Case Number: 2208050/2016

EMPLOYMENT TRIBUNALS

Claimant		**Respondents**
Mr B R Perinparaja	**v**	**The Royal Marsden NHS Foundation Trust**

Heard at: London Central

On: 1 – 3, 6 March 2017
In chambers: 7 March 2017

Before: Employment Judge Lewis
Ms G Gillman
Ms J Seaton

Representation

For the Claimant: In person

For the Respondents: Mr W Dobson, Counsel

RESERVED JUDGMENT

1. The claims for direct disability discrimination are not upheld.
2. The claims for harassment are not upheld.
3. The claims for discrimination arising from disability are not upheld.
4. The claims for failure to make reasonable adjustments are not upheld.
5. The claim for indirect disability discrimination is not upheld.
6. The claims for victimisation are not upheld.
7. The claim for notice pay is dismissed on withdrawal.

REASONS

The claims and issues

1. The claim was for disability discrimination and notice pay. The respondents conceded the claimant had the disabilities of depression, Crohn's disease and radiculopathy, although they disputed knowledge on certain aspects. The issues were agreed as follows.

Direct disability discrimination - Equality Act 2010, s13

1.1 Whether the respondents treated the claimant less favourably because of the claimant's disability than they treated or would treat a comparator by cancelling / failing to put him onto (i) the corporate induction training and (ii) the business planning training. The comparator is hypothetical and/or in respect of the corporate induction training, Ciara Mowat and Jabir Alam.

Harassment – Equality Act 2010, s26

1.2 Whether the respondents engaged in unwanted conduct related to disability.

1.3 Whether that conduct had the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading or offensive environment for the claimant.

1.4 If the conduct did not have that purpose, but it did have that effect, whether it is reasonable for the conduct to have that effect, taking account of the claimant's perception and the other circumstances of the case.

1.5 The alleged conduct is:

1.5.1 Excessive work monitoring by holding two 1 to 1s in one week, ie on 15 and 18 March 2016.
1.5.2 On 18 March 2016, criticising the claimant for failing to attend meetings to which he was not invited.
1.5.3 On 18 March 2016, criticising the claimant for not covering the responsibilities of team members while they were off sick.
1.5.4 Being asked to carry out additional tasks outside the claimant's role with unrealistic deadlines. This refers to requiring the claimant to supply the monthly income report by 9 March 2016.
1.5.5 Sending emails to the claimant's home address late at night and in the early hours of the morning.

1.5.6 Jabir Alam's saying to the claimant on 22 March 2016, 'Did you have to take a call in the disabled toilet?'

Discrimination arising from disability – Equality Act 2010, s15

1.6 Whether the respondents treated the claimant unfavourably because of something arising in consequence of the claimant's disability by dismissing him. The claimant was allegedly dismissed for poor performance. In so far as his poor performance was caused by his inability to work more than 37.5 hours or work without breaks or without a proper monitor, or in so far as it was a cause for concern that he had time off for medical appointments, these were matters arising from his disability.

1.7 If so, whether the respondents can show that the treatment was a proportionate means of achieving a legitimate aim.

1.8 The respondents do not admit they knew the claimant was disabled. The issue is therefore whether the respondents can show they did not know and could not reasonably have been expected to know that the claimant had the relevant disability.

Failure to make reasonable adjustments – s20-s21 Equality Act 2010

1.9 Whether the claimant has been put at a substantial disadvantage in comparison with people who are not disabled by the application of a provision, criterion or practice or a physical feature of the premises or by failure to provide an auxiliary aid. As part of that:

1.10 What the relevant provision, criterion or practice or physical feature or auxiliary aid is. The claimant contends that it is (i) failure to provide a suitable desk monitor (ii) requiring the claimant to work more than 37.5 hours/week during the busy period (iii) not ensuring the claimant take periodic rest breaks.

1.11 Whether it has put the claimant at a substantial disadvantage compared with non-disabled people. The claimant contends that it did so because of his radiculopathy which made working at a desk for prolonged periods very painful.

1.12 If so, whether the respondents have taken such steps as is reasonable to avoid that disadvantage, ie by providing the monitor, requiring the claimant to work no more than 37.5 hours/week and ensuring he took regular rest breaks of 5 – 10 minutes every 45 minutes – 1 hour.

1.13 The respondents do not admit that they knew the claimant had the relevant disability and was likely to be placed at a disadvantage as a result. The issue therefore is

1.13.1 Whether the respondents knew the claimant had a disability and if not, whether they could reasonably be expected to know. If so

1.13.2 Whether the respondents knew that the claimant was likely to be placed at a disadvantage as a result and if not, whether they could reasonably be expected to know that.

Indirect disability discrimination under Equality Act 2010, s19

1.14 What is the discriminatory provision criterion or practice applied by the respondents? The claimant alleges this was sending emails to his home address late at night and early in the morning.

1.15 Was such a provision, criterion or practice applied to the claimant by the respondents?

1.16 Did the provision, criterion or practice put, or would it put, people who share the claimant's disability at a particular disadvantage when compared with people who do not share that disability?

1.17 Did the provision, criterion or practice put, or would it put, the claimant at that disadvantage?

1.18 If so, can the respondents show the provision, criterion or practice is a proportionate means of achieving a legitimate aim?

1.19 As part of this, was this conduct a breach of art 8 of the European Convention on Human Rights?

Victimisation – Equality Act 2010, s27

1.20 Whether the respondents dismissed the claimant because he did a protected act. The alleged protected acts were:

1.20.1 The claimant's complaint to Karry Tymieniecka on 6 and 8 April 2016 that adjustments had not been made.

1.20.2 The claimant's GP note of 8 April 2016 which stated his radiculopathy had been exacerbated.

1.20.3 The claimant's complaint on 22 March 2016 that adjustments had not been made.

Notice pay

1.21 Were the respondents entitled to terminate the claimant's contract early or is he owed more notice?

Remedy

1.22 Should the claimant succeed, he has indicated that he wishes for re-instatement or re-engagement, but he does not seek any financial compensation for injury to feelings or loss of earnings.

Procedure

2. We heard evidence from the claimant and his witness, Anthony Silcok. We also read the witness statement of Mark Edwards, who was unable to attend. For the respondents, we heard from Karen Musee, Penelope Strover, Kerry Fowler, Sarah Elsey, Jabir Alam, Karry Tymieniecka and Nina Singh. There was a trial bundle of 542 pages. Each side provided closing written submissions and the respondents provided a bundle of authorities.

3. Various adjustments were made during the course of the hearing at the claimant's request. He was told he could have breaks any time he wished, and his requests were adhered to. The claimant was permitted to give evidence from his own seat rather than from the witness table so that he had a longer table to enable him to turn pages of the files.

4. The respondents applied at the outset to ask supplementary questions in the light of various additions to the claimant's witness statement which had not been in the pleadings and to have other additions struck out entirely. The claimant voluntarily removed paragraph 31 from his witness statement. He confirmed the other matters were background information and not new causes of action. The tribunal reminded the respondents that a party is not required to have pleaded all matters put in evidence. Mr Dobson accepted this point and agreed to deal with new matters by way of supplementary questions or submission.

5. The claimant confirmed during the hearing that he had no independent claim for breach of contract and that his complaint about early termination was linked solely to his discrimination claim. During final submissions, he appeared to re-open this matter. After further discussion, he again confirmed he had no wrongful dismissal claim. He accepts his contract could be terminated on 12 weeks' notice and that he was a few weeks ago paid his notice pay in full.

Facts

6. The claimant was appointed to the post of Finance Manager (Band 8a) on a 6 month fixed term contract starting 22 February 2016, working as Finance Manager for the Cancer Division. This was to cover the departure of Ben Bourn (Finance Manager for Cancer Services) and pending the return of Caroline Ibbs (Finance Manager for Community Services) from

maternity leave. The interim recruitment was partly driven by Nicky Browne, the Director of Cancer Services and Charity Liaison, who was concerned that the Trust's Cancer Division was not getting sufficient support from the Finance department.

7. Mr Silcock, the claimant's witness, had worked with the claimant at Transport for London in 2007. Mr Silcock said the claimant was well regarded by colleagues and managers for his competence and that he was effective in supporting Mr Silcock in his area of Transport Policing. He believed the claimant had advanced skills on Excel. He did not recall if he had ever seen him use Pivot Tables.

8. The claimant also showed the tribunal a reference from the claimant's line manager at Health Education England, where he had worked as a Finance Business Partner on an interim contract from March – June 2014. He was scored above average for valuing diversity, work quality, punctuality and ability to develop in role and average/meets standard for communication skills, team-working, working under pressure and management ability.

9. At the material time, the claimant had the disabilities of radiculopathy, Crohn's disease, and anxiety / depression. The claimant did not mention these matters or refer to any health issues in his interview with Sarah Elsey and Karry Tymieniecka on 10 February 2016. Ms Elsey was interim Head of Financial Management Accounts and reported to Ms Tymieniecka, who was acting Assistant Director of Financial Operations.

10. The claimant completed an equal opportunities monitoring form attached to his job application of 26 January 2016. He stated there that he had a disability but he did not answer the question on the form as to what his main disability was.

11. Having been offered the position, the claimant was asked by 'Recruitment Support' to complete a health declaration. This is a standard process for everyone offered a position. Candidates are sent a 'job features' form which highlights aspects of the job that might need adjustments. For the claimant's position, they had ticked lone working, managing people, manual handling and display screen equipment user. The claimant selected the website option which indicated he had a health condition which might need adjustments.

12. As the claimant had selected that option, Recruitment Support emailed Occupational Health ('OH') asking them to carry out an assessment. In line with usual procedure, Suzanne O'Reilly carried out an initial telephone consultation on 16 February 2016. The tribunal has not heard from Ms O'Reilly in person as she has left the Trust and moved to Ireland. There is however a telephone note of her conversation with the claimant. Essentially the note recorded that the claimant told her he was under the care of a neurologist for radiculopathy which affects the nerves of the neck and lower back. He said that he was taking Pregablin and his symptoms were well controlled, but he had been advised to refrain from moving and

handling, and was seeing a physiotherapist. He said he had disclosed his condition because he was concerned at the possibility of manual handling referred to on the job features form. He said he would require a work station assessment on starting and did not require anything more than a standard functioning chair.

13. The claimant says this note is broadly accurate apart from the order of the discussion, except that he said he was taking Pregablin for anxiety as well as for his radiculopathy. He agrees he did not mention his depression and did not mention that he had Crohn's disease. Penelope Strover, the Occupational Health and Wellbeing Manager, confirmed to the tribunal that Pregablin can be used to treat anxiety and depression as well as neuropathic pain. On balance, we find that the claimant did not mention he was also taking Pregablin for anxiety/depression. Ms O'Reilly has not mentioned it in her note, as we would expect her to do. Moreover, the claimant did not suggest that he told anyone else at any stage that he had anxiety/depression. It therefore seems more likely that he did not want to draw attention to this matter.

14. Ms O'Reilly sent a report to Ms Tymieniecka on the same date. She said the claimant was fit for post with adjustments and that equality legislation may apply. The claimant had provided his consent to forward the following details:

> 'Mr Perinparaja has a chronic neurological condition which is currently well controlled. He is under the care of a specialist. He will require time off work to attend any appointments with the specialist in relation to this which will be on an infrequent basis and will also require time off to attend his physiotherapy appointments which will be about every three weeks.
>
> I recommend that he has a workstation assessment on starting – I have contacted the Health and Safety Adviser to request that this is carried out within his first week of employment. He should refrain from participating in any moving and handling tasks beyond his current capability.'

She would not have sent her own notes of the telephone call.

15. Ms O'Reilly then sent an email to Kerry Fowler asking her to carry out a workstation assessment. She did not provide any details of the claimant's condition. Ms Fowler was a Health and Safety and Back Care Adviser. She would carry out about 3 workstation assessments each week. She would go through a standard set of checks of the chair, keyboard, monitor etc. The important point she would always check was that the top of the monitor screen was at eye level. We accept this. In our experience, these are the central routine checks which are carried out in a workstation assessment. It was not Ms Fowler's role to check the measures she recommended were carried out. That became the line manager's responsibility.

16. Ms Fowler carried out the assessment on 3 March 2016. She made no notes at the time, because she immediately reported the outcome to Ms Elsey. The claimant showed Ms Fowler a letter from his neurologist. She does not now remember the content and it is not in the bundle. She discussed with the claimant the location of his difficulties – she knew where C7 and L4-L5 were located.

17. Ms Fowler's recollection is that she tested the height of the monitor and it was at the correct height. She says that, had it not been, she would immediately have propped it up on some books as an interim measure, and she would have recommended that a monitor stand or adjustable monitor be provided. She says the claimant did not ask for an adjustable monitor. He simply stated a preference for a square screen, which he was used to, rather than the wide screens in the Finance department. She says she told the claimant there was a square monitor in the office which could be provided but he needed to check with IT whether the square screen was compatible. Ms Fowler told the tribunal that the height of the wide screen monitors was the same as that of the square monitors.

18. Ms Fowler also made the standard recommendation that the claimant take 5-10 minute breaks every 45 – 60 minutes away from the screen, and she recommended a footstool to support his posture and give him height. She asked whether the claimant required a specific chair, but he said he did not.

19. The claimant says he did ask for an adjustable monitor and that Ms Fowler said he would be provided with one within a week. He denies he asked for a square monitor at all. He adds that he had no need for a footstool.

20. It is agreed that the claimant did not mention his anxiety/depression or Crohn's disease to Ms Fowler.

21. Ms Fowler immediately went to speak to Ms Elsey regarding the claimant's assessment. She also wanted to discuss another assessment she had done for someone else on the same day, and a general issue regarding whether Finance staff should be using laptops as a second screen. For reasons of confidentiality, they discussed these matters in a meeting room away from the open plan office.

22. According to Ms Fowler and Ms Elsey, Ms Fowler simply recommended a footstool for the claimant and said that he would prefer to use a square screen monitor. Ms Elsey says she spoke to the claimant that Friday or the next Monday and told him square screen monitors were available but he needed to check compatibility with the IT department. The claimant denies this conversation. It is agreed that she provided the claimant with a footstool on 7 March. One had been available from an employee on maternity leave.

23. As she was only in an interim position, Ms Elsey did not have any budgetary authority and did not have authority to make decisions to order reasonable adjustments. She would take any request to Linda Green, the PA to the Chief Financial Officer, who had the requisitioning authority, and Ms Green would get authority from Ms Tymieniecka. Ms Elsey's general impression was that the Trust was relaxed about expenditure at the level of computer monitors and stands. For example, she had no difficulty getting Ms Green to authorise replacement of six sub-standard chairs.

24. On 4 March 2016, Ms Elsey asked the claimant to move to the desk that his predecessor had occupied, now that the latter had left. The claimant says he told her he was still awaiting the adjustable monitor and that she responded, 'Do you need an adjustable desk like Patrick Highland', which he took to be sarcastic. Ms Elsey denies there was any such conversation at all.

25. On 7 March 2016, the claimant moved over to Mr Bourn's desk. Ms Elsey gave him a footstool. According to the claimant, he reminded her about the monitor and Ms Elsey asked him if he needed an adaptation to his desk similar to that which a colleague, Tayo Adewole had. Ms Elsey denies there was any such discussion.

26. After the claimant had been dismissed and had raised issues of disability discrimination, Ms Elsey asked Ms Fowler whether she had done a written assessment on the claimant. Ms Fowler responded that she had not done so, but HR had asked the same question, so she had done one on the hoof, 'nothing that we didn't already discuss though'. She asked Ms Elsey to give her a ring. Ms Elsey replied that the claimant was 'trying to claim DDA after we dismissed him – which he appears to be in denial about'. Ms Fowler replied, 'Thought it might be the case, I remember you saying he was only fixed term anyway?? He seemed very strange from the get go. Why do people have to be such a pain in the a*** ?'

27. The assessment report was dated March 2016, but reading the content, it was not an attempt to pass itself off as written at the time, as it refers to subsequent events (a conversation with Sam Ball). When Ms Elsey saw it, she reminded Ms Fowler that a footstool had been recommended. Ms Fowler then rewrote her report adding a sentence to say a footrest should be provided.

28. We will make our fact finding regarding whether the claimant asked for a height adjustable monitor and the related conversations at the end of our fact findings.

Time off for physiotherapy / medical appointments

29. Ms Elsey was made aware prior to the start of the claimant's employment that he would require time off for physiotherapy appointments. That did not concern her. All staff were granted time off for medical appointments. In

the event, the only appointment of which she was aware was the claimant attending physiotherapy on his first day. Mr Alam also understood there was no issue with the claimant taking time off for medical appointments. The respondents allowed all staff to have such time. The claimant never mentioned any hospital appointments to him. On one occasion he told Mr Alam he was going to a GP appointment in the afternoon.

Corporate induction

30. The respondents' corporate induction policy in operation at the time of the claimant's recruitment said that all permanent staff and all staff on fixed term contracts for over 3 months are expected to attend the first induction event after joining the Trust, and certainly within 90 days of joining.

31. At that time, there were 12 corporate induction events per year. The normal process for booking a new starter onto a corporate induction event was as follows. The Recruitment Service would advise the recruiting manager when pre-employment checks (including OH checks and references) had been completed. The latter would agree a start date with the new employee and notify the Recrutiment Service. Recruitment Service would enter the date on the system. Every week, the Recruitment Service would run a booked start date report which was sent to HR Administration and Learning and Development. The report would not contain any information about an employee's disabilities. HR Administration and Learning and Development would then notify the employee of a date for attending the induction.

32. In this case, the claimant was sent a letter on 11 February 2016, telling him that once pre-employment checks were completed, he would be asked to agree a start date and he would then receive separate notification of his induction. The Recruitment Service was not told of the claimant's start date until 29 February 2016. Also, OH did not change the claimant's status on the system from 'with OH to discuss' to 'Fit with no restrictions' until 29 February 2016. When the claimant's start date was inputted on the Trac system on 29 February 2016, it triggered a standard letter to be sent to him that day saying a date would be reserved for him on the Trust induction. He was told he would receive details from the Learning and Development department. In the event, the claimant was never sent an invitation to a corporate induction event prior to his dismissal.

33. With reference to the claimant's comparators, Jabir Alam (who was to be the claimant's immediate line manager) started employment on 25 January 2016 and attended a corporate induction on 1 February 2016. He was on the booked start date on 25 January 2016 which was sent to Learning and Development. Ciara Mowat, who worked in a different team to the claimant, started employment on 25 October 2015 and attended the corporate induction on 2 November 2015.

34. The corporate induction covered matters such as information about the Trust, information about internal audit controls and risk assessments, fire

procedures and safeguarding. The matters covered did not have any impact on the claimant's day-to-day job in the Finance Department.

35. The claimant did not chase up his attendance on a corporate induction.

The claimant's duties

36. The claimant's main duties involved supervising and training his team of three: Mohammed Hussain, Anna Kogat and Imran Patel, his assistant. The objective was to provide high-level financial advice to the Division. The focus of the role was to provide financial information and support to Directors to assist them monitoring financial performance of their Division. Tasks involved writing various reports or sections of reports, eg the finance section in the divisional monthly Performance Review Group report, plus the narrative for the monthly clinical division reports, ie the smaller units within the Division. He had to check whether the units and Division were over or under achieving. He had to provide support to the Director and various managers in various meetings. He had to represent the respondents at certain external meetings and take financial information along.

37. Mr Alam invited the claimant to a meeting on 2 March 2016 to go through the divisional business planning template. In the issues, this is referred to as 'Business Planning training'. Mr Alam sent an email stating 'Hi Barry – I may start work on this in an earlier gap but was keen to block out some dedicated time in case I get dragged into something else!' The claimant says the meeting was cancelled and that his notes on the email invite were his own notes when he studied the matter on his own. Mr Alam says the meeting is in his outlook diary and no other meetings are recorded that day. He has no memory of cancelling the meeting. On balance, we find the meeting did go ahead and the claimant must have misremembered. We say this because the tone of the email setting up the meeting is positive and friendly, and Mr Alam had no conflicting meetings. We cannot see why Mr Alam would therefore have cancelled the meeting. Indeed it would not be in his interests not to show the claimant how to do the job as it would cause him more work.

38. On Friday 4 March 2016 at 3.20 pm, the claimant was sent a calendar invite to a Business Planning meeting for Cancer Services to take place at 9 am on Monday 7 March 2016. The meeting, which was attended by the respondents' CEO, was scheduled to last one hour. The claimant accepted the invitation on his computer at 9.28 am and arrived 40 minutes late. The claimant told the tribunal he had not noticed the email prior to leaving the office at 5 pm on the Friday because his uncle's funeral was over the week-end.

39. All Finance Managers had to attend a monthly Income and Expenditure Review meeting on work day 7 in each month, where they would come with a monthly income report prepared on the Trust Division which they looked after. The claimant had to bring the monthly income report for

Cancer Services and for NHS income. The claimant attended the 9 March 2016 meeting without a monthly report for Cancer Services or NHS income. Ms Elsey was frustrated because she had to prepare a report for the Regulator based on the claimant's reports and this might mean she would have to work over a weekend. Mr Alam had to work with the claimant until 7.30 pm that evening to complete the report, cancelling plans he had made with his wife.

40. On 7 March 2016, Ms Elsey sent an email to Ayodeji Johnson, Namrata Nambiar and the claimant at 12.51 regarding 'third iteration files'. The first two were emailed on their work emails. The claimant was emailed to his home email ie Hotmail. Mr Johnson answered pressing 'reply all'. The claimant therefore received another email at home. It arrived at 22.13. On 8 March 2016, Ms Elsey sent an email to the claimant at his home address reminding him to attend the I&E month end review meeting the next day. This email arrived at 2 am at the claimant's home email address. The claimant was already sitting awake and worrying as a result of the 10 pm email, and this caused him further sleeplessness.

41. Ms Elsey says she would not have been sending any work emails at 2 am. Indeed, she does not normally work beyond 5.30 pm except at peak times, and on that occasion, she was only working in the morning. She therefore assumes the emails were held up by the respondents' firewall because they were addressed to a Hotmail account. Regarding the use of the claimant's home email address, she says that this must have auto-filled when she typed his initial, since she had relatively recently been corresponding with the claimant at home regarding his recruitment. The claimant does not accept this explanation because he points out that on 10 March 2016, Ms Elsey had correctly emailed him on his work email, yet the next morning on the same subject, she had used his home email. The claimant takes the view that she deliberately emailed him to his home in the middle of the night.

<u>15 and 18 March meetings</u>

42. The claimant had fortnightly 1 to 1 meetings with Ms Elsey and Mr Alam. Ms Elsey sat in because Mr Alam was himself new to his job. At the 1 to 1 on 15 March 2016, Mr Alam raised various mistakes which the claimant had made. This included the claimant's response to a request made by Ms Browne for the actual cost which the Institute of Cancer Research would charge for three 'programmed activities' by a particular Professor. The claimant sent Ms Browne an estimate which he had made, averaging usual consultant costs. Mr Alam had specifically told the claimant not to send an estimate. Ms Browne was furious that she had been sent an estimate despite her specific request for the actual cost. She responded by email dated 4 March 2016 asking for the actual cost. On 8 March 2016, Mr Alam had to chase the claimant for an update.

43. Following the 1 to 1 on 15 March 2016, further issues arose. On 8 March 2016, Mr Hussain had emailed the claimant asking for leave from 21 – 24

March and requesting confirmation once it was approved. On 11 March 2016, Mr Hussain sent the claimant a link to the excel file which records leave and asked him to update it there. On 16 March 2016, Mr Hussain emailed again, 'I know you have verbally approved this, please can you confirmation this by email and update the MACC leave file'. Mr Alam was copied in on these emails and he was concerned that the file had still not been updated, even though it is only a few minutes work to do so.

44. Initially, the claimant told the tribunal that he felt it was nitpicking for Mr Alam to raise the issue at a time when they were short-staffed, given that he had given verbal approval anyway. Later he told the tribunal that he could not approve the leave while Mr Patel was on leave, because he needed to check availability. When it was put to him that he had given verbal permission, he then said he had only given a positive indication that it would probably be OK.

45. On 17 March 2016, the claimant did not arrive on time at the CIP (Cost Improvement Programme) meeting. He arrived 40 minutes late after Mr Alam emailed Ms Elsey to 'ask Barry to turn up'. The claimant says that he was not invited to the meeting and he had not seen the pre-meeting agenda circulated by Ms Browne because her email had not been sent until 19.28 the previous day, after he had already gone home. Mr Alam's view was that the claimant knew about the meeting because it was fortnightly and the claimant had attended the meeting two weeks previously. Further, Mr Alam had discussed the meeting with the claimant the previous day when he asked him to bring printed copies of the tracker to the meeting.

46. Later that day, Ms Browne emailed Ms Tymieniecka to say she felt she was doing more of a Finance Manager job than a Director role, which she did not find acceptable. She was impressed with how quickly Mr Alam was catching on, but she was not impressed with the claimant. She said he was late to every single meeting and seemed to feel he had to say something which did him no favours and lost him credibility with all. She also felt he tried to undermine Mr Alam which was not healthy.

47. There is no evidence Ms Browne knew of any of the claimant's disability issues at all.

48. Other issues also arose, ie the claimant had failed to action a query from the Divisional Nurse Director, which resulted in a nurse not being paid; the claimant had failed to clear non Purchase Order workflow; there were ongoing delays in the delivery of the month 11 divisional report for Cancer Services; and the claimant had arrived late to the Month End timetable working group meeting on 17 March 2016. A computer printout shows the claimant was invited to the meeting at 17.16 on 15 March 2016 and had accepted the invitation to the meeting at 17.01 on 16 March 2016. In addition, members of the claimant's team had expressed informal concerns about the claimant's performance and about his apparent inability properly to use Excel.

49. As a result of these issues, Ms Elsey and Mr Alam decided to hold a further 1 to 1 on 18 March 2016 at the time already fixed for a catch-up meeting between the claimant and Mr Alam. The purpose of the meeting was to talk through their concerns about the claimant's performance.

50. At the 18 March 2016 meeting, Mr Alam and Ms Elsey raised with the claimant his late attendance at the three meetings (Business Planning on 7 March, Month End timetable on 17 March and CIP on 17 March 2016). They said they felt he should set a better example to more junior members of his team. The claimant said he did not feel the meetings had been clearly communicated to him. It was therefore decided that Mr Alam would share his calendar with the claimant, who would ensure he had all the meetings he was supposed to attend for the next two months in his own diary.

51. Mr Alam and Ms Elsey also raised Ms Browne's complaint re inappropriate comments in meetings. The action points were that the claimant should ensure he was well-prepared for meetings and Mr Alam would attend in support when senior managers were in attendance until such time as the claimant was able to conduct meetings alone.

52. The claimant was also told to clear emails on a daily basis, as his late response to an email had resulted in a member of staff not being paid. Further, the claimant was told he must clear Non PO workflow.

53. There was a discussion about working hours during the meeting. The claimant's contracted hours were 37.5/week. Ms Elsey said they did not expect senior managers to work excessive hours but at this time of year, they did need to work extra to complete work to deadlines. She said core hours were 10-4 each day, but she expected the claimant to work from 9 am each day. The claimant says Ms Elsey originally asked him to come in at 8 or 8.30 am but he said he could not manage that because of his radiculopathy and they agreed 9 am. He says Mr Alam said that he himself came in at 8 am. Ms Elsey and Mr Alam deny they ever asked the claimant to come in at 8 or 8.30 am and they deny Mr Alam came in at those times. Indeed Ms Elsey said she only came in at 8 am because it suited her as she lived in Northampton. She left early as a result. She said only two or three people were in when she arrived. On balance, we find that Ms Elsey did not ask the claimant to come in before 9 am. There is no hint of that in her note. It was unusual for anyone to come in that early, Mr Alam did not do so, and Ms Elsey did so only for personal reasons.

54. Ms Elsey asked the claimant whether he needed any additional support during his first few weeks. He asked for some Accelerator training, which was not required for his role, and for a time management course. He accepts he did not say anything about an adjustable monitor.

55. At one point, the claimant said he was not sleeping. Ms Elsey asked whether he was stressed because of the work. He said no. He did not elaborate any further. He did not say his hours were excessive.

56. At the end of the meeting, Ms Elsey told the claimant they would be monitoring and supporting him over the next two weeks to ensure he was meeting the requirements of the role. After the meeting, Ms Elsey sent the claimant a note of the key discussion and action points. Her note did not refer to his statement that he had not been sleeping.

57. Ms Elsey did not at the meeting criticise the claimant for not covering the responsibilities of team members while they were off sick. She did not expect him to do so. As their line manager, she would expect him to share out the work of absent junior members of the team across the team.

58. The claimant told the tribunal he feels two 1 to 1s in a week constituted excessive monitoring and that there was deceit involved in the meeting of 18 March 2016 in that it was scheduled at the last minute and initially called a 'catch-up'. He also feels he was criticised excessively harshly, having been thrown into a busy job with his team not always present. Imran Patel was absent for 10 days from about 7-18 March 2016 and. Anna Kogat was away for 8 days from about 21-29 March 2016.

<u>22 March 2016</u>

59. On 22 March 2016, the claimant had planned to attend a monthly drugs meeting at the main site. The meeting was cancelled at the last minute. The claimant was experiencing increased pain from his radiculopathy. The claimant says he asked someone in the IT department if they could locate an adjustable monitor, and they said they would look into it. He says he spoke to the manager of a team of seven in the basement of the hospital. He was able to give no further detail. We cannot make any specific fact-finding on this visit, who the claimant spoke to, what he said and what he was asking for. The claimant had not previously mentioned this conversation in his grievance or pleadings. The respondents had no realistic opportunity of investigating this allegation. They would have had to go to the main IT department and ask if anyone remembered an impromptu conversation with someone about a monitor almost a year previously. Indeed we wonder how clearly the claimant could remember at this stage.

60. The claimant also went to visit OH. Ms O'Reilly had told him to visit OH if he had any problems. On finding no one at the front desk, he entered a private office where only one person was present. The individual told him that OH was not a treatment centre. The claimant says he was not offered an appointment. The respondents say that is unlikely. However, they were unable to call any witness to deal with the matter because the claimant had not previously mentioned it in his grievance or in his tribunal pleadings and he has still not identified the individual he spoke to. We find the claimant did go in and speak to someone, doubtless an administrator. He

was able to describe the lay-out of the room. We accept he was told it was not a treatment centre but we find it hard to imagine he was not also told he would need an appointment, even if the individual concerned did not want to deal with that at that particular moment. We do not accept the claimant was likely to have identified himself in any way at that stage and we feel confident that the individual did not pass on any information regarding his visit back to management. The claimant did not try to make an appointment subsequently.

61. The claimant returned to the Finance Office. He says that within 5 minutes of sitting down, Mr Alam said to him out of the blue, 'Did you have to take a call in the disabled toilet?' The claimant took 'take a call' to mean 'pay a visit' as opposed to 'make a telephone call'. The claimant says Lee Clarke was standing next to him when Mr Alam made the comment and he smiled at Mr Alam, which made the claimant feel humiliated. The claimant says he took this to be a reference to his Crohn's disease, although when pressed, he accepted he did not know whether Mr Alam knew he had Crohn's.

62. Mr Alam denies he made this comment or anything similar. He says there were two toilets for men, which attracted a certain amount of banter. The main toilet was extremely small and was referred to as the 'piss bucket'. The other toilet was adapted for people with physical disabilities and known as the disabled toilet. He says he himself suffers from ulcerative colitis and would therefore not have made such a comment.

63. We find on the balance of probabilities that Mr Alam did not make this remark. He was never at any stage aware that the claimant had Crohn's. The claimant had never told anyone at the respondents, not even OH, that he had Crohn's. If the claimant had been seen going in and out of the 'disabled toilet', that would not have been a matter of remark, because everyone used that as a second available and more spacious toilet. We also feel that Mr Alam, having ulcerative colitis himself, would be most unlikely to make that kind of remark.

Ongoing issues

64. The claimant's contracted hours were 37.5/week. He was at this busy time, getting in at 9 am and sometimes leaving at 6 pm or later. Very approximately, we would estimate he was working an additional 5 – 7 hours/week on the premises. He also spent time on his laptop at home, although this was unknown to the respondents.

65. The claimant was ill over Easter week-end. When he arrived at work on 29 March 2016, he told Ms Elsey he had booked a GP appointment that morning as he had been rushing frequently to the toilet over Easter. He did not tell her he had Crohn's. On 31 March 2016, the claimant went for his physiotherapy appointment. He was told that his condition was being exacerbated by working long hours and not taking regular breaks at his desk.

66. On 1 April 2016, the claimant attended a 1 to 1 with Ms Elsey and Mr Alam. They discussed the actions from the previous 1 to 1. The claimant said these had been done, but Mr Alam subsequently discovered most of them had not even been started. He therefore sent an email on 1 April 2016 with a list of tasks and the deadlines. One of the items stated, 'NHS Income – if the Perfsum detail is available on day 5, please can we try to complete a day early to allow for checking?' The claimant complains that it was oppressive to bring forward the deadline for completing the monthly NHS Income report. Mr Alam's intention was that he could offer support by checking the quality of the draft the day before the meeting when it was due to be presented, given that the claimant had not presented a good report the previous month.

67. Before going home at about 8 pm, the claimant went to see Ms Tymieniecka. He asked to work from home the next morning because of the drilling outside the building. Ms Tymieniecka agreed. The claimant said there had been no reasonable adjustments made to his workplace. Ms Tymieniecka knew the claimant had been given a footstool and that he had asked for a square monitor, because at the time Ms Elsey had asked her if it was OK to move screens around and she had said yes. She therefore assumed the claimant meant this had not happened. She asked whether he had discussed his adjustments with Ms Elsey or Mr Alam. The claimant did not answer either way. He did not say what adjustments he was referring to and, because she thought he was referring back to what had previously been identified, Ms Tymieniecka did not ask. The claimant said in cross-examination that he specifically referred to an adjustable monitor to Ms Tymieniecka. We do not think that he did. He is not so precise in his witness statement. There were a number of reasonable adjustments which he says he had on his mind at this point and this conversation was brief and focused on working at home because of the drilling. We had the impression that Ms Tymieniecka did not want to get personally involved in the details. She wanted to refer back to Ms Elsey in the first instance.

68. Ms Tymieniecka did not have a long conversation with the claimant. It was late. She fired off an email to Ms Elsey before she left saying the claimant would not be in the next morning. She decided she would speak to her verbally about the adjustments. On 7 April 2016, Ms Tymieniecka was in and out the office with meetings. Then the matter became superseded by events.

69. By 7 April 2016, Mr Alam had serious concerns about the claimant's performance. The claimant's team had been orally raising concerns about the claimant with Mr Alam. On 7 April 2016, Mr Alam sent Ms Kogut, Mr Hussain and Mr Patel an email asking them to send him a few bullet points of the issues they were facing with the claimant. The team each emailed back their concerns the same day. In essence, they felt micro-managed and not trusted by the claimant; they felt he did not listen and went off at tangents; that he showed a lack of understanding of basic matters such as

correct use of pivot tables on Excel, and they found they had to constantly ask Mr Alam or people in other teams for help.

70. Mr Alam felt the claimant did not have the skills and competencies for the job and that it was using up too much time to deal with the problems he was causing. As well as the examples given above, there was also other difficulties. For example, in relation to Estabpay business planning, there was an occasion when the claimant had copied and pasted formulas instead of values. This had led to the wrong calculations and incorrect figures being passed on to Ms Elsey. On another occasion, in the NHS income report, the claimant had put the figure for actual patients discharged after bone marrow transplants into work in progress. Mr Alam told the claimant he had completed the spreadsheet in the wrong way, but the claimant disregarded him. Again this led to incorrect data being provided to Ms Elsey. Ms Elsey asked Mr Alam to look at it. Mr Alam again told the claimant he had done it the wrong way, but the claimant ignored him.

71. It came to a head on 6 April 2016 on a simple task involving the vacancy recruitment forms. Ms Browne had asked if there was budget to hire one whole time equivalent post. The claimant had responded with a confusing and incorrect statement, saying there was funding for 0.56 full time equivalent, instead of declining. Ms Browne queried the reply. Mr Alam had to stop the claimant sending her an email saying she was wrong. The claimant then got it into his head that Mr Alam and Ms Browne had both tampered with the excel spreadsheet, which they had not. He insisted Mr Alam open and closed the file. When Mr Alam did so, the same result showed up. Mr Alam then went back and found the claimant's last saved version, which was exactly the same as that shown to Ms Browne. The claimant then started bringing Ms Kogat into the conversation and it all became very confused. On his way out the office that evening, Mr Alam spoke to Ms Elsey. He said 'This is beyond belief. It is more work dealing with the claimant on simple basic tasks, let alone complex ones. We need to have a conversation tomorrow on how to go forward with this.'

72. Ms Elsey was also very concerned about the claimant's conduct and performance. She had her own experience of the level of the claimant's Excel skills. She was worried that he was not reconciling to the ledger correctly; putting in random figures which he labelled as holding figures, and not rolling forward properly to the next month. She felt matters particularly went downhill after the complaint from Ms Browne on 18 March 2016. She said the department was preparing budgets for 2016/7; they had a number of spreadsheets and the claimant had deleted quite a lot of information on one of them. Fortunately she had a previous version of the Excel sheet which she could rebuild. It took Mr Alam and herself a day and a half to rebuild it. She felt the level of intervention they had to do meant they would be better off having the claimant's post vacant.

73. The claimant worked at home on the morning of 7 April 2016. He suffered a severe anxiety attack at lunchtime, but he went in to work in the

afternoon. At some point early in the morning of Friday 8 April 2016, Ms Elsey and Mr Alam came to see Ms Tymieniecka and told her they felt the claimant should be dismissed. Ms Tymieniecka pointed out they would have the rest of the fixed-term period without anyone. Ms Elsey and Mr Alam felt that the claimant was more of a hindrance than a help. Ms Tymieniecka was not surprised because she had been discussing the claimant's progress with Ms Elsey at their own weekly 1 to 1s. She had also heard of performance concerns from Ms Browne and Lewis Butler. She had spoken to Ms Browne after the latter sent the 17 March 2016 email. Ms Browne had asked that the claimant did not attend meetings with her staff and that he perform more of a back office role because he was not competent in those meetings and was damaging the credibility of the department.

74. Ms Elsey and Mr Alam then asked the claimant to meet at 4 pm. The claimant wanted to defer the meeting until the next Tuesday, but gave no particular reason. He then said he was waiting for a GP call. Ms Elsey arranged the meeting for noon instead and said the claimant could bring his mobile and take the call if it came in. They then went into a meeting room where the claimant was very agitated. Ms Elsey told him she was terminating his employment. The claimant then ran from the room saying he could not do this now.

75. Ms Elsey went to speak to Ms Tymieniecka and then to HR to tell them what had happened. She then sent the claimant an email at 13.48 on 8 April 2016 confirming the termination of his employment with immediate effect. This was confirmed in a letter which stated that the claimant was not required to work notice and would be paid one month in lieu. This was in fact contractually incorrect as the claimant was entitled to three months. This was rectified at a later date.

76. Meanwhile, the claimant had gone to see Ms Tymieniecka. He said he had a serious medical issue and he had spoken to his GP, and needed to go to the hospital Emergency Room immediately. Ms Tymieniecka asked if the claimant was OK. During the conversation, she tried to ensure the claimant understood his contract had been terminated and why, but he would not engage in conversation on the subject. The claimant then backed out of Ms Tymieniecka's office and ran out the building. Ms Tymieniecka tried to follow to ensure he was OK but he ran away. There was no discussion about lack of adjustments.

<u>Post termination investigation</u>

77. On 11 April 2016, the claimant emailed Ms Tymieniecka a fit note under cover of an email which said it followed on from his need to seek immediate emergency treatment, which he communicated to her on 8 April 2016, and his query to her on 6 April 2016 as to why the respondents had not activated his workstation assessment. The fit note, which was dated 8 April 2016, said the claimant may be fit for work with 'Different monitor at

work to avoid exacerbating radiculopathy'. Ms Tymieniecka found this confusing because the claimant's employment had already been brought to an end.

78. On 12 April 2016, Cllr Lomas contacted the respondents on the claimant's behalf to raise concerns about bullying and harassment. Nina Singh, Director of Workforce, was asked by the Chief Executive to investigate. At that point, Ms Singh was unaware that the claimant was no longer employed. Ms Singh met the claimant on 18 April 2016 to discuss his allegations. The claimant provided a written summary of events, which Ms Singh annotated. He noted that 'A workplace adaptation was agreed to provide a suitable Monitor to prevent exacerbating medical condition or pain'. Ms Singh told us that the claimant referred only to a square monitor and not to a height adjustable monitor. She says she spoke to him for half an hour, attempting to seek clarification as to how a square monitor would assist his condition, but she received no satisfactory explanation.

79. Ms Singh asked Lorna Adair to investigate. Ms Singh then met with the claimant, Cllr Lomas and Ms Tymieniecka on 24 June 2016 to discuss the findings. In her outcome letter of 6 July 2016, Ms Singh writes, 'At our meeting on 24 June, you stated the issue was not about the shape of the monitor but about having a monitor where the height could be adjusted. This was a surprise and was the first time I understand the issue of height adjustment has been raised by you.'

80. Ms Singh went on to say that there was no evidence the claimant had raised the issue of the height adjustment of the monitor during his employment. The claimant had spoken to each of Ms Fowler, Ms Tymieniecka and Ms Elsey separately and they had all understood the issue was the shape of the monitor. Had the issue been communicated, a temporary adjustment of using reams of paper or books to heighten the monitor could have been put in place immediately. Indeed, the claimant could have made such adjustment himself.

81. We find that the claimant did not tell Ms Singh at their first meeting that he needed a height adjustable monitor. He only referred to a square monitor. It was not until the meeting on 24 June 2016 that he referred to a height adjustable monitor. We believe this is the case for several reasons. The note which the claimant originally gave Ms Singh just referred to 'a suitable monitor'. It did not refer to height adjustable. Had he referred to height adjustable, Ms Singh would have asked him about the obvious interim solution, using paper or books. There would have been no reason for her to have disguised what the claimant was saying. She had not been involved in the previous events and indeed she thought the claimant was still employed at that stage. Most significantly, she wrote in her 6 July 2016 letter that the claimant had only for the first time on 24 June 2016 raised the issue of a height adjustable monitor. We feel it would have been disingenuous of her to make this up at that point. She then went away and further investigated the issue of the height adjustable monitor.

Did the claimant ever ask for a height adjustable monitor?

82. We now return to the disputed issue regarding whether the claimant ever asked for a height adjustable monitor. We gave this a great deal of thought. Ms Fowler, Ms Elsey, Ms Tymieniecka and, as regards her first meeting, Ms Singh, all say that not only did the claimant not ask for a height adjustable monitor, he expressed a preference for a square monitor. On the other hand, the claimant insists he asked for a height adjustable monitor from the outset in his workstation assessment with Ms Fowler, again in conversations with Ms Elsey on 4 and 7 March 2016, on 6 April 2016 to Ms Tymieniecka and at their first meeting, to Ms Singh. We are unhappy about the fact that Ms Fowler did not complete a written workstation assessment at the time. Even if she was able to report her findings immediately to the line manager, we find that sloppy practice. It means we cannot rely on her later report as a reliable contemporaneous record. Further, we do not like the disrespectful way in which she referred to the claimant in her email after his dismissal once it was indicated to her that he was alleging disability discrimination. However, such attitude and sloppy practice do not in themselves mean she was not telling the truth regarding her recollection of the workstation assessment. There is a certain logic to her account. We accept she checked the monitor was the correct height for the claimant. In our experience, that is an absolutely standard workstation assessment check. We accept that, if she had found it the wrong height, she would have raised the monitor with paper or books, either as an interim measure or as (an admittedly shoddy) permanent solution. We cannot imagine why she would not have taken such a simple, quick and cost free measure. Indeed, we would have expected the claimant to take such action himself at some stage, but he never did.

83. We also cannot understand why Ms Fowler would have failed to recommend a height adjustable arm or monitor if that were needed, or why Ms Elsey would have told her not to do so. It would not have been a great expense. Ms Elsey had obtained authorisation for six new chairs with no difficulty. It would have been small beer for the Trust. A suitable monitor may well already have been available, but if it needed to be purchased, it would have been useful for others once the claimant's fixed-term came to an end. Ms Elsey was not responsible for the budget anyway, but she understood the Trust would have been relaxed about that kind of expenditure. For the same reason, we do not see why Ms Tymieniecka would have objected if the matter had gone to her. Indeed Ms Elsey and Ms Tymieniecka had offered the claimant the post knowing he had a neuropathic disability requiring physiotherapy and a workstation assessment. They must have envisaged the possibility of that level of adjustment.

84. We also note that the claimant had told Ms O'Reilly that his radiculopathy was well-controlled, and the reason he had disclosed his condition was because of the reference to 'manual handling' on the job features form. He did say he would need a workstation assessment on starting, but he made

no specific reference to a height adjustable monitor and he said he required nothing more than a standard functioning chair. We further note that the claimant, by his own admission, did not raise the issue of a height adjustable monitor at the 1 to 1 on 18 March 2016. He says he had given up by then, but this would have been the most obvious time to mention it, when his performance was patently under scrutiny and when he says his health was deteriorating. We cannot draw any conclusions from his visit to IT on 22 March 2016 for reasons we have already stated. Accepting his word that he did visit, we cannot make any findings as to what exactly he was asking for. It may still have been the square monitor.

85. Finally we note Ms Singh's evidence that the claimant talked only of a square monitor, and not a height adjustable monitor, when they first met. We have explained why we accept this evidence, and further why we do not accept the claimant mentioned a height adjustable monitor to Ms Tymieniecka on 6 April 2016. We have no basis for reaching an independent conclusion on whether the claimant spoke to Ms Elsey regarding a height adjustable monitor on 4 and 7 March 2016 which she denies, but having regard to all the other factors we have listed above, we think it unlikely.

86. For all these reasons and weighing everything up, we find that the claimant did not tell the respondents he wanted a height adjustable monitor at any time prior to the meeting attended with Cllr Lomas on 24 June 2016.

87. We add that, although this was not the basis for our finding, the claimant did not in the tribunal give convincing evidence regarding why he needed a height adjustable monitor. He repeatedly stated it was because of his radiculopathy and because of the effect of using a mouse, but he did not explain in any greater detail. The claimant said the monitor on the 'hot desk' he occupied until after Mr Bourn left was the right height but that the permanent desk he moved to on 4 March 2016 was lower and thus the monitor was too low. However, we accept the respondents' evidence that the desks were the same height and in any event, the claimant's work station assessment was done on the permanent desk and, as we have said, the height of the monitor was checked and found satisfactory. When pressed on why he had not adopted the solution of propping up the monitor with paper, the claimant eventually said that he needed to be able to adjust the monitor from time to time as he looked at different things. The respondents asked why he could not simply scroll the page up or down. The claimant was unable to answer this. We accept there can be a good reason why individuals might need height adjustable monitors as a result of disabilities such as radiculopathy. It is just that in the claimant's case, it was extremely difficult to get any explanation at all, and the explanation which was eventually elicited was still not clear.

Notice period

88. The claimant's statement of terms and conditions contained a summary statement referring to section 21 for his notice period. Clause 21 stated that the employment could be terminated with 12 weeks' notice for Band 8 employees. Although the claimant was initially only paid 4 weeks' in lieu, subsequent to these proceedings, he was paid the balance of the 12 weeks. He accepts that he has now been paid the correct notice under his contract.

Training and equality

89. The respondents' annual equality report for January 2016 reported staff survey findings. These included that staff with disabilities experienced more harassment and bullying from other staff than did staff without disabilities. There was also a decrease from the previous year in the proportion of disabled staff believing the Trust provided equal opportunities for career progression and promotion from 88% to 77%. The respondents plan to increase awareness training and set up a disability forum as a result of staff feedback.

90. The respondents provide on-line equality and diversity training every three years, which has an 89% compliance level. Ms Tymieniecka has had such training, although she did not appear to remember it in the tribunal.

Law

Direct discrimination

91. Under s13(1) of the Equality Act 2010 direct discrimination takes place where, because of disability, a person treats the claimant less favourably than that person treats or would treat others. Under s23(1), when a comparison is made, there must be no material difference between the circumstances relating to each case. Under s23(2), where the protected characteristic is disability, the circumstances relating to a case include a person's abilities.

Harassment

92. Under s26, EqA 2010, a person harasses the claimant if he or she engages in unwanted conduct related to a relevant protected characteristic, and the conduct has the purpose or effect of (i) violating the claimant's dignity, or (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. In deciding whether conduct has such an effect, each of the following must be taken into account: (a) the claimant's perception; (b) the other circumstances of the case; and (c) whether it is reasonable for the conduct to have that effect.

93. In Richmond Pharmacology Ltd v Dhaliwal [2009] IRLR 336, EAT, Mr Justice Underhill (as he then was) gave this guidance:

> 'an employer should not be held liable merely because his conduct has had the effect of producing a proscribed consequence. It should be reasonable that that consequence has occurred. The claimant must have felt, or perceived, her dignity to have been violated or an adverse environment to have been created, but the tribunal is required to consider whether, if the claimant has experienced those feelings or perceptions, it was reasonable for her to do so……..Not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers and tribunals are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other discriminatory grounds) it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase.'

Discrimination arising from disability

94. Section 15 of the Equality Act 2010 prohibits discrimination arising from disability. This occurs if the respondents treated the claimant unfavourably because of something arising in consequence of the claimant's disability. The respondents have a defence if they can show such treatment was a proportionate means of achieving a legitimate aim.

95. The respondents will not be liable under section 15 if they show that they did not know, and could not reasonably have been expected to know, that the claimant had the disability.

Reasonable adjustments

96. The duty to make reasonable adjustments is set out in sections 20 – 21 of the Equality Act 2010 and in Schedule 8. Where a provision, criterion or practice of the employer puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, the employer is required to take such steps as it is reasonable to have to take to avoid the disadvantage.

97. Under Schedule 8, paragraph 20(1), the employer is not subject to a duty to make reasonable adjustments if the employer does not know, and could not reasonably be expected to know that the disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement.

Indirect discrimination

98. Under s19 of the Equality Act 2010, indirect discrimination occurs if the respondents applied to the claimant a provision, criterion or practice which (a) the respondents applied or would have applied to those with whom the claimant does not share his protected characteristic, (b) put, or would have put those sharing the claimant's protected characteristic at a particular disadvantage when compared with those not sharing the claimant's

protected characteristic, (c) put, or would have put the claimant at that disadvantage, and (d) the respondents cannot show it to be a proportionate means of achieving a legitimate aim.

Victimisation

99. Under s27, EqA 2010, it is victimisation if the respondents subjected the claimant to a detriment because he had done a protected act or because they believed that he had done or may do a protected act. A 'protected act' includes making an allegation (whether or not express) that someone has contravened the Equality Act.

100. Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

Burden of proof under Equality Act 2010

101. Under s136, if there are facts from which a tribunal could decide, in the absence of any other explanation, that a person has contravened the provision concerned, the tribunal must hold that the contravention occurred, unless that person can show that he or she did not contravene the provision.

102. Guidelines on the burden of proof were set out by the Court of Appeal in Igen Ltd v Wong [2005] EWCA Civ 142; [2005] IRLR 258. Once the burden of proof has shifted, it is then for the respondents to prove that they did not commit the act of discrimination. To discharge that burden it is necessary for the respondents to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of the protected characteristic, since 'no discrimination whatsoever' is compatible with the Burden of Proof Directive. Since the facts necessary to prove an explanation would normally be in the possession of the respondents, a tribunal would normally expect cogent evidence to discharge that burden of proof.

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

104. The Court of Appeal in Madarassy, a case brought under the then Sex Discrimination Act 1975, states:

> 'The burden of proof does not shift to the employer simply on the claimant establishing a difference in status (eg sex) and a difference in treatment. Those bare facts only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal 'could conclude' that on the balance of probabilities, the respondent had committed an unlawful act of discrimination.

105. In relation to reasonable adjustments, once the duty has arisen and a potentially reasonable adjustment has been identified, the burden of proof shifts to the employer.

Article 8, Human Rights Act

106. The Equality Act 2010 must, so far as it is possible, be read and given effect in a way that is compatible with the European Convention on Human Rights. Article 8 is the right to respect for private and family life.

Conclusions

107. We now apply the law to the facts to reach our conclusions. For reasons of conciseness, we do not repeat every single fact which we have set out above and which we have taken into account. In reaching our conclusions, we have looked at each allegation separately and also considered the overall picture.

Direct disability discrimination

Failure to put the claimant on corporate induction

108. The claimant was not sent on the corporate induction during his employment, which lasted from 22 February 2016 until 8 April 2016 (48 days). His two comparators, who were not disabled, Mr Alam and Ms Mowat were both sent within one week. Ms Mowat worked in a different team. The respondents' corporate policy was to send employees, even fixed term employees, on the first available induction and in any event within 90 days. There were 12 inductions per year at the time the claimant started. We do not have the dates of each induction, but it is likely that the claimant missed the first available date, although he was still well within the 90-day period. The claimant did not chase up his attendance on an induction, so this is not a situation where we can draw conclusions from his requests being ignored. The system for booking employees onto induction was semi-automated. It was dealt with by Learning and Development who, as far as we are aware, did not even know the claimant had a disability, and who would have no reason to object if they did.

109. We do not find these facts sufficient to shift the burden of proof. This was an administrative system removed from those people the claimant has claimed discriminated against him during his employment. Those who dealt with booking the claimant on the induction did not know he had a disability. He was still within the 90-day period. The existence of two comparators, one of whom was in a different team, is not particularly revealing in these circumstances. We therefore do not uphold this claim.

Business planning training

110. We do not uphold this claim. We believe this meeting was not in fact cancelled. We gave reasons for this fact-finding above. Even if the meeting had been cancelled, we would see no evidence to shift the burden of proof that such cancellation was due to the claimant's disability as opposed to some pressing work matters at the time. We say this because only shortly before, Mr Alam had been so keen to fix the meeting, sending an email which said, 'Hi Barry – I may start work on this in an earlier gap but was keen to block out some dedicated time in case I get dragged into something else!'. Also there is evidence that, on another occasion, Mr Alam gave the claimant a great deal of time in terms of supervision and assistance. For example, he asked to see the draft finance report the day before it was due. He discussed numerous other matters.

Harassment

Excessive work monitoring (1.5.1)

111. The 15 March 2016 meeting was a scheduled 1 to 1. The additional meeting on 18 March 2016 was held because further performance issues had arisen. The problem was that the claimant was not performing to the level expected for his role, he was not attending meetings on time and a senior manager, Ms Browne, had complained. The two 1 to 1s in one week were not held for a reason related to the claimant's disability. There is insufficient evidence to shift the burden of proof on this. This harassment claim is therefore not upheld.

112. We would add that holding a meeting to discuss concerns with the claimant's performance was not intended to violate his dignity or create an intimidating, hostile, degrading or offensive environment for him. Nor, though it may have felt uncomfortable for him, could it reasonably be said to have that effect. There was nothing about the way the issues were raised which would bring it into those categories.

On 18 March, criticising the claimant for not attending meetings to which he was not invited (1.5.2)

113. We do not uphold this claim. There was no evidence that could suggest this criticism was related to the claimant's disability. The respondents did criticise the claimant for arriving late at the CIP meeting on 17 March 2016, the Month End timetable meeting on 17 March 2016 and the Business Planning meeting on 7 March 2016. However from the respondents' point of view, the claimant had been invited to each of those meetings. At 3.20 pm on Friday 4 March 2016, he was sent a calendar invitation to attend the Business Planning meeting on 7 March 2016. The CIP meeting on 17 March 2016 was fortnightly and the claimant had attended the previous meeting. Moreover, Mr Alam had the previous day asked the claimant to bring printed copies of the trakker to the meeting. With regard to the Month End timetable working group meeting on 17 March 2016, a computer printout shows the claimant was invited to the meeting at 17.16 on 15 March 2016 and accepted the invitation at 17.01 on 16 March 2016.

Moreover, Ms Browne had sent a forceful email to Ms Tymieniecka on 17 March 2016 complaining that the claimant was late to every single meeting. The matter obviously had to be raised with the claimant. There is no evidence to shift the burden of proof.

114. We would add that making the criticisms was not intended to violate the claimant's dignity or create an intimidating, hostile, degrading or offensive environment for him. Nor could it reasonably be said to have that effect. The matter was discussed in the 1 to 1 meeting and a constructive suggestion was made that Mr Alam share his calendar for the next two months and the claimant ensure he had all meetings noted.

On 18 March, criticising the claimant for not covering the responsibilities of team members while off sick

115. We do not uphold this claim. The claimant was not criticised for not covering the responsibilities of his team members while off sick. The criticisms were of the claimant's own responsibilities. Ms Elsey did not expect the claimant to undertake the work of his sick team members, though she did expect him to redistribute the work appropriately. There is no evidence that Ms Elsey would not have had the same expectations of any locum Manager in the claimant's position, regardless of whether he or she had a disability. Work needs to be organised and it was the busy end of year period. This criticism, such as it was, was not in any way related to the claimant's disability. There was no evidence to shift the burden of proof.

Being asked to carry out additional tasks outside the claimant's role with unrealistic deadlines. This refers to requiring the claimant to supply the monthly income report by 9 March 2016.

116. We do not uphold this claim. There was no evidence that this request was related to the claimant's disability. It was the claimant's role to supply the report. He was asked to provide the draft one day earlier. The reason was to give his line manager a chance to look the draft over before it was publicly presented because of problems with the previous month's report. There was no evidence to indicate Mr Alam would have behaved any differently with any other person in the claimant's position who did not have a disability.

Sending emails to the claimant's home address late at night and in the early hours of the morning.

117. We do not uphold this claim. There was no evidence that sending the emails to the claimant's home email address late at night and in the early hours of the morning was related to the claimant's disability. It was an accident. Ms Elsey had the claimant's home email on her computer because she had relatively recently been exchanging emails with him over his recruitment. When she typed in his name or initial, his home email address auto-filled. The fact that Ms Elsey did not make the same mistake

on other emails on neighbouring days does not mean it was deliberate on this occasion. We all have experience of the auto-fill control on Outlook. At different times it throws up different addresses for the same name if more than one address is stored. Moreover, we ourselves have experience of clicking the wrong address at different times through inattention. Regarding the timing of the emails, the email which arrived at 22.13 was not sent by Ms Elsey but as a result of Mr Johnson clicking, 'Reply all'. Regarding Ms Elsey's own email which arrived at 2 am, we accept Ms Elsey's evidence that she would never be sending work emails at that time or indeed out of work hours, and that on this particular occasion, she could only have sent it in the morning, because she did not work that afternoon. We find credible her speculation that the email was held up in the Trust firewall because it was to a gmail account. This is far more likely than the suggestion that she would deliberately sit up in the middle of the night sending emails at 2 am to the claimant at his home address to harass him. There was no other conduct by Ms Elsey entailing that kind of crude harassment.

Jabir Alam's saying to the claimant on 22 March 2016, 'Did you have to take a call in the disabled toilet?'

118. This claim is not upheld. Mr Alam did not make this comment.

Discrimination arising from disability

Knowledge

119. The respondents were unaware that the claimant had Crohn's disease or that he had anxiety/depression. He never told OH, Ms Elsey, Mr Alam, Ms Tymieniecka, Ms Fowler, Ms Singh or anyone else. Nor could they reasonably have been expected to know he had those disabilities. The only indicator the claimant refers to in relation to Crohn's was that he told Ms Elsey on 29 March 2016 that he had been rushing frequently to the toilet over Easter. One cannot expect Ms Elsey to have inferred from this that the claimant had Crohn's or any disability. The fact that the claimant told Ms Elsey on 18 March that he was not sleeping was not sufficient to alert her in any way to the fact that he had the disability of anxiety/depression. When she asked if it was because of stress at work, he said no. The claimant has not argued the respondents should have known from any other factors. The respondents were however aware that the claimant had radiculopathy.

120. The question therefore arises whether the claimant was dismissed because of something arising from his radiculopathy.

Dismissal

121. The claimant was dismissed for poor performance. We do not find that his poor performance was caused by his inability to work more than 37.5 hours or to work without breaks or to work without a proper monitor. The

respondents' concerns related to the claimant's general competence as Finance Manager including his proficiency with the Excel spreadsheets, which they regarded as a core skill. They were worried about the errors he was making, using wrong formulae, entering wrong data, deleting information in error, not accepting he had made mistakes, not arriving at meetings on time, making inappropriate comments at meetings and generally not having adequate knowledge. Examples given to us included putting figures for bone marrow patients actually discharged into the work in progress column; providing an estimate rather than the requested actual figure from the Institute of Cancer Research; having to rebuild a spreadsheet because of deleted information; and the final straw being a confused statement about budget on the vacancy recruitment form followed by a long and argumentative reaction regarding who had made the mistake. These matters did not arise from the claimant's inability to work more than 37.5 hours or to work without breaks or to work without a proper monitor. They were matters of competence, knowledge and attitude.

122. Further, we do not find the claimant was dismissed in any way because it was a cause for concern that he had time off for medical appointments. The claimant was never told he could not attend medical appointments or that the respondents were not happy for him to do so. It had been on his medical clearance from the outset that he would need to attend physiotherapy. There was no evidence that this was a matter which concerned the respondents. All staff were granted time off for physiotherapy and medical appointments if needed. Indeed, Ms Elsey and Mr Alam were scarcely aware that the claimant was attending hospital appointments.

123. As the reason for dismissal did not arise in consequence of the claimant's disability, this claim is not upheld.

Reasonable adjustments

Knowledge

124. As already stated, the respondents knew the claimant had radiculopathy, but they did not know – and could not be expected to know – that he had Crohn's Disease or anxiety/depression. We will address knowledge of disadvantage, in relation to each separate claimed adjustment.

Failure to provide a suitable desk monitor

125. We find that the respondents did not know the claimant would be likely to be placed at a disadvantage as a result of his radiculopathy without a height adjustable monitor, and they could not reasonably be expected to know this. The claimant never asked for a height adjustable monitor. The respondents made enquiries about his needs. He told Ms O'Reilly that his radiculopathy was well-controlled and that he needed nothing more than a standard functioning chair. He did not mention a height adjustable monitor

to Ms Fowler in the workstation assessment, which was the obvious opportunity. He simply expressed a preference for a square monitor because that is what he was used to. He still did not say he needed a height adjustable monitor during the 1 to 1 on 18 March 2016 when there was a discussion about his performance.

126. As the respondents did not know and could not reasonably be expected to know that the claimant was likely to be placed at a disadvantage without a height adjustable monitor, his claim for such a reasonable adjustment fails.

127. We add that we were not satisfied that the claimant was in fact placed at a disadvantage as a result of not having such a monitor. We accept that the claimant was in increased pain towards the end of his employment, but we do not have the evidence to attribute this to the lack of the monitor. It is equally consistent with working at a desk for a full week or sitting in a bad posture with a laptop at home or feeling stress because of criticisms of his performance.

128. We never had a medical report from his GP or physiotherapist which indicated how his radiculopathy was aggravated by not having a height adjustable monitor. The claimant's own evidence on this was difficult to elicit. He said his monitor was at the wrong height, yet he had never tried to place paper underneath to raise it. We are not saying this would have been a suitable long-term solution, but we are puzzled that the claimant did not attempt this as an interim measure if there really was a height problem. When pressed on why he did not attempt this solution, he eventually said he needed the monitor to be height adjustable because he was looking at spreadsheets one day and emails the next. He did not explain why he could not just scroll down the screen. We were struck by how unforthcoming the claimant was in his evidence to the tribunal by way of explanation of the nature of the alleged difficulty. When asked why he needed a height adjustable monitor, he kept saying that it was 'because of his radiculopathy' and difficulties with the mouse, without explaining what the height adjustment helped with. This also made us wonder whether height adjustability really was something that he needed.

Requiring the claimant to work more than 37.5 hours/week during the busy period

129. The respondents did expect the claimant to work some extra hours at this particular time of year. The claimant's hours contracted hours were 37.5. Ms Elsey told the claimant on 18 March 2016, that she expected him to work extra hours but not 'excessive' hours. The claimant was getting in at 9 am and sometimes leaving past 6 pm. Some of the claimant's extra hours were self-imposed because he was finding it difficult to cope with the job. Ms Elsey and Mr Alam were not aware the claimant was working at home, but Mr Alam knew the claimant was sometimes working late. We would estimate the claimant was therefore in effect required to work 5 – 7 hours extra/week.

130. Did the respondents know that the claimant was likely to be placed at a disadvantage by these additional hours as a result of his radiculopathy and if not, could they reasonably be expected to know? We do not find that the respondents knew or could reasonably be expected to know that the claimant would be placed at such a disadvantage by only 5 – 7 additional hours/week. If he was able to work 37.5 hours/week, as they understood, they had no reason to anticipate only a few additional hours would cause a problem. The health screening report on 16 February 2016, echoing the conversation the claimant had had with Ms O'Reilly, said the claimant's condition was 'well controlled'. Apart from mentioning time off to see his physiotherapist and the need for a workstation assessment, and avoiding moving and handling, it says nothing about any difficulties connected with sitting at a desk all day or working long hours. As the respondents did not know and could not reasonably be expected to know, the claim for this adjustment fails.

131. Indeed, we were not ourselves satisfied that the additional 5 – 7 hours caused any disadvantage. We were shown no medical or physiotherapy report to that effect. If the claimant was in pain, that could have been because he was tensing up through stress or because he was adopting a poor posture with a laptop at home or because he was working full-time at a desk with a mouse. We had no specific evidence that the additional 5 – 7 hours/week caused any extra difficulty. For this reason also, this claim would fail.

Not ensuring the claimant take periodic rest breaks.

132. This claim fails because the respondents did not prevent the claimant taking regular rest breaks. They did not apply a provision, criterion or practice that he work without breaks. He was told by Ms Fowler, as part of her standard recommendations for computer users, that he should take 5 – 10 minute breaks every 45 minutes to 1 hour. He was a senior manager. There was nothing to stop him taking breaks. We add that he did not complain to Ms Elsey, Mr Alam or Ms Tymieniecka at any time that he was not able to take breaks.

<u>Indirect disability discrimination under Equality Act 2010, s19</u>

133. We do not uphold this claim. The respondents did not apply a provision, criterion or practice of sending emails to the claimant's home address late at night. The late arrival to the claimant's email address was caused by the server.

134. The respondents did not breach of art 8 of the European Convention on Human Rights by sending the emails to the claimant's home email address late at night. Only two late emails were sent and a third earlier in the day. It was an accident caused largely by automated processes and some human error.

<u>Victimisation – Equality Act 2010, s27</u>

Protected acts

135. The following were protected acts: (1) the claimant's complaint to Karry Tymieniecka on 6 April 2016 that adjustments had not been made and (2) the claimant's email of 11 April 2016 enclosing the GP note of 8 April 2016. The claimant did not mention reasonable adjustments or say anything else which was a protected act on 8 April 2016 to Ms Tymieniecka. Nor did the claimant complain to anyone on 22 March 2016 that adjustments had not been made.

Whether the respondents dismissed the claimant because he did a protected act.

136. The only protected act which took place prior to the dismissal was therefore the conversation with Ms Tymieniecka on 6 April 2016.

137. On this matter, we find the burden of proof shifts. The claimant complained on 6 April 2016 to Ms Tymieniecka that reasonable adjustments had not been made, albeit that he was also asking about going home early because of drilling. It was the first time he had complained to Ms Tymieniecka about this. Two days later he was dismissed very suddenly without going through any formalised procedure. On 7 April 2016 Mr Alam had required the team to put their previous complaints about the claimant in writing.

138. The burden of proof therefore shifts to the respondents to satisfy us that the dismissal was in no sense whatsoever because of the protected act. The respondents' explanation is that the decision was taken by Ms Elsey and Mr Alam on 7 April 2016 and only discussed with Ms Tymieniecka in the morning of 8 April 2016. At that point, Ms Tymieniecka had not yet relayed to them the claimant's complaint on 6 April 2016. The respondents say that there had been performance difficulties with the claimant since he started which had become progressively worse. Matters had particularly started to go downhill on Ms Browne's serious complaint on 17 March 2016. They had held an additional 1 to 1 with the claimant on 18 March 2016 because of their performance concerns. On 1 April 2016 they had had to set out a task list containing matters still not done from 18 March. Their concerns came to a head on 6 April 2016 over the vacancy recruitment forms incident. One can see why that had all the elements of being the final straw. The claimant had made an error over a simple matter and then had reacted by making improbable suggestions that Mr Alam and Ms Browne had tampered with his spread sheet, all of which took an inordinate amount of time to sort out. All these matters took place well before the protected act.

139. We accept the respondents' explanation. There was ample evidence of genuine performance concerns with the claimant. These concerns were increasingly raised with him prior to the protected act. There was also an incident which explained the timing, ie the final straw. The claimant's concerns expressed to Ms Tymieniecka on 6 April 2016 then became

overtaken by events, when Ms Elsey and Mr Alam told her they had concluded the claimant was not up to the job. By the time the claimant sent in his GP note, he had already been dismissed.

140. For these reasons, the victimisation claim is not upheld.

Overview

141. For completeness, we have also considered whether an inference can be drawn in any respects from considering one or more incidents together. We find that it cannot. The central explanation provided by the respondents for their conduct and treatment of the claimant was their perception that his performance was unsatisfactory. They satisfied us that this perception was genuine and unrelated to his disability. They provided many examples of the difficulties they perceived. There were documents showing they had these concerns at the time. Concerns were expressed during the claimant's employment by a large number of different individuals, not purely by his line managers, but also by his team and by Ms Browne, who was clearly an influential manager having been the person to press for increased support from the Finance department for her division prior to the claimant's recruitment.

142. We did take into account Mr Silcock's evidence that, when they worked together in 2007, the claimant was well regarded by colleagues and managers for his competence. That was however a different job, about which we had few details, and which took place a long time ago. Moreover, it may be that the claimant had good skills on Excel for what was required on that job and at that date, but we had many explicit examples from a number of different people that the claimant was making many Excel errors when employed by the respondents. Further, the vagueness of Mr Silcock's evidence on this is demonstrated by the fact that he did not recall if he had ever seen him use Pivot Tables, which was one of the specific issues raised by the respondents.

143. We did also take account of the claimant's good reference from Health Education England, where he had worked as a Finance Business Partner on an interim contract from March – June 2014. However, that was a very short term job, it took place two years prior to the job with the respondents, and we did not have detail on what was required in that job compared with the areas of work where the respondents found the claimant wanting. As we have said, the respondents gave very specific examples of problems which they perceived with the claimant's performance which we found credible.

144. We further took into account the result of the respondents' staff survey in relation to disability and the apparent lack of effective training on disability awareness. The fact that staff with disabilities reported experiencing more harassment and bullying from other staff than did staff without disabilities is a worrying statistic. However, the respondents are a very large organisation. The fact that a proportion of disabled employees perceive

there to be a more general problem, does not in itself mean that the claimant as an individual was harassed or bullied or treated unfavourably because of his disability. Even putting the general picture into the equation with the other primary facts, there was insufficient evidence to shift the burden of proof.

Time-limits

145. We have not addressed the issue of whether certain claims were out of time as it is unnecessary to do so. We considered the claims on their merits and did not uphold them.

Notice pay

146. The claimant conceded he had no separate claim for notice pay. In any event, we would find that the respondents were entitled to terminate the contract on three months' notice and three months' pay in lieu has now been paid.

Employment Judge Lewis
16 March 2017