EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr H George	**v**	Morgan West Associates LLP

Heard at: **Bristol (by video)** **On: 22 to 26 February 2021**

Before: **Employment Judge C H O'Rourke**
Ms J Le Vaillant
Ms C Date

Appearances
For the Claimant: **in person**
For the Respondent: **Mr S Ball – partner**

JUDGMENT

1. The Respondent discriminated against the Claimant on the grounds of his disability.

2. The Claimant's claims of constructive unfair dismissal and unlawful deductions from wages fail and are dismissed.

RESERVED REMEDY JUDGMENT

The Respondent is ordered to pay the Claimant the sum of £27,401.01, as set out in the reserved Remedy reasons, set out below.

(The Respondent having, at the Hearing, requested written liability reasons, in accordance with Rule 62(3) of the Employment Tribunal's Rules of Procedure 2013, the following reasons are provided:)

REASONS

Background and Issues

1. By a claim form presented on 23 December 2019, the Claimant brought claims of constructive unfair dismissal, disability discrimination and unlawful deduction from wages. He had been employed by the Respondent, as a principal recruitment consultant, for approximately nine years, until his resignation on notice, on 21 November 2019, with his employment terminating on 20 January 2020.

2. The issues in this claim were agreed at a case management hearing of 26 May 2020 and are as set out below.

3. Constructive unfair dismissal

   3.1 The Claimant claims that the Respondent acted in fundamental breach of contract in respect of the express term of the contract relating to pay and the implied term of mutual trust and confidence. The breaches were as follows;
   3.1.1 Mr Heynen (a partner) telling the Claimant to resign in February 2018;
   3.1.2 In February 2018 (corrected at the Hearing to March), issuing the Claimant with a final performance warning, despite not having followed any performance procedure;
   3.1.3 On 2 January 2018 and in November 2019, refusing to pay the Claimant commission payments;
   3.1.4 On 18 November 2019, Mr Heynen shouting at him and telling him that he was mentally unwell and then suspending him.
   (The last of those breaches was said to have been the 'last straw' in a series of breaches, as the concept is recognised in law).

   3.2 Did the Claimant resign because of the breach? The Respondent considers that there may have been other reasons for resignation.

   3.3 Did the Claimant tarry before resigning and affirm the contract? The Respondent considered that the Claimant had affirmed the contract.

   3.4 In the event that there was a constructive dismissal, was it otherwise fair within the meaning of s. 98 (4) of the Act?

4. Disability

   4.1. The Respondent accepts that at the material time (from January 2017 onwards) that the Claimant was disabled, by virtue of suffering from bipolar affective disorder.

5. Section 13: Direct discrimination on grounds of Disability

5.1. Did the Respondent subject the Claimant to the following treatment falling within section 39 Equality Act, namely*:*

5.1.1. Telling him to resign in February 2018;
5.1.2. Mr Heynen shouting at him on 18 November 2019, stating that he was mentally unwell.

5.2. Did the Respondent treat the Claimant as alleged less favourably than it treated or would have treated the comparators? The Claimant relies upon the hypothetical comparator of a non-disabled consultant.

5.3. If so, can the Claimant prove primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because of the protected characteristic?

5.4. If so, what is the Respondent's explanation? Can it prove a non-discriminatory reason for any proven treatment?

6. Section 15: Discrimination arising from disability

6.1. The allegations of unfavourable treatment as "something arising in consequence of the claimant's disability" falling within section 39 Equality Act are as follows (no comparator is needed):

6.1.1 Refusing to pay company sick pay from January to March 2017 and April to May 2018;
6.1.2 Having clients removed from him and not returned, on his return to work in April 2017, continuing through to his resignation;
6.1.3 Having commission withheld from him during sickness absence during the same periods as in 6.1.1 above and his enquiries in respect of such being dealt with in an aggressive and hostile manner;
6.1.4 Mr Heynen advising him to resign, while on sick leave, in February 2018;
6.1.5 Issuing the Claimant with a final written performance warning in February 2018;
6.1.6 Mr Heynen shouting at him on 18 November 2019, telling him (and his partner by phone) that he was mentally unwell;
6.1.7 Mr Heynen making demeaning comments, on a number of occasions, in 2018 and 2019 regarding his disability, mocking him for being depressed for so long and for the bad back he suffered from, preceding his breakdowns in 2016 and 2018. (The Claimant subsequently, during the Hearing, withdrew this allegation, as he considered that he had insufficient evidence to support it).

6.2. Can the Claimant prove that the Respondent treated him as set out in paragraph 6.1 above because of the "something arising" in consequence of the disability? The Claimant states that the 'something arising' was his increased likelihood of needing to take sick leave and the requirement to

attend for and to continue at work, whilst still suffering from severe depression.

6.3. Can the Respondent show that the treatment was a proportionate means of achieving a legitimate aim? The Respondent seeks to rely on this statutory defence, to cover the following issues:

6.3.1 As to the business aim or need sought to be achieved: the need to ensure the business' viability and profitability;
6.3.2 As to the reasonable necessity for the treatment: employees need targets to which they can aim; and
6.3.3 As to proportionality: there were no alternative steps that the Respondent could take to achieve the aim, otherwise.

6.4. The Respondent does not dispute that they knew of the Claimant's disability, at all relevant times.

7. Reasonable adjustments: section 20 and section 21

7.1. Did the Respondent apply the following provision, criteria and/or practice ('the provision') generally, namely the conduct of performance proceedings?

7.2. Did the application of any such provision put the Claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled in that:

7.2.1. His absences made it more likely that he would be subjected to such procedure; and
7.2.2. He could not participate in such procedures.

7.3. Did the Respondent take such steps as were reasonable to avoid the disadvantage? The burden of proof does not lie on the Claimant, however it is helpful to know the adjustments asserted as reasonably required and they are identified as follows:

7.3.1. Meeting with the Claimant to discuss and set out targets and a time frame to improve his performance;
7.3.2. Applying either lower targets or a longer time frame to take account of periods of sickness absence;
7.3.3. Inviting the Claimant to and holding a formal performance review procedure;
7.3.4. Issuing him with a formal performance warning letter, to include a right of appeal.

7.4. Again, the Respondent does not dispute that they knew of the Claimant's disability, at all relevant times.

8. Unlawful Deduction from Wages

8.1 Was the Claimant contractually entitled to company sick pay and commission? The Claimant accepted in the Hearing that all commission due to him had, by then, been paid, so the claim was restricted to the sick pay point. There is a dispute as to the contents of relevant contractual documentation. In this respect, the Claimant contends that in addition to receiving three months' full sick pay (which he did receive), he should also, thereafter, have received a further three months' half sick pay, which he did not receive.

8.2 If so, was the Claimant underpaid during his sickness absence and if so, in what amount?

9. Time/limitation issues

9.1. The claim form was presented on 23 December 2019. Accordingly any act or omission which took place more than three months before that date (allowing for any extension under the early conciliation provisions) is potentially out of time, so that the tribunal may not have jurisdiction.

9.2. Can the Claimant prove that there was conduct extending over a period which is to be treated as done at the end of the period? Is such conduct accordingly in time?

9.3. Was any complaint presented within such other period as the employment Tribunal considers just and equitable?

The Law

10. We reminded ourselves of the case of **Western Excavating (ECC) Ltd v Sharp [1978] ICR 221 EWCA**, which sets out the test for constructive unfair dismissal and which has been itemised already by us, when we set out the issues above. Also, we considered the case of **Mahmud v BCCI International [1997] UKHL ICR** 606, which stated (as subsequently clarified) that:

> *"The employer should not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee"*

11. In respect of the discrimination claims, we note that the initial burden of proof is on the Claimant to establish a prima facie case that the Respondent has committed a contravention of the Equality Act, specifically, primary facts from which the Tribunal could reasonably and properly conclude, in the absence of any explanation to the contrary that there had been unlawful discrimination (**Ayodele v Citylink Ltd [2018] IRLR EWCA)**.

12. The case of **Abbey National v Chagger 2010 ICR 397 EWCA** ruled that if there was a chance that, apart from the discrimination, an employee would have been dismissed in any event, that possibility had to be factored into the measure of loss, on the same basis as a *Polkey* deduction.

The Facts

13. We heard evidence from the Claimant and on his behalf, from a Ms Joanne Wood, his partner. On behalf of the Respondent, we heard evidence from Mr Nicholas Heynen, one of the two partners in the business; Ms Leigh Smith, an office manager and Mr Stephen Ball, the other partner.

14. The Respondent is a small business, with, at the time, only two employees, the Claimant and Ms Smith. It is a specialist recruitment company, seeking to place internal auditors with employers. The Claimant's role was to find client employers and then to place candidates with them, for which he would earn commission (as well as being paid a basic salary).

15. Chronology. We set out the following chronology, upon which we comment as we consider appropriate:

    15.1. October 2011 – the Claimant commenced employment with the Respondent. It was common evidence that in the period 2011 to 2016, the Claimant had been a productive and successful salesman.

    15.2. October 2016 - the Claimant suffered a bipolar breakdown (mania followed by depression), requiring hospital admission and commencing a period of sick leave.

    15.3. January 2017 – the Claimant was discharged from hospital and remained on sick leave, whilst suffering from severe depression.

    15.4. June 2017 – the Claimant returned to work. His return was coordinated between him, the Respondent and care agencies who had been assisting him and involved a meeting between all of them, at a café. When he re-started work, he did so on a phased basis, over a month and some clients with whom he'd worked in the past were not returned to him.

    15.5. December 2017 and January 2018 – on the former date, the claimant emailed a candidate CV to a client (Janus Henderson) and on the latter date, there was a response from the client, inviting the candidate for interview. He considers, therefore that he was due commission for that placement.

    15.6. January 2018 – the Claimant had a second period of absence due to ongoing severe depression.

    15.7. 21 February 2018 – the Respondent wrote to the Claimant [1], noting that he continued to be on sick leave, indicating that capability procedures may be appropriate and asking him to call or email '*to discuss options going forward'*. The letter is electronically signed by both partners, although Mr Ball said that he'd written it. The Claimant called Mr Heynen, in response. Mr Heynen was asked in cross-examination as to what 'options' they were considering, but said that he '*didn't recall'* and nor could he remember whether he and Mr Ball had discussed any such options. The Claimant said

that in that phone call Mr Heynen said to him '*that it would be in your best interests to resign from the Company, for both you and I*', which suggestion he rejected. The call was on speaker-phone, to which the Claimant's partner, Ms Wood, was listening. She said that Mr Heynen had suggested that '*it was the work that made Harvey unwell and in the light of this it would be in Harvey's best interest to resign'*. She said, in cross-examination that the reason she remembered the call so clearly was that she'd been unhappy with the content of the letter and that she'd decided to listen in, as the Claimant was '*not thinking straight'* and she was fearful that he would lose his job. The Claimant was challenged, in cross-examination, as to why he'd not complained about this alleged comment, or brought a grievance and he said he wouldn't have known who to complain to, in this two-partner business, with only Ms Smith, the office manager, in addition and who was a relative of Mr Ball and in any event, there was no published grievance procedure. Mr Heynen's account of this conversation, both in his witness statement and cross-examination was simply that he had not told or said to the Claimant that he should resign. When challenged that, as he had previously accepted that he had no recollection of the 'options' referred to in the letter and could not recall '*very much'* of the telephone conversation, how he could be 100% certain that he had not suggested the Claimant resign, he said that he '*had never told you to resign, so am sure that I wouldn't have done so in this call*.' He considered that Ms Wood must have misheard the conversation and didn't know why the Claimant would be suggesting that he would made such a comment. There clearly being, therefore, a direct conflict in the evidence, we need to state which account we prefer, which is, in this case, the Claimant's. His evidence is supported by Ms Wood's account and neither his nor her evidence was shaken in cross-examination, while, in contrast, Mr Heynen's account is apparently absolutely certain on this point, despite him having little recall of the conversation. We generally, hereafter, when confronted with conflicting accounts between the Claimant and the Respondent's evidence, which are unsupported by corroborative evidence, prefer that of the Claimant, over the Respondent's. We do so for the following reasons:

15.7.1. The Claimant's evidence was cogent, clear and direct to the point.

15.7.2. In contrast, the Respondent's evidence was often muddled, unclear and frequently strayed from the point of the question. Several questions sometimes had to be asked, on the same point, to extract a direct answer. An example of this is when Mr Ball was asked whether, the business having made a decision that they were not going to carry out a performance review on the Claimant, or dismiss him, they had communicated this decision to him, in any form and he embarked on a long-winded evasive answer, eventually requiring the Tribunal's intervention to extract the only answer possible, which was 'no'.

15.8. Returning to the chronology - 29 March 2018 – while the Claimant was still on sick leave, the Respondent wrote to him [2], '*to inform you of a final performance notice due to unacceptable levels of fee income over the last*

twelve months'. Targets for fee income were set and the Claimant was warned that '*the likely consequence of continued or further poor performance during the period of this improvement notice is Dismissal'*. It was common ground that there had been no capability procedure prior to this '*final'* warning, which the Respondent said in the letter was due to the Claimant being on sick leave. While the Respondent asserted in their response to the Claimant's reasonable adjustments claim that they had, as one such adjustment, afforded him the right of appeal to such a warning, the letter does not say that.

15.9. June 2018 – the Claimant returned to work and was placed on a three-month rolling performance review, for a year, starting from that point. He inquired of Mr Heynen as to the commission due for the candidate he had submitted to Janus Henderson, prior to going on sick leave and was told that Mr Heynen had taken over that client, in the Claimant's absence and that as a further meeting was required with the client, to ensure the candidate's placement, he (the Claimant) was not due the commission for that client (a sum after tax of approximately £2500). There is no dispute that this commission was withheld, for the reason stated, but was subsequently paid to the Claimant, just before his resignation, over a year later.

15.10. August 2018 – at the conclusion of the first three-month review period, the Claimant asked Mr Heynen if he had met the performance requirements and whether he still had a job to come to, as he had had no formal or detailed feedback from the Respondent on this point. He said that he told Mr Heynen that his stress levels had been increasing and his sleep had been affected. He said that Mr Heynen's response was limited to him saying to him that he should '*not be silly and that Morgan West had no intention of terminating my employment'*. He said that throughout the entire twelve-month period, he received no updates, reviews or other assurances that his performance was meeting expectations. Mr Ball asserted, however, that the Claimant, by being in the office regularly, was effectively being informally routinely performance managed.

15.11. October 2018 – the Claimant suffered a second bipolar breakdown, necessitating a further sickness absence period, until January 2019, when he returned to work.

15.12. 18 November 2019 – while the performance review period apparently concluded in June 2019, the Claimant stated that he received no update, report or information as to his performance against measured targets and simply continued at work. Also, as mentioned previously, Mr Ball accepted in cross-examination that despite him and Mr Heynen having reached a management decision that they were not going to carry out a performance review on the Claimant, or dismiss him, they did not communicate that decision to him in any formal way. The Claimant continued to consider that he was entitled to payment of the commission from 2018 and therefore resolved to speak to Mr Heynen about it, on 18 November 2019. He said in evidence that he resolved to be calm in doing so, even writing notes to himself to that effect and restricted the conversation to that point and also a

routine request to work from home for a period. He said that when he raised the commission issue with Mr Heynen, '*he became very aggressive and hostile, telling me again it was me who had made a mistake. Very shortly after this, he told me that I was mentally unwell and I was instructed to go home.'* Mr Heynen, also, while the Claimant was driving home, phoned Ms Wood and told her, she said that '*he thought that Harvey was having another episode, to which I replied that he was upset and not unwell'*. Mr Heynen said that the Claimant had been upset when they spoke due, firstly, to problems Ms Wood was having and which was stressful for him and secondly to '*feeling pressure due to his poor sales revenues at work*'. He denied that he had told the Claimant that he was mentally unwell and had made no reference to his mental health. He considered that the Claimant was having an '*episode'*, similar to ones he had had in the past and that it was in everybody's interest that he go home. We find, as a fact that the Claimant's account of this discussion is the accurate one. We do so because, generally, we prefer his evidence and secondly, his account is corroborated by the uncontested conversation Mr Heynen had with Ms Wood, in which he referred to the Claimant having another '*episode*' and the fact that Ms Wood used the term '*not unwell*' indicates that that latter word was used. As an aside, in the context of his unfair constructive dismissal claim, the Claimant stated in his claim and at the case management conference that this incident was 'the last straw'

15.13. 20 November 2019 – the Claimant emailed a grievance [23], referring to the non-reassignment of clients to him following his return from initial sick leave; the lack of any formal procedure in relation to performance review; non-payment of the commission he claimed was due to him and general concerns about adverse conduct towards him.

15.14. 21 November 2019 – the Claimant emailed [23], referring to his email of the previous day and resigning on two months' notice, on the grounds that the Respondent's actions over the last three years '*have irreparably broken the working relationship'* and referring to the incident of the 18th as the '*last straw for me'*.

15.15. 3 December 2019 – Mr Ball, who had been in hospital, emailed the Claimant [26], stating that he would conduct a grievance procedure, but asking, in the meantime, '*if there was anything Morgan West can do to keep you in the business and to understand the outcome you are expecting …'*. The Claimant replied the same day [31], stating that he '*would be happy to have a phone conversation in order to discuss the grievances …'*.

15.16. 5 December 2019 – following a routine exchange of emails between the Claimant and Mr Heynen about client matters, the Claimant wrote stating '*may I ask why important emails are being deleted from my account? I ask as I do remain an employee of Morgan West?'*

15.17. 6 December 2019 – the Claimant wrote to Mr Ball [31], stating that '*I hope my email finds you well.'* He referred to continuing on sick leave and that '*although I remain majorly stressed and I remain worried about it*

escalating I would be comfortable in having a phone conversation with you on Monday morning in order to discuss the grievances that I have raised. I look forward to receiving your response'.

15.18. 17 December 2019 – Mr Ball wrote to the Claimant [32], referring to a telephone conversation on 11 December, recording that when asked what the Claimant had been '*looking to achieve from the process'*, he (the Claimant) had said '*it depended on the outcome of this conversation and subsequent investigations.'* And also that he would be signed off sick until his notice ran out on 20 January 2020 '*unless you can persuade me otherwise'*.

15.19. 20 December 2019 – Mr Ball reached his conclusions, rejecting the grievance. On the same day [33], the Claimant responded, indicating his disagreement with the outcome and requesting an appeal process. He stated that '*in light of your response, Steve, I do feel that my position with Morgan West is untenable as all trust and confidence in the company has, in my belief, been irreparably broken. Towards the end of our phone conversation on 11 November* (this must be a typo and refer instead to December) *I advised you that unless you were able to convince me to stay that my employment with Morgan West would end on January 20th 2020. In light of the above … I have no intention of retracting my resignation.'*

15.20. 23 December 2019 – the Claimant commenced these proceedings.

16. Claim of Constructive Unfair Dismissal. We turn now to the issues we need to consider in respect of this claim:

16.1. In respect of the alleged breaches of contract by the Respondent, we find as follows:

16.1.1. As already found, Mr Heynen did tell the Claimant to resign, in February 2018.
16.1.2. Again, as already found, the Respondent did issue a final performance warning in March (not February) 2018, without having followed any prior procedure, or even indicating to the Claimant that they had concerns about his performance.
16.1.3. Again, as already found, the Respondent did withhold the commission payment over the period 2018 and 2019.
16.1.4. Finally, again as already found, Mr Heynen did, in the conversation on 18 November 2019, shout at the Claimant that he was mentally unwell and tell him to go home.

16.2. It's clear to us that these breaches, in particular the final one, were either singly, or cumulatively fundamental breaches of the implied term of trust and confidence.

16.3. Did the Claimant resign because of the breach or did he tarry in doing so and therefore affirm the contract? We consider that he did affirm the contract, for the following reasons:

16.3.1. While not of itself a conclusive factor, the fact that the Claimant resigned on notice could be considered as indicating affirmation, particularly when he seemed to continue to be engaged in the business and when combined with the other factors set out below.

16.3.2. It was undisputed evidence that on at least one previous occasion during his employment, the Claimant had resigned, but been persuaded to return on better terms.

16.3.3. As indicated by his correspondence post-resignation (as set out in the chronology), he was open to an offer sufficient to persuade him to return.

16.3.4. Finally, his own confusion, as clear from his oral evidence, when he referred to a later 'final straw', indicates a continuing relationship. These factors do not, to our mind, present an employee who felt (applying **BCCI**) that the relationship was destroyed or seriously damaged, but was in fact reparable. Such a position is contrary to the principles set out in **Western Excavating**.

16.4. For these reasons, the claim of constructive unfair dismissal fails and is dismissed.

17. Direct discrimination. The issues in respect of this claim are as follows:

17.1. As already found, the Respondent did subject the Claimant to detrimental treatment, in respect of the two incidents set out in this claim (the suggestion to resign in 2018 and the final incident on 18 November 2019).

17.2. We consider that in respect of those incidents, the Claimant was treated less favourably than a non-disabled comparator, for the following reasons:

17.2.1. In respect of the suggestion of resignation, we do not consider that a non-disabled employee, who had happened to have taken a lengthy period of sick leave, would have been invited to resign, provided it was clear that that employee was capable of returning to work. In the Claimant's case, Mr Heynen's view was influenced by his perception that the Claimant would be unduly pressurised by the work and which would perhaps also then lead to further periods of sick leave. We note, however that the Respondent was, at this stage, making this and other decisions without the benefit of any form of medical or occupational health advice.

17.2.2. In respect of the final incident, the use of the term '*mentally unwell*' would clearly not have been used to a non-disabled comparator.

17.3. We can therefore only conclude that such treatment was because of his disability.

17.4. The Respondent could provide no worthwhile evidence to counter this claim. While they asserted that they had, generally, been supportive of the Claimant,

when he was ill, or needed support (and there were uncontested examples of such support) this does not excuse their behaviour in respect of these two incidents.

17.5. We find therefore that the Respondent did directly discriminate against the Claimant, because of his disability.

18. Discrimination Arising From Disability. The issues in respect of this claim are as follows:

18.1. The allegations of unfavourable treatment are largely a repeat of those made in respect of the unfair dismissal claim and therefore we do not repeat our positive findings in respect of those incidents. The only two allegations that are not set out in that claim are as follows:

18.1.1. An allegation that he was not paid the correct level of company sick pay during absences in January to March 2017 and April to May 2018. By way of support of this allegation, the Claimant relied on an undated document entitled 'Company Attendance Management Policy and Procedure', which states that sick pay, in view of his length of service should have been for three months' full pay, followed by three months' half pay, not simply the three months' full pay he did receive. He said that he had located this document in an unrestricted policy folder on the Company's database. Ms Smith confirmed that the folder was called 'company policy folder'. Both she and Mr Ball stated that this document had never been published or formed any part of the Respondent's sickness absence policy. Mr Ball thought it may have been a draft policy created by a previous manager, during a time when the Respondent had many more employees. The Respondent instead referred to the Claimant's contract of employment [72] which stipulates the entitlement as three months' full pay only, for his length of service. We find that the policy document cannot trump the contract of employment, as the contract is dated, is clear and undisputed by the Claimant and the policy document, in contrast, is undated, its provenance and general background is unclear and there is no evidence that it was ever provided to the Claimant. We therefore dismiss this allegation and also, in turn, dismiss the claim of unlawful deduction from wages, as that is put on exactly the same basis.

18.1.2. In respect of the allegation of withdrawal of clients, this, as we have found, was not in dispute. Clearly, the withdrawal of clients, in a commission-based environment is potentially unfavourable treatment, due to reduced commission and fees from clients.

18.2. We have no hesitation in concluding that all of these acts of unfavourable treatment were because of something arising in consequence of the Claimant's disability. All of the incidents arose in the 2016 to 2019 period, during which the Claimant had lengthy periods of sick leave and even while at work, was, on his own evidence, suffering periods of depression. We contrast that with the previous period of employment, when, as was undisputed, he had not taken a single day's sick leave and his performance

was to a high standard. The difference clearly therefore, in the latter period, was the onset of bi-polar breakdown, sickness absence as a consequence and then, while at work, reduced performance. These issues lead to the Respondent's acts of unfavourable treatment and are clearly directly linked to his disability.

18.3. Finally, can the Respondent show that the discrimination that we have found was a proportionate means of achieving a legitimate aim? The Respondent in this respect relied upon the small size of the business, there being only two partners and the need for a regular fee income to sustain the business. Turning to each of the acts of unfavourable treatment, we comment as follows:

18.3.1. In respect of the withdrawal of clients, we can see that particularly in view of the lengthy periods of sick leave and the Claimant's admitted lower performance levels that the Respondent's business need for continuity and client reassurance was a reasonably necessary business aim for them. However, the application of the aim was not proportionate, as there was no evidence whatsoever that they had discussed or consulted with the Claimant on this issue, or considered subsequent adaptations to it.

18.3.2. Clearly, as the Respondent did, in the end, pay the commission, without explaining why it had been previously withheld and why they now considered it due, it must have been unreasonable and disproportionate for them to have withheld it.

18.3.3. Under no circumstances can it be reasonable or proportionate for an employer to encourage an employee to resign.

18.3.4. While it is of course a reasonable business aim to ensure good performance levels for employees and therefore, if necessary, to implement a capability procedure (which was accepted by the Claimant), it is clearly not reasonable or proportionate to do so by issuing a final warning, without any prior procedure and then, subsequently, to fail to follow up in any formal way that procedure, advising the employee accordingly as to whether their performance met the required standard and that accordingly their employment was secure. Telling him not to be '*silly'* when he raised concerns trivialised them and obviously, from his evidence, did nothing to allay his fears.

18.3.5. Clearly, shouting at an employee and telling that they were mentally unwell can never be reasonable or proportionate.

18.4. For these reasons, therefore, the Respondent commits acts of discrimination arising from the Claimant's disability.

19. Reasonable Adjustments. The issues in respect of this claim are as follows:

19.1. There was no dispute that the Respondent had a PCP of conducting performance proceedings.

19.2. It was not actively disputed either that the Claimant was at a substantial disadvantage in comparison to a non-disabled person, in this respect, due to

being more likely to be subjected to such procedures, by taking more sick leave and also, while on sick leave, due to the nature of his illness, being incapable of participating in a meaningful fashion.

19.3. Did the Respondent take such steps as were reasonable to avoid that disadvantage? In this respect, the Respondent stated the following:

19.3.1. While they claim that they met with the Claimant to discuss and set out targets and a time frame to improve his performance, the only evidence for such is that, in 2017, they agreed, on agency advice, to a phased return to work and that, in March 2018, they issued him with the final warning. That falls far short of what they claim to have done in this paragraph and also what could be expected of a reasonable employer. In this respect, we consider that a reasonable employer, even a small one such as this, would have sought formal medical advice on the Claimant's condition, its effects on his work and necessary adjustments, all in consultation with him. It was clear from the Respondent's evidence that they did not really make efforts to understand the Claimant's conditions and how it might impact on his performance and behaviour and how they could respond appropriately. The Respondent's references to '*manic episodes*' and '*mentally unwell*' strengthen that perception and the overall impression that they were trying to 'work round' him, rather than 'with' him.

19.3.2. We accept that the Respondent did make an effort to apply reduced targets.

19.3.3. There is no evidence whatsoever that the Respondent, as claimed, invited the Claimant to and held a formal performance review procedure.

19.3.4. Issuing a final performance warning without any prior procedure cannot be a reasonable step to avoid the disadvantage to the Claimant. Nor did that warning, as claimed, offer an appeal.

19.4. For these reasons, we find that the Respondent failed to make reasonable adjustments for the Claimant's disability.

20. Limitation. Clearly, in relation to the final incident of 18 November 2019, the claim was brought within the limitation period. In respect of the other incidents, it is clear to us and as should also be apparent from our reasons that, applying s.123(3) Equality Act 2010, there was, in this case, conduct extending over a period, which is therefore treated as done at the end of the period. These were a series of acts by the Respondent, which although separated in time, had a common theme and related to the same matter, the Claimant's disability.

21. Judgment. Our judgment is therefore that the Claimant's claims of constructive unfair dismissal and unlawful deduction from wages, fail and are dismissed, but that the Respondent discriminated against him, on grounds of his disability.

22. Respondent's Application. Having informed the parties (both at the outset of the Hearing and following the delivery of this judgment) that we would be proceeding

immediately to consider Remedy, Mr Ball, on behalf of the Respondent, made an application to adjourn the remedy hearing to another date, as he wished to obtain legal advice before proceeding, stating that he was unclear on the legal concepts involved. The Claimant objected to that application. Following a short break, the Tribunal rejected that application, for the following reasons:

22.1. It is not plausible that at this 11th hour, in a case now fourteen months old that the Respondent has only now realised that they may need legal advice. It seems more likely to us that this request is prompted by the fact that they have been found liable for discrimination which, previously, they may not, wrongly, have considered likely, but now found themselves facing the financial consequences of such a finding.

22.2. The legal issues, in any event, have been and will continue to be explained to the parties and were set out in the case management order of eight months ago, to include reference to the *Vento* guidelines, with links to guidance on them (paragraph 3.2). The *Polkey* principle has been explained several times now to the Respondent during this hearing and it has been pointed out to Mr Ball that it is simply a question of him making a submission to us as to the likelihood of the Claimant being dismissed in a fair and non-discriminatory fashion at some fixed point in the future, thus limiting his loss of earnings to that point. There are no other 'legal issues'.

22.3. Finally, applying the 'Overriding Objective' (Rule 2 of the Tribunal's Rules of Procedure), we consider that it would not be in compliance with that Objective to create unnecessary delay, or to have the additional expense of further hearing days, when it will be proportionate to continue with the Remedy hearing today, in the time remaining to us (approximately three hours). We consider also that the Claimant is entitled to finality in these proceedings.

RESERVED REMEDY REASONS

1. We heard evidence from the Claimant and both parties made submissions. The Claimant also provided a schedule of loss. That evidence and submissions concluded at 16.45 and therefore we reserved judgment, meeting the next day for consideration.

2. Claimant's case. In summary, the Claimant seeks the following remedy:

    a. Loss of earnings from the date of dismissal, to the date of the hearing (approximately a year) and then one further year's loss, less actual and prospective earnings during that period, based on his basic annual gross salary of £20,000, at the point of resignation. He said that he had applied for '*lots of jobs'*, but that as his sleep pattern was disrupted, he sought jobs with irregular hours to match, which lead him to delivery/courier roles. He obtained such a role, but, on the advent of the Covid pandemic, was furloughed on 80% salary, from March to September 2020. His current job is as a part-time courier for a veterinary business. When Covid struck, he was obliged to shield, as

he is classified as being at particular risk, due to having only one kidney. He said that he particularly did not wish to work again in recruitment, as he considered it be an unethical business. He said he chose the type of roles he has since applied for, because he was '*putting my health first'*.

b. Loss of commission of £15,000, which figure he based on an average of annual commissions earned over the entire period of his employment. He pointed out that by way of evidence of the general level of such commissions, it was accepted that he was due gross commission on the Janus Henderson placement, of £3750, for just one such placement.

c. An award for injury to feelings of £20,000. He believed that that claim is conservative and that with different initial advice, he might have sought an award in the higher *Vento* band, but he considers this level to be fair and not at such a level as to prejudice the future of the Respondent's business. He reminded us of the evidence we had heard as to the prolonged nature of the discrimination and the effect it had had upon him, in particular making him very unwell.

d. Aggravated damages of £2000.

e. Damages for personal injury of £5000.

f. Interest as appropriate.

3. Respondent's Challenge. The Respondent challenged such a claim, on the following basis:

a. The period for which loss of earnings is sought is grossly excessive, as the Claimant is, as evidenced in this Hearing, perfectly capable of conducting himself in a professional environment, but has made a conscious decision, for reasons of his own and nothing to do with the Respondent's actions, to limit his job searching to part-time, low-level, poorly-paid positions. Nor has he provided corroborative evidence of any such job-searching. He should have been capable of returning to a similar level of role relatively quickly.

b. The actual commission the Claimant earned in his last year of employment was £6500 and this therefore is a considerably more accurate figure than his £15,000 estimate, based on past commission, for which he has provided no corroborating evidence.

c. In respect of an award for injury to feelings, this case falls within the lower *Vento* band, as each incident is an isolated one.

d. Relying on *Polkey*, the Claimant's fair and non-discriminatory dismissal was inevitable, due to his underperformance, within two or three months of his resignation date and accordingly, loss of earnings should be limited to such a period. The Claimant disagreed with this assertion,

stating that the Respondent had provided no figures to justify any conclusion that he was underperforming, as there was no evidence to compare his performance in 2019 with previous years, having had no targets whatsoever, prior to the letter of March 2018.

4. Findings. Our findings in respect of Remedy are as follows:

    a. Firstly, we note the almost complete absence of any documentary evidence to support the contentions of either party. This is despite the case management order setting out (2.2) that disclosure of documents should include documents relevant to Remedy, to include job searching, earnings etc. Mr Ball asserted that his failure to provide any evidence as to the Claimant's past or most recent commission earnings, or his performance generally was due to the bundle size being limited. It was pointed out to him, however, that the bundle page limit had been based on the Parties' own estimates, could be increased, as set out in the Order and that while he had provided a 75-page bundle, only a small fraction of those documents had actually been referred to.

    b. In respect of loss of earnings, we are not satisfied with the Claimant's evidence as to his efforts to mitigate his loss. It is clear to us that the Claimant made a positive decision, on health grounds, not to return to anything like his previous role, therefore limiting his job-searching to low-paid roles. He is obviously clearly entitled to choose to do so, but we do not consider that the Respondent can be held responsible for the consequences of such a choice. While it might be understandable that he would not wish to return to a sales role, he is, we agree with Mr Ball, clearly an intelligent man, with considerable communication and organisational skills (as evident from his conducting of his case in this Tribunal) and therefore will have transferable skills that may have assisted him in finding a better-paid role, but he did not seek any such role.

    c. While the Claimant argues that his medical condition/health concerns prevented him from doing so, he has provided no medical evidence whatsoever to support such a contention.

    d. He points out, also that with the onset of the Covid pandemic, he was necessarily limited in the type of roles he could pursue, being unable to travel or work away from home. Firstly, however, he was not, in any event, seeking to apply for any such higher-paid roles and therefore, in the absence of such enquiry, cannot know what was or wasn't available to him. Secondly, we take judicial notice that very many office-based jobs moved to working from home during the last year and continue to be so and there is no evidence before us to indicate that recruitment for at least some such roles did not continue.

    e. We consider, therefore that the Claimant could have, had he chosen to do so, sought a better-paid role, with his transferable skills, within six months of his resignation. His loss of earnings is, therefore, limited to

that period. Taking into account that he was paid for December 2019 and much of January 2020, we estimate such loss therefore to be limited to four months. Such loss, based on his basic salary at time of dismissal, is £6666.00 gross, from which we deduct his actual earnings during that period, of £385 gross per week, for thirteen weeks, of £5000, leaving £1666.00 due to him for loss of earnings.

f. We don't consider that a *Polkey* defence is open to the Respondent, as all the correspondence following the Claimant's resignation indicated that the Respondent wished him to return to work, thereby undermining their contention that he would have been inevitably dismissed a few months later.

g. In respect of commission payments, we reiterate our comment above as to the complete lack of corroborative evidence on this point. We therefore, by way of general equity between the parties, take the mid-point figure between the two figures offered by them, of £15,000 and £6,500, namely £10,750, as the appropriate figure. Based on our estimate that the Claimant's loss of earnings would have ceased four months after his notice period expired, we find that his loss of prospective commission is therefore £3583.

h. Turning to his claim for injury to feelings, we deal first with his claim for aggravated damages. We note, in this respect, the guidance in **Commissioner of Police of the Metropolis v Shaw 2012 ICR 464, EAT**, identifying three broad categories of such casea:

- where the manner in which the wrong was committed was particularly upsetting. This is what the Court of Appeal in a related case meant when referring to acts done in a 'high-handed, malicious, insulting or oppressive manner'

- where there was a discriminatory motive — i.e. the conduct was evidently based on prejudice or animosity, or was spiteful, vindictive or intended to wound. Where such motive is evident, the discrimination will be likely to cause more distress than the same acts would cause if done inadvertently; for example, through ignorance or insensitivity. However, this will only be the case if the claimant was aware of the motive in question — an unknown motive could not cause aggravation of the injury to feelings, and

- where subsequent conduct adds to the injury — for example, where the employer conducts tribunal proceedings in an unnecessarily offensive manner, or 'rubs salt in the wound' by plainly showing that it does not take the claimant's complaint of discrimination seriously.

We don't consider, having canvassed these guidelines with the Claimant that aggravated damages are appropriate in this case.

i. Then, considering the Claimant's claim for personal injuries, we again note the complete lack of medical evidence in this case, particularly as the claim involves issues of mental health. While the Claimant blamed the Respondent for his second period of bi-polar breakdown, in October 2018, we can only, in the absence of medical evidence as to its cause, speculate. The Claimant accepted that it was possible that there could be several factors influencing any mental breakdown and in the absence of evidence pointing either exclusively, or even partially, to the Respondent, we cannot make such an award.

j. Finally, we turn to the award for injury to feelings. We are entirely confident that this is a case that falls firmly with the middle band of *Vento* and we do so for the following reasons:

- the acts of discrimination ranged over approximately two and a half years. Some, such as the failure to pay commission, the failure to properly conduct a performance procedure and the withdrawal of clients, continued uninterrupted over those years, whereas while others were single-date specific, they do fall into a general pattern of discrimination.

- Accordingly, therefore the injury to the Claimant's feelings was similarly prolonged and was continuing after his employment, through, as was evident from his demeanour at this Hearing, to the present day.

- The Claimant gave compelling and heartfelt evidence as to that injury, to include the effect on his health, his self-worth and his relationship with his partner. Although not argued by the Respondent, we emphasise that it is not the case that any account can be taken of the Claimant's medical condition, in asserting that he was particularly sensitive to such injury and that accordingly any award should be discounted, as a consequence. Rather, it is the case that the 'eggshell skull' principle applies to loss such as this, arising from discrimination. The principle is alternatively expressed by saying that the discriminator must take the victim as he or she finds him or her. This means that even if the victim is unusually sensitive or susceptible, and the level of damage or loss sustained is therefore worse than it would have been for another individual, the discriminator will be liable for the full extent of the damage, loss or injury, so long as it can be shown that this flowed from the act of discrimination.

k. We saw no reason to depart from the Claimant's claimed figure of £20,000. We consider that the award falls somewhere in the middle of the middle band (£18,000), but further consider that in this case, it should just 'tip over' that middle point, to reflect the severity of the injury to the Claimant and that therefore that appropriate point is at £20,000.

l. Accordingly, therefore the award for loss of earnings and commission is £5249, plus interest at 8%, for 217 days, at £1.15 per day, of £249.55.

m. The award for injury to feelings is £20,000, plus interest at 8%, for 434 days, at £4.38 per day, of £1902.46.

n. The total award due to the Claimant is therefore £27,401.01.

5. Judgment. The Respondent is, therefore, ordered to pay the Claimant the sum of £27,401.01.

Employment Judge O'Rourke
Date: 26 February 2021

Judgment and Reasons sent to the parties: 08 March 2021

FOR THE TRIBUNAL OFFICE