Case Number: 1807557/2019

EMPLOYMENT TRIBUNALS

Claimant: **Mr M Haynes**

Respondent: **Sky UK Limited**

Heard by CVP at **Sheffield** **On:** **28, 29, 30 September 2020**
1 October 2020
2 October 2020 (in chambers)

Before: **Employment Judge Brain**
Mrs JM Cairns
Mr D Fields

Representation

Claimant: Mr P Smith, counsel
Respondent: Mr G Price, counsel

RESERVED JUDGMENT

The Judgment of the Employment Tribunal is that:

1. The claimant was constructively dismissed by the respondent because of the matters at 4.3.5 and 4.3.7 of the list of issues set out in the Employment Tribunal's Order of 19 February 2020 ('the Order').
2. Accordingly, the claim of constructive wrongful dismissal succeeds.
3. Accordingly, the claim of constructive unfair dismissal succeeds.
4. The respondent treated the claimant unfavourably for something arising in consequence of disability upon the matters at 4.12.1, 4.12.2 and 4.12.4 of the list of issues in the Order.
5. The respondent failed to comply with the duty upon it to make reasonable adjustments upon the matter set out in paragraphs 4.21 to 4.24 of the Order.
6. The claimant's complaints in paragraphs 4 and 5 brought were presented within the time limit provided for by the Equality Act 2010.

REASONS

Introduction

1. After hearing the evidence in the case and then receiving helpful submissions from counsel, the Tribunal reserved its judgment. We now give our reasons for the judgment that we have reached. The Tribunal regrets the delay in promulgating this judgment.

2. The claimant pursues the following complaints:

   2.1. Constructive wrongful dismissal.

   2.2. Constructive unfair dismissal. This claim is brought under the Employment Rights Act 1996.

   2.3. Disability discrimination. This complaint is brought under the Equality Act 2010.

3. The relevant disability for the claim under the 2010 Act is the mental impairment of anxiety and depression.

4. The complaints of disability discrimination are brought under section 15 and sections 20 and 21 of the 2010 Act: that is to say, the claimant pursues complaints of unfavourable treatment for something arising in consequence of disability; and that the respondent failed to comply with its duty to make reasonable adjustments.

5. The case benefited from a case management hearing which came before Employment Judge Licorish on 19 February 2020. She set out a comprehensive list of the issues in the case. We shall come to these in due course.

6. The Tribunal heard evidence from the claimant. He attested as to the truth both of his witness statement of fact and his impact statement dealing with his disability and its effect upon him. (The latter is in the bundle at pages 584 to 589). On behalf of the respondent, evidence was heard from:

   6.1. Melissa McNab. Miss McNab has been employed by the respondent since 2010 in a number of roles. She became retail regional manager in January 2019. This is the post which she currently holds.

   6.2. Simon Mackenzie Crooks. He has been employed by the respondent for over 15 years in various investigation roles. He currently holds the post of group director of investigation and government liaison. Prior to working for the respondent, he worked for the State of Guernsey Customs and Immigration Department specialising in carrying out investigations.

Findings of fact

7. The respondent is a very well-known broadcaster and telecommunications company. The claimant worked for the respondent between 1 April 2009 and 3 October 2019. He worked in various roles. He was initially employed as a sales agent. There is a statement of particulars of employment dated 27 March 2009 in the bundle at pages 52 to 56. This

gives the claimant's place of work as *'Tesco (Yorkshire)'*. The claimant told us that this was an error. His evidence was that at no stage did he work in a Tesco store.

8. At some point in or around 2016 the claimant was appointed to the post of sales manager. In that capacity, he worked in the Frenchgate shopping centre in Doncaster.

9. At paragraph 10 of his witness statement the claimant says that his work as a sales manager at Frenchgate continued until October 2018. The claimant says, "*at that point, the role was deleted and therefore I dropped down to a sales advisor."* He goes on to say that he "*worked at a 'store' in the Frenchgate Centre in Doncaster town centre. The store was basically a permanent stand in the public walkway on the second floor of the Frenchgate Centre, directly opposite Starbucks. There was a workstation and various stands. The idea was to catch the attention of passing members of the public and bring them into the working area for the purposes of selling them Sky services. We were also able to answer enquiries at the workstation."*

10. The claimant's account, in paragraph 11 of his witness statement is that he, "*worked with a team of 3 to 4 colleagues who were located at the Doncaster store. There were other stores located in other shopping centres, within the Yorkshire area, the closest being Meadowhall in Sheffield".*

11. The claimant tells us, in paragraph 29 of his witness statement, that the deletion of the sales advisor role in October 2018 was pursuant to a restructure. The claimant took up his new role of sales advisor with effect from 26 October 2018. This was confirmed in writing on 16 November 2018 (page 361).

12. Prior to the changes in October 2018, sales advisors were line managed by an area manager. Miss McNab told us that each area manager (also known as a team leader) would have responsibility for managing several stores. The team leader would visit each store once a day during their five-day week. The need for such visits, she says, depended upon the needs of the sales advisors.

13. The claimant's area manager/team leader from 2016 was Andrew Stimpson. The claimant says, in paragraph 12 of his witness statement, that he worked well with Mr Stimpson and enjoyed a good working relationship with him. Unfortunately, Mr Stimpson fell ill in May 2016. His temporary replacement was Malcolm Reynolds. The claimant says that Mr Reynolds had worked as a sales assistant prior to his promotion to the role of team leader. The claimant concludes at paragraph 12 of his witness statement with the remark that, "*it was immediately obvious that Malcolm had a different style of working."*

14. Mr Stimpson recovered from his illness and returned to his area manager role in March 2017. In evidence given under cross-examination, the claimant confirmed that he did not work again under the line management of Mr Reynolds at any point after March 2017. The contact the claimant had with him after March 2017 was somewhat fleeting. Although in the usual course the claimant would have been required to attend bi-monthly

management meetings in which Mr Reynolds participated, the claimant was excused attendance on the grounds of anxiety following a discussion which he had had with Mr Stimpson.

15. The cause of the claimant's anxiety was summarised by the claimant in paragraph 18 of his witness statement. He says that, "*During the period May 2016 until February 2017 I was subjected to regular public dressing downs. [Mr Reynolds] would swear at me every time he saw me. My performance was criticised on at least a weekly basis. Malcolm would regularly use inappropriate, over aggressive language, swearing at me and using phrases such as "you need to sort this fucking stand out" and "the figures have been shit" and "you're in deep shit". It wasn't friendly banter, it was meant to offend and intimidate me. He would use these phrases at the store, in ear shot of potential customers and my colleagues. He also insisted that he carry out meetings with me in Starbucks, regardless of the subject of those meetings. I would regularly have to listen to threats that I would be replaced as manager."* The claimant says that Mr Reynolds went so far as to name the individual whom he (Mr Reynolds) had identified as the claimant's replacement.

16. In paragraph 19 of his witness statement, the claimant refers to Mr Reynolds upbraiding him about his sales figures during a telephone call on 8 July 2016. An hour later, Mr Reynolds turned up at the Doncaster store and *"went into a rant"* in the Starbucks café.

17. The return of Mr Stimpson to work in March 2017 doubtless came as a relief to the claimant. It was put to the claimant in cross-examination that Mr Stimpson had assured the claimant upon his return that he would not have to "*put up with Mr Reynolds for much longer*". It was suggested that this remark was made by Mr Stimpson at a meeting. The claimant said that he was "*not sure that it wasn't a telephone conversation.*" At all events, the claimant did not appear to dispute that Mr Stimpson had given him reassurance about not having to work with Mr Reynolds in future.

18. This notwithstanding, the claimant complains (in paragraph 28 of his witness statement) that, "*During that time [between the date of Mr Stimpson's return to work in March 2017 and October 2018] Malcolm still tried to impact on my work. In July 2018, I had called in sick and Malcolm drove past my house and then called the Doncaster store and asked why I wasn't there. He told my colleague Jordan Houlsten that he had seen my car on my drive and it shouldn't be there because I should be working. Jordan called me at home to tell me. I found this behaviour to be oppressive and threatening because at that point he was the manager of Nottingham and not Doncaster and therefore had no reason to be checking my whereabouts."*

19. The claimant and his colleagues learned that following the October 2018 re-organisation the role of area manager (occupied by Mr Stimpson) was also to be deleted and that Mr Reynolds was to become the permanent line manager of the sales advisors in Doncaster.

20. Miss McNab told us that Mr Reynolds was appointed to manage the Doncaster store in the Frenchgate Centre and two other stores at Crystal Peaks and Meadowhall (both in Sheffield). As we shall see in due course,

the Doncaster store closed on 3 September 2019. This left Mr Reynolds to manage the two Sheffield stores.

21. Above the line managers in the hierarchy stood regional managers (of whom Miss McNab was one). The regional managers were assigned responsibility for a geographic area within the country. Miss McNab's territory encompasses Wales, the north of England *"above Doncaster"* and Scotland (where she is based).

22. News of the appointment of Mr Reynolds as his line manager precipitated the claimant becoming (as he says in paragraph 35 of his witness statement) "*extremely ill as a result of the work-related stress and I attended an appointment with my GP, during which I was prescribed sertraline to treat my anxiety and zopiclone to help me sleep. I was given a fit note to cover my first period of absence [commencing on 15 November 2019] until 8 December 2018. I was given the details to refer to IAPT for psychological therapy services. This is detailed in my impact statement."*

23. The claimant, in fact, did not return to work after he commenced long term sickness absence on 15 November 2018. The sick notes which cover the period from 15 November 2018 until 8 October 2019 are in the bundle at pages 525 to 533. All bar one refers to anxiety and/or depression.

24. The respondent concedes the claimant to be a disabled person for the purposes of section 6 of the 2010 Act because of the relevant disability of anxiety and depression from 1 August 2019. In evidence given under cross-examination, Miss McNab fairly accepted that all the fit notes from 15 November 2018 until the end of the claimant's period of employment with the respondent arose from anxiety and depression. No issue was raised by the respondent that the sick notes at pages 525 to 533 had not been received.

25. Upon finding out that Mr Reynolds was going to be appointed as his line manager, the claimant wrote to the respondent's human resources department. This is known as the *'People Plus Department'.* The claimant's email is dated 8 November 2018 and is at pages 352 to 357. The claimant's email was sent on his own behalf and on behalf of his colleague, John O'Neill who also had concerns.

26. In his email of 8 November 2018, the claimant gave some details of his experience during Mr Reynolds' temporary tenure as area manager when he (Mr Reynolds) was covering for Mr Stimpson's illness. In recounting the history of matters, the claimant included a screenshot of an email that he had sent to Chris Spence who is a senior manager within the respondent. This email is dated 5 May 2016. Similarly, he also included screenshots of emails dated 13 January 2017 and 23 February 2017 addressed to Mr Stimpson from Mr O'Neill and himself respectively.

27. The email from the claimant to Mr Spence of 5 May 2016 (at pages 353 and 354) raised the following issues:

    27.1. That on or around 1 May 2016, Mr Reynolds had reduced to tears a female member of staff working in the Barnsley store (and who was suffering from post-natal depression) by shouting at her.

27.2. That Mr Reynolds had spoken to Michael Spiers, a fellow sales advisor, in an inappropriate manner using foul and abusive language.

27.3. That Mr Reynolds had used foul and abusive language to another female employee.

28. The claimant's account is that Mr Spence prevailed upon the claimant not to pursue the issues raised in his email of 5 May 2016 as a formal grievance. Mr Spence said that he would speak to Mr Reynolds. The claimant says that he did so and (*per* paragraph 17 of the claimant's witness statement) "*there was an improvement in Malcom's behaviour for a few weeks. However, it didn't last very long and he was quickly using the same sort of language and inappropriately aggressive approach. Following that he seemed to target me. He called me a "fucking coward" at a public training course, which I found to be humiliating".* The claimant refers to this incident in the email addressed to People Plus on 8 November 2018: see the final paragraph of page 354.

29. The claimant also recounted (in the first substantive paragraph at page 355) the incidents cited in paragraphs 15 and 16 above. The claimant says in the same paragraph of page 355 that Mr Reynolds' behaviour on 8 July 2016 was such that the claimant suffered severe heart palpitations. He had to ask his father to take him to hospital. His general practitioner then gave him a two weeks' sick note for stress which the claimant sent to Mr Stimpson.

30. In paragraph 21 of his witness statement the claimant says that, "*In January 2017 I witnessed Malcolm act inappropriately towards my colleague John O'Neill. He walked quickly up to John and placed his hands on his shoulders, before quickly unzipping his jacket and exposing his clothes beneath it. This was done to show that John didn't have the company shirt on below his uniform jacket. He did it to make a show of John, but John found it very upsetting because he had suffered a traumatic experience in his past, so he discussed it with me and explained why he was so clearly upset about it. The atmosphere of the Doncaster team was extremely negative and low."* Mr O'Neill in fact complained about this incident to Mr Stimpson on 13 January 2017 (pages 356 and 357): (*as we have said, a screenshot of this email was included in the email of 8 November 2018 to People Plus).*

31. In paragraph 23 of his witness statement, the claimant says that on 21 February 2017 he was required to attend a performance meeting. He says, "*It was Malcolm who insisted that I intend and it was his choice to conduct the performance review. I believe the meeting should have been held in a private office or within a private space, however, I was told to attend Starbucks coffee shop in the Frenchgate Centre, opposite the store. It was busy and full of shoppers. The tone of the meeting was very critical and I could tell other customers were listening. I was completed humiliated."*

32. He goes on to say in paragraph 24 of his witness statement that, *"I felt really ill as a result of this meeting. I therefore attended the first available appointment with my GP on Thursday 23 February 2017 and was advised to take time off work because of stress and anxiety. I was required to have*

blood tests and I was referred to the hospital for an ECG, which was followed up with a 24 hour heart rate monitor. This was the start of months of medical tests and therapy, the details of which are set out in my medical records and the impact statement."

33. On 23 February 2017, the claimant emailed Mr Stimpson. A screen shot of this email is at pages 355 and 356 (as part of the email of 8 November 2018 addressed to People Plus). The claimant opens the email of 23 February 2017 with the words, *"I have been to the doctors this morning for an emergency appointment due to my heart rate/palpitations, brought about by a discussion (I use the word discussion in the loosest of terms) as it was more of a one sided attack on my career from Malcolm Reynolds on Tuesday [21 February] of this week, I have been advised to take time off due to stress and anxiety related issues."* Mr Stimpson was informed that the claimant had had "*blood tests done today and referred for an ECG followed by a 24 hour monitor as a precaution."* The claimant was absent from work between 21 February 2017 and 9 March 2017. By the time the fit note had expired Mr Reynolds was working back in Meadowhall as a sales advisor and Mr Stimpson had returned to work as the claimant's area manager.

34. As was the case in May 2016, it appears that the respondent took no formal action upon the claimant's complaint set out in his email of 23 February 2017. The claimant says in paragraph 25 of his witness statement that, *"Mr Stimpson didn't take any action, nor were my emails forwarded on to anyone else to deal with. He told me that he would be back in the managerial role soon, so I shouldn't worry."* It will be recalled that Mr Stimpson retuned in March 2017.

35. In summary, there matters rested until the claimant received the unwelcome news that he was once again to fall under the line management of Mr Reynolds with effect from November 2018.

36. The respondent chose not call Mr Reynolds to give evidence. Neither of the respondent's witnesses had any first-hand knowledge of incidents referred to in the claimant's evidence around Mr Reynolds' behaviour.

37. That being said, Miss McNab in fact carried out a grievance investigation into aspects of Mr Reynolds' behaviour other than those raised by the claimant. This followed a complaint raised about Mr Reynolds by Ian Inwood. In the course of that investigation, Miss McNab interviewed Mr O'Neill on 27 February 2019 (pages 121 to 124). Mr Inwood's complaint appears to have been around an incident which took place on 21 December 2018 at the Crystal Peaks store. Mr O'Neill told Miss McNab (page 122) that Mr Reynolds called Mr Inwood a "*dick"* in a loud voice. This was overheard by *"two women who work at the bag stand nearby and the mobile phone stand guy".* Mr O'Neill said that the witnesses were shocked by Mr Reynolds' behaviour. Mr O'Neill says that Mr Inwood asked Mr Reynolds to repeat what had been said. Mr Reynolds duly obliged commenting "*yes I did call you a dick."* Mr O'Neill said to Mr Reynolds that he had acted unprofessionally and "*was out of order*". Mr O'Neill said that Mr Reynolds was *"very irate and aggressive. If I was to describe his body language after Ian [had gone], he was clearly agitated."* He said that both Mr Inwood and Mr Reynolds had got heated.

38. It was suggested to Miss McNab by Mr Smith that her findings about Mr Reynolds' behaviour towards Mr Inwood on 21 December 2018 are consistent with Mr Reynolds' behaviour towards the claimant, the female employee in the Barnsley store in May 2016, the other female employee and the foul and abusive language meted out to Michael Spiers referred to in paragraph 27 above. Miss McNab fairly conceded this to be the case.

39. Miss McNab accepted that the incident involving John O'Neill of January 2017 had in fact occurred as described by him. Mr O'Neill had told Miss McNab about the incident at some point during the "*first half of 2019".* Miss McNab had arranged for Mr O'Neill to work separately from Mr Reynolds upon Mr O'Neill's return to work. *"I wouldn't put him back with Mr Reynolds"* was how Miss McNab put it. It appears that Mr O'Neill was amenable to the idea of mediation between him and Mr Reynolds. The mediation succeeded and it seems that Mr O'Neill did work alongside Mr Reynolds at Crystal Peaks following the mediation process.

40. It was put to Miss McNab that Mr Stimpson was aware of the incident mentioned in paragraph 18 (about Mr Reynolds' observing the claimant's car parked upon the claimant's driveway in July 2018). Miss McNab confirmed that at this time Mr Reynolds had no line management responsibility for the claimant. She agreed that Mr Reynolds' behaviour was outrageous if it was the case that Mr Reynolds was checking up on the claimant's movements and that it was reasonable for the claimant to reach that conclusion.

41. Mr Reynolds' propensity to behave inappropriately, aggressively and to resort to foul and abusive language is corroborated by Miss McNab's investigations into the Inwood aggrievance. Her findings are consistent with the pattern of behaviour described by the claimant who recounts a number of examples of inappropriate behaviour to himself and male and female colleagues over a significant span of time between May 2016 and the summer of 2018. In these circumstances, the Tribunal finds as a fact that Mr Reynolds did behave as alleged by the claimant.

42. This finding is underscored by Miss McNab's evidence that during the course of the mediation between Mr O'Neill and Mr Reynolds, she had had to ask Mr Reynolds to leave at one point due to his behaviour during the process. Miss McNab said that Mr Reynolds had become "*frustrated about Mr O'Neill's account. He said he didn't want to listen to what was being said*."

43. The Tribunal also accepts that Mr Stimpson was aware that the stress brought on by Mr Reynolds' behaviour towards him had led to the claimant seeking medical advice in February 2017. This was referred to, of course, in the claimant's email of 23 February 2017 addressed to Mr Stimpson (page 355). When Mr Stimpson was interviewed by Asif Sharif about the issues raised by the claimant in November 2018 (as part of Mr Sharif's grievance investigation) Mr Stimpson readily acknowledged that the claimant had told him in February 2017 that his health was suffering. (Mr Sharif interviewed Mr Stimpson on 31 January 2019. The notes of interview are at pages 90 to 94. The salient passage is at page 93).

44. The claimant's evidence, in paragraph 34 of his witness statement, is that he did not receive an immediate response to his email of 8 November 2018

(at pages 352 to 357). The claimant sent a further email on 16 November 2018 (pages 348 and 349). The claimant raised a further complaint about Mr Reynolds' behaviour, in particular of taking steps to discredit the claimant during a meeting held with the team in Doncaster on 14 November 2018. The claimant informed People Plus that he had an emergency appointment with his general practitioner that morning.

45. Towards the end of the email of 8 November 2018 (at page 357) the claimant complained that other members of staff were unwilling to add their names to the grievance raised by the claimant and Mr O'Neill. The claimant alleged that Mr Reynolds was coercing individuals not to co-operate with the claimant. The claimant's evidence was that he thought the meeting of 14 November 2018 was convened with this aim in mind.

46. The claimant then raised a further grievance on 27 November 2018. This is at page 579. The claimant again raised complaints about what he had heard regarding Mr Reynolds' behaviour on 24 and 25 November 2018. The claimant had received confirmation from a colleague, Anthony Kerr that Mr Reynolds had said "*tell Matt I'll see him soon*" which the claimant interpreted as a threat.

47. The inference from the claimant's witness statement is that the respondent took no action upon his grievances until after 27 November 2018. However, during the course of the hearing, the claimant produced a copy of notes that he had saved on his smartphone. This appears to have been a living document, the claimant having been apparently advised by his cognitive behavioural therapist to keep a contemporaneous note of matters as they progressed. We can see from this document that on 19 November 2018 the claimant records that he had received an email from the respondent's HR department in which the claimant was told that somebody was to be appointed to investigate his grievance. The claimant then makes a note dated 7 December 2018 in which the claimant records receiving a telephone call from Mr Sharif to say that he would be investigating the claimant's grievances.

48. Mr Sharif is the respondent's head of sales operations. He wrote to the claimant on 9 December 2018 (page 68). Mr Sharif invited the claimant to a grievance meeting to be held on Thursday 13 December 2018. This was to be undertaken by telephone.

49. Mr Sharif then interviewed eight witnesses. (Anthony Kerr was in fact interviewed twice). The interviewees were with:

    49.1. Michael Spiers – pages 79 to 80 and 85 to 88.

    49.2. Jennifer Reid – pages 82 to 84.

    49.3. Mr Stimpson – pages 89 to 94.

    49.4. Jordan Houlsten – pages 95 to 97.

    49.5. John Grant – pages 98 to 100.

    49.6. Mr Kerr – pages 101 to 108 and 118.

    49.7. Chris Spence – pages 105 to 109.

    49.8. Malcolm Reynolds – pages 110 to 117.

50. These interviews were conducted between 30 January and 14 February 2019. The claimant accepted, in evidence given under cross-examination, that Mr Sharif told him on 13 December 2018 that he would conduct his investigations into the claimant's grievance early in the new year.

51. It is not necessary to look in any great detail at the contents of each of the interviews conducted by Mr Sharif. The Tribunal will simply focus upon the relevant passages highlighted during the hearing by counsel:

    51.1. The claimant's interview (pages 70 to 77): the claimant confirmed (at page 70) that Mr Sharif had fairly summarised his points of grievance. Mr Sharif also afforded the claimant the opportunity of incorporating amendments to Mr Sharif's notes which Mr Sharif did not challenge. The claimant was asked what would be a good outcome for him at the conclusion of the process. He said, "*I guess just not having Malcolm as a manager as it doesn't help my anxiety and he could make other people feel like me in the future which isn't right" … "I couldn't work under Malcolm with everything that happened last time [it] would not be viable or good for my health. I'm starting therapy again for another 12 weeks which could help. It depends on what happens with this and the therapy what my long term outcome would be I think."*

    51.2. Jennifer Reid – she confirmed that she was aware of the incident between Mr Reynolds and Mr O'Neill which occurred in January 2017. This is further corroboration of the Tribunal's findings in the claimant's favour upon the issue of Mr Reynolds' behaviour.

    51.3. Michael Spiers – he confirmed Mr Reynolds' use of foul and abusive language (in particular at the top of page 87). Again, this provides further corroboration of the claimant's case about Mr Reynolds' behaviour.

    51.4. Andrew Stimpson – we have dealt with some of the salient parts of Mr Stimpson's interview already (in particular his knowledge of the need for the claimant to seek medical attention after the incident of 21 February 2017, the incident involving the claimant's car in July 2018 and the incident with John O'Neill of January 2017). Again, this is corroboration of the claimant's case regarding Mr Reynolds' behaviour. Mr Stimpson was also asked by Mr Sharif about arrangements to keep in touch with the claimant whilst he was off sick. Mr Stimpson said, "*I sent him an email of the absence policy. I asked him to contact me weekly. He advised me that he had spoken to HR and that he didn't have to contact me weekly because of his absence nature. I did some digging and that was indeed what he had been told so from there on I just received sick notes. It is not being managed by me any longer. I did want to speak to him regularly from a duty of care perspective as I wanted to check in with him and try and get him back to work as soon as I could as the longer this goes on the more difficult it would be I believe for Matt, so it was his welfare that was my primary concern"*. Mr Stimpson was interviewed on 31 January 2019. At this point, he was, of course, no longer the claimant's line manager. Mr Stimpson also said at page 91 that he recognised that the claimant had an issue

with *"his shyness".* He went on to say that the claimant "*didn't want me to do anything relating to his health concerns, apart from wanting to know if I was coming back and if I was coming back to the role of his team leader, that in his mind that would resolve the situation for him. He said he didn't need any other support.*"

51.5. Jordan Houlsten – he had a recollection of Mr Reynolds telephoning him after having seen the claimant's car parked outside the claimant's home in July 2018.

52. As we shall see, it was the respondent's case that the claimant was against the idea of the respondent making any adjustments in the workplace pending the outcome of the November 2018 grievance. This the claimant denied. The salient passage of the interview with Mr Stimpson just referred to in paragraph 51.4 was put to the claimant in support of the respondent's contention.

53. Mr Stimpson was of course being asked by Mr Sharif about his handling of the issue raised by the claimant in February 2017. Mr Stimpson had no part in the management of the claimant's grievances raised in November 2018. It was put to the claimant that what he told Mr Stimpson in February 2017 was indicative of and consistent with the claimant not requiring further support when further matters arose in November 2018. The difficulty for the respondent, of course, is that Mr Stimpson effectively told the claimant in or around February 2017 that he would no longer have to work under the line management of Mr Reynolds. That was the adjustment required by the claimant at that time and which enabled the claimant to return to work. Mr Stimpson appeared to have managed the claimant's issue raised in the spring of 2017 informally and successfully.

54. When interviewed by Mr Sharif on 7 February 2019, Mr Reynolds said (at page 111) that he had *"heard a few rumours which I have tried to quash and just get on with my job".* This is corroborative of the claimant's case (referred to in paragraph 45) that he was encountering difficulty in persuading people to support the grievance raised by him and Mr O'Neill in November 2018 and that Mr Reynolds was seeking to deter others from corroborating the claimant's allegations. In view of our findings about Mr Reynolds' behaviour generally, it is credible that Mr Reynolds behaved in this way and his reference to quashing rumours was an oblique way of admitting to coercion.

55. Mr Sharif prepared his grievance outcome letter. This is dated 19 March 2019 and is at pages 133 to 138. Mr Sharif set out the 10 points of grievance raised by the claimant (and which had been agreed by the claimant at the meeting of 13 December 2018). Mr Sharif's conclusions do not, of course, bind the Tribunal. Mr Sharif, in summary, did not uphold the claimant's grievance upon the following points:

55.1. Inappropriate behaviour towards him by Mr Reynolds.

55.2. That Mr Reynolds did not adequately support the claimant during the time that the claimant was being line managed by him.

55.3. That the grievance of 2016 was inappropriately handled by Mr Spence (in the sense that Mr Spence did not treat it as a formal grievance).

55.4. That the complaint of February 2017 was not appropriately handled for the same reason.

55.5. That colleagues had been coerced into not raising concerns in.

55.6. That Mr Reynolds behaved inappropriately in checking up on the claimant in July 2018.

55.7. That Mr Reynolds issued a threat via Anthony Kerr promising to "*see the claimant soon*."

56. Mr Sharif did acknowledge that Mr Stimpson had spoken to the claimant about the claimant's health concerns following the February 2017 incident. Mr Sharif said, "*I believe you did speak with Andrew [Stimpson] about this, but I also believe you did not ask for any specific support. Andrew recalls that you felt reassured that Malcolm would no longer be your line manager, and Andrew felt that the concerns you [had] would no longer be an issue."*

57. The grievance outcome letter was hand delivered to the claimant at a meeting held on 26 March 2019. The meeting took place at the Costa Coffee café at the Junction 31 services of the M1 motorway. The claimant's father drove him to the meeting. The claimant says that he "*found it to be particularly humiliating and distressing to discuss these matters in a public setting. There were people sat next to us on the next table who could hear every word."* The claimant complains (with justification) that, "*my employer is a multi-billion pound company with call centres and offices at its disposal and I was required to meet in a service station to discuss something so important and confidential."*

58. In evidence given under cross-examination, the claimant accepted that Mr Sharif had raised with the claimant the idea of having a facilitated mediation discussion with Mr Reynolds. Presumably, this was to work along the same lines as that which had been brokered by Miss McNab between Mr O'Neill and Mr Reynolds. The claimant said that he was resistant to the idea. He said, "*I couldn't see him [Mr Reynolds]. I'd have a panic attack."*

59. The claimant was asked by Mr Price whether he had complained about Mr Sharif's idea of meeting at the service station. The claimant appeared to evade the question and replied that his father had given him a lift to the meeting. That said, the Tribunal considers there to be merit in the claimant's complaint about the respondent's choice of venue. It is surprising that the respondent proposed holding such an important meeting with the claimant in a busy public area and that arrangements could not be made for the respondent to meet with the claimant in private (perhaps by hiring a private meeting room in a business hotel or something similar).

60. The Tribunal did not have the benefit of hearing evidence from Mr Sharif. Mr Smith was therefore left with little option but to put to Miss McNab that Mr Sharif had taken an unreasonably lengthy period of time to conclude his grievance investigation. It was suggested that the respondent waited an unreasonably long period of time between 8 November 2018 and 9 December 2018 to notify the claimant that Mr Sharif was to undertake the grievance investigation. Miss McNab fairly accepted that if it was the case that the claimant's grievance had not even been acknowledged then the claimant's trust and confidence in the respondent was likely to be shaken.

(As we said in paragraph 47, the grievances of 8 and 16 November 2018 were in fact acknowledged on 19 November 2018).

61. It was then suggested that there was an unreasonable delay between 13 December 2018 (when Mr Sharif interviewed the claimant) and then the time when Mr Sharif picked the matter up and interviewed the other witnesses between 30 January and 14 February 2019. There was then a further delay of around six weeks or so between 14 February 2019 until the date of delivery of the grievance outcome to the claimant on 26 March 2019.

62. The claimant appealed against Mr Sharif's grievance outcome decision. The claimant's letter of appeal is at pages 141 to 147. This is detailed and is well written. However, there is no need for the Tribunal to consider the points made by the claimant in detail. The Tribunal notes that in the *"overview"* section on page 141 the claimant refers to "*six employees [raising] concerned about how they have been treated by Malcolm, including making female employees cry as a result of his aggression*." The claimant goes on to say that, "*one grievance from a member of staff within the past month has been upheld against Malcolm Reynolds for intimidation/causing a member of staff to feel threatened."* It is not clear whether this is meant to be a reference to Mr Inwood or to John Grant (a member of the sales team whom Mr Smith suggested to Miss McNab had also raised a grievance about Mr Reynolds). This is further corroboration, if such were needed, of the claimant's case about Mr Reynolds' behaviour.

63. The claimant's appeal was dealt with by David Holmes, director of retail operations. The grievance appeal hearing was held on 9 May 2019. The notes are at pages 148 to 165. As with the grievance hearing, this was dealt with by telephone. As did Mr Sharif, Mr Holmes permitted the claimant to make amendments to the record of the meeting which Mr Holmes did not seek to challenge.

64. It is unnecessary to go through the details of the appeal hearing. However, towards the end, Mr Holmes asked the claimant whether there was any further support which could be afforded to him by the respondent. The claimant replied (at page 164) "*no, I would like a timely resolution as I feel it will help my mental health. Please refer to the occupational health reports again*." The claimant was asked whether Mr Holmes had given the claimant a fair opportunity to present his case. The claimant agreed that he had been given that opportunity. Mr Holmes told him that his "*next point of call will to be review the case notes*."

65. When reverting to Mr Holmes about the contents of the appeal hearing minutes, the claimant said (in an email of 29 May 2019 at pages 167 and 168) that, "*a point you may also wish to consider as part of my appeal and the correspondence associated with the notes and appeal is that it is well documented by the company's occupational health advisor in two letters to my employer that I am suffering from work-related stress and anxiety and that discussions to try to resolve these problems should be undertaken. I would request that you have sight of these reports as part of my appeal hearing. This is one of the points I will be raising as part of the notes which have been produced."* The claimant had referred to the occupational health reports in the appeal hearing: this is recorded in the passage in page 164

to which we referred in paragraph 64. We shall consider the issue of the occupational health referrals and reports shortly.

66. The claimant's appeal was dismissed. Mr Holmes' appeal outcome letter of 26 June 2019 is at pages 186 to 191.

67. Again, Mr Holmes' conclusions are not binding on the Tribunal. It is unnecessary to go into his reasoning in any detail. In summary:

    67.1. Mr Holmes acknowledged that a lengthy period elapsed between the date upon which Mr Sharif met with the claimant on 13 December 2018 until the conclusion of Mr Sharif's findings at the end of March 2019. Mr Holmes said, "*Under review I can see that the Christmas holiday period would have affected time to complete and the number of people that required interviewing was lengthy so whilst I understand it took time, it is my belief that this was due to a desire to properly investigate*."

    67.2. Mr Holmes concluded that the claimant had "*been treated fairly and with the best intent*." He went on to say that he could "*find no evidence to support your claims that Malcolm looked to try to single you out or that he consciously looked to make you feel unwell. There is a clear and obvious breakdown in the relationship with Malcolm, however I cannot agree with the view that Malcolm or Sky have acted in the collective coercive manner to cause this*."

    67.3. Mr Holmes said, "*I appreciate that this is not the outcome you hoped for given our meeting and the intensity of dialogue in your appeal. During our meeting you were unspecific as to your desired outcome so I cannot look at what reasonable adjustments you feel may be relevant. I am also aware that mediation has been offered between you and Malcolm though you have not chosen to avail of this. I do however hope you find a way soon to be able to return to work and are able to manage your illness*."

68. During the currency of the grievance and the grievance appeal processes, the claimant was of course absent from work through ill health. Melissa McNab had become retail regional manager in January 2019. She delegated the task of managing the claimant's sickness absence to Janice Smith who at the material time was a team leader. Miss McNab justifies her decision to delegate this task in paragraph 3 of her witness statement where she says that,

    "I had not yet got to grips with my new role and I was not in the best position to manage the claimant's absence at that time. Conversely Janice was a very experienced team leader so I felt that she was best placed to handle his absence at that time."

    She goes on to say in paragraph 4 of her statement that,

    "Janice and I arranged several appointments with occupational health in this regard and the advice was always followed" (pages 62 to 67).

69. At paragraph 43 of his witness statement the claimant says that, "*On approximately 16 January 2019 I received a call from Janice Smith who made general enquiries about my health. This is the first call I'd received from anyone about my sickness absence since the start of my absence in*

mid-November 2018. We briefly discussed my grievance and impact it had had on my health and I explained that resolving [it] might assist with my recovery. No further action was discussed or arranged at that stage. Janice called me again on 25 January 2019 and we had a brief chat." The claimant's contemporaneous note referred to in paragraph 47 above refers to calls received by him from Janice Smith upon these dates. There being contemporaneous corroboration, the Tribunal accepts the claimant's account.

70. In paragraph 44 of his witness statement the claimant goes on to say that,

"*On 25 February I was referred to the respondent's occupational health department. I don't remember being told in advance that this would happen but I was happy to attend. I therefore attended an appointment with occupational health on 5 March 2019."*

71. The occupational health report of that date is at pages 62 and 63. The report was prepared by Jacqueline McCunn, a senior occupational health nurse with Sky Occupational Health. The report followed a telephone consultation with the claimant.

72. The salient parts of the report are as follows:

- That the claimant is absent due to a flare up of *"an existing psychological condition with an anxiety related aspect"* which the claimant reported as being *"a direct result of perceived work related concerns, namely relationship with manager".*
- The claimant is receiving a treatment plan for his psychological condition and is attending regularly for further specialist support.
- He has made some progress with his recovery and is not experiencing as many anxiety attacks and reported an improved mood.
- The claimant was aware of the options of additional support available through the respondent including the use of the Sky Healthcare Plan and Sky Support Services and external sources of support.
- The claimant felt unable to consider a return to work at the current time.
- Mrs McCunn said that she was "*unable to predict the length of absence at this current time. However I am not optimistic of a return work within the next four weeks."* She anticipated that *"with continued appropriate treatment and support the likelihood of further impact upon his fitness for work will be reduced."*
- Mrs McCunn said that she had advised the claimant *"to discuss his treatment plan with his GP and a potential increase".*
- She noted that the claimant *was "currently waiting on the outcome of a current grievance. It appears to be important to [the claimant] to receive this outcome as it appears the waiting is impacting negativity on his overall mental health status."*

- She recommended that the respondent's management have a discussion with the claimant to address his perceived work-related concerns and possible adjustments.
- She opined *that "the disability remit of the Equality Act is likely to apply to the claimant's psychological condition."*
- In answer to the question as to whether there was a foreseeable return date, Mrs McCunn reported that *"the grievance outcome may impact on [the claimant's] decision. Re-deployment may be an option and can be discussed with [the claimant]. I have advised him that he would need to follow the normal process of looking for further positions within Sky".*

73. Mrs McCunn concluded by saying that she had discussed with the claimant obtaining his content "*to allow me to obtain a medical report to ascertain longer term prognosis and the likely length of absence. On receipt of this report I will arrange a follow-up consultation and update you following this review. Occupational health provides recommendations for managers to consider and implementing is a management responsibility*." In cross-examination, the claimant accepted the accuracy of Mrs McCunn's report and her description of his condition and treatment.

74. The claimant says in paragraph 45 of his witness statement that, "*There was no attempt from anyone to speak to me about a meeting that would address the relationship between me and Malcolm. The report was addressed to and sent directly to Melissa [McNab] and contained recommendations that she didn't put in place or follow up on. The respondent was dealing with the grievance but it was a long drawn out process without any real attempt to resolve anything."*

75. The respondent's case is that the claimant did not wish to progress anything pending the outcome of the grievance. In support of its case, the respondent relies upon a note prepared by Janice Smith which is in the bundle at pages 358 and 359. Unfortunately, this note is not dated. However, it would appear to be a record prepared by Janice Smith of her conversation with the claimant that took place on 16 January 2019. We say this as it is recorded that the claimant was asked by Ms Smith whether he would consent to an occupational health referral. Certain it is therefore that this record pre-dates the claimant's consultation with Mrs McCunn of 5 March 2019.

76. The claimant said that he had not seen the note at pages 358 and 359 prior to its disclosure during these proceedings. There is nothing to suggest that the note was shared with the claimant at the material time. The note records that the claimant told Janice Smith that he was receiving counselling through the NHS. Janice Smith told the claimant that services were available through the respondent. The claimant said, "*I don't want to do both at once but it is something I might consider in future, this one is not as good as the last one."* He said that he had received advice from his GP to continue with counselling and taking medication.

77. Staying with the discussion of 16 January 2019, the claimant was asked whether he had a time frame for his return to work. The claimant said, "*I don't know as I felt a bit better after taking the tablets but then yesterday*

that really threw me. I thought it was getting better." When asked whether there were any adjustments which could support the claimant's return to work, the claimant said, "*not at the minute, again with the ongoing investigation just waiting a conclusion to that."* The claimant was then again reminded of the availability of counselling through the respondent's private healthcare arrangements.

78. The claimant denied ever saying that he did not wish the respondent to make any adjustments with a view to him returning to work pending the outcome of the grievance.

79. The respondent also relied, in support of its case upon this point, upon what Andrew Stimpson told Asif Sharif during the grievance investigation meeting of 31 January 2019. We can see at page 91 that Mr Stimpson is recorded as saying to Mr Sharif that the claimant did not wish him (Mr Stimpson) "*to do anything relating to his health concerns apart from wanting to know if I was coming back and [the claimant] was adamant that if I was coming back to the role of his team leader, that in his mind would resolve the situation for him. He said he didn't need any other support*." Similarly (at page 93) Mr Stimpson told Mr Sharif that the claimant did not wish to have any contact other than receipt from Mr Stimpson of sick notes for his long-term sickness absence and that effectively the claimant wished to wait upon the grievance outcome.

80. In evidence given under cross-examination, Miss McNab said that the claimant "*was not willing to discuss a return to work until his grievance had been resolved in his discussions with Janice Smith."* It was pointed out that this important evidence had been omitted from her witness statement. Miss McNab said that she could not explain its omission.

81. Further, it was put to Mss McNab by Mr Smith that Janice Smith's note at pages 358 and 359 did not say in terms that the claimant did not wish to await the outcome of the grievance before discussing adjustments with a view to assisting him back to work. It was also put to her that there was no express reference within the note of the meeting between Mr Sharif and Mr Stimpson (in particular at page 93) of the claimant refusing to return to work until the outcome of his grievance was known. In any case, it was suggested that even if the claimant had said that, the respondent is not absolved of its responsibilities to consider making reasonable adjustments.

82. Miss McNab was taken to an email sent to Mr Mackenzie Crooks from Jessica Johnston, employee relations consultant. This is dated 18 October 2019 and is at pages 318 and 319. Jessica Johnston commented that "*I can assume reasonably that [the claimant] perhaps didn't want to have weekly contact."* It was suggested therefore that the respondent was making assumptions about the claimant's wishes.

83. As mentioned in paragraph 65 above, in his dealings with Mr Holmes during the grievance appeal process, the claimant had said (at pages 167 and 168) in an email dated 29 May 2019:

"A point you may also wish to consider as part of my appeal and the correspondence associated with the notes and appeal is that it is well documented by the company's occupational health advising two letters to my employer that I am suffering from work related stress and anxiety and

that discussions to try to resolve these problems should be undertaken. I would request that you have cited these reports as part of my appeal hearing. This is one of the points I will be raising as part of the notes which have been produced" [emphasis now added]. This is at odds with an assertion by the claimant of an unwillingness to discuss matters pending the grievance outcome.

84. Miss McNab said that upon receipt of the occupational health report of 5 March 2019 she emailed Mr Sharif for a progress report. Mr Sharif said to her that the grievance process was ongoing. She said that she could not recall whether she had emphasised to Mr Sharif occupational health's recommendations for a timely conclusion to the grievance process.

85. After giving evidence in his witness statement (at paragraph 45) that, "*there was no attempt from anyone to speak to me about a meeting that would address the relationship between me and Malcolm"* following the occupational health report of 5 March 2019 the claimant then goes on to say at paragraph 48 of his witness statement that, "*On 9 April I received the follow up call from Janice Smith. It was very much a routine call. There was no suggestion that the respondent would follow the advice from occupational health. The focus was very much on the fact that I wasn't well enough to return to work yet. My grievance wasn't discussed nor was the occupational health report. There was no discussion at all about what steps could be taken to get me back to work. The call felt like a box ticking exercise."*

86. A second occupational health report was prepared by Mrs McCunn. This is dated 30 April 2019 and is at pages 64 and 65. Again, the report followed a telephone consultation.

87. She reported that since her review of 5 March 2019, "*there appears to have been a deterioration in [the claimant's] overall mental health status".* She reported that the claimant felt unable to consider a return to work at the current time. She said that she was now in receipt of a medical report (not shared with the Tribunal) *"which has provided me with an overall view of his current mental health status".* Upon this basis she opined that the claimant was not fit to return to work. She felt unable to predict the length of absence. She considered that a return to work was unlikely within the next three months.

88. She included several recommendations. These were:

    - She advised the claimant to consider using the Sky Healthcare Plan. She said however that the claimant was receiving *"appropriate support and treatment by the NHS".*
    - She strongly recommended that the respondent's management have a discussion with the claimant to address his perceived work-related concerns and possible adjustments. She said that "*this may have a positive impact on [the claimant's] overall mental health status and reduce his length of absence."*
    - She said that the claimant was currently in the process of undergoing an income protection assessment.

89. The claimant was asked by Mr Price to clarify the medical report to which Mrs McCunn was referring in her report of 5 March 2019 (paragraphs 72 and 73). The claimant thought that Mrs McCunn had had sight of the GP's records. (As she appears to be an employee of the respondent, it is surprising that the respondent was unaware of to which medical report she was referring).

90. In paragraph 51 of his witness statement the claimant gives evidence that Mrs McCunn "*was annoyed that I hadn't been contacted for the purposes of discussing or arranging reasonable adjustments. She therefore said that she would strongly recommend this in the next report."* This is indeed what Mrs McCunn had said in her report (paragraph 88).

91. Melissa McNab was asked what steps the respondent had taken between 5 March and 30 April 2019. Ms McNab said that she understood that Janice Smith had been in contact with the claimant. It was put to Melissa McNab that there was nothing within the bundle recording that any contact had been made. The only contemporaneous record is that of the claimant in his contemporaneous note in which he records the discussion which he had with Janice Smith of 9 April 2019 mentioned in paragraph 85 above.

92. It was suggested to Melissa McNab that Mrs McCunn's strong recommendation in her second report that the respondent make contact with the claimant is at odds with the respondent's case that the claimant was reluctant to entertain any discussion with the respondent pending the grievance outcome. Miss McNab said that she was aware from Janice Smith that the claimant didn't want to talk about a return to work until he knew the grievance outcome. She fairly recognised that if it was the case that the claimant was willing to entertain discussions with the respondent and the respondent had not acted upon the occupational health recommendations to contact him then such would be damaging of the claimant's trust and confidence in the respondent.

93. On 20 May 2019, the claimant's solicitor wrote to the respondent. The letter is at pages 572 to 578. The solicitor's letter complained that the occupational health recommendations of 5 March and 30 April 2019 had not been followed. Again, this appears at odds with the respondent's case that the claimant was not willing to entertain any form of discussion pending the grievance outcome. Based upon this paragraph and paragraphs 83 and 92 the Tribunal finds as a fact that this was not the case and that the claimant was willing to consider discussions before the outcome of his grievance was known.

94. In paragraph 49 of his witness statement the claimant records his understanding that Janice Smith had moved in to a different department on 1 May 2019. He then says that he did not hear from Miss McNab until 1 July 2019. Miss McNab said that she had not seen the claimant's solicitor letter of 20 May 2019. (It is not clear to the Tribunal whether the respondent replied to it).

95. Miss McNab said that she in fact took over management of the claimant's case from the end of May 2019. There appears therefore to be an issue of fact between the claimant and Miss McNab as to when Janice Smith moved department.

96. At all events, Miss McNab's evidence is in accord with that of the claimant in that they first spoke on 2 July 2019. Miss McNab says that she emailed the claimant on 7 June 2019 shortly after taking over management of his case. The email is at page 182. The claimant says that he did not receive the email. It was addressed to his work email address to which the claimant did not have access. Miss McNab was then on annual leave between 7 June and 23 June 2019. She therefore picked the matter up following her return. Miss McNab maintained that she attempted to telephone the claimant after 23 June 2019. Her telephone records are in the bundle. It was pointed out to her that there was no record of her calling the claimant's mobile number during the week following her return from annual leave. Miss McNab said that she may have attempted to contact him on Skype. However, that assertion is not in her witness statement.

97. The claimant accepts that Miss McNab attempted to telephone him on 1 July 2019. That was the claimant's birthday. He therefore missed the call (which call is recorded in the call log).

98. The claimant's account of the discussion of 2 July 2019 is at paragraph 54 of his witness statement. He says that during the call Miss McNab introduced herself "*and told me that she would be contacting me on 8 July 2019 to discuss important changes. I think I said something like "that sounds worrying" and she responded by telling me that she would explain on 8 July. I therefore waited nervously to receive the call. This is the worst way that she could have handled the situation, given the reason for my absence."*

99. Miss McNab recalls, in paragraph 4 of her witness statement that "*I recall speaking with him about his health and about the support that he was getting. I remember that we discussed the Aviva healthcare offering available through Sky and I got his permission for another occupational health appointment. The claimant informed me that he was already seeing a therapist, but he was happy to speak to occupational health."*

100. The claimant's contemporaneous note for 2 July 2019 records that he "*Called Melissa back, she apologised for never contacting me and that nobody was in contact with me to help, she spoke about my occupational health meetings (therefore she was aware of them and chosen not to take up the recommendations) she is referring me to them again which seems strange as she clearly doesn't value their recommendations. However offers me no adjustments to help me back to work as per the occupational health recommendation. She asked how I was and I explained still in therapy and on tablets (I stated everything is now with ACAS and lawyers so at this point I'm leaving everything with them) said she will call me Monday the 8th to tell me some important things that should be delivered correctly. Wouldn't tell me what that was even though I explained my anxiety will make me worry, so now my anxiety is really bad as I am worried what it could be, came off the phone shaking. I believe this to have been a reasonable request that was ignored."*

101. The accuracy of the claimant's contemporaneous note dated 2 July 2019 was challenged by Mr Price upon the basis that the tracked changes made by the claimant following his meeting with Mr Mackenzie Crooks of 25 September 2019 (to which we shall come) has the claimant noting only

that Miss McNab "*did not mention anything regarding business, she just introduced herself."*

102. The claimant said that she had made no mention of the closure of the Doncaster Frenchgate store but did intimate that there was going to be a business change. Miss McNab said that she had no recollection of giving the claimant any indication that a major change was on its way. She said that such "*would not have been appropriate if I don't have the full information about changes in the business*".

103. In paragraph 5 of her witness statement Miss McNab records that, "*At the back end of that week [that is to say, the week ending Friday 5 July 2019] I had been informed by my boss that the decision had been made to close one of my stores, the Doncaster store, which is where the claimant worked. This was part of a wider business decision where four stores would be closing, but only Doncaster fell into my region."* She goes on to say that, "*On [Monday] 8 July 2019 I was in Doncaster carrying out a one to one meeting with one of my team leaders and because I was there, it had been decided that I would tell the three members of staff present that the store was due to close and I would inform the two remaining team members over the phone. Unfortunately, one of the three that were present, John Grant had to leave work because his son was unwell, but I proceeded to tell the two others the news. I told them that they would not be losing their jobs as they could move to another local store and I asked them to keep the update to themselves until I had had the chance to inform the other three members of staff. One being John Grant, [Anthony Kerr] was on holiday at the time and the other team member was the claimant."*

104. In paragraph 6 of her witness statement, Melissa McNab says that she spoke to Mr Grant and the member of the team who was on holiday whilst she was driving to her hotel on 8 July 2019. She says that she "*decided to contact the claimant the following day as I didn't want to call him whilst I was driving and the conversation not go well, or be able to answer questions competently as my notes were in my notebook, causing him to become stressed. I wanted to be in my office and have all the information in front of me. I telephoned the claimant on 9 July 2019 but he did not answer the phone so I left a message. I tried again throughout the following week, but I could not get hold of the claimant".*

105. In evidence given under cross-examination, Miss McNab said that when she spoke to the claimant on 2 July 2019, she was aware that the Doncaster store was closing but not of the timescale. She said that on Monday 8 July 2019 she drove down from her home in Scotland to Doncaster. During the course of her visit to the Doncaster store, she spoke to the members of the team who were in store as a group before proceeding to seem them individually. (Of course, she did not see John Grant because he had to leave work because of childcare issues). Miss McNab said that at this stage, at the time of her store visit, she had all of the relevant information including the timescales and the options for alternative employment.

106. Miss McNab was challenged upon the evidence which she gave to the Tribunal that on 8 July 2019 she had been made aware of the closure of the Doncaster store with effect from 3 September 2019. This was upon the basis that a draft of her witness statement was in fact mistakenly served

upon the claimant's solicitor. This was replaced by the witness statement attested to by Miss McNab under oath. In the latter, she made no mention of knowing that the Doncaster store was going to close on 3 September 2019. It was suggested to her that had she known of the date of the closure she would have left in this important piece of information. She said that she was aware by 8 July 2019 that the store was closing on 3 September 2019 but could shed no light as to why that fact had been removed from the final version of her witness statement. She denied that no final decision had been taken at that point and that plans were only at a formative stage.

107. Miss McNab was then asked by Mr Smith about her decision not to inform the claimant of the fact of the disclosure on the same day upon which the other members of the team learned of it. She said that she had had a long day having had to get up early in the morning to drive to Doncaster from Scotland. She said that by the time she had spoken to Mr Grant and Mr Kerr (who was the employee who was on annual leave at the time of her visit to the store on 8 July) "*it was past 6, I'd been up early that morning, so I decided not to discuss it with the claimant that day. I didn't want to make his stress worse*."

108. The Tribunal accepts Miss McNab's account that she had to get up very early on the morning of 8 July 2019. She said that she met with the two individuals who remained in store that day at around 1 or 1.30pm. To get to Doncaster from Scotland for around that time would indeed entail an early start for her.

109. The claimant says that in paragraph 55 of his witness statement that, "*On Monday 8 July I received the call from a work colleague John Grant, who I had worked with prior to the commencement of my sick leave. I was told by him that it had been decided that the Doncaster store would close."* That Mr Grant telephoned the claimant at around 4.45 that evening is corroborated by the claimant's contemporaneous note. Miss McNab did not dispute that Mr Grant had beaten her to it in telling the claimant of the store closure. Miss McNab denied treating the claimant like a *"spare part"* (as it was put by Mr Smith).

110. It was suggested to Miss McNab by Mr Smith that the claimant's disability ought to have permeated all of the decisions that she had took during the time that she had responsibility for managing him. Notwithstanding that she had been given no equal opportunities training generally or training upon disability issues generally, Miss McNab fairly recognised this to be the case. She sought to justify the decision to defer discussing matters with the claimant until 9 July upon the basis that she did not wish to aggravate the claimant's stress and wished to ensure that when she spoke to him she had access to all relevant information. When asked why the claimant was not emailed in advance that she wished to discuss the issue with him, Ms McNab said that she had been advised by her human resources department to notify the claimant of the fact of the closure in a face-to-face discussion.

111. In paragraph 56 of his witness statement the claimant says, "*I didn't receive any communication at all from Melissa on 8 July nor did I have any missed calls from her. I was checking my phone every hour throughout the day. The call logs at page 247 and 249 show this. I assumed that the important*

issue that she had previously referred to was the planned closure of the Doncaster store. I emailed the respondent's HR department. I requested further information about the proposed store closure. This email is included in the bundle at page 192."

112. The email at page 192 is dated 8 July 2019 and timed at 16:45. This coincides with the time at which John Grant informed the claimant of the store closure. Pages 247 to 249 are some of Miss McNab's mobile telephone records. The claimant is right to say that these do not show any missed calls from her to his mobile telephone. Likewise, there appears to be nothing in that record to show a telephone call to the claimant from Miss McNab on 9 July 2019 as she claims. When this was put to her she said that she may have tried to call the claimant's laptop.

113. The claimant resorted to emailing the respondent's HR department again on 11 July 2019 (pages 192 and 193). He expressed disappointment that he had not heard anything further about the store closure.

114. The claimant's contemporaneous note records that on 15 July 2019 the claimant received a voicemail message from Miss McNab. That Miss McNab did so is corroborated by the telephone record at page 247. The claimant says that he made a couple of unsuccessful attempts to return her call at that day. On 16 July 2019 she emailed the claimant (at page 205). She said that she had been attempting to contact him without success. Upon receipt of her email, the claimant telephoned her and they managed to speak.

115. Miss McNab's account in paragraph 7 of her witness statement is that during the call of 16 July 2019, "*I informed him that the store was closing, and I assured him that he was not going to lose his job. I told him that he could work another local store and I gave him four options. He was the only team member to be offered four options, all of which were within a 30 minute commute. I recall that the claimant did not seem keen on working at any other store but he did not object to any of them out of hand. I informed him that he did not have to rush to decide and that he had time to think about what he wanted to do. I told the claimant that I was going on holiday and that we should pick up the conversation when I got back, and he was happy with this plan*."

116. The claimant's account is in paragraph 59 of his witness statement. He says, "*During my conversation with Melissa she confirmed that the decision had been made to close the Doncaster store. She confirmed that every other employee who was based at the Doncaster store had been informed of this on 8 July 2019. Melissa told me that I had the option of moving to another store but that my options would be limited to the store located in Meadowhall, Sheffield, the store located at Crystal Peaks in Sheffield, the store in Castleford or the town centre store in Huddersfield. I was told that I had one week to decide where I would prefer to work."*

117. The claimant goes on to say in the same paragraph that, "*I was still experiencing symptoms of anxiety and depression and found the idea of commuting outside of the local area extremely stressful. One of the symptoms that I experienced regularly was insomnia. Long-distance commutes requiring me to drive for long periods would have undoubtedly increased my fatigue and would have been detrimental to my health.*

Further, given the lack of sleep, I didn't feel it was safe for me to drive. I told her that I couldn't work anywhere that was managed by Malcolm and that the other options were too far to commute given my health. I can't remember my exact words but I told her the problems with driving distances on little sleep to unfamiliar locations. Her response was to tell me that I had a week to decide." The claimant's contemporaneous note records his interpretation of the imposition of a one-week deadline.

118. The claimant requested a written account of the conversation. His email of 16 July 2019 to that effect is at page 412. Miss McNab replied on 20 July 2019 (page 411). After apologising for the delay because she wasn't picking up emails that week, she said that she proceeded "*to provide you with an essential business update and what this means for you. I explained that the Doncaster store was due to close on 3 September 2019, however we had identified a role for you at a local store, and that you would simply transfer to this location for work. Due to your circumstances, I have identified four new locations for you to work from, and explained the choice was yours. I also explained you did not have to decide immediately, and we could pick up within a week or so. As discussed on the phone, after this is decided, I will provide formal written notification to you. For reference, notifications of store closures began on 8 July."* She then referred to the four location options which were, as the claimant said, Crystal Peaks, Meadowhall, Castleford and Huddersfield.

119. Miss McNab in fact opened her email with confirmation that there had been a discussion about the claimant's well-being and his "*up and coming occupational health appointment*." The claimant says that on 16 July 2019 he was referred to occupational health again by Miss McNab. This resulted in the third occupational health within the bundle. It is at pages 66 and 67 and is dated 1 August 2019. It was prepared by Moji Akinduro, senior occupational health nurse. We shall come to this report in due course.

120. It was suggested to Miss McNab that her dealings with the claimant had been unsatisfactory in that he had been left hanging for a week between 8 July and 16 July 2019. Miss McNab denied that the claimant was being treated as a *"bit part"* and had been forgotten about. Miss McNab fairly acknowledged that it would have been open to the respondent to email the claimant in order to communicate with him and when this had been done on 16 July 2019 the claimant had responded straightaway.

121. Miss McNab denied that plans for the closure of Doncaster were only at a formative stage. This suggestion was put to her by Mr Smith upon the basis that the wording in the letter of the email of 20 July 2019 cited above in paragraph 118 was suggestive of a provisional rather than a final decision having been made. The Tribunal accepts Miss McNab's account that a definitive decision had been made at this stage. Firstly, the claimant does not say that Mr Grant told him (during their conversation in the late afternoon of 8 July 2019) that Miss McNab had spoken only about plans being at a formative stage. Mr Grant told the claimant, even on the claimant's case, that the store was going to close. Secondly, Miss McNab confirmed in the contemporaneous email of 20 July 2019 that the store would close on 3 September 2019. She would not have been so definitive had a final decision not been taken at that stage. Thirdly, the claimant's credibility upon this issue is tainted to a degree by his assertion that Melissa McNab told him

that he had a week to decide. That is not in fact what the email of 20 July 2019 says. In fact, to the contrary, Miss McNab said that the claimant did not have to decide immediately as to which of the four new locations he wished to work. She said that the discussions could be picked up within a week or so. This is some way removed from a final deadline by which the claimant had to make a final decision. Fourthly, in his contemporaneous note, the claimant records that Miss McNab had told him that "*Doncaster is getting closed".* His note makes no reference to a strict deadline being imposed upon him by Miss McNab.

122. A feature of the claimant's contemporaneous note of 16 July 2019 is that he records having mentioned to Miss McNab an inability to travel to Huddersfield or Castleford because "*I have a small child to get ready for school"*. The claimant records him mentioning to Miss McNab that childcare issues ruled out Huddersfield and Castleford. The claimant's note records him being concerned that the other two stores at Meadowhall and Crystal Peaks were managed by Mr Reynolds.

123. In evidence given under cross-examination, the claimant denied that he had mentioned childcare issues to Miss McNab. He said that this was an *"afterthought"* which he had recorded in his note. This was difficult evidence to understand in circumstances where the claimant recorded at the time that he had said that he had childcare issues during the course of the discussion with Miss McNab. The claimant gave evidence that he and the child's mother had separated in or around June or July 2019. Therefore, the separation was at around the same time as the claimant received news of the closure of the Doncaster store. The claimant fairly accepted that the childcare issue was a factor contributing to his anxiety and depression.

124. That said, when Miss McNab about the conversation of 16 July 2019, she said that childcare was not "covered on the call". Therefore, although (as we have said) the claimant's contemporaneous note certainly gives the impression of him having mentioned childcare to Miss McNab, the Tribunal accepts upon the basis of what was said in evidence in the Tribunal by each of them this did not feature in the discussion of 16 July 2019.

125. In paragraph 100 of his witness statement, the claimant refers to the distances involved in driving to Huddersfield and Castleford as being the reasons for discounting them as options for alternative work. He says that, "*the suggested re-deployment to stores based in Huddersfield, which was 26 miles from my home, or Castleford, which was 17 miles from my home, which meant that I was left in limbo, without a place of work when the Doncaster store closed."* He goes on to say that the "*two locations which were within a reasonable commuting distance were managed by Malcolm."*

126. It was put to the claimant by Mr Price that the Crystal Peaks store was in fact 16 miles from his home. This is a round trip of 32 miles which was more or less the same as the journey to Castleford. The claimant said that it was not a question of distance but rather of the traffic conditions and the route which he would have to take to get from his home to Castleford or Huddersfield. This would entail driving upon the motorway which he said would be too stressful for him. The claimant said that public transport was not an option because of his condition of anxiety. He said he had managed

his commute when working in Doncaster because he had found a quiet and less stressful route to drive from his home to the Frenchgate Centre.

127. The claimant said that the only reason why he could not contemplate work at either of the two Sheffield stores was because they were to be line managed by Mr Reynolds. He also confirmed that there was no meaningful work that he could do from home. The role is one which requires him to be *in situ* at the store.

128. Mr Price suggested to the claimant that assigning the claimant to work at either of the two Sheffield stores and adjusting his start and finish time while assigning him a different line manager would not necessarily alleviate the difficulty because Mr Reynolds was still regularly visiting the stores in order to line manage others.

129. Miss McNab accepted that the claimant objected to working either at Meadowhall or Crystal Peaks because he did not wish to work under the line management of Mr Reynolds. She fairly accepted that a long commute would cause a stress to the claimant "*under the circumstances."* By this, the Tribunal infers that Miss McNab was alluding to the claimant's stress and anxiety. She accepted that travel by car to Castleford or Huddersfield was out of the question for the claimant given his condition. She also fairly accepted that to be required to work under the line management of Mr Reynolds would cause a disadvantage for the claimant in comparison to others (such as Mr O'Neill) who were able so to do: paragraphs 39 and 42.

130. That being the case, Miss McNab said that the respondent would have wished to discuss the matter with the claimant in order to devise a return to work plan. It was suggested to Miss McNab by Mr Smith that the respondent could have changed the *"chain of command"* so as not to require the claimant to report to Mr Reynolds. Miss McNab said, "*yes, all options are possible."* It was suggested that requiring the claimant to report to another line manager would be cost neutral. Miss McNab replied that cost would "*not be important".*

131. It was suggested that the respondent could have made adjustments so as to effectively remove Mr Reynolds from the picture as far as the claimant was concerned. Miss McNab did not disagree and in fact said that she "*did not wish to make that decision for the claimant.*"

132. In paragraph 63 of his witness statement the claimant says that, "*On 26 July 2019 I hadn't received anything further from Melissa."* He said that he noticed a missed call from her that day. This appears to have been prompted by a query raised by the claimant about a significant deduction from his pay.

133. The claimant had heard nothing from Miss McNab between 16 July and 26 July 2019. This corroborates the Tribunal's finding that Miss McNab had not imposed a one week's deadline for him to make a decision as to his future with the respondent.

134. We have mentioned that Miss McNab was on holiday between 12 and 23 June 2019. She then had further holidays between 1 and 12 August 2019, on 16 August 2019 and then between 11 and 23 September 2019. The impression that the Tribunal has, given the number of holidays that she was taking at this time coupled with the size of her territory, is that Miss McNab

was extremely busy and unable to give her full attention to the claimant's case.

135. The next development was the claimant's visit to see Moji Akinduro on 1 August 2019.

136. The claimant complains, in paragraph 65 of his witness statement, that the occupational health referral form completed by Miss McNab included an incorrect date of birth and incorrect contact details. He says that, *"The telephone number included on the occupational health referral form [prepared by her] was not my own mobile telephone number, it was in fact Malcolm's mobile telephone number. I found this out because on 1 August 2019, when I attended the appointment with the respondent's occupational health advisor, she told me that the date of birth on the form that had been sent to her was incorrect. It was also confirmed that a mobile telephone number that had been placed on the form belonged to Malcolm.*"

137. He goes on to say in paragraph 66 that, *"I was horrified when I found this out because it meant that, when the occupational health nurse attempted to contact me to make an arrangement for the occupational health assessment, she contacted Malcolm and left a message on his mobile phone leaving a message asking me to get in touch to arrange an appointment, thereby providing him with information about me, namely that I was still off sick and that I was required to attend an occupational health appointment. This would have been an unfortunate mistake made by the respondent if that mobile telephone number had belonged to anyone else. However, the fact that it belonged to Malcolm, the manager who had caused me so much anxiety at work, was particularly insensitive, negligent and damaging to my mental well-being and the confidence I had in my employer".*

138. The claimant informed Miss McNab that she had given an incorrect mobile telephone number to occupational health. His email to that effect of 16 July 2019 is at page 211. Miss McNab put the mistake down to human error. She accepted that while the occupational health nurse had left a voicemail upon Mr Reynolds' mobile telephone no confidential information about the claimant was shared with him. That said, she fairly accepted that the claimant could reasonably hold a concern that a breach of confidentiality had taken place.

139. The claimant complained about the matter on 2 August 2019. He emailed Miss McNab that day (pages 214 and 215). This was picked up by Mr Holmes who replied the same day. He explained that Miss McNab was "*literally on holiday."* He said that she had asked him to deal with the matter in order to avoid the claimant having to wait for her return from holiday before the issue was looked at. The claimant replied to Mr Holmes on 2 August 2019 thanking him for his email. He commented, *"I wasn't expecting such a speedy response.*" The claimant appeared to be damning the respondent with faint praise here as that comment was made in the context of the claimant having been kept waiting "*for nine days now"* in connection with the pay deduction issue. It was put to Miss McNab by Mr Smith that the claimant took this issue very seriously. Miss McNab replied that she was "*on my way to the airport when I picked it up and I forwarded it to Mr Holmes so that he could investigate it*."

140. Miss McNab fairly accepted that the claimant would not want Mr Reynolds to know that he was being referred once again to see occupational health. That said, Miss McNab commented that she was not aware that the claimant had requested Mr Reynolds not be informed. She said that she did not "*disagree with the claimant's feelings*" expressed in paragraph 66 of his witness statement cited above.

141. Mr Smith suggested that the claimant could no longer repose trust and confidence in her. Miss McNab replied that she was *"not sure it's a trust issue. It's a mistake.*" The Tribunal observes that the errors made by her in putting an incorrect mobile telephone number and incorrect date of birth demonstrate a lack of attention on her part, perhaps brought about by work pressure and her imminent holiday. This incident reinforces the Tribunal's earlier conclusion that Miss McNab was extremely busy and did not appear to have sufficient time to properly manage the claimant's case. This is underscored by Miss McNab accepting that she had not followed the respondent's procedure to share details of the referral with the employee prior to the referral being submitted to occupational health. The standard form of declaration from the manager confirming that this process has been followed may be seen at page 218. Miss McNab said that she had not followed the process on this occasion.

142. On 7 August 2019 Mr Holmes emailed the claimant (page 457). He said that whilst he could understand the claimant's concerns "*I can assure you that no details regarding your occupational health referral or any of your sensitive details have been disclosed to any employee without your consent. As previously advised, the incorrect telephone number was input on your referral which resulted in a call being made and message left on the voicemail of another employee, however no details regarding your referral were disclosed on this message. This has been fully investigated by myself with the support of our HR and OH teams. The matter has also been reported to our data protection team who are satisfied with the investigation and have confirmed that there has been no breach of your data."* Mr Holmes regarded the matter as closed.

143. In the Tribunal's judgment, Mr Smith was right to suggest to Miss McNab that this was not a trivial error. Miss McNab fairly recognised this to be the case. To her credit, she apologised to the claimant during her giving evidence. Likewise, to his credit, the claimant accepted during his evidence that Miss McNab had not made the mistake deliberately.

144. The claimant said that he had not referred the matter to the Information Commissioner's Office. That said, the claimant did raise this as one of the grievances which was dealt with by Mr Mackenzie Crooks.

145. Following her return from holiday Miss McNab attempted to contact the claimant. This followed the return from her holidays taken between 1 and 12 August and then 16 August 2019. Miss McNab says in paragraph 8 of her witness that, "*upon my return from holiday I tried to call the claimant on 21 August 2019 in order to follow up with him about his thoughts on the alternative stores but he did not answer the phone and he did not call me back."* She goes on to say that, "*shortly after this, I was contacted by HR and asked not to contact the claimant because he had raised a grievance against me. I never tried to contact the claimant after this point.*"

146. In his contemporaneous note the claimant records the missed calls received by him from Miss McNab on 20 and 21 August 2019. In paragraph 77 of his witness statement he said, "*I didn't understand why she was calling me because I had already indicated that I wanted to deal with someone else until my grievance was concluded. I really didn't want to have an informal chat with her and I didn't want to discuss my grievance against her with her."*

147. It was put to Miss McNab by Mr Smith that there had been no follow up with the claimant concerning the closure of the Doncaster store. Miss McNab said that the claimant had not responded to the email of 20 July 2019: (this is the email at page 411 cited in paragraph 118 above). Miss McNab said that she had already told the claimant that the Doncaster store was closing on 3 September 2019 and that she had made attempts to contact him but her calls went unanswered.

148. It was put to the claimant that the telephone records at pages 241 to 246 show calls made by Ms McNab to the claimant's mobile telephone on 15, 16, 26 and 31 July 2019. The calls of 15 and 16 July led to the discussion between the pair on the latter date. Miss McNab's call to the claimant of 26 July 2019 appears to have been about the deduction from the claimant's wages. The Tribunal accepts that Miss McNab put a call out to the claimant on 31 July 2019 and that the claimant did not return the call.

149. The third occupational health report dated 1 August 2019 is at pages 66 and 67. The following issues arose as reported by Moji Akinduro:

    - She noted that the grievance and appeal process had concluded. However, the claimant's *"sick note has been further extended till 17 August due to deterioration in his mental health and his medication has recently been further increased."*
    - The claimant has continued to access psychological health support via the NHS.
    - The occupational health nurse was unable to predict an anticipated timescale for the claimant's return to work or anticipated future attendance. She said, "*I have no adjustments to facilitate a return to work at the present time.*"
    - She recommended that "*management have a further discussion with [the claimant]."*
    - She did not arrange for a further review.

150. Moji Akinduro opined that, "*the disability remit of the Equality Act is likely to apply to [the claimant's] psychological condition; however, the decision as to whether the act applies is a legal decision that can only be made by an Employment Tribunal.*"

151. On 6 August 2019 the claimant raised a grievance. This is at page 229. In essence, the grievance was about the lack of consultation with him concerning the closure of the Doncaster store. He complained about not having been informed of the closure of the store until 16 July 2019 in contrast to colleagues who knew about the matter when Miss McNab had visited the store on 8 July 2019. He also complained about the respondent's handling of the issue of alternative employment. He said that he had given reasons why none of the four alternatives were suitable.

152. The grievance of 6 August 2019 was followed by a further grievance dated 12 August 2019 which concerned the issue of the occupational health referral and the failure to act upon the occupational health recommendations. This is at pages 230 and 231. It was then quickly followed by a third grievance dated 14 August 2019 at pages 231 and 232. This appears largely to replicate the claimant's concerns about the issues arising from the closure of Doncaster. There was then a fourth grievance sent on 16 August 2019 (pages 232 and 233). The claimant again raised his concerns about the Doncaster closure and went on to say that he was concerned that the respondent may be in breach of its grievance procedure by including Miss McNab in email correspondence in circumstances where she was the subject of one of the claimant's grievances. The claimant then sent a fifth grievance on 21 August 2019 (pages 233 and 234). The claimant complained that Miss McNab had attempted to contact him on 20 and 21 August 2019 notwithstanding that the claimant had raised a grievance about her and had said that he did not wish to discuss the matter with her.

153. In summary, therefore, the claimant raised five grievances in August 2019. The claimant then received a telephone call on 28 August 2019 from Adam Wickes, a regional manager. He was told that Mr Wickes would be the claimant's contact point from then on.

154. The claimant was notified, on 6 September 2019, that Mr Mackenzie Crooks had been appointed to deal with the grievances which he raised in August.

155. Mr Mackenzie Crooks spoke to the claimant on 13 September 2019. The purpose of the call was for Mr Mackenzie Crooks to introduce himself to the claimant as they were unknown to one another. Mr Mackenzie Crooks also wanted to discuss with the claimant how to progress the matter. It is common ground between the parties that the claimant preferred the grievance investigation meeting to take place by telephone. Mr Mackenzie Crooks agreed to a telephone hearing.

156. Mr Mackenzie Crooks prepared a note of the discussion of 13 September 2019. The claimant complains, in paragraph 84 of his witness statement that, *"the note is a sparse summary of the conversation and it doesn't reflect the tone of the conversation."* The claimant says that Mr Mackenzie Crooks only reluctantly agreed to hold the grievance hearing by telephone and that he preferred to deal with it in person. He also said that Mr Mackenzie Crooks adopted a "*very dismissive tone"* and told the claimant that *"the time limits within the respondent's grievance policy would probably not be adhered to because my grievance was not his priority.*" In short, the claimant perceived Mr Mackenzie Crooks to have reacted negatively to the claimant's request for the grievance hearing to be by telephone.

157. Mr Mackenzie Crooks was asked if he could explain the delay between the date of the first part of the claimant's August 2019 grievances (of 6 August 2019) and the date upon which Mr Mackenzie Crooks made contact. Mr Mackenzie Crooks said that he was asked to deal with the claimant's grievance shortly before contacting the claimant on 13 September 2019. He could not therefore explain the delay from 6 August 2019. Mr Mackenzie Crooks said that he could understand how the delay in dealing with matters may damage the claimant's trust and confidence in the respondent.

158. It was also put to Mr Mackenzie Crooks that those parts of the August 2019 grievance touching upon the question of adjustments to enable the claimant to continue to work for the respondent after the closure of the Doncaster store was at odds with the respondent's case that the claimant did not wish to discuss the issue of adjustments pending the outcome of the grievance procedures. Mr Mackenzie Crooks fairly accepted there to be a tension between the respondent's position on the one hand and the stance taken by the claimant in August 2019 on the other.

159. Not only did the claimant complain about Mr Mackenzie Crooks' tone in the discussion of 13 September 2019, he also was concerned that Mr Mackenzie Crooks told the claimant that he would not investigate all of the issues raised in the five component parts which make up the August 2019 grievance. Mr Mackenzie Crooks accepted this to be the case. In fact, his contemporaneous note says just that. His note records that he *"was aware there were a number of things that were in his emails that were seeking answers and this wasn't my role and I would not be answering those."* He went on to observe that the claimant understood and accepted Mr Mackenzie Crooks' position. (For more upon this issue see paragraph 164.3 and 180 below).

160. Mr Mackenzie Crooks wrote to the claimant on 20 September 2019. He was invited to a grievance meeting to be held on 25 September 2019 by telephone. Mr Mackenzie Crooks had spent some time analysing the August 2019 grievances. He summarised what he discerned to be the 10 points of grievance within his letter. The claimant accepted, when giving in evidence in cross-examination, that the summary prepared by Mr Mackenzie Crooks (at pages 264 and 265) was reasonably accurate.

161. The 10 points which form the subject matter of the August 2019 grievance were summarised by Mr Mackenzie Crooks as follows:

    161.1. That the claimant was not invited to a staff meeting on 8 July 2019 at which staff were advised of the closure of the Doncaster store and that Miss McNab had not involved the claimant in consultations in relation to the closure.

    161.2. The claimant had provided reasons as to why none of the alternative options were suitable in terms of store stores relocate to and the claimant believed that because he was absent from work he had been discriminated against because of disability.

    161.3. That the claimant says that he was "*put at risk of a potential data breach and breach of a reasonable adjustment that Malcolm Reynolds does not know about [the claimant's] occupational health referrals and that the actions of Melissa McNab in putting incorrect details discriminated against [the claimant].*"

    161.4. That Melissa McNab discriminated against the claimant by failing to follow occupational health recommendations on two occasions.

    161.5. That Mr Holmes had failed to follow a correct grievance procedure because when concerns were raised about the potential data protection breach around the occupational health referral the claimant was not invited to a meeting and was not given an opportunity to appeal against Mr Holmes' decision.

161.6. That Mr Holmes discriminated against the claimant "*by way of his aggressively toned emails sent to [the claimant] in relation to reasonable adjustment requests."*

161.7. The claimant contended that he had been discriminated against by Miss McNab "*owing to the significant time lapse of 7.5 months from when [the claimant] went off work to when [the claimant] was contacted in that [the claimant] was treated differently to other staff members who were contacted weekly for support.".*

161.8. That Miss McNab had failed to recommend services available to him when he first went off work.

161.9. That the respondent had failed in its duty of care in that the first occupational health referral had taken place three months after the claimant commenced his long-term sickness absence in November 2018.

161.10. That the respondent had failed in its duty of care and had discriminated against him "*by Melissa McNab contacting [the claimant] to discuss informal discussions following [the claimant's] formal requests for Sky to consider informal discussions as inappropriate."*

162. The notes of the meeting of 25 September 2019 at pages 266 to 278. These contain annotations from the claimant. The notes are specifically noted not to be verbatim. The claimant confirmed in evidence that all of the 10 points of grievance had been discussed.

163. Mr Mackenzie Crooks telephoned the claimant again on 2 October 2019. A note of the conversation prepared by Mr Mackenzie Crooks is at page 280. The claimant confirmed in this conversation that he had received Mr Mackenzie Crooks' notes of the meeting of 25 September 2019 and was about halfway through the process of checking them. Mr Mackenzie-Crooks then asked the claimant for some further evidence about matters. His note then says that the claimant "*expressed that he had lost all faith in Sky*" and had written a resignation letter albeit that he had not yet sent it.

164. In the event, the claimant sent his letter of resignation to the respondent the following day. The letter dated 3 October 2019 is at pages 282 to 284. The claimant notified the respondent he was resigning from his position as sales advisor with immediate effect. He gave as his reasons for resigning the following:

164.1. That the respondent discriminated against him because of his disability. He said that he had been absent from work from November 2018 because of stress and anxiety and that the respondent had: failed to acknowledge his disability; failed to make reasonable adjustments when requested to do so, particularly in regard to meetings concerning his grievances and consultations regarding potential redundancy; failed to act upon occupational health recommendations; and failed to contact him and discuss a potential return to work taking into account his disability.

164.2. That the respondent had failed to follow a proper consultation process with regard to the closure of the Doncaster store. The claimant complained that he had only been told on 16 July 2019 that the store would be closing whereas others had been told on 8 July. He said that since then he has had no communication about the store closure. This situation pertained notwithstanding the claimant raising a grievance about the matter as part of the August 2019 grievances.

164.3. That the respondent had failed to follow the respondent's grievance procedure. The claimant complained that Mr Mackenzie Crooks had given him the impression that he would not consider, as part of the grievance, the Doncaster store closure. (This was in fact the first issue identified by Mr Mackenzie Crooks' as being part of the claimant's grievance in the letter to which we have referred dated 20 September 2019 at pages 468 and 469). The claimant also complained about Mr Mackenzie Crooks advising the claimant that his grievance was not a priority and his reluctance to deal with the claimant's grievance hearing by telephone.

164.4. That the respondent has acted in breach of trust and confidence by not dealing with the claimant's grievance in an open, transparent and timely manner, that the appointment of Mr Mackenzie Crooks was irregular (as he was head of security and thus an intimidating presence) and the grievance process had been beset by delays.

164.5. The claimant said that "*the final act"* was that he learned of the fact of the closure of the Doncaster store on 27 September 2019 and that the respondent had failed to notify him of the closure of his workplace without proper consultation, failed to offer him suitable alternative employment and failed to make any pay in lieu of notice to him as a result of the closure of the Doncaster store.

165. About the "*final act"* (by which the Tribunal infers the claimant means to refer to a "*final straw*"), the claimant says in paragraph 89 of his witness statement that he found out about the closure on 27 September 2019 only "*because I called the reception number for Doncaster Frenchgate Centre. I asked whether the Sky store was still there and I was told that it had closed and been removed. I was shocked that my employer hadn't thought to tell me. I hadn't even been told at the grievance meeting that I had attended two days previously".*

166. In evidence given under cross-examination, the claimant said that he had decided to resign from his employment before he spoke to Mr Mackenzie Crooks on 2 October 2019. The claimant fairly accepted that Mr Mackenzie Crooks' investigation could not be said to be untimely. It will be recalled that Mr Mackenzie Crooks was only appointed to deal with the matter on or around 6 September 2019 in circumstances where the last part of the August 2019 grievances was submitted only on 21 August 2019.

167. Mr Price put it to the claimant that it was not the case that he was unaware, on 27 September 2019 that the Doncaster store had closed. This was

because Melissa McNab had told him that it was going to close on 3 September 2019 and the claimant had received this information from her on 16 July 2019. The claimant did not accept this to be the position. It was the respondent's case that the claimant's complaint in reality is that the respondent had not told the claimant again of the fact of the store closure prior to 3 September 2019 at any point after 16 July 2019.

168. Notwithstanding the claimant's resignation, Mr Mackenzie Crooks continued to investigate the claimant's August 2019 grievance. On 9 October 2019 the claimant returned Mr Mackenzie Crooks' notes of the meeting of 25 September incorporating tracked changes. Mr Mackenzie Crooks sought further information from the claimant on 11 October 2019.

169. Mr Mackenzie Crooks then met with Miss McNab, Mr Reynolds, Mr Holmes and Janice Smith in order to investigate the claimant's complaints.

170. Mr Mackenzie Crooks' grievance outcome letter was sent to the claimant on 6 November 2019 (pages 473 to 481).

171. Mr Mackenzie Crooks' findings are not (as he himself accepted) binding upon the Employment Tribunal. It is not necessary to consider his findings in any great detail. In summary, he did not uphold any of the 10 points raised by the claimant in the August 2019 grievances.

172. Upon the issue of Mr Mackenzie Crooks' conclusions, the Tribunal shall confine itself simply to making further comment upon the areas about which he was cross-examined by Mr Smith.

173. The first of these concerned the question of the Doncaster store closure. Mr Mackenzie Crooks found that Miss McNab informed two employees about the store closure when she visited on 8 July 2019 and that the claimant was one of three members of staff who were not told about the store closure at the time but were told subsequently over the telephone. Mr Mackenzie Crooks accepted that the claimant had not been told of the fact that the Doncaster store was due to close when Ms McNab visited on 8 July 2019 because the claimant was absent from work through ill health.

174. Mr Mackenzie Crooks also found that the delay in him being told by Miss McNab of the closure of the Doncaster store was caused by the claimant not responding to Melissa McNab's telephone calls rather than her treating him differently by design. Mr Mackenzie Crooks appeared to have approached this issue from the perspective of whether or not the claimant was less favourably treated than his colleagues. He appeared not to have viewed the matter through the prism of the respondent's obligations to level the playing field and make reasonable adjustments so as to ensure the claimant was not disadvantaged by reason of his disability related absence. Mr Mackenzie Crooks maintained that his view was that Ms McNab had not treated the claimant less favourably than his colleagues. (Mr Mackenzie Crooks said that he had had no Equal Opportunities training generally or about disability issues in particular).

175. Mr Smith then turned to the question of suitable alternative employment. Mr Mackenzie Crooks found that the claimant had been offered four alternative places of work, all within 30 minutes of home and within the respondent's "*normal policy for alternatives*". He also found that two of the

options offered to the claimant (those in Huddersfield and Castleford) were "*purposefully designed to avoid a manager that the claimant had raised a previous grievance against in the past*)". He said that it was apparent that "*other employees (except for one other) had been given only two alternative options.*"

176. It was put to Mr Mackenzie Crooks that Mr Grant had, in fact, also been offered four alternatives. This may be seen from the document at page 262. There, there are listed the five affected employees in Doncaster. The claimant and Mr Grant were both offered four options of alternative employment.

177. In paragraph 15 of his witness statement, Mr Mackenzie Crooks refers to his finding that Janice Smith had held several well-being calls with the claimant after she was assigned the task by Miss McNab of managing the claimant's ill health absence which commenced in November 2018. Mr Mackenzie Crooks was unable to point to any documentary evidence (other than the note to which we have referred earlier in paragraph 75) to corroborate his case that Janice Smith had regular contact with the claimant.

178. It was put to Mr Mackenzie Crooks by Mr Smith that when giving evidence before the Tribunal he had adopted a brusque tone which lent credence to the claimant's case that his manner towards the claimant had come across as hostile during the course of the telephone conversations (in particular during the introductory telephone conversation of 13 September 2019). Mr Mackenzie Crooks, perhaps understandably, said that he was at something of a loss as to how to answer that contention.

179. Mr Mackenzie Crooks impressed the Tribunal as a professional individual who answered Mr Smith' questions very precisely. He had a very business- like manner. We can accept that subjectively the claimant may have detected a lack of warmth from Mr Mackenzie Crooks. However, that in our judgment, is a long way from hostility. In our judgment, Mr Mackenzie Crooks was not hostile to the claimant.

180. While we part company with some of Mr Mackenzie Crooks' conclusions (which are not binding upon us in any case) he carried out his task diligently and with reasonable expedition. This is a complex matter. Mr Mackenzie Crooks was new to it when he was assigned the role of investigating the claimant's grievances. He took the time to distil them into 10 points. The claimant agreed that his summary of his grievances was accurate. He sent notes to the claimant and was amenable to the claimant returning them with tracked changes. He interviewed others and produced a very comprehensive grievance outcome. He afforded the claimant the right of appeal against his findings. (In the event, the claimant did not seek to appeal Mr Mackenzie-Crooks' decision). Further, in our judgment, Mr Mackenzie Crooks was right not to go behind the rationale of the closure of the Doncaster store but did investigate some of the aspects to which that closure gave rise as part of the claimant's grievance.

181. In these circumstances, the Tribunal does not accept the claimant's contention that Mr Mackenzie Crooks told the claimant that his grievance was a low priority. Mr Mackenzie Crooks fairly accepted that he did say to the claimant that the matter may take some time to investigate. In our

judgment, that is not the same as saying to the claimant that his grievance was a low priority and that it was not a matter of importance. Mr Mackenzie Crooks in our judgment professionally managed the situation by managing the claimant's expectations. He was undertaking the investigation into the claimant's complex grievance alongside the many duties which faced him in his substantive role.

The issues in the case

182. We now turn to the issues in the case. These are set out in Employment Judge Licorish's case management summary as follows:

'Time limits

4.1 According to the date that the claim form was presented and the dates of early conciliation, any complaint about something that happened certainly before 5 July 2019 is potentially out of time, so that the Tribunal may not have jurisdiction to deal with it.

4.2 The Tribunal will need to consider whether all of the claimant's complaints were presented within the time limits set out in section 123 of the Equality Act 2010 (EqA). The claimant will argue that there was an act and/or conduct extending over a period, and/or a series of similar acts or failures, or that time should be extended on a "*just and equitable*" basis.

Constructive unfair dismissal

4.3 Has the claimant proved a fundamental breach of the contract by the respondent, and if so, was that breach sufficiently important to justify the claimant resigning, or else was it the last in a series of incidents which justified him leaving? The claimant contends that the respondent was in breach of the implied term that it would not, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence. He relies on the following allegations (summarised at paragraphs 4a to k of his further particulars):

4.3.1 Bullying behaviour by Malcom Reynolds from May 2016 until November 2018.

4.3.2 Mr Reynolds' inappropriate behaviour with a colleague on around 12 January 2017.

4.3.3 The way in which the respondent dealt with the claimant's concerns about Mr Reynolds' behaviour raised between 1 and 8 November 2018.

4.3.4 On around 7 November 2018, Mr Reynolds told the claimant's colleagues not to corroborate his allegations.

4.3.5 From around 5 March 2019, the respondent failed to follow occupational health (OH) advice to identify reasonable adjustments to enable him to return to work.

4.3.6 In around July 2019, the respondent included Mr Reynolds' date of birth and contact details on the claimant's OH referral form, as a result of which sensitive personal information about the claimant was disclosed to Mr

Reynolds when the OH nurse left a message on his mobile phone.

4.3.7 From 8 July 2019, the respondent failed to engage in meaningful consultation with the claimant regarding its intention to close his place of work.

4.3.8 In around August 2019, the respondent failed to tell the claimant that it had closed its Doncaster store.

4.3.9 From around 23 February 2017, the respondent failed to address the claimant's grievances in an open and timely manner (as set out at paragraph 4j of his further particulars).

4.3.10 The claimant alleges that the "*final straw*" occurred when he found out on 27 September 2019 that his place of work had been closed for almost a month (paragraph 4k), whereas he understood that the respondent intended to close the Doncaster store at some point in the future. The claimant maintains that the respondent failed properly to engage with him regarding suitable alternative employment and his request for reasonable adjustments.

4.4 Did the claimant resign at least in part because of that last act or omission?

4.5 If so, did the claimant affirm the contract following that last act or omission?

4.6 If not, was that last act or omission in itself a fundamental breach of contract?

4.7 If not, was it part of a course of conduct comprising several acts or omissions which, viewed cumulatively, amounted to a fundamental breach of the implied term of trust and confidence?

4.8 If the claimant was constructively dismissed, has the respondent shown that the reason for dismissal was potentially fair? In other words, what was the reason for the respondent's conduct?

4.9 Was the respondent's reason for its conduct otherwise sufficient to justify the breach?

[The respondent will set out in its amended grounds of response how it intends to defend the unfair dismissal complaint if the claimant is found to have been dismissed.]

Disability

4.10 Was the claimant a disabled person according to section 6 EqA at all relevant times (November 2018 to 3 October 2019) because of the following condition(s): depression, anxiety and stress? [The respondent will confirm its position in its amended response.]

Section 15 EqA: discrimination arising from disability

4.11 Did the following arise in consequence of the claimant's disability:

4.11.1 his sickness absence from November 2018?

4.11.2 his inability to attend a grievance meeting in person with Simon McKenzie Crooks (director of security) in September 2019 on the basis that such attendance might trigger an anxiety attack?

4.12 Did the respondent treat the claimant unfavourably by:

4.12.1 Melissa McNab (regional officer) leaving him out of the consultation regarding the closure of his place of work until 16 July 2019?

4.12.2 Failing to follow a full and meaningful consultation with the claimant regarding the closure? The claimant says that he received nothing in writing about the closure, was not invited to any consultation meetings (whether in person or by telephone), and was not given the opportunity to raise questions about the effect of the closure on his employment or relating to offers of alternative employment. As a result, he was obliged to raise those matters via a grievance.

4.12.3 Giving the claimant one week to choose between four alternative positions and failing to engage with him about the suitability of those options?

4.12.4 Failing to notify the claimant on 29 August 2019 that the Doncaster store had in fact closed?

4.12.5 Mr McKenzie Crooks telling the claimant on 25 September 2019 that his grievance was low priority?

4.12.6 Mr McKenzie Crooks' hostile tone during the telephone hearing and the hostile tone of the minutes subsequently produced?

4.12.7 Mr McKenzie Crooks informing the claimant that he might not be able to investigate the grievance in line with the time limits set out in the respondent's grievance policy, and thereafter failing to address it in a timely manner?

4.12.8 Mr McKenzie Crooks deciding not to investigate all aspects of the claimant's grievance?

4.13 Did the respondent treat the claimant unfavourably in any of those ways because of his sickness absence and/or inability to attend a grievance meeting in person?

4.14 If so, has the respondent shown that any unfavourable treatment found was a proportionate means of achieving a legitimate aim? [The respondent will specify any such defence in its amended response.]

4.15 Alternatively, has the respondent shown that it did not know, and could not reasonably have been expected to know, that the claimant had a disability? [To be confirmed by the respondent in its amended response.]

Section 19 EqA: indirect disability discrimination

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

4.16.1 The requirement to attend grievance meetings in person, according to its grievance policy?

4.16.2 Treating redeployment within a 30-mile radius of an employee's home address as suitable alternative employment?

4.17 Did the respondent apply (or would the respondent have applied) any proven PCP to its non-disabled employees?

4.18 If so, did any PCP put disabled employees at a particular disadvantage?

4.19 If so, did any PCP(s) put the claimant at that particular disadvantage? The claimant says:

4.19.1 Requiring him to attend a meeting in person would have made him unwell and unable to participate effectively. When Mr McKenzie Crooks was told this he became hostile, labelled the claimant's grievance as low priority, did not investigate all aspects of the grievance and failed to deal with it in a timely manner.

4.19.2 A lengthy commute to and from his place of work would have caused him anxiety and stress. It would also increase his fatigue as his condition causes insomnia. The respondent was also aware that two of the identified positions were in stores managed by Malcolm Reynolds.

4.20 If so, has the respondent shown it to be a proportionate means of achieving a legitimate aim? The respondent will confirm any defence of justification in its amended grounds of response.

Sections 20 and 21 EqA: reasonable adjustments

4.21 Did the respondent apply the following PCP(s):

4.21.1 As identified at paragraph 4.16.2 above?

4.21.2 The requirement to continue to work for, near or under a manager about whom an employee has raised a grievance?

4.22 If so, did any PCP put the claimant at a substantial disadvantage compared to persons who are not disabled? The claimant says that:

4.22.1 He could not accept a job in Castleford or Huddersfield for the reasons stated at paragraph 4.19.2 above.

4.22.2 He could not accept a job in Meadowhall or Crystal Peaks because they were managed by Malcolm Reynolds. Such a requirement would therefore have caused him considerable anxiety and stress.

4.22.3 He was prevented from returning to work because working with Mr Reynolds would have exacerbated his condition.

4.23 If so, did the respondent know or could it reasonably have been expected to know that the claimant was likely to be placed at any such disadvantage? [The respondent will confirm its position in its amended response.]

4.24 If so, did the respondent take such steps as were reasonable to have to take to avoid any such disadvantage? The claimant maintains that the following steps should have been taken:

4.24.1 Following OH recommendations made in around March and April 2019.

4.24.2 Allocating a different line manager on a permanent basis.

4.24.3 Allocating him a different line manager on a temporary basis, and arranging mediation between himself and Mr Reynolds.

4.24.4 Allowing him to work flexibly to make the commute to Castleford or Huddersfield more manageable.

4.24.5 Terminating the claimant's employment on notice and with a redundancy payment if there were no suitable jobs nearer to his home and not managed by Mr Reynolds.

Breach of contract

4.25 If the claimant was constructively dismissed, the claimant says that he was entitled to 10 weeks' notice according to his contract of employment.

The relevant law

183. The Tribunal now sets out the relevant law. We shall start by considering the claims brought under the Equality Act 2010. The relevant provisions upon prohibited conduct for the purposes of this claim are to be found in section 15 and sections 20 and 21 of the 2010 Act. (The claimant is not pursuing the complaint of indirect disability discrimination and therefore we need not be concerned with the provisions of section 19 and the issues in paragraphs 4.16 to 4.20 set out in paragraph 182).

184. Section 15 is the relevant provision which makes discriminatory conduct which unfavourably treats a disabled person because of something arising in consequence of their disability. Sections 20 and 21 deal with the duty imposed upon employers to make reasonable adjustments where workplace systems put a disabled person at a disadvantage because of their disability.

185. The prohibited conduct referred to in paragraph 184 is unlawful in the workplace. By section 39(2) of the 2010 Act an employer must not discriminate against an employee by dismissing the employee or subjecting the employee to any other detriment. By section 39(5) of the 2010 Act the duty to make reasonable adjustments applies to an employer.

186. By section 15 of the 2010 Act it is unlawful for an employer to treat a disabled person unfavourably not because of the disability itself (which would of course amount to direct discrimination) but because of something arising from, or in consequence of, a person's disability. The unfavourable treatment must be because of something that arises in consequence of

the disability. There must be a causative link between the disability and the treatment complained of: this is not a *'but for'* test of causation (that is to say, but for the disability the employee would not have been treated as they were). Rather, it is necessary to consider the thought process (conscious or unconscious) of the decision makers concerned.

187. An employer may defend such a complaint upon the basis that the employer did not know or could not reasonably be expected to know that the disabled person has a disability. Further, an employer has a defence to a complaint brought under section 15 of the 2010 Act where the employer can justify the unfavourable treatment upon the basis that it is a proportionate means of achieving a legitimate aim.

188. Unfavourable treatment means in this context putting the employee at a disadvantage. The consequences of the disability which give rise to that disadvantage include anything which is the result, effect or outcome of a disabled person's disability.

189. The Equality and Human Rights Commission's *Code of Practice on Employment* provides guidance upon the objective justification defence available to employers when seeking to defend a complaint brought under section 15. The legitimate aim in question must be legal and should not be discriminatory. It must also present a real objective consideration. Where an employer has failed to make reasonable adjustments which would have prevented or minimised the unfavourable treatment then it will be very difficult for the employer to show that the treatment was objectively justified. Even where an employer has complied with the duty to make reasonable adjustments in relation to the disabled person, the employer may still subject a disabled person to unlawful discrimination arising from disability. This can arise where the adjustment is unrelated to unfavourable treatment complained of.

190. To be proportionate, the measure has to be both an appropriate means of achieving the aim and reasonably necessary in order to do so. The objective of the measure in question must correspond to a real need and the means used must be appropriate with a view to achieving the objective and be necessary to that end. This is an objective test. It is not enough that a reasonable employer might think that the action is a proportionate means of achieving the legitimate aim. The Tribunal has to weigh the real needs of the undertaking against the discriminatory effects of the requirements. It is necessary to consider the particular employee in question in order to consider whether that treatment was a proportionate means of achieving a legitimate aim.

191. We now turn to the reasonable adjustments complaint. In considering a claim that an employer has discriminated against an employee by failure to comply with the duty of reasonable adjustment, the Tribunal must firstly identify the provision, criterion or practice (*PCP*) applied by or on behalf of the employer and which puts the claimant at a substantial disadvantage. The Tribunal must then identify the disadvantage caused to the disabled person by reason of the application to the employee of the relevant PCP and the extent to which that disadvantage is caused by the disability in comparison to non-disabled comparators. The comparator exercise is

undertaken so that the Tribunal can be satisfied that the disadvantage is materially caused by the disability and not because of another reason.

192. This process then enables the Tribunal to judge whether any proposed adjustments are reasonable and have a prospect of ameliorating the disadvantage in question. There must be some evidence of some apparently reasonable adjustments that could be made and which come with that prospect. It is unlikely to be reasonable for an employer to have to make an adjustment that involves little benefit to the disabled person. However, there does not necessarily have to be a good or real prospect of an adjustment removing a disadvantage for that adjustment to be a reasonable one. It is sufficient for a Tribunal to find simply that there would have been a prospect of it being alleviated.

193. The duty only applies in respect of those steps that it is reasonable for the employer to take to avoid the disadvantage experienced by the disabled employee. The test of reasonableness in this context is an objective one and it is ultimately the Tribunal's view of what is reasonable that matters. It is unlikely to be reasonable for an employer to have to make an adjustment that involves little benefit to the disabled person.

194. The focus of the Tribunal must be on whether the adjustment would be effective by removing or reducing the disadvantage the claimant is experiencing at work as a result of disability and not whether it would advantage the claimant generally. As the reasonable adjustment provisions are concerned with practical outcomes rather than procedures, the focus must be on whether the adjustment itself can be considered reasonable rather than on the reasonableness of a process by which the employer reached the decision about a proposed adjustment.

195. The duty to make reasonable adjustments only arises where the employer knows or ought to know that the employee is disabled and that the employee is likely to be placed at a disadvantage by the PCP.

196. A significant change brought about by the 2010 Act is the omission of specific factors to be considered when determining reasonableness. The Disability Discrimination Act 1995 (when it was in force) stipulated that in determining whether it was reasonable for an employer to have to take a particular step in order to comply with that duty, regard should be had to a number of factors. Those factors are not mentioned in the 2010 Act. However, paragraph 6.28 of the Equality and Human Rights Commission's *Employment Code* gives examples of matters that the Tribunal might take into account. The Code stipulates what is a reasonable step for an employer to take will depend on all the circumstances of each individual case. The factors to have in mind include for example the extent to which taking the step would prevent the effect in relation to which the duty was imposed, the impracticality of such step, the costs that would be incurred by the employer in taking that step and the extent to which it would disrupt any of its activities.

197. Other factors that need to be taken into account include the extent of the employer's financial and other resources, the nature of the employer's activities and the size of its undertaking. Examples of steps which it might be reasonable for employers to have to take are set out in paragraph 6.33 of the Code. These include transferring the disabled worker to fill an

existing vacancy and altering the job content of the disabled worker's role. There is a positive duty upon employers to consider adjustments.

198. It is for the claimant to make out a *prima facie* case that the respondent has discriminated against him. It is therefore for the claimant to make out a *prima facie* case that the respondent treated him unfavourably for something arising in consequence of disability and/or that the respondent failed to comply with the duty to make reasonable adjustments by the reason of the imposition of a disadvantaging PCP. It is for the claimant to prove that he suffered the treatment and not merely to assert it. Should the claimant prove a *prima facie* case of discrimination then the burden passes to the respondent to show a non-discriminatory explanation for the treatment.

199. An issue arises in this case as to whether or not the claimant presented his disability discrimination complaint within the relevant limitation period. The general rule is that a claim concerning work related discrimination brought under the 2010 Act must be presented to the Tribunal within a period of three months beginning with the date of the act complained of. Conduct extending over a period is to be treated as done at the end of that period.

200. Much of the case law upon time limits in discrimination cases is centred on whether there is continuing discrimination extending over a period of time or whether there is a series of distinct acts. Where there is a series of distinct acts, the time limit begins to run when each act is completed whereas if there is continuing discrimination, time only begins to run when the last act is completed. In considering whether separate incidents form part of an act extending over a period one relevant but not conclusive factor is whether the same or different individuals were involved in those incidents. However, even if the same individual is involved then this may not be sufficient to link the separate incidents if they are quite distinct from one another and ought to be treated as individual matters.

201. The three months' time limit for bringing a discrimination claim is not absolute. Tribunals have discretion to extend the time limit for presenting a complaint where they think it is just and equitable so to do.

202. There is no presumption that the Tribunal should extend time. It is for the claimant to convince the Tribunal that it is just and equitable to extend time. The exercise of discretion is the exception rather than the rule. However, this does not mean that exceptional circumstances are required before the time limit can be extended on just and equitable grounds. The law simply requires that an extension of time should be just and equitable.

203. Tribunals must weigh up the relative prejudice that extending time would cause to the respondent on the one hand and to the claimant on the other. The prospective merits of a claim may be taken into account in weighing the balance of prejudice. The prejudice to the respondent must be more than simply having to answer the claim. If that were to be a decisive factor then the discretion vested in tribunals as to whether or not to extend time upon just and equitable grounds would largely be devoid of content.

204. In exercising discretion to allow out of time claims to proceed, Tribunals may also have regard to the matters referred to in section 33 of The

Limitation Act 1980. This provision deals with the exercise of discretion in civil courts in personal injury cases and requires the court to consider the prejudice that each party will suffer as a result of the decision reached and to have regard to all of the circumstances of the case.

205. The focus should not solely be on whether the claimant ought to have submitted his claim in time. Tribunals must weigh up the relative prejudice that extending time would cause to the respondent on the one hand and to the claimant on the other.

206. In disability discrimination cases, there is an additional factor to be taken into account when considering an application to extend the time limit and that is the disability itself. The impact of the disability may be taken into account in assessing the reason for and length of delay in presenting the claim.

207. Claimants may also face problems in complying with the three months' time limit where the trigger is the employer's inadvertent failure to make reasonable adjustments. In such circumstances, tribunals may be expected to have some sympathy with regard to the difficulty created for claimants by the operation of the relevant time limits.

208. We now turn to the claimant's complaint of constructive unfair dismissal. By section 95 of 1996 Act, an employee is dismissed by the employer if (amongst other things) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.

209. This question must be determined in accordance with the law of contract. Therefore, an employee is entitled to treat themselves as constructively dismissed if the employer is guilty of conduct which is a significant breach going to the root of the contract of employment or the employer's conduct shows that the employer no longer intends to be bound by one or more of the essential terms of it. This is an objective test. Conduct is repudiatory if, viewed objectively, it shows an intention upon the part of the employer no longer to be bound by the contract.

210. There is implied into every contract of employment a term that the parties will not without reasonable and proper cause conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between them. This is the relevant implied term which arises in this case. (We shall at times refer to this as "*the implied term*" or "*the implied term of trust and confidence"*). It is well established that a breach of the implied term is a fundamental breach amounting to a repudiation since it necessarily goes to the root of the contract. The Tribunal's function therefore is to look at the employer's conduct as a whole and to determine whether it is such that its cumulative effect, judged reasonably and sensibly, is such that the employee could not be expected to put up with it.

211. Once repudiation of the contract by the employer has been established, the proper approach is then to ask whether the employee has accepted that repudiation by treating the contract of employment as at an end. It is enough that the employee resigns in response, at least in part, to a fundamental breach by the employer. There must be unequivocal

acceptance of the repudiation by words or conduct. The employee must make up their mind to leave soon after the conduct of which they complain. If they continue for any length of time without leaving, they will be regarded as having elected to affirm the contract and will lose their right to treat themselves as discharged from it.

212. Earlier waived fundamental breaches may be revived should the employee resign in response to a *"final straw"* which, not in itself a breach of contract, must be an act in a series of earlier acts which cumulatively amounts to a breach of the implied term. The final straw does not have to be of the same character of the earlier acts. Its essential quality is that, when taken in conjunction with the earlier acts on which the employee relies, it amounts to a breach of the implied term of trust and confidence. It must contribute something to that breach, although what it adds may be relatively insignificant so long as it is not utterly trivial. The final straw, viewed in isolation, need not be unreasonable or blameworthy conduct. However, an entirely innocuous act on the part of the employer cannot be a final straw even if the employee genuinely but mistakenly interprets the act as hurtful and destructive of their trust and confidence in the employer. The test of whether the employee's trust and confidence has been undermined is an objective one.

213. Should the claimant fail to show that he was constructively dismissed then it follows that he was not unfairly dismissed (as no dismissal will have taken place, there being no issue that the respondent expressly dismissed him). Should he establish that he was constructively dismissed, then it will be for the respondent to show that the reason for the dismissal fell within one of the permitted reasons upon which basis an employer may dismiss an employee. One of the statutory permitted reasons for dismissal of an employee is redundancy. It is that reason upon which the respondent relies should it be established that the claimant was constructively dismissed. The question for the Tribunal then will be whether the respondent acted reasonably in treating redundancy as a sufficient reason for the dismissal of the claimant in the circumstances.

Discussion and conclusions

214. The Tribunal will now set out its conclusions.

215. We shall deal with matters in the order in which they appear in Employment Judge Licorish's Order. We shall therefore start with the complaint of constructive unfair dismissal. We shall also use the same paragraph numbering in Employment Judge Licorish's Order which is set out in paragraph 182 above.

216. The allegation at 4.3.1 is that the respondent was in fundamental breach of contract by reason of Mr Reynolds' bullying behaviour between May 2016 and November 2018. The allegation at paragraph 4.3.2 is that Mr Reynolds behaved inappropriately towards a colleague on or around 12 January 2017. It is convenient also to consider here allegation 4.3.4: that on or around 7 November 2018 Mr Reynolds told the claimant's colleagues not to corroborate his allegations.

217. The relevant findings of fact are at pages 13 to 42, 51 and 62. In summary, the Tribunal found that Mr Reynolds was guilty of bullying behaviour

towards the claimant and towards other members of staff. We think that Mr Smith's description of Mr Reynolds as *"a tyrant"* is apt. On any view Mr Reynolds' conduct was likely (if not calculated) to seriously destroy the trust and confidence which the claimant had in the respondent and his conduct was without reasonable and proper cause. There was simply no justification for his behaviour. Mr Reynolds was in a position senior to the claimant. As far as the claimant was concerned, Mr Reynolds was a personification of the respondent's management. On any view, applying an objective test, Mr Reynolds' conduct was such as to place the respondent in breach of the implied term of trust and confidence. As a matter of principle, this is a fundamental breach. The claimant is entitled to take the view that it was conduct which he could not reasonably and sensibly be expected to put up with.

218. However, the difficulty for the claimant is that, on the evidence, he did not resign from his employment in response to Mr Reynolds' conduct. That conduct was not referred to in his resignation letter of 3 October 2019: see paragraph 164. Furthermore, the claimant did not find himself under the line management of Mr Reynolds after March 2017. He seldom came across him afterwards. We accept that Mr Reynolds behaved outrageously in July 2018 when he went out of his way to track the claimant's movement when the claimant was absent from work through ill health. We refer to paragraph 18. The claimant also discovered in November 2018 that Mr Reynolds had been seeking to deter others from corroborating the claimant's allegation: (paragraph 54).

219. The Tribunal therefore accepts that although the claimant did not find himself under Mr Reynolds' line management again following Mr Stimpson's return in March 2017, Mr Reynolds' conduct continued to cast a shadow over the claimant up to November 2018. The claimant was then absent from work through ill health. He resigned his position 11 months later. In the meantime, he had received salary from the respondent and had engaged with the respondent's sickness absence process and grievance procedure.

220. In those circumstances, the Tribunal's judgment is that not only did the claimant not resign because of Mr Reynolds' conduct towards him, the claimant also affirmed the contract and waived his right to resign in response to the breach of the implied term of trust and confidence. A delay of 11 months between November 2018 and October 2019 is simply too long to give of any other conclusion in the circumstances.

221. Allegation 4.3.3 concerns the way in which the respondent dealt with the claimant's concerns about Mr Reynolds' behaviour raised by him between 1 and 8 November 2018. The factual findings are at paragraphs 25,26 and 44 to 61. Essentially, this allegation covers the period between the date upon which the claimant raised his grievance of 8 November 2018 until the date upon which Mr Sharif handed the claimant the grievance outcome decision at the service station on 26 March 2019.

222. The Tribunal is not satisfied that the respondent's handling of the claimant's grievance was such as to be objectively likely to destroy or seriously damage mutual trust and confidence. The claimant's email of 8 November 2018 was acknowledged by the respondent on 19 November

2018. Mr Sharif was appointed to investigate the claimant's grievances and contacted the claimant on 7 December 2018. He held a grievance meeting with the claimant on 13 December 2018 over the telephone. He then conducted interviews with the witnesses between 30 January and 14 February 2019.

223. The Tribunal accepts that subjectively, from the claimant's point of view, matters were proceeding at something of a leisurely pace. However, the Tribunal takes account of the fact that the grievance meeting with the claimant was held on 13 December 2018. The festive break was then looming. Time is inevitably taken up in arranging interviews. This is a complex matter. In the Tribunal's judgment, Mr Sharif acted reasonably quickly in arranging the nine interviews which he held and which are referred to in paragraph 49. Further, Mr Sharif had managed the claimant's expectations by telling him on 13 December 2018 that he would conduct the investigations into his grievances in the early course of the new year.

224. Mr Sharif then took a period of around six weeks to collate his findings and prepare his report. The grievance outcome letter is at pages 133 to 138. It is detailed and well written.

225. We do have some sympathy with the claimant that he would have liked matters to have progressed quicker. However, the test to be applied is objective. Upon that basis, the Tribunal considers that objectively the respondent acted reasonably in response to the claimant's grievances raised by him in November 2018 and this aspect of the claimant's claim fails. Nothing about the respondent's conduct upon this issue showed an intention that the respondent did not intend to be bound by the implied term. There was reasonable and proper cause for the length of time taken by Mr Sharif.

226. Allegation 4.3.5 is that from around 5 March 2019, the respondent failed to follow occupational health advice to identify reasonable adjustments to enable the claimant to return to work. The findings of fact about the occupational health advice obtained by the respondent may be found principally in paragraphs 70 to 74, 86 to 91 and 149 and 150.

227. It was part of the respondent's case that the claimant was against the idea of the respondent making any adjustments in the workplace pending the outcome of the November 2018 grievances. The Tribunal rejects the respondent's case for the reasons given in paragraphs 92, 93 and 158.

228. The claimant's approach to matters in February 2017 (referred to in paragraphs 52 and 53) is consistent with the claimant's case upon the issue of wanting there to be adjustments after November 2018. Effectively, the claimant had the benefit of the adjustment in February 2017 of the removal from Mr Reynolds' line management back into the line management of Mr Stimpson. There was therefore no reason, from the claimant's point of view, for any further adjustments to be made. That is consistent with the very adjustment which the claimant was seeking following the commencement of his ill health absence in November 2018. The occupational health recommendations were for consultation with the claimant and re-deployment (paragraph 72), the need for a discussion with the claimant for the purposes of discussion and arrangement of

reasonable adjustments (paragraphs 88-90). Like recommendations were made later: paragraph 149.

229. No effective steps were taken by the respondent after the preparation of the occupational health report of 5 March 2019 (see paragraph 85). Likewise, there was no discussion with the claimant after the second occupational health report of 30 April 2019 until 2 July 2019 (paragraphs 90 to 96). Even then, no meeting in fact was arranged to discuss with the claimant the occupational health reports and what may be done to facilitate the claimant's return to work. No arrangements were made with the claimant to discuss the possibility of the respondent making reasonable adjustments to assist him. Miss McNab did refer the claimant to occupational health for a third time on 16 July 2019. However, the respondent failed to arrange a meeting with him following the preparation of the third occupational health report.

230. As we saw from paragraph 164, one of the reasons for the claimant's resignation on 3 October 2019 was the respondent's failure to engage with the issue of making reasonable adjustments and the occupational health recommendations. The claimant also mentioned a failure to contact him to discuss a potential return to work taking into account his disability.

231. The impression given to the Tribunal by the respondent is that the claimant was very much out of sight and out of mind. The management of his ill health absence had in May 2019 been placed into the hands of Miss McNab who plainly was too busy to pay proper attention to it.

232. In our judgment, there was a breach of the obligation upon the part of the respondent over a period of time to make reasonable adjustments. Further, the respondent failed to properly consult with the claimant about reasonable adjustments and discuss with him the prospect of a return to work.

233. A failure to consult with an employee is not in and of itself a breach of the duty to make reasonable adjustments under the 2010 Act. However, failing to effectively communicate with an employee about their return to work and effectively leaving them in limbo, while not a breach of the duty to make reasonable adjustments for the purposes of the 2010 Act, is capable of being a breach of the implied term of trust and confidence.

234. The inadequate response of the respondent to the occupational health reports and the failure to properly manage the claimant's ill health absence and to properly consider the question of reasonable adjustments in our judgment is a breach of the implied term of trust and confidence. This was a continuing breach. The respondent had several opportunities to address the matter upon receipt each of the occupational health reports. The respondent failed to do so. There was thus no reasonable and proper cause for these failures.

235. The third and final report was dated 1 August 2019. By this stage, the claimant had given the respondent ample opportunity to deal with the matter. This culminated in the grievances raised by him in August 2019 summarised in paragraph 152. There had been no resolution of the matter or any effective measures taken by the respondent to address matters. In the circumstances, the respondent's conduct was likely (but not

calculated) to seriously damage mutual trust and confidence. There was no reasonable and proper cause for the way in which the respondent handled the claimant's absence and the question of making reasonable adjustments.

236. The claimant had not affirmed the contract and waived the right to resign in response to this breach as at 3 October 2019. This was an ongoing failure and the claimant simply afforded the respondent a further reasonable opportunity to address matters after he raised a grievance about it in August 2019.

237. Furthermore, this fundamental breach of contract was a material reason for the resignation of the claimant. The failure to follow the occupational health recommendations was given as a reason for the claimant's resignation: see paragraph 164.1. In the circumstances, the claimant was constructively dismissed by reason of the breach identified in paragraph 4.3.5 of Employment Judge Licorish's case management order.

238. We now turn to the allegation at 4.3.6. This concerns the errors upon the occupational health referral form completed by Miss McNab. The findings of fact are in paragraphs 136 to 144. In the Tribunal's judgment, these were significant errors. The Tribunal has no doubt that Miss McNab did not intend effectively to divulge to Mr Reynolds the fact that the claimant was going through an occupational health process. However, that is the effect of what she did because of her lack of attention to detail at the material time.

239. As has been said, the test of whether the employer's conduct amounts to a repudiatory breach is an objective one. The parties' subjective intentions are not relevant. On any view therefore, Miss McNab's conduct, when viewed objectively, was repudiatory. We agree that it was not calculated to destroy or seriously damage mutual trust and confidence but it was likely to have that effect. There was no reasonable and proper cause for her conduct. It was simply a product of overwork and lack of attention to detail.

240. Mr Holmes' comment, in his email of 7 August 2019 (referred to in paragraph 142) that Mr Reynolds had not been furnished any details about the circumstances of the referral is in reality no answer to this issue. The mere fact of the occupational health referral is in itself confidential and the respondent had broken the claimant's right to confidentiality.

241. The difficulty for the claimant upon this issue, however, is that the fundamental breach of contract (as we have found it to be) subsisted over the period between 1 and 7 August 2019. It cannot be regarded as a continuing act (in contrast to the issue in allegation 4.3.5).

242. Between 7 August 2019 and 3 October 2019, the claimant continued to engage with the respondent's processes. In our judgment, therefore, the claimant affirmed the contract and waived his right to resign in response to this fundamental breach. A period of around eight weeks is simply too long to constitute anything other than affirmation in the circumstances. Additionally, this episode appears not to have formed a reason for the claimant to have resigned his position in any case. It was not mentioned in his letter of resignation at pages 282 to 284.

243. Allegation 4.3.7 concerns the respondent's failure to engage in meaningful consultation with the claimant regarding its intention to close his place of work. The Tribunal's findings of fact about this matter run from paragraphs 98 to 134 and 145 to 176.

244. The Tribunal accepts as a fact that Miss McNab did not know that the Doncaster store was going to close when she spoke to the claimant on 2 July 2019. However, she became aware of it towards the end of that week and certainly knew that it was going to close when she travelled down to Doncaster from Scotland on 8 July 2019.

245. The Tribunal has sympathy for the predicament in which Miss McNab found herself on the afternoon of 8 July 2019. She made a judgement call to leave contacting the claimant until the following day. The flaw with this plan was, of course, that it was hostage to the fortune that the claimant would find out the position from others. That is indeed what happened when the claimant was informed by Mr Grant that Miss McNab had told him that the store was going to close.

246. In and of itself, the Tribunal does not consider Miss McNab's decision to defer contacting the claimant until the following day to be a breach of the implied term of trust and confidence. An employer will frequently find, in a redundancy situation, that not all of the affected employees are in the workplace at the same time. Employees may be absent on holiday or for a number of other reasons. The employer then has the dilemma of whether to inform the absent employees first or those who are within the workplace. Whichever way the employer does it, there is a risk that those informed first will tell the others of the position before the employer does. There was reasonable and proper cause for her decision to defer informing the claimant of the closure of the store until 9 July 2019.

247. That said, the Tribunal finds it surprising that an employer with the respondent's resources would expect a manager to drive down from Scotland to Doncaster to impart such important news in circumstances where the travel time alone will take up a large part of the day. This led Miss McNab to have insufficient time, in her judgement, to make contact with the claimant on the evening of 8 July 2019. She took that decision because she was naturally very tired after having worked a long day. That being said, as observed, even had the respondent found the resources to accommodate her in a hotel in Doncaster the night before the fact of the matter is that the claimant was not present in the workplace. The consequence of that is that inevitably the employees needed to be informed of the closure of the Doncaster store sequentially.

248. The claimant is on stronger ground, upon this issue when considering the sequence of events after 9 July 2019. There is, we think, much in Mr Smith's submission that the respondent treated the claimant very much like a "*spare part".* It is remarkable, in our judgment, that the matter was simply allowed to drift on after 9 July until 16 July and then again that there was drift following Miss McNab's email of 20 July 2019. The relevant findings of fact are in paragraphs 111 to 119. The Tribunal has found that the claimant was (on 16 July 2019) given a firm date for the closure of the Doncaster store of 3 September 2019. However, the respondent simply

left matters to drift on after 9 and then 20 July 2019 such that the claimant simply did not know where he stood.

249. The Tribunal is satisfied that Miss McNab did not impose a one week's deadline for the claimant to make a decision as to his future. We refer to paragraphs 121 and 133.

250. The claimant was forced to raise a grievance about matters on 6 August 2019. We refer to this in paragraph 151. Subsequent grievances were raised by him (as summarised in paragraph 152). This notwithstanding, no one within the respondent troubled to contact the claimant and clarify with him what he was meant to do after 3 September 2019.

251. We accept Mr Price's point that the claimant was aware from 16 July 2019 that the Doncaster store was going to close with effect from 3 September 2019. In our judgment, the claimant's call to the Doncaster Frenchgate Centre of 27 September 2019 was borne out of the claimant's frustration at the lack of information emanating from the respondent.

252. In circumstances where the respondent had been recommended by its occupational health physicians to consult with the claimant about making adjustments, it is remarkable that no effective steps were taken so to do. This is all the more surprising given the context of the redundancy situation that pertained.

253. In our judgment, the respondent's management of the claimant (both upon the question of the making of reasonable adjustments and of the redundancy situation) was poor. The Tribunal can accept that the respondent's failure to meaningfully consult with the claimant about the redundancy situation was not calculated to destroy or seriously damage mutual trust and confidence. However, objectively, it was likely to have that effect. Again, this was a continuing failure. It was without reasonable and proper cause. There can be no reasonable explanation for the respondent to keep the claimant in limbo for so long. In the circumstances, this was a repudiatory breach as objectively the respondent was in breach of the implied term of trust and confidence.

254. This was a matter about which the claimant complained in his letter of resignation. It was therefore a material reason for his resignation. In our judgment therefore, the claimant was constructively dismissed because of the respondent's failure to engage in meaningful consultation with him regarding its intention to close his place of work.

255. We now turn to allegation 4.3.9. This that from in around February 2017 the respondent failed to address the claimant's grievances in an open and timely manner. We understand this to be a separate allegation from that at allegation 4.3.3. The findings of fact relevant to allegation 4.3.9 may be found in paragraphs 33 and 34.

256. In our judgment, this contention fails. The Tribunal accepts that the respondent did not conduct a formal grievance investigation into the matter raised by the claimant with Mr Stimpson on 23 February 2017. However, Mr Stimpson was able to deal with matters informally. He reassured the claimant that before too long he would no longer find himself under the line management of Mr Reynolds. This satisfied the claimant. In our judgment, objectively, the respondent did not act in a manner calculated or likely to

destroy or seriously damage mutual trust and confidence upon this matter. On the contrary, in the Tribunal's judgment, the respondent acted quickly and informally to reassure the claimant. The claimant was content to find himself back under the line management of Mr Stimpson and there, by and large, matters rested until November 2018.

257. Allegation 4.3.10 is that the final straw occurred when the claimant found out on 27 September 2019 that his place of work had been closed. The Tribunal has found as a fact that the claimant knew from 16 July 2019 that the Doncaster store was closing on 3 September 2019. We think there much in Mr Price's point that this allegation amounts to the claimant contending that the respondent had failed to tell him again of the fact of the store's closure prior to 3 September 2019 after he was informed of it on 16 July 2019.

258. It is difficult to see how the respondent's failure effectively to remind the claimant of the fact of the closure may be viewed as anything more than an innocuous act. The claimant knew of the fact of the closure in any case. Further, because he has succeeded in establishing that he was constructively dismissed because of the issues in paragraph 4.3.5 and 4.3.7 (each of which are continuing breaches up to the date of the claimant's resignation) the claimant does not need to rely upon a final straw in any case.

259. For the same reason, the claimant has no need to rely upon any final straw in order to revive what we have determined to be the fundamental breaches in respect of which the claimant waived his right to resign and claim constructive dismissal, those being the matters referred to in paragraphs 4.3.1, 4.3.2, 4.3.4 and 4.3.6.

260. It follows therefore that the claimant has succeeded in establishing that he was constructively dismissed by the respondent. As we have said, it is then for the respondent to then show a potentially fair reason for the constructive dismissal. Mr Price does not in fact engage with the question of a potentially fair reason for the constructive dismissal (if such be found by the Tribunal) in his written submissions. We shall deal with this issue of fairness for the sake of completeness.

261. In a constructive dismissal complaint, the potentially fair reason may be found in the respondent's explanation for being in fundamental breach of the contract of employment. The respondent's amended grounds of resistance plead redundancy as a potentially fair reason for the dismissal of the claimant.

262. Redundancy was of course the background to the matters referred to in allegation 4.3.7. However, in our judgment, the respondent did not act reasonably in treating redundancy as a sufficient reason for the constructive dismissal of the claimant. The consultation, as we have observed, was poor. The respondent did not carry out any fair and reasonable consultation with the claimant about the need for redundancy and the question of alternative employment.

263. The fact that there was a redundancy situation cannot be a reason for the breach of the implied term around the respondent's failure to properly engage with the occupational health advice received. Indeed, to the

contrary, given that there was a redundancy situation in the background it was all the more important for the respondent to meaningfully and properly deal with the claimant.

264. The respondent did not act reasonably in treating the redundancy situation as a fair reason for the constructive dismissal of the claimant where there was viable alternative employment in the Sheffield stores. The respondent's dismissal of the claimant was thus outside the range of reasonable management responses to the redundancy situation in which the parties found themselves.

265. It follows from this that the claimant's complaint of constructive unfair dismissal succeeds. We now move on to the complaints brought under the 2010 Act. We shall start with the complaint of unfavourable treatment for something arising in consequence of disability set out in sub-paragraphs 4.11 to 4.15 of paragraph 182. All of the claimant's complaints of unfavourable treatment post-date the claimant's absence from work from 15 November 2018.

266. The sick notes which he submitted (referred to in paragraph 23) all (bar one) refer to anxiety and/or depression. Mrs McCunn opined in her report of 5 March 2019 that the claimant was likely to be a disabled person for the purposes of the 2010 Act by reason of his psychological condition (paragraph 72). Prior to the long-term sickness absence commencing in November 2018, the claimant had been admitted to accident and emergency in February 2017 as a consequence of Mr Reynolds' behaviour. We refer to paragraph 43. In our judgment, it is plain that the respondent had actual knowledge that the claimant was a disabled person with effect from 5 March 2019 at the latest. Further, in our judgment, the respondent had constructive if not actual knowledge of that fact in February 2017 and also during the period prior to the commissioning of the occupational health report of March 2019 upon receipt of the sick notes from 15 November 2018.

267. The Tribunal finds that the claimant's sickness absence from 15 November 2018 was something that arose in consequence of his disability. The cause of his absence was anxiety and depression. That is the relevant disability for the purposes of this case.

268. For the reasons set out in paragraphs 243 to 253 above, we find that the contentions in paragraphs 4.12.1 and 4.12.2 succeed. While we found there to be no fundamental breach in Melissa McNab deciding not to contact the claimant until 9 July 2019 about the closure of the Doncaster store, it is difficult to understand why the respondent left matters in abeyance until 16 July 2019. For a period of a week, the claimant was effectively left out of the loop and was only aware of the closure of the Doncaster store because he had been told of this by a work colleague. The Tribunal can accept that Miss McNab had difficulty in contacting the claimant. However, in this situation, it is incumbent upon the employer to notify the employee of the position. The respondent could easily have done this by writing to him or emailing him. More generally, the Tribunal found that there was a failure to follow a full and meaningful consultation with the claimant regarding the closure. Ultimately, this obliged him to raise the matters by way of a grievance.

269. On any view, this is unfavourable treatment. Any reasonable and right-thinking employee would view being kept in limbo and out of the loop about such an important matter as redundancy to be to their disadvantage.

270. The unfavourable treatment arose as a consequence of the claimant's ill health absence which was in turn a consequence of his disability. A complaint of unfavourable treatment for something arising in consequence of disability is not of course a comparator exercise. However, comparing how the respondent dealt with those employees who were in work can give context to the question of whether the claimant was unfavourably treated because of something that arose in consequence of his disability. Had he been in the workplace and not absent on ill health due to his disability then effective consultation with him would have taken place. Miss McNab's decision to not contact the claimant until 9 July 2019, to leave matters in abeyance until 16 July and then again after 20 July was influenced by her knowledge of the claimant's disability as was her decision to leave matters in abeyance and not make contact with the claimant. This may be contrasted with her dealings with those who were in the workplace. Being generous to Miss McNab it may well have been the case that, aside from her demanding work and holiday schedule, she was to some extent influenced by a benign motivation not to pressure the claimant and that this is why she did not make contact with him.

271. A benign motive does not however save an employer from a discrimination finding if the conduct was nevertheless discriminatory. Here, in our judgment, it was: the claimant was treated unfavourably as he simply did not know the position with his job and that position was causally linked to the fact of his disability. This goes beyond a 'but for' analysis and it simply being the fact of the disability as background to what happened. The fact of the claimant's disability was the operative cause of the unfavourable treatment because of the respondent's unwillingness to contact him and effectively manage the redundancy situation, a position that pertained effectively until the claimant's resignation, there being no full and meaningful consultation with him, particularly about alternative employment.

272. The next allegation of unfavourable treatment for something arising in consequence of disability is that in allegation 4.12.3: giving the claimant one week to choose between four alternative positions and failing to engage with him about the suitability of those options. This fails upon the facts. The Tribunal has determined that the claimant was not given just one week to decide upon his options: paragraphs 121 and 133

273. The allegation at 4.12.4 is that the respondent failed to notify the claimant on 29 August 2019 that the Doncaster store had in fact closed. The Tribunal accepts that the respondent failed so to do. In reality, the allegation at 4.12.4 is part and parcel of that at 4.12.2. Allegation 4.12.4 is therefore upheld.

274. The allegation of 4.12.5 is that Mr Mackenzie Crooks told the claimant on 25 September 2019 that his grievance was low priority. The allegation at 4.12.6 is that Mr Mackenzie Crooks adopted a hostile tone during the telephone hearing and in the minutes subsequently produced. The allegation at 4.12.7 is that Mr Mackenzie Crooks informed the claimant that

he might not be able to investigate the grievance in line with the time limits set out in the respondent's grievance procedure and thereafter failed to address it in a timely manner. Finally, the allegation at 4.12.8 is that Mr Mackenzie Crooks decided not to investigate all aspects of the claimant's grievances.

275. The relevant findings of fact may be found in paragraphs 154 to 177. The Tribunal found as a fact that Mr Mackenzie Crooks did not tell the claimant on 25 September that his grievance was a low priority. We found as a fact that Mr Mackenzie Crooks did not adopt a hostile tone towards the claimant. There was nothing that we can detect from the minutes suggestive of a hostile tone. In fact, on the contrary, Mr Mackenzie Crooks sent the draft minutes to the claimant and allowed the claimant to consider them. The claimant was in the process of so doing when Mr Mackenzie Crooks spoke to him on 2 October 2019 (paragraph 163).

276. In our judgment, Mr Mackenzie Crooks dealt with matters in a timely fashion. The Tribunal was not taken to the respondent's grievance procedure and the timescales within it. At all events, Mr Mackenzie Crooks was presented with a complex case on 6 September 2019 and in our judgment progressed matters with reasonable despatch. Further, Mr Mackenzie Crooks did decline to investigate the claimant's grievance about the reason for the closure of the Doncaster store. We agree with Mr Price that this was outside Mr Mackenzie Crooks' remit. That was a business decision taken by management. It was not something to be second-guessed by a grievance process. Mr Mackenzie Crooks did investigate the respondent's handling of the redundancy exercise.

277. In those circumstances, the Tribunal concludes that there was no unfavourable treatment of the claimant by the respondent in relation to the matters referred to in paragraphs 4.12.5 to 4.12.8 inclusive. We can accept that Mr Mackenzie Crooks preferred to meet with the claimant in person. However, he was willing to allow the claimant the benefit of a telephone hearing which was the claimant's preference. Given that Mr Mackenzie Crooks acceded to the claimant's wishes it is difficult to see how this can constitute unfavourable treatment of him. The Tribunal does not accept that Mr Mackenzie Crooks' preference for an in-person meeting caused him to adopt a hostile tone or downgrade the claimant's grievance because of it. Mr Mackenzie Crooks, in our judgment, conscientiously investigated the claimant's grievance.

278. We now turn to the issue of justification upon issues 4.12.1, 4.12.2 and 4.12.4. The Tribunal accepts that the respondent had a legitimate aim, that being the efficient running of its business which prompted it to decide the closure of the Doncaster store. However, in the Tribunal's judgment, the failure to Miss McNab's dealings with the claimant in July 2019 and the respondent's failure to meaningfully consult with the claimant about his redundancy was not a proportionate means of achieving that aim. Unfavourably treating the claimant because of something arising in consequence of his dismissal by effectively excluding him from meaningful consultation went nowhere towards enabling the respondent to achieve its objective of closing the Doncaster store. The objective could just as well have been achieved by meaningful consultation with the claimant. The failure had a significant impact upon the claimant who was uncertain as to

his position and about his job security. When balancing the impact upon the claimant of the unfavourable treatment linked to the disability against the lack of benefit to the respondent of the unfavourable treatment towards meeting its aim the matter gives of only one answer. Further, as we shall see, there were reasonable adjustments available to the respondent which were not made and which had a prospect of alleviating the situation. Accordingly, there is no defence of justification by way of answer to the matters in respect of which the claimant has succeeded in this head of claim, those being allegations 4.12.1, 4.12.2 and 4.12.4.

279. We now turn to the reasonable adjustments complaint. The first impugned PCP is that in paragraph 182(4.21.2): the requirement to work for or near or under Mr Reynolds. The Tribunal has already determined that the respondent had actual and/or constructive knowledge of the claimant's disability with effect from February 2017. The Tribunal finds as a fact that the respondent also had actual knowledge of the disability (by virtue of the sick notes) and of the disadvantage caused to the claimant by the requirement for the claimant to work under the line management of Mr Reynolds with effect from November 2018.

280. We say all of this for the following reasons. Mr Stimpson was aware of the difficulties which working under the line management of Mr Reynolds caused to the claimant in February 2017 culminating in hospital admission. The claimant put the respondent on notice of his misgivings in his email of 8 November 2018. This precipitated long term sickness absence by reason of anxiety and depression. Miss McNab was on notice in July 2019 that the claimant objected to working at Meadowhall or Crystal Peaks because he did not wish to work under the line management of Mr Reynolds. She was well aware of problems with Mr Reynolds' line management generally from her dealings with the Inwood grievance (paragraph 37). Further, on 5 March 2019, Jacqueline McCunn had reported upon the claimant's psychological condition as a direct result of perceived work-related concerns arising from his relationship with a manager.

281. The Tribunal accepts that this PCP put the claimant at a substantial disadvantage compared to persons who are not disabled. Persons without a disability were, it appears, able to work with Mr Reynolds. For example, Mr O'Neill was able to work with him following a successful mediation.

282. The Tribunal is satisfied therefore that the claimant has made out his case that the relevant PCP of requiring him to work under the line management of Mr Reynolds from November 2018 placed him at a substantial disadvantage by reason of his disability when comparing his position with that of non-disabled comparators. It follows therefore, the respondent being on actual notice both of the disability and the relevant disadvantage, that a duty arose to make reasonable adjustments.

283. The Tribunal accepts that the suggested adjustment of the claimant working in Castleford or Huddersfield was not one that was reasonable. The Tribunal accepts that part of the claimant's inability to contemplate working at Castleford or Huddersfield was because of the claimant's childcare commitments. However, the disability was in our judgment a

material reason why that adjustment was not one that was reasonable in the circumstances for the reasons in paragraph 286 below.

284. It would not be a reasonable adjustment to require the claimant to work in Meadowhall or Crystal Peaks under the line management of Mr Reynolds. However, it was clear from the evidence of Miss McNab that arrangements could be made to enable the claimant to work at Meadowhall or Crystal Peaks under the line management of another line manager and that matters could be arranged so that Mr Reynolds and the claimant would not come into contact. We refer in particular to paragraphs 130 and 131.

285. The impression that the Tribunal had was that Miss McNab (and therefore the respondent) was very willing to contemplate the making of reasonable adjustments to enable the claimant to work at Meadowhall or Crystal Peaks without difficulty. The impression that the Tribunal formed from Miss McNab's evidence is that this was something which could easily have been arranged. In those circumstances, it is regrettable that steps were not taken to properly consult with the claimant at the material time. Had that step been taken it would appear that the claimant would have been able to return to work once certified as fit so to do in either of the two Sheffield stores. Miss McNab said that placing the claimant in either of the two stores would have been possible and that cost would not have been an issue. Taking into account the respondent's resources, it is plain that such an adjustment would have been practicable, would cost little and would have come with a prospect of alleviating the substantial disadvantage caused to the claimant by reason of his disability consequent upon the respondent's requirement for him to carry out his substantive role under the line management of Mr Reynolds.

286. The second disadvantaging PCP (at paragraph 182(4.16.2) is that adopted by the respondent of treating re-deployment within a 30 miles' radius of an employee's home address as suitable alternative employment. This very much goes hand in hand with the first impugned PCP. We agree with the claimant that in and of itself simply alighting upon a 30 miles' radius and applying that to a disabled person may result in a substantial disadvantage in circumstances where the store within the 30 miles' radius comes with travel difficulties attributable to the relevant disability. This is the situation that pertains in this case. An adjustment to the PCP may therefore need to be made and indeed in this case could have been made to enable the claimant to work in the Sheffield stores as opposed to in Castleford or Huddersfield notwithstanding that the latter two were within the 30 miles' radius. Travel to the Sheffield stores is easier for the claimant logistically than is to Huddersfield or Castleford. A material reason for that difficulty is the claimant's disability. Adjusting the redeployment policy by excluding those two stores from consideration and allowing the claimant to work from the Sheffield stores instead had a prospect of alleviating the disadvantage.

287. The Tribunal determines that the claimant's complaints brought under the Equality Act 2010 upon which the claimant has succeeded were brought within the time limit provided for by section 123 of the 2010 Act. The successful complaint under section 15 was a continuing act, that being a failure to follow a full and meaningful consultation regarding the closure of the Doncaster store. In a similar vein, the reasonable adjustments complaint was likewise of a failure to make reasonable adjustments. That

failure to re-deploy the claimant to one of the Sheffield stores was a continuing failure which only ended up on the claimant's resignation. It follows therefore that the claimant's discrimination complaints were presented within the relevant time limit.

288. The Tribunal need not be concerned about the issue of extending the time limit upon just and equitable grounds given the finding in paragraph 287. For the sake of completeness, the Tribunal would have found it to be just and equitable to extend time in any case. There was a continuing failure by the respondent to make reasonable adjustments. The respondent's ability to call cogent evidence was in no way prejudiced by any delay. There would be significant prejudice to the claimant in driving him from the judgment seat upon a meritorious claim when weighed against that to the respondent which was that of simply having to meet the claim.

289. For the reasons set out in paragraphs 216 to 260 above, the respondent was in fundamental breach of contract. It follows therefore that the complaint of wrongful constructive dismissal also succeeds in part for the same reasons.

290. The Tribunal will now list the case for a remedy hearing. Within 21 days of the date upon which this Judgment is promulgated, the parties shall write to the Employment Tribunal with the following information:

290.1. A time estimate for the remedy hearing.

290.2. Dates of availability over the next four months.

290.3. An indication as to whether the parties consider that a telephone case management discussion with the Employment Judge would be of benefit.

Employment Judge Brain

Date 21 December 2020