EMPLOYMENT TRIBUNALS

Claimant: Mr N Wakeman

Respondent: Atkins Limited

Heard at: Liverpool **On:** 14–18 February 2022
29 April 2022
(in chambers)

Before: Employment Judge Benson
Mr M Gelling
Mr R Cunningham

Representation
Claimant: Mr Ginniff - Counsel
Respondent: Mr McGlashen - Solicitor

RESERVED JUDGMENT

1. The claimant was not dismissed. The claim of unfair dismissal fails.

2. The complaint of direct disability discrimination fails.

3. The complaint of discrimination arising from disability fails.

4. The complaint that the respondent has failed in its duty to make reasonable adjustments fails.

5 The complaint of harassment related to disability fails.

6. The complaints of indirect disability discrimination, discrimination pursuant to section 111 Equality Act 2010 and an unlawful deduction from wages are not pursued.

7. All claims are dismissed.

REASONS

Claims and Issues

1. The claimant brought claims of constructive unfair dismissal, direct disability discrimination, discrimination arising from disability, a failure in the duty to make reasonable adjustments, harassment related to disability and breach of contract. An application was made to include a claim of harassment and indirect discrimination. Submissions were heard and the claim of harassment was permitted to be pursued for the reasons given at the time. The claims of indirect disability discrimination, unlawful deductions from pay and a claim under section 111 Equality Act were not pursued.

2. A draft List of Issues had been prepared by Mr McGlashen based upon the claimant's claim form and further particulars which had been supplied. At the final hearing, the claimant was represented by counsel. At the request of the Tribunal, Mr Ginniff clarified with the claimant the claims and issues and an updated list of issues was eventually agreed on the second day of the hearing. This provided the factual allegations which the claimant relied upon in respect of each of his claims in addition to missing information for his discrimination claims. Those factual allegations are set out below in bold type within the Conclusions section below.

3. The Tribunal did not commence hearing evidence until the afternoon of the second day in view of the amount of reading and difficulties in clarifying the list of issues. The claimant's witness statement ran to some 58 pages and that together with the respondent's statements and the relevant reading from the agreed bundle of 657 pages, took some time for the Tribunal to read. It was clear from the outset that the hearing could not be completed in the 5 days listed. We were able to complete the evidence by late on the fifth day and Mr Ginniff and Mr McGlashen agreed to provide written submissions. Mr Ginniff was also provided with the opportunity to comment upon the respondent's submissions. The Tribunal was grateful for these. It was agreed that the Tribunal would provide a reserved decision. For listing reasons, the Tribunal was not able to meet to consider its decision until 29 April 2020 and the Tribunal apologises to the parties for the delay in the reserved decision being produced.

Evidence and Submissions

4. The Tribunal heard witness evidence from the claimant, two former colleagues, Richard Elsdon and Philip Shaw and received written evidence from claimant's former colleague, Gavin Brown. The respondent's witnesses were the claimant's previous line manager, Lee Knights, Mr Knights' line manager, Ian Wilson, the respondent's Sector Integrity Officer, Jonny Beatty, the Grievance investigator, Rosie Matin and the Grievance Appeal investigator, Martin Bower.

5. This case contained a great deal of detailed information and evidence, particularly from the claimant and within the documentation we were referred to.

Although we have considered such evidence, we have only made findings in respect of matters which are relevant to our decision.

Findings of Fact

Background

6. The claimant commenced employment with the respondent in December 2015 as a Principal Engineer at the Warrington office leading the civil structural and architectural ("CS&A") team. His contract of employment was issued on 15th October 2015. He reported to Mr Knights as his line manager. Mr Knights reported to Mr Wilson, a member of the senior lead team based in Warrington.

7. The respondent is a consultancy which amongst other services provides engineering design solutions to clients.

8. The claimant's contract at clause 22 stated:

9. "The Company wishes to maintain a positive work environment for all its employees. We therefore require employees not to engage in or knowingly permit any fellow employees to engage in sexual, racial or other harassment or unlawful discrimination against any other employee, customer or supplier"

10. The claimant was a valued member of the team and had received positive performance reviews ("PDRs") and pay increases during his employment.

11. The nuclear fuel cycle business ("NFC") operated from the respondent's Whitehaven (Westlakes) and Warrington offices, focusing on work at URENCO and Sellafield.

Working Hours

12. The claimant had core working hours of 40 per week. As a consulting business, the respondent keeps a record of the hours that its employees work on client's projects as the basis of its charging structure and measuring its profitability. As such the claimant and his team were required to complete timesheets, recording hours worked against a particular client and job/project. That was known as productive time. The claimant led a team and had responsibility for ensuring that his team met a target for productive time. It was a team target. The claimant, as a senior member of staff was not expected to be fully productive by billing all of his time to a client. He had a team to develop and train and had administrative work to do. He could record that as non-productive time. His performance was not measured solely on how many hours he worked or how many hours he recorded.

13. Overtime could be claimed for hours worked in excess of the claimant's normal hours of 40 per week. The claimant rarely claimed overtime, but when it was claimed it was approved by Mr Knight.

14. On one occasion, being the CAB project for URENCO, it was clear that the number of hours quoted for the job would be exceeded by a considerable margin. As such the project would result in a loss for the respondent. The claimant and

others were asked to not record any further hours against that project, and reference was made to these being 'discretionary' hours.

15. The claimant was never spoken to or questioned or admonished for not recording sufficient productive time, individually or as a team. In a PDR in 2018 the claimant's line manager noted that: 'There have been times when the claimant's personal man-hours have been excessive, and this is an area that we will work on in 2019 to address.' The claimant along with a colleague Mr Elsdon, would often work in the office after others had left, but this was not at the request or insistence of the respondent.

16. There was support for the claimant in managing any work-related stress. This included Mental Health first aiders and an employee assistance programme. The claimant was aware of these resources but did not use them.

The claimant's approach to design

17. Jobs for clients were costed in two ways. For some clients there was a Framework agreement whereby the respondent would not need to tender for a job, rather it was appointed having provided a design solution and given a price to the client for the work. The other type of work was where the respondent would pitch against other companies for a particular project. They would offer a design solution and would provide a price based upon the number of hours the job would require. They may be awarded the contract for that project. The engineer carrying out the job if the pitch or tender was successful was not the same employee who had assessed the price for the job or developed the solution. In the claimant's case this led to difficulties as the claimant had a methodical and detailed approach to designs and the solution to problems which could result in more time being spent on a project than was originally put forward to the client. If there was a possibility that the job would require more hours, the respondent could approach the client and agree additional hours. Clients had an input into a design which was put forward. They would approve the design solution. The claimant was a conscientious worker and his designs were meticulously detailed. Engineering design is subject to various regulatory, statutory and contractual codes and standards and a client may prefer a 'rough and ready' solution or they may wish to have (and pay for) a 'gold standard' solution. Both would work and be appropriate but which one the client wishes to use is a matter for their commercial and professional judgment.

18. The respondent recognised that the claimant's method of working and his design solutions could result in him working too many hours on a project. This could result in an additional cost to the client or less profitable work for the respondent. His methodical approach was appropriate for some projects but not for others. The respondent sought to match an engineer's approach to the type of design solution which the client required.

CAB project

19. In 2018 the respondent was asked to design, engineer and manage a project to construct a centrifuge assembly building (CAB) at URENCO. The claimant was required to estimate the timescale and cost for the CS & A aspects

of the project. The design and cost needed to be agreed between the respondent and the client. This project was conducted on a framework in that it was not a competitive tender however the client had a budget in mind and discussions took place with the client to consider what it could achieve for its budget.

20. The claimant prepared the design but there were a number of further discussions with the client as the claimant's design solution included too many hours and was more expensive than the client wanted. There was insufficient time and money in the client's budget to do the work in the way that the claimant recommended and after discussion the claimant agreed to amend his estimate. The respondent considered that he had 'overengineered' certain aspects of the design solution, in that it was more complicated than the client thought it needed to be. It wanted a quick and easy fix. It wanted to ensure the building was structurally sound and functioned well. The client didn't want it to take so long or spend as much money as the claimant had suggested. This caused frustrations for the client. A contractor, Boulting was responsible for implementation and installation of the design. The respondent's relationship with Boulting wasn't good and this added to the difficulties in completing the project. As the project progressed, the costs increased and it was apparent that a mistake had been made by someone other than the claimant on updated costings. The project was challenging and the relationships between the client, the respondent and Boulting became strained. The project fell behind schedule and the respondent lost money on it because they were paid a fixed price. The project accounted for around 90% of the Warrington office work and around £10 million of annual revenue at that time

Conflict of interest complaint

21. The client was struggling to recruit a project manager for this work and at the client's request, an employee of the respondent, Mr Hallett was seconded to the client to act as project manager on the client side. Prior to his secondment he was the claimant's line manager. This was not an unusual arrangement. The respondent and the client acknowledged that there was a potential conflict of interest and arrangements were put in place such that Mr Hallett would not approve invoices or make other commercial decisions. The claimant raised a concern about Mr Hallett being present at a particular meeting and the respondent acted on his concerns and arranged for Mr Hallett not to be present.

22. The claimant remained concerned. On 29 August 2018 he emailed the Compliance Consultation Centre/Integrity Team raising a conflict of interest concern relating to Mr Hallett's role. He was concerned as to how the conflict between the two roles may influence how decisions on the project were managed and he felt uncomfortable that with the situation. He asked for guidance.

23. Mr Beatty, the respondent's Chief Integrity Officer responded on 5th September 2018 and explained that he would like to anonymise the claimant's concerns and log the request at the next Case Assignment Analysis and Prioritisation (CAAP) meeting. He said that he anticipated that the outcome would be for the relevant person to investigate his concerns and attempt to rectify them if the independent review showed they were needed. Mr Beatty was new to the role and he had assumed when told by CAAP that they wanted to share the concerns with senior leaders within the business for them to investigate and

review, that they would take steps to do that, whereas Mr Beatty had misunderstood and it was in fact for him to share the report with the senior leaders. It was not until October 2019, when he was asked about the outcome of the investigation when the claimant later raised it in a grievance, that Mr Beatty became aware of his mistake. The claimant did not chase or make further enquiries of Mr Beatty about his conflict concern during this period.

24. The outcome of the investigation was that there was no conflict of concern in this particular case, but the framework management plan between the client and the respondent was updated to include specific sections on conflicts of interest for seconded staff.

Gold plated comments

25. The respondent had concerns that the claimant had overengineered the solutions on the CAB project. These were discussed within him in August 2018.

26. In February 2019, the claimant raised with Mr Knights that he believed that he was being denied the opportunity to do productive work, particularly by Whitehaven staff and that obstacles were being put in his path. He considered that these related to various projects including Devonport Docks, BAE Barrow, Wylfa and Sellafield.

27. This was not accepted by Mr Wilson, but Mr Wilson told the claimant there was a perception that he designed things with 'gold on it'. He agreed that it would be helpful for a meeting to be arranged between the claimant and the Whitehaven staff to understand why they were of that view. That meeting took place on 19 March 2019. The claimant asked what the 'gold plated solutions' were that people were referring to and Mr Oliver referred to the CAB project and that he had been told that the claimant had insisted that 150 trail holes were dug. The claimant corrected Mr Oliver in that there were 15 holes, not 150.

28. On that date there was also discussion about the integration of the Warrington and Whitehaven offices.

29. Following the meeting, the claimant was asked to prepare a proposed brief for a project. At a follow up meeting on 4 April he was told by a Mr Marwood that it was not what he had wanted. The claimant believed that Mr Marwood, who was new to the business, was being asked to report upon how the claimant had approached the task. The claimant made attempts to speak to Mr Knights which were unsuccessful.

Claimant's stroke

30. The claimant felt insecure following the recent work events and was finding things difficult to cope with. He consulted his GP on 5th April 2019. On 15th April 2019 he suffered a stroke. He remained in hospital overnight. He had regular telephone calls with Mr Knights during his absence and returned to work on 21st June 2019.

31. On 17th June 2019 the claimant sent a grievance letter to the respondent's HR department complaining of work-related stress, employment insecurity, exclusion, unfair treatment, rumour spreading and obstruction and requesting a review of the "situation" and the identification of any reasonable adjustments that could be made.

32. On 24th June 2019 an Occupational Health doctor appointed by the respondent advised that the claimant should have a phased return to work, increasing from 50%, that there should be a 20% reduction in workload and that a work stress risk assessment should be carried out. It confirmed that the claimant reported he was symptom free and was fully physically functional with no impairment. Further that he was on medication but did not have side effects.

Appointment of Mr Liaw

33. On return to work, the claimant was told that during his absence there had been a restructure of the nuclear business units within the Warrington and Whitehaven offices and Kai Liaw had been appointed as the new lead civil and structural engineer over both offices. The claimant was told that he would now report to Mr Liaw but that his role would not change. The respondent had not advertised the position and was under no obligation under its own procedures or policies to invite the claimant or anyone else to apply for the role. It had intended that Mr Liaw was to be appointed to the role, rather than there being any competitive process. The claimant was not told about the appointment of Mr Liaw during his absence because the respondent did not wish to raise such issues while he was re-cooperating.

H2H Project

34. When the claimant returned to work, he was asked to become involved in a project at Heysham Power station ("H2H project"). There was a short delivery time for the project which had to be completed by the 19th July. The claimant did not consider that there were sufficient hours built into the scope for the work to be completed. He raised this with the project manager. The claimant was also concerned that the work could not be completed within the time scale required by the client. He was briefly removed from this project then reinstated. The project was subject to time pressures, delays and frustrations for all concerned who worked on it. The project manager sought an extension of time from the client, but they were unable to move on the deadline and asked that the respondent achieve what they could in the time frame available. The claimant advised the respondent that he could not commit to completing his work by the deadline as he was on a phased return to work and he was unable to work any additional hours because of his recent ill health issues. He was removed from the project and another engineer was asked to complete it. The person who made the decision was unaware of the claimant's phased return to work but was aware that the claimant couldn't complete the work in the timescale required.

MyQSSE complaint

35. On 18 July 2019, the claimant raised the stress that the H2H project was causing him and other staff as an incident on the respondent's MyQSSE system

which was a system for reporting concerns. The matter was taken forward by a manager Mr Geary as the concern was in relation to his H2H project. He asked Mr Wilson to speak to the claimant. On 19th July, Mr Wilson spoke to the claimant and confirmed that he was no longer required to work on H2H project. Later that morning Mr Liaw telephoned him and explained that they were looking into his report. He was told that he would be updated. On 22nd July the claimant met with Mr. Wilson and discussions took place about the H2H project. Mr Wilson understood the claimant's reasons for refusing to work extra hours in view of his agreed reduced hours but raise that a pragmatic approach had been required for this project and there was a view that he was doing things outside the scope necessary on the project. This was a view that others had also taken in respect to the claimant's work on this project and more widely.

36. The claimant raised the QSSE report in the discussions with Mr Wilson Following the grievance meeting with Ms Matin on 5 August no further enquiry was made by the claimant until on 10 October when the report was taken offline and closed. The QSSE system noted that the issues raised were being managed by local line management. This was what had happened. When the claimant was advised of this, he emailed the respondent and asked for more feedback as he was of the view that was a lot to be learned from the incident. He was told that the closure statement was kept brief as it wasn't appropriate to have lots of detail online. The regional QSSE Advisor confirmed to him by email that as the incident involved workplace stress and could be quite sensitive in nature, the best approach would be for the claimant to discuss any further feedback with the claimant's QSSE Director, Mr Feltham. The claimant asked for a discussion with Mr Feltham who called him to discuss his concerns.

Stress Risk Assessment

37. On 14 August, Kai Liaw and Lee Knights met with the claimant to undertake a risk assessment as recommended by the Occupational Health Practitioner. They spent some time with the claimant gaining an understanding from him of the matters which caused him stress within the working environment. Information was collated on a whiteboard, photographs of which we have been referred to. From that it is clear that a detailed discussion took place with the claimant to identify matters within the workplace that could impact the claimant's and other colleagues' levels of stress. The discussions could not be completed that day, but it was agreed that the claimant could work from home when he needed to and that the discussions would resume on a later date. A further meeting took place on 2 December when the discussion continued. The process was ongoing and the claimant found the process positive.

38. The Management of Health and Safety at Work Regulations 1999, at Regulation 3, paraphrased, imposes an obligation on an employer to make a suitable and sufficient assessment of risk to health and safety and further that it should record the significant findings.

39. To meet their obligations under those regulations, an employer must take account of the risk to employees of stress related ill health. Schedule 1 contains General Principles of Prevention and specifies the general principles of prevention set out in Article 6(2) of the Council Directive 89/391/EEC) (1), being:

(a) Avoiding risks;

(b) Evaluating the risks which cannot be avoided;

(c) Combatting the risks at source;

(d) Adapting the work to the individual, especially as regards the design of workplaces, the choice of work equipment and the choice of working and production methods, with a view, in particular, to alleviate monotonous work and work at predetermined work rate and reduce their effect on health;

(e) Adapting to technical progress;

(f) Replacing the dangerous by the non dangerous or the less dangerous;

(g) Developing a coherent overall prevention policy which covers technology, organisation of work, working conditions, social relationships and the influence of factors relating to the working environment;

(h) Giving collective protective measures priority over individual protective measures;

(i) Giving appropriate instructions to employees.

Grade 14 and above pay review

40. In April 2019 the claimant was advised that staff at Grade 14 and above would not be receiving a pay increase or bonus that year. The claimant later found out that some staff had received increases and/or bonuses. The respondent had already decided that some staff would receive increases when this announcement was made. What they told the claimant was therefore untrue, but the respondent considered it was in the interests of the business to take that approach. Increases were given to staff for retention purposes or for exceptional performance. Any increases in salary or bonuses for the claimant were governed by the claimant's contract of employment. This provided that a review of salary would take place of 1 April each year but with no guarantee of an increase, and that any bonus was discretionary.

Blame Culture

41. In August 2018 when Mr Wilson was at the Warrington office, he commented that the company had made a £50,000 loss on the project and that 'heads could roll' when he reported it. The claimant says he sensed that there was a blame culture.

42. When working on the H2H project in July 2018, Ms Cowie the project manager was told by the claimant that he could not achieve what was being asked in the time available. She commented that she might be shouted at.

Investigation of Grievance

43. The claimant's grievance was considered by Ms R Matin. Miss Matin had contributed to the company's work on equality, diversity and inclusion, having led the NFC's work together with its approach to mental health and wellbeing. She met with the claimant on 5th August to hear his grievance. She was accompanied by a senior HR advisor. The focus of the claimant's grievance was that he had suffered undue stress at work. He said that the factors which had contributed to his stress were an underlying blame culture and an expectation to work longer hours to complete tasks, conflicts of interest in the CAB project, his feeling of insecurity in his employment, exclusion, unfair treatment, spreading of rumours and obstruction, inadequate project management discipline and tools, a lack of mental health awareness in the business, a lack of communication and failure to learn from experience specifically two projects being the B6 barrel project and the CAB project, and treatment whilst on the H2H project.

44. The claimant sought to achieve changes within the business with more information, transparency and regular feedback. Although notes of the meeting were taken by the HR manager, they were only sent to the claimant on 3 October 2019 who was then give the opportunity to approve them or amend them. The delay was unfortunate but was down to pressures of work. Ms Matin met with Mr Liaw, Mr Oliver and Mr Knights and obtained evidence from Mr Geary in relation to the H2H project and Mr Beatty in respect of the claimant's conflict concern. Ms Matin met with the claimant on 4 November 2019 to provide the grievance outcome and talk through her responses. A Grievance Investigation Report was completed and send to the claimant on 8 November 2019.

45. In her report, Ms Matin provided her views following her investigations upon the events which the claimant said had led to his work-related stress and she partially upheld his grievance. She made recommendations as follows: where secondments could create a potential conflict, the respondent's delivery team structure should be assessed independently from the project; local weekly communication could be provided as well as a monthly brief to ensure regular and consistent updates; a full prejob project briefing would be provided to any individual joining a project part way through; following an individual's return to work from a mental health related absence a stress risk assessment should be conducted prior to an individual starting a new project; where possible line management changes should be restricted within the first year of an individual's return to work from a mental health related absence; the conflict of interest investigation in 2018 would be reopened and the conclusion and feedback should be provided to the claimant from Mr Beatty.

46. As part of the grievance investigation, Ms Matin also provided constructive feedback to the claimant. She found that there was not a blame culture as the claimant had suggested nor an expectation to work longer hours to complete tasks. She recommended but there should be open communication between project managers and senior leaders however the claimant in her view should have raised issues relating to deadlines if he didn't feel able to meet them. She found that the claimant accepted he had a work ethic that had driven him to work longer hours in

the past. Although he felt insecure in relation to his continued employment following a perception that the Whitehaven office had more information about changes then the Warrington office, she found that there was bound to be more conversation in Whitehaven in that it had eight members of staff whereas Warrington had two, but since June 19 the communication had been consistent to both offices. She confirmed that his role as lead CSA engineer within the Warrington office was not in question, that he was a technically excellent engineer and she recommended that the respondent get him involved in the bidding stage of complex design projects encouraging open dialogue with the clients and ultimately him leading the technical delivery.

47. In respect of his concerns that he was an engineer who had been branded as someone who provided gold plated, over engineered solutions, she considered that his reputation had not been damaged, as he had been integrated into the CSA and NFC teams after his stroke to enable him to gain momentum on new projects. Although the claimant was concerned that the costing of projects was not managed at the appropriate level, she felt that the development of junior members of staff in Warrington and encouragement for the better use of project management tools would assist.

48. The recommendations which Miss Matin made proposed steps towards improving the wellbeing in the working environment, but she felt that the claimant's overarching concern was that he wanted the business too seek to prevent mental health issues arising in the first place. Miss Matin considered that the business could not do that nor pretend that it could. It was not in a position to take actions that could resolve all mental health issues and she felt that that was impossible to achieve. Further that although the business cared about people it could never fix the problem altogether. She felt however that the claimant's view that the business should learn from experience to avoid stress impacting other colleagues should be considered and she made the recommendations set out above. The respondent proceeded to take those recommendations forward.

References

49. The respondent has a system called Workday which is used for annual reviews. On 4 December 2019, the claimant met with Mr Liaw to discuss members of the claimant's team. Mr Liaw commented that he had asked for references for those engineers for the purposes of their annual review. The claimant asked whether Mr Liaw had sought references for the claimant too. He confirmed that he had. That worried the claimant, but Mr Liaw did not see a problem as he explained he wanted them as he hadn't worked with him for very long. The claimant was concerned as to who Mr Liaw had approached as he had not at that stage obtained his own references, as Mr Liaw had said not to. This and the fact that they were not noted on the Workday system made the claimant feel uncomfortable and despondent, however he proceeded to obtain his own references which were shared on the system with Mr Liaw.

Grievance appeal

50. The claimant appealed against the grievance outcome by way of letter dated 29th November 2019. He considered that there were shortfalls which left a

number of matters not having been resolved. He listed those in his letter. He also made some factual observations. Mr Bower was appointed to consider the claimant's appeal. He found that the claimant had broadened the discussion and issues and it was difficult for him to get to the nub of what his grievance was. There were therefore additional matters which he felt he needed to consider.

51. An appeal meeting took place with the claimant on 7th January 2020. A representative of HR was also present. Thereafter, Mr Bower interviewed the witnesses relevant to his investigation and reviewed relevant documents. He interviewed Mr Beatty, Mr. Wilson and Ms Martin. Having done so, he met with the claimant again on 14 February 2020 and provided his appeal. He also gave him the outcome letter dated 7th February 2020 containing his report.

52. The report was detailed and each of the matters raised by the claimant including the additional points were dealt with. The issues which the claimant raised which required investigation were: elimination of unnecessary work related stress not being implemented; personal reputational damage of being labelled as gold plated; prolonged exclusion from workstreams; CAB project irregularities; lack of communication with the Warrington office regarding the integration with the Whitehaven office; the nature of the actions taken to remove the claimant from the H2H project; exclusion from the consultation process that followed the MyQSSE report; not providing feedback to staff when a concern is raised; inadequate programming and identification of dependencies on many projects; uncertainty about G14 staff receiving pay rises and bonuses; and bullying in the workplace.

53. The additional concerns which were raised in the meeting on 7th January were that the grievance outcome report did not address whether a blame culture existed or not; a breakdown in relationship was discussed in the grievance outcome report and the claimant was highlighted as not being an effective communicator; that the claimant had not received the final copies of the minutes from the grievance meeting; that he would like the minutes from the grievance investigation meetings and that he would have liked to understand what parts of the outcome reports had been upheld and what had not been upheld.

Grievance appeal outcome

54. Mr Bower conclusions as summarised in his evidence were as follows:

55. Failing to eliminate unnecessary work-related stress: The claimant was aware that the respondent had resources in place to deal with work-related stress but the claimant believed that more should be done to stop stress originating in the first place. He found that the business had several initiatives to support employees and that staff wellbeing was a prime concern within the business. It formed part of the organisation's day to day work including rigorous bidding and governance processes to help identify what would work better. He found that it was not feasible to prevent all work related stress and it was too much out of the business' control to ensure that no stress was ever created. He did not uphold this point of appeal.

56. The personal reputational damage of being labelled as gold plated: the claimant considered that this term was derogatory because it implied that he did more than he should on projects. He believed that the label had hindered his

progress. Mr Bower found that the 'gold plated' label had been applied to the claimant on several occasions and by a variety of people and those people perceived that the claimant over engineered projects. He found that there was no evidence that the label prevented the claimant from being used on projects or led to him being excluded from work. He did however consider that the term was derogatory and affected the claimant's reputation. He therefore upheld this point of appeal and recommended that at the outset of a project the claimant's style should be recognised to ensure that he was suitable for the role.

57. Prolonged exclusion from workstreams: The claimant believed that he had been purposely excluded from certain workstreams. Mr Bower found no evidence to corroborate that allegation. He found that the claimant was not selected for certain workstreams, but the reasons were legitimate. He considered that the business had applied its judgement when assigning or not assigning work to him as it was entitled to do. Jobs were resourced according to availability and best fit. The claimant had not been maliciously excluded from work and multiple factors had been considered when resourcing. This point of appeal was not upheld.

58. CAB project irregularities : The claimant's suggested that there may have been inside intelligence between the business and its client when pricing the CAB job and that some money may not have been invoiced. Mr Bower found no evidence to support his claim. The project had undergone a conflict of interest investigation. It found financial and business mistakes but no evidence of corruption. The business had made a loss on the project. Mr Bowers did not uphold this point of appeal but told the claimant that if he had any further information, he should raise it as a matter of urgency.

59. Lack of communication with the Warrington office regarding its integration with the Whitehaven (Westlakes) office: The claimant said the lack of communication with him personally caused him stress and made him feel insecure. Mr Bower found that the communication of the restructure was not handled well and employees were left uninformed about the actions being taken. However, the lack of communication was not isolated to the claimant or the Whitehaven office. It was across the board. He did not uphold this point of appeal.

60. The nature of the actions taken to remove the claimant from the H2H project: the claimant was of the view that it had been inappropriate to remove him from the project when he was recovering from a serious illness. Mr Bower found that his phased return did not permit him to complete the work in the time available. Someone else was assigned who was available. Mr Bower found that the decision was justified and had the business not replaced the claimant it would have jeopardise the claimant's wellbeing and the project. Mr Bower did not uphold this point of appeal however he recognised that the business should have given more thought to the project on which the claimant was placed during his phased return.

61. Exclusions from the consultation process that followed the claimants MyQSSE report: The claimant had raised a report regarding work related stress that had been caused by the H2H project. An instruction was made by Mr Geary to close off the incident and the claimant felt that he wasn't adequately consulted about the decision to do that. Mr Bower found that the investigation showed there was a lapse in communication with the claimant regarding the incident raised. The

report was closed off as each incident is hosted online in a public forum and the claimant's report contained sensitive and personal information, so it was closed off and taken offline. Mr Bower found however that the claimant should have been told that the matter would be investigated offline. This point of appeal was therefore upheld.

62. Providing feedback to staff when a concern is raised. This element of the appeal was intrinsically linked to the previous issue raised and Mr Bower again upheld this point of appeal. He found that this had contributed to the stress that the claimant had been experiencing in the workplace.

63. Inadequate programming and identification of dependencies on many projects: the claimant raised concerns about the standard and quality of project managers and project management practices in the NFC division. He said that programmes and schedules were not in place and that fundamental project management tools were not being utilised. As part of these investigations Mr Bower was satisfied that there was a strong team of competent project managers in this part of the respondent's business. As the claimant was not privy to all project management conversations, he found that he was unable to have a full and holistic view of the project management capabilities and processes within the organisation. He accepted that issues did arise, and some projects might not always go to plan, however he found that the standard of project management in the respondent was high. He therefore did not uphold this element of the appeal however he acknowledged that improvements could always be made there should be a constant attempt to increase the project management capabilities in the respondent.

64. Lack of certainty about G14 receiving pay rises and bonuses: The claimant said he had been misinformed about the provision of pay rises and bonuses for grade 14 staff in 2019. Mr Bower found that a decision had been made by the MD of Nuclear and Power, Mr Ball that grade 14 staff and above would not receive pay rises that year. Latterly some were made to retain staff. He found the claimant had not been misinformed. He did not uphold this point of appeal.

65. Bullying in the workplace the claimant said that senior managers had intentionally and subconsciously subjected him to bullying: the claimant believed that each of the issues raised in his appeal constituted bullying. He said that colleagues had not followed his professional advice and that he had been unfairly labelled as gold plated. Mr Bower found that the gold plated label was derogatory and had become widespread. The bullying and harassment policy described bullying as behaviour that was humiliating, degrading or demeaning. Mr Bower felt that was sufficient to uphold that element of the claimant's appeal. He did not find that any other elements of the claimant's appeal satisfied the description of bullying. He referred to the respondent's policy procedures and guidelines.

66. The claimant considered that the grievance outcome report didn't address whether a blame culture existed. Mr Bower's investigation found no evidence to suggest that a blame culture existed. He found that individuals may have blamed themselves if something went wrong, but the business did not systematically seek to attach fault to employees.

67. The grievance report highlighted the claimant as being an ineffective communicator. The report alluded to the claimant's communication contributing to a breakdown in relationships and the claimant wanted to know why. Mr Bower found that Ms Matin had said that the claimant could have generally communicated better. The trial pits project was a specific example. The management team had raised this with the claimant and it was accepted that the comment could be applied across the department. This element of the appeal was not upheld.

68. The claimant hadn't received the final notes of his grievance hearing. Mr Bower found that the notes had been issued to the claimant on 3rd October 2019 and again on 13th January 2020.

69. Mr Bowers' conclusions were that there had been no evidence to support the majority of the claimant's concerns, however there needed to be greater thought when allocating work to him. This would enable the business to use him more effectively. The term gold plated was derogatory, but it was not possible to identify all the people who had used this term. This had caused the claimant stress however it had not led the claimant to being excluded from work or blocked in his career. Mr Bower partially upheld the claimant's appeal.

70. He went on to consider the claimant's desired outcomes and concluded as follows in respect of those matters where it was appropriate to make recommendation: that the NFC management team would be told that the term 'gold plated' was not acceptable and should not be used by anyone in the division concerning the claimant again and that the business should apologise for using it; that the team should be educated on what terms were acceptable when referring to team members to stop it from happening again; to counter any unnecessary stress, that the respondent thoroughly considered the work that it expected the claimant to do when assigning him to a project; that the business needed to communicate better with the claimant and explain the rationale of its decisions to him; that any concerns with the claimant's approach to work on an upcoming project should be explained and discussed with him; that management should have open and transparent conversations with their employees; that line managers should support where managers had to provide difficult advice on a project, however he noted that it is the prerogative of a client to push back and challenge the advice that that the respondent gives; that line managers should support difficult conversations with clients. He advised the claimant that if he needed support to have a difficult conversation, then the line manager or other suitably qualified persons should support him.

Spy in the camp comment

71. Within the report were minutes of meetings which Mr Bower had held and related documentation. Within this was a reference by Mr Oliver saying that the claimant had referred to another engineer as a 'spy in the camp'. The claimant denied saying this.

Career progression

72. In the same minutes, the claimant noted that Mr Oliver had discussed the claimant's promotion concerns and that he commented that currently there were

no Grade 15 single discipline engineers in NFC nor any demand for them. The claimant wished to progress within the business and had not been advised of this position by the respondent, until he saw these minutes.

Resignation and last straw

73. The claimant was disappointed with the majority of the findings, particularly that the respondent did not consider it was feasible to invoke the principle of prevention to seek to eliminate work-related stress. The focus of the claimant's grievance had been seeking to eliminate unnecessary stress to the claimant and culturally in the respondent, further to highlight and prevent an underlying culture of bullying and harassment from senior management, the use of the term gold plated being just one example. He sought to change the respondent's approach and culture by raising his grievances but considered that the outcome of the grievance reflected that the respondent was unwilling to address these issues and he had no confidence that the situation would improve such that the respondent was a fit and proper place for him to work. He did not wait to see if the recommendations made by Mr Bower were implemented. The grievance appeal outcome was the last straw and conscious of his recent ill health, on 17 February 2020 he resigned with immediate effect by way of a short letter to the respondent.

74. Further findings of fact are contained within the Conclusions section below.

The Law

Constructive dismissal

75. To succeed in a claim of unfair dismissal, the claimant has to establish that he was dismissed by the employer. In a case of constructive dismissal, a claimant has to show that he terminated the contract by resigning, whether with or without notice, but in circumstances in which he was entitled to do so by reason of the employer's conduct.

76. The relevant section of the Employment Rights Act 1996 is section 95(1)(c). The leading case is Western Excavating (ECC) Limited v Sharp [1978] ICR 221. In that case the Court of Appeal ruled that for an employer's conduct to give rise to a constructive dismissal, the employee must establish there was a fundamental breach of contract on the part of the employer, that the employer's breach caused the employee to resign and that the employee did not delay too long before resigning, thus affirming the contract and losing the right to claim constructive dismissal.

77. In order to identify a fundamental breach of contract on the part of the employer, it is first necessary to establish what the terms of the contract are. Individual actions by an employer that do not in themselves constitute fundamental breaches of any contractual term may have the cumulative effect of, for example, undermining the trust and confidence inherent in every contract of employment. A course of conduct can therefore cumulatively amount to a fundamental breach of contract entitling an employee to resign and claim constructive dismissal following a 'last straw' incident.

78. The 'last straw' does not by itself need amount to a breach of contract (Lewis v Motorworld Garages Ltd 1986 ICR 157, CA).

79. The existence of the implied term of mutual trust and confidence was approved by the House of Lords in Malik v Bank of Credit and Commerce International SA (in compulsory liquidation) 1997 ICR 606, HL. There, their Lordships confirmed that the duty is that neither party will, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee.

80. If the claimant establishes that he has been dismissed, the provisions of Section 98 Employment Rights Act 1996 come into play. In this matter the respondent does not plead a potentially fair reason within section 98.

Discrimination Arising from Disability

81. Section 15 of the EQA provides that

> *(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.*
>
> *(2) 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.*

82. In Secretary of State for Justice and anor v Dunn EAT 0234/16 the EAT (presided over by Mrs Justice Simler, President) identified the following four elements that must be made out in order for the claimant to succeed in a S.15 claim:

(1) there must be unfavourable treatment,

(2) there must be something that arises in consequence of the claimant's disability,

(3) the unfavourable treatment must be because of (i.e. caused by) the something that arises in consequence of the disability, and

(4) the alleged discriminator cannot show that the unfavourable treatment is a proportionate means of achieving a legitimate aim.

83. If the employer can establish that it was unaware and could not reasonably have been expected to know that the claimant was disabled, the claim cannot succeed.

Duty to make reasonable adjustments

84. By section 20 of Equality Act 2010 the duty to make adjustments comprises three requirements.

85. The first requirement, by section 20(3), incorporating the relevant provisions of Schedule 8, is a requirement, where a provision, criterion or practice of the employer's puts a disabled person at a substantial disadvantage in relation to the employer's employment in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

86. A disadvantage is substantial if it is more than minor or trivial: section 212(1) Equality Act 2010.

87. Paragraph 6.28 of the EHRC *Code* lists some of the factors which might be taken into account when deciding what is a reasonable step for an employer to have to take:

(1) Whether taking any particular steps would be effective in preventing the substantial disadvantage;

(2) The practicability of the step;

(3) The financial and other costs of making the adjustment and the extent of any disruption caused;

(4) The extent of the employer's financial and other resources;

(5) The availability to the employer of financial or other assistance to help make an adjustment (such as advice through Access to Work); and

(6) the type and size of employer.

88. Claimants bringing complaints of failure to make adjustments must prove sufficient facts from which the Tribunal could infer not just that there was a duty to make adjustments, but also that the duty has been breached. By the time the case is heard before a Tribunal, there must be some indication as to what adjustments it is alleged should have been made.

Harassment

89. Section 40(1)(a) prohibits harassment of an employee. The definition of harassment appears in section 26, for which disability is a relevant protected characteristic, and so far as material reads as follows:

(1) A person (A) harasses another (B) if -

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of:

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

(4) In deciding whether conduct has the effect referred to sub-section (1)(b), each of the following must be taken into account -

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect.

90. Chapter 7 of the EHRC Code deals with harassment.

Burden of proof

91. Section 136 of Equality Act 2010 applies to any proceedings relating to a contravention of Equality Act. Section 136(2) and (3) provide that if there are facts from which the Tribunal could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the Tribunal must hold that the contravention occurred, unless A shows that A did not contravene the provision.

92. We are reminded by the Supreme Court in Hewage v Grampian Health Board [2012] UKSC 37 not to make too much of the burden of proof provisions. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the Tribunal is in a position to make positive findings on the evidence one way or the other.

Conclusions and Further findings of fact

Constructive Unfair Dismissal

93. The claimant relies upon an express term of his contract (clause 22) relating to maintaining a positive work environment; and in addition the implied terms of mutual trust and confidence, to take reasonable care of the claimant's health and safety and to protect him from being bullied or harassed. The latter two in any event also being part of the implied term of mutual trust and confidence. Essentially the claimant relies upon all of the factual allegations he made in his grievance appeal as leading to a situation in February 2020 when he felt he had no option but to resign. He relies upon the rejection of his grievance appeal as the last straw. These allegations are set out in bold below.

94. In considering each of these terms, we must consider firstly whether the claimant has shown that the respondent did the things that he alleges which he says caused him to resign. The claimant must show that these things happened on the balance of probabilities.

95. In the case of the implied term of mutual trust and confidence, we must go on to consider whether the respondent had reasonable or proper cause for its actions and if not whether individually or cumulatively the respondent's conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between the claimant and itself.

96. In each case we must also consider whether any breach caused the claimant to resign and whether he delayed such that he affirmed the contact.

Express Term: clause 22 of his contract

97. Clause 22 is an aspiration for the respondent and its employees to live up to. It does not impose any contractual obligation other than expressing the nature of the environment it wishes its employee to create for each other. The claimant has not shown that the respondent has breached this term. To do so, he would need to demonstrate that the respondent did not have that desire.

Implied Terms: Mutual Trust and confidence

Causing the claimant a prolonged period of work-related stress

98. Although the claimant refers in his claim to a number of issues causing him a prolonged period of stress, the focus within the evidence and the claimant's (and respondent's) submissions was the claimant's workload and the number of hours that the claimant says he was expected to work. Our findings upon the other issues are below.

99. We do not find that the claimant had an excessive workload. Nor do we find that the claimant was expected to work an onerous number of hours. It was the claimant's way of working which caused him to need to work more hours than the respondent expected of him. He produced detailed designs for engineering problems over a number of different projects that were often more than the respondent or its client expected or wanted. This involved him in more work than was required. He did not do this because he was under any pressure from the respondent to work more hours or because it gave him a workload that was unachievable. The claimant was a senior manager, responsible for a team of people. He put himself under pressure. It was his decision to seek to record all of his 40 hours per week as productive. There was the facility to record non productive hours, and as someone who led a team, it was expected that this be used for his administrative functions. There was no questioning or suggestion from the claimant's line managers that he was not recording enough hours. His target was a team target. He had other responsibilities and the respondent understood this. The only comments about hours from the respondent was from Mr Knights during a PDR and on other occasions that he shouldn't be working as many hours and should cut them back. Although we heard from two of the claimant's former colleagues, their evidence was of limited relevance and assistance to us. Mr Elsdon had performance issues which was a different position to that of the claimant and neither had worked upon the projects which were relevant to these

claims. We preferred the evidence of the respondent's witnesses on the productivity issues.

100. It was not until the claimant returned to work in July 2019 that he raised any concerns about his workload or the stress he was suffering. It was only following his stroke that the claimant recognised that stress had been a factor in his ill health and by raising his grievance he sought to persuade the respondent that more should have been done and should be done in the future to prevent unnecessary stress arising. The claimant has not proved that the respondent caused him a prolonged period of work related stress through an excessive workload or by way of the other reasons he relies upon.

Excluding the claimant from different workstreams for a prolonged period

101. There is no evidence that the claimant was excluded from workstreams over a prolonged period. The claimant was not short of work to do, though he may have had concerns whether he had access to more productive work. Jobs were allocated according to a number of factors, including availability and best fit. Although he was not selected for certain projects, that is different from being excluded and it was the respondent's responsibility to ensure that work was given to the engineer who in their view was most appropriate for the project. The claimant's design solutions were thorough and for the projects where he says he was excluded, it considered that his solutions were not appropriate. That was their judgment to apply and their decision to make.

Treating the claimant unfairly

102. There is no evidence to support this. It is a very wide allegation, and essentially comprises the other more specific allegations.

Bullying the claimant

103. The claimant relied upon a number of matters amounting to bullying, essentially being each of the issues set out as reasons for his resignation in the list of issues. These were set out in his grievance and were fully investigated by Ms Matin and Mr Bower. Other than the finding by Mr Bower that the use of the phrase 'gold plated' was a derogatory comment as it fell within the definition of bullying in the respondent's policies, he did not find any other actions to amount to bullying of the claimant. We concur with Ms Matin's and Mr Bower's conclusions that none of these matters amounted to bullying.

104. In respect of the "gold plated" comment, viewed objectively, we do not consider that the comment being attached to the claimant by colleagues was calculated or likely to destroy or seriously damage trust and confidence within the employment relationship. As such, individually, it does not amount to a fundamental breach of contract. It was a phrase used to describe the thorough and detailed way in which the claimant worked. It may have damaged his reputation in that those who didn't want that level of thoroughness on their projects may have decided his approach wasn't right for them and not chosen him to work with. Others however may have needed the claimant's methodical and detailed approach. We do not consider that this comment inappropriately resulted in the claimant not being

given work. As we have said the claimant had plenty of work to do, indeed he complains that his workload was excessive. Mr Bower recommended corrective actions including ensuring that it be made clear to the wider Nuclear Fuel Cycle Management team that the term 'gold plated' was not acceptable and should not be used in relation to the claimant in the future; further that it should provide an apology. The claimant resigned before that recommendation was actioned. We further find that there is no breach of the implied term to protect the claimant from being bullied and harassed which could be described as a fundamental breach.

Unfairly appointing a new Lead Civil and Structural Engineer for the Integrated Nuclear Fuel Cycle

105. It was never the intention of the respondent to open this role up for competition. When the reorganisation of the Warrington and Whitehaven offices was being considered, the respondent always had in mind appointing Mr Liaw as the lead. There was no obligation upon them to open it up for others, including the claimant, to apply. They were entitled to appoint someone directly to that position which they did. The only relevance of the claimant's absence following his stroke, was that they did not wish to communicate the changes to him whilst he was recovering from a serious illness. He was advised of the change when he returned and that it did not result in a change to his own role. Although the claimant has not indicated that it was role he would have wanted to do, even if he had not been absent, he would not have been appointed. Mr Liaw was not appointed unfairly and the claimant has not proved this allegation.

Continually failing to apply the regulatory principles of prevention with regards to unnecessary health and safety risks arising from work-related stress

106. The regulatory principles of prevention are set out above. They are general principles which all types of employer are obliged to apply. They are therefore by their very nature wide ranging and not precisely tailored to the claimant's employment. That would be done by way of the risk assessment which the respondent had commenced with the claimant when he returned to work after his stroke. Most work has a level of stress. That level can vary throughout employment. That happened in the claimant's case. Working on projects, deadlines or difficult and tricky problems led to increased stress. Ms Matin and Mr Bower generally found that the respondent did what was reasonable to prevent excessive stress to the claimant. The Tribunal agrees with that conclusion and finds that the claimant has not proved this allegation.

107. In his claim before us, the claimant said his focus was upon the need to prevent unnecessary excessive stress as opposed to eliminate all work related stress. Ms Matin found that the outcome that the claimant sought was too big an issue to be resolved in his grievance and focused upon the claimant's specific complaints. Mr Bower understood the claimant to seeking removal of work related stress more generally which they did not consider was feasible. They both sought to understand the basis of the claimant's views upon this during the grievance process, but the examples he gave of what he considered had caused unnecessary stress to him, they found the majority not to have been the fault of the respondent. Those that they did, they made recommendations to reduce the

risk arising in the future. The claimant's views on what amounted to unnecessary stress were by reference to his own experiences and the very wide ranging Principles of Prevention. Mr Bower commented that he found it difficult to get to the nub of what the claimant's grievance was as much of his concerns didn't seem to arise from the original grievance. There were few other practical suggestions that the claimant was making. The claimant did put forward the suggestion that the respondent should ensure projects were planned appropriately and where possible involve the person doing the work at an early stage. Mr Bower concluded that projects were planned appropriately, but Ms Matin and Mr Bower both made recommendations for areas of improvement, which they considered addressed some of the claimant's concerns. We find that the claimant has not shown that the respondent failed to apply the regulatory principles during his employment.

Damaging the claimant's reputation by labelling him as 'gold-plated'

108. Our findings in respect of this point are set out above. We accept that the term "gold-plated" was taken by his colleagues as a critical comment of him, even though it could have been both a strength and a weakness. It was critical of his design style and overengineering of projects. It made people question what jobs to use him on. We accept that the claimant was offended by it and it did cause him some reputational damage, but it was sometime before he discovered it was being used. Mr Bower recommended that all managers and colleagues were instructed not to use it in the future and that the respondent should apologise to the claimant. The claimant did not inappropriately lose any work as a result. There was plenty of work and indeed he says he was having to work excess hours to cover it. The claimant took it personally, but that comment or the respondent's response to it wasn't sufficient to destroy or seriously damage trust and confidence within the employment relationship.

Re-wording and narrowing of the scope of the claimant's grievance complaint that he was made to feel insecure about his continued employment

109. We do not accept that the respondent reworded and narrowed the scope of the claimant's grievance. The claimant's grievance covered a number of issues and Ms Matin and Mr Bower met with the claimant in order to understand his grievances and how he believed they could be resolved. Ms Matin understood the claimant's complaint concerning his insecurity related to the communication issues concerning the reorganisation of the Westlakes and Warrington offices. We were impressed with Ms Matin's evidence and her clear attempts to seek to understand the claimant's concerns and how they might be resolved. Even if Ms Matin's moved the focus of the claimant's grievance to the communications relating to the reorganisation, her approach was a reasonable one, as was Mr Bower's when faced with a detailed grievance such as this. It was not done to undermine or misinterpret the claimant's concerns and both has reasonable cause for taking the approach that they did. In any event their conduct was not such that it was likely to destroy or seriously damage trust and confidence.

Unfairly distributing salary rises and bonus rewards

110. The claimant's allegation was that there was an unfair distribution of salary rises and bonuses. The question of how people are paid is one which is a matter for the business. There was no contractual entitlement to a pay increase. The claimant's case was that he was treated unfairly in that he did not get an increase whilst others at his grade did. Those that did were graded as exceptional performers or were paid more in order to retain them. The claimant was graded at his PDP as 'fully met expectations' not 'exceptional'. The claimant has not shown that there was any unfairness in the distribution of increases or bonuses.

111. During the course of the evidence the respondent's witnesses gave evidence that they had been economical with the truth at the time that they spoke to the claimant, in that it was accepted that they had told the claimant there wasn't going to be a pay rise for Grade 14, even though it was intended to give some staff increases or bonuses. It was surprising that an organisation the size of the respondent sought to justify telling untruths to employees. The claimant became aware that others had received pay rises in February 2019. Although the claimant felt he had been treated unfairly, this issue did not concern him at that time to the extent that he considered the employment relationship had broken down. We do not find that it played any part in his decision, a year later to resign. Any potential breach was in any event affirmed by that delay.

Failing to recognise that bullying has a deep underlying culture that cannot be easily resolved

112. The claimant has not shown that the respondent has failed to recognise that bullying is a cultural problem in its business, nor has he shown that bullying is an issue within the organisation. The respondent has mandatory training courses for its staff on their Code of Conduct which includes sessions on bullying and harassment, which all must attend.

Allowing a culture of blame

113. We do not accept that there was a culture of blame within the respondent. The evidence does not support that it to be the case. The claimant seeks to rely upon a couple of throw away comments made by managers when under particular pressure on a project. The comments were not directed at him. The claimant himself was never warned, formally or otherwise about his performance or not working or recording enough hours. In contrast his performance was praised and he always had good PDR outcomes. Although the CAB project had issues and the claimant's approach was not what the client wanted and the contractor Boulting no longer wanted him to work on that project, that was not the respondent's view but that of a client over which they had no control.

Senior managers supporting a long-standing covert campaign to exclude the claimant from Sellafield Workstreams.

114. The claimant has not shown this to be true. Although the claimant's appropriateness for the work at Sellafield was subject to the same considerations as with other projects, he has not shown that he was excluded from workstreams or that there was any campaign, covert or otherwise, by managers to exclude him. There is a difference between not being selected and being excluded.

A senior manager wrongly attributing a quote to the claimant

115. We accept that what was reflected within the minutes of that meeting was not the phrase used by the claimant. However, the sentiment accords with the claimant's concerns at the time when he reported the potential conflict and we find that he did make some comment about this which was reflected in the minutes. The fact that the words were not the exact words used was not likely to destroy or seriously damage trust and confidence.

Failing to complete a work stress risk assessment as recommended by occupational health

116. The risk assessment was ongoing and as it was not complete, it was not recorded in a formal manner. We find that the respondent did take it seriously, and indeed held two lengthy meetings with the claimant to discuss the issues which caused stress and ways of alleviating stress. The claimant's managers were working with him to understand how the claimant and colleagues could be protected and ensure the risks were assessed and taken into account. Their approach was positive and interactive, and led to further meetings being required. As such it wasn't formally recorded on a risk assessment form, but we are satisfied that there was an assessment in the process of being carried out. It was far more than simply asking an employee to complete a stress questionnaire which is often the approach of employers to such a request from Occupational Health. This allegation is not proved.

Causing the claimant unnecessary and excessive stress on the H2H project

117. It was unfortunate that the project which the claimant returned to following the absence because of his stroke, was a project which had time pressures. There was poor communication with the claimant, but the respondent was subject to the client's demands and time requirements. The claimant's design proposal could not be achieved in the hours available to him. He expressed that view. The respondent therefore took him off the project and replaced him with an engineer who was able to achieve the client's time scales with a solution which was acceptable to them. We note that the decision maker had no knowledge of the claimant being on a phased return. That was because of poor communication between the team, as others were aware, including the claimant's line manager, but that does not alter the position. Ultimately, although the claimant was caused stress by being placed on the project so soon after his return, when he raised that he couldn't do what was necessary in the timescales available he was taken off the project. He was not caused unnecessary and excessive stress. The pressures were therefore removed.

118. There was reasonable and proper cause for the respondent's approach. There is no fundamental breach**.**

Failing to manage or inadequately managing the claimant's Quality Safety Security and Environment ('MyQSSE') report (Reference INCREP0009735) about work-related stress

119. It was accepted that the claimant was not kept informed that his complaint about work related stress on the H2H project reported in his MyQSSE report was being looked into offline because of the personal nature of the subject matter. He had been spoken to immediately upon receipt of the report by Mr Wilson and taken off the project that he reported what causing him stress. The issue had been dealt with at local line management level. Nothing was recorded on the QSSE system in view of the personal nature of the issue. It was some months after he lodged the report and had initial feedback that he contacted the respondent and that was upon receiving the alert that the report had been closed. Other than his initial enquiries in July and early August 2019, the claimant did not follow this up to ask what had happened to his report. We consider that this was because it had been dealt with. The respondent had reasonable cause for taking it offline. Their failure to communicate that to the claimant was unfortunately but not so serious as to destroy or seriously damage the employment relationship.

Detrimental and retrograde effects

120. This as we understand this allegation it relates to the impact of the restructure on the claimant. This was a commercial decision and one which the respondent was entitled to take. It does not amount to a fundamental breach.

Placing a block on the claimant's prospects for development and promotion

121. The claimant has not shown that that there was any blocking of his prospects for development and promotion. There were no Grade 15 roles for engineers with his qualifications. That is a fact and does not amount to a blocking of his development, even if that was not known to him.

Failing to disclose an unauthorised and targeted third-party reference

122. The respondent has an internal system for requesting comments for their PDRs. Mr Liaw didn't use that system when he carried out his first round of appraisals of the claimant and others. He was unfamiliar with the system, having recently been appointed to that role and didn't see any particular issue in asking for references from others in different offices and outside his team when he worked in different offices and on different projects. He did not seek to hide this from the claimant and volunteered the information when the claimant asked. There was no underlying reason other than to obtain feedback for the purposes of an appraisal. This allegation is not proved.

Failing to implement actions that were agreed during the grievance process

123. We accept the respondent's arguments that the actions had been implemented so far as they were able to be progressed. Ms Matin had raised the need to prevent unnecessary stress and recommended that at the start of a project the respondent should assess the structure and team against the project. This was being done. She also recommended open communication and moderation of working hours by the project manager. This was done on the H2H project and the concerns the claimant had about being unable to complete the project within the reduced hours he had available, resulted in his being taken off the project. The claimant has not shown that the respondent failed to implement the

recommendations. Their implementation was ongoing and the first steps had been taken. This allegation is not proved.

Failing to process the claimant's concerns about a conflict of interest

124. When the claimant raised concerns about Mr Hallett being present at a meeting, the project director asked Mr Hallett not to attend. That was acted upon immediately. There was however a considerable delay in the claimant's written concerns about a potential conflict of interest in the role of Mike Hallett being investigated. Mr Beatty's misunderstanding was unfortunate, but we accept his explanation. We note that the claimant did not follow up his report. If this issue was of such concern to him that he considers the failure to process it was a fundamental breach, he would have followed it up with Mr Beatty and asked what had happened to his report. He didn't do that. When Mr Beatty's mistake was discovered as part of his grievance, the matter was looked into and the respondent was satisfied that there was no conflict in the situation brought to their attention by the claimant but amended their guidance for any future similar situations.

125. We do not consider that Mr Beatty's failures were likely to destroy or seriously damage trust and confidence.

The content of the grievance appeal investigation report and appendices (the last straw)

126. This appears to be a complaint about failing to deal properly with the grievance appeal investigation. We do not accept that the investigation was handled in anyway other than a thorough investigation. In respect of implementing any outcomes recommended by Mr Bower, there was no time to implement them as the claimant resigned very shortly afterwards. This aspect of the allegation is not proved. More generally it was unrealistic for the claimant to expect that all unnecessary workplace stress could be eliminated. This appears to be what he wanted to achieve by way of his grievance. We deal with the grievance outcome as the last straw below.

Breach of the term implied by Parts 3, 4 and Schedule 1 of The Management of Health and Safety at Work Regulations 1999 to apply the principles of prevention with regards to risk assessment and health and safety at work

127. Our findings in respect of Regulations 3, (risk assessment) 4 and Schedule 1 (general principles of prevention) are set out above. We find that the claimant has not shown that there has been a breach of those regulations**.**

Failing to learn from inadequate planning and setting up of previous projects (see CAB project – Learning from Experience Minutes);

128. We accept the respondent's arguments that this was an operational issue. The claimant has not proved these allegations. Ms Matin in her grievance outcome provided the Learning From Experience reports in respect of the B6 Barrel project and the CAB project demonstrating that issues learned were being recorded and shared.

Failing to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures 2015 by:

(1) its presentation of its draft grievance report (dealing with issues fairly),

(2) its grievance conclusions and issuing its final report (unreasonable delay), and
(3) failing to collect evidence from the claimant before concluding the grievance appeal (dealing with issues fairly).

129. The claimant alleges that the respondent had failed to comply with the ACAS Code of practice in that it states that it is important to deal with issues fairly and without delay. The claimant's complaints relate to unreasonable delay and failing to collect evidence from the claimant. We accept that Ms Mattin carried out a thorough investigation. Her oral evidence was clear and she carried out reasonable investigation to the best of her ability. There were certain administration issues in that there was a delay in sending the notes of the first investigatory meeting with the claimant for two months, and there were no notes produced for the meeting on 4 November when the claimant was provided with the grievance outcome, but an updated outcome report itself was provided to the claimant following the meeting. None of these impacted upon the fairness of the process and as such we find did not amount to a failure to comply with the code. Although it may have added to the claimant's concerns it was not sufficiently serious to be likely to destroy or seriously damage trust and confidence.

Data Protection Act 2018 and or the General Data Protection Regulation principles to only process authorised information and to provide access to personal information held on record

130. The claimant has not proved that the respondent breached the Data Protection Act 2018 or Regulations when seeking references for the claimant. He says that permission was not requested of him. Our findings about the requests made by Mr Liaw are set out above. The claimant's contract of employment provided that:

> "in order to keep and maintain accurate records relating to your employment, it will be necessary for the company to process and store personal data and sensitive data relating to you".

131. He suggests that the requests which Mr Liaw made was outside that authority. He has not shown to us why obtaining of a reference for the purpose of an appraisal was not permitted by that clause. In any event even if it were outside, we do not consider that Mr Liaw's actions and reasons for requesting those references amounted to a fundamental breach. He had proper cause for his actions in that he wanted to gather views upon the claimant's performance for the purpose of his appraisal.

Did the conduct taken cumulatively amount to a fundamental breach of the term of trust and confidence?

132. The claimant relies upon a large number of allegations of behaviour by the respondent. We have considered each of these and found that in respect of many, we did not agree with the claimant's view or interpretation. Of those that he has shown happened, we have for the reasons set out, found that either the respondent had reasonable and proper cause for their actions or that the conduct was not calculated or likely to destroy or seriously damage the term of trust and confidence.

133. The claimant's case is put on the basis that the outcome to his grievance was the last straw, when he realised that the respondent was not willing to change its behaviours to prevent the claimant and others suffering unnecessary work-related stress in the future. The grievance outcome in itself need not amount to a breach of contract.

134. The test in a claim of constructive dismissal is a difficult one. The employer's conduct must be so bad that it has no reasonable and proper cause for its conduct and it must be sufficiently serious so as to be calculated or likely to destroy or seriously damage the trust and confidence between them. That is a high hurdle to achieve and one which we do not consider in this case the claimant has met. Whilst absent following his stroke, the claimant became aware of the impact of stress upon his and others health. He concluded that his work environment and his response to it had contributed to his stroke and sought to do what he could to change what he saw as an environment where the pressures of long working hours, excessive workload, poor planning and a blame culture was causing unnecessary stresses.

135. Although that was his view of the respondent's workplace, it was not one which the respondent recognised and not one which the Tribunal has found. Some of the issues which caused the claimant to have that view were because of his own approach to his work, and his own insecurities. They were not borne out by the evidence. The claimant was a valued member of the organisation and his team. Pressures are inherent in a consulting business, and the respondent although recognising that they could not eliminate all work related stress, whether unnecessary or not, were receptive to the claimant's concerns and both Ms Matin and Mr Bower made recommendations to take forward some of the issues raised by the claimant. Although upon receiving the grievance outcome the claimant felt that he had no option but to resign he did not wait to see if Mr Bower's recommendations would be implemented. We find that the decision to resign was not in response to a fundamental breach by the respondent.

136. We find that the claimant has not shown that individually nor cumulatively the conduct of the respondent met the test in Malik (above). There was no fundamental breach of contract.

137. Further we do not consider that the respondent is in breach of the implied terms that it will take reasonable care of the claimant's health and safety or to protect him from being bullied and harassed. The claimant has been unable to

establish that the respondent has failed to do these things. The burden is that of the claimant show that there has been a breach and he has not done so.

138. In view of our findings, it is not necessary for us to consider the remaining parts to the test in Western Excavating (ECC) Limited v Sharp [1978] ICR 221.

139. The claimant was not dismissed. The claim of constructive unfair dismissal fails and is dismissed.

Disability

140. The respondent has conceded that from 15 April 2019 the claimant was a disabled person by reason of his stroke. Although the claimant during the hearing sought to widen this to mental health issues, this was not the pleaded case.

Direct Disability Discrimination

141. In a claim of direct discrimination, the claimant must show on the balance of probabilities that the treatment of him occurred. If he is able to show that, he must then show facts from which we could conclude that because of his disability, he has been treated less favorably than, in this case a hypothetical comparator, being a non disabled person in materially the same circumstances. If he is able to show that, then the burden moves to the respondent to show that any less favorable treatment is not because of the claimant's disability.

142. The claimant relies upon a number of allegations of less favourable treatment as set out in the List of Issues. The claimant has been unable to show that a number of the allegations occurred. These are:

> ***Failing to apply the principles of prevention with regards to risk assessment and health and safety at work contained in Parts 3, 4 and Schedule 1 of The Management of Health and Safety at Work Regulations 1999.***
>
> ***Failing to complete a work stress risk assessment as recommended by occupational health.***
>
> ***Causing the claimant unnecessary and excessive stress on the H2H project.***
>
> ***Failing to disclose an unauthorised and targeted third-party reference.***
>
> ***Failing to implement actions that were agreed during the grievance process.***
>
> ***Appointing a new Lead Civil and Structural Engineer for the Integrated Nuclear Fuel Cycle.***

143. As such those allegations cannot therefore amount to less favourable treatment and are dismissed. Of those that remain our findings are set out below:

Failing to manage or inadequately managing the claimant's Quality Safety Security and Environment ('MyQSSE') report (Reference INCREP0009735) about work-related stress.

144. There was poor communication with the claimant concerning this report. The claimant has however been unable to show any facts from which we could conclude that his treatment was less favourable than a comparator, or that it could be because of his stroke. The claimant has been unable to show anything which would suggest such a connection. The issue related to work related stress. The respondent had an explanation for its decision to take the report offline, being the personal nature of the report which was not because of the claimant's stroke. This claim fails.

145. All complaints of direct discrimination claim fail and are dismissed.

Discrimination arising from disability

Knowledge

146. The first matter we must consider is whether the respondent knew or could reasonably have been expected to know that the claimant had a disability and if so, from what date. We find that the respondent could reasonably have been expected to know that the claimant was a disabled person from 18 April 2019 when they were informed that the claimant had suffered a stroke. A stroke is a serious condition which as a matter of general knowledge requires ongoing blood thinning medication, primarily to prevent reoccurrence. If it hadn't realised this, it would have been reasonable for them to make enquiries. The claimant's medication is confirmed in the Occupation Health report of 24 June 2019 but if the respondent had addressed its mind to it, we consider that they ought to have known from the date that they were advised of the claimant's stroke that he would have to take ongoing medication to reduce the risk of a further stroke such that he would be a disabled person within section 6 of the Equality Act 2010.

147. In a claim of discrimination arising from disability, the claimant is required to show that the unfavourable treatment that he complains about occurred. We are only required to consider whether there has been discrimination arising from disability in respect of those allegations which the claimant has proved. Further the claimant was ordered at early stage of these proceedings to provide further particulars of the 'something arising' as a consequence of his disability in respect of each allegation. These are detailed in the bundle at page 73 onwards. After discussion with Mr Ginniff he confirmed that the claimant relied upon an increased susceptibility to stress as the something which arose in consequence of his disability.

148. The burden of proof is upon the claimant initially to shown facts from which we could conclude that the respondent has treated him unfavourably in the ways he says, because of that increased susceptibility (the 'something' arising as a consequence of his disability). If he can show such facts, then the respondent must show that any such treatment was not because of that. Further the respondent

may seek to objectively justify any treatment and we must consider whether they have a legitimate aim and that it was achieved in a proportionate manner.

149. The claimant has not proved the following allegations of unfavourable treatment occurred and as such the claims in respect of these fail.

> ***Failing to apply the principles of prevention with regards to risk assessment and health and safety at work contained in Parts 3, 4 and Schedule 1 of The Management of Health and Safety at Work Regulations 1999.***
>
> ***Failing to complete a work stress risk assessment as recommended by occupational health.***
>
> ***Causing the claimant unnecessary and excessive stress on the H2H project.***
>
> ***Failing to disclose an unauthorised and targeted third-party reference.***
>
> ***Failing to implement actions that were agreed during the grievance process.***
>
> ***Unfairly appointing a new Lead Civil and Structural Engineer for the Integrated Nuclear Fuel Cycle.***

150. The claimant has shown the following occurred:

> ***Failing to manage or inadequately managing the claimant's Quality Safety Security and Environment ('MyQSSE') report (Reference INCREP0009735) about work-related stress.***

151. The claimant's increased susceptibility to stress arises from his stroke.

152. We must consider whether the claimant has shown that the respondent's failure to manage or adequately manage the report he made, could be because of his increased susceptibility to stress. We do not find that he has shown facts from which we could conclude this. There is no evidence that the respondent's poor management was *because* of any increased susceptibility to stress. It may have had more of an impact upon the claimant because of his susceptibility but we do not find that the failure to manage the report was because of any increase susceptibility.

153. Even if the claimant had discharged his burden, we consider that the respondent would have shown a non discriminatory reason for its decision being that it sought to manage his complaint in a sensitive way that resolved it but maintained his dignity and complied with its data protection principles. This would also have amounted to a legitimate aim and removing the report offline was a proportionate way of achieving that aim. We are also not satisfied that the claimant suffered any unnecessary stress. Mr Bower found that the decision to take it offline should have been communicated to him, but although not advising him that it was taking the report off line was unfortunate but we do not consider

that really had any impact upon him. If it had been anything other than a minor concern, he would have made enquires about what action was being taken, but he didn't.

154. All claims of discrimination arising from disability fail and are dismissed.

Reasonable Adjustments

Knowledge

155. We find that the respondent ought reasonably to have had knowledge of the claimant's disability by 18 April 2019 for the reasons as set out above.

156. In a claim of a failure to make reasonable adjustments, the claimant must show facts from which we could conclude that the respondent has provisions criterion or practices (PCPs) which put him to a substantial disadvantage compared to someone without the claimant's disability. The claimant say that the substantial disadvantage he was put to was that the PCPs aggravated his stress thereby adversely affecting his health. He says that the respondent could reasonably have expected to know this and as such, a duty arose such that it should have put in place steps to avoid that disadvantage. He suggests steps that could have been taken. The respondent disputes that it had some of the PCPs relied upon. It says that the duty did not arise and that it did make adjustments when it would assist the claimant, but that some of the adjustments put forward would not have been reasonable.

Did the Respondent have the following PCPs?

A practice of failing to apply the principles of prevention with regards to risk assessment and health and safety at work contained in Parts 3, 4 and Schedule 1 of The Management of Health and Safety at Work Regulations 1999

157. The claimant's submission focused on the risk assessment in respect of this claim. In view of our factual findings, we do not find that the respondent had this PCP.

Appointing a new Lead Civil and Structural Engineer for the Integrated Nuclear Fuel Cycle because of the claimant's sick leave

158. This PCP is put differently in the claimant's submissions. We have to consider the case as it is pleaded by the claimant. We consider that we must therefore rely upon the PCP as pleaded and set out in the agreed List of Issues. This PCP is focused upon the claimant's particular situation rather than it being a general practice. Although a one off act can amount to a practice, if there is some indication that it would be repeated if a similar circumstance arose in the future, we do not consider that is the position here, nor has that been argued by the claimant. We therefore find that this was not capable of amounting to a PCP.

159. In the alternative, if the PCP was as set out in the claimant's submissions, which says it was a PCP of 'making appointments without considering the fairness

of open competition', this is capable of amounting to a PCP, but the claimant has not shown that that respondent had this PCP or that it put the claimant at a substantial disadvantage in that aggravated the claimant's stress thereby adversely affecting his health. Although it was aware that the claimant had a stroke, it was only when he returned to work and raised with his managers the impact that excessive stress might have upon him, that they could have become aware that the claimant would have been put at a substantial disadvantage by this PCP. It was not something that they would have been expected to know before then. As such any duty only arose at that stage and by then the respondent had already appointed Mr Liaw to the position.

160. This claim fails.

161. ***Failing to complete a work stress risk assessment as recommended by occupational health thereby exposing the claimant to unnecessary and excessive work-related stress (24)***

162. The claimant has not shown that the respondent had this PCP. This claim fails.

Causing unnecessary and excessive stress

163. The claimant has not shown that the respondent had this PCP. This claim fails.

Failing to manage or inadequately managing Quality Safety Security and Environment ('MyQSSE') report (Reference INCREP0009735) about work-related stress

164. This was a PCP of the respondent but we find that the claimant has not shown that it put him at a substantial disadvantage as alleged. The burden is upon the claimant to show that it was a PCP which could have resulted in a substantial disadvantage. The claimant says that it aggravated his stress thereby adversely affecting his health. Although this was a disadvantage, if the claimant had been concerned or if it was causing him anything more than minor or trivial stress, he would have asked about its progress and chased it up, but he didn't. We find that any disadvantage was no more than minor or trivial and as such the duty to make an adjustment did not arise.

165. This claim fails.

Failing to disclose an unauthorised and targeted third-party reference because it was 'business sensitive information

166. The claimant has not shown that the respondent had such a PCP. This claim therefore fails.

Failing to implement actions that were agreed during the grievance process when those changes were necessary to support and protect the claimant's mental health (30)

167. The claimant has not shown that the respondent had such a PCP. This claim therefore fails.

168. The claims of a failure to make reasonable adjustments fail and are dismissed.

Harassment

169. In a claim of harassment, the claimant must firstly show that the allegations he makes occurred. For the reasons already set out, he had not done this. The only allegations he has proved is that the respondent has done is:

Failing to manage or inadequately managing the claimant's Quality Safety Security and Environment ('MyQSSE') report (Reference INCREP0009735) about work-related stress

170. The respondent failed to let the claimant know that it was dealing with his report offline. He alleges that this caused him to feel intimidated in a blame culture. We do not consider that the respondent had the purpose of intimidating the claimant, nor do we consider that it was reasonable for it to have had that effect upon the claimant, even considering his own perceptions and all the other circumstances pertaining at the time. As we have said, although the claimant was not told that the matter was being investigated offline, he knew that he had been spoken to at the time by Mr Wilson and his concerns had been acted upon by being removed from the H2H project. He did not follow up his report until some months after he raised it and then only when prompted. He had no concerns about raising other concerns within the grievance process and we do not accept that he felt intimidated.

171. This claim fails.

Time Issue

172. In view of our findings in respect of the discrimination claims, it is unnecessary for us to make findings as to whether the claims were presented in time and if not whether it would have been just and equitable to extend time.

Breach of Contract

173. ***Whether the respondent breached the claimant's contract of employment by requesting an internal and external reference about the claimant's work in contravention of the UK General Data Protection Regulation and the Data Protection Act 2018***

174. For the reasons set out above, we find that the claimant has not shown that this is a term of his contract nor that the respondent is in breach of this legislation.

175. This claim fails.

Unauthorised deductions from pay

176. This claim is taken to be withdrawn in view of the claimant’s submissions.

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Employment Judge Benson

Date: 1 July 2022

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON

1 July 2022

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