Case Number: 2204510/2021

THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON CENTRAL**
BEFORE: **EMPLOYMENT JUDGE ELLIOTT**
MEMBERS: **MR N BROCKMANN**
MS J GRANT

BETWEEN:

Mr J Kavanagh

Claimant

AND

Harrods Ltd

Respondent

ON: **26, 27, 28 and 29 September 2022 and 10 November 2022**
(29 September and 10 November In Chambers)

Appearances:
For the Claimant: **In person**
For the Respondent: **Ms A Greenley, counsel**

RESERVED JUDGMENT

The unanimous Judgment of the Tribunal is that:

1.
2. The claimant was not a disabled person at the material time, so the claim for disability discrimination fails and is dismissed.
3. Even if he was a disabled person, the claim for disability discrimination fails in any event.
4. The claim for constructive unfair dismissal fails and is dismissed.

REASONS

1. By a claim form presented on 3 August 2021 the claimant Mr Jack Kavanagh brings claims of constructive unfair dismissal and disability discrimination as to both direct and indirect discrimination, discrimination arising from disability and failure to make reasonable adjustments.

This remote hearing

2. The hearing was a remote public hearing, conducted using the cloud video platform (CVP) under Rule 46. The parties agreed to the hearing being conducted in this way.

3. In accordance with Rule 46, the tribunal ensured that members of the public could attended and observe the hearing. This was done via a notice published on Courtserve.net. No members of the public attended.

4. The parties were able to hear what the tribunal heard and see the witnesses as seen by the tribunal. From a technical perspective, there were no difficulties of any substance.

5. The participants were told that it was an offence to record the proceedings.

6. The tribunal was satisfied that each of the witnesses, who were all in different locations, had access to the relevant written materials. We were also satisfied that none of the witnesses was being coached or assisted by any unseen third party while giving their evidence.

The issues

7. The issues were identified as far as possible at a Case Management Hearing before Employment Judge Tinnion on 24 November 2021 just in terms of the factual issues and the main jurisdictional headings. Thereafter the parties worked on a List of Issues which appeared in the bundle at page 47. At the start of this hearing we spent 1 hour 40 minutes clarifying the issues and dealing with administrative matters.

8. During this discussion the claimant withdrew the following as his contentions for reasonable adjustments: Paragraphs 21 (d) (f) (g) (j) and (k) on pages 54 and 55 of the bundle and he agreed that paragraphs (h) and (i) should be combined into one.

9. We asked the claimant to consider, during the tribunal's reading time on day 1, his claim for indirect disability discrimination to help the tribunal to understand the particular disadvantage to which the Performance Improvement Plan and disciplinary process put persons with his disabilities. This is as set out below.

10. We told the parties at the start of day 1 that this hearing would be for liability only and a separate remedy hearing would be listed if the claimant succeeded.

<u>Constructive unfair dismissal</u>

11. Did the claimant resign and/or was he dismissed?

12. Was there a breach of contract? The claimant relies on a breach of the implied term of trust and confidence.

13. The claimant relies on the matters relied upon as acts of direct disability discrimination as amounting to a breach of his contract of employment.

14. Was that breach of contract a fundamental breach of contract?

15. Did the claimant waive the breach of contract?

16. Did the claimant resign in response to the fundamental breach of contract?

17. If the claimant was dismissed was that dismissal unfair as defined in section 94 Employment Rights Act 1996 (ERA)?

18. What was the reason for the dismissal? The respondent says that if the tribunal finds that the claimant was dismissed, then the reason was capability.

19. Was that dismissal fair or unfair pursuant to section 98(4) ERA, 1996?

Disability status

20. At the material time was the claimant a disabled person under section 6 EqA 2010 with a mental impairment of anxiety and depression? The claimant relies on the two separate conditions.

21. Did either condition have a substantial and long-term adverse effect on his ability to carry out normal day to day activities.

Direct disability discrimination

22. Did the respondent treat the claimant less favourably as follows:

    a. Ms Cindy Cheng's MS Teams exchange on 25 March 2021 stating, "'*You had not informed me at the time that you were experiencing anxiety which was preventing you from completing the task, nor provided a timeframe for when you would try again. In future, please let me know of any blockers before the deadline instead of communicating once I had chased*";
    b. Failing to follow Occupational Health's recommendations dated 21 March 2021 and 20 April 2021 that, "*Where possible recommend PIP is concluded as quickly as possible to mitigate the continuation of perceived symptoms of anxiety"*;
    c. Initiating the Performance Improvement Process ("PIP")
    d. Not ending the PIP;
    e. Not bringing the PIP to an early conclusion;
    f. Issuing a Final Written Warning on 12 May 2021;
    g. by his resignation on 13 July 2021.
    h. penalising the claimant for incorrect formatting of an email and other

minor mistakes while on the PIP. The email is at page 104-108. The penalty is receiving disciplinary action.

i. Ms Cheng being unhappy with the second part of a training session the claimant delivered to team members on 21 January 2021 (Ms Cheng had not attended the first part of the session delivered approximately 1 month before);
j. Being penalised for asking a clarification question to Ms Cheng during the PIP process. The claimant asked a clarification question about the affect of Brexit on the website. Ms Cheng was not in the meeting but heard about the question. There was also a question: *"sorry if I've missed this, but is the P2 data for the next period wrap up?"*
k. On 30 March 2021 a meeting was held at which the claimant was too anxious to speak, but his manager Ms Cheng wrongly said he was unprepared for it.

23. Was any such proven treatment because of the claimant's disability?

24. Did the respondent treat the claimant less favourably than they would have treated a hypothetical comparator in materially similar circumstances?

Discrimination arising from disability – section 15 Equality Act

25. Did the claimant's disability have the consequence of, or result in the following:

    a. Being too anxious to participate in a meeting on 31 March 2021, the digital marketing team weekly call;
    b. It not being possible for him to inform his manager Ms Cheng of a "blocker" on the completion of a task; the claimant clarified that this meant that his disability meant that he could not always inform his manager of the team that he could not complete tasks on time.

26. Did the respondent treat the claimant unfavourably as a consequence of those matters that arose from his disability as follows:

    a. the application of the PIP;
    b. Ms Cheng's MS Teams exchange on 25 March 2021 stating "*'You had not informed me at the time that you were experiencing anxiety which was preventing you from completing the task, nor provided a timeframe for when you would try again. In future, please let me know of any blockers before the deadline instead of communicating once I had chased*";
    c. on 30 March 2021 when a meeting was held which the claimant was too anxious to speak at, but his manager Ms Cheng wrongly said he was unprepared for it;
    d. Issuing the final written warning on 12 May 2021. The PIP process involved penalisations for minor issues and there was a lack of understanding of how the claimant's condition affected his ability to carry out normal day-to-day activities. It is the PIP process itself

which was relied upon.

e. Being penalised for incorrect formatting of an email and other minor mistakes while on the PIP. The email is at page 104-108.
f. Ms Cheng being unhappy with the second part of a training session the claimant delivered to team members on 21 January 2021
g. Being penalised for asking a clarification question to Ms Cheng during the PIP process. The claimant asked a clarification question about the effect of Brexit on the website. Ms Cheng was not in the meeting but heard about the question. There was also a question: *"sorry if I've missed this, but is the P2 data for the next period wrap up?"*
h. failing to follow Occupational Health's recommendation dated 21 March 2021 and 20 April 2021 that, "*Where possible recommend PIP is concluded as quickly as possible to mitigate the continuation of perceived symptoms of anxiety*";
i. Initiating the Performance Improvement Process ("PIP")
j. Not ending the PIP;
k. Not bringing the PIP to an early conclusion; despite the clear negative impact it had on the claimant's mental health - management had seen reports showing this impact.
l. Issuing a Final Written Warning on 12 May 2021;
m. The dismissal, relied upon as a constructive dismissal by resignation on 13 July 2021.

27. If so, was the treatment a proportionate means of achieving the legitimate aim of the effective management of employee performance?

28. Did the respondent know or could the respondent reasonably have been expected to know that the claimant had the disability?

Indirect disability discrimination

29. It is accepted that the application of the respondent's PIP and disciplinary processes are both capable of amounting to a PCP and that they were applied to the claimant.

30. Did the application of those PCPs put, or would put, those with the claimant's disability at a particular disadvantage when compared to other persons? The claimant says that the PIP process involves scrutiny and checking of work which can heighten feelings of depression and anxiety.

31. Did the PCP put the claimant at that disadvantage?

32. If so, was that a proportionate means of achieving the legitimate aim of effective management of employee performance?

Failure to make reasonable adjustments – sections 20/21 Equality Act

33. It is accepted that the application of the respondent's PIP and disciplinary processes are both capable of amounting to a PCP and that they were

applied to the claimant.

34. Did the PIP and/or disciplinary process put the claimant at a substantial disadvantage in comparison with people who do not share his disability? The substantial disadvantage was put as the application of the PIP and disciplinary process exacerbating the claimant's conditions.

35. Did the respondent take such steps as it was reasonable to have to take to avoid the disadvantage?

36. The burden of proof does not lie on the claimant, however it is helpful to know the adjustments asserted as reasonably required and they were identified as follows:

    a. ignoring "*minor mistakes*". The claimant asserted that the criteria of the PIP were vague and unclear, allowing the respondent to penalise him for very small errors.
    b. making PIP criteria "*clearer/less vague*"
    c. not continuing the PIP process; and
    d. following Occupational Health's recommendation dated 21 March 2021 and 20 April 2021 that, "*Where possible recommend PIP is concluded as quickly as possible to mitigate the continuation of perceived symptoms of anxiety";*
    e. bringing the PIP to an early conclusion.

37. Did the respondent not know, or could the respondent not be reasonably expected to know that the claimant had a disability or was likely to be placed at the disadvantages set out above?

Remedy – to be considered at a separate hearing, if applicable

38. If successful, to what remedy is the claimant entitled?

39. Has the claimant taken proper steps to mitigate his loss?

40. Should any award be reduced by up to 25% for the claimant's failure to raise a grievance prior to his resignation/dismissal? Was this an unreasonable failure to follow the ACAS Code on Disciplinary and Grievance Procedures?

Witnesses and documents

41. There was an electronic bundle of 454 pages and a cast list and chronology from the respondent.

42. The respondent had introduced 50 new pages on Friday 23 September 2022, the working day before this hearing and the claimant understandably complained about this. They were clearly relevant and disclosable documents. The respondent apologised for the late disclosure. The claimant said he had been able to read the documents

over the weekend and he did not wish to seek a postponement in order to consider the documents further.

43. A further one page document was introduced by the respondent after lunch on day 1 following the clarification of issues. The claimant did not object.

44. We ordered disclosure from the claimant overnight between days 1 and 2 of his offer letter of employment in South Korea and any documents showing when he first approached the recruitment agency. On the respondent's application we also ordered that the claimant disclose documents to show when he booked his flight to South Korea.

45. On day 3 the claimant introduced his contract of employment for his new job in South Korea.

46. We had copies of two authorities from the respondent. We had written submissions from the respondent to which counsel spoke and verbal submissions from the claimant. All submissions were fully considered including any authorities referred to, whether or not expressly referred to below.

Witnesses

47. For the claimant the tribunal heard from 2 witnesses: the claimant and Mr Tarandeep Sandhu, his union representative at his first disciplinary hearing. There was a witness statement from Ms Carol Kavanagh, the claimant's mother. The claimant agreed that this statement went to remedy rather than liability so the tribunal did not hear from the claimant's mother during this liability hearing.

48. The claimant gave evidence from South Korea and we saw an email from the Foreign Commonwealth and Development Office showing that permission had been obtained for this.

49. For the respondent the tribunal heard from 2 witnesses, Ms Cindy Cheng, the claimant's former line manager and Ms Caroline Andrew, Employee Relations Manager. Ms Andrew had travelled from Spain to the UK to give evidence by video, permission having not yet been granted by Spain.

Findings of fact

50. The claimant worked for the respondent as a Search Engine Optimisation (SEO) Lead from 17 June 2019 to 9 August 2021. He resigned on 13 July 2021 giving four weeks' notice. His line manager was Ms Cindy Cheng.

51. The claimant had a particular skill set and 5 years' experience in the field so the respondent was pleased to recruit him and they valued the skills he brought to the team. In January 2020 he was named "*Star of the Month*" for his work on the system migtration, an internal award at the respondent

(page 90).

52. The team in which the claimant worked deals with generating traffic to the Harrods.com website and growing its on-line presence through search engine results and advertising. During the time the claimant worked for the respondent there were 3 people in the team; Ms Cheng, the claimant and an SEO assistant.

53. The claimant's role was to carry out regular reporting and research on the performance of the website's search engine rankings. The claimant worked with other teams at the respondent, including trade, marketing, content and web development. He was expected to provide recommendations and training to them to strengthen the SEO results.

54. The SEO team works with other agencies and the claimant was expected to work with those agencies and have a good understanding of their platforms, to identify any issues and provide solutions.

Disability status

55. The claimant's case was that he is and was a disabled person with the impairments of anxiety and depression.

56. The claimant's evidence was that the condition of anxiety began in February 2020 (disability impact statement paragraph 2 – bundle page 393). He contacted his GP about this on 10 February 2020 (GP records page 109). We did not see the GP notes of this consultation, just the reason for the consultation. The claimant said he was prescribed sleeping tablets in the summer of 2020. He decided not to take these as they made him feel "*groggy*" and he preferred to have counselling.

57. There was no further entry in the medical records for anxiety until August 2020, six months later. We find that the incidence in February 2020 was an isolated incident and that this was not a continuing state of affairs.

58. The claimant's evidence (statement paragraph 10) was that in August 2020 his mental health took a "*pronounced nosedive*" and he experienced what he has "*subsequently come to recognise as a mental breakdown*". He contacted Workplace Options, an external agency offering support to the respondent's employees. He made contact on 6 August 2020 and he was given a single session of therapy over the phone.

59. We saw the notes of that session on 6 August 2020 (page 313-314) as follows:

> *"Main reason for participant seeking support today…..: …..Pt. reports feeling overwhelmed due to experiencing relationship issues and workplace stress. Pt. reports being with his partner for 7 years…….. ……..... …… Pt. reports not knowing what to do with the relationship at this point. Pt. also reports being with the company for a*

year which has been stressful. Pt. reports he is often hard on himself which causes him to make minor mistakes. Pt. reports when making mistakes at the job there are consequences. Pt. reports working under pressure has caused him to question his ability and work ethic. Pt. reports finding himself constantly worrying about messing up which has impacted his ability to focus and concentrate. ORS scores could not be completed due to the pt. getting off subject."

60. In answer to the question *"What emotional health symptoms is participant experiencing?"* the answer was given as: *"Anxiety/Panic Low Mood Difficulty Concentrating Marital/Relationship."*

61. In answer to the question: *"How long has participant experienced their current symptom(s)/situation?"* the answer was given as *"1 month".* This supports our finding above that the February consultation with his GP was an isolated incident and not a continuing state of affairs from February to August 2020.

62. The report set out the advice the clinician gave to the claimant around conflict resolution, communication and healthy relationships. It said that no follow up was needed (page 316).

63. We saw a copy of a print-out of GP records starting at page 109. Under the heading "*Problems – Past (Significant)"* it said "*None*". Under "*Problems – Past (Minor)"* it said "*10 February 2020 Stress at work"*, on 19 March 2021 it said "*Anxiety disorder*" and the same again on 7 May 2021.

64. There was no reference to the condition of depression. This first appeared in GP letter dated 2 December 2021 which the claimant obtained following the preliminary hearing on 24 November 2021. The GP said "*I confirm that he has had and is ongoing history of anxiety and depression"* (page 306).

65. On 25 August 2020 the claimant made contact with the respondent's OH service. The OH Report was at page 93. This said that the claimant had been "*feeling low*" and that his GP had prescribed anti-depressants which he had yet to start taking. It said the claimant was currently working and this was working from home. It was the first year of the pandemic. It said that his condition meant that his quality of work was compromised and basic errors were being made.

66. The report said:

- *His main symptoms are anxious every day, worrying continually about different things, he has lost interest in doing things and his sleep pattern has been affected.*
- *This has impacted on his concentration and I understand there have been some small mistakes made.*
- *In my opinion his symptoms are related to his personal stressors.*
- *He is under the active care of his General Practitioner, who has*

prescribed some medication to manage his symptoms. At this stage he is reluctant to take them as he wants to try therapy first.

67. At this appointment the claimant told the OH Adviser that he did not have any previous mental health issues (page 94). He accepted in evidence that he said this to the OH Adviser, but he was not sure why he said it because he had been to his GP in February 2020 about anxiety. As we have found above, the February 2020 was a one-off isolated incident and it was not part of an ongoing state of affairs. We find that this is why the claimant told the OH Adviser that he did not have any previous mental health issues.

68. The claimant agreed that he also told the OH Adviser that he enjoyed his job and had "*good support from management and colleagues*" (page 94). We find that he did have good support from management and colleagues.

69. The report concluded that the claimant was not fit for work, so he should take a week off. The claimant took a week's sick leave from 26 August to 2 September 2020. The report also concluded with the OH Adviser's view that the Equality Act "*was unlikely to apply*". We are aware that this view is not binding on us. The claimant found the week off beneficial and this was followed by a week on holiday in Turkey.

70. The claimant had no further sick leave for 8 months, until May 2021.

71. The claimant underwent counselling from 20 August 2020 to 1 October 2020. The notes showed that the focus was on a relationship break up, the effects of Covid isolation and work pressures causing mistakes. The claimant was also dealing with a bereavement. He had a total of 6 sessions, the last one taking place on 1 October 2020. He was then discharged with a positive summary from the counsellor and from their point of view the case was closed (page 330).

72. The claimant had a follow-up appointment with OH on 23 September 2020, to assess his progress. He was much more positive and happy to be back at work. His assessment scores had improved dramatically. His symptoms of worrying every day and trouble concentrating "*had dissipated from every day to just an occasional time".*

73. The claimant told OH that he appreciated the week of sick leave as it helped him to refocus. A relative had sadly passed away and arrangements were ongoing within the difficult restrictions of Covid. The report said: *"He feels much more positive about the future and is happy to be at work."*

74. In terms of his psychological well-being the report said: "*He scores have improved dramatically. His symptoms of worrying every day and trouble concentration, have dissipated from every day to just an occasional time*" It concluded that the claimant was "*making a good recovery*". The OH Adviser gave the opinion that the claimant was "*fit for his hours and all his*

tasks". The OH Adviser said that the claimant did not require any further review and his case was closed (page 97). No adjustments were recommended.

75. The claimant's evidence was that Covid and lockdown restrictions from the end of October 2020 to 6 January 2021 contributed to the worsening of his condition. His Performance Improvement Plan (PIP) commenced on 4 December 2020. He found the PIP process very stressful and was referred back to OH in March 2021.

76. On 19 March 2021 the claimant was reviewed by OH. The report said: "*In my opinion Jack's symptoms are as a natural response to life events, recovery from these are personal to each individual"* (page 212). He was considered fit for work with adjustments. The OH report also said: "*it is the natural course of this condition to settle and not recur".*

77. The claimant had further counselling sessions. The counsellor's report had a "*Service Professional's Summary*" date 6 April 2021 (page 377-378) which said that the claimant had improved but would like more sessions.

78. The notes from the counselling session on 23 March 2021 said that the claimant was feeling generally positive and that he was "*exploring a new job opportunity*". In his witness statement (paragraph 49) the claimant said that he was "*committed to staying at Harrods – I had no intention of leaving at that point".* We say more about this below in relation to the constructive dismissal claim.

79. On 29 March 2021 the claimant was prescribed anti-depressants. He agreed and we find that the last time he was prescribed citalopram was on 11 June 2021. This did not accord with his earlier evidence that he had been taking this medication up to the date of this hearing in September 2022. The claimant said that although his last prescription was on 11 June 2021 "*it doesn't say how much was dispensed*". When it was put to the claimant that GP's do not usually prescribe large quantities of medication to allow patients to stockpile and that the norm is for repeat prescriptions, he conceded that he was not continuing to take this medication but he was "*not sure*" when he stopped taking it.

80. We find on a balance of probabilities that the claimant took citalopram while he was going through the stressful period of his PIP and disciplinary process and that his prescription came to an end in July 2021, around the time he booked his flight to South Korea (on which we say more below). It was medication to support him through a stressful period of life when he was being performance managed and the situation resolved.

<u>Day to day activities</u>

81. In terms of the effects upon his ability to carry out normal day to day activities, the claimant dealt with this at paragraph 5 of his disability impact statement. He said that from February 2020 he struggled to get out of bed

in the mornings and lacked interest in areas he previously found interesting such as writing.

82. The claimant accepted that he was able to get up for work each day. He worked continuously between 2 September 2020 and 7 May 2021. He told the tribunal that on the days he travelled in to work, he got up at 7:30am for the 90 minute commute and that he usually got home around 7pm. It is necessary to get up in advance of 7:30am to be ready to leave for work and on the days he went into the office, he was combining a day's work with a total of 3 hours of commuting. We find that the claimant overplayed the effect of the condition on his ability to get up in the mornings.

83. In terms of the activity of writing, we saw from the records from the counselling service, Workplace Options, that they had recommended the claimant keep a written journal which he had done and found helpful (page 391). We find that the claimant's ability to carry out the normal day to day activity of writing was not substantially adversely affected by his condition.

84. The claimant also said there was a deterioration in him cleaning his apartment and his personal hygiene. We find on a balance of probabilities that he was able to take care of himself sufficiently to present for work. Based on our findings above in relation to getting up in the mornings and the activity of writing, that on a balance of probabilities, the claimant's condition did not have a substantial adverse effect on his ability to carry out his cleaning or his personal care.

Conclusions on disability status

85. We find that the claimant did not have the impairment of depression. We saw no record of him being diagnosed with this. It was first mentioned in the GP letter of 2 December 2021 obtained following the preliminary hearing. It made reference to an "*ongoing history of anxiety and depression".* As observed by the EAT in ***J v DLA Piper*** (below) "*…it may be a difficult distinction to apply in a particular case; and the difficulty can be exacerbated by the looseness with which some medical professionals, and most lay people, use such terms as "depression" ("clinical" or otherwise), "anxiety" and "stress".* We find that the combined reference in the GP letter to anxiety and depression was part of this loose description of the overall condition, as we saw no evidence in the medical records that the claimant was diagnosed with the separate condition of depression. We find that the claimant was not a disabled person at the material time with the condition of depression.

86. The respondent did not dispute that the claimant had treatment for the condition of anxiety. They disputed that the condition amounted to a disability for the purposes of section 6 Equality Act. They said it was not long term, it did not have a substantial adverse effect on his ability to carry out normal day to day activities and that it was a reaction to adverse life events rather than a clinical impairment. The claimant said that his anxiety

affected his ability to do his job, in that he made mistakes and minor errors. Our focus under the Equality Act was on his ability to carry out normal day to day activities.

87. Our finding above is that the claimant presented to OH and the counselling service in late August 2020. He had 6 sessions of counselling and by 1 October 2020 he had improved significantly to the extent that he was discharged by the counselling service and OH treated his case as closed. The claimant took medication for a short period only.

88. We find that this was a short period of reaction to the adverse life events set out above and that the claimant responded very well to the counselling he received. OH said that his symptoms of worrying every day and trouble concentrating "*had dissipated from every day to just an occasional time".* We find that by 1 October 2020 the condition was not having a substantial effect on his ability to carry out normal day to day activities.

89. The claimant had symptoms of anxiety from mid-August 2020 to the beginning of October 2020 and again from March 2021 to July 2021. These were reactions to the adverse life events of a relationship break-up, bereavement, Covid-19 and being performance managed. OH's view in March 2021 was that it was the *"natural course of this condition to settle and not recur".* We find that the condition was not long term. It did not last for 12 months or more and it was not likely to do so.

90. In addition to our finding that the condition was not long term, we have also found above that it did not have a substantial adverse effect on the claimant's ability to carry out normal day to day activities.

91. For these reasons we find that the claimant was not a disabled person at the material time with the conditions of either depression or anxiety.

92. If we are wrong about this, we have gone on to make findings below setting out what these findings would have been, had we decided that he met the definition of disability.

Findings on the substantive case

Initial performance concerns

93. The claimant's line manager, Ms Cindy Cheng, first had concerns about his performance in February 2020. She raised these matters with him informally in their 1:1 meetings.

94. Ms Cheng worked with the claimant for 2 months in the Hammersmith office before the first national lockdown. From March 2020 onwards, Ms Cheng noticed the claimant's standards were slipping. She thought he was making basic errors and the quality of his work had decreased significantly.

95. Ms Cheng also said that the claimant's probationary period had to be

extended because he was not meeting the standards. This evidence was not challenged so we find that the claimant's probationary period had to be extended when he first joined.

96. On 24/25 June 2020 the claimant had his annual appraisal with Ms Cheng which was confirmed in an email on 25 June 2020 (page 91). At this meeting Ms Cheng again raised performance concerns. The email said:

Work Objectives
1. Clarity when providing insights

a. Cut down on the data and focus on answering the query
b. Ensure that the insights/reply provided is clear and concise

2. Taking ownership of the channel

a. More involvement and picking up more emails from Pi/FF regarding topics outside of BAU
optimisations.
b. Less reliant on recommendations from Pi
i. E.g be prepared to adapt slides provided by Pi to make them more relevant to the meetings you
are holding
c. Redirects should come to us and be delegated to Ella, the SEO team owns the redirect process internally
so avoid @ing Ella in emails for her to pick up

Strengths:

- *owning CMS implementations and training*
- *constantly reading and sharing SEO updates*

3. Prioritise and Organisation
a. Better organisation and prioritsation so that no work is missed e.g hampers optimisations
b. Not prioritising also reflects in the work you are handing over e.g Katie prioritising the selfridges report over the weekly deck while you were on annual leave.

97. These were the areas where Ms Cheng felt the claimant needed to improve. The claimant said he thought this was Ms Cheng telling him what he needed to do to get to the next level, rather than criticising his performance. The claimant agreed for example, that prioritisation and missing deadlines were areas on which he needed to improve. The claimant wanted to apply for a managerial lead, but Ms Cheng thought he was not ready for this.

98. The claimant's objectives were set out in detail in a document used for his appraisal (page 411). He agreed in evidence that these were the objectives he was set. There were six "Goals" with Goals 1 and 2 in

particular that were yet to be achieved. They were "*Management of assistant to drive results and meet deadlines"* and *"Meeting Deadlines & Time Management and Prioritisation*" with examples given.

99. The claimant was also finding it difficult to manage his direct report, the SEO Assistant. Ms Cheng took over this line management responsibility to make things easier for him.

100. On 12 August 2020 Ms Cheng told the claimant that her concerns about his performance had been escalated to her manager Ms Truesdale. Ms Cheng also referred the claimant to OH.

101. The claimant attended his first OH appointment on 25 August 2020. In that meeting, as we have found above, he told the OH Adviser that he had no previous mental health issues (report page 94). In evidence he admitted saying this but was not sure why he said it. The OH Adviser reported that the claimant disclosed some significant personal stressors in his life at the current time and that in her opinion his symptoms were related to his personal stressors (page 94). In August 2020 the claimant was also receiving counselling therapy.

102. The claimant was off sick for a week from 26 August 2020 to 2 September 2020 on OH's recommendation. He found this week off very beneficial. The week on sick leave was followed by the claimant taking a holiday in Turkey.

103. On 23 September 2020 the claimant attended a follow-up OH meeting. Our findings on this are set out above, under the heading "*Disability status"*. At that time, the claimant felt confident that the PIP would conclude satisfactorily. The OH Adviser said that the claimant did not require any further review so the case was closed (page 97).

<u>The commencement of the Performance Improvement Plan (PIP).</u>

104. Ms Cheng decided to give the claimant a period of time to improve before she took any further steps and to allow time for his personal circumstances to improve. She first began to raise performance issues with him informally in February 2020 but waited until early December 2020 before implementing a PIP.

105. On 4 December 2020 Ms Cheng placed the claimant on a PIP for a period of a month, until 6 January 2021 (page 99). It was put to the claimant that Ms Cheng did not put him on the PIP because he was disabled. He replied "*No"* meaning that he agreed that Ms Cheng did not put him on the PIP because he was disabled. We agree and find that the reason Ms Cheng put the claimant on the PIP was because of her concerns about his performance and not because of any disability.

106. The claimant complained that on or about 17/18 December 2020 he was penalised for the incorrect formatting of an email and other minor mistakes

while on the PIP. The email relating to this was at pages 104-108 and the claimant said that the penalty was subsequently receiving disciplinary action. The email exchange concerned the presentation of information in a spreadsheet, not an email.

107. Ms Cheng said (page 105): *"The ordering makes sense. For the keywords, the tab is quite messy. Is there another way to display the keywords and SV and can they be added as a new column in Yvonne's sheet? Should they all be brand-based keywords, or are there other more generic keywords?"* The claimant's reply was "*Thanks for the feedback, it all makes sense".* It was hard to reconcile the claimant's response with the position that he took at this hearing, that he regarded it as an act of direct disability discrimination and discrimination arising from disability.

108. We find there was no less favourable treatment of the claimant because of disability and no unfavourable treatment because of something arising from disability because this was constructive feedback which the claimant accepted positively at the time. The claimant also accepted in evidence that this was not because of something arising from disability.

109. On 6 January 2021 the PIP was extended for a further month as shown in a Record of Informal Counselling with Ms Cheng (page 86). The claimant agreed and we find that Ms Cheng gave him a specific run-down of how he was performing against the PIP. Instead of ending the PIP and moving to a formal procedure, the PIP was extended by a further 4 weeks to give him more time to improve. The claimant considered it did not benefit him as it prolonged the process.

110. The claimant accepted in evidence that he was initially not placed on the PIP because of his disability. We find that Ms Cheng was continuing along the path of performance management because the claimant's standard of work had not met the objectives. This was not because of his disability or because of something arising from disability. We also find that it was not less favourable or unfavourable treatment of the claimant. Ms Cheng's evidence which we accepted, was that the alternative was to move him straight on to a formal disciplinary process so we find that she took the more favourable approach for the claimant.

111. The claimant's case was that being put on the PIP was an act of direct disability discrimination. The following exchange took place in cross examination:

> *Q: The reason Ms Cheng started the PIP was because she felt you were underperforming?*
> *A: I think so yes.*
> *Q: It's not that she put you on this because you were disabled did she?*
> *A: No.*

112. We find on the claimant's own evidence, that the reason Ms Cheng put

him on a PIP was because of his underperformance and not because of any disability. The two matters relied upon as something arising from his disability (see paragraph 25 (a) and (b) above and findings of fact below) had not arisen as at 4 December 2020 so we find that he was not placed on a PIP because of something arising from disability.

113. The claimant's case was that the terms of the PIP were "*vague and unclear*". The PIP document was at pages 99-103 in a table format. It had the following headings: "*Performance Concern; Performance standard to be met; How this will be addressed/What action will be taken* and *When does this need to be achieved?"*

114. In terms of what the claimant needed to do, this was set out in more detail. For example, under the heading "*Attention to detail"* the claimant was required to update management and provide a time frame if he was unable to complete a task. He was to ensure that all emails were read so he could respond appropriately and have the most recent updates to provide. We found that the terms of the PIP were detailed, practical and clear. In evidence, the claimant was unable to say in what way he thought the criteria were vague or unclear. We find that this allegation fails on its facts.

115. The claimant complained about Ms Cheng being unhappy with the second part of a training session he delivered to team members on 21 January 2021. This was training the claimant gave to the wider team about what the SEO team were doing. Ms Cheng agreed that she did not attend the first part of the training session and she received positive feedback from that session.

116. Ms Cheng said that she did not find the second training session particularly relevant to the work they did and she thought it was not a good use of the time. She said a lot of time was spent on quizzes, with questions about films and songs and it took up about half of the meeting. Her view was that it was not technical training of any relevance to the respondent or insights that the team could apply.

117. The claimant did not challenge Ms Cheng's account of what she observed in that second training session so we find that her account was accurate and that she did raise this with the claimant. We find that Ms Cheng was unhappy about the second training session because of the content of the session and not because of the claimant's medical condition and not because of anything arising from disability.

118. On 3 February 2021 the claimant was told that his performance had still not met the required standard.

<u>Commencement of a formal process</u>

119. On 18 February 2021 the claimant was invited to a formal disciplinary meeting under the People Management Policy (page 161). Ms Cheng

provided evidence and details of the ways in which she considered the claimant was underperforming. The first disciplinary meeting was due to take place on 24 February 2021 but was moved to 3 March 2021 so that the claimant's union representative could be present. The concerns had been going on for a year by this date. The claimant considered that the meeting notes (from page 165 onwards) were accurate. Both disciplinary meetings were recorded and transcribed.

120. The claimant complained that as an act of discrimination, the respondent did not end the PIP and/or that they did not bring it to an early conclusion. Ms Cheng's evidence, which we accepted and we find that he was a valued employee whom they did not want to lose. They gave him a year in an informal process from February 2020 onwards to give him structure, weekly check-ins and other areas of support to help him meet his objectives.

121. The claimant did not deny that he was underperforming. We find that the respondent kept the informal process going, in the hope that the claimant would meet the required standards and that they could avoid a formal disciplinary process. We find that this was not less favourable treatment because of disability nor was it unfavourable treatment because of something arising from disability. It was the respondent seeking to help the claimant improve and meet the standards with a view to retaining him in their employment.

<u>The first disciplinary meeting</u>

122. In the meeting on 3 March 2021 Ms Cheng and the HR representative told the claimant that he could not remain on informal performance management indefinitely, but they wanted to support him. The claimant said that he understood this. He said in evidence that at the time he felt that he could work within it and "*get off the PIP*". The claimant agreed that he was asked whether there was anything else the company could do to support him. He also accepted that the tasks were not particularly difficult but he was having difficulty with them.

123. The claimant agreed that at this disciplinary meeting he was offered training on keyword research and on the Harrods' customer and luxury market. He agreed and we find that he declined this training.

124. It was also agreed at this meeting that if the claimant was failing to meet a deadline, he was to flag it in advance so that Ms Cheng could delegate it to someone else. The claimant agreed to be more communicative (page 181).

125. On 5 March 2021 the claimant was sent the outcome of the disciplinary meeting which was a first written warning under the People Management Procedure (page 195). It was to remain in place for 12 months and the claimant was given a right of appeal within 10 days. He did not appeal.

126. On 11 March 2021 Ms Cheng confirmed that the claimant could attend the workplace, either in Hammersmith or Knightsbridge, to assist him in feeling less isolated during the pandemic.

127. On 19 March 2021 the claimant attended his third OH appointment.

128. The claimant's case was that a reasonable adjustment would have been for the respondent to have concluded and not continued with the PIP. The OH recommendation on 19 March 2021 said: "*Where possible recommend PIP is concluded as quickly as possible to mitigate the continuation of perceived the symptoms of anxiety"* (page 212). We find that the OH Adviser did not recommend the immediate cessation of the PIP, but recommended that where possible it be concluded as quickly as possible. No time frame was mentioned. We find that there are two very important words at the beginning of the OH recommendation and they are the words "*Where possible…."*.

129. We find that OH was not saying that the respondent should not performance manage. We find that it was not possible for the respondent to cease the PIP process because of the continued underperformance. The respondent did this with sympathy and understanding and in a supportive manner as they wanted him to succeed. They took as long as they reasonably could before moving him into a formal process. We find that the respondent did not fail to comply with the OH recommendation. We accept that the claimant found the process stressful, which is an understandable and inevitable reaction to such a process. It was not less favourable treatment because of disability or unfavourable treatment because of something arising from disability.

130. On 23 March 2021 the claimant told his counsellor that he was *"more focused on exploring a new job opportunity"* (notes page 373). The claimant agreed that he said this, but said in evidence that it was "*not something he was seriously considering".* He denied that he was exploring the job opportunity in South Korea which he subsequently took in August 2021. The claimant pointed to his next counselling session on 30 March 2021 (page 347) when he discussed with the counsellor that leaving the respondent was a "*flight or fight"* response.

131. The claimant complained about an exchange on MS Teams on 25 March 2021 from Ms Cheng in which she said: "'*You had not informed me at the time that you were experiencing anxiety which was preventing you from completing the task, nor provided a timeframe for when you would try again. In future, please let me know of any blockers before the deadline instead of communicating once I had chased*".

132. The claimant relied on this as an act of direct disability discrimination and discrimination arising from disability. In evidence we were taken to the teams exchange at pages 400-401 where we could not see the words relied upon the claimant. In oral evidence we understood that this concerned the claimant missing a deadline. The claimant said he missed

it because of his anxiety. Ms Cheng said that she would have appreciated him letting her know (page 400, entry at 09:59 hours). The claimant replied "*I know and it must look bad..*" and at 10:45 he said: "*I understand why you have to chase it up as well, it's my fault for not letting you know*" and "*I appreciate your understanding…".*

133. We find that Ms Cheng legitimately raised with the claimant his missing of a deadline. She did not do this because of disability or because of something arising from disability, she did this because the deadline had been missed. From his responses, the claimant clearly understood this and said he appreciated Ms Cheng's understanding. It is again difficult to reconcile his response at the time with his contention in these proceedings that this was disability discrimination. Ms Cheng took a proper managerial response and the claimant understood this. It was not less favourable treatment because of any disability or unfavourable treatment because of something arising from disability. Ms Cheng simply wanted the claimant to let her know if he was not going to be able to complete a task.

134. The claimant complained that at a meeting on 30 March 2021 he was too anxious to speak and Ms Cheng wrongly said he was unprepared for the meeting. He complains that this was an act of direct disability discrimination and discrimination arising from disability.

135. On 30 March 2021 the claimant and Ms Cheng had agreed that he would present at a team weekly call with Ms Cheng's manager Martha Farrell, the Head of Performance Marketing. The objective of the call was to give the claimant the opportunity to speak in front of the Head of Performance Marketing and to highlight the team's achievements which had been discussed in an SEO call an hour before. The claimant was not able to answer questions or to summarise the team's achievements so Ms Cheng stepped in and gave the summary to her manager in place of the claimant.

136. The allegation of discrimination is that Ms Cheng wrongly said that he was unprepared for the meeting. Ms Cheng disagreed that she said this (statement paragraph 54). Her evidence was that she explained to the claimant that it could appear that he was unprepared because it was based on a call that had taken place only an hour earlier and he could not present a summary. Ms Cheng's oral evidence was consistent with her witness statement and she was not challenged on this. We find that Ms Cheng fed back to the claimant that "*it could appear"* that he was unprepared not that he "*was unprepared"* so we find that this allegation fails on its facts. Ms Cheng had good reason to make the comment.

137. The claimant complained that he was penalised for asking clarification questions during the PIP process and that this was because of his disability and because of something arising from disability. He relied upon asking: "*sorry if I've missed this, but is the P2 data for the next period wrap up?''*

138. We saw this in a Teams chat between himself and Ms Cheng on 31 March

2021 (page 402). The claimant went on to ask whether he should use the template from the last period and Ms Cheng reminded him that it had been discussed in their last 1:1 on 24 March and this was no longer the format to use. The claimant said he now remembered, he got a bit confused and he would fill in the data and Ms Cheng thanked him.

139. This matter was later included in the claimant's disciplinary process because Ms Cheng's concern was that the claimant had failed to acknowledge and implement a new process that he accepted he had been told about (see disciplinary outcome letter page 293).

140. We find that this matter was included in the claimant's disciplinary because it was a genuine performance concern and it was not raised in the disciplinary proceedings because of any disability. We find that a hypothetical comparator who had not followed a new process that he or she acknowledged they had been told about, would have been treated in the same way within an overall performance disciplinary process covering a number of matters. We also find that it was not because of something arising from any disability but for legitimate managerial reasons. We find that in any event the disciplinary aspect was a proportionate means of achieving the legitimate aim of managing an underperforming employee.

141. The other question the claimant said he was penalised for asking, was a clarification question about the effect of Brexit on the respondent's website. He asked this at a meeting Ms Cheng did not attend, she heard about it from her manager. The claimant considered it unfair for Ms Cheng to raise this when she did not attend the meeting herself.

142. We agreed with the respondent's submission that Ms Cheng could not be present with the claimant every moment of his working day and she was entitled to rely on what her manager reported to her. The claimant's manager had sent 3 emails about Brexit and the effect on the business and Ms Cheng thought that the claimant had not paid attention to these emails. She thought it was a lack of attention to detail.

143. We find that this matter was raised with the claimant because it was a genuine performance concern and not because of any disability. We also find that it was not because of something arising from any disability but for legitimate managerial reasons because of a concern that the clamant had not paid attention to the 3 emails about the effect of Brexit. We find that in any event this was a proportionate means of achieving a legitimate aim of performance managing an employee who had received instructions on a matter that he later queried.

<u>Job adjustments made</u>

144. The claimant agreed that the respondent had made a number of job adjustments for him, including (i) weekly meetings to review the PIP with a "*traffic light*" system to help him understand how he was doing against each task, (ii) 4-weekly reviews, (iii) more time to complete tasks (iv) a

partial return to the office – 1 day a week for 2 weeks and then 2 days per week to help him feel less isolated during Covid and (v) removal of his line management responsibilities.

The second disciplinary meeting

145. On 28 April 2021 the claimant attended a second disciplinary meeting. This was once again led by Ms Cheng and the claimant was accompanied by a union representative, Mr Adaga. An Employee Relations Adviser attended as a note taker. The meeting was recorded and a full transcript was at page 251.

146. In that meeting the claimant acknowledged that Ms Cheng had really helped him and that he felt like he could talk to her about the things he was going through (transcript page 285).

147. The claimant was also reassured by the HR representative that it was not about reprimand but about supporting him (page 284). He agreed that this was a consistent message and "*people did say that to [him] a lot".*

148. At the disciplinary meeting on 28 April 2021, the claimant was issued with a final written warning and a "*PIP reset*" for another month. He was told about this verbally at the end of the meeting (page 287).

149. The claimant went off sick with an "*anxiety disorder"* on 7 May 2021, initially for two weeks (fit note page 289).

150. On 12 May 2021 he was sent written confirmation of the final written warning (page 290). He agreed in evidence that the reason he was given this warning was because the respondent considered that he was still not performing in his role, but he said it was because of his medical issues. Although it was a final warning the PIP was reset for a further month. We find that as the claimant himself acknowledged, he was given the warning because he was underperforming.

151. We find that this was not because of any disability. Even if it was for something arising from his disability, in terms of the claimant saying it was for "*medical issues*" we find that it was a proportionate means of achieving a legitimate aim of managing an underperforming employee. We find that employers are not obliged to refrain from performance management even where an employee is disabled, because they have business and operational standards to meet in the interests of running their business.

152. On 24 May 2021 the claimant appealed the final written warning.

153. On 8 June 2021 The claimant was invited to an appeal hearing to take place on 18 June 2021. He went off sick again on 11 June 2021 until Friday 9 July 2021 and as a result of this the appeal hearing was delayed and never took place. The claimant booked a flight to South Korea on Friday 9 July 2021 which was also the day on which Early Conciliation

ended (page 28).

The reasonable adjustments claim

154. The respondent admits that the disciplinary procedure and the PIP were PCP's which were applied to the claimant.

155. We considered whether the PIP and/or disciplinary process put the claimant at a substantial disadvantage in comparison with people who do not share his disability. Our substantive finding is that the claimant was not disabled at the material time. The findings we make below are in the event that we are wrong about this.

156. The substantial disadvantage relied upon was that the application of the PIP and disciplinary process exacerbating the claimant's conditions. On the claimant's evidence we find that the PIP and disciplinary procedure made him more anxious. We find that most employees, disabled or not, find such processes stressful. Had we found that the claimant was a disabled person, we would have found that these processes exacerbated his symptoms and he would have satisfied us on the issue of substantial disadvantage.

157. The respondent made a large number of adjustments for the claimant. These included weekly meetings to review the PIP with a "*traffic light*" system to help him understand which task to focus on; opportunities to speak in biweekly catch up meetings; time during working hours for medical appointments; 4-weekly reviews; more time to complete tasks; a partial return to the office and removal of his line management responsibilities. Ms Cheng also did not insist that he complete a task if he let her know that he could not do it. This was to allow her the opportunity to delegate the task. We find that these were steps that it was reasonable for the respondent to have to take to avoid the disadvantage.

158. The claimant contended for the following adjustments on which we make the following findings:

    a. Ignoring "*minor mistakes*". The claimant asserted that the criteria of the PIP were vague and unclear, allowing the respondent to penalise him for very small errors. We have found that the PIP was not vague and unclear, it was the opposite. The claimant himself could not say in evidence how it could have been made clearer. We find that it was not a reasonable adjustment for the respondent to ignore mistakes which arose despite clear performance criteria.
    b. Making PIP criteria "*clearer/less vague*". We have found that the PIP was not vague and unclear, it was the opposite.
    c. Not continuing the PIP process. We find that this would not be a reasonable step to have to take. We accepted the respondent's submission and find that where an employee is consistently unable to perform in his role, an employer is entitled to implement capability procedures to try to put things back on track. The alternative would be

to ignore legitimate performance issues which we find is not a reasonable step for the respondent to have to take.

d. Following Occupational Health's recommendation dated 21 March 2021 and 20 April 2021 that, "*Where possible recommend PIP is concluded as quickly as possible to mitigate the continuation of perceived symptoms of anxiety".* We have found that the respondent did not fail to follow the OH recommendation.
e. Bringing the PIP to an early conclusion. We find that it would not have been a reasonable step for the respondent to have to take, to bring the PIP to an early conclusion when performance concerns were ongoing. Our reasoning is the same as under issue (c) above.

<u>The claimant's resignation and his decision to take up employment overseas</u>

159. The claimant resigned by email on 13 July 2021 (page 85). He said that despite OH reporting on the detrimental effects of the PIP process it continued "*without any reasonable adjustments*". He asserted that he had been constructively dismissed.

160. The day after he resigned, on 14 July 2021, the claimant was asked if he wanted to continue with his appeal, with the setting of a hearing date (page 453) but he did not reply. He said that this was because he was off sick and not checking his work emails. Nevertheless he did nothing to check on or chase up his appeal. We find that this was because he did not intend to pursue his appeal against the warning. When the email of 14 July was sent, he had already booked his flight to South Korea and was leaving the country to take up a job there. He had no intention of a pursing the appeal because he was leaving to take up a job in that country.

161. The claimant was further signed off sick until 9 August 2021, which was his last day of employment with the respondent. He flew to South Korea on 6 August 2021, before the expiration of that sick note.

162. On 24 June 2021 the claimant had been to his GP surgery for his travel immunisations. We saw a record of this in his medical records at page 133 and we find on a balance of probabilities that he needed to book this well in advance with the surgery.

163. The claimant denied that when he had these vaccinations, he had it in mind to go to South Korea. He said that having gone on holiday to Turkey in September 2020 he decided that he might want to do some more travelling so he went to get the immunisations for worldwide destinations, including Africa and Asia and South America.

164. The claimant had these vaccinations 9 months after his holiday in Turkey yet only 2 weeks before he booked his flight to South Korea and 6 weeks before he travelled. We find on a balance of probabilities and due to the timing, that he had the journey to South Korea very much in mind when he had vaccinations on 24 June 2021. It was part of his preparation for the move to that country.

165. The claimant's evidence on day 1 was that he did not decide to go to South Korea until early August 2021, around the time he submitted his ET1. His ET1 was submitted on 3 August 2021 and he told the tribunal that it took him "*a couple of days to fill out the form".* He agreed that it took a lot of time and effort to find a job overseas and move country when Covid restrictions were still prevalent. He said he "*had help*". When the claimant disclosed his flight booking which was ordered on day 1 and was not initially produced and had to be ordered again on day 2, we saw that he booked his flight on 9 July 2021, four days before he resigned and well before he prepared his ET1.

166. On 26 August 2021 the claimant commenced new employment in South Korea. We saw a copy of his contract of employment. He found the job through a recruiter. It is a teaching role. We sought disclosure of his initial contact with the recruiter. On day 2 the claimant provided some redacted email correspondence with the recruiter dated 17 August 2021 when he was already in South Korea. He told the tribunal that his contact with the recruiter was via a website or on video call so he could not produce any written record of his initial contact with them.

167. The semi-redacted information that he did disclose dated 17 August 2021 also showed that he had obtained an E2 visa in advance of his travel. We find this also requires some advance planning and preparation.

168. For the reasons given above, we did not accept the claimant's evidence that he first decided to go to South Korea in early August 2021. The flight had been booked a month before. It is a big step to take a job overseas and move country and we find on a balance of probabilities that this takes time, planning and preparation and is not normally done in less than a week.

169. We find, based on the discussion with the counsellor in the session on 23 March 2021 when he said he was "*exploring a new job opportunity*", that his intention to move to South Korea was formed in March 2021. This was a specific comment relating to *"a new job opportunity*" rather than job opportunities generally. We found that the claimant was not always reliable in his evidence, particularly as to when he decided to go to South Korea and as to taking citalopram through to the date of this hearing. For these reasons we did not accept his evidence that in the next counselling session on 30 March he had changed his position on exploring this job new opportunity.

Was there a fundamental breach of the claimant's contract of employment?

170. The claimant relied on the final written warning on 28 April 2021 as the last straw which he said caused him to resign and treat himself as constructively dismissed.

171. We have considered whether this warning and the steps which preceded it amounted to a fundamental breach of his contract of employment. The

respondent was contractually entitled to carry out a PIP and a disciplinary procedure. The claimant did not deny that he was making mistakes at work, he was concerned about it and discussing it with those treating him. We find that it was not a breach of contract and even less a fundamental breach, to take steps in line with the contractual procedures to manage his underperformance.

172. We find that Ms Cheng was a sympathetic manager who was keen to support the claimant and to see him succeed. He had a skill-set which they wanted and he was a valued employee. Ms Cheng waited about 10 months from when she first raised performance concerns in February 2020 to 4 December 2020 before she put the claimant on the PIP. This was to take account of the personal difficulties that she knew he was dealing with. This showed us her sympathy and concern as a manager.

173. We also rely on our findings above in relation to the disability claim on the individual matters relied upon, for example our finding that the PIP was not unclear or vague.

174. We find that the performance management procedure culminating in the final written warning given on 28 April 2021 and confirmed in writing on 12 May 2021 did not amount to a fundamental breach of the claimant's contract of employment. It was a proper managerial process and in line with the contractual terms. The process was not conducted in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between the parties. The respondent was entitled to take steps to deal with underperformance and we find they did so in an appropriate manner.

<u>If there was a fundamental breach, did the claimant affirm any such breach?</u>

175. If we are wrong on our finding that there was no fundamental breach, we have considered whether the claimant affirmed any such breach. The claimant was given the warning verbally on 28 April 2021. Our finding is that by that date, he was already making plans to obtain work and move to South Korea.

176. The claimant was off work for 2 weeks from 7 to 21 May 2021 (fit note page 289) and again from 11 June to 9 July (page 304) which was extended until his last day of service on 9 August 2021 (page 305). He was in work for just over a week at the end of April and for 3 weeks from late May to mid-June 2021.

177. The claimant waited 11 weeks from the date he was given the warning until he resigned. He was not off sick during that entire period and he was also able to make his preparations to go overseas, including getting his vaccines and booking his flight. We find that the wait of 2.5 months was an affirmation of any breach.

<u>Did the claimant resign in response to any such fundamental breach?</u>

178. Even if we are wrong on the issue of fundamental breach and/or affirmation of breach, our finding is that the warning was not causative of the claimant's resignation. Our finding above is that the claimant formed an intention in March 2021 to take up a new job opportunity and he spent the time between March and July 2021, when he booked his flight and resigned, putting that plan into place. We find that the claimant resigned of his own accord because he wanted to take up a new job in another country.

Indirect disability discrimination

179. The respondent admitted applying PCPs of the PIP and the disciplinary process. When the issues were clarified at the start of day 1 the claimant said that the particular disadvantage to which persons with his disability were put, was that the PIP process involved scrutiny and checking of work which could heighten feelings of depression and anxiety.

180. The claimant said that he could only provide evidence about the disadvantage to himself and he did not have any evidence of disadvantage to the group of people who shared his disability. He could only speak from his own experience.

181. In the absence of any evidence we could make no finding as to whether persons who share the claimant's disability (if it had been proven) were put at a particular disadvantage by the application of those PCPs.

The relevant law

Constructive unfair dismissal – sections 95 and 98 Employment Rights Act

182. The applicable law is found in section 95(1)(c) of the Employment Rights Act 1996 which provides that "*for the purpose of this Part an employee is dismissed by his employer if …….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".*

183. The leading case on constructive dismissal is ***Western Excavating (ECC) Ltd v Sharp 1978 ICR 221, CA.*** The employer's conduct must give rise to a repudiatory breach of contract. In that case Lord Denning said "*If the employer is guilty of conduct which is a significant breach going to the root of the contract, then the employee is entitled to treat himself as discharged from further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed."*

184. In ***Malik v Bank of Credit and Commerce International SA 1997 IRLR 462*** the House of Lords affirmed the implied term of trust and confidence as follows:

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

185. In ***Baldwin v Brighton and Hove City Council 2007 IRLR 232*** the EAT had to consider whether for there to be a breach, the actions of the employer had to be calculated and likely to destroy the relationship of confidence and trust, or whether only one or other of these requirements needed to be satisfied. The view of the EAT was that the use of the word *"and"* by Lord Steyn in the passage quoted above, was an error of transcription and that the relevant test is satisfied if either of the requirements is met, so that it should be "*calculated or likely".*

186. If there was a dismissal, the tribunal must consider whether the dismissal was for one of the potentially fair reasons set out in sections 98(1)(b) or 98(2) of the Employment Rights Act and whether the dismissal was fair or unfair under section 98(4)

187. In ***Kaur v Leeds Teaching Hospitals NHS Trust 2018 IRLR 833*** the Court of Appeal listed five questions that should be sufficient for the tribunal to ask itself to determine whether an employee was constructively dismissed (judgment paragraph 55):

    a. What was the most recent act (or omission) on the part of the employer the employee says caused, or triggered, their resignation?

    b. Has the employee affirmed the contract since that act?

    c. If not, was that act (or omission) by itself a repudiatory breach of contract?

    d. If not, was it nevertheless a part (applying the approach explained in *Waltham Forest v Omilaju [2004] EWCA Civ 1493*) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a repudiatory breach of the implied term of trust and confidence? (If it was, there is no need for any separate consideration of a possible previous affirmation, because the effect of the final act is to revive the right to resign).

    e. Did the employee resign in response (or partly in response) to that breach?

Disability – section 6 Equality Act 2010

188. Section 6 of the Equality Act provides that a person has a disability if that person has a physical or mental impairment, and the impairment has a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities.

189. The burden of proof is on the claimant to show that he is disabled in relation to each impairment relied upon.

190. Under section 212(1) of the Equality Act 2010 "substantial" means more than minor or trivial.

191. In ***J v DLA Piper 2010 IRLR 936 (EAT)*** the EAT drew a distinction between two states of affairs which can produce broadly similar symptoms, such as symptoms of low mood and anxiety. The first state of affairs is a mental condition which can be referred to as 'clinical depression' and an impairment under the Equality Act and the second is not a mental condition but a reaction to adverse circumstances, such as problems at work – which can be referred to as 'adverse life events'.

192. ***J v DLA Piper*** was considered and approved in ***Herry v Dudley Metropolitan Council 2017 ICR 610 (EAT).*** The claimant in that case was unable to establish disability because the difficulties he encountered were due to a reaction to problems at work and life events rather than a mental impairment. At paragraph 71 the EAT said: "*there can be cases where a reaction to circumstances becomes entrenched without amounting to a mental impairment."*

Direct disability discrimination – section 13 Equality Act

193. Direct discrimination is defined in section 13 of the Equality Act 2010 which provides that a person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

194. Section 23 of the Act provides that on a comparison of cases for the purposes of section 13, there must be no material difference between the circumstances relating to each case.

Discrimination arising from disability – section 15 Equality Act

195. Discrimination arising from disability is found in section 15 Equality Act 2010:

> *(1) A person (A) discriminates against a disabled person (B) if –*
>
> *(a) A treats B unfavourably because of something arising in consequence of B's disability and*
>
> *(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim,*
>
> *Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.*

196. The approach to be taken in section 15 claims is set out in ***Pnaiser v NHS England 2016 IRLR 170 (EAT)*** by Simler P at paragraph 31. This case also addresses the burden of proof in section 15 cases. Under section 136, once a claimant has proved facts from which a tribunal could conclude that an unlawful act of discrimination has taken place, the burden shifts to the respondent to provide a non-discriminatory explanation. In order to prove a prima facie case of discrimination and shift the burden to the employer, the claimant needs to show:

a. that he or she has been subjected to unfavourable treatment;

b. that he or she is disabled and that the employer had actual or constructive knowledge of this;

c. a link between the disability and the 'something' that is said to be the ground for the unfavourable treatment;

d. some evidence from which it can be inferred that the 'something' was the reason for the treatment.

197. If the prima facie case is established and the burden shifts, the employer can defeat the claim by proving either:

a. that the reason or reasons for the unfavourable treatment was not in fact the 'something' that is relied upon as arising in consequence of the claimant's disability; or

b. that the treatment, although meted out because of something arising in consequence of the disability, was justified as a proportionate means of achieving a legitimate aim.

198. The something that causes the unfavourable treatment need not be the main or sole reason but must have at least a significant or more than trivial influence on the unfavourable treatment and so amount to an effective reason for or cause of it (judgment paragraph 31b).

Indirect disability discrimination – section 19 Equality Act

199. Section 19 Equality Act provides that a person discriminates if it applies a provision, criterion or practice (PCP) which is discriminatory in relation to a relevant protected characteristic, in this case disability.

200. A PCP is discriminatory if the employer applies or would apply it to persons who do not share the claimant's disability and it puts persons with the claimant's disability at a particular disadvantage when compared to people who do not have that disability. It must also put the claimant at that particular disadvantage.

201. There is a defence if the respondent can show that the application of the PCP is a proportionate means of achieving a legitimate aim.

The duty to make reasonable adjustments – sections 20 and 21 Equality Act

202. The duty to make reasonable adjustments is found under section 20 EqA. They duty comprises three requirements. Subsection (3) is as follows:

The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant

matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

203. The EAT in ***Royal Bank of Scotland v Ashton 2011 ICR 632*** held that in relation to the disadvantage, the tribunal has to be satisfied that there is a PCP that places the disabled person not simply at some disadvantage viewed generally, but at a disadvantage that was substantial viewed in comparison with persons who were not disabled; that focus was on the practical result of the measures that could be taken and not on the process of reasoning leading to the making or failure to make a reasonable adjustment.

204. This case was considered by the Court of Appeal in ***Griffiths v Secretary of State for Work and Pensions 2015 EWCA Civ*** on the comparison issue. Elias LJ held that it is wrong to hold that the section 20 duty is not engaged because a policy is applied to equally to everyone. The duty arises once there is evidence that the arrangements placed the disabled person at a disadvantage because of his disability.

205. Under section 21 of the Equality Act a failure to comply with section 20 is a failure to make reasonable adjustments. Section 21(2) provides that "*A discriminates against a disabled person if A fails to comply with that duty in relation to that disabled person".*

206. In deciding whether an employer has failed to make reasonable adjustments, as set out by the EAT in ***Environment Agency v Rowan 2007 IRLR 20,*** the tribunal must identify:

(a) the provision, criterion or practice applied by or on behalf of an employer, or;

(b) the physical feature of premises occupied by the employer;

(c) the identity of non-disabled comparators (where appropriate); and

(d) the nature and extent of the substantial disadvantage suffered by the claimant.

207. On the burden of proof, the EAT in ***Project Management Institute v Latif 2007 IRLR 579*** (Elias P as he then was) held that the claimant must not only establish that the duty to make reasonable adjustments has arisen, but also that there are facts from which it could reasonably be inferred, absent an explanation, that it has been breached. Demonstrating that there is an arrangement causing a substantial disadvantage engages the duty, but it provides no basis on which it could properly be inferred that there is a breach of that duty. There must be evidence of some apparently reasonable adjustment which could be made. It is necessary for the respondent to understand the broad nature of the adjustment proposed and to be given sufficient detail to enable him to engage with the question of whether it could reasonably be achieved or not.

208. In relation to knowledge of disability, knowledge of the disadvantage and reasonable adjustments Schedule 8 paragraph 20(1)(b) of the Equality Act provides:

> *(1) A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know - …..that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement.*

209. In ***Newham Sixth Form College v Saunders 2014 EWCA Civ 734*** *the Court of Appeal (*Laws LJ) said in relation to knowledge of the substantial disadvantage: *"[the] nature and extent of the disadvantage, the employer's knowledge of it and the reasonableness of the proposed adjustment necessarily run together. An employer cannot … make an objective assessment of the reasonableness of proposed adjustments unless he appreciates the nature and extent of the substantial disadvantage imposed upon the employee by the PCP*" (judgment paragraph 14).

<u>The burden of proof</u>

210. Section 136 of the Equality Act deals with the burden of proof and provides that if there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred. This does not apply if A goes on to show that it did not it did not contravene the provision, namely where it gives a non discriminatory explanation for the treatment.

211. One of the leading authorities on the burden of proof in discrimination cases is ***Igen v Wong 2005 IRLR 258***. That case makes clear that at the first stage the Tribunal is to assume that there is no explanation for the facts proved by the claimant. Where such facts are proved, the burden passes to the respondent to prove that it did not discriminate.

212. Lord Nicholls in ***Shamoon v Chief Constable of the RUC 2003 IRLR 285*** said that sometimes the less favourable treatment issues cannot be resolved without at the same time deciding the reason-why issue. He suggested that Tribunals might avoid arid and confusing disputes about identification of the appropriate comparator by concentrating on why the claimant was treated as he was, and postponing the less favourable treatment question until after they have decided why the treatment was afforded.

213. In ***Madarassy v Nomura International plc 2007 IRLR 246*** it was held that the burden does not shift to the respondent simply on the claimant establishing a different in status or a difference in treatment. Such acts only indicate the possibility of discrimination. The phrase "*could conclude*" means that "*a reasonable tribunal could properly conclude from all the evidence before it that there may have been discrimination*".

214. In ***Hewage v Grampian Health Board 2012 IRLR 870*** the Supreme

Court endorsed the approach of the Court of Appeal in ***Igen Ltd v Wong*** and ***Madarassy v Nomura International plc***. The judgment of Lord Hope in ***Hewage*** shows that it is important not to make too much of the role of the burden of proof provisions. They require careful attention where there is room for doubt as to the facts necessary to establish discrimination, but have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other

215. The courts have given guidance on the drawing of inferences in discrimination cases. The Court of Appeal in ***Igen v Wong*** approved the principles set out by the EAT in ***Barton v Investec Securities Ltd 2003 IRLR 332*** and that approach was further endorsed by the Supreme Court in ***Hewage*****.** The guidance includes the principle that it is important to bear in mind in deciding whether the claimant has proved facts necessary to establish a prima facie case of discrimination, that it is unusual to find direct evidence of discrimination.

216. More recently in ***Efobi v Royal Mail Group Ltd 2021 IRLR 811*** the Supreme Court confirmed the approach in ***Igen v Wong*** and ***Madarassy***.

Conclusions

Disability status

217. Our findings are set out above, that the claimant was not a disabled person at the material time. Had we found the claimant to be a disabled person, these would have been our conclusions.

Direct disability discrimination

218. We have made the following findings above on the matters relied upon as acts of direct disability discrimination.

219. Issue a: Ms Cheng's MS Teams exchange on 25 March 2021 stating, "'*You had not informed me at the time that you were experiencing anxiety which was preventing you from completing the task, nor provided a timeframe for when you would try again. In future, please let me know of any blockers before the deadline instead of communicating once I had chased*". We have found above that this was not less favourable treatment because of disability. Ms Cheng simply wanted the claimant to let her know if he was not going to be able to complete a task.

220. Issue b: Failing to follow Occupational Health's recommendations dated 21 March 2021 and 20 April 2021 that: "*Where possible recommend PIP is concluded as quickly as possible to mitigate the continuation of perceived symptoms of anxiety"*. Our finding above is that the respondent did not fail to follow the OH recommendation. This allegation fails on its facts.

221. Issue c: Initiating the Performance Improvement Process ("PIP"). We

have found on the claimant's own evidence that the reason Ms Cheng put him on the PIP was because of his underperformance and not because of any disability.

222. Issue d: Not ending the PIP. We take (d) and (e) together.

223. Issue e: Not bringing the PIP to an early conclusion. Our finding above was this was not less favourable treatment because of disability. It was the respondent seeking to help the claimant improve and meet the standards with a view to avoiding a formal disciplinary process and retaining him in their employment.

224. Issue f: Issuing a Final Written Warning on 12 May 2021. The warning was not issued because of any disability. It was issued for poor performance.

225. Issue g: The claimant's resignation on 13 July 2021. The claimant relied upon his alleged constructive dismissal. We have found that he was not dismissed, so this allegation fails on its facts.

226. Issue h: Penalising the claimant for incorrect formatting of an email and other minor mistakes while on the PIP. The email is at page 104-108. The penalty is receiving disciplinary action. Our finding above is that this was not less favourable treatment. It was constructive feedback which the claimant accepted positively at the time

227. Issue i: Ms Cheng being unhappy with the second part of a training session the claimant delivered to team members on 21 January 2021 (Ms Cheng had not attended the first part of the session delivered approximately 1 month before). We have found that Ms Cheng was not happy with the second part of the training because of its content and not because of any disability.

228. Issue j: Being penalised for asking a clarification question to Ms Cheng during the PIP process. The claimant asked a clarification question about the effect of Brexit on the website. Ms Cheng was not in the meeting but heard about the question. There was also a question: *"sorry if I've missed this, but is the P2 data for the next period wrap up?* Our finding above is that this was due to a genuine performance concern and not because of any disability.

229. Issue k: On 30 March 2021 a meeting was held at which the claimant was too anxious to speak, but his manager Ms Cheng wrongly said he was unprepared for it. This allegation failed on its facts because we have found that Ms Cheng fed back to the claimant that "*it could appear"* that he was unprepared not that he "*was unprepared"*. She had good reason to make that comment.

Discrimination arising from disability

230. Did the claimant's disability have the consequence of, or result in the following:

    a. Being too anxious to participate in a meeting on 31 March 2021, the digital marketing team weekly call;
    b. It not being possible for him to inform his manager Ms Cheng of a "blocker" on the completion of a task; the claimant clarified that this meant that his disability meant that he could not always inform his manager of the team that he could not complete tasks on time.

231. We have made the following findings on the allegations of unfavourable treatment:

232. Issue a: The application of the PIP. As we have found above the PIP commenced on 4 December 2020. The two matters on which the claimant relies as arising from his disability arose after 4 December 2020, so we find that he was not placed on a PIP because of something arising from his disability. We also repeat our findings above as to the reasons why he was placed on the PIP.

233. Issue b: Ms Cheng's MS Teams exchange on 25 March 2021 as set out above. We have found above that this was not unfavourable treatment because of something arising from disability. We have found that this was not unfavourable treatment because of something arising from disability. Ms Cheng simply wanted the claimant to let her know if he was not going to be able to complete a task.

234. Issue c: At a meeting on 30 March 2021 Ms Cheng telling the claimant he was unprepared for it. This allegation failed on its facts because we found that Ms Cheng fed back to the claimant that "*it could appear"* that he was unprepared not that he "*was unprepared"*. She had good reason to make that comment.

235. Issue d: The final written warning. We have found that even if this was for something arising from disability, in terms of the claimant saying it was for "*medical issues*" we have found that it was a proportionate means of achieving the legitimate aim of managing an underperforming employee. Our finding is that employers are not obliged to refrain from performance management even where an employee is disabled, because they have business and operational standards to meet in the interests of running their business.

236. Issue e: The incorrect formatting of an email. Our finding above is that there was no unfavourable treatment because of something arising from disability because this was constructive feedback which the claimant accepted positively at the time. The claimant also accepted in evidence that this was not discrimination because of something arising from disability.

237. Issue f: Ms Cheng being unhappy with the second part of a training session on 21 January 2021. We have found that Ms Cheng was not happy with the second part of the training because of its content and not because of something arising from disability.

238. Issue g: Being penalised for asking clarification questions. We have found that this was not because of something arising from any disability but for legitimate managerial reasons. We have found that in any event the disciplinary aspect was a proportionate means of achieving the legitimate aim of managing an underperforming employee.

239. Issue h: Failing to follow the OH recommendation that, "*Where possible recommend PIP is concluded as quickly as possible to mitigate the continuation of perceived symptoms of anxiety*". Our finding above is that the respondent did not fail to follow the OH recommendation. This allegation fails on its facts.

240. Issue i: Initiating the PIP – this issue and our decision is the same as for issue (a) above.

241. Issue j: Not ending the PIP. Our finding above is that this was not unfavourable treatment because of something arising from disability. It was the respondent seeking to help the claimant improve and meet the standards with a view to retaining him in their employment. Even if it was, this was a proportionate means of achieving a legitimate aim of performance managing an underperforming employee.

242. Issue k: Not bringing the PIP to an early conclusion. Issues (j) and (k) are effectively the same.

243. Issue l: Issuing a Final Written Warning – this is the same as issue (d) above.

244. Issue m: The alleged constructive dismissal. This allegation fails on its facts as our finding is that the claimant was not dismissed.

Indirect disability discrimination

245. As we have found above, the claimant put forward no evidence as to group disadvantage. As such he did not show any facts from which we could conclude, in the absence of any other explanation, that there had been indirect disability discrimination. The burden of proof did not pass to the respondent.

246. In the absence of any evidence as to group disadvantage and the fact that we could find no group disadvantage, the claim for indirect disability discrimination fails and is dismissed.

Reasonable adjustments

247. The respondent admitted applying the PCP's of the PIP and the disciplinary process.

248. Our finding above is that the respondent made a number of reasonable adjustments for the claimant, to assist him with his performance. On our finding it is not a reasonable adjustment to refrain from any performance management. We also found as a fact that the terms of the PIP were not vague or unclear.

249. The claim for disability discrimination fails and is dismissed based on our finding that the claimant was not a disabled person at the material time. Even if we are wrong about this, the claim for disability discrimination would have failed in any event, for the reasons set out above.

Constructive unfair dismissal

250. We have found above that there was no fundamental breach of the claimant's contract of employment. The respondent followed a contractual performance management procedure to address the claimant's underperformance and it did so with understanding and sympathy. They wanted him to succeed.

251. We also found that if there was a breach culminating with the final written warning, the claimant affirmed any such breach by waiting 2.5 months before he resigned.

252. More importantly we have found that any such breach was not causative of his resignation and that he resigned of his own accord to take up a job in South Korea which he had been planning, on our finding, since at least March 2021 and prior to any written warning.

253. The claimant was not constructively dismissed and the claim for unfair dismissal fails.

Employment Judge Elliott
Date: 10 November 2022

Judgment sent to the parties and entered in the Register on: 11/11/2022

_ for the Tribunal