



# EMPLOYMENT TRIBUNALS

BETWEEN

Claimant  
Mr J Moreton

AND

Respondent  
Skills for Health Limited

## JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Birmingham ON 16, 17 & 20 – 22 November 2017  
23 November 2017 (Panel Only)

EMPLOYMENT JUDGE GASKELL MEMBERS: Mr D Johnson  
Mr NJ Howard

### Representation

For the Claimant: Mr P Starcevic (Counsel)  
For Respondent: Mr W Young (Counsel)

### RESERVED JUDGMENT

The unanimous judgment of the tribunal is that:

- 1 The respondent did not, at any time material to this claim, act towards the claimant in contravention of Sections 39 and/or 40 of the Equality Act 2010. The claimant's complaints of indirect discrimination; discrimination for a reason arising from disability; a failure to make reasonable adjustments; victimisation and harassment; pursuant to Section 120 of that Act, are dismissed.
- 2 The claimant was not dismissed by the respondent: his claim for unfair dismissal is not well-founded and is dismissed.

### REASONS

#### Introduction

- 1 The claimant in this case is Mr James Morton, born on 4 April 1973 (44yrs): he was employed by the respondent, Skills for Health Limited, as a Business Development Lead (later Regional Director) from 1 July 2012 until 20 February 2017 when he resigned.
- 2 In 2013 the claimant was diagnosed as suffering from depression: due to which, he claims that, at all material times, he was a disabled person as defined by Section 6 and Schedule 1 to the Equality Act 2010 (EqA).

3 By a claim form presented to the tribunal on 20 April 2017, the claimant claims that he was constructively and unfairly dismissed and that, prior to the termination of his employment, he suffered discrimination by the respondent on the grounds of his disability. The strands of discrimination alleged are: indirect discrimination; discrimination for a reason arising from disability; a failure to make reasonable adjustments; harassment; and victimisation.

4 The claims are denied: in its initial response to the claim, the respondent did not concede that the claimant was, at any material time, a disabled person; but, in any event, the respondent denied any discrimination; denied any fundamental breach of the claimant's employment contract; and further maintained that in respect of some of the allegations the tribunal lacked jurisdiction because the claim was presented out of time.

5 Following early disclosure of medical information and a disability impact statement, on 25 July 2017, the respondent conceded the claimant's disability status.

6 We are grateful to the parties for an agreed list of issues submitted for our consideration at the outset of the hearing.

### **The Evidence**

7 The claimant gave evidence on his own account; he did not call any additional witnesses. For the respondent we heard evidence from five witnesses namely: Adam Causon - Executive Director, Finance and Corporate Services; John Rogers - Chief Executive; Samuel Gallaher - Executive Director, Business Services and Development; Christopher Davies - Senior HR Manager; and Adrian Jackson - Managing Director, Skills for Justice (Enterprise) Limited.

8 In addition to the oral evidence, we were provided with an agreed hearing bundle running to more than 600 pages. We have considered the documents in the bundle to which we were referred by the parties during the hearing.

9 The claimant was a most unsatisfactory witness: his account is severely undermined by several fundamental inconsistencies: -

- (a) It is essential to the claimant's case that the respondent was aware of his disability: in his witness statement, he claims to have told his line-manager Mr Gallaher of his depression on many occasions; but in none of the claimant's written communications before December 2016 is there any reference to depression; and when pressed during cross-examination he admitted that he had never told Mr Gallaher that he suffered from depression (other than a single reference to *having* suffered from depression some years earlier).
- (b) This inconsistency was magnified by the fact that the claimant also sought to explain his failure to tell Mr Gallaher of his depression because of his belief that Mr Gallaher would be unsympathetic.
- (c) It is also essential to the claimant's case that his depression was the

cause of poor performance at work: and yet, throughout, the claimant argues that there was no poor performance. If this is the case, then his performance could not have been adversely affected by depression. Furthermore, the claimant complains that he was not provided with the opportunity to undertake an MBA course at Worcester University: it must therefore be his case that, even as late as January 2017, he was mentally fit to undertake such a demanding course whilst also remaining in full-time employment. This again is wholly inconsistent with his case that he was affected by depression in his performance at work.

10 There is one specific matter where we find that the claimant has not told the truth: this refers to a conversation with Gabrielle Sleeman - Senior HR Manager in August 2017. The claimant stated that he had expressly told Ms Sleeman that he was suffering from depression: but we do not believe this to be true. Our reasons for this finding are that when Ms Sleeman wrote to the claimant on 25 August 2016 (shortly after their discussion) she makes no reference to depression; and, more importantly, when the claimant wrote to Mr Davies on 5 December 2016 (an email where he makes specific reference to depression and to having been prescribed anti-depressants), he himself makes no mention of having disclosed this information to Ms Sleeman (Mr Davies' predecessor in post).

11 By contrast, we found the evidence of the respondent's witnesses to be clear; compelling; and consistent. The evidence given by each of those witnesses was consistent with the evidence given by the others; unlike the claimant, those witnesses did not vary their account when challenged under cross-examination; and their evidence was consistent with contemporaneous documents.

12 Where there is a difference in the factual statements made by the claimant on the one hand and by the respondent's witnesses on the other, we prefer the evidence of the respondent's witnesses and we have made factual findings accordingly.

## **The Facts**

13 The respondent is a not-for-profit organisation which provides products and services relating to workforce and organisational development to employers across the UK in the health and justice sectors. Many of the respondent's largest customers are NHS Trusts.

14 On 1 July 2012, the claimant commenced employment with the respondent as Business Development Lead for the East Midlands and East of England. His job title was later changed to Regional Director but the requirements of the role remained the same. The claimant's line manager was Mr Gallaher he held the role of Executive Director – Business Services & Development since October 2009. The role of a Regional Director was to develop business within his/her region: for the years 2012/2013 and 2013/2014 the individual sales target for each Regional Director was £600,000; thereafter it increased to £750,000.

15 From the outset, Mr Gallaher was concerned that the claimant's sales achievement fell below expectations; he was particularly concerned when the figures took a sharp decline in 2015/2016. The claimant disputes the figures for earlier years; but he accepts that for 2015/2016 his figures were unsatisfactory.

16 The respondent's financial year runs from 1 October to 30 September each year: and by January 2016, Mr Gallaher was concerned at the downturn in the claimant's figures; and began monitoring the position carefully.

17 On 13 April 2016 (the end of the 2<sup>nd</sup> quarter of the 2015/16 financial year), Mr Gallaher held a meeting with the claimant: the purpose of the meeting was to ensure the claimant understood that his performance was unsatisfactory; to explore the reasons for this; and determine what steps could be taken by the claimant and/or the respondent to improve the position. Less than satisfactory progress was made because the claimant did not agree with Mr Gallaher's figures; did not recognise that there was a serious problem; and was therefore less than well-disposed to finding a solution. During the meeting, the claimant referred to "personal problems" which Mr Gallaher took to be a reference to his young family; the claimant did not make any reference to suffering from depression.

18 Following that meeting, the claimant and Mr Gallaher exchanged several emails and telephone conversations in which Mr Gallaher was seeking specific information from the claimant as to the progress of sales leads; and when such leads might be converted into firm orders.

19 On 4 August 2016, the claimant and Mr Gallaher met again. Mr Gallaher was becoming increasingly concerned that there was no discernible progress in turning the claimant's performance around: and it was clear that he would not reach anywhere near his target in the financial year. It is again clear that the claimant did not agree with the figures; or accepted that the failing was as substantial as Mr Gallaher claimed. The claimant's position is that broadly speaking his performance was satisfactory: this contradicts any assertion his part that his performance was adversely affected by depression. In any event, at the meeting on 4 August 2016, the claimant again made no reference to depression.

20 Mr Gallaher explained that, if there was no substantial improvement, then a formal performance management process may be required. The claimant's account of the meeting is that Mr Gallaher asked him to consider his options - effectively inviting him to resign; we reject this account: we find that Mr Gallaher simply encouraged the claimant to properly consider his performance and address the deficiencies. We also reject the claimant's account that there was discussion around the topic of "*constructive dismissal*".

21 It is the claimant's case that, at the end of the meeting, Mr Gallaher asked him to "*write his own performance improvement plan*" - we reject this account: Mr Gallaher had made clear that a formal performance improvement programme might be required if improvement could

not be achieved otherwise; he asked the claimant to set out his ideas as to how performance could be improved without the requirement of a formal programme.

22 On, or very shortly after, 22 August 2016, the claimant contacted Ms Sleeman and asked her for details of the respondent's in-house counselling service: these were provided to him in writing. We find that the claimant did not tell Ms Sleeman that he was suffering from depression; and, in any event, when giving evidence, the claimant accepted that anything he had told Ms Sleeman during such a call would have been entirely confidential; she could not disclose that information to Mr Gallaher or anyone else.

23 The claimant and Mr Gallaher met again in Belfast on 2 September 2016 for a further review of the claimant's performance; and this was followed by a meeting in London on 27 September 2016. When the claimant arrived for that meeting, he was surprised to find that Mr Causon was present; Mr Causon's presence was simply because he and Mr Gallaher had been meeting anyway in London on that day; and in his role as Interim Finance Director, Mr Causon had legitimate concerns as to the claimant's performance and wished to hear from the claimant personally as to the chances of improvement moving into the new financial year. The claimant's year-end sales figure was projected to be £286000; far below the target of £750000. During the meeting, the claimant made no reference to any health issue; and made no mention that he was suffering from, or receiving treatment for, depression. He could provide no explanation which was satisfactory to Mr Gallaher for his poor performance.

24 On the claimant's account, following this meeting, his health was deteriorating; and he was absent from work from 25 to 28 October 2016 suffering from stress and depression. The respondent's records indicate that the absence was due to cold, cough, and influenza.

25 At the end of the meeting on 27 September 2016, Mr Gallaher had made it clear that the time had now come for the to be a formal performance management program: this would require the involvement of HR; he confirmed that he would contact the claimant about this in due course.

26 Despite having been told that a formal procedure would now commence, the claimant claims to have been confused as to the current position; unsure as to whether he had already been subject to a formal procedure for some weeks. He contacted Ms Sleeman in HR; she properly advised him to raise his concerns with Mr Gallaher. We have carefully considered the relevant emails: and it is perfectly clear to us, and in our judgement, was perfectly clear to the claimant, that, at this time, no formal procedure had commenced.

27 The first meeting under the respondent's Capability Policy and Procedure took place on 29 November 2016: present were the claimant; Mr Gallaher; and Mr Davies; who by then had succeeded Ms Sleeman as Senior HR Manager. The claimant confirmed in evidence that by the time he attended this meeting he fully understood that this was the first meeting under the Procedure; it was intended to be an initial counselling session. We accept the evidence of Mr Gallaher and Mr Davies that the claimant was highly confrontational during the meeting; complaining about Mr Gallaher's management style; and about lack of support. When asked

what support he required, the claimant's response was that he required an Administration Assistant (none of the other Regional Directors had such assistance; the Regional Directors were expected to undertake their own administration); he also stated that he wished the respondent to contribute to the cost of an MBA course - to which Mr Gallaher responded that such a request could be considered if the claimant was achieving his sales targets. During the meeting the claimant mentioned that "*he had been depressed*": both Mr Gallaher and Mr Davies were clear, and we accept their evidence, that the claimant spoke of his depression in the past tense.

28 The outcome of the meeting was that there would be a further meeting on 15 December 2016 at which a specific plan was to be put in place to improve the claimant's performance over the course of the following two months (January and February 2017). We are satisfied that Mr Gallaher made it clear that this was not a requirement for the claimant to meet target (£750,000 pa) within that period; but simply that the plan must ensure some specific; measurable; improvement.

29 Following that meeting, on 5 December 2016, the claimant sent an email to Mr Davies: he raised many concerns about Mr Gallaher's management style; and, for the first time, he stated that he was suffering from ill health and that he had been prescribed anti-depressants. Mr Davies responded the same day: he made clear that if the claimant was unhappy about the way he had been managed he could raise a grievance under the respondent's Grievance Procedure; in view of what the claimant said about his health, and about having been prescribed anti-depressants, Mr Davies made a referral to Occupational Health. An Occupational Health appointment was obtained for 22 February 2017.

30 An Organisational Development Day (ODD) was scheduled for 13 December 2016: the claimant and other Regional Directors were aware that attendance at such days was compulsory; and considered important. They knew that they should not arrange other business meetings on those days. On 12 December 2016, at 9:53am, the claimant emailed Mr Gallaher: the email read as follows: -

*"Sam, I won't be attending tomorrow, for two reasons; mainly my personal situation. I do not want to attend with what's going on, as I am not in a position to mingle and be positive about the company at the moment. However, I also have an important LD stakeholder meeting that need to attend as I have not been able to make the last two"*

The claimant's non-attendance at the meeting was not acceptable to Mr Gallaher who responded as follows: -

*"James*

*As I have mentioned on several occasions both collectively 2 teams and 2 individuals ODE days (there are only 2 year) take precedence over all other things and we don't schedule meetings for this day or if there are*

*groups we wish to attend – i.e. where we have no influence over the date – give our apologies or make other arrangements. If we allowed such practices then it follows all staff days wouldn't be all staff days. If there is a business conflict then I also don't think it is appropriate to raise the issue with me the day before the all staff day. Things may be uncomfortable at the minute but unfortunately that's just one of these things. We all can't just opt not to attend or re-prioritise things just because we feel like it. I don't have the option so I don't see why exception should be made for other staff. In this case I don't think personal circumstances are such that warrants you not attending tomorrow."*

The claimant duly attended the meeting: and during the day Mr Rogers made specific reference to a group of employees who were at risk of redundancy - whose attendance had been excused.

31 The meeting on 15 December 2016 was unproductive: the claimant made clear that he was deeply suspicious of the process and insisted on recording the meeting against Mr Gallaher's wishes. He was also unwilling to set a plan which would see improvement over the course of the following two months; insisting that a nine-month period was more realistic - but this was not acceptable to Mr Gallaher. What Mr Gallaher wish to do was to set reasonable; and achievable; and preferably agreed; objectives over a two-month period. The upshot was that no progress was achieved and a further meeting was arranged for 6 January 2017. During the meeting the claimant made no further disclosure regarding his health.

32 On 3 January 2017, the claimant's solicitor wrote to the respondent stating, amongst other things, that, due to his suffering from depression, the claimant was a disabled person as defined in Section 6 EqA: and further, that the respondent was in breach of its duty to make reasonable adjustments; and intimating that the claimant may bring a claim for constructive dismissal and disability discrimination. This letter, and subsequent dealings with the solicitors, were dealt with by Mr Rogers - Mr Gallaher was not involved. Mr Gallaher became aware that negotiations had commenced for the claimant to leave the respondents employment on agreed terms; and, in the light of this understanding, the meeting arranged for 6 January 2017 did not take place. The claimant commenced a period of sick leave on 18 January 2017.

33 We should make it clear that we were provided with limited information as to the *fact* of termination negotiations but not of their *content*. Arguably, such information is inadmissible before the tribunal: but such information as we were provided with, was provided with the express agreement of both parties.

34 It was widely understood between the parties that an agreement had been achieved; and that a Compromise Agreement terminating the claimant's employment on agreed terms was to be signed by both parties on 8 February 2017. That morning, the claimant submitted to Mr Gallaher an expense claim form for December 2016 and January 2017. Mr Gallaher received a message to the effect that the claimant required his expenses to be approved and paid before signing the Compromise Agreement: Mr Gallaher responded to the effect that the

expenses would be paid through the payroll in the normal run of events and should not be affected by the signing of the Compromise Agreement; Mr Gallaher heard no more, and assumed (without enquiry) that the Compromise Agreement had been signed that day. In the event, absent the payment of his expenses, the claimant had refused to sign.

35 That evening, believing that the Compromise Agreement had been signed during the day, Mr Gallaher set the claimant's out of office message to state that he had left the business; transferred the claimant's telephone number; and turned off the claimant access to emails. Of course, the claimant, not having signed the Compromise Agreement, remained in the respondent's employment - although he was still absent on sick leave.

36 The following day, Mr Gallaher visited clients in Watford: a meeting which the claimant would have attended but for his absence on sick leave and/or the agreed termination of his employment. The expense claim form sent to Mr Gallaher the previous day included a mileage claim for visiting those clients on 1 December 2016: during the course of the meeting on 9 February 2017, Mr Gallaher referred to the claimant's meeting on 1 December 2016; only to be informed that no such meeting had taken place. This raised obvious concerns regarding the claimant's expense claims. Further scrutiny of the claim form gave rise to several queries.

37 Mr Davies wrote to the claimant on 14 February 2017 asking for clarification of some of the entries on the expense claim form; the response he received was less than satisfactory.

38 On 15 February 2017, the claimant was due to return to work following sick leave (his sick note expired on that day – but, in the event the claimant did not return). By now, Mr Rogers was aware of the expense claim discrepancies: it appeared that the claimant had over claimed to a value of at least £253; and the responses which he had provided to Mr Davies indicated the possibility that the claims were fraudulent. In addition, Mr Rogers had become aware of another problem involving the claimant's conduct: it appeared that he had agreed to the insertion of a "break-clause" in a contract with a customer when such clauses were prohibited without Mr Gallaher's specific approval.

39 Mr Rogers concluded that it was necessary for the respondent to investigate both aspects of the claimant's conduct; Mr Rogers also decided that the claimant should be suspended on full pay during the investigation. On 16 February 2017, Mr Rogers wrote to the claimant advising him of the disciplinary matters which had given rise to concern; advising him of the suspension; and of the investigation.

40 By letter dated 20 February 2017, the claimant resigned with immediate effect. He set out the reasons for his resignation which can be summarised as follows: -

- (a) The unfair application of the Capability Policy and Procedure.
- (b) Mr Gallaher's failure to make allowances for his mental health.
- (c) Mr Gallaher's insistence on the claimant's attendance at the ODD.
- (d) Mr Gallaher's actions on the evening of 8 February 2017: advising others that the claimant had left the business when this was not the case.



(e) The decision to suspend him pending investigation

In the letter, the claimant alleged that these matters, and other unspecified matters, amounted to improper conduct; and a complete; fundamental; and unreasonable breach of the employment contract.

41 The investigation continued despite the claimant's resignation: Mr Jackson was appointed to investigate; and Ms Candace Miller - Executive Director, Learning Services and Consultancy was appointed as the disciplining manager. Mr Jackson and Ms Miller were chosen by Mr Rogers as a suitable for the roles as they held senior positions within the organisation but had no line-management relationship with the claimant; indeed, prior to the investigation, Mr Jackson did not know the claimant; and had not previous dealt with him.

42 Mr Jackson invited the claimant to attend an investigatory meeting: through his solicitor, the claimant declined but indicated that he was willing to answer written questions - this was dealt with by email.

43 On 3 April 2017, Mr Jackson submitted a draft report to the claimant for consideration: on 7 April 2017, the claimant submitted a response. Mr Jackson undertook some further investigations in the light of the response and then produced his final report which was submitted to the claimant and to Ms Miller on 19 May 2017.

44 In summary, Mr Jackson found that over a period of five months the claimant had made eleven incorrect expense claims totalling £1020.04: it was his opinion that the claimant's explanations did not stand scrutiny. Regarding the break-clause Mr Jackson found that the claimant had agreed to an annual break-clause which effectively turned a contract from a five-year contract into a heavily discounted one-year contract. There was no evidence that the claimant had sought or been given authorisation to agree the break-clause and it appeared to Mr Jackson that he had operated outside the normal contracting procedures. Mr Jackson reported that, if the claimant had still been employed by the respondent, he would have recommended disciplinary action to consider potential allegations of gross misconduct in respect of both the expense claims and the break-clause. He also recommended that the claimant should be asked to repay the full amount of the incorrect expense claims; and he suggested that Mr Rogers should give consideration as to whether the matter should be referred to the police.

45 In 2013, the claimant was diagnosed as suffering from depression and since then he has used prescribed medication There is no independent medical evidence addressing the effects of the Claimant's depression, or the cause of his poor performance. The claimant's GP notes indicate symptoms from depression in late 2013 and early 2014; but then, limited consultations about depression between September 2014 and August 2016. What entries there are (in November 2014 and November 2015) indicate that the Claimant was doing well, and his mood had improved. This impression is confirmed by the entry from November 2016, which stated that he had been feeling better before the consultation in August 2016.

46 The Claimant confirmed in cross examination (though of course he is not medically qualified) that this chronology from the medical records does not suggest that his depression was the cause of his poor performance. The claimant only acknowledged any poor performance in the 2015/2016 financial year: he agreed there was nothing in his medical records to attribute diminishing performance at that time to the depression which had been diagnosed two years earlier.

47 In addition, and contrary to the impression given in the Claimant's disability impact statement (which states that his social life "almost came to a halt"), the Claimant appears to have remained actively involved in social and sporting extra-curricular activities, including after August 2016, and even as late as January 2017.

48 Notably, the Claimant confirmed in cross-examination that he remained keen to be enrolled on an MBA course in early 2017. This would have required 6 weekends' (Friday – Monday) a year of study, as well as evening sessions, and additional homework. If the Claimant considered himself willing and able to undertake this, despite his depression, then it would seem very unlikely that this could have been the cause of his poor sales performance at work.

## **The Law**

### ***Disability Discrimination***

49 Under Section 6 EqA a person is disabled if he/she has a physical or mental impairment that "*has a substantial and long term adverse effect on his/her ability to carry out normal day to day activities.*"

50 "Discrimination arising from a disability" is prohibited by section 15 EqA, which states that a person discriminates against a disabled person if: "*A treats B unfavourably because of something arising in consequence of B's disability, and A cannot show that the treatment is a proportionate means of achieving a legitimate aim*", although this section does not apply if A can show that he did not know, and could not reasonably have been expected to know that B had a disability.

51 According to Section 19 EqA, a person (A) discriminates against another person (B) if he applies a provision, criterion or practice (PCP) that applies, or would apply, to persons with whom B does not share the protected characteristic in question; the PCP puts, or would put, persons with whom B shares the protected characteristic at a particular disadvantage when compared with persons who do not share it; it puts B to that disadvantage; and A cannot show that it is a proportionate means of achieving a legitimate aim.

52 Under the EqA, Sections 20, 21 and 39(5), the duty to make reasonable adjustments is (as relevant) as follows: "*where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who*

*are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage”.*

53 Under the EqA, Schedule 8, Part 3, Paragraph 20, an employer must have knowledge that the person in question is disabled, and that the PCP is liable to put them at the disadvantage as described in Section 20. This knowledge can be actual or constructive:

**Secretary of State for Work and Pensions v Alam [2010] ICR 665.**

54 Under Section 26 EqA, a person subjects another to harassment where *“he engages in unwanted conduct related to a protected characteristic [here, race]”* which *“has the purpose or effect of – (a) violating [that person’s] dignity, or (b) creating an intimidating, hostile, degrading, humiliating or offensive environment for [that person].”* In deciding whether conduct has the effect referred to above, a tribunal must consider the claimant’s perception, the other circumstances of the case, and whether it is reasonable for the conduct to have that effect (Section 26(4)).

55 Under Section 27 EqA, a person, A, victimises another person, B, if A subjects B to a detriment because B did a protected act, or because A believes that B has done, or may do, a protected Act. A protected act is: a) bringing proceedings under the EqA; b) giving evidence or information in connection with such proceedings; c) doing any other thing for the purposes or in connection with such proceedings; or d) making an allegation that A or another person has contravened the EqA.

56 When considering whether detriments have been imposed “because of” a protected act, it must be established that the protected act was an effective cause of the detriment, but it does not have to have been the only, or even the main reason for the treatment.

57 Section 39(2) EqA prohibits an employer from discriminating against an employee by dismissing him or subjecting him to any detriment. Section 39(4) prohibits an employer from victimising an employee by dismissing him or subjecting him to any other detriment.

58 Under section 136 EqA the burden of proof is reversed in certain discrimination cases: *“if there are facts from which the court could decide, in the absence of any other explanation, that a person (A) had contravened the provision concerned, the court must hold that the contravention occurred”*, but that section does not apply *“if A shows that A did not contravene that provision”*.

Guidance on the reversal of the burden of proof in pre-EqA discrimination legislation is given in **Igen v Wong [2005] ICR 931**, which remains relevant under the new provisions of the EqA.

### ***Constructive Dismissal***

59 The Claimant, as an employee, had the right not to be unfairly dismissed (Section 94, Employment Rights Act 1996 (ERA)). The potentially fair reasons for dismissal are set out in Section 98(2) ERA, one of which is capability, and one of which is conduct.

60 As well as showing that there is a potentially fair reason for dismissal an employer will also have to show, according to Section 98(4) ERA, that the decision to dismiss the employee was reasonable. The determination of that question:

- (a) *depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and*
- (b) *shall be determined in accordance with equity and the substantial merits of the case."*

61 In relation to cases of dismissal for capability reasons, an employer must show that it had a genuine belief in the employee's lack of capability, based on reasonable grounds (**Alidair Ltd v Taylor [1978] ICR 445**).

62 In order to be a constructive dismissal, the employee must have resigned as a result of a fundamental and repudiatory breach of contract. The party claiming constructive dismissal must not have waived the breach by delaying excessively before resigning in response (**W.E. Cox Toner (International) Ltd v Crook [1981] ICR 823**).

63 An employee may resign as a result of an action on the part of the employers that, whilst not a breach of contract in itself, amounts to the "last straw" leading to the employee's resignation. The final act, however, must be an act in a series the cumulative effect of which amounts to a repudiatory breach of contract (**Omilaju v Waltham Forest London Borough Council [2005] ICR 481**). Simply unreasonable behaviour is not sufficient to amount to constructive dismissal (**Western Excavating (ECC) Ltd v Sharp [1978] ICR 221**).

64 There is implied into every contract of employment a term of mutual trust and confidence between the employee and the employer. This term was set out in **Malik v BCCI [1997] IRLR 462** in the following terms: that the employer (or employee) shall not "*without reasonable and proper cause, conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee*".

65 In assessing whether there has been a breach of such a term, "*all the circumstances must be taken into account in so far as they bear on an objective assessment of the intention of the contract breaker... if the employer acts in such a way, considered objectively, this his conduct is likely to destroy or seriously damage the relationship of trust and confidence, then he is taken to have the objective intention spoken of.*" (**The Leeds Dental Team v Rose [2014] ICR 94**)

66 Where there has been a breach of the implied term of trust and confidence, that breach is inevitably a fundamental one (**Morrow v Safeway Stores [2002] IRLR 9**).

### **The Claimant's Case**

### ***Harassment***

67 It is the claimant's case that the following were acts of harassment related to the claimant's disability: -

- (a) Mr Gallaher's refusal to allow him to absent himself from the ODD: in particular, the wording of Mr Gallaher's email (Paragraph 30 above).
- (b) Mr Gallaher's dismissive attitude to the claimant's personal problems.
- (c) Mr Gallaher's email on the evening of 8 February 2017 to colleagues saying that the claimant had left the respondent's employment and changing his out of office response (Paragraph 35 above).
- (d) Removal of access to emails, IT (databases) and mobile phone (Paragraph 35 above).
- (e) The claimant's suspension on 16 February 2017.

### ***Indirect Discrimination***

68 The PCP identified by claimant is the Capability Policy. This must necessarily include the events which lead to the application of the policy, which in this case is the requirement for sales targets to be substantially achieved.

69 The claimant's case is that disabled people suffering from depression are essentially disadvantaged by a requirement to perform to the same level as non-disabled employees. And, that he was placed at a particular disadvantage because, due to his disability, he found it more difficult to meet the sales targets and his performance was therefore judged as poor within the meaning of the policy.

70 The claimant submits that the respondent has led little evidence as to the impact of his performance on its business or demonstrate that its unbending application of the policy without making allowances for his disability did or would affect the business. The claimant therefore submits that the respondent has failed to discharge the burden which is upon it to justify the discriminatory impact of its application of the Capability Policy.

### ***Discrimination Arising from Disability***

71 The claimant submits that the "something" which arises in consequence of his disability is his performance, which is prejudiced by his disability, in particular affecting C's concentration and ability to face meeting and engaging with clients. The unfavourable treatment is subjecting him to the Capability Policy, both informal and formal stages with the potential for sanctions which this may entail.

### ***Victimisation***

72 The claimant's pleaded case is that his protected acts for the purposes of his victimisation claim were his oral statements made to Mr Gallaher and Mr Davies at the meeting on 29 November 2016 and the contents of his email to Mr Davies dated 5 December 2016. At the hearing, Mr Starcevic conceded that on neither occasion did the claimant go any further than to simply mention that he suffered from or alternatively *had suffered from* depression; he made no allegation of disability discrimination. Mr Starcevic conceded that the only protected act which could be identified was the letter to the respondent from the claimant's solicitor dated 3 January 2017 which referred to a potential claim for disability discrimination. At the outset of the case Mr Starcevic applied to amend the claimant's pleaded case to plead that letter as the protected act. Mr Young opposed the application.

73 The unfavourable treatment alleged to have arisen from the protected act is the decision to suspend the claimant and instigate the Disciplinary Procedure.

### ***Reasonable Adjustments***

74 As with indirect discrimination the claimant submits that the PCP is the application of the Capability Policy which must necessarily incorporate the requirement for satisfactory performance in the form of him substantially meeting his sales targets.

75 It is submitted that the claimant was at a substantial disadvantage meeting the sales targets because of his disability and in improving performance to the required standard upon an application of the Capability Procedure. That disadvantage could be reduced by the application of adjustments such as the respondent reducing its expectations of the claimant offering additional support such as additional training; the provision of an administration assistant; and allowing more time for the claimant to improve his performance.

### ***Constructive Dismissal***

76 The relies on a course of conduct by the respondent and its managers, in particular: -

- (a) Mr Gallaher acting in a manner calculated to seriously damage the relationship at the meeting on 4 August 2016 (Paragraphs 19 – 21 above): suggesting that C should reconsider his options; effectively inviting him to resign.
- (b) Mr Gallaher's conduct at, and Mr Causon's presence at the meeting on 27 September 2016 (Paragraph 23 above).
- (c) Failing to follow the Capability Procedure and discover the reasons for any alleged under-performance and how the claimant may be assisted to achieve satisfactory performance. Mr Gallaher was dismissive of the claimant's depression when he sought to raise this. The respondent's approach meant that C was bound to fail the Capability

Process. A persistent failure to make reasonable adjustments can itself amount to fundamental breach (**Greenhof v Barnsley MBC [2006] IRLR 98**).

- (d) On 12 December 2016 requiring the claimant to attend the ODD, despite his depression and knowing that it would be uncomfortable for him whilst under threat of dismissal through capability. Likewise, being required to attend the Nations Sales Team meeting on 12 January 2017.
- (e) Whilst the claimant was on sickness absence Mr Gallaher emailing his colleagues and telling clients that he had left the business, which was not true. Mr Gallaher also limited the claimant's access to emails and his phone was transferred (Paragraph 35 above). In this regard the claimant submits that the respondent must be judged objectively upon its actions and not by what it secretly intended or whether the motivation was error (**BBC v Beckett [1983] IRLR 43**).

77 The claimant says that the last straw was R's decision to suspend him on 16 February 2017. Although the last straw need not necessarily itself be a breach of contract, or even unreasonable conduct (**Omilaju**) in the circumstances of this case the suspension was itself a fundamental breach of contract. Suspension is a serious step and is not necessarily a neutral act and it is wrong for the respondent to have suspended the claimant without considering whether suspension was necessary, or considering the alternatives to suspension or seeking and properly considering the claimant's explanations for the alleged misconduct. (**Aggreko v London Borough of Lambeth [2017] EWHC 2019**)

### ***The Respondent's Case***

78 There are factual disputes between the parties as to precisely what was said at various meetings, but essentially, the respondent's response to the discrimination case is more fundamental than that. Even taking the claimant's account at its height, the respondent's case is that it did not have any/sufficient knowledge of the claimant's disability or of any disadvantage caused by it for the provisions of Section 15 EqA or the duty to make reasonable adjustments to even be engaged. Further, and equally fundamentally, the respondent's case is that the claimant has not established that his disability was the cause of his poor performance: in which case his discrimination (as opposed to victimisation) claims must fail. He has not established that any unfavourable treatment because of poor performance was because of anything *arising* from his disability (Section 15 EqA); he has not established that the application of the Capability Procedure placed him or others suffering from depression at a disadvantage (Indirect Discrimination & Reasonable Adjustments); and he has not established that unwanted conduct aimed at his poor performance was *related* to his disability (Harassment).

79 So far as the victimisation claim is concerned, the respondent objects to the proposed amendment to the claimant's pleaded case; but accepts that the solicitor's letter of 3 January 2017 is capable of being a protected act. However, the respondent denies that the detrimental treatment alleged - namely the suspension and the instigation of the Disciplinary Procedure

was in any way in response to that letter: the reverse is true, on the agreed evidence, the respondent's response to the letter was to enter negotiations with the claimant which came close to achieving a Compromise Agreement. The respondent's case is that the evidence is clear that what prompted the suspension and the disciplinary process was concerns about the claimant's conduct which arose in early February 2017.

80 The respondent raises jurisdictional objections to the discrimination claims: the claim form was presented to the tribunal on 20 April 2017; the respondent contends that claims in respect of acts allegedly committed before 21 January 2017 are out of time; and that the claimant has adduced no case to the effect that it would be *just and equitable* for time to be extended.

81 Regarding the claim for constructive dismissal, the respondent's case is that Mr Gallagher acted with just and proper cause in response to legitimate concerns as to the claimant's performance; and, that nothing he did amounted to a breach of the claimant's contract of employment. Even his actions on the evening of 8 February 2017 (Paragraph 35 above) are clearly attributable to a genuine mistake on his part. And, bearing in mind that the claimant was absent from work in any event, objectively viewed, this conduct was not such as to breach the implied duty of mutual trust and confidence.

### **Discussion & Conclusions**

#### ***General Matters***

##### *Knowledge*

82 Taking the claimant's account at its height, in our judgement, the respondent did not at any material time have knowledge of the claimant's disability; or of any disadvantage which may be caused by it. Neither can it be said that the respondent ought to have had such knowledge.

83 The claimant accepts that at no time prior to his meeting with Mr Gallaher and Mr Davies on 29 November 2016 had he even used the word "*depression*" when speaking to Mr Gallaher. And, for the reasons given in Paragraph 10 above, we reject his claim to have told Ms Sleeman of his depression in August 2016.

84 At the meeting on 29 November 2016 the claimant spoke in the past tense of *having* suffered from depression; in our judgement, it was not until his email to Mr Davies of 5 December 2016 that the respondent was aware that he was *currently* suffering from depression.

85 Knowledge of *depression* does not equate to knowledge of *disability* and still less to knowledge of *disadvantage*. Those matters were the subject of proper further investigation; Mr Davies put such investigations in train by making an OH referral.



86 As to *disadvantage*, the person who uniquely could have informed the respondent of disadvantage suffered if there was any, was the claimant himself. Not only did he not do so, he provided contradictory information, suggesting that there was no real issue with his performance, and consistently lobbying to be supported through an MBA programme.

#### *Causation*

87 The tribunal cannot assume that an individual suffering with depression, and by reason thereof being a disabled person, will necessarily perform badly in any given occupation. It is essential to the claimant's case that the poor performance identified by the respondent was caused by the fact of his being disabled because of depression. No medical evidence to this effect has been adduced: such a proposition cannot be discerned from the claimant's GP notes and records which are available. And the claimant's own evidence is positively contradictory, he asserts that his performance was to acceptable standards; and that he had the capacity to continue in his job and undertake a demanding MBA programme.

#### *Time Limits/Jurisdiction*

88 Mr Young did not press the jurisdiction issue with any substantial force: he was right not to do so. In our judgement, if there was merit in the claimant's claims, it would follow that there had been a course of conduct on the part of the respondent in general, and Mr Gallaher in particular, which was both discriminatory and in breach of the employment contract. The impugned conduct commenced in August 2016 and extending until the claimant was suspended on 16 February 2017. On this analysis, applying Section 123(3)(a) EqA, the claim form was presented in time.

#### *Amendment*

89 As already stated, the claimant applied to amend his pleading to plead the solicitor's letter of 3 January 2017 as the protected act in the victimisation claim: the respondent objected to the application. We did not rule on the application during the hearing: stating our intention to do so in our final judgement on liability. We have applied the principles set out in **Selkent Bus Co Limited v Moore** [1996] ICR 836: and, in our judgement, it is right that the amendment should be permitted. The respondent is not embarrassed by the proposition that the letter was a protected act: the respondent has always known of the letter and of its contents; the real issue with the case is the respondent's reasons for suspending the claimant and instigating the Disciplinary Procedure.

#### ***Harassment***

90 In our judgement, none of the matters complained of as set out in Paragraph 67 above remotely amount to harassment relating to disability. Firstly, none of those matters are in any way related to the claimant's disability; but, in any event, none of them in our judgement had

the proscribed purpose or effect. If any of them did have the proscribed effect then it was unreasonable for them to have done so.

(a) At the time of the ODD the claimant was being asked to improve his performance: his attendance at such an event was more important than ever. In our judgement, it is significant that employees under threat of redundancy had been specifically excused attendance; this demonstrates the respondent's intention at that time that the claimant should be remaining in its employment.

(b) We reject the claimant's assertion that Mr Gallaher was dismissive of his personal problems. Mr Gallaher was clearly a robust manager with little time for excuses; and the problems which appear to have been drawn to his attention (which did not include depression or disability) were problems encountered by most employees at some time or another.

(c) Mr Gallaher's actions on 8 February 2017 were a genuine mistake: in our judgement, the claimant must have realised this. He knew that he had been expected to sign the Compromise Agreement that day; it was he who had derailed the signing by his insistence, at short notice, that his expenses should be approved; he is also culpable for submitting an incorrect expense claim which required scrutiny.

(d) In our judgement the claimant was suspended for good reason in the light of genuine concerns about his conduct.

### ***Indirect Discrimination***

91 For the reasons stated at Paragraph 87 above, in our judgement, it has not been established that the respondent's application of its Capability Procedure and its requirement for satisfactory performance placed disabled people suffering from depression in general, or the claimant specifically, at a disadvantage. Absent evidence to this effect, there can be no finding of indirect discrimination.

### ***Discrimination Arising from Disability***

92 The claimant was subject to the Capability Procedure with all its potential consequences because the respondent was not satisfied with his *performance*. Arguably, this was not *unfavourable treatment* because any under-performing employee would have been subject to the same procedure. But, to the extent that the treatment was unfavourable, in our judgement it was wholly unrelated to the claimant's disability. And, in any event, as we have already stated, in our judgement, the respondent was unaware of the disability; and knowledge cannot be imputed. Accordingly, the claim for discrimination arising from disability cannot succeed.

### ***Victimisation***

93 In our judgement, the evidence is clear: the claimant was not suspended and the Disciplinary Procedure instigated because of the contents of the claimant's solicitor's letter dated 3 January 2017. He was suspended, and the Disciplinary Procedure was instigated, because of concerns which arose relating to his conduct. These matters came to light

respectively on the 7 and 8 February 2017. And the suspension did not occur until after the claimant had been given an initial opportunity to explain the expense claim discrepancies. The victimisation claim cannot succeed.

### ***Reasonable Adjustments***

94 The claim for a failure by the respondent in its duty to make reasonable adjustments must fail on two accounts. Firstly, there is no evidence that the claimant's disability was the cause to him of any disadvantage when the respondent applied its Capability Procedure to him. And, secondly, because, for the reasons already explained, we are satisfied that the respondent was unaware of the disability and of the disadvantage; and that such knowledge cannot be imputed.

### ***Constructive Dismissal***

95 Our judgement is that Mr Gallaher and the respondent acted throughout entirely in accordance with the employment contract and took no steps to undermine the implied term of mutual trust and confidence. Mr Gallaher had genuine concerns regarding the claimant's performance: not only was he entitled to act in response to such concerns, it was his obligation to do so. He had a series of meetings with the claimant to try and establish any reasons for under-performance and agree an informal programme for improvement without invoking the formal procedure. The claimant was reluctant to engage.

96 When the formal procedure was instigated, it was done in accordance with contractual documentation: and it is quite wrong to suggest that Mr Gallaher was setting unrealistic targets which the claimant could not be expected to achieve. At the time of the claimant's resignation no targets had been set: the claimant had been asked to contribute to what targets might be reasonably achievable over a two-month period – he declined.

97 The requirement for the claimant to attend the ODD was both reasonable and necessary: it demonstrates an intention on the respondent's part for the claimant's employment to continue.

98 Mr Gallaher's actions on the evening of 8 February 2017 were a genuine mistake: they were entirely understandable; and, in our judgement, the claimant must have realised what had happened. It appears that the claimant had largely created the situation by his submission of, and demand for payment of, an expense claim which he admits contained discrepancies.

99 Accordingly, and for these reasons, we find that there is no merit in the claimant's discrimination claims; and his claim for unfair dismissal is not well-founded. All claims are therefore dismissed.

100 In the event of a finding in the claimant's favour, the respondent argued that we should find that, because of the contents of Mr Jackson's report, there was a strong likelihood that the claimant would have been dismissed for gross misconduct within a very short period after his

resignation. And that, accordingly, any award of compensation would be very limited. In view of our findings on the substantive claims, it has not been necessary for us to consider Mr Jackson's report or make any findings regarding the claimant's conduct.

Employment Judge Gaskell  
22 February 2018