took no further action on the Claimant's letter of 10 February.

61. As to issue 3.1.8, the Claimant accepts he continued to manage Mr Cox and Ms Boulter until he left the Respondent's employment. His complaint, he says, is that Mr Macaulay treated all of them the same in the way he handled the difficult employment relations situation. He describes Mr Macaulay as task-focused and not people-oriented.

62. The Claimant alleges (issue 3.1.10) that on 20 February 2020, Mr Macaulay said to him "You want to deal with that then don't you" after the Claimant informed Mr Macaulay that Mr Cox was swearing at him, referring to him as "a wanker" and "Mr big bollocks". There is reference on pages 190-1, the Claimant's notes of a meeting with Mr Macaulay on 26 March 2020, to "derogatory and abusive language" directed at the Claimant, but there is no such reference in his long letter to Mr Macaulay of 10 February 2020. He says that Mr Macaulay's comment was discrimination or harassment because of or related to disability because Mr Macaulay was not concerned about his welfare, it would have been reasonable to provide some support, but he did not want to entertain the issues because he saw the Claimant as a nuisance and not a long-term part of the team.

63. Mr Macaulay does not recall the Claimant raising these specific words with him. He says it would have stood out in his mind because it is not the sort of language one would come across in the office. He says at GM37.5 that it is not his style to say what he is alleged to have said and points out that he regularly advised the Claimant to have private meetings with employees if there were attitude problems.

64. The Claimant also says he told Mr Macaulay that Mr Cox had said, "Steve has the disability spot", when one day he parked at the front of the building. The Claimant says this was said in front of him, to someone else, in a dismissive and joking way. Mr Macaulay was not present. The Claimant says he did not raise it with Mr Cox at the time as he was surprised Mr Cox would know he was a disabled person, but raised it with Mr Macaulay when more abusive language was used, we assume on this occasion. Mr Macaulay denies that it was mentioned to him.

65. Dealing first with the alleged reporting of Mr Cox's use of swearwords towards the Claimant, again, there was little for us to go on in terms of direct evidence. We concluded that, as Mr Macaulay says, the Claimant reporting these specific words is something Mr Macaulay would have recalled, given that – as Ms Campbell's investigation showed (see below) – it appears to be generally accepted this was not the kind of language used in the office. Moreover, we noted that the Claimant made only general rather than specific reference to bad language, for example in the 26 March meeting note. We were prepared to accept however that he drew Mr Macaulay's attention to the use of abusive language generally, that is without identifying particular phrases, and it is

consistent with Mr Macaulay's overall approach that he said something to the effect that the Claimant would need to deal with it. As to the comment about the "disability spot", we had the Claimant's assertion that it was said and how, though he could not specify a date or any other details. Set against that assertion we had the broader evidence obtained by Ms Campbell about the office culture generally. Further, the date of the alleged comment is unknown but it must have been early in the Claimant's employment, before everyone was largely working from home because of the pandemic and, as we have noted, the Claimant had made a positive comment about the environment, in mid to late January. We noted also that this comment was not raised in his resignation letter, when he raised other specific comments that he said had been made. Again, there was little direct evidence to go on, but on balance for the reasons just summarised, we found that the comment about the "disability spot" was not made. We were fortified in the conclusions set out in this paragraph by what the Claimant told Ms Ward at the probation review meeting in June to the effect that he had not told Mr Macaulay about things said "not in the spirit of diversity".

66. The Claimant says (issue 3.1.7.3) that on 26 March 2020, Mr Macaulay brought up how he had written Ms Boulter's objectives, saying angrily that the Claimant should write objectives like everyone else, thus wanting the Claimant to be like other people. This took place on the phone, with Mr Macauley, the Claimant says, shouting words to the effect that he needed to take "...a leaf out of other people's book". Mr Macaulay denies that this was said. At page 193, which is part of Mr Macauley's note of the one-to-one meeting on this date, he noted his "concern … that SS and his team still did not appear to be working as a team". Mr Macaulay says he was not apportioning blame; the fact that he pointed the Claimant to HR was an acknowledgment that Mr Cox and Ms Boulter had contributed to the issues that existed between them.

67. We could well believe that Mr Macaulay may have been exasperated by the ongoing issue of the objectives, but we did not accept that he demonstrated anger towards the Claimant or shouted at him. In support of that conclusion, we refer again to his voluntarily reporting to his line manager an occasion when he raised his voice with the Claimant and to his ongoing discussions with the Claimant seeking to support him in finalising Ms Boulter's objectives, all of which indicated to us that Mr Macaulay's evidence on this matter was to be preferred.

68. The notes of the same meeting, at pages 190-191, referred to workloads being extremely heavy and Mr Cox being on indefinite leave, with his work to be picked up partly by the Claimant and partly by another Surveyor. The notes also recorded that the Claimant "recommend[ed] [an] additional full time Surveyor should be considered going forward". Under "Team issues", the notes stated, "SS felt some behaviours were challenging and unreasonable", citing Ms Boulter going over his head to Mr Macaulay or HR, agreeing her objectives and then complaining. As noted above, the Claimant also mentioned "derogatory and abusive language" being directed at him, stating that this had "affected [his] health". He noted that he had requested an OH referral on 10 February 2020, though the Claimant "believed the team had moved on from these initial issues". Mr Macaulay says that this is when he became aware of the Claimant's concerns in detail; he read the notes as the Claimant saying that the team issues were getting him down and he knew the Claimant was depressed, anxious, angry and frustrated. As far as he was concerned however, the wheels were already in motion to address the concerns, because in relation to Ms Boulter the Claimant

was liaising with Human Resources, and Mr Cox was now absent. By late March/early April, the Claimant was working from home because of the pandemic.

69. On 27 March 2020, the Claimant emailed Mr Macaulay (page 245) asking if he had found the process for an OH referral and whether he could contact Ms Ward himself. On 29 March 2020 (page 246), Mr Macaulay forwarded the relevant link to the Claimant. The notes of their meeting on 26 March 2020 (page 194) indicate that they discussed the Claimant's wellbeing and that Mr Macaulay was to put the Claimant in touch with OH once a colleague returned from leave, noting that the Claimant was happy with that. These are the same words as were noted on 17 February 2020, suggesting that on this occasion this was simply a copy and paste of a note from the earlier meeting, though as we have already said, that does not necessarily mean it was not mentioned again, however briefly.

70. On 2 April 2020 (page 255) Mr Macaulay emailed the Claimant saying, "Steve, I have sent you a copy of my objectives as promised to give you a flavour of the Optivo style and the level of detail required when putting together objectives for your team…". Mr Macaulay says that usually, an employee's objectives are just a list of items, prepared separately from a performance development review and that compliance with CORE values would be just one objective, not eight objectives as in the document the Claimant had drafted for Ms Boulter. He says that the items the Claimant had included under that heading should have related to other specific objectives and not to the values, adding that Ms Boulter would have been "blown away" by this document as it was much too detailed. Taking item seven as an example, it required her to "seek guidance", something Mr Macaulay says goes without saying. If she was not seeking guidance, that should not have been part of her objective-setting, but part of a performance improvement plan. He accepts that it is the manager's responsibility to set the objectives; he was simply saying how they should be presented. He does not accept that he was telling the Claimant what to write. We were content that what Mr Macaulay described to us reflected the Respondent's usual way of setting objectives.

71. Mr Macaulay also said in his email, "As explained the system will not allow me at present to add these [the Claimant's objectives] into Performance Hub presumably as you are under probation but I will see if there is some way that the system will let me" (page 256). Issue 3.1.15 (see also SS82) is that although Mr Macaulay emailed objectives to the Claimant, he failed to record them on Performance Hub, which is used to record and monitor objectives, performance meetings and the like for staff generally. It is obviously correct that the Claimant's objectives were not recorded in that way. The Claimant's case is that this too was because Mr Macaulay did not accept him as a team member in the long-term. Mr Macaulay says that as he advised the Claimant at the time, he was having technical issues doing so, in that because the Claimant was in his probation period, the system would not let Mr Macaulay upload them, but the Claimant was in any event sent a copy by email. We accepted Mr Macaulay's explanation, consistent as it was with his contemporaneous correspondence. The Claimant did not raise any concern about this matter at the time.

72. It is agreed that Mr Macaulay's manager, Barry Waller, Director of Property Services for London and Midlands, asked Mr Macaulay to tell the Claimant not to

attend a regular fire safety meeting held by video or telephone conference, after the Claimant had raised, in what Mr Waller regarded as a confrontational way, a lack of resource in his region as the reason why there were problems with completing tasks, at a meeting on 2 April 2020. Mr Macaulay told us that Mr Waller found this a "bit embarrassing" as it was something that should have been raised via Mr Macaulay himself. Mr Waller said he would provide any updates to the Claimant via Mr Macaulay and that the Claimant could use the time that would otherwise have been spent in the meeting continuing to close tasks. The Claimant says that Mr Macaulay issued this instruction because of the way the Claimant was perceived in respect of his manner of communication, believing that Mr Macaulay would have told Mr Waller of his disability. The Claimant says that this is one of an accumulation of events which showed he was not accepted as part of the team because of his disability.

73. The Claimant accepts that in a busy team it is a normal occurrence from time to time not to be able to attend meetings. Issue 3.1.7.4 raises the allegation that on 9 April 2020 Mr Macaulay shouted at him, "I don't give a shit", when the Claimant told him that he could not attend a meeting on that particular date. Mr Macaulay denies any such comment, though he recalls telephoning the Claimant because he had not accepted a meeting invitation. He says that he did not shout however, or feel that his tone was aggressive; he simply asked the Claimant to let him know whether he was going directly to a site. He also says that he did not swear and would not do so. In his many years working for the Respondent, he cannot recall anyone swearing at a colleague. As indicated above, he recalls one occasion when he raised his voice, when he felt the Claimant was not listening. He reported this to Ms Campbell (page 845, paragraph 5.3) in his interview with her which formed part of her investigation into a number of issues after the Claimant's resignation. It is described at GM37.3 – "We were having a phone call that was taking too long. Steve was not performing in clearing down the number of fire risk assessments, which was a key part of his role. I was trying to give him feedback but he was just not listening to what I was saying and kept talking over me. I was frustrated and at the end of my tether ... I said something like please will you just listen to me. I remember telling Barry that I had had to raise my voice with Steve on that occasion". The Claimant says the alleged comment was direct discrimination because Mr Macaulay was blaming him not only for the team issues but also that he had mental health issues which meant he presented differently to other staff and Mr Macaulay did not want to accommodate that.

74. What the Claimant says in support of his case in this respect is that if Mr Macaulay could use at a probation meeting, in front of an HR colleague, the phrase "better to be inside the tent pissing out, rather than outside the tent pissing in" (see below), it is likely he would have used similar language on 9 April. That is a fair argument, and we considered it carefully. We were clear, as already indicated, that swearwords were not a frequent occurrence in the Respondent's office – all of the contextual evidence, particularly from Ms Campbell's investigation, bears that out. Further, the comment at the probation meeting was in the context of trying to assist the Claimant, albeit Mr Macaulay regrets making it in the way that he did, as we will come to; the comment allegedly made on 9 April was very different, being dismissive in nature. We did not have any broader evidence of Mr Macaulay being dismissive of the Claimant in this or any other way. In fact, the position is quite the opposite: the overall tenor of the evidence is of Mr Macaulay seeking to engage with the Claimant,

even if not always to the Claimant's liking or not always wholly effectively. There was little for us to go on, but on balance, weighing up the evidence we have just summarised, we found that this comment was not made as alleged for the reasons just indicated.

75. On 15 April 2020, Mr Macaulay recorded in one-to-one meeting notes: "Occ. Health - GM updated SS on progress. GM to access link and submit to OH. GM advised on issues he had had in accessing. HR have advised GM to use their username for access" (page 263).

76. On 23 April 2020, Mr Macaulay wrote to the Claimant saying that the "disciplinary/competency issue" in relation to Mr Cox was urgent as Mr Cox was soon planning to return to work. He said that the Claimant needed to "prepare and get all your facts together" and asked him to discuss it with HR and let him know how best to handle it. The Claimant responded saying "No worries", that he had already spoken to HR about it, and that he would draft a performance improvement plan and approve it with Mr Macaulay (page 261). Evidently therefore, the Claimant and Mr Macaulay had discussed the need to address some issues with Mr Cox.

77. On 27 April 2020 (see page 266) Mr Macaulay sent the Claimant his notes of their latest one-to-one meeting. They had discussed Mr Macaulay's difficulty with utilising the link for the OH referral, and the wording to be used for that referral. Mr Macaulay says the wording seemed sensible to him. The Claimant questions whether Mr Macaulay was just stalling.

78. Also on 27 April 2020, the Claimant emailed Mr Macaulay regarding Ms Boulter's objectives, setting out some "Core Values" objectives, with Ms Boulter's comment, "too specific" against two of them. Mr Macaulay replied saying that the two comments highlighted should not be under "Core Values" and should be under a "Riskhub objective" and measurable. See pages 272-275.

79. As can be seen from issue 3.1.7.5 and SS79, the Claimant alleges that Mr Macaulay shouted on 29 April 2020, during a one-to-one meeting, "Shut up, shut up, shut up", "with intense fury". He alleges that this was direct disability discrimination, alternatively an act of harassment related to disability, because Mr Macaulay had no concern for the Claimant's struggles, did not see him as a long-term member of the team and it was easy to bully him. Mr Macaulay denies the allegation. It did not appear in the Claimant's meeting notes and he did not complain about it at the time. Albeit we accept that it is not always easy to complain to one's employer, we concluded accordingly that Mr Macaulay's tentative suggestion at paragraph 37.3 of his statement was likely to be correct, namely that this was the occasion which he later reported to Mr Waller, as described above. We concluded therefore that Mr Macaulay did raise his voice, was no doubt exasperated and did ask the Claimant to let him speak, though if whatever was said had been said with "intense fury", as alleged, we thought it very likely the Claimant would have recorded it somewhere at the time. We were also prepared to accept that Mr Macaulay asked or directed the Claimant to "shut up" on this occasion – after all, that is not far from what Mr Macaulay himself recounts – but, for the reasons just given, not that he repeated this or that he said it in the way alleged.

80. On 6 May 2020, the Claimant and Mr Macauley had another one-to-one meeting – page 196. There is reference in the note of the meeting to the Claimant arranging a competency meeting with Mr Cox and a note that he should log such items on a performance improvement plan if implemented. There was also a discussion about someone who had left the Respondent's employment and a comment that the Claimant would be involved in the recruitment of a replacement.

81. The notes of this meeting also said (page 207), in relation to the OH referral, "GM has now attempted to initiate twice, the latest time yesterday – GM has ongoing problems in registering. GM to liaise with Jackie Ward". The Claimant accepts the referral was discussed, though not that Mr Macaulay had a good excuse for not having done it beforehand. On 21 May 2020 (page 326), Mr Macaulay emailed Ms Ward asking her to open an OH request for the Claimant, giving the wording, "To help Steve put in place some coping methods for his stress and anxiety levels experienced at times", which was the wording the Claimant had supplied a week or so before. Ms Ward put through the request shortly afterwards. Mr Macaulay described as "ridiculous" the Claimant's suggestion that he was stalling by not making the referral. He accepts it was an oversight on his part not to think of calling the provided helpline number when he had technical problems using the link and accessing the referral form, but noted that it would have made his life far easier than the various exchanges he had with Human Resources, had he been able to overcome the technical issues.

82. Mr Macaulay says he had never previously actioned or commissioned an occupational health report for anyone else. We had no reason to disbelieve that evidence, somewhat surprising as it was. As is clear from the above, his case is that the referral was delayed because of oversight on his part and because of the IT difficulties. As already indicated, the Claimant does not accept these as valid reasons for the delay. He himself had issues referring one of his team members to OH and resolved it by a telephone call asking for assistance. He does not believe Mr Macaulay gave due regard to, or tried hard enough to address, the issues identified by Ms Ward, because he did not view the Claimant as a long-term member of the team. As to why this was direct discrimination, he says Mr Macaulay expressed concern for Ms Boulter's welfare on 23 June at the probation review meeting held with the Claimant (see below), but never for his. He says he had constant difficulties getting any level of support from Mr Macaulay.

83. At issue 3.1.11, the Claimant alleges that Mr Macaulay allocated and continued to assign to him two difficult team members, that is Mr Cox and Ms Boulter. He told us Mr Macaulay cannot be blamed for them being allocated to him in the first place, but says he should reasonably have seen that things were not working and should have revisited the arrangements. By not doing so, he says Mr Macaulay did not show any responsibility towards him. At no point did the Claimant ask for either colleague to be managed by someone else – his response to that suggestion in evidence was, "Why would I?".

84. On 14 May 2020 (page 290) Ms Boulter emailed Mr Macaulay after a call with the Claimant. She stated, "I've got to tell you that I am VERY UNHAPPY [capitals original]". She said the Claimant had objected to an email she had sent him, became "shirty" and had pointed out "how my bad attitude is a constant". She went on to say, "He even told me to SHUT UP [capitals original] … as I was

trying to explain that no one else has a problem … I want to know why I am being so closely monitored as this is causing unnecessary stress". This came as a surprise to Mr Macaulay – he knew the Claimant was still progressing matters with HR but thought they were being worked through.

85. Mr Macaulay and Ms Boulter then spoke by telephone, Ms Boulter assuming the Claimant had been in touch with Mr Macaulay about their conversation, though in fact he had not. She then sent a further email to Mr Macaulay (page 287), highlighting concerns about the Claimant scrutinising her logging on times, documenting "unpunctuality" in one-to-one notes, telling her to "shut up" and shouting at her, as well as "too-lengthy phone calls involving having things read out to me … implying that I'm stupid", "several lengthy conversations about my objectives/appraisal", taking over an hour to decide whether she could have a day off, being shouted at to return to the office after working from home and being hung up on when she refused to do so, reducing her to tears.

86. Mr Macaulay evidently discussed this with the Claimant as at page 302 there is an e-mail from him to Ms Boulter dated 15 May 2020 saying, "Obviously as I said yesterday there are always two sides to every story so I have asked Steve to send me examples of instances where he feels that he has been accommodating towards you". At page 300 there is an e-mail from the Claimant to Mr Macaulay of the same date providing a snapshot of "efforts he had made to appease or keep [Ms Boulter] happy", including asking her if there was anything she needed, asking her if her workloads were okay, enquiring about any courses she would like to undertake, offering to take certain tasks off her, overlooking errors she had made and agreeing to put her on to a flexible working pattern because she was often late into work.

87. On 21 May 2020, the Claimant produced the document at pages 327 to 333 setting out the improvements he believed were required of Ms Boulter. He recorded how he soon became aware of behavioural issues after starting his employment and noted that they still continued to obstruct the delivery of essential safety services. He stated that where behaviours demonstrated were in conflict with the Respondent's values, employees can expect a reasonable and proportionate action to encourage improvement and if there is no improvement, they can expect disciplinary action. He then went on to give examples of Ms Boulter speaking to him in a condescending tone, for example snapping at him on 5 February that she had only just sent letters out when he asked how she was getting on with something, refusing to attend some training, refusing to undertake a DSE assessment, saying she was dealing with a particular piece of work and so declining the Claimant's help but then failing to produce it on time, working from home without seeking his permission, refusing to attend the office whilst working from home, and so on. He highlighted errors he said she had made in recording actions on Riskhub, repeated issues with timekeeping (he cited several examples of her logging in late or not recording any activity), delays in achieving deadlines (explained by her on what he saw as the incorrect basis that she had no access to relevant records which led him to believe that she was deliberately frustrating "processes and outcomes"), failing to act with integrity by saying that she did not have enough work to do and yet raising concerns about the work she was doing on the gas side of her duties, and making spurious and vexatious complaints about him.

88. Neither Ms Boulter nor Mr Macaulay saw this document. The Claimant thinks he shared it with someone in HR. Mr Macaulay recalls the Claimant saying to him that Ms Boulter had complained to Mr Macaulay about having too little work when she had told the Claimant she had too much, though Mr Macaulay does not recall his response except that more administrative resource had been allocated to gas work at the end of April, so that Ms Boulter could devote all of her time to fire safety (page 270). The Claimant replied to that news, "That's great news, thanks Gordon, all". Mr Macaulay accepts that the other matters in the Claimant's communication of 21 May 2020 were of concern, but says he was not privy to those details at the time, which we accepted.

89. At pages 334-336 is Ms Boulter's grievance of 22 May 2020. She wrote, "No doubt [the Claimant] is an expert in Fire Safety as he liked to tell us how qualified he was, but he has always been reluctant to listen to advice about housing policies and how we do things". She said that there had been occasions where the Claimant had belittled and talked down to both her and Mr Cox. She referred again to obsessive micro-managing and the Claimant becoming very "shouty" if challenged. She then went on to give specific examples, citing from her diary being told not to question a task; that her objectives for 2019 to 2020 had been deleted or amended; being spoken over when discussing a work matter and when discussing the objectives; the Claimant telling her she had no authority to decide to work from home; his shouting at her, both when saying that he expected her back in the office and when she said she was requesting not demanding and he asked her whether she was refusing to do so; and his hanging up on her when she said yes. She went on to complain about him requiring her to itemise every piece of work and monitoring her logging in times, referring to his notes of their meetings on Performance Hub. Finally, though not with any examples, she referred to him confusing people by giving contradictory advice. She stated, "I believe that Steve is the type of person that if challenged, asked, queried about anything, and he doesn't know the answer or makes a bad decision, will defer the blame elsewhere and essentially 'go and kick the dog'. I feel like I am the dog".

90. Mr Macaulay told the Claimant about the grievance. The meeting notes at page 345 suggest that this was at their one-to-one meeting on 26 May. They state, "Advised SS that JB has discussed issues with HR in relation to SS's management of her". Having provided evidence to HR regarding the grievance, the Claimant emailed Ms Ward on 9 June 2020 (page 414) saying, "I think it's important for Ms Boulter's grievance to be heard and for all involved to learn from it and move forward".

91. On 2 June 2020 (pages 356-358), the Respondent received an OH report. We were not taken to this at all during evidence, but in short it advised that the Claimant was fit to continue in his role, recounted what the Claimant said about his medical history and said that he was able to manage his normal day to day living activities, although he did have some issues with his sleep pattern which could lead to him being fatigued. The report advised the Respondent to complete a stress risk assessment forthwith with regard to the issues with the Claimant's team member and the hours the Claimant was working. It also stated that the Claimant's health condition should not affect how he communicated with work colleagues. In answering the Respondent's specific question, it concluded that "his case may be admissible under the disability provisions of the Equality Act 2010". The recommendations to his manager and Human Resources were

that management may wish to have regular meetings with the Claimant in order to assess his progress and provide further support if needed and to the Claimant that he should speak to his GP or the employee assistance programme service for more advice with regards to coping mechanisms.

92. On 9 June 2020 (pages 428 to 430), the Claimant sent an email to Darren Goodsell (who was to hear Ms Boulter's grievance) and Ms Ward, referencing an email exchange between Ms Boulter and another colleague, Deborah Brotherton, which the latter had forwarded to him. First, he challenged Ms Boulter's comment that she did not know about the issue Ms Brotherton had raised with her, and secondly, he noted that Ms Boulter had said, "PS Mid-table respectability" which he believed to be a reference to his performance against the Respondent's Core Competency Grid, saying he believed she had been speaking ill to colleagues about him, to the effect that he was not respectable. We think it overwhelmingly likely that this was an unrelated sporting reference, it being next to inconceivable that Ms Boulter would make even a veiled negative reference to the Claimant that she would ask Ms Brotherton to forward to him. This was also the day on which the Claimant was interviewed about Ms Boulter's grievance – SS87.

Report on Jayne Boulter's grievance

93. Ms Boulter's grievance was considered and a report produced in June 2020, upholding it in part – see pages 480 and following – by Darren Goodsell, Head of Maintenance London. As the report shows, a number of emails from Ms Boulter, the Claimant, Mr Macaulay and Mr Cox were considered and all four of them were interviewed, together with other employees.

94. The report summarised the key responses from witnesses, which included comments that the Claimant had not been seen belittling Ms Boulter, that according to more than one witness the Claimant could be confusing, and that one witness had seen conversations where the Claimant did not let the other person speak and did not feel other staff would want to work for him. Mr Cox believed the Claimant did not demonstrate the CORE values of "one team" or "respect", said that the Claimant could be confusing and gave examples of where the Claimant had not given him a clear direction, adding that the Claimant did not listen to his opinion. He had also heard the Claimant shouting, as Ms Boulter alleged, though neither of the other two witnesses nor Mr Macaulay said anything similar. Mr Macaulay told Mr Goodsell he felt the Claimant had good technical and management experience, that his management style was technical and said that he had advised the Claimant to speak with Ms Boulter privately. He said that the Claimant had highlighted Ms Boulter's performance and attitude on several occasions, but his belief was that both had let themselves down in failing to display the Respondent's values. He is recorded as having said Ms Boulter was known to him as having a reputation for being difficult, but told us he does not recall saying that. We concluded it is likely that he did say it, given that the comment appears in the notes. The investigator noted there was no evidence that Mr Macaulay had given the Claimant any clear advice on how to resolve the situation with Ms Boulter.

95. The Claimant's own responses were also noted, including his reference to Ms Boulter's difficult attitude from the start, the failure (as he saw it) to give specifics

about her complaints, Ms Boulter's failure to address issues with him and going to Mr Macaulay instead, and issues with her work and punctuality.

96. In summary, Mr Goodsell's findings were that there was evidence the Claimant had not always been clear in his communications, but there was no evidence of micromanagement so that the Claimant's e-mail instructions were reasonable and acceptable. There was no corroboration that the Claimant had shouted at Ms Boulter, nor any evidence of breach of the Respondent's Dignity at Work Policy. There was consistent evidence that the Claimant had not always been clear with his instructions and had confused staff, and that the performance improvement action plans he had produced did not comply with the Respondent's capability policy. There was evidence that both the Claimant and Ms Boulter had not demonstrated the Respondent's values, evidenced by the lack of action taken to resolve their issues and the over-reliance on long emails to communicate with each other.

97. Mr Goodsell concluded that the Claimant had not fully demonstrated the Respondent's values, and had not used the most effective means of communication which had caused unnecessary confusion and upset, but had met his duty of care as a manager. He also concluded that Ms Boulter had not consistently demonstrated the Respondent's values either and that the issues between them had not been managed effectively or proactively by Mr Macaulay. He stated that there had been "insufficient support from Steve's manager Gordon to help him effectively manage Jayne and the relationship. Gordon expected Steve to manage it by himself. The focus was more about the work than people management". There were recommendations for Mr Macaulay regarding management of his team, for the Claimant to complete various training modules and for Ms Boulter to do something similar.

98. The Claimant says that the report does not reflect the issues Mr Macaulay raised with him. He asserts that his conduct was scrutinised by way of the grievance and that Ms Boulter was not held to the same standard – he says it should have been evident she was accusing him of doing things that she herself was doing. He also says she was allowed to make vexatious complaints and not held to account. See issue 3.1.18.2.

99. The Claimant further says that there was no evidence of him not upholding the Respondent's values and does not think it is clear that Mr Goodsell considered all of the relevant evidence. He gave the example of Mr Goodsell concluding that the Claimant had only attended one Gober (values) training session, without understanding that he was asked not to attend. When asked why he says Mr Goodsell's decision was made in part because of his disability, he told us that Mr Goodsell did not take his disability into account in reaching his decision. He does not know if Mr Goodsell was aware of his disability. He himself did not mention his disability in his discussions with Mr Goodsell, simply answering the questions that were put to him.

Probation review

100. The Respondent's probation procedure is the additional document handed up during the Hearing. At paragraph 3.2 it requires the line manager to carry out a first review meeting and at paragraph 3.3 says that they must advise on any improvements required in the remaining period of probation as well as providing

appropriate support. Paragraph 3.4 requires completion of a probationary review form and the opportunity for the employee to review their assessment and provide their own comments on their performance to date.

101. Paragraph 3.5 requires the line manager to carry out a second review meeting by the end of the 22-week period and no later than the 24-week period, reviewing any appropriate documentation, priorities and achievements to date, conduct, punctuality, attendance, and any support required in the role. As set out in paragraph 3.6, if, at this meeting, it is evident there are aspects of the employee's performance causing concern, the manager must advise the employee they will be invited to attend a probationary review meeting to discuss the possible extension to the probation period or termination of employment. Ms Campbell's evidence is that before any probation review meeting, the employee should have an understanding of the likely outcome. The manager is required to inform Human Resources who then write to the employee to invite them to a formal probationary review meeting. Paragraph 5 of the procedure sets out a right of appeal in the event of the employee being dismissed during their probationary period.

102. It is accepted that no formal 12-week probation review was held for the Claimant – this would have taken place on around 5 March 2020. The Claimant in fact attended a management course on that date. His case is that not having a review at this point affected him adversely, even though he was having other regular meetings with Mr Macaulay, because issues were raised at the 22-week review in June (see below) that had not been drawn to his attention before, such as the Claimant being "too technical". The Claimant's implication is that the 12-week review would have been an ideal time for discussion of such issues. Mr Macaulay describes the failure to hold a 12-week review as an oversight, saying he had not before this point taken any new staff through the probation process and that any issues had been picked up in regular meetings with the Claimant. Although again somewhat surprising, we had no reason not to accept Mr Macaulay's evidence that he had not had to manage a probation process in this way before.

103. At pages 450 to 453 is the Claimant's probation review form. This was evidently discussed with the Claimant on 3 or 9 June 2020, at what the Claimant describes as an unauthorised probationary review meeting (issue 3.1.17). It said, "Steve is customer focused but has struggled to get his team working as one team. Steve certainly has a one team approach himself and this has resulted in good relationships with other colleagues and customers. Steve has respect from his colleagues due to his technical knowledge but appears to have struggled to get the respect of his two team members. This appears to be a perception by them of Steve's inability to give clear, timely and understandable advice to them to assist in the speedy completion of Riskhub tasks". The areas for improvement were identified as, "Build relationships with team to work collaboratively and maximise their potential" and "Giving clear, less technical advice to colleagues in response to queries in order that they can progress with the issues raised in a timely manner". Action points and targets were noted as, "Produce definitive action plan to deliver on an ever-increasing number of fire actions … Satisfactorily address the performance issues of the Fire Safety Surveyor [Mr Cox]" and "Improve communication and interaction with colleagues in line with [the Respondent's] core values, policies and procedures".

104. The Claimant does not accept that in specifying as an objective that he was to manage Mr Cox's performance, Mr Macaulay was empowering him; he says that it was only a statement that the issues needed to be addressed. Mr Macaulay's evidence is that the point in relation to the team would have been better worded "Continue to build relationships …" – there were, in his view, obvious issues with building team relationships and working collaboratively, but for example the Claimant had made a start on managing Mr Cox's performance. In the "Further Comments" section, the form stated, "Satisfactory outcome with regards to the grievance raised by Steve's Team Assistant [that is, Ms Boulter]". Mr Macaulay's rather unclear evidence was that this was because the grievance was not upheld in its entirety.

105. The Claimant signed the form, which Mr Macaulay took as meaning he agreed with the issues raised, and did not ask for examples of the issues identified in the form during that discussion. Mr Macaulay insists that the Claimant was aware of the issue regarding over-technical communication from the time Mr Macaulay shared with him Ms Boulter's concerns in early February, prior to the clear the air meeting – see above. The Claimant says that what Ms Boulter raised was not him being technical, but someone saying he was.

106. The Claimant's case is that Mr Macaulay did not tell him he was responsible for the difficulties with Ms Boulter and Mr Cox until this point. He also says his inability to give "clear advice" had never been put to him like this, nor had the statement that his advice was not "timely". At page 651, in his appeal against his own later grievance outcome, he said, "Over time I have been drip-fed various complaints [from Ms Boulter] that have changed and ranged from – not listening to her, micro-managing her, shouting at her, inability to make decisions, being disorganised, making her work unnecessarily difficult, and so on".

107. The Claimant blames Mr Macaulay for the way the team ended up, as he says Mr Macaulay treated him, Mr Cox and Ms Boulter as all being at the same level. Mr Macaulay does not accept that, saying his approach was to try to stay neutral, get to the bottom of the issues and encourage them to resolve the issues between themselves, thus providing a level of support to all of them. To him it seemed the Claimant was managing the issues by way of performance management of Mr Cox and the help of HR. His evidence was that the Claimant wanted to manage the situation.

108. At the meeting on 3 or 9 June 2020, Mr Macaulay informed the Claimant that he would recommend a three-month extension of the Claimant's probation, though he would have to run it past Mr Waller. The Claimant says that being given a signed probation form on that day was a breach of the Respondent's policy, as it was a meeting prior to the formal probation review meeting. He goes further and says that it was a conspiracy between Mr Macaulay and HR to entrap him into signing the document when they knew that he was not well, and that Mr Macaulay could have used that meeting simply to get his views on the issues instead. There was no evidence before us of the Claimant telling Mr Macaulay on this occasion that he was not in the right frame of mind or state of health to sign the form or in any way unwilling to do so.

109. Mr Macaulay says that it was HR who told him that he had to have a formal meeting with the Claimant, with an HR representative present, in view of the probation being extended. He did not know at the time of the meeting on 3 or 9

June that a second meeting would be needed. Accordingly, he did not tell the Claimant that this would be required. He did say to the Claimant however, according to unchallenged evidence, "Hand on heart, I want you to succeed".

110. Mr Macaulay evidently having discussed the matter with HR, a letter was sent to the Claimant – page 454 – inviting him to a formal probation review meeting. The letter was dated 12 June 2020. It said, "As you are aware, concerns have been raised regarding your building of relationships with your team to work collaboratively and maximize their potential, your ability to give clear, less technical advice to colleagues in response to queries, together with the production of a clear delivery plan….". It advised the Claimant that one of the potential outcomes of the meeting was the termination of his employment, though it seems to be agreed that Mr Macaulay met with him before the meeting to tell him that this would not happen and that he would be recommending an extension of the probation period. Nothing turns on whether that was said on a separate occasion to the meeting which took place on 3 or 9 June.

111. The probation review meeting took place on 23 June 2020. Present were the Claimant, Mr Macaulay, Ms Ward and another representative from HR. The meeting began with Ms Ward saying that Mr Macaulay would talk through the support and intervention required to enable the Claimant to pass his probation. Mr Macaulay explained that the recent meeting (on 3 or 9 June) identified aspects of the Claimant's performance giving cause for concern and therefore his view was that the probation period should be extended. He highlighted that the Claimant was customer-focused and had respect because of his technical knowledge, but that his team were not working as one and there were issues around clear communication with them. Mr Macaulay acknowledged that the Claimant was building relationships elsewhere in the wider team.

112. The Claimant asked for examples of his not having delivered timely guidance. In response, Mr Macaulay referred to comments made by Ms Boulter and said that the issue was giving too much detail, for example in her objectives. He is noted as saying, "looking at objectives, level of detail for people, its either too long or technical. It either blows them away or rubs them up the wrong way". Mr Macaulay promised to provide other examples. It appears Ms Ward also referred to an example raised by Donna Ashmore (see below).

113. The Claimant was asked to elaborate on his support needs. He said he had had an ADHD referral and a recent OH report. He had registered to attend an Adults with Autism service, but had not had the chance to be properly assessed. He wanted people to go to him if they had concerns about his communication and is noted as saying, "Maybe the perception from colleagues is that [he is] a bit odd, and they don't approach [him]". Mr Macaulay emphasised that the key issue was clear advice and staff having an answer they could work with. The Claimant said he had "no issue with the too technical comment". Mr Macaulay said he wanted the Claimant to get to the expected level (of performance) and to have support from HR to "merge him into an Optivo manager". Ms Ward suggested that a stress risk assessment be undertaken.

114. The Claimant says that the concerns about his work were presented differently at the meeting on 23 June compared to how they were presented at the meeting on 3 or 9 June, Mr Macaulay having at the earlier meeting played down the concerns and telling him he would pass his probation. The tone on 23

June was more accusatory, the Claimant says. Mr Macaulay denies this and says that in fact it was the Claimant's tone that changed because unlike their earlier meeting, he demanded examples of the issues that had been raised with him. Our reading of the meeting notes was that Mr Macaulay and Ms Ward adopted an approach which resonated with what took place on 3 or 9 June. What is recorded does not read as accusatory or challenging.

115. The Claimant says that the way the probationary review was handled was discriminatory because the decision had already been made, irrespective of what he might say, to push him out of the organisation because he was not accepted as a member of the team. He does not accept that Mr Macaulay could simply have dismissed him and not extended his probation because, the Claimant says, he would not easily have obtained consent from his colleagues to take the more serious step of dismissing him. The alleged less favourable treatment (issue 3.1.20) was that the Claimant was being blamed for issues he was not directly responsible for and which had not been raised with him previously. Mr Macaulay says it was not his position that it "was all doom and gloom", because if it had been, and if he had been determined to remove the Claimant from the organisation, dismissal is what he would have pushed for.

116. The Claimant suggested at the meeting that he had heard things "not in the spirt of diversity". He was asked by Ms Ward if he had shared this with Mr Macaulay and the Claimant replied, "No". Ms Ward suggested that a separate meeting be held to address this concern.

117. The Claimant alleges that Ms Ward's comment recorded on page 458, made with reference to the OH report, that working long hours was not healthy and that there is a need to work smartly, was a discriminatory comment (it is an allegation of discrimination arising from disability – issue 6.1.8) because she knew about his mental health issues and the problems he had with his direct reports; she should have considered the workload he was coping with. He says it was stated critically, as though he was not working smartly. Mr Macaulay cannot recall the comment and thinks it may have been made while he was offline because of technical difficulties. Clearly the comment was made, given it was recorded. We will come to its significance in our analysis.

118. As already noted, the Claimant asked for evidence of where he had been too technical to "get to the bottom of this". Mr Macaulay did not provide it because the Claimant resigned shortly after the meeting. Mr Macaulay's evidence before us was that colleagues had made clear the Claimant's communication was too detailed, which Mr Macauley says breached the Respondent's "One Team" value (one of the CORE values), though he accepts this was not deliberate on the Claimant's part. Mr Macaulay also said to us that there were emails from the Claimant to Ms Boulter that were hard to understand. He referred in his evidence to page 363 which is part of an email exchange between the Claimant and Ms Boulter, in which the Claimant included a table of various works required and alongside each of them details of schemes or certificates relevant to them. Mr Macaulay did not give this example to the Claimant at the time it arose, as the Claimant was in his view dealing with Ms Boulter directly. He was clear that it was no part of the Respondent's case that there was a problem with all of the Claimant's communications. Mr Macaulay also said in evidence that it had been alleged that the Claimant shouted, talked

down to and talked over colleagues at times, breaching the Respondent's "Respect" value.

119. In further support of his views about the Claimant's communications, Mr Macaulay also cited to us Dawn Ashmore's evidence to Ms Campbell on 30 November 2020 (see below) in which she said that the "DLO had problems with SS's work but not his personality. His work was confusing, with a lack of information". She later said she "needed a simple job explanation but it never, ever worked like that. When the lads were on site [she] would direct them to [the Claimant] on the phone. It was fine, but [the Claimant] would talk about regulations, and the operatives are not fire trained to his standard. [The Claimant] would reference regulations but couldn't understand why that was frustrating at times". Mr Macaulay fully accepts that fire safety is a technical area, but says that the required skill is being able to deliver to less technically able staff the details of technical issues in a way that enables them to deal with them.

120. The Claimant says that Mr Macaulay scolded him at the 23 June meeting, by accusingly apportioning blame to him for communication issues with his team members (issue 3.1.20.3), which again he says Mr Macaulay had never mentioned before. It is agreed that at one point during the meeting Mr Macauley used the words, "back off". His evidence is that, if said, it was in the context of the Claimant picking up Ms Boulter for being a few minutes late, so that he was just encouraging the Claimant to be a bit more lenient, i.e., "you need to back off for a little bit". We concluded that Mr Macaulay's version of this comment is much more consonant with what can be read of the meeting from the notes we have referred to and we thus accepted his account.

121. It is also agreed that towards the end of the meeting Mr Macaulay lost connection. On his re-joining, the meeting was closing and Mr Macaulay said words to the effect, "It is better to be on the inside pissing out than on the outside pissing in". He accepts this was not the best terminology, though his evidence is that it was a turn of phrase and that he was not swearing at the Claimant, though admittedly he used a swear word. The Claimant says it shows Mr Macaulay saw him as set apart from others, suggesting he was not a team player, thus betraying his attitude to autistic people who may have difficulties building relationships. Mr Macaulay says his point was that he wanted the Claimant to be part of the team – in the tent – having told him at their previous meeting that he wanted him to succeed, and believing he would.

122. By the end of the meeting, the Claimant said he "could not care less" if he passed his probationary period.

123. Mr Macaulay believes he handled the Claimant's probation fairly, consistently and transparently. The letter to the Claimant communicating the outcome of the 23 June meeting was sent on 29 June 2020 – page 476. It highlighted the areas for improvement that had been discussed, and in respect of action points and targets set out the need to prepare a definitive action plan to deliver fire actions, address the performance of Mr Cox, and complete certain training including some coaching on emails and action plans to improve levels of communication. It acknowledged the concerns the Claimant had raised at the probation review meeting but noted that he had since submitted his formal

resignation. The letter did not set out any right of appeal against the Respondent's decision to extend the probation period, no doubt for that reason.

The Claimant's resignation, 26 June 2020

124. The Claimant resigned on 26 June 2020, sending Mr Macaulay a detailed letter (pages 469-472) headed "Constructive dismissal due to discrimination". We were not taken to this document at all during the Hearing but it is clearly appropriate for us to refer to it in our decision. The Claimant referred in the letter to a number of matters that were raised in this Hearing, including having had malicious complaints made against him, being the subject of gossip, being sworn at, not receiving an OH assessment until 2 June 2020, being given unreasonable and excessive work demands, the content of the 23 June probationary review meeting, and some of the comments alleged to have been made by Mr Macaulay himself. Some of what the Claimant referred to in the letter is considered in his statement at SS69 where the Claimant says that he was the subject of a very hostile and "exclusive" environment which impacted his mental health and welfare, adding that the standards of behaviour were not what he had been used to elsewhere. He told us that there had been a comment in relation to George Floyd (the individual killed by the police in the USA which sparked the Black Lives Matter movement) to the effect that "you can't rewrite history"; a comment from another employee about a "posh Indian" (in his statement the Claimant said this was about him (SS70) but in oral evidence he said he overheard it and was unsure it was about him); comments about the MeToo movement and about Eastern Europeans taking UK jobs; he also said in oral evidence that Mr Macaulay made comments about women's breasts. Not everyone made these comments, the Claimant says, but when they were made by vocal individuals, they tended to be generally accepted. We will return to our conclusions regarding the Claimant's assertions in this respect in our analysis.

125. Mr Macaulay denies being relieved by the Claimant's resignation, saying he was surprised by it, because they were working through the issues the Claimant felt he had with his staff. The resignation letter was treated as a grievance.

126. Shortly after the Claimant's resignation, it was decided that his post should be removed, with Mr Cox and Ms Boulter to be managed from London instead of Birmingham. Mr Macaulay drafted an announcement to affected staff – page 489 – which Mr Waller commented upon – page 490. In doing so, Mr Waller removed the words, "It is envisaged that the new reporting structure will allow a greater focus and speedier delivery in the Midlands … and that Dave and Jayne will also benefit from greater support from the established London team". In his revised version, Mr Waller also introduced a list under the sentence, "Why are we making this change", which included the bullet point, "Regional staff in the Midlands, supported centrally by the London team". Mr Macaulay says that they were trying to put the decision not to replace a post in a positive way. The fire safety workstream was taken off Mr Macaulay, which he says was a relief from a workload perspective.

127. We heard almost no reference during this Hearing to the initial response to the Claimant's grievance set out in his resignation letter. It was considered by Louise Thomas (Head of Region, (Midlands)). The outcome (pages 480-487), which we were not taken to, was not in the form of a report but apparently in

letter form instead. The Respondent has no standard approach to the form a grievance outcome document must take.

Claimant's grievance appeal

128. The Claimant appealed against the outcome of his grievance. It was considered by Ms V Benson, Director Property Services Kent & Sussex. Her decision letter dated 17 September 2020 is at pages 683 to 686. She did not uphold his complaint that the Respondent's grievance procedure had not been followed, nor did she think that the new details the Claimant had provided to her (which again we were not taken to) constituted new information. She did conclude however that there were inconsistencies in the original decision letter, in that the Claimant had communicated his unhappiness in work both to HR and to senior management and had provided supporting evidence, and so the statement in the grievance outcome that there was no evidence of him raising concerns with his line manager prior to his resignation could not be supported. She upheld those grounds of appeal, stating that she did not consider that all of the concerns the Claimant had raised were responded to by Ms Thomas and that the grievance investigation was not as thorough as it should have been. She recommended that the grievance be re-investigated by someone "suitably senior and independent to the situation".

129. The Claimant points out that an earlier draft of this letter at page 624 includes the comments, "I recognise the impact the probation extension had on you and how it was the catalyst, on top of the Jayne Boulter grievance, for you to reach the decision to leave. In hindsight I believe a more empathic approach, irrespective of the reasoning behind the extension, would have been advisable in light of your mental health. But please let me assure you it was not intended to be a punitive action. I apologise for any distress this may have caused or how this action may have been interpreted, due to lack of explanation or support".

Respondent's "re-investigation"

130. Ms Campbell was appointed to carry out the re-investigation. She is Director of Legal Services and a solicitor. She had not had any contact with the Claimant before. She told us that the option of a re-investigation, whilst not expressly mentioned in the Respondent's grievance policy, falls within one of the options following an appeal (page 962), namely where an appeal is partially upheld "and actions [are] agreed" – the action here being a re-investigation. She strongly refuted the Claimant's suggestion that she approached her work with a pre-determined outcome in mind.

131. Part of allegation 3.1.18.2 is that Louise Thomas, the person who initially dealt with the grievance, was on the same level as and in the same office as Mr Macaulay. When asked whether Ms Thomas failing to undertake a thorough investigation, as he sees it, was because of his disability, the Claimant said that this was "not entirely his position".

132. He sees the re-investigation as an act of discrimination, or otherwise harassment (and thus related to his disability), because Ms Benson could have done that work herself (she had sufficient information in his view to come to her own decision), a re-investigation was not within the remit of the Respondent's grievance policy, he could not go over everything again because of his health,

the Respondent knew it would have a detrimental impact on him and it was a "damage limitation exercise". He says the Respondent's express purpose was to produce more evidence against him and come to a pre-determined conclusion, which was debilitating for his self-esteem. Accordingly, he did not wish to be involved in the re-investigation at all. Ms Campbell considers that a great pity, as she had hoped that by participating in the investigation, the Claimant would have been given some reassurance about what had taken place. She told us she felt that anyone who had raised serious issues would wish to see the process through and help ensure the fullest enquiry possible.

133. Ms Campbell spoke with Ms Benson, who identified her first concern to be whether the initial grievance outcome had considered all of the elements of concern the Claimant had raised, in particular allegations of name-calling and the culture in the Midlands office generally and the impact of the support the Claimant received from Mr Macaulay. Ms Benson's concern arose from the fact that the Claimant's grievance, contained in his long resignation letter, differed from the parameters set for his grievance by the letter dated 7 July 2020 inviting him to the grievance hearing – pages 492-494 – which distilled the grievance down to three points, namely that the grievance presented by Ms Boulter included allegations that never happened, Mr Macaulay's tone as line manager, and discrimination by the Claimant's colleagues and Mr Macaulay "in relation to protected characteristics".

134. Ms Benson's second concern was whether the investigation had fully explored the available evidence, in particular whether the evidence gathering process was adequate and whether records in HR had been reviewed.

135. Ms Campbell reviewed the Claimant's role and the original investigation documents. She denies the motivation the Claimant attributes to the Respondent for carrying out the re-investigation, saying it was simply trying to ensure a full and thorough investigation took place into all of the matters he had raised in his resignation letter. She interviewed ten witnesses between 6 and 30 November 2020, including Mr Macaulay. She did not know him either, before her investigation. She asked HR to identify individuals who commenced employment around the same time as the Claimant, so that she could explore with them the culture of the office (that was her understanding of the Claimant's concerns, not that he was complaining about the culture of Mr Macaulay's team specifically). She was assisted in her work by Karen Gooday, Interim Director of People Services.

136. On 18 October 2020 (page 710) the Claimant wrote to Ms Gooday protesting about the re-investigation. By then, these employment tribunal proceedings were on foot. He said in the letter that he could not go over the same issues again and again at yet further meetings, when it was clear to him that the Respondent was not able to recognise the damaging impact on individuals with mental health disorders. He wrote a similar letter to HR on 19 November 2020 (pages 774-5) headed, "Cease and Desist", asserting that the Respondent was "acting to deliberately and aggravatedly further compound [his] mental health disorders and deliberately manufacturing further witnesses in defence of [his] claim".

137. Notwithstanding the Claimant's concerns, Ms Campbell proceeded with the re-investigation. Having done so, she concluded that the Claimant's concerns

had been appropriately investigated and that Ms Thomas was an appropriate investigator, having had no previous relationship with Mr Macaulay and also being the Respondent's Wellbeing Network Chair. She also concluded that the scope of the grievance had been agreed with the Claimant (she referred us to the letter of 7 July 2020 (pages 492-4)), and had also been reiterated at the grievance hearing itself (see her interview with a representative of HR on page 844), though regrettably it had not been documented in the meeting notes, which had caused some confusion for the Claimant and Ms Benson, who did not have that information. Ms Campbell recommended that such matters be clearly documented in future – see paragraph 10.1.1 of her outcome report on page 852. We noted that the matters listed in the letter of 7 July do not entirely match those identified by Ms Campbell, but we did not see the need to address that further.

138. As for comments allegedly made in the team, Ms Campbell's investigation found that no-one had heard them, whether directed at the Claimant or others. Many said they were shocked by the allegations, describing the office as multi-cultural and not a place where it was common to swear. People of different ethnicities had started at the same time as the Claimant and none described anything akin to the Claimant's experience; they provided positive responses about the culture of the office. As for Mr Macaulay, he told Ms Campbell he could not recall what the Claimant alleged took place during a telephone call on 9 April 2020 (issue 3.1.7.4) or what the Claimant said had happened at a meeting on 29 April 2020 (issue 3.1.7.5). He relayed what is stated above regarding the one occasion he could recall raising his voice with the Claimant. He also relayed what is said above regarding the "back off" and "pissing out" comments, made at the meeting on 23 June 2020. The Claimant says Ms Campbell did not interview staff who reported to Mr Macaulay. We were satisfied that she appropriately interviewed other new starters, given that the grievance was about the office culture generally. We were also satisfied that her findings gave her – and gave us – a fair reflection of that culture and of how staff tended to behave.

139. Ms Campbell was also satisfied that the Claimant was appropriately supported regarding his health. She noted that Mr Macaulay had delayed referring the Claimant to OH, which he told her (page 846) was mainly due to IT issues and workload, but this was, Ms Campbell found, of "no substantive effect" as the OH report that was eventually forthcoming (pages 356-358) confirmed that the Claimant was fit to continue working and the support which OH identified, namely regular meetings with Mr Macaulay, was being provided and was at the appropriate level of frequency in her view. An earlier OH referral and a formal appointment of a buddy would, she nevertheless thought, have been helpful.

140. Ms Campbell says that no other adjustments were identified during the Claimant's employment. As she said in her report, other members of staff had seen some signs of concern about the Claimant, specifically that he appeared not to be able to retain information and his communication could be confusing (see page 847), but these had not been flagged to Mr Macaulay. Mary Pond in HR told her the Claimant had spoken with her on 7 February 2020, saying he was concerned about a team member (Ms Boulter) who had gone over his head to Mr Macaulay. It was agreed in that discussion that the Claimant would speak to Mr Macaulay and call Ms Pond again if needed. Ms Pond said that this was her only conversation with the Claimant (page 849). As for broader support, Mr Macaulay told Ms Campbell that much was expected of the Claimant, managing two experienced members of staff. He had attended a two-day managers' course in

March. Mr Macaulay also said to Ms Campbell that the Claimant met the criteria for technical knowledge and was excellent at interview, and had been referred to HR when Ms Boulter brought a grievance against him.

141. Ms Campbell considered the grievance pursued by Ms Boulter and its outcome, noting that Mr Goodsell's report found that Mr Macaulay could have provided more support to the Claimant in managing Ms Boulter. She noted that Mr Macaulay had held the clear the air meeting, had referred the Claimant to HR, and had expected him to take responsibility for his direct reports, but she did not consider that the Claimant was held to a higher standard than others, given the level of his role. Mr Macaulay also told Ms Campbell that all of the issues raised at the probation review meeting had been raised previously and so should not have come as a surprise to the Claimant (page 865). As Ms Campbell says, Donna Ashmore mentioned to her raising with Mr Macaulay that her operatives struggled to understand the Claimant's instructions – see page 893. This was in addition to the evident issues within the Claimant's team, part of his role being to manage it. Ms Campbell was not able in evidence to point to recognisably concrete examples given to her of the Claimant not complying with the Respondent's CORE values.

142. In summary, Ms Campbell described Mr Macaulay's support as "adequate" – at JC35 she puts this in the context of the constraints imposed by the Claimant, namely that he did not want his health discussed with others. She noted too that until his resignation, the Claimant did not raise any concerns about Mr Macaulay, whether to Mr Macaulay's manager, HR or by raising a grievance. She saw the extension of the Claimant's probation as evidence of Mr Macaulay wanting the Claimant to succeed in his role, and while accepting that a 12-week review would have been ideal, was satisfied that there had been a lot of contact between the Claimant and Mr Macaulay in that 12-week period. She also said to us that Mr Macaulay is a manager with long experience and an unblemished record, who had been operating under incredible pressure. She directed us to Louise Thomas's comments in her interview with Ms Campbell at page 879, where she described him as a very focused manager with whom she had a good working relationship, saying that he had never been rude to her, was very professional and worked hard. Ms Thomas said she was happy to approach him if there were any issues.

143. As to the specific points she was tasked to consider, Ms Campbell found that there was a thorough investigation, Louise Thomas in her view being suitably experienced and independent to carry it out. She felt it reasonable that Ms Thomas did not consider the issues between the Claimant and Ms Boulter, Ms Thomas's view being that Ms Boulter's grievance was being investigated separately. She noted one inaccuracy in Ms Thomas's outcome letter, relating to the Claimant reporting his concerns.

144. Ms Campbell discussed relations within the team with those she interviewed. At JC40 she says, that there was "consistent feedback that [the Claimant] was difficult to work with and it was clear there had been a fundamental breakdown in the working relationships". Ms Campbell describes Ms Boulter as visibly upset when recalling her experiences with the Claimant, and other interviewees also commented on the impact upon her, Dawn Ashmore saying (page 803) that "JB was quite a confident lady, but had shrunk down around SS". Ms Campbell told us that she found Ms Boulter very credible and,

recognising of course that she had not interviewed the Claimant, preferred her account of the issues between them. Ms Campbell checked, it seems by asking HR to look at relevant records and by asking Mr Macaulay, whether Ms Boulter's previous managers had raised any issues about her, and was told that they had not. Ms Ashmore did not make any adverse comment about Mr Macaulay and was one of those who expressed herself to be shocked at the Claimant's allegations about the work environment generally.

145. Ms Campbell was satisfied there had been no discrimination, that the Claimant's concerns were properly investigated against the agreed scope of his grievance, and that the investigation was sufficiently thorough. She says at JC44, "My overall view was that the Claimant had struggled with his role. He was appointed to a reasonably senior position where there was an expectation that he would take ownership and responsibility for certain matters. He was supported appropriately and I felt there were opportunities to resolve matters before they escalated [but] that the Claimant did not help himself in that regard".

146. Her recommendations in respect of Mr Macaulay were at paragraph 10.2 of her report (page 852). These included Mr Macaulay considering team building activities, introducing a buddy system for new managers, and providing pro-active regular support to managers to help them manage staff effectively and resolve issues.

147. It is not disputed that the Claimant was diagnosed with ASD after leaving the Respondent's employment.

Law

Burden of proof

148. Section 136 of the Equality Act 2010 ("the Act") provides as follows:

(1) This section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the court [which includes employment tribunals] *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".

149. Direct evidence of discrimination is rare and tribunals frequently have to consider whether it is possible to infer unlawful conduct from all the material facts. This has led to the adoption of a two-stage test, the workings of which were described in the annex to the Court of Appeal's judgment in **Wong v Igen Ltd (formerly Leeds Careers Guidance) [2005] ICR 931**, updating and modifying the guidance that had been given by the Employment Appeal Tribunal ("EAT") in **Barton v Investec Henderson Crosthwaite Securities Ltd [2003] ICR 1205**. The Claimant bears the initial burden of proof. The Court of Appeal held in **Ayodele v Citylink Limited and anor [2017] EWCA Civ. 1913** that "there is nothing unfair about requiring that a Claimant should bear the burden of proof at the first stage. If he or she can discharge that burden (which is one only of showing

that there is a prima facie case that the reason for the Respondent's act was a discriminatory one) then the claim will succeed unless the Respondent can discharge the burden placed on it at the second stage".

150. At the first stage, the tribunal does not have to reach a definitive determination that there are facts which would lead it to the conclusion that there was an unlawful act. Instead, it is looking at the primary facts to see what inferences of secondary fact could be drawn from them. As was held in **Madarassy v Nomura International plc [2007] IRLR 246**, "could conclude" refers to what a reasonable tribunal could properly conclude from all of the evidence before it, including evidence as to whether the acts complained of occurred at all. In considering what inferences or conclusions can thus be drawn, the tribunal must assume that there is no adequate explanation for those facts.

151. Unreasonable behaviour of itself is not evidence of discrimination – **Bahl v The Law Society [2004] IRLR 799** – though the Court of Appeal said in **Anya v University of Oxford and anor [2001] ICR 847** that it may be evidence supporting an inference of discrimination if there is nothing else to explain it.

152. In a harassment case, the first stage of the burden of proof is particularly relevant to establishing that the unwanted conduct was related to the protected characteristic.

153. If the burden of proof moves to the Respondent, it is then for it to prove that it did not commit, or as the case may be, is not to be treated as having committed, the allegedly discriminatory act. To discharge that burden, it is necessary for the Respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the prohibited ground. That would require that the explanation be adequate to discharge the burden of proof on the balance of probabilities, for which a tribunal would normally expect cogent evidence.

154. All of the above having been said, the courts have warned tribunals against getting bogged down in issues related to the burden of proof – **Hewage v Grampian Health Board [2012] ICR 1054**. In some cases, it may be appropriate for the tribunal simply to focus on the reason given by the employer and if it is satisfied that this discloses no discrimination, then it need not go through the exercise of considering whether the other evidence, in the absence of a satisfactory explanation, would have been capable of amounting to a prima facie case of discrimination. This decision was recently considered by the EAT in **Field v Steve Pye and Co (KL) Ltd and others [2022] EAT 68**. The EAT said that where there is significant evidence that could establish that there has been discrimination, it cannot be ignored. In such a case, where a tribunal moves straight to the "reason why" question it could only do so on the basis that it has assumed the claimant has passed the stage one threshold, so that the burden was now upon the respondent in the way described above. The EAT went on to say that if at the end of the hearing the tribunal concludes that there is nothing that can suggest that discrimination has occurred and the respondent has established a non-discriminatory reason for the impugned treatment, there would be no error of law in just answering the "reason why" question, but in fact the complaint would fail at the first stage. If having heard all of the evidence the tribunal concludes that there is some evidence that could indicate discrimination, but nonetheless is fully convinced that the impugned treatment was in no sense whatsoever because of the protected characteristic, it is permissible to reach a conclusion at the second

stage only, but there is much to be said for properly grappling with the evidence and deciding whether it is sufficient to shift the burden of proof. Particular care should be taken if the reason for moving to the second stage is to avoid the effort of analysing evidence that could be relevant to whether the burden of proof should have shifted at the first stage.

Direct discrimination

155. Section 39 of the Act provides, so far as relevant:

"*(2) An employer (A) must not discriminate against an employee of A's (B)— … (b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service … //(d) by subjecting B to any other detriment*".

156. Section 13 of the Act provides, again so far as relevant, "*(1) 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*". The protected characteristic relied upon in this case is disability. Section 6(2) makes clear that this means the Claimant's particular disability. Section 23 provides, as far as relevant, "*(1) On a comparison of cases for the purposes of section 13 … there must be no material difference between the circumstances relating to each case*".

157. The Tribunal must therefore consider whether one of the sub-paragraphs of section 39(2) is satisfied, whether there has been less favourable treatment than a (in this case, hypothetical) comparator, and whether this was because of the Claimant's disability.

158. In determining whether the Claimant has been subjected to a detriment, "one must take all the circumstances into account. This is a test of materiality. Is the treatment of such a kind that a reasonable worker would or might take the view that in all the circumstances it was to [his] detriment? An unjustified sense of grievance cannot amount to 'detriment'" (**Shamoon v Chief Constable of the RUC [2003] UKHL 11**).

159. The fundamental question in a direct discrimination complaint is the reason why the Claimant was treated as he was. As Lord Nicholls said in the decision of the House of Lords in **Nagarajan v London Regional Transport [1999] IRLR 572** "this is the crucial question". Disability being part of the circumstances or context leading up to the alleged act of discrimination is insufficient.

160. Most often, the act complained of is not in itself discriminatory but is rendered discriminatory by the mental processes (conscious or otherwise) which led the alleged discriminator to act as they did. Establishing the decision-maker's mental processes is not always easy. What tribunals must do is draw appropriate inferences from the conduct of the alleged discriminator and the surrounding circumstances. In determining why the alleged discriminator acted as they did, the Tribunal does not have to be satisfied that the protected characteristic was the only or main reason for the treatment. It is enough for the protected characteristic to be significant in the sense of being more than trivial (again, **Nagarajan** and **Wong v Igen Ltd [2005] ICR 931**).

Harassment

161. Section 40 of the Act renders harassment of an employee unlawful. Section 26 defines harassment as follows:

"*(1) A person (A) harasses another (B) if - //(a) A engages in unwanted conduct related to a relevant protected characteristic [here, disability], 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".

162. The Tribunal is thus required to reach conclusions on whether the conduct complained of was unwanted, if so whether it had the requisite purpose or effect and, if it did, whether it was related to disability.

163. It is clear that the requirement for the conduct to be "related to" disability entails a broader enquiry than whether conduct is because of disability as in direct discrimination. What is needed is a link between the treatment and the protected characteristic, though comparisons with how others were or would have been treated may still be instructive. In assessing whether it was related to disability, the form of the conduct in question is more important than why the Respondent engaged in it or even how either party perceived it.

164. The question of whether the Respondent had either of the prohibited purposes – to violate the Claimant's dignity or create the requisite environment – requires consideration of each alleged perpetrator's mental processes, and thus the drawing of inferences from the evidence before us. As to whether the conduct had the requisite effect, there are clearly subjective considerations – the Claimant's perception of the impact on him (he must actually have felt or perceived the alleged impact) – but also objective considerations including whether it was reasonable for it to have the effect on this particular Claimant, the purpose of the conduct, and all the surrounding context. That much is clear from section 26 and was confirmed by the EAT in **Richmond Pharmacology Ltd v Dhaliwal [2009] ICR 724.** The words of section 26(1)(b) must be carefully considered; conduct which is trivial or transitory is unlikely to be sufficient. Mr. Justice Underhill, as he then was, said in that case:

> *"A Respondent should not be held liable merely because his conduct has had the effect of producing a proscribed consequence: it should be reasonable that that consequence has occurred. That … creates an objective standard … whether it was reasonable for a Claimant to have felt her dignity to be violated is quintessentially a matter for the factual assessment of the tribunal. It will be important for it to have regard to all the relevant circumstances, including the context of the conduct in question. One question that may be material is whether it should reasonably have been apparent whether the conduct was, or was not, intended to cause offence (or, more precisely, to produce the proscribed consequences): the same remark may have a very different weight if it was evidently innocently intended than if it was evidently intended to hurt …*

> *"…We accept that not every racially [as it was in that case] slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase…"*

165. It is for the Claimant to establish the necessary facts which go to satisfying the first stage of the burden of proof. If he does, then it is plain that the Respondent can have harassed him even if it was not its purpose to do so, though if something was done innocently that may be relevant to the question of reasonableness under section 26(4)(c). Violating and intimidating are strong words, which will usually require evidence of serious and marked effects. An environment can be created by a one-off comment, but the effects must be lasting. The person who makes the comments, and whether others hear, can be relevant, as can whether an employee complained, though it must be recognised that it is not always easy to do so. Where there are several instances of alleged harassment, the Tribunal can take a cumulative approach in determining whether the statutory test is met.

Discrimination arising from disability

166. As to what constitutes "unfavourable treatment", the Supreme Court in **Williams v Trustees of Swansea University Pension and Assurance Scheme and anor [2019] ICR 230** held that it is first necessary to identify the relevant treatment and it must then be considered whether it was unfavourable to the Claimant. The Court said that little was likely to be gained by differentiating unfavourable treatment from analogous concepts such as "detriment" found elsewhere in the Act, referring to a relatively low threshold of disadvantage being needed. One could answer the question by asking whether the Claimant was in as good a position as others.

167. What caused the unfavourable treatment requires consideration of the mind(s) of the alleged discriminator(s) and thus that the something which is said to arise from disability be more than just the context for the unfavourable treatment. There need only be a loose connection between the unfavourable treatment and the alleged reason for it however, and it need not be the sole or main cause of the treatment, though the reason must operate on the alleged discriminators' conscious or unconscious thought processes to a significant extent (**Charlesworth v Dronsfield Engineering UKEAT/0197/16**). By analogy with **Igen**, "significant" in this context must mean more than trivial. Whether the reason for the treatment was "something arising in consequence of the Claimant's disability" could describe a range of causal links and is an objective question, not requiring an examination of the alleged discriminator's thought processes.

168. The approach to complaints of discrimination arising from disability was considered in detail by the EAT in **Pnaiser v NHS England [2016] IRLR 170**:

> "*(a) A tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B*

unfavourably in the respects relied on by B. No question of comparison arises.

(b) The tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, 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 section 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.

(c) Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant: see Nagarajan v London Regional Transport [1999] IRLR 572. A discriminatory motive is emphatically not (and never has been) a core consideration before any prima facie case of discrimination arises …

(d) The tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is 'something arising in consequence of B's disability'. That expression 'arising in consequence of' could describe a range of causal links. Having regard to the legislative history of s.15 of the Act … the statutory purpose which appears from the wording of s.15, namely to provide protection in cases where the consequence or effects of a disability lead to unfavourable treatment, and the availability of a justification defence, the causal link between the something that causes unfavourable treatment and the disability may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.
…

(f) This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.

…
(i) As Langstaff P held in Weerasinghe, it does not matter precisely in which order these questions are addressed. Depending on the facts, a tribunal might ask why A treated the Claimant in the unfavourable way alleged in order to answer the question whether it was because of "something arising in consequence of the Claimant's disability". Alternatively, it might ask whether the disability has a particular consequence for a Claimant that leads to "something" that caused the unfavourable treatment.''

169. A complaint of discrimination arising from disability will be defeated if the Respondent can show that the unfavourable treatment was a proportionate means of achieving a legitimate aim – "justification" for convenient shorthand. For reasons which will be apparent in our conclusions, it is not

necessary for us to set out the principles emerging from the case law on this subject.

Knowledge

170. A complaint of discrimination arising from disability will also be defeated if the Respondent can show that at the time of the unfavourable treatment, it did not know and could not reasonably be expected to know that the Claimant was a disabled person. We return to this below in summarising the law on reasonable adjustments.

Reasonable adjustments

171. Section 20 of the Act provides as far 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 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".

172. Section 21 provides:

"*(1) A failure to comply with the first, second or third requirement is a failure to comply with the 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".

173. "Substantial" in this context means "more than minor or trivial" – section 212(1) of the Act. Ordinarily, the Tribunal's task is to set out the nature, effects and extent of the alleged substantial disadvantage and assess it objectively. In other words, it must consider what it is about the PCP that puts the Claimant at the alleged disadvantage. As can be seen from section 20(3), a comparative exercise is required, namely consideration of whether the PCP disadvantaged the Claimant more than trivially in comparison with others. As indicated in **Griffiths v Secretary of State for Work and Pensions [2016] IRLR 216** the comparator is merely someone who was not disabled. They need not be in a like for like situation, but should be identified by reference to the PCP, so as to test whether the PCP puts the Claimant at the substantial disadvantage. The disadvantage must relate to the Claimant's disability.

174. The next question is whether there were any reasonable steps which the Respondent could have taken to avoid the disadvantage which were not taken. It is well known that assessing whether a particular step would have been reasonable entails considering whether there was a chance it would have helped overcome the substantial disadvantage, whether it was practicable to take it, the cost of taking it, the employer's resources and the resources and support

available to it. The question is how might the adjustment have had the effect of preventing the PCP putting the Claimant at a substantial disadvantage compared with others. This is an objective test, and the Tribunal can substitute its own view for that of the Respondent.

175. A summary of the above can be found in **Environment Agency v Rowan [2008] IRLR 20,** in which the EAT restated guidance on how an employment tribunal should approach such a complaint, saying that tribunals must identify:

> *"(a) the provision, criterion or practice applied by or on behalf of an employer, or;*
> *(b) the physical feature of premises occupied by the employer;*
> *(c) the identity of non-disabled comparators (where appropriate); and*
> *(d) the nature and extent of the substantial disadvantage suffered by the Claimant*."

176. **Rowan** also held (at paragraph 61), subsequently approved in **Rider v Leeds City Council [2012] UKEAT/0243/11** that what the duty envisages is that steps will be taken which will have some practical consequence of preventing or mitigating the difficulties faced by a disabled person at work. It is not concerned with the process of determining what steps should be taken, thus following **Tarbuck v J Sainsbury's Supermarkets [2006] IRLR 664**.

177. In **Bank of Scotland v Ashton [2011] ICR 632**, Langstaff J emphasised the importance in all cases of the tribunal focusing on the words of the statute and considering the matter objectively:

> "*The Act demands an intense focus by an Employment Tribunal on the words of the statute. The focus is on what those words require. What must be avoided by a tribunal is a general discourse as to the way in which an employer has treated an employee generally or (save except in certain specific circumstances) as to the thought processes which that employer has gone through*."

Knowledge

178. Paragraph 20 of Schedule 8 to the Act provides, in wording akin to section 15(2):

"*(1) A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know—*

(b) [in any case referred to in Part 2 of this Schedule], that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement".

179. The burden is on the Respondent to show that it did not have the knowledge in question – certainly that is clear enough in relation to section 15 given the express wording of section 15(2). The EAT held in **Wilcox v Birmingham CAB Services Ltd UKEAT/0293/10** that what this provision requires is that the employer know (or could reasonably be expected to know) that an employee was suffering from an impairment, the adverse effects of which on their ability to carry out day-to-day activities were substantial and long-term, that is the various constituent elements of the definition of disability in section 6 of the Act – though

as made clear in **Gallop v Newport CC 2013 EWCA Civ 1583** it is knowledge of the facts of the Claimant's disability that is required, not an understanding by the Respondent that those facts meet the statutory definition.

180. If the employer did not know and could not reasonably be expected to know the Claimant was disabled, knowledge of disadvantage does not arise.

181. What is reasonable for the Respondent to have known is for the Tribunal to determine and will depend on all the circumstances of the case. The question is what the Respondent would have found out if it had made reasonable enquiries – in other words there should be an assessment of what the Respondent should reasonably have done, but also of what it would reasonably have found out as a result (**A Ltd v Z EAT 0273/18** reflecting paragraph 5.15 of the EHRC Code on Employment (2011)).

Time limits

182. Again for reasons which will be evident from our conclusions below, it is not necessary for us to set out the relevant legislation or case law in relation to time limits.

Other matters

183. Finally, although he did not refer to it in detail in his submissions, the Claimant asked us to consider an employment tribunal decision, **Moan v Optimal Strategix Group Ltd 2416875/2018**. That was a case in which the tribunal found the Respondent's witness evidence distinctly unimpressive on a number of counts, leading it to find that there had been direct disability discrimination related in particular to the claimant being put on a performance improvement programme after three months' employment when it was recognised that nine months was needed to establish himself, in relation to his being excluded from a course without explanation and in relation to his being excluded from a presentation he was due to attend. The tribunal also found that there were failures to make reasonable adjustments, principally related to imposing a requirement for the claimant to work from home and not accommodating his working from the office. Finally, there was discrimination arising from disability, the performance plan being found to be a device to remove the claimant from employment.

184. It was not clear to us what principles the Claimant was asking us to draw from the case. It is not binding on us of course, but more importantly seems very much to arise – as one would expect – from its own facts, rather than espousing any notable legal principle.

Analysis

185. We begin our analysis and conclusions with a few introductory comments, before turning to deal with each complaint.

186. It is right that tribunals afford litigants in person, even those as intelligent as the Claimant, some latitude in the preparation and presentation of their case. That latitude cannot be unlimited however. As already alluded to in summarising the procedural history of the case, the Claimant has had many opportunities, even before us, to seek amendments to and refinements of his complaints.

Furthermore, during the course of this Hearing, we offered appropriate support to the Claimant, for example assisting with formulation of questions and allowing a further opportunity for cross-examination of the Respondent's witnesses after we had asked them our questions. We also noted that as early as the first Case Management Hearing in October 2020, Employment Judge Dimbylow urged the Claimant to take advice on his case, recognising its extensive detail and potential complexity.

187. In **Chapman v Simon [1994] IRLR 124**, the Court of Appeal made clear that an employment tribunal's jurisdiction is limited to the complaints that have been made to it. In other words, tribunals can only decide the case presented to them. We repeat what we have said before, that accordingly it was not for us to take the Claimant to any part of his case where his complaint did not fit the statutory wording or was repetitive or was not made out on the evidence and direct, or even indicate, that a different case should be argued. We sought during our deliberations to take as generous an approach as was reasonable in identifying the complaints we were being asked to decide, as will be clear, but we had to have in mind the guidance of the EAT in **Chandhok v Tirkey [2015] ICR 527**:

"*If a 'claim' or a 'case' is to be understood as being far wider than that which is set out in the ET1 or ET3, it would be open to a litigant after the expiry of any relevant time limit to assert that the case now put had all along been made, because it was 'their case', and in order to argue that the time limit had no application to that case could point to other documents or statements, not contained within the claim form. Such an approach defeats the purpose of permitting or denying amendments; it allows issues to be based on shifting sands; it ultimately denies that which clear-headed justice most needs, which is focus. It is an enemy of identifying, and in the light of the identification resolving, the central issues in dispute … An employment tribunal should take very great care not to be diverted into thinking that the essential case is to be found elsewhere than in the pleadings*".

188. With that introduction in mind, we now turn to the complaints. First, we deal with the complaints under paragraph 3.1 of the list of issues, all of which were complaints of direct disability discrimination. The numbers in the headings below are of course taken from that list.

Direct disability discrimination

3.1.1. Did Mr Macaulay ask the Claimant to leave managers' meetings before the other managers on 3, 9 and 17 January 2020?

189. As noted in our findings of fact, the Claimant clarified during his evidence that the detriment he was complaining about was not having to leave the meetings as such, but Mr Macaulay sharing his disability with others after he did so. There was no evidence presented to us of that having taken place. Our findings of fact make clear that Mr Macaulay was cautious about who he spoke to regarding any of the Claimant's health issues. The Claimant did not establish the detriment on which he relies, which rested entirely on speculation on his part. There was no evidence of him challenging or even commenting on the practice of leaving meetings at the time. Furthermore, the meetings in question were within the first few weeks of his employment, and the Claimant had said around this

time, as reported by Mr Macaulay to Ms Ward, that it was a good working environment.

190. In any event, it was plain that asking certain managers to stay behind for further discussion while others left was routine in the business, as it is in many businesses – it was Mr Macaulay's standard practice. The Respondent's workforce was very busy at this time, as was widely acknowledged, and so a senior manager like Mr Macaulay would not have wanted to take up his managers' time unnecessarily. The very limited evidence we had on this issue makes very clear therefore that a hypothetical comparator, namely another manager attending a meeting led by Mr Macaulay who did not have the Claimant's disabilities, would also have been asked to leave, or more precisely not asked to stay behind and told that they could leave, if what Mr Macaulay wanted to discuss did not concern them. That also identified that the reason why Mr Macaulay adopted this practice was the busyness of the team. The Claimant did not establish a prima facie case that it was because of his disability.

191. Accordingly, the Claimant did not establish facts from which the Tribunal could conclude in the absence of an adequate explanation that the Respondent discriminated against him in this regard. This complaint failed.

3.1.2. Did Mr Macaulay inform the Claimant during a one-to-one meeting on 3 January 2020 that Ms Ward of HR had informed him that the Claimant should have declared his disability at interview stage?

192. As will already be clear from our findings of fact, the factual basis of this complaint was not made out. We found that Mr Macaulay did not make the comment before the exchange of emails which took place later between him and Ms Ward and we also found that there was no evidence that the comment was made to the Claimant (which is what the allegation is) at all. Again therefore, the detriment on which the Claimant relies was not made out. The alleged less favourable treatment is not that Mr Macaulay asked the question of Ms Ward; it is that Mr Macaulay relayed Ms Ward's answer to the Claimant.

193. The complaint had to fail on that basis. Even if Mr Macaulay had made this comment to the Claimant however, the evidence we had in order to determine how a hypothetical comparator would have been treated was limited, but it was highly likely in our view that Mr Macaulay would have passed on the same comment from Ms Ward relating to his question about disclosure of health information, whether to a disabled person or not.

194. The context of Mr Macaulay's email exchange with Ms Ward was the discussion between them about referring the Claimant to OH, and the completion of a Wellness Plan. What Mr Macaulay said was, "Also Jackie, would Optivo have expected that this [the Claimant's medical information] be disclosed at interview or application stage?". The enquiry seems to have been a general one relating to information about the Claimant's health. The limited evidence we have suggests that Mr Macaulay would have wanted to know whether health information should have been provided earlier, whether from a disabled person or a person who was not disabled, given that the email exchanges indicate that it was Mr Macaulay wanting to have got things moving sooner that was the burden of his enquiry.

195. We will return separately to the broader question of whether any adverse inferences could be drawn from the enquiry itself, but in relation to this complaint, the Claimant again failed to establish that there were facts from which we could regard the burden of proof as having shifted to the Respondent.

3.1.3.1. Did Mr Macaulay fail to undertake a stress risk assessment as recommended by Ms Ward?

196. The factual basis of this complaint was well-founded because it is agreed Mr Macaulay failed to carry out such an assessment. The question was whether that was discriminatory, that is whether by so failing the Respondent treated the Claimant less favourably than it would have treated someone who did not have his disability.

197. OH said in June 2020 that a stress risk assessment should be carried out forthwith, and we had no reason to dispute that doing so may have been helpful. We noted carefully however that what Ms Ward said to Mr Macaulay in her email of 23 December 2019 was that an assessment could be done if the Claimant wanted it and in her email of 7 January 2020 that Mr Macaulay could request an assessment from the Health & Safety team. It was thus not a recommendation as such, though as we say it is agreed no assessment was carried out and we were prepared to accept that the Claimant had established the detriment on which he relied.

198. As already noted, we accepted that Mr Macaulay had never completed a risk assessment before. His explanation for his omission in the Claimant's case was that whilst he could not recall if he at any point discussed a risk assessment with the Claimant, the Claimant had only been in post for a week or so when this was mentioned by Ms Ward, they had engaged in an open discussion about what he needed, the Claimant was happy with what was in place, and so the question of a risk assessment went off his radar. As for the Claimant himself, he did not raise the need for a risk assessment, because his priority was an OH referral. Given all of that, it is overwhelmingly likely that the hypothetical comparator would have been treated in the same way, namely someone who had indicated to Mr Macaulay early in their employment that nothing further was needed and, even when it became clear later in their employment that they were facing certain challenges (for example, something equivalent to managing Ms Boulter), did not raise or ask for such an assessment. For them too, undertaking such an assessment would have remained off Mr Macaulay's radar.

199. Further, based on the evidence generally and given that the idea of a stress risk assessment was initially raised by Ms Ward in the context of the Claimant having reported stress and having long-term responsibility for caring for a relative, the Claimant did not show that anxiety and depression or ASD was in Mr Macaulay's mind in not carrying out the assessment. Even the OH report in June 2020 recommended an assessment not in connection with the Claimant's disabilities but in relation to his issues with Ms Boulter and his working hours.

200. Both in relation to establishing less favourable treatment and on the question of whether Mr Macaulay's failure in this regard was because of his disability, the Claimant did not prove that there were facts establishing a prima facie case of direct discrimination. In his submissions on issue 3.1.3 generally, the Claimant himself said it was hard to say whether there was less favourable

treatment, which confirmed our conclusion. Even if the burden of proof had passed to the Respondent, we were satisfied that the reason for the failure to make the assessment was that Mr Macaulay forgot about it, because of the Claimant's initial assurances that everything he required was in place and because the question of an assessment was not raised subsequently – until the OH report which was shortly before the Claimant's resignation and, as just noted, did not in any event connect the recommendation for an assessment to the Claimant's disabilities.

3.1.3.2. Did Mr Macaulay fail to refer the Claimant to OH?

201. Strictly speaking, Mr Macaulay did refer the Claimant to OH so that taking a literalist approach, this allegation could have been properly dismissed on that basis. We did however find that Mr Macaulay did fail to make the referral for some time, which can properly be said to have been a detriment for the Claimant. Mr Macaulay did not cover himself in glory in this regard, and the failure to make the referral might even be said to have bordered on the unreasonable, but the question was whether this was less favourable treatment compared to the hypothetical comparator because of the Claimant's disability.

202. The relevant factual context can be summarised as follows. Ms Ward emailed Mr Macaulay on 3 January 2020 saying that the Respondent may need to make an OH referral once the Claimant had had his ASD assessment. On 6 January 2020 (page 183) Mr Macaulay forwarded the completed Wellness Plan to Ms Ward and asked whether they could get an OH assessment carried out for the Claimant, stating, "This may speed up his assessment process [i.e., the ASD assessment]".

203. That is as clear evidence as one could wish for that Mr Macaulay wanted the referral to be made. Ms Ward replied on 7 January 2020 that once the ASD assessment had been completed, they could refer the Claimant to OH, said that it was however concerning that there had been a delay in the ASD assessment being completed (as the Claimant had advised), and said that therefore referring him to OH as soon as possible would be best practice. She provided Mr Macaulay with a link to do so. Mr Macaulay then said in his email to Ms Ward on 16 January 2020 (page 184) that he took it the Respondent could not refer the Claimant to OH until the ASD assessment had taken place, pointing out that the Claimant had already been waiting a year. That is a further, albeit this time implicit, indication that Mr Macaulay did not want any further delay. Ms Ward replied that the referral could be made at that point and apologised for any confusion. Any delay to that point is thus clearly explained by Mr Macaulay misunderstanding or overlooking what Ms Ward had said in her email of 7 January.

204. At page 248, we have Mr Macaulay's email to Ms Ward of 10 February 2020 in which he sought advice on how to get the ball rolling, now that the Claimant had said he would like an OH referral. The one-to-one meeting note of 17 February 2020 records that Mr Macaulay was to put the Claimant in touch with OH. Mr Macaulay then went back to HR himself, as the Claimant did not want the colleague who was identified to us as "KW" doing the referral. In March 2020, the Claimant and Mr Macaulay discussed the referral again. At their meetings on 15 and 27 April 2020 they agreed the wording for the referral and Mr Macaulay explained to the Claimant the IT issues he had been encountering.

205. All of this history amply demonstrated that there was no reluctance on Mr Macaulay's part to refer the Claimant to OH. His private correspondence with HR shows that, and his communications with the Claimant show that. He was not seeking to keep the question of the referral off the agenda.

206. Further, whilst there was a lack of pro-activity on Mr Macaulay's part, we have noted three principal explanations for that. First, as he later told Ms Campbell, it was due to workload issues – clearly Mr Macaulay was incredibly busy, particularly from early to mid-March 2020 when the pandemic struck, and whilst we do not excuse his delay, that is an explanation which is not discriminatory. The second explanation related to the fact that the process for making the referral was to go on to an IT platform. Mr Macaulay plainly struggles with IT, and it thus seemed clear to us that this too was a valid explanation of the delay. Mr Macaulay had not done a referral before and so was unfamiliar with the process. The third explanation is that the Claimant seemed, at least for a large part of his employment, to be keeping on top of things, including – as Mr Macaulay understood – with HR support. We were amply satisfied in the light of the absence of any evidence suggesting any reluctance to make the referral – the evidence is to quite the opposite effect – and in the light of the explanations Mr Macaulay gave, that the same delays would have occurred with anyone under his management. Furthermore, we accepted Mr Macaulay's evidence that it was to his benefit to make the referral so that he had no untoward reason to stall in doing so.

207. In the light of the above, whether analysed as a failure to show less favourable treatment and that there was something more suggesting that any such treatment was because of his disability, or as the Respondent having provided wholly non-discriminatory reasons for the failure to make the OH referral, this complaint too was not made out.

3.1.3.3. Did Mr Macaulay fail to seek clarification on what being "supportive and understanding" meant for the Claimant?

208. The factual basis of this complaint was not made out. It is plain from his email to Ms Ward dated 16 January 2020 that Mr Macaulay did seek this clarification from the Claimant. The complaint failed on that basis.

3.1.3.4. Did Mr Macaulay fail to appoint a buddy?

209. This was a recommendation by Ms Ward – she said that Mr Macaulay "should ensure" one was appointed. On the face of it, Mr Macaulay did fail to appoint a buddy. We were satisfied therefore that the Claimant had established the relevant detriment. Again, the question was whether this was less favourable treatment because of the Claimant's disability.

210. Mr Macaulay was unfamiliar with the notion of appointing a buddy and his explanation for not doing so is that the Claimant did not want details of his disability disclosed, which is consistent with Ms Ward's email (on page 179) dated 23 December 2019 that the information she had disclosed to Mr Macaulay about the Claimant must remain private. Even though of course Mr Macaulay could have appointed a buddy for the Claimant without disclosing anything about his disabilities, he certainly seems to have taken what Ms Ward said as a guiding

principle and seriously so. Mr Macaulay also saw himself as the Claimant's buddy, although he did not communicate that to the Claimant. Although as Ms Campbell said, he should have done so, we also noted that it was not suggested to us that the Claimant at any time sought a buddy appointment by other means or raised his not having one.

211. We were clear on the basis of the evidence just summarised that Mr Macaulay would have acted in just the same way in relation to a non-disabled comparator in relation to whom HR recommended a buddy be appointed but who did not want anyone else to know their personal information. Furthermore, the reasons Mr Macaulay did not take this step were as just set out, namely his belief that he could not do so for confidentiality reasons and his belief that he was there to provide whatever support the Claimant may need. As the case law shows, disability has to be more than the context for the Respondent's actions or failures to act – in this case that the Claimant did not want his disabilities disclosed. Mr Macaulay did not fail to appoint a buddy because of the Claimant's disabilities but because of confidentiality and his belief that it was not necessary given his own role in supporting the Claimant himself.

212. Whether on the basis that the Claimant had not established less favourable treatment and had not led evidence to show that Mr Macaulay's omission was because of his disabilities, or on the basis that the Respondent had shown wholly non-discriminatory reasons for the omission, this complaint was not made out.

3.1.3.5. Did Mr Macaulay fail to discuss with the Claimant at one-to-one meetings what extra support he would require?

213. We did not think this complaint was made out on the facts.

214. We have acknowledged that not everything in the one-to-one meeting notes was discussed at each meeting to which a particular set of notes relates, but the notes do show that such matters as the OH referral were discussed, or at the very least that this and related matters were on the agenda and could have been raised. Monthly one-to-one meetings continued up to June 2020. The Claimant now questions their usefulness, but there is no evidence of him doing so at the time. One might say that Mr Macaulay could have asked a specific question at each meeting about the Claimant's wellbeing, but it is reasonable to expect a senior manager such as the Claimant, particularly when discussions of this nature had taken place earlier, to raise any matters of concern, so that we would not have been persuaded that the Claimant could properly be said to have been subjected to a detriment in this regard.

215. Even if Mr Macaulay had failed to ask this question and it was a detriment, the reason he did so was his wholly reasonable assumption that if the Claimant had something he wished to raise in this regard he would do so, not consciously or unconsciously because the Claimant was a disabled person, i.e., because of anxiety and depression or ASD. There was no evidence of that before us at all.

216. This complaint failed on its facts and would have failed in any event on the basis of failure to establish a detriment, less favourable treatment and that any less favourable treatment was because of the Claimant's disabilities.

3.1.3.6. Did Mr Macaulay fail to review the Claimant at the 12 and 22-week points during his probationary period and support him?

217. In relation to the 22-week point, it is plain that Mr Macaulay did review the Claimant so that this part of the complaint was not made out factually. The Respondent's policy says that there should be a meeting of the employee and manager, the employee should be advised there will be a review meeting, HR should then be told about it and then it should issue an invitation to that meeting. That is broadly what happened in this case. There was no detriment to the Claimant in this regard at all.

218. It is clear however that a formal 12-week review did not take place. The Claimant says that this was detriment because as a result he did not have opportunity to review the Respondent's concerns about his performance. We were prepared to accept that this could reasonably be viewed as a detriment, on the basis that having a formal opportunity to comment on one's performance and how it is perceived is clearly something of value.

219. There was however nothing before us to suggest that the hypothetical comparator would have been treated any differently. Mr Macaulay was unfamiliar with the probationary process and felt that he was dealing with any issues in one-to-one meetings. Whether or not performance concerns were being raised in those meetings (and they clearly were to some extent, for example the writing of Ms Boulter's objectives), not holding the formal review was clearly no more than an oversight on Mr Macaulay's part in what was a very busy period. For these reasons, we were satisfied Mr Macaulay would have conducted himself in exactly the same way in relation to a non-disabled probationer of similar seniority, with whom he was meeting on a regular basis. Even if one were to say it was an unreasonable oversight, and we do not think it was, it was a clear and satisfactory explanation as to why Mr Macaulay did not carry out the review which was not infected by considerations of disability.

220. Accordingly, the Claimant did not show that there were the necessary facts to establish a prima facie case. Even if he had, we would have been wholly satisfied that the Respondent had discharged the burden of proof at the second stage by establishing wholly non-discriminatory reasons for treating the Claimant as it did.

3.1.3.7. Did Mr Macaulay fail to support the Claimant?

221. This was a very general allegation and the Claimant did not define it for us so as to add anything to the more specific allegations we have already dealt with. It was not possible for us to decide such a general allegation, but it was nevertheless the case that the Respondent gave several examples of support being provided:

221.1. Although the Claimant did not know that this was the case, Mr Macaulay wanted an early OH referral and for him to get his ASD assessment referral as well.

221.2. The wording for an OH referral was agreed.

221.3. Mr Macaulay sought to resolve the issues between the Claimant and Ms Boulter, something which we will come back to in more detail below, inviting both parties to prepare a list of concerns. This may not have been the Claimant's preferred approach, but he said himself he accepted without question that Mr Macaulay wanted him to be successful.

221.4. Mr Macaulay sought to help the Claimant with Ms Boulter's objectives, for example sending him a draft set of objectives to consider.

221.5. He clearly supported the Claimant in managing Mr Cox, to the extent of encouraging him to get a formal action plan in place.

221.6. He deployed Mr Khan to provide support for the Claimant when Mr Cox was off sick.

221.7. The Claimant went on management training.

221.8. Mr Macaulay involved him in the engagement of a new recruit.

221.9. He also secured extra support on Ms Boulter's gas side of her work, to free up more of her time to support the Claimant.

222. The Claimant says Mr Macaulay expressed concern for Ms Boulter's welfare at the probation review meeting, but never for his. We did not agree. Mr Macaulay can fairly be said to have been focused on his work, as one of his colleagues said to Ms Campbell, but as the list above shows – and there are other items that could be added to it, such as signing off the Wellness Plan – there are examples throughout the Claimant's work history of Mr Macaulay being supportive. This does not automatically mean there was no discrimination on the specific matters dealt with elsewhere in these Reasons, but even if we could properly have dealt with it, we did not think that the Claimant's case in respect of this particular complaint was factually made out.

3.1.4. Did Mr Macaulay fail to take on board or carry out to any effect, Ms Ward's advice that "if a colleague declares a disability, we need to provide evidence of how we have supported the colleague and any reasonable adjustments put in place"?

223. We were unable to see how this differs from issue 3.1.3.7. Ms Ward did make this comment, but other than the matters we have already dealt with, or will deal with below, the Claimant did not give us any specifics as to what Mr Macaulay failed to do, nor any adjustments he failed to implement. We repeat what is stated above about the difficulties of dealing with general allegations.

224. Furthermore, the allegation seems to be that Mr Macaulay failed to provide evidence of any support that was being provided. The one-to-one meetings do record some of the discussions between Mr Macaulay and the Claimant in this respect, but there was no evidence whatsoever that could safely lead us to conclude that Mr Macaulay would have taken a different record-keeping approach with any other employee. It was not suggested by the Claimant that any significant discussion about the support he needed was not recorded in the notes. Furthermore, Mr Macaulay can also be said to have recorded some of the

steps that were being taken in his email exchanges with HR. He plainly had no issue in discussing such matters in writing.

225. The detriment on which the Claimant relied was therefore not made out on the evidence, it is overwhelmingly likely Mr Macaulay would have taken precisely the same record-keeping approach with a colleague who was not disabled, and there was no evidence to suggest that the failure to do anything further was in any sense influenced by the Claimant's disabilities.

226. For all of these reasons, the Claimant did not establish the necessary facts from which we could conclude in the absence of an adequate explanation that the Respondent had discriminated against him in this regard.

3.1.5. Did Mr Macaulay fail to carry out regular reviews with the Claimant about his health or welfare, other than the single meeting on 3 January 2020?

227. It is correct that there were no meetings specifically called by Mr Macaulay just to discuss the Claimant's health, other than that on 3 January, but it is instructive to note the following:

227.1. The Claimant was happy with the outcome of that meeting, wanted to be treated the same as his colleagues, and wanted an open-door policy on Mr Macaulay's part.

227.2. There was no record of the Claimant saying that this approach did not work.

227.3. As already noted, notwithstanding that the one-to-one notes were not always a proper reflection of what was discussed at each individual meeting, questions about the Claimant's health and welfare – such as related to the OH referral – did come up at these regular meetings, or at least were on the agenda.

227.4. The Claimant was a senior employee.

228. For these reasons, the Claimant did not establish that the Respondent subjected him to a detriment.

229. In any event, the Claimant said that the less favourable treatment was that it would have been reasonable to consider his disability. That is plainly not the same as saying that Mr Macaulay did not hold regular health review meetings because of his disabilities. The complaint would have failed on that basis also. The reason why Mr Macaulay did not arrange any such meeting was his understanding that their one-to-one meetings covered whatever was required and not because of the Claimant's disabilities. In every respect, the Claimant failed to establish a prima facie case such as to enable us to say that the burden of proof had passed to the Respondent.

3.1.6. Did Mr Macaulay fail to carry out the Claimant's request in his Wellness Plan on 3 January 2020 "to be supportive and understanding"?

230. This was another complaint that it was very difficult for us to determine. It was also a repeat of issues 3.1.3.7 and 3.1.4. Again, the Claimant did not define

it further, beyond the specific allegations we have already or will determine. The complaint could not properly be considered further for that reason.

231. In any event, we refer again to Mr Macaulay's email of 16 January 2020 to Ms Ward, spelling out what the Claimant had told him that "supportive and understanding" meant to him (page 184), namely an open-door policy and being in a pleasant working environment. We refer also to the examples of support already given above. There were clearly times when the Claimant disagreed with Mr Macaulay's approach, but at no time did he inform him, a more senior manager, or HR that he felt Mr Macaulay was not being supportive and understanding. The occasion on which he said he felt Mr Macaulay's criticism about the issue of the objectives did not amount to any such statement.

232. The Claimant says it is convenient that Mr Macaulay failed to do so much, but to summarise the complaints we have considered so far, the specifics come down to his not carrying out a stress risk assessment, the delay in making the OH referral and his not appointing a buddy for the Claimant. In relation specifically to the risk assessment, the Claimant himself said to us that Mr Macaulay would "quite possibly" have treated a non-disabled person with a health issue in the same way. It was our conclusion in relation to allegations 3.1.3 to 3.1.6 that this is precisely what he did, for the reasons we have given.

233. We considered whether the question Mr Macaulay asked of Ms Ward in his email of 7 January 2020 should lead to any inferences of discriminatory treatment in relation to steps Mr Macaulay did not take, as just summarised. We noted from page 183 that prior to this enquiry he asked Ms Ward if she could get an OH referral done, and specifically said that this may speed up the ASD assessment which the Claimant was waiting for. As we have already alluded to, and as Ms Goodman submitted, this is important. It shows that Mr Macaulay wanted to take steps to know what, if anything, the Respondent should be aware of and do, and to assist the Claimant by hopefully speeding up the ASD assessment.

234. It is true that the OH assessment ended up being heavily delayed, but what he wrote on the previous day is by far the best indication of what was in Mr Macaulay's mind when he wrote the 7 January email, and suggests that the enquiry was made in the general sense we have described and not because of the Claimant's disabilities or any concern on Mr Macaulay's part about seeking to accommodate him. Rather, it supports Mr Macaulay's explanation of his question, namely that he simply wanted to know whether they could have known about the Claimant's health details sooner so as to put actions in train before they actually did. He wanted to move things along and wished they could have been moved along before.

235. The Claimant says the email shows that Mr Macaulay would not have recruited him had he known about his health conditions, but the evidence to the contrary is clear. Mr Macaulay highly rated the Claimant's abilities from his interview performance right through to point of extending his probation period, being positive about various aspects of the Claimant's work throughout. We accepted his explanation for asking the 7 January question, namely that he was concerned that they had lost a head-start on considering what would have been helpful.

236. Issue 3.1.7 concerns the allegation that Mr Macaulay undertook meetings with the Claimant in an interrogative, hostile and impatient manner. It plainly could not be considered in these general terms, and thus we considered the specific allegations the Claimant made in this regard in the way set out below.

3.1.7.1. The Claimant alleges he was reprimanded on 20 January 2020 in front of his staff after he raised concerns on 17 January 2020.

237. We did not accept the Claimant's account of this occasion. The complaint failed on that basis. Even if it had been made out on its facts, what the Claimant says is that the reprimand was direct discrimination because it was a green light to staff to go to Mr Macaulay instead of to him, because of how the Claimant was perceived. No case of less favourable treatment than the hypothetical comparator was explained to us. That aside, we think it highly unlikely Mr Macaulay would have wanted Mr Cox and Ms Boulter to go to him instead of the Claimant at all, given how busy he was: there was no evidence that this allegedly discriminatory reason was in Mr Macaulay's mind to any extent in any of his dealings with the Claimant. The complaint would thus have failed at the first stage on this basis also.

3.1.7.2. This allegation relates to 6 and 7 February 2020. The Claimant alleges he was reprimanded for putting in place objectives for his staff and made to rescind them.

238. First of all, taking this allegation as it was pleaded, it is simply not true that the Claimant was reprimanded for putting in place objectives for his staff. Mr Macaulay was very aware that all staff needed to have objectives and he expressly wanted to rework the objectives for Ms Boulter, in other words he was clear that she should have objectives, just not in the form drafted by the Claimant, and he also expressly encouraged the Claimant to put a performance plan in place for Mr Cox.

239. Further, we have held that Mr Macaulay did not reprimand the Claimant. In fact, he engaged with the issue at length, including the suggestion of a meeting to have all three of them discuss the objectives. He continued to engage with the Claimant on the issue thereafter. That is wholly inconsistent with the notion that he reprimanded the Claimant the first time the issue came to his attention.

240. Even if Mr Macaulay had behaved as the Claimant alleged, there are two things to say about the Claimant's case that this was less favourable treatment because he has a different communication style to others. First, there was no evidence before us, other than the Claimant's assertion, to lead to us conclude that how he wrote objectives was related to ASD (this evidently being the disability relied upon). We would have to be very careful indeed about taking judicial notice of any such matter and did not think it appropriate to do so. Secondly, we were in no doubt whatsoever that anyone else under Mr Macaulay's management – indeed anyone else working anywhere for the Respondent – would have been asked to work on putting objectives into the Respondent's usual style. Mr Macaulay was clearly very keen on that, and we could see no objection to it. The Claimant plainly wanted to be able to draft Ms Boulter's objectives as he had previously drafted objectives in other organisations. The Respondent cannot be criticised for wanting something different. We can also see objectively that what the Claimant drafted could

legitimately be open to challenge, for example setting as an objective that Ms Boulter should "seek guidance".

241. Accordingly, not only did the Claimant fail to establish the facts on which he relied for this complaint, even if he had, the relevant evidence clearly pointed to the only available conclusion, namely that he had not established less favourable treatment than his hypothetical comparator. The complaint failed on that basis.

3.1.7.3. This issue relates to 26 March 2020. The Claimant alleges Mr Macaulay told the Claimant off for not taking "...a leaf out of other people's book" (relating to the setting of objectives for his staff).

242. Again, factually, this allegation was not made out. As set out in our findings of fact, we held that Mr Macaulay did not demonstrate anger, hostility or impatience towards the Claimant. We repeat our conclusions on allegation 3.1.7.2. Mr Macaulay continued to engage with the issue of Ms Boulter's objectives and pointed the Claimant to HR. The complaint was bound to fail on that basis.

243. In any event, we were again clear that Mr Macaulay would have responded in the same manner to an employee who was not disabled. The expression he was alleged to have used is not discriminatory in nature, nor did it seem to us to amount to a reprimand. Even if, by this point, Mr Macaulay was exasperated by the issue of the objectives and expressed some impatience with the Claimant, he would have treated the hypothetical comparator in exactly the same way, because what he wanted was to get to a resolution. The evidence was very much to the effect that the Claimant was not less favourably treated than someone who was not disabled who was continuing to fail to draft objectives as the Respondent in general and Mr Macaulay in particular required. The Claimant would not have established a prima facie case of discrimination sufficient to pass the burden of proof to the Respondent.

3.1.7.4. This allegation relates to 9 April 2020. The Claimant alleges he was reprimanded by Mr Macaulay for not being available for an ad-hoc meeting on the same day and that Mr Macaulay shouted, "I don't give a shit"; the Claimant was undertaking his surveyor's duties, as well as his own, at the time.

244. As set out in our findings of fact, we concluded that these words were not said. The complaint was dismissed accordingly.

245. In any event, the Claimant says that the alleged comment was direct discrimination because Mr Macaulay was blaming him not only for the team issues but also because Mr Macaulay did not want to accommodate the fact that the Claimant had mental health issues which meant he presented differently to other staff. Accordingly, even if we had found that the comment was made, the connection the Claimant sought to draw between the comment and his disabilities did not seem to relate to the comment itself. Had the comment been made it would have been because Mr Macaulay expected the Claimant to be at the meeting. The complaint would have failed on those grounds as well.

3.1.7.5. This allegation relates to 29 April 2020. The Claimant alleges Mr Macaulay shouted at him to "Shut up! Shut up! Shut up!".

246. As already set out in our findings of fact, we were prepared to accept that Mr Macaulay asked or directed the Claimant to "shut up" on this occasion – after all, that is not far from what Mr Macaulay himself recounts – but not that he repeated this in the way alleged or that he said it in the way alleged.

247. It would require a very broad interpretation to say that what we have found was said by Mr Macaulay amounted to a detriment, particularly in the context of a discussion between two senior staff members where the Claimant was himself not allowing Mr Macaulay to say what he wanted to say. We concluded that it could not reasonably be said in this context that this was a detriment to the Claimant. In any event, we were entirely satisfied that Mr Macaulay would have said exactly the same to anyone else to whom he did not feel he could communicate his point. What was said, or something like it, is plainly what the situation required. The Claimant did not establish that he was less favourably treated than a hypothetical comparator, namely a senior manager who refused to let his or her manager get their point across.

248. Furthermore, the Claimant says that the reason Mr Macaulay behaved like this was because he had no concern for the Claimant's struggles, did not see him as a long-term member of the team and it was easy to bully him. That did not seem to us to be an argument that the comment was because of the Claimant's disabilities, but rather background evidence to the other aspects of the Claimant's case that Mr Macaulay wished to be rid of him. We will come to that, but in addition to it not being established that there was a detriment or less favourable treatment, this complaint would have failed on basis that the Claimant had not led evidence to suggest that the comment was made because of his disabilities.

3.1.7.6. This allegation relates to 23 June 2020. The Claimant alleges Mr Macaulay told him to "back off!" and "stop pissing from the outside of the tent in" in the Claimant's 22-week probationary review meeting.

249. Dealing first with the "back off" comment, we concluded that this was not a detriment to the Claimant because it was an appropriate comment appropriately made, to support him in his ongoing role as Ms Boulter's manager. We found that the comment was, "You need to back off for a little bit", encouraging the Claimant not to pick up on every aspect of Ms Boulter's timekeeping, however small. That part of this complaint failed accordingly. We were, in addition, satisfied that something to the same effect would have been said to the hypothetical comparator: what Mr Macaulay plainly wanted was for the team to have more harmonious working relationships, and his comment was directed to that end.

250. As to the other comment, the words we have found were used were, "It is better to be on the inside pissing out than the outside pissing in". As we have noted, Mr Macaulay regrets making it. Nevertheless, in our judgment it would again stretch the definition of detriment, as interpreted in the case law, to find that this was detrimental to the Claimant, the comment being plainly intended to be an encouragement to him in terms of how to manage his team. The complaint was bound to fail on that basis.

251. Even if it was a detriment however, we would then have needed to consider whether it was less favourable treatment of the Claimant because of one or both

of his disabilities. The Claimant says it shows that he was regarded as an outsider.

252. We were satisfied that the comment was plainly not inherently related to anxiety and depression or ASD. It is a common turn of phrase that could self-evidently be made, and – ill-advised as it may have been – in materially similar circumstances would have been made, to someone without either of those disabilities who had encountered such serious difficulties in managing his team and who Mr Macaulay wanted to retain in the business.

253. The remaining question would have been whether in making the comment, Mr Macaulay had either of the Claimant's disabilities in mind, consciously or unconsciously. It seemed to us that in this particular regard the focus of the Claimant's case was ASD. We were satisfied that what was in Mr Macaulay's mind was plainly the differences between the Claimant and his team, not in terms of ASD or neuro-diversity, but in terms of the serious fall out that had happened particularly between the Claimant and Ms Boulter, and Mr Macaulay's wish that the Claimant make a contribution to putting that right so that he could pass the extended probation. The nature of the comment was that it was better for the Claimant to be alongside Ms Boulter working with her than to be seen to oppose her. Mr Macaulay's broader attempts to help and support the Claimant make clear that this was what was in his mind, as does his professed wish for the Claimant to pass his probation, which we will come to. The complaint would have failed for all of these reasons.

3.1.8. Did Mr Macaulay take control of managing the Claimant's direct reports from 20 January 2020?

254. Again, the Claimant did not provide evidence to support this complaint. He accepts he continued to manage both Mr Cox and Ms Boulter as his direct reports. What he says is that Mr Macaulay treated all of them in the same way in how he handled the situation in the team and that he should have encouraged Ms Boulter to go to the Claimant first with her concerns and complaints.

255. Two preliminary points should be made. First, the Claimant changed the basis on which this allegation was put, as just outlined. It fell to be dismissed on that basis alone, in the absence of an amendment to the Claim. Secondly, if the Claimant and his direct reports were treated the same, there cannot have been discrimination and so a prima facie case was plainly not made out.

256. Further, we did not think that Mr Macaulay improperly treated the Claimant and his team members in the same way, as "squabbling colleagues". As we have set out, he encouraged the Claimant to put a performance plan together for Mr Cox, and plainly did not direct Mr Cox to do anything of that nature in relation to the Claimant. As for Ms Boulter, it is clear that Mr Macaulay sought to facilitate a shared solution and referred the Claimant to HR. He could possibly be criticised for that, as Mr Goodsell found when he concluded that Mr Macaulay expected the Claimant to manage the situation by himself. Whilst however Mr Goodsell's conclusion was partially correct, the evidence very much shows that Mr Macaulay sought to treat the Claimant as Ms Boulter's manager, precisely by his referring the Claimant to HR to deal with the matter as a manager and for example by sharing Ms Boulter's comments with the Claimant prior to the clear the air meeting but not vice versa. Again, there was very obviously no

suggestion that Mr Macaulay directed Ms Boulter to do anything of the same nature in relation to the Claimant.

257. This allegation flags the tension in the Claimant's case highlighted by Ms Goodman. He criticises Mr Macaulay for having been too involved in team matters, whilst at the same time (as we will see) saying that he did not intervene enough. The Claimant repeatedly used the phrase "coercive control" during his evidence. It was never entirely clear to us what he meant by that, except that he seemed to argue that Mr Macaulay disempowered him. That is not borne out however by Mr Macaulay's consistently referring the Claimant to HR and the Claimant's ongoing performance of his duties. Mr Macaulay's reason for behaving as he did, whether referring the Claimant to HR or getting the Claimant and Ms Boulter together to "clear the air", was solely to seek a resolution of the issues and to get the team functioning effectively. As we say, whether his methods were the best way to achieve that is another question, but that was his obvious rationale.

258. In summary, this allegation was dismissed because its factual basis was not made out, whether as set out in the list of issues or on the alternative – very different – construction the Claimant put on it during the Hearing. Further, there was no evidence suggesting a line manager also dealing with difficult colleagues would have been treated any differently by Mr Macaulay, and the Claimant did not advance a prima facie case that what operated on Mr Macaulay's mind in this regard was anything other than what we have just outlined. It was not his disabilities.

3.1.9. Did Mr Macaulay try to reject a letter from the Claimant on 10 February 2020 and fail to act on the Claimant's request for an occupational health referral within that letter for 16 weeks?

259. As to the first part of this allegation, we acknowledged that the Claimant's evidence about this event was very specific and detailed, but the fact remains that Mr Macaulay had explicitly and expressly invited both the Claimant and Ms Boulter to put their concerns to him, because he wanted to see them resolved. That is wholly incongruous with the allegation that he rejected the Claimant's letter. We do not accept that he did, and so the factual basis of this complaint was not made out. Moreover, the Claimant said expressly that this was not less favourable treatment so that the complaint was bound to fail on that basis as well. The second part of this allegation has already been dealt with, in particular at allegation 3.1.3.2.

3.1.10. On 20 February 2020, did Mr Macaulay say to the Claimant "You want to deal with that then, don't you" after the Claimant informed Mr Macaulay that Mr Cox was swearing at him, referring to him as "a wanker!" and "Mr big bollocks!"?

260. Again, this complaint failed on its facts, in that we concluded as set out above that the use of these specific words was not communicated to Mr Macaulay. The complaint fell to be dismissed on that basis.

261. As again already noted, we were prepared to accept that the Claimant drew Mr Macaulay's attention to the use of abusive language generally, that is without identifying particular phrases, and it is consistent with Mr Macaulay's overall

approach that he said something along the lines that the Claimant would need to deal with it. Had it been appropriate to deal with the complaint on that basis, we would not have been prepared to hold that this was a detriment: it was a supportive comment, or at worst, neutral.

262. The Claimant says that the comment he attributes to Mr Macaulay was discrimination or harassment because of or related to disability because Mr Macaulay was not concerned about his welfare, it would have been reasonable to provide some support, but he did not want to entertain the issues because he saw the Claimant as a nuisance and not a long-term part of the team. Quite apart from that not being a complaint that the comment was made because of the Claimant's disabilities, this was inconsistent with the fact that Mr Macaulay encouraged the Claimant to put together a plan regarding Mr Cox's disciplinary/competency issues on his return from sick leave. Mr Macaulay would doubtless have encouraged any manager to deal with the issues and been supportive of them doing so. The complaint would have failed for these reasons also.

3.1.11. Did Mr Macaulay allocate and continue to assign two difficult and challenging staff members to the Claimant, namely Mr Cox and Ms Boulter?

263. As to the first part of this allegation, it is correct that Mr Macaulay put the Fire Safety team together. As set out above, we found that both Mr Cox and Ms Boulter were content to take the roles, they were not coerced to do so, both were suitably experienced and Mr Macaulay had sound reasons for appointing them.

264. Mr Macaulay did say to the Claimant, "Don't let [Ms Boulter] bully you", but there is no evidence that this is what he expected, let alone what he had in mind when appointing her. She may have been a difficult character at times – after all, she described herself as a "bit of a mare" – but Mr Macaulay's sole ambition in appointing all three individuals was an effective and functioning team. It is inconceivable, on all of the evidence we saw, that he would have had anything other than that in mind and the Claimant himself says that Mr Macaulay could not be blamed for the initial allocation of the team members. Accordingly, the Claimant did not establish any detriment in this regard, there was no evidence to suggest Ms Boulter and Mr Cox would not have been appointed if the Fire Safety Contracts Manager had been an individual who did not have the Claimant's disabilities, and there was nothing to suggest a discriminatory reason for their appointments.

265. As to the second part of this allegation, namely that Mr Macaulay continued to assign Mr Cox and Ms Boulter to the Claimant, it is correct that they did stay in post, that there were difficulties and that the Claimant told Mr Macaulay as early as 3 February 2020 that he was finding it increasingly difficult to deal with Ms Boulter's behaviour. At no point however did the Claimant ask that either employee be removed from his management. His evidence when asked about this – "Why would I?" – was revealing; he had no reason to ask for it. As late in his employment as Ms Boulter's grievance, he wanted it dealt with so that they could move on. We found in that context that the Claimant had not established the detriment he relied upon.

266. Furthermore, as we have said, Mr Macaulay empowered the Claimant to deal with Mr Cox's conduct/performance issues and took the facilitative approach

to seeking to resolve the issues with Ms Boulter that we have described, also repeatedly pointing the Claimant to HR for support. Whether effective or not, we had no evidence to suggest that Mr Macaulay would have acted in a different way in relation to a similar situation involving a manager reporting to him who was not disabled. Further still, even if he should have reallocated them – which of itself may have undermined the Claimant – there was no evidence to suggest that he failed to do so because of the Claimant's disabilities. If he failed to redeploy them, it was because of his hope that with support and some goodwill, the parties involved could sort out their differences and/or that the Claimant was seeking to manage the situations himself.

267. The Claimant says that by keeping the two employees in the team, Mr Macaulay was hoping to obtain leverage to remove the Claimant from his employment. As we will come to, that is not consistent with the handling of the probation review. Furthermore and as already indicated, Mr Macaulay was far too busy to even contemplate such a conspiratorial approach to managing the issues before him, let alone to enact it.

268. This complaint too failed on the basis that the Claimant had not established that there are facts from which we could conclude, in the absence of an adequate explanation, that he was discriminated against.

3.1.12. Did Mr Macaulay ask the Claimant not to attend future Fire Safety meetings after a meeting on 2 April 2020 where the Claimant raised concerns over lack of resources (at a time when the Claimant was covering the work of Mr Cox)?

269. We have found that this was the case, and concluded that it could reasonably be seen as a detriment not to be permitted to attend a regular meeting that one had previously attended, particularly when it was squarely in one's subject area. The question was whether this was less favourable treatment because of the Claimant's disabilities. The Claimant says Mr Macaulay issued this instruction because of the way the Claimant was perceived in respect of his manner of communication.

270. We noted that it was not Mr Macaulay who asked that this be the arrangement; he was simply Mr Waller's messenger. It is abundantly clear that whoever Mr Waller had discussed with Mr Macaulay in this way would have had the same request made of them; in other words, Mr Macaulay would have actioned Mr Waller's instruction in relation to any employee. That is also why he made the request, namely he had been asked to. He did not ask the Claimant not to attend the meetings in future because of the Claimant's disabilities. For all of these reasons – the absence of any prima facie case of less favourable treatment and any evidence to suggest that the request was because of the Claimant's disabilities – the Claimant did not meet the burden of proof in relation to this allegation and the complaint was bound to fail on that basis.

271. We add that it was not, to our understanding, the Claimant's case that Mr Waller issued the instructions for discriminatory reasons and as we have said, it was our job to decide the complaints the Claimant actually made, not those he might have made. In any event, the facts show that this was not the case. Mr Waller thought that the Claimant's complaint about resources should not have been aired in the context of the Fire Safety meeting. That was the reason for his

request. We should add also that the Claimant did not produce any evidence that would support his contention that the way he communicated at the meeting with Mr Waller was because of his disabilities or either of them. Again, we should be very careful about taking judicial notice of such assertions.

3.1.13. Did Mr Macaulay frequently allocate the Claimant work with deadlines the same day which resulted in the Claimant having to work in excess of his contracted hours?

272. As we have said, the Claimant was very busy pretty much from the outset of his employment and we know from what Ms Ward said at the 23 June meeting that there was concern about his working hours. The Claimant did not however lead any evidence of Mr Macaulay giving him same day deadlines, other than the single reference in SS76, which neither we nor Mr Macaulay were taken to (there is no bundle reference for the email mentioned in that paragraph). It was not for us to assume, without such evidence, that this is what Mr Macaulay did, still less to decide a more general complaint, of direct discrimination or otherwise, related to a heavy workload. Accordingly, the Claimant did not establish the detriment on which he relied and this complaint failed on that basis.

273. In any event, we had accepted that there was a lot of work in all of the Respondent's regions at this time, particularly once the pandemic arose. Even if Mr Macaulay could have been shown to have frequently allocated same-day deadlines to the Claimant, although there was limited evidence on the point we were confident, first of all, that other employees who were not disabled were regularly in the same position, given the overall high levels of work in the business. Secondly, it is abundantly clear that Mr Macaulay as the work-focused person he was known to be would have issued any such deadline not because the Claimant was disabled, but to get the work done. We also noted again our findings regarding the additional support Mr Macaulay provided for the Claimant, specifically assigning him the support of Mr Khan and securing extra hours on fire safety work for Ms Boulter. Thirdly, the Claimant's evidence was that assigning him deadlines was not done to put pressure on him; his point is that more resource was needed, and that Mr Macaulay should have considered how the workload would affect him. That is not a complaint of direct disability discrimination.

274. For all of these reasons – not establishing the detriment, the absence of any evidence of less favourable treatment, the absence of any evidence to indicate that the reason for the alleged treatment was in any sense the Claimant's disabilities, and the way in which the Claimant himself put the complaint – the Claimant did not establish a prima facie case of direct discrimination.

3.1.14. Did Mr Macaulay fail to carry out the Claimant's 12-week probationary review?

275. This allegation has already been dealt with at issue 3.1.3.6 and for the reasons we have given in relation to that matter, this complaint failed. We need only add that the Claimant said it would be reasonable to diarise a 12-week review and carry it out. That might be so, but failure to do so does not amount to direct disability discrimination.

3.1.15. Did Mr Macaulay fail to set the Claimant's objectives on "Performance Hub" (the Respondent's people management system)?

276. Mr Macaulay did fail to put the Claimant's objectives on Performance Hub, emailing them to the Claimant instead. We could not see how this was a detriment to the Claimant however, particularly as Mr Macaulay was unable to do it because of how the Respondent's system was set up. His not posting objectives on the Hub does not evidence that he did not see the Claimant as a long-term part of the team. After all, he wrote the objectives. The Claimant could not say whether Mr Macaulay encountered, or had previously encountered, the same issue with other employees on probation. We were amply satisfied that any employee, disabled or otherwise, would have been treated in the same way, even if that was due to Mr Macaulay's limited IT capability. Moreover, the reason for what took place is that there were technical issues; the reason was not the Claimant's disabilities. For all of these reasons, namely failing to establish a detriment, less favourable treatment or any hint that disability was the reason for the treatment, the Claimant did not establish a prima facie case to pass the burden of proof to the Respondent.

3.1.17. Did Mr Macaulay hold an 'unauthorised' probationary review meeting with the Claimant on 3 (or 9) June 2020?

277. As we have noted in our findings of fact, paragraphs 3.5 and 3.6 of the Respondent's probation policy expressly envisages a meeting between the employee on probation and the manager, followed by a probationary review meeting. The policy says that if there are aspects of concern, the manager must advise that the employee will be called to the further meeting.

278. Mr Macaulay may not have made clear on 3 or 9 June that a further meeting was required, but we saw no basis on which to conclude that the meeting he held with Claimant on one of those dates was unauthorised. It could not be said therefore that the Claimant had established the detriment on which he relied. He said, as we have recorded, that getting him to sign the probation form at this meeting was outside of the policy. That is not the allegation he made, but in any event, we did not read the policy as saying when at the 22- to 24-week point the form should be completed and signed.

279. The complaint failed on that basis. Furthermore, whilst again we had limited evidence to go on, it seemed to us clear that Mr Macaulay would have held the meeting in any event – that is what the Respondent's policy envisages, and being inexperienced in handling a probation extension, he would have conducted it in precisely the same way. Accordingly, the Claimant did not establish less favourable treatment either, nor did he adduce any evidence to suggest that his disabilities played any part in Mr Macaulay's conduct in this respect. His complaint would have failed on these grounds as well.

3.1.18. Was the Claimant held to a much higher standard of conduct and accountability than others?

280. Of course, of itself this was another allegation too general to adjudicate upon, but the Claimant had in this instance pleaded certain specific respects in which he says he was held to higher standards. We come to those below. We would observe first however, as a general point, that the premise of the allegation

is notable. Whilst every employee's conduct should be held to the same standards in an organisation, it is generally the case that managers are held more accountable and to higher standards than those they manage. The Claimant plainly did not accept that and several aspects of his case rested on his inability or unwillingness to see that this is appropriate.

281. We also make the following general comments:

281.1. In relation to the "clear-the-air" meeting, Mr Macaulay obtained comments from both the Claimant and Ms Boulter; we saw no evidence of a higher standard being expected of the Claimant in that respect.

281.2. Mr Macaulay repeatedly referred the Claimant to HR, expressly to the end that he should get support to deal with Ms Boulter, again evidencing that Mr Macaulay expected Ms Boulter to be held to account.

281.3. Mr Cox was also held to account, by Mr Macaulay specifically encouraging the Claimant to put him through a formal management process, to prepare to do so and to get all his facts together.

281.4. When Ms Boulter made her detailed complaints about the Claimant prior to her formal grievance, Mr Macaulay told her, "There are always two sides to every story". He thus clearly wanted to hear the Claimant's account, specifically of where he had been supportive, so as to counter, or at least provide balance to, Ms Boulter's portrayal of the relationship. That is clear evidence of even-handedness.

281.5. Ms Boulter did make comments about the Claimant's conduct, some of which were quite serious – shouting at her and so on. What she had said required formal investigation, as the Claimant himself recognised.

We turn now to the specifics.

3.1.18.1 Was the Claimant scrutinised more than others over the Respondent's "CORE" values?

282. This is another complaint that was not well-particularised. We nevertheless considered it at face value. Having done so, we concluded that it was not made out on the evidence presented to us. We noted in particular:

282.1. During the discussion about Ms Boulter's objectives, Mr Macaulay made clear to the Claimant that "everyone" has the CORE values as objectives, such that they did not need to be specified - page 272.

282.2. Mr Goodsell reported that both the Claimant and Ms Boulter had failed in some respects to comply with the CORE values.

282.3. He did not uphold some of the allegations made against the Claimant by Ms Boulter, which shows a balanced approach.

282.4. His grievance outcome report expressly required Ms Boulter, the Claimant and indeed Mr Macaulay to take steps to address the issue of team relations.

282.5. Mr Macaulay himself concluded that both Ms Boulter and the Claimant had let themselves down in failing to display the Respondent's values.

283. Mr Macaulay acknowledged that the comment he made towards the end of the 23 June meeting was not appropriate and Ms Campbell at least does not seem to have dealt with the comment expressly, beyond noting Mr Macaulay's reflections. One could say perhaps that there is some inconsistency there, in that Mr Macaulay appears not to have been spoken to about it, but this of itself was far from sufficient to support the Claimant's assertion that he was held to a higher standard. In any event, there was no evidence that if in this one respect he was held to a higher standard, that this was because of his disabilities or either of them. Most likely, it was because Mr Macaulay recognised that he ought not to have said it, unlike the Claimant who at no point during his employment showed any recognition whatsoever of any shortcoming on his part or that he was responsible to any extent for any of the issues with which he was involved. That was a material difference between their cases.

284. The Claimant failed to establish a case sufficient to pass the burden of proof to the Respondent, because he had not proved the factual basis for the complaint nor was there any evidence of his being less favourably treated than his comparator (who, it should be noted appears to have been one or more actual persons in this instance, namely Mr Macaulay and/or Ms Boulter).

3.1.18.2. Did the Respondent take a different approach to the Claimant's grievance than it did with Ms Boulter's grievance against him?

285. Taking this allegation at face value, the Claimant must be referring to his resignation letter. If the allegation refers to the broader question of his concerns about Ms Boulter raised with Mr Macaulay, we rely on the reasons we have already given for dismissing the Claimant's complaints in that regard.

286. We noted the following:

286.1. The Claimant did not actually file a grievance, but the Respondent nevertheless treated his resignation letter as such.

286.2. As we have said, the Claimant supported Ms Boulter's grievance being dealt with.

286.3. The outcomes were presented in different formats, but that cannot be sensibly said to have subjected the Claimant to a detriment. The form of the grievance outcome is irrelevant to its substance.

286.4. The Claimant says (SS139) that Ms Boulter's grievance was investigated by a senior manager outside of the region, whereas his was investigated by an internal member of the Midlands team at the same level as Mr Macaulay. It was not clear why that was said to be a detriment to the Claimant, given the balanced outcomes in both cases we have referred to. Ultimately of course, the Claimant's complaints were investigated by a very senior employee, namely Ms Campbell. She gave sound reasons as to why Ms Thomas was a suitable person to hear the Claimant's complaints.

286.5. The Claimant was interviewed as part of the investigation of Ms Boulter's grievance, which is what one would expect.

286.6. That grievance was only upheld in part and thus the Claimant was exonerated of many of the complaints against him.

286.7. As already noted, some of Mr Goodsell's conclusions were critical of Mr Macaulay, including in relation to his support of the Claimant, even though this was not part of the Claimant's grievance. There were thus recommendations for each of the Claimant, Mr Macaulay and Ms Boulter.

287. In support of this allegation, the Claimant gave the example of Mr Goodsell concluding he had only attended one Gober (values) training session, without understanding that he was asked not to attend. That was so minor a point as to be incapable of amounting to a detriment or supporting the allegation that a different approach was taken with the Claimant compared to Ms Boulter.

288. The comparator evidence was unusually clear in relation to this particular complaint. Contrary to the formally pleaded case, the comparator was of course Ms Boulter, not a hypothetical comparator and, essentially, they were treated in the same way. There were notable similarities in fact in the outcomes and conclusions identified by both Mr Goodsell and Ms Campbell, namely that there were improvements and steps for all to take – although of course because the Claimant did not participate in Ms Campbell's investigation and in any event had left the Respondent's employment, there were no recommendations for him in her report.

289. When asked why he says Mr Goodsell's decision was made in part because of his disabilities, the Claimant told us that Mr Goodsell did not take them into account in reaching his decision. That is the precise opposite of what direct discrimination requires.

290. In respect of Ms Thomas's investigation into his grievance, the Claimant says that it is "not entirely his position" that her investigation or any shortcomings it contained were because of his disabilities. We were barely taken to Ms Thomas's or Ms Benson's work at all. No evidence was drawn to our attention that their work was in any sense infected by considerations of disability or in any sense less favourable than the thorough work done by Mr Goodsell. In fact, Ms Benson highlighting concerns about the work done by Ms Thomas demonstrates the Respondent's wish to be careful and fair in considering what the Claimant had raised. We return below to what Ms Campbell did, but again we found her conclusions to be balanced and supported by the evidence she obtained.

291. For the reasons set out above, the Claimant failed to establish the detriment on which he relies, failed to establish that he was subjected to less favourable treatment in this regard and failed to establish that his disabilities were in any sense a feature of the grievance processes. The burden of proof did not pass to the Respondent.

3.1.18.3. Was the Claimant not permitted to formally raise concerns about his team members' conduct?

292. We did not understand this allegation. The Claimant raised concerns about both Ms Boulter and Mr Cox at his one-to-one meetings with Mr Macaulay, in correspondence with Mr Macaulay (including prior to the clear-the-air meeting), and was referred to HR, in relation to both employees. There was no evidence, in the face of that, to suggest that he was dissuaded from raising his concerns even more formally, say by way of a grievance.

293. The Claimant says that part of this allegation was that he was made to withdraw the objectives he had drafted for Ms Boulter, but we have dealt with that already. Mr Macaulay expressly said to him in the context of that discussion that if Ms Boulter was not seeking supervision, he should deal with that under a performance improvement plan. He was thus standing with the Claimant in relation to formal processes and did so in relation to the Claimant's management of Mr Cox as well.

294. Whilst the Claimant appears to have gone to HR only once (as Ms Pond indicated to Ms Campbell), there was no evidence before us of Mr Macaulay putting any barrier in the Claimant's way of raising matters either with a more senior manager or with HR. Again, the evidence was quite to the contrary.

295. This complaint failed on the basis that the detriment on which the Claimant relied was simply unsupported by the evidence.

3.1.18.4. Was the Claimant's probationary period extended because he was accused of not communicating effectively, when others were permitted to swear and speak in a derogatory manner?

296. We have noted that Ms Campbell explicitly set out to investigate the culture of the office in which the Claimant had worked and that those she spoke to were shocked at his allegations. The evidence led us to conclude that swearing and speaking in a derogatory manner was not a common occurrence. Even if it did occur however, what the Claimant pleaded must be carefully considered, namely that others were permitted to swear and speak in a derogatory way. We had no evidence that even if any such language may have been used on occasions, it was in some way permitted or not addressed. We also found that Mr Macaulay expressly said that the Claimant would need to deal with the alleged bad language used by Mr Cox.

297. Still less did we have any evidence that if anyone permitted such language, they did so because the Claimant was disabled. We could identify with certainty what was in Mr Macaulay's mind regarding the extension of the Claimant's probation period, which we will come to, but there was no basis on which we could find what was in the minds of people unknown who the Claimant says permitted comments to go unchallenged, even if we were to accept that was the case.

298. The Claimant established of course that his probation period was extended but, if this is what he sought to argue, he did not establish the less favourable treatment inherent in this particular allegation. We will come separately to the extension of his probation itself.

3.1.19. Was the Claimant blamed for a delay in delivering essential safety functions despite raising concerns about his staff's performance of the work in question?

299. This allegation was not addressed in the evidence at all. We re-read the Claimant's statement during our deliberations and it does not appear to be referred to in there at all. The probation review form recorded that the Claimant was to produce a definitive action plan to deliver on an ever-increasing number of fire actions, but that is not blaming the Claimant for delays in delivering essential safety functions, it was simply tasking him with producing a definitive action plan. The complaint failed on the basis that the Claimant had not established the detriment on which he relied.

3.1.20. This allegation concerned the Claimant's probation review meeting on 23 June 2020 and listed three things the Claimant says he was accused of by Mr Macaulay.

300. We make some general points first:

300.1. Mr Macaulay did during the 23 June meeting raise all of the matters specifically referred to by the Claimant in this allegation, although we did not think the word "accuse" was appropriate for reasons which we will come to. That was not the tenor of the meeting.

300.2. It was clear to us that Mr Macaulay wanted the Claimant to succeed in his role. The Claimant himself accepted this, back in his detailed letter of 10 February 2020. Mr Macaulay made that directly clear at the 3 or 9 June meeting saying, "Hand on heart, I want you to succeed".

300.3. This is consistent with Mr Macaulay repeatedly praising the Claimant's abilities, whether in his interview with Mr Goodsell or in the probation form itself, not only in relation to the Claimant's technical knowledge, but in relation to his wider relationships outside of the team, and being clear – at least in his evidence before us – that he was not saying all of the Claimant's communications were too technical. Mr Macaulay wanting the Claimant to succeed is consistent with that balanced approach.

300.4. The Claimant signed the probation review form on 3 or 9 June and did not ask for examples of the issues Mr Macaulay had raised. As we have found, there was no indication in the evidence before us that he felt pressured into signing.

300.5. The fact is that Mr Macaulay extended the Claimant's probation, rather than ending his employment. We had no reason to doubt he could have secured that outcome had he wished. Mr Waller may well have been supportive of that, given his own concern about the Claimant's behaviour at the Fire Safety meeting, but anyway was likely to follow Mr Macaulay's lead.

300.6. Ms Benson said that a more empathic approach could have been taken to the probation extension in light of the Claimant's mental health. It is not entirely clear what that meant, but it does not indicate at all that she thought the Claimant's probation had been extended because of his mental health or that the reasons given for the extension were because of his mental health. Her concern

appears to be more about the process of discussing the extension with the Claimant, although we could not be sure about that.

300.7. The Claimant's case was that the probation extension and raising these three issues was discriminatory because he was being blamed for things that he was not responsible for and because they had not been raised before this meeting. We agree with the Respondent that it is of concern that the Claimant, as a very senior employee, would not recognise at all the concerns that were raised, in particular in relation to his conduct of relations with Ms Boulter. We were not taken to any evidence of an occasion on which it was suggested that the Claimant was solely to blame for the deterioration in that relationship, but as the manager, he can legitimately have been expected to reflect on and adjust his approach, for example in relation to drafting her objectives.

301. With those observations in mind, we turn to the specifics. It is correct that Mr Macaulay raised the three concerns the Claimant identified. Given the general observations we have made, it was plainly not correct however to describe them as accusations. Mr Macaulay's clear intention was to identify areas for improvement and to see the Claimant work on them and so continue in the Respondent's employment. We considered whether there were proper grounds for identifying them as issues for the Claimant to address in order to pass his probation.

3.1.20.1. Being unable "to give clear, timely and understandable advice";

302. As part of the Claimant's grievance appeal (see page 651), the Claimant had plainly been told that he was – on occasions at least – making Ms Boulter's work unnecessarily difficult. Mr Goodsell – whose work, as we have identified, was balanced and fair – reached the conclusion that the Claimant was not <u>always clear</u> in his communications. He reached that conclusion as someone completely independent of the Claimant's team of course, balancing it by being careful to note that there was no breach of the Respondent's Dignity at Work policy in the Claimant's communications. We also have the evidence of Ms Ashmore given to Ms Campbell – page 893 – of the DLOs' difficulties in understanding the Claimant's communications as well.

3.1.20.2. Being too technical in his communication

303. The Claimant was shown Ms Boulter's email to Mr Macaulay prior to the clear-the-air meeting, which included the comment that he used 1,000 words when three would do. We accept of course that this was not a specific example, but it was clearly Ms Boulter's view and it was shared. Ms Boulter's objectives were a clear example of the Claimant's communication in relation to which the Respondent could legitimately conclude that he had used far too much detail. This was raised with him on more than one occasion. Mr Macaulay gave us the example of page 363 in which the Claimant included in an email to Ms Boulter a table of various works required and alongside each of them details of schemes or certificates relevant to them. Again, this was not raised with the Claimant at the time because he was dealing with Ms Boulter directly, but it does show the nature of what the Respondent was concerned about. Ms Ashmore was independent of Mr Macaulay and made a similar point in her discussion with Ms Campbell. Mr Cox raised examples with Mr Goodsell. Indeed, the Claimant himself said on 23

June that he had no problem with the "too technical" comment. He accepts he uses too many words.

3.1.20.3. Unsatisfactory relationships with colleagues.

304. It is not necessary to repeat the evidence we have already referred to at length. There were clearly unsatisfactory relationships between the Claimant and his team. We also noted Ms Ashmore's evidence of the effect on Ms Boulter of her relationship with the Claimant, describing her as a "shrunken woman". We did not read Mr Macaulay's raising the issue of relations with colleagues as unfair or unbalanced. As already noted, he expressly recognised that the Claimant had fostered good relationships elsewhere in the organisation. As to whether this had been raised before, a clear the air meeting was needed in February and Ms Boulter raised further complaints by way of her grievance in May, all of which was relayed to the Claimant.

305. In summary therefore, as at 23 June 2020, there was some evidence – shared with us at this Hearing – of each of these issues featuring in the Claimant's work, in particular of unsatisfactory team relationships. It is not the case that they came from nowhere and are unsupported by evidence, which could certainly have given us cause to consider whether an adverse inference should be drawn against the Respondent for using them as a basis to extend his probation. Given that they were evidenced, and given Mr Macaulay's hopeful approach to the probation review, we were amply satisfied that any other manager in relation to whom the same issues had been identified, would have been informed of the same by Mr Macaulay at their probation review. Moreover, they were raised not because of the Claimant's disabilities, but because the Respondent wanted to see an improvement – and as we have said, it wanted to see that improvement so that the Claimant could become an effective Optivo manager. Whilst these points being raised and the probation being extended could properly be considered a detriment, the Claimant had thus not established that he was treated less favourably than his comparator, nor anything to suggest that the Respondent's identification of the need for improvement in these respects was anything to do with his disabilities. This complaint failed accordingly.

306. For completeness, we repeat that the Claimant did not produce evidence, other than his own tentative suggestions, that could satisfy us that being too technical or not communicating clearly, still less the way he conducted relations with colleagues, was due to his disabilities. In fact, the only evidence we had was to the contrary, in that OH informed the Respondent in its June 2020 report that the Claimant's health condition did not affect how he communicated.

307. Looking at the Claimant's allegations of direct discrimination overall, either he did not establish the necessary facts to show that he was subjected to the claimed detriment, or what he established on the facts did not amount to a detriment, or he did not show that he was less favourably treated than the actual comparator or than a hypothetical comparator would have been treated in materially similar circumstances, where that comparator can be assessed. Further, he did not show "something more" than the fact of his disability and his being unhappy with various ways in which the Respondent treated him, in order to meet the burden of proof that was initially on him. In any event, we identified in relation to most of the allegations that the reason why the Respondent acted or

failed to act as it did was clear. We are not saying that Mr Macaulay is beyond criticism, nor that he could not have done better in various respects, but the Claimant did not show that his actions were consciously or unconsciously influenced by considerations of disability. Overall, Mr Macaulay's thought processes were focused on seeking to support the Claimant in carrying out his duties including in relation to his team, so that the matters they were discussing did not put further pressure on his already busy workload and so that the work that was assigned to the team was carried out effectively.

Harassment

308. We dealt with the complaints of harassment next as they covered mainly allegations already addressed in relation to direct discrimination. Harassment is unwanted conduct related to disability which had the purpose or effect of violating the Claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for him. Unless otherwise noted below, we assumed that where the Claimant made out the facts on which he relied for an allegation of harassment, in each instance it was unwanted conduct. That is not a high barrier to overcome.

3.1.7.1. The Claimant alleges he was reprimanded on 20 January 2020 in front of his staff after he raised concerns on 17th January 2020.

309. As already noted, we found that there was no reprimand, and so the complaint failed on that basis. There was thus no unwanted conduct. In any event, even if the comment was made, it was plainly not related to disability even if Mr Macaulay had made a strong comment about the IT programme in question. The required connection between the comment and disability was simply not made out.

310. Further, the Claimant did not show that Mr Macaulay had the requisite purpose. If the Claimant had been reprimanded, Mr Macaulay's purpose would plainly have been to minimise further IT complexity for the team, or more likely for himself given his IT difficulties generally. Again, even if such a comment was made it did not have the required effect either, based on the limited evidence we were given. This alleged incident was very early in the Claimant's employment, and he had had said that he was working in a good environment; and there was no evidence before us of any concern about this incident being raised at the time. Further still, it would not have been reasonable for any reprimand to have the effect the Claimant claimed it did, when he says it made him feel Mr Macaulay was telling his colleagues they did not need to work with him. It was no such message, not least because Mr Macaulay very obviously did not want to manage the team himself. He was simply airing his views on a commonplace piece of software.

3.1.7.2. This allegation relates to 6 and 7 February 2020. The Claimant alleges he was reprimanded for putting in place objectives for his staff and made to rescind them.

311. We repeat our finding of fact that the Claimant was not reprimanded for putting objectives in place nor made to rescind them. We rely on our earlier conclusions in relation to direct discrimination. Even if he had been reprimanded, the comments were plainly not related to disability but to the need to adopt the

Respondent's style in drafting objectives. For completeness, we add that there was no evidence before us demonstrating that the way in which the Claimant drafted the objectives was related to his disabilities, though even if there had been, that would not have rendered the alleged comment "related to disability" as required.

312. The need to adopt the Respondent's way of drafting objectives would have been Mr Macaulay's purpose in making any such comment, as shown by his working with the Claimant over several exchanges on this subject. As to the requisite effect, whilst the Claimant's communications with Mr Macaulay on this issue do display his unhappiness about the situation generally, it would not have been reasonable for any such comments to have the effect. First, we must heed the warning of the case law not to encourage a workplace culture in which the merest slight is held to satisfy the wording of the statute. This was a routine workplace matter in which a manager was giving routine instructions to another manager. Secondly, it was the Claimant's intransigence on the subject that created any discomfort he may have felt about it.

3.1.7.3. This relates to 26 March 2020. The Claimant alleges Mr Macaulay told the Claimant off for not taking "...a leaf out of other people's book!" (relating to the setting of objectives for his staff).

313. We repeat our conclusions in relation to the preceding allegation.

3.1.7.4. This allegation relates to 9 April 2020. The Claimant alleges he was reprimanded for not being available for an ad-hoc meeting on the same day by Mr Macaulay who shouted, "I don't give a shit"; the Claimant was undertaking his surveyor's duties, as well as his own, at the time.

314. As already indicated, we found that this comment was not made. Even if it had been, whilst such a comment may very well have had the required effect, even if not the purpose, of violating the Claimant's dignity, it was not related to disability, either inherently or otherwise in terms of what Mr Macaulay would have been saying. Rather, it would have related to Mr Macaulay wanting the Claimant to be available for a meeting and being cross that he was not.

3.1.7.5. This allegation relates to 29 April 2020. The Claimant alleges Mr Macaulay shouted at him to "Shut up! Shut up! Shut up!".

315. There is no need to repeat our factual conclusions. Mr Macaulay was plainly exasperated on the occasion in question, but we could not see how the comment was related to disability. It was simply related to the Claimant not letting him speak. In that context, it was plainly not intended to violate the Claimant's dignity or create the requisite environment, and it would not have been reasonable for the comment to have the requisite effect when the Claimant himself was not letting Mr Macaulay speak. That is important context. We repeat that we were not taken to any evidence, nor was it suggested, that the Claimant not letting Mr Macaulay speak was related to his disabilities, and that in any event that would not have been sufficient in our judgment for the comment itself to be related to disability as the statute requires.

3.1.7.6. relates to 23 June 2020. The Claimant alleges Mr Macaulay told him to "back off!" and "stop pissing from the outside of the tent in" in the Claimant's 22-week probationary review meeting.

316. The "back off" comment was plainly not related to disability. Rather, it was advice as to how the Claimant might work towards a more effective working relationship with Ms Boulter. For the same reason, it equally plainly did not have the relevant purpose. Putting the words "back off" in the context of the Claimant raising with Ms Boulter her being a few minutes late and Mr Macaulay suggesting that this kind of exchange was not the best way forward, we concluded also that it would not have been reasonable for the comment to have the necessary effect.

317. The comment about pissing out rather than pissing in was also not related to disability. The phrase is commonplace, albeit not in the Respondent's workplace. The Claimant says it betrays that Mr Macaulay saw him as an outsider. In our judgment however, the evidence when assessed overall does not indicate any sense in which Mr Macaulay was positioning himself, Ms Boulter and Mr Cox on one side – that is, in the team – and the Claimant on another, that is outside the team. The support for formal action in respect of both of the more junior team members is the clearest evidence of that. In fact, therefore, Mr Macaulay was simply saying that it is better to work with the team members than against them, seeking to assist the Claimant to engage with his colleagues on a positive footing. For the same reasons, the comment plainly did not have the requisite purpose and particularly given Mr Macaulay's broader comments about the Claimant's good relations with others outside of the team, as well as his other qualities, it was not reasonable for it to have the required effect. Any difficulties the Claimant felt about this subject being addressed, albeit in this particular instance the comment is regretted by Mr Macaulay, was likely to have arisen from his inability and unwillingness to countenance any personal responsibility for how team relations had developed. Again, we saw no evidence suggesting that the Claimant's difficulties with team relations were related to his disabilities and again, even if there had been, that would not have been sufficient in our judgment for the comment itself to be related to disability as the statute requires.

3.1.10. On 20 February 2020, did Mr Macaulay say to the Claimant "You want to deal with that then don't you" after the Claimant informed Mr Macaulay that Mr D Cox was swearing at him, referring to him as "a wanker!" and "Mr big bollocks!"?

318. As already noted, this allegation failed on the facts. We do not need to repeat what we have found was said. Perhaps Mr Macaulay could have made his point clearer, but it seems clear enough that he was saying the Claimant would need to deal with it, consistently with his broader support of action against Mr Cox if required. We could not see how this could properly be said to be unwanted conduct. It was also not related to disability: the Claimant at no point suggested to us how it was. It did not have the requisite purpose, as it was intended to direct the Claimant to address the issue of any misconduct by Mr Cox and it was plainly not reasonable for the comment to have the required effect for the same reason. Mr Macaulay was delegating the matter to the Claimant for him to deal with as he saw fit.

5.1.3. On or around an unconfirmed date Mr Cox said, "Steve's got the disability spot".

319. As set out above, we found that this comment was not made. The complaint failed on that basis.

320. Even if it had been said, we were not given sufficient information to enable us to understand the context. The word "disability" was used, but it is far from clear whether, as would be required, it in any way related to the Claimant's disabilities. It could for example, simply have been an observation about where the Claimant had parked or, if made jokingly, a comment to the effect that the Claimant should not have been parked there. We found it difficult to believe that this could have been a reference to the Claimant's disabilities as they were unknown to Mr Cox, given Mr Macaulay's care not to disclose them.

321. It was also impossible for us to reach any conclusion as to Mr Cox's purpose, not least because we had almost no information about his behaviour generally. Similarly, given that did not have any information about the context in which the alleged comment was said to have been made, we could not reach a conclusion as to whether it would have been reasonable for it to have the required effect. The Claimant did not make out a prima facie case on this or any aspect of this complaint. Moreover, he did not raise the matter in his grievance letter nor with Mr Cox at the time, which also tended to the conclusion that the requisite effect was not made out.

5.1.4. Mr Macaulay failed to address complaints (which the Claimant says were vexatious) from other members of staff about the Claimant.

322. This was a general complaint, which was difficult to determine without specific details. It was anyway not borne out by the facts we have already rehearsed at length.

323. Further, any failure to deal with complaints was not shown on prima facie grounds to relate to disability. Painting it at its worst, it was incompetent management. As to purpose or effect, Mr Macaulay may not always have addressed Ms Boulter's complaints about the Claimant effectively, but his holding a clear the air meeting and referring the Claimant to HR were not the actions of someone, as the Claimant would have it, seeking to store up the complaints to use in the future. He actually tried to address them, contrary to the Claimant's case as to his purpose, and of course, he extended the Claimant's probation rather than using these matters as grounds to end his employment, contrary to the Claimant's case as to the required effect.

5.1.5. Subject the Claimant to a hostile working environment

324. This was self-evidently too general for us to determine, though we noted that Ms Campbell looked at the working environment and culture in her re-investigation and found nothing to support the Claimant's assertion. The Claimant says she should have interviewed longer-serving staff; in fact, it is more likely that staff in that position would be less likely to see any cultural issues.

5.1.6. Further attempt to undertake a 're- investigation' into the Claimant's grievance.

325. This complaint was a non-starter. The Claimant clearly did not want the re-investigation, and we can understand his feelings about not wanting to go over matters again, but it obviously did not relate to disability. The Respondent's concern was to get to the bottom of Ms Benson's concerns about the grievance process. Even on the Claimant's case, the re-investigation was about the Respondent shoring up its position in relation to the forthcoming Tribunal case, which would not relate to the Claimant's disability but to the litigation.

326. The re-investigation equally obviously did not have the requisite purpose. Whilst as we say we understand the Claimant's feelings about not wanting to engage with it, it does not follow that it was reasonable to say his dignity was violated by the Respondent going ahead with it or, if it were possible given that he had left, that it created the requisite environment, and we saw no evidence to indicate it had either of those purposes.

327. In summary, all of the allegations of harassment fail on the basis that, for the reasons we have set out, the Claimant did not in relation to any of the complaints establish a case which shifted the burden of proof to the Respondent.

Failures to make reasonable adjustments

Knowledge of disability

328. The Respondent accepted it had knowledge at the relevant times that the Claimant was a disabled person by reason of anxiety and depression. We had to decide the same point in relation to ASD.

329. We began with what the Respondent had by way of actual knowledge:

329.1. It had the equality, diversity and inclusion form in which the Claimant said that he considered himself a disabled person, mentioned anxiety and depression and said that he was awaiting an ASD assessment.

329.2. The form completed for the Respondent at the start of the Claimant's employment, apparently by OH (page 175) said that the Claimant was fit for work and currently awaiting an ASD assessment.

329.3. In the Wellness Plan, the Claimant said that he lived with anxiety and depression. He also mentioned again that he had been referred for an ASD assessment "to assess if I might be on the spectrum", adding that he was very robust and resilient.

329.4. The OH report of 2 June 2020 said that "his case may be admissible under the disability provisions of the Equality Act 2010" but did not comment on which impairment it was referring to.

329.5. It is agreed that the Claimant only got his ASD assessment after he left the Respondent's employment.

329.6. Mr Macaulay told us that he had no reason to believe the Claimant was not disabled in the light of Ms Ward's comments in their December and January email exchanges. It is not clear whether Mr Macaulay was referring to anxiety

and depression or ASD or both. Clearly, neither he nor anyone at the Respondent was qualified to have made a medical assessment regarding ASD.

330. In terms of what the Respondent should reasonably have known from reasonable enquiries:

330.1. The Claimant says it had the resources and opportunity to understand his condition. He has not suggested however, still less provided evidence to the effect, that the Respondent should have known he had ASD because of his behaviour or his performance of his duties, notwithstanding that some of his colleagues in their evidence to Ms Campbell said that he appeared not to be able to retain information and his communication could be confusing.

330.2. The Respondent also had no context to observe any changes in his behaviour over time.

331. Accordingly, we did not think that the Respondent should reasonably have taken steps to enquire further about ASD. In any event, we heard nothing to suggest that it could have done anything further to secure an appropriate opinion sooner than that which the Claimant obtained after his employment terminated. All the evidence suggests that for whatever reasons, unrelated to the Respondent, it was difficult to get to the point of an assessment taking place. There was a delay in the OH referral, and it could reasonably have been done sooner, but that would not have – because it did not – reveal whether the Claimant had ASD.

332. In the light of all of that, we concluded that the Respondent did not fail to carry out any reasonable step towards finding out more about the Claimant's possible ASD. Based on what it knew, and given the Claimant's own expressed uncertainty about whether he had that impairment, whilst the Respondent was on notice that the Claimant might have the impairment (though not that he did have it), it certainly could not be said to have had sufficient information to assess where he was on the autism spectrum and either as a result of such an assessment or simply from its own observations to know anything about the impact ASD had on his ability to carry out normal day to day activities. He was carrying out his work, which was demanding, and dealing with caring responsibilities outside of work. There were difficulties in some of his work relationships but by no means all of them and in some but by no means all of his communications. In neither respect however, was there any suggestion, expressly or implicitly, that should have led the Respondent to conclude that the Claimant's ASD was the cause of any such difficulties, still less that it was having the required substantial (more than minor or trivial) effect on his ability to carry out normal day to day activities.

333. In our judgment, for the reasons we have given, the Respondent did not know and could not reasonably have been expected to know that the Claimant was a disabled person by reason of this particular impairment. As a result, the complaints of failure to make reasonable adjustments and discrimination arising from disability fell to be assessed in relation to anxiety and depression only.

The complaints

334. The Claimant said in submissions that he was struggling with the statutory definition of failure to make reasonable adjustments and with explaining it in the context of his experiences. We recognise that whilst at its core the duty to make reasonable adjustments is a simple concept, it can often raise complications in practice. We thus adopted as generous an interpretation as we could of the Claimant's case, recognising that he is a litigant in person, though we are bound to say again that we could not make the Claimant's case for him, whether in the Hearing or at the deliberations stage. Particularly given the background to the case we have described, with multiple opportunities for the Claimant to refine his arguments and indeed take advice, we had to assess the case as presented to us within the agreed list of issues. That was right both to ensure focused conduct of the litigation and fairness to the Respondent.

335. It is important to be clear on how such complaints work. If there was one or more PCPs, a tribunal must then determine the substantial disadvantage said to arise from the PCP and the burden is on the Claimant to show that. It must then be determined that there were steps the Respondent could have taken but failed to take to avoid the disadvantage. If all of those constituent parts of the case are made out, it is if the Respondent did not take those steps and they were reasonable that a complaint succeeds.

336. Putting all of the above together, the central point of the duty to make reasonable adjustments is to require employers to adjust the PCP in order to overcome the substantial disadvantage encountered by the employee as a result of it. The question therefore is whether any modification or qualification could be made to the PCP which would or might remove the substantial disadvantage it allegedly caused. The steps which can be reasonably required of an employer therefore depend on the PCP it has applied. Neither the alleged substantial disadvantage(s) nor the purported reasonable steps can be divorced from each other or from the PCPs. The substantial disadvantage must arise from the PCPs and the adjustments contended for must address the PCP, to avoid the disadvantage(s) the Claimant alleges he was put to as a result.

337. As noted in our summary of the law, "substantial" means "more than minor or trivial". The Tribunal should ask what was the nature and extent of the disadvantage and what it was about the PCP that put the Claimant at the alleged disadvantage. The Tribunal can consider itself what reasonable steps could have been taken to avoid the disadvantage even if those steps were not suggested by the Claimant.

338. The first PCP was said to be the Respondent applying one or more of the following organisational policies and its CORE values rigorously to the Claimant but not to other staff including Mr Macaulay – the Code of Conduct, its Probationary Policy/Procedure, its Grievance Policy/Procedure, its Equality, Diversity and Inclusion Policy, its Wellbeing Policy and its Dignity at Work Policy.

339. As the Respondent submitted, this was a repetition of various aspects of the Claimant's direct discrimination complaints, the Claimant saying that in these respects he was treated less favourably than others. The nature of a reasonable adjustment complaint is that there is a PCP that is applied to the Claimant and others which puts the Claimant at a substantial disadvantage compared to

persons who are not disabled, but that is not the case the Claimant put forward. Further, we were not taken by the Claimant to all of the policies on which he relied, nor except in the ways we have already covered did he spell out how these policies were applied more rigorously to him than to others in any event.

340. Further still, as our conclusions on direct discrimination show, the alleged differences in treatment, even had they been relevant to reasonable adjustments complaints (which they were not), were either not made out on the facts or insufficient evidence was put forward to support any such difference. In summary the first PCP was not a PCP either as a matter of the logic of how the case was pleaded and presented nor, if it were necessary for us to assess it on its merits, on the facts.

341. The second PCP was said to be the Respondent supporting a hostile culture where staff could openly express right-wing views within an exclusive environment and where the Claimant's alleged disabilities were regarded as a weakness.

342. It would require very clear and specific evidence to find that the Respondent had a practice of supporting such a culture. As will already be clear, the Claimant's contention to this effect was not made out on the evidence presented to us. We have already noted our conclusion that the Respondent did not support such a culture. What the Claimant alleged is contrary to what Mr Macaulay says; it is contrary to what staff told Ms Campbell – they were shocked by the allegation; Dawn Ashmore, who evidently liked the Claimant, described a welcoming and inclusive (rather than exclusive) environment and said that she would have been "on top of" anything said along the lines the Claimant had alleged. We also noted the Claimant's own contrary views in mid to late January 2020, reported by Mr Macaulay, when the Claimant had been in the King's Heath office for a month or thereabouts. It seems inconceivable that the environment changed so much over the next month or so before he and his colleagues were largely working away from it such that a culture along these lines could have been felt and experienced.

343. Even taking the most generous interpretation of the two pleaded PCPs, the Claimant's case in either respect was not made out. The complaints of failure to make reasonable adjustments failed at that point. There were however further difficulties with the complaints which would also have led to them being dismissed.

344. First, it was not at all clear how the PCPs put the Claimant to the substantial disadvantages on which he relied:

344.1. His not being referred to OH within a reasonable time could not logically be a disadvantage to which he was put by the Respondent applying policies more rigorously to him than to others nor by it supporting the hostile culture he describes. In addition, the Respondent was in fact seeking – albeit somewhat ineffectively – to refer him to OH from very early in January 2020.

344.2. The same is true of requiring the Claimant to carry out a second role – if this was indeed the case, it was the heavy workload and Mr Cox's absence that put him to this disadvantage not the alleged PCPs.

344.3. The same is also true of the Respondent engaging Mr Cox who, the Claimant says, was unqualified as a surveyor and Ms Boulter who he says did not want her role (perhaps it should be said that what the Claimant argues is that he had to work alongside one unqualified person and one unwilling person). It was not the PCPs – the more rigorous application of policies to him or the encouragement of a particular culture – which put the Claimant to any such disadvantage. In any event, there was no evidence Ms Boulter did not want her role and we repeat that we were satisfied that Mr Cox was a suitable appointment for his role.

344.4. The same was again true of the Respondent not considering the impact on the Claimant's mental health knowing that it had appointed "challenging and disobedient staff" to his team. Even taking the allegation on its face, this was not logically a substantial disadvantage for the Claimant arising from either PCP, but something the Respondent did directly. Appointing Ms Boulter and Mr Cox without consideration of the Claimant's health did not arise from more rigorous application of policies to the Claimant nor from it supporting a hostile culture. In addition, we make the point again that we found as a fact that they were appropriate appointments, Mr Macaulay wanting and expecting the team to succeed and, in January 2020, the Claimant being pleased to be on board.

345. In summary, as the Respondent submitted, these were allegations of unfavourable treatment, not substantial disadvantages arising from the alleged PCPs. The complaints had to fail on that basis also.

346. Further and similarly, most of the steps the Claimant contended for very obviously would not have addressed the PCPs of applying policies to him more rigorously and encouraging a hostile environment – referral to OH, appointing a buddy, learning about his condition, carrying out a stress risk assessment, appointing different staff to the team, Mr Macaulay seeking support, Ms Ward following up instructions given to Mr Macaulay. As we have said, the steps it is said a respondent should take do not stand in a vacuum.

347. Step 4.5.7 – "the Respondent could have applied its policies/procedures consistently with all staff and could have been committed to practising its own diversity and well-being codes of practice with Mr Macaulay and existing staff that did not demonstrate its CORE values" – might be the exception, in that it could be said to address the PCPs, but first it was far too general (it effectively says the Respondent should not have had the PCPs) and secondly it would not have avoided the disadvantages the Claimant relied on.

348. In addition to all of the above, many of the steps the Claimant contended for – seeking advice, seeking support, following up on suggestions – fall foul of the decision in **Tarbuck**. The point of reasonable adjustments is that they have some practical consequence of preventing or mitigating the difficulties a disabled person faces at work. The duty is not concerned with the process of determining what steps should be taken, which is all those steps would entail.

349. Further still, some of the alleged failures on the Respondent's part were simply not made out on the facts – 4.5.8, 4.5.9 and 4.5.10 in particular.

350. For all of these reasons, the complaints of failure to make reasonable adjustments failed. They would thus have failed even if we had reached a

different conclusion on the question of the Respondent's knowledge of ASD. It was not necessary for us to consider any further steps that might have been taken to avoid the alleged disadvantages, nor the question of the Respondent's knowledge of any disadvantage.

Discrimination arising from disability

351. Turning finally to the complaints of discrimination arising from disability, we have dealt with knowledge above – the Respondent knew that the Claimant was a disabled person by way of anxiety and depression, but did not know and could not reasonably have been expected to know at any time during his employment that he was also a disabled person by way of ASD.

352. As with reasonable adjustments, it is important to set out how a complaint of discrimination as defined by section 15 of the Act works.

353. First, there must be unfavourable treatment. This is a relatively low threshold; it is equivalent to detriment, the question being whether a reasonable person could conclude that the treatment was unfavourable. Secondly, the Claimant has the burden of establishing the reason for the unfavourable treatment, the Tribunal ordinarily determining this by establishing what was in the mind of the alleged discriminator, consciously or otherwise: that reason does not have to be the only cause of the treatment, but must have had a more than trivial influence on it. Thirdly, the Claimant has the burden of establishing that the reason for the unfavourable treatment arose in consequence of his disability of anxiety and depression; this is an objective test, not to do with what the alleged discriminator thought. Finally, if relevant, there is the justification defence, where the burden rests on the Respondent.

354. The Claimant relied on nine instances of unfavourable treatment. The first thing to say about them is that most were generalised to say the least, making the Tribunal's task of assessing them next to impossible. These were:

354.1. Treating the Claimant with suspicion and mistrust – allegation 6.1.1.

354.2. Treating the Claimant as though he was not capable of managing a team – allegation 6.1.2.

354.3. Not taking the Claimant's concerns seriously and undermining him by managing him and his team as squabbling colleagues – allegation 6.1.3.

354.4. Scrutinising the Claimant disproportionately with vexatious allegations of misconduct, yet apportioning him blame for the conduct and performance issues of his team – allegation 6.1.4.

354.5. Allowing the Claimant to be bullied and harassed by Mr Macaulay because he perceived his disabilities as an unwanted additional burden for him to manage – allegation 6.1.5.

354.6. Refusing to deal objectively with the Claimant's concerns about his team's performance and conduct – allegation 6.1.6.

354.7. Ignoring the Claimant's requests for support and medical intervention – allegation 6.1.7.

354.8. Making the Claimant feel completely inadequate because of his neurodiverse attributes – allegation 6.1.9.

355. It was plainly detrimental to the Claimant's case that even after many opportunities to do so, these allegations were not properly particularised. We make clear again that after substantial case management, the responsibility for that cannot be the Tribunal's or indeed the Respondent's.

356. Secondly, it will be evident from our conclusions on direct discrimination that we do not accept the Claimant's characterisation of most of what the Respondent did which he says amounted to unfavourable treatment:

356.1. As to 6.1.2, Mr Macaulay did not treat the Claimant as though incapable of managing a team – as we have repeatedly said, whether effectively or not, Mr Macaulay sought to enable him to do so, entrusting him even with formal action in respect of Mr Cox for example.

356.2. As to 6.1.3 and 6.1.6, on the same basis, Mr Macaulay did not manage the team as squabbling colleagues. The Claimant's concerns were taken seriously, hence Mr Macaulay asking the Claimant to document them before the clear the air meeting, arranging a meeting to try and sort out the team differences and referring him to HR for support in how to take forward matters with Ms Boulter as her manager, in addition to supporting him in compiling a management plan for Mr Cox. Specifically in respect of 6.1.6, what the Claimant seemed to mean was essentially that unless Mr Macaulay wholly accepted his account of the issues with Ms Boulter and wholly rejected hers, Mr Macaulay was not dealing with his concerns about his team objectively. That clearly cannot be correct.

356.3. Whilst it is not at all clear what the Claimant refers to at 6.1.4, we were not aware that the Claimant was ever found to have misconducted himself; the complaints made by Ms Boulter were investigated, the Claimant wanted them to be considered, and of course Mr Goodsell found that there was no misconduct on his part, even though he pointed out various ways in which he could have improved his management. The Claimant was not blamed for the conduct and performance issues in his team; he was, with reasonable grounds, asked to address certain issues as a condition of passing his probation.

356.4. We rejected the Claimant's account of Mr Macaulay's conduct as alleged at 6.1.5.

356.5. In relation to 6.1.7, the Claimant did not make requests for support and medical intervention that were ignored – he did, understandably, chase up the OH referral, which was delayed, though it was eventually made, but he at no point protested to Mr Macaulay or HR that particular steps were not being taken. He was allowed to attend medical appointments.

356.6. In respect of 6.1.8, the Claimant was not reprimanded by Ms Ward for working long hours.

357. In summary, the unfavourable treatment on which the complaints under section 15 depended was not made out either on the facts as we found them to be or because it was not properly particularised. They failed on that basis.

358. We nevertheless considered what the Claimant said arose in consequence of his disability, which as we have outlined are for these purposes the reasons for the unfavourable treatment. What the Claimant said arose from his disability was that he was accused of various things at the 22-week probation review. There were a number of issues with that:

358.1. First, we did not think the word "accused" an appropriate description for the reasons we have given.

358.2. Secondly, not all of the items the Claimant referred to at 6.2.1 were in fact discussed at the 23 June meeting (or otherwise) as he alleged. He was not told he did not build relations with staff nor that he did not possess people skills. As already noted, Mr Macaulay highlighted that his wider relations in the organisation were effective. He was not told either that he was not on board or outside pissing in; what Mr Macaulay said as guidance for dealing with Ms Boulter was that it is better to be inside pissing out than outside pissing in.

358.3. Thirdly, as a matter of logic and timing, the Claimant being accused of these things on 23 June cannot have been the reason for the unfavourable treatment he relied on, all of which, except 6.1.8, arose before then.

358.4. Fourthly, as Ms Goodman submitted, the Respondent (allegedly) making accusations about the Claimant was not as a matter of logic the reason for the alleged unfavourable treatment. For example, the Respondent accusing the Claimant of the nine things he says were raised at meeting, was not the reason it treated him as incapable of managing a team. That was the way the Claimant's case had to be assessed, especially after such considerable case management. The Tribunal could not determine an alternative case.

358.5. Fifthly, even if we had taken a less precise view of the Claimant's case and viewed it as the Claimant saying that the list of matters at 6.2.1 arose from his disability, he has not shown that to be the case. We made the point repeatedly from early in the Hearing that the parties needed to put evidence to support their respective cases as set out in the list of issues. We heard no evidence that the things at 6.2.1 arose in consequence of the Claimant's disability and it would be a very bold step to take judicial notice of that. We were not prepared to do so.

358.6. Sixthly, although subsequently asserting on a few occasions during his evidence that he communicated and related to others in certain ways because of his neuro-diversity, in agreeing the list of issues at the start of this Hearing the Claimant said he could not recognise in himself anything in the list at 6.2.1.

358.7. Seventhly, the OH report said that the Claimant's "health condition" should not affect his communication with colleagues. That is the only evidence we were taken to that speaks to the question of what arose from the Claimant's disabilities and it did not support his case.

358.8. Finally, it seemed abundantly clear that the Claimant relied on ASD as the disability giving rise to the list of matters at 6.2.1. The Respondent established that it did not have knowledge of it and could not reasonably have been expected to.

359. For all of these reasons also, the complaints of discrimination arising from disability failed – and would have failed even had we reached a different conclusion on the question of the Respondent's knowledge of ASD. It was not necessary to consider justification.

Time limits

360. None of the Claimant's complaints succeeded, so that it was not necessary to consider time limits. Without having done so in any detail, but just for completeness, our provisional view was that we may well have found the matters complained of to be a course of conduct ending with the events of 23 June 2020, particularly given that Mr Macaulay was a common denominator, so that complaints about events outside the normal time limit may well have been in time. As is abundantly clear however, the point was academic.

Employment Judge Faulkner
Date: 8 August 2022

Appendix – List of Issues

1. Jurisdiction

1. The Claimant submitted his claim to the Tribunal on 4 August 2020. Taking into account ACAS Early Conciliation (31 days), the Claimant's claim was in time so far as it related to allegations on or after 2 April 2020. To the extent that any of the acts and/or omissions complained of occurred prior to 2 April 2020, do these, together with the later acts and/or omissions amount to a course of conduct extending over a period within the meaning of section 123(3)(a) Equality Act 2010?

2. To the extent that any of the acts and/or omissions do not amount to a course of conduct extending over a period within the meaning of section 123(3)(a) Equality Act 2010, were the relevant complaints submitted within such time after the statutory time limit as the Tribunal considers just and equitable – section 123(1)(b) Equality Act 2010?

2. Disability

The Respondent accepts that the Claimant was throughout his employment disabled by the impairments of anxiety and depression and autism spectrum disorder.

3. Direct disability discrimination

3.1. Did the Respondent do the following things:

3.1.1. Did Mr Macaulay (the Claimant's line manager) ask the Claimant to leave managers' meetings before the other managers on 3, 9 and 17 January 2020?

3.1.2. Did Mr Macaulay inform the Claimant during a one-to-one meeting on 3 January 2020 that Ms Ward of HR had informed him that the Claimant should have declared his disability at interview stage?

3.1.3. From 7 January 2020, did Mr Macaulay fail to carry out the following alleged recommendations of Ms Ward:

3.1.3.1. To undertake a stress risk assessment;

3.1.3.2. To refer the Claimant to occupational health;

3.1.3.3. To seek clarification on what being "supportive and understanding" meant for the Claimant;

3.1.3.4. To appoint a buddy;

3.1.3.5. To discuss with the Claimant at one-to-one meetings what extra support he would require;

3.1.3.6. To review the Claimant at the 12 and 22-week points during his probationary period and support him;

3.1.3.7. To “support him”.

3.1.4. Did Mr Macaulay fail to take on board or carry out to any effect, Ms Ward’s advice that “if a colleague declares a disability, we need to provide evidence of how we have supported the colleague and any reasonable adjustments put in place”?

3.1.5. Did Mr Macaulay fail to carry out regular reviews with the Claimant about his health or welfare, other than the single meeting on 3 January 2020?

3.1.6. Did Mr Macaulay fail to carry out the Claimant's request in his Wellness Plan on 3 January 2020 “to be supportive and understanding”?

3.1.7. Did Mr Macaulay undertake meetings with the Claimant in an interrogative, hostile and impatient manner? The Claimant relies on the following meetings:

3.1.7.1. 20 January 2020 – the Claimant alleges he was reprimanded in front of his staff after the Claimant raised concerns on 17th January 2020;

3.1.7.2. 6 and 7 February 2020 – the Claimant alleges he was reprimanded for putting in place objectives for his staff and made to rescind them;

3.1.7.3. 26 March 2020 – the Claimant alleges Mr Macaulay told the Claimant off for not taking “...a leaf out of other people’s book!” (relating to the setting of objectives for his staff);

3.1.7.4. 9 April 2020 – the Claimant alleges he was reprimanded for not being available for an ad-hoc meeting on the same day by Mr Macaulay who shouted, “I don’t give a shit”; the Claimant was undertaking his surveyor’s duties, as well as his own, at the time;

3.1.7.5. 29 April 2020 – the Claimant alleges Mr Macaulay shouted at him to “Shut up! Shut up! Shut up!”;

3.1.7.6. 23 June 2020 – the Claimant alleges Mr Macaulay told him to “back off!” and “stop pissing from the outside of the tent in” in the Claimant's 22-week probationary review meeting.

3.1.8. Did Mr Macaulay take control of managing the Claimant's direct reports from 20 January 2020?

3.1.9. Did Mr Macaulay try to reject a letter from the Claimant on 10 February 2020 and fail to act on the Claimant's request for an occupational health referral within that letter for 16 weeks?

3.1.10. On 20 February 2020, did Mr Macaulay say to the Claimant “You want to deal with that then don’t you” after the Claimant informed Mr

Macaulay that Mr D Cox was swearing at him, referring to him as “a wanker!” and “Mr big bollocks!”?

3.1.11. Did Mr Macaulay allocate and continue to assign two difficult and challenging staff members to the Claimant, namely Mr Cox and Ms J Boulter?

3.1.12. Did Mr Macaulay ask the Claimant not to attend future Fire Safety meetings after a meeting on 2 April 2020 where the Claimant raised concerns over lack of resources (at a time when the Claimant was covering the work of Mr Cox)?

3.1.13. Did Mr Macaulay frequently allocate the Claimant work with deadlines the same day which resulted in the Claimant having to work in excess of his contracted hours?

3.1.14. Did Mr Macaulay fail to carry out the Claimant's 12-week probationary review?

3.1.15. Did Mr Macaulay fail to set the Claimant’s objectives on “Performance Hub” (the Respondent’s people management system)?

3.1.16. This issue was withdrawn.

3.1.17. Did Mr Macaulay hold an 'unauthorised' probationary review meeting with the Claimant on 3 June 2020?

3.1.18. Was the Claimant held to a much higher standard of conduct and accountability than others? The Claimant relies on the following allegations:

3.1.18.1. Was the Claimant scrutinised more than others over the Respondent's “CORE” values?

3.1.18.2. Did the Respondent take a different approach to the Claimant's grievance than it did with Ms Boulter’s grievance against him?

3.1.18.3. Was the Claimant not permitted to formally raise concerns about his team members’ conduct?

3.1.18.4. Was the Claimant's probationary period extended because he was accused of not communicating effectively, when others were permitted to swear and speak in a derogatory manner?

3.1.19. Was the Claimant blamed for a delay in delivering essential safety functions despite raising concerns about his staff’s performance about the work in question?

3.1.20. Did Mr Macaulay accuse the Claimant of the following things at his 6-month probationary review meeting on 23 June 2020:

3.1.20.1. Being unable “to give clear, timely and understandable advice”;

3.1.20.2. Being too technical in his communication; and

3.1.20.3. Unsatisfactory relationships with colleagues?

3.2. By any of the above, did the Respondent subject the Claimant to a detriment?

3.3. If so, and in relation to such of the alleged detriments set out in 3.1 which the Claimant is able to establish on the evidence, did the Respondent treat the Claimant less favourably than it would have treated a hypothetical comparator? The Claimant relies on the hypothetical comparator of a person engaged as a Fire Safety Contract Manager with the same training, experience and qualifications as the Claimant but who did not have the Claimant's disabilities of depression and anxiety or ASD/ADHD.

3.4. If so, was it because of his disability?

4. Failure to make reasonable adjustments

4.1. Did the Respondent know or could it reasonably have been expected to know that the Claimant was a disabled person? From what date?

4.2. A "PCP" is a provision, criterion or practice. The Claimant relies on two PCPs as follows:

4.2.1. The Respondent applying one or more of the following organisational policies and its CORE values rigorously to the Claimant but not to other staff including Mr Macaulay:

- Code of Conduct
- Probationary Policy/Procedure
- Grievance Policy/Procedure
- Equality, Diversity and Inclusion Policy
- Wellbeing Policy
- Dignity at Work Policy

4.2.2. The Respondent supporting a hostile culture where staff could openly express right-wing views within an exclusive environment and where the Claimant's alleged disabilities were regarded as a weakness.

4.3. Did the PCPs or any of them put the Claimant at one or more of the following substantial disadvantages compared to someone without the Claimant's disability, in that the Respondent:

4.3.1. Failed to refer the Claimant to OH within a reasonable time. The Claimant contends this failure occurred in February 2020.

4.3.2. Required the Claimant to undertake a second role in addition to his own. The Claimant contends this failure occurred in March 2020.

4.3.3. Engaged someone unqualified as a Surveyor (Mr Cox) in the Midlands team (and not elsewhere). The Claimant contends this failure occurred on 8 January 2020.

4.3.4. Engaged a staff member as the Team Assistant (Ms Boulter) who did not want the position. The Claimant contends this failure occurred on 8 January 2020.

4.3.5. Did not consider the impact on the Claimant's mental health knowing that it had appointed challenging and disobedient staff to his team. The Claimant contends this failure occurred in around January 2020.

4.4. Did the Respondent know or could it reasonably have been expected to know that the Claimant was likely to be placed at the disadvantage(s)?

4.5. What steps could have been taken to avoid the disadvantage? The Claimant suggests:

4.5.1. The Respondent could have undertaken an Occupational Health assessment when the Claimant was first employed.

4.5.2. The Respondent could have given the Claimant an Occupational Health assessment in good time after he requested it in writing on 10 February 2020.

4.5.3. The Respondent could have allocated the Claimant a buddy to assist him in the on-boarding period.

4.5.4. The Respondent could have made efforts to learn more about the Claimant's conditions. It could have sought advice and help from its Occupational Health advisor or a specialist.

4.5.5. The Respondent could have undertaken a Stress Risk Assessment for the Claimant at any stage during his employment.

4.5.6. The Respondent could have employed a qualified, committed and enthusiastic Surveyor and Team Assistant.

4.5.7. The Respondent could have applied its policies/procedures consistently with all staff and could have been committed to practising its own diversity and well-being codes of practice with Mr Macaulay and existing staff that did not demonstrate its CORE values.

4.5.8. The Respondent could have supported the Claimant in addressing the conduct issues he had with Mr Cox and Ms Boulter and followed the disciplinary policies and procedures.

4.5.9. Mr Macaulay could have sought support.

4.5.10. Ms Ward could have followed up on the instructions she gave to Mr Macaulay.

4.6. Was it reasonable for the Respondent to have to take those steps and when? Did the Respondent fail to take those steps?

5. Harassment related to disability

5.1. Did the Respondent do the following things:

5.1.1. The allegations at 3.1.7?

5.1.2. The allegation at 3.1.10?

5.1.3. On or around an unconfirmed date Mr Cox said, “Steve’s got the disability spot”?

5.1.4. Mr Macaulay failed to address complaints (which the Claimant says were vexatious) from other members of staff about the Claimant?

5.1.5. Subject the Claimant to a hostile working environment?

5.1.6. Further attempt to undertake a ‘re- investigation’ into the Claimant's grievance?

5.2. If so, was that unwanted conduct?

5.3. If so, did it relate to disability?

5.4. If so, did the conduct have the purpose of violating the Claimant’s dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him? In particular did the conduct at 5.1.6 have the purpose of exacerbating the Claimant’s health and welfare even further?

5.5. If not, did it have that effect? The Tribunal will take into account the Claimant’s perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

6. Discrimination arising from disability

6.1. Did the Respondent treat the Claimant unfavourably by:

6.1.1. Treating the Claimant with suspicion and mistrust?

6.1.2. Treating the Claimant as though he was not capable of managing a team?

6.1.3. Not taking the Claimant's concerns with due seriousness and undermining the Claimant by managing him and his team as squabbling colleagues?

6.1.4. Scrutinising the Claimant disproportionately with vexatious allegations of misconduct, yet apportioning him blame for the conduct and performance issues of his team?

6.1.5. Allowing the Claimant to be bullied and harassed by Mr Macaulay because he perceived his disabilities as an unwanted additional burden for him to manage?

6.1.6. Refusing to deal objectively with the Claimant's concerns about his team's performance and conduct?

6.1.7. Ignoring the Claimant's requests for support and medical intervention?

6.1.8. Reprimanding the Claimant for working excessive hours at his 22-week probationary review meeting on 23 June 2020?

6.1.9. Making the Claimant feel completely inadequate because of his neurodiverse attributes?

6.2. Did the following things arise in consequence of the Claimant's disability?

6.2.1. At the 22-week probationary review the Claimant was accused of:

- being "too technical"
- not giving "clear, timely and understandable advice"
- rubbing others "...up the wrong way"
- not building relations with staff
- communications being "long-winded and detailed"
- not possessing "people skills"
- "pissing outside the tent in!"
- not getting "...on board!"
- not demonstrating "CORE values"

6.3. Was the reason for the unfavourable treatment referred to in paragraph 6.1 any of those things listed in paragraph 6.2?

6.4. If so, was the treatment a proportionate means of achieving a legitimate aim? The Respondent says that its aim was ensuring performance and conduct is managed in a fair and reasonable manner.

6.5. In particular:

6.5.1. Was the treatment an appropriate and reasonably necessary way to achieve those aims?

6.5.2. Could something less discriminatory have been done instead?

6.5.3. How should the needs of the Claimant and the Respondent be balanced?

6.6. Did the Respondent know or could it reasonably have been expected to know that the Claimant had the disability? From what date?