# EMPLOYMENT TRIBUNALS

**Claimant:** Mr J Gough

**Respondent:** Duckworth (Wholesale) Ltd

**Heard at:** Manchester **On:** 16 - 19 July 2018

**Before:** Employment Judge Franey
Mrs A Jarvis
Mr A J Gill

**REPRESENTATION:**

**Claimant:** In person (aided by his son, Mr R Gough)
**Respondent:** Mrs J Ormond, Consultant

# WRITTEN REASONS

## Introduction

1. These are the written reasons for the judgment given orally (with reasons) at the conclusion of the hearing on 19 July 2018, and sent to the parties in writing on 26 July 2018.

2. By a claim form presented on 8 August 2017 the claimant complained of unfair dismissal, disability discrimination and age discrimination arising out of the termination of his employment as a driver with the respondent with effect from 31 March 2017. The details on the claim form itself were very limited, but in a letter of 8 September 2017 he made clear that he had been a disabled person because of a head injury some years earlier, and that he believed the real reason for his dismissal, ostensibly for gross misconduct, was to avoid the costs of continuing to employ him with an adjusted working pattern.

3. By its response form of 27 October 2017 the respondent defended the proceedings. It did not accept that the claimant was a disabled person. In any event it denied any discriminatory treatment and argued that there had been a fair

dismissal for misconduct following three occasions on which, without permission, the claimant had gone home early after finishing his deliveries for the day.

4. The claims were considered and Case Management Orders made at a preliminary hearing on 21 November 2017 by Employment Judge Howard. The claimant was required to serve a consolidated summary of his case and information about his disability. The respondent amended its response.

5. There was a further preliminary hearing before Employment Judge Howard on 17 January 2018 at which the age discrimination complaint was withdrawn and dismissed, and Case Management Orders made to bring the matter to this final hearing.

## Issues

6. The complaints pursued and the issues which arose had been identified in broad terms by Employment Judge Howard at the preliminary hearing in November 2017. At the start of our hearing Mrs Ormond confirmed that the respondent conceded that the claimant was a disabled person at the material time by reason of the effects of his head injury, although the extent of knowledge about this was still in dispute.

7. In addition in his claim form the claimant described himself as "an undiagnosed Asperger". One effect of the claimant's conditions was that verbal communication was more difficult for him than being able to write things down. The Tribunal wanted to ensure that he did not omit any relevant matters in his questioning of the respondent's witnesses. As a consequence we took time during our reading of the witness statements and documents to prepare a more detailed List of Issues, which incorporated a list of the main points derived from the three documents prepared by the claimant which together were taken as his particulars of claim. The List of Issues was provided to the parties at 2.00pm on the first day of the hearing and was agreed the following morning.

8. The agreed List of Issues was as follows:

**Breach of Duty to Make Reasonable Adjustments – sections 20 and 21 Equality Act 2010**

1. **Did the respondent apply a provision criterion or practice ("PCP") between August 2016 and December 2016 of requiring two drivers to undertake the work previously carried out by three?**

2. **If so, did that PCP place the claimant at a substantial disadvantage compared with a person without his disability because the workload required him to work through his break and finish late, resulting in excessive fatigue?**

3. **If so, can the respondent show that it did not know and could not reasonably have been expected to have known**

   **(a) that the claimant had a disability, and**

   **(b) that he was likely to be placed at that disadvantage?**

4. **If not, did the respondent fail in its duty to take such steps as it would have been reasonable to have taken to avoid the disadvantage? The adjustment for**

**which the claimant contends would have been to have reduced his workload so he could have breaks and finish on time.**

**5. If the respondent breached its duty, can the claimant show that it formed part of discriminatory conduct extending over a period ending with his dismissal?**

**Discrimination Arising from Disability – section 15 Equality Act 2010**

**6. Can the respondent show that it did not know and could not reasonably have been expected to have known that the claimant had a disability?**

**7. If not, in dismissing the claimant did the respondent treat him unfavourably because of something arising in consequence of his disability, namely the arrangements about the claimant's working pattern put in place since 2012?**

**Unfair Dismissal Part X Employment Rights Act 1996**

**Reason**

**8. Can the respondent show that the reason or principal reason for dismissing the claimant was a reason relating to his conduct? The claimant argues that this was a pretext and that the real reason was to save money. He relies on the following points:**

**(a) The fuel costs resulting from the van being driven between Burnley and Blackpool;**

**(b) The van was not available on his day off (Mondays);**

**(c) He was not able to work extra unpaid hours;**

**(d) The agreement reached on holidays in December 2016 would cost the company more;**

**(e) He was due to be off work from April 2017 because of a hernia operation, and**

**(f) Two drivers were recruited in December 2016 when only one was needed.**

**Fairness**

**9. Did the respondent genuinely believe the claimant was guilty of misconduct?**

**10. Did the respondent have reasonable grounds for the belief that the claimant was guilty of misconduct?**

**11. Did the respondent carry out such investigation as was reasonable?**

**12. Did the respondent follow a reasonably fair procedure?**

**13. Was the appeal handled in a reasonably fair manner?**

**14. Was the decision to dismiss the claimant within the band of reasonable responses?**

**The claimant relies on the following points as to fairness:**

**(a) Washing the van on 7/3/17 was a work activity and an authorised and established practice.**

**(b)** **He had rung Mr Forster on 17/3/17.**

**(c)** **He used his 60 minute unpaid lunch break on 24/3/17 to collect his daughter.**

**(d)** **There was no attempt to deal with matters informally before proceeding to disciplinary action.**

**(e)** **Mr Forster was not asked about the phone call on 17/3/17 or that he told the claimant to expect an "easy time": his brief written statement of 23/3/17 was simply accepted.**

**(f)** **The routes were planned to end in Burnley so in effect permission to finish early was given.**

**(g)** **There was a delay of over a week before the claimant was asked about 7/3/17 even though the respondent knew of his memory problems.**

**(h)** **Reliance on tracker information alone for disciplinary purposes was unfair given the stated aim of introducing the trackers.**

**(i)** **There was no indication that the meetings on 15/3/17 and 16/3/17 were investigatory meetings.**

**(j)** **Mr Bullough dealt with the disciplinary hearing in a combative, aggressive and unfair manner.**

**(k)** **The minutes kept were inaccurate and not provided to the claimant promptly to agree them.**

**(l)** **The disciplinary invitation letter was not clear.**

**(m)** **The minutes of previous meetings were not provided before the disciplinary hearing.**

**(n)** **The reasons for dismissal were not clarified despite being requested.**

**(o)** **The appeal took too long; different documents were supplied; the telephone records were not obtained and Mr Forster not re-interviewed, and Mr Murphy was not impartial due to prior involvement of ELS in the dismissal process.**

**(p)** **The fact the claimant had been working through his breaks and doing other unpaid work was ignored.**

**(q)** **Credit was not given for his clean disciplinary record and length of service.**

**(r)** **The conduct could not reasonably be regarded as gross misconduct under company rules.**

**(s)** **Other employees used company vehicles for private purposes without accounting for fuel.**

**Remedy**

**15.** **If any of the above claims succeed, what is the appropriate remedy?**

## Evidence

9. The parties had agreed a bundle of documents running to just over 180 pages, and any reference in these reasons to page numbers is a reference to that bundle unless otherwise indicated.

10. We heard from three witnesses in person, each of whom answered questions having confirmed the truth of a written statement. The claimant was the only witness on his side. The respondent called Rod Bullough, who dismissed the claimant, and Kevin Murphy from the employment law consultancy, Employment Law Solutions ("ELS"), who heard the appeal against dismissal.

## Relevant Legal Principles – Liability

Part One: Disability Discrimination Equality Act 2010

11. The complaints of disability discrimination were brought under the Equality Act 2010. Section 39(2)(c) prohibits discrimination against an employee by dismissing him. Section 39(5) applies to an employer the duty to make reasonable adjustments.

12. The Equality Act 2010 provides for a shifting burden of proof. Section 136 so far as material provides as follows:

> **"(2) If there are facts from which the Court could decide in the absence of any other explanation that a person (A) contravened the provision concerned, the Court must hold that the contravention occurred.**
>
> **(3) But subsection (2) does not apply if A shows that A did not contravene the provision."**

The section goes on to make it clear that the reference to the Court includes an Employment Tribunal.

13. Consequently, once all the evidence on both sides has been heard, it is for the claimant to establish that there are facts from which the Tribunal can reasonably conclude that there has been a contravention of the Act. If the claimant has done so, the burden shifts to the respondent to show that there has been no contravention of the relevant provision by, for example, identifying a different reason for the treatment.

14. The time limit for Equality Act claims appears in section 123 as follows:

> **"(1) Proceedings on a complaint within section 120 may not be brought after the end of –**
>
> **(a) the period of three months starting with the date of the act to which the complaint relates, or**
>
> **(b) such other period as the Employment Tribunal thinks just and equitable…**
>
> **(2) …**
>
> **(3) For the purposes of this section –**

**(a) conduct extending over a period is to be treated as done at the end of the period;**

**(b) failure to do something is to be treated as occurring when the person in question decided on it".**

Discrimination arising from disability

15. Section 15 of the Act reads as follows:-

**"(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".**

16. The "knowledge" defence in section 15(2) is addressed in the Equality and Human Rights Commission's Code of Practice on Employment 2011 ("the Code") in paragraphs 5.13 – 5.19. Paragraph 5.18 reads as follows:

"**Therefore, where information about disabled people may come through different channels, employers need to ensure that there is a means – suitably confidential and subject to the disabled person's consent – for bringing that information together to make it easier for the employer to fulfil their duties under the Act."**

17. The proper approach to causation under section 15 was explained by the Employment Appeal Tribunal in paragraph 31 of **Pnaiser v NHS England and Coventry City Council EAT /0137/15** as follows:

**"(a) A Tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.**

**(b) The Tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a section 15 case. The 'something' that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.**

**(c) Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant …...**

**(d) The Tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is "something arising in consequence of B's disability". That expression 'arising in consequence of' could describe a range of causal links …[and] may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be**

> **a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.**
>
> **(e) ….. However, the more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact.**
>
> **(f) This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.**
>
> **(g) …..**
>
> **(h) Moreover, the statutory language of section 15(2) makes clear …. that the knowledge required is of the disability only, and does not extend to a requirement of knowledge that the 'something' leading to the unfavourable treatment is a consequence of the disability. Had this been required the statute would have said so."**

18. In **City of York Council v Grosset [2018] WLR(D) 296** the Court of Appeal confirmed the point made in paragraph (h) in the above extract from **Pnaiser**: there is no requirement in section 15(1)(a) that the alleged discriminator be aware that the "something" arises in consequence of the disability. That is an objective test.

Reasonable Adjustments

19. The duty to make reasonable adjustments is found in Section 20, Section 21 and Schedule 8.

20. The duty does not apply if the employer did not know, and could not reasonably be expected to know that the employee had a disability and was likely to be placed at the disadvantage in question by the PCP (Schedule 8 paragraph 20). In that sense it goes beyond the section 15 knowledge defence. The Code makes the same point about keeping information (see paragraph 16 above) in paragraph 6.21.

21. The duty imposes three requirements upon an employer. Relevant in this case was the first requirement in Section 20(3):-

> **"the first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage".**

22. The importance of a Tribunal going through each of the constituent parts of that provision was emphasised by the EAT in **Environment Agency –v- Rowan [2008] ICR 218** and reinforced in **The Royal Bank of Scotland –v- Ashton [2011] ICR 632.**

23. Section 212(1) defines substantial as being "more than minor or trivial".

Part Two: Unfair Dismissal Employment Rights Act 1996

24. The unfair dismissal claim was brought under Part X of the Employment Rights Act 1996.

25. The primary provision is section 98 which, so far as relevant, provides as follows:

> **"(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –**
>
> **(a) the reason (or, if more than one, the principal reason) for the dismissal and**
>
> **(b) that it is either a reason falling within sub-section (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.**
>
> **(2) A reason falls within this sub-section if it … relates to the conduct of the employee …**
>
> **(3) …**
>
> **(4) Where the employer has fulfilled the requirements of sub-section (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –**
>
> **(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and**
>
> **(b) shall be determined in accordance with equity and the substantial merits of the case".**

26. The reason or principal reason for dismissal is derived from considering the factors that operate on the employer's mind so as to cause him to dismiss the employee. In **Abernethy v Mott, Hay and Anderson [1974] ICR 323**, Cairns LJ said, at p. 330 B-C:

> **"A reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee."**

27. If the employer fails to show a potentially fair reason for dismissal (in this case, conduct), dismissal is unfair. If a potentially fair reason is shown, the general test of fairness in section 98(4) must be applied.

28. In a misconduct case the correct approach under section 98(4) was helpfully summarised by Elias LJ in **Turner v East Midlands Trains Limited [2013] ICR 525** in paragraphs 16-22. Conduct dismissals can be analysed using the test which originated in **British Home Stores v Burchell [1980] ICR 303**, a decision of the Employment Appeal Tribunal which was subsequently approved in a number of decisions of the Court of Appeal. The "**Burchell** test" involves a consideration of three aspects of the employer's conduct. Firstly, did the employer carry out an investigation into the matter that was reasonable in the circumstances of the case? Secondly, did the employer believe that the employee was guilty of the misconduct complained of? Thirdly, did the employer have reasonable grounds for that belief? [1]

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[1] Since **Burchell** was decided the burden on the employer to show fairness has been removed by legislation. There is now no burden on either party to prove fairness or unfairness respectively.

29. A fair investigation requires the employer to follow a reasonably fair procedure. By section 207(2) of the Trade Union and Labour Relations (Consolidation) Act 1992 Tribunals must take into account any relevant parts of the ACAS Code of Practice on Disciplinary and Grievance Procedures 2015 ("the ACAS Code").

30. The appeal is to be treated as part and parcel of the dismissal process: **Taylor v OCS Group Ltd [2006] IRLR 613.**

31. If the three parts of the **Burchell** test are met, the Employment Tribunal must then go on to decide whether the decision to dismiss the employee was within the band of reasonable responses, or whether that band fell short of encompassing termination of employment.

32. It is important that in carrying out this exercise the Tribunal must not substitute its own decision for that of the employer. The band of reasonable responses test applies to all aspects of the dismissal process including the procedure adopted and whether the investigation was fair and appropriate: **Sainsburys Supermarkets Ltd v Hitt [2003] IRLR 23.** The focus must be on the fairness of the investigation, dismissal and appeal, and not on whether the employee has suffered an injustice. The Tribunal must not substitute its own decision for that of the employer but instead ask whether the employer's actions and decisions fell within that band.

33. In a case where an employer purports to dismiss for a first offence because it is gross misconduct, the Tribunal must decide whether the employer acted reasonably in characterising the misconduct as gross misconduct, and also whether it acted reasonably in going on to decide that dismissal was the appropriate punishment. An assumption that gross misconduct must always mean dismissal is not appropriate as there may be mitigating factors: **Britobabapulle v Ealing Hospital NHS Trust [2013] IRLR 854** (paragraph 38).

34. Paragraph 21 of the ACAS Code says that an employee should be told how long a warning remains current. In general terms reliance on an expired warning as part of the decision to dismiss may lead to unfairness: see **Diosynth Ltd v Thomson [2006] IRLR 284** (Court of Session). However, it does not inevitably follow that an employer acting fairly must completely disregard an expired warning. In **Airbus UK Ltd v Webb [2008] ICR 561** the Court of Appeal recognised that when considering mitigating factors in a gross misconduct case an employer could fairly distinguish between those employees with clean records and those with expired warnings for the same type of misconduct. It was fair to dismiss the latter when the former were only warned. The EAT in **Stratford v Autorail VR Ltd EAT 0116/16** in October 2016 reviewed **Diosynth** and **Airbus** and applied the latter in concluding that it was fair for an employer to dismiss for conduct that otherwise merited a final written warning because the employee had a history of previous disciplinary issues (on seventeen occasions), even though no warnings were current at the time of the misconduct.

**Relevant Findings of Fact**

35. This section of our reasons sets out the broad chronology of events. Two important disputes of fact will be resolved in our conclusions section.

Background

36. The claimant was born in January 1957. In 1986 he was injured whilst riding his bicycle and sustained a head injury. The effects of that injury continued over the years that followed, although he did not get any expert medical diagnosis until 2012.

37. The claimant started as a new employee of Duckworths LLP in 2007. The company by which he had been employed had gone into administration. Duckworths LLP purchased the assets and took on some of the employees as new starters. He was working as a delivery driver/warehouse person based at the Burnley warehouse. His contract of employment appeared at pages 91-95. Subsequently his employment transferred to the respondent. For a number of years he worked five days each week, Monday to Friday, doing deliveries from the Burnley warehouse.

38. In late 2011 the claimant began to research his condition on the internet and this led him to approach Dr David Shakespeare, a leading consultant in neurological rehabilitation medicine. He referred the claimant to the consultant clinical neuropsychologist, Dr Laraway, and he produced a detailed report dated 1 May 2012 (pages 161-167). It recorded that the claimant had experienced marked difficulties with persisting fatigue and concentration problems since his head injury in 1986. A number of psychological tests were carried out. The report recorded that the claimant had difficulties with his short-term memory and in sustaining concentration, and felt he had never regained the conversational fluency he had before the injury. The following paragraph appeared at page 162:

> **"However, the main issue appears to be fatigue. Mr Gough is aware of its effect on cognitive efficiency. He is also aware that at times of increased cognitive demand, fatigue becomes more severe. He is reliant on taking regular, short rest periods during the day to ensure he feels alert enough to safely fulfil the requirements of his job role. Unfortunately, these rest periods also mean that he is regularly working longer hours. Home life remains significantly affected by the fatigue, with Mr Gough required to use the majority of his time outside of work to recover. Any tasks or demands over and above his job feel like 'overload'. He is frustrated that he cannot take a more active role within the family and this contributes to periods of low mood."**

39. The tests indicated that in general terms his memory was good or above average, but increased levels of fatigue could then contribute to further lowering in overall cognitive efficiency.

40. The claimant shared parts of this report with his employer and this resulted in an agreement from September 2012 that he would work four days a week only, having Mondays off. This arrangement enabled him to cope with the demands of the work. He was able to get through his deliveries in time within the four working days, but then take three days to recover.

41. The arrangement led to a concern about holidays. The claimant raised this in September and October 2014 (pages 155-157). His point was that because Bank Holidays fell on a Monday when he was not working, he was getting less holiday than his colleagues. The matter was not resolved at that time.

42. In late 2015 the employment of the claimant and others was transferred to the present respondent.

Disciplinary Procedure

43. The respondent's disciplinary procedure appeared at pages 96-97. It said that no disciplinary action would be taken until the matter had been fully investigated. There would be the right to be accompanied by an employee or union representative at every stage. Five examples of gross misconduct were given on page 97.

44. There was a right of appeal, and in that event:

> **"Your employer will hear your appeal and decide the case as impartially as possible, normally within five working days. As well as investigating the offence, and the action taken, the appeal process is an opportunity, the last before termination is confirmed, to ensure that the procedure has been properly applied."**

Company Rules

45. The disciplinary procedure was accompanied by the Company Rules (pages 98-102). A failure to comply with rules 1-14 could result in disciplinary action, and repeated non-compliance could lead to dismissal.

46. Rule 13(f) prohibited the carrying of unauthorised passengers during business hours.

47. Rule 14 dealt with the private use of vehicles and in its entirety read as follows:

> **"Employees who are authorised by the company to take vehicles home may use them for private purposes, provided the employee:**
>
> **(a) Pays the first £100 for any damage caused by any means whilst using the vehicles when unrecoverable. (The company may deduct this from wages).**
>
> **(b) Advises the company where the vehicle is left overnight.**
>
> **(c) Does not use the vehicle for purposes normally banned by insurance policies…**
>
> **(d) Does not allow anyone else to drive the vehicle.**
>
> **(e) Pay personally for all fuel used for private mileage, including travel to and from work.**
>
> **(f) Cleans the vehicle at least once per week, inside and outside.**
>
> **(g) Reports immediately any accident, damage, defect or theft.**
>
> **(h) Obtains permission from the company for private mileage in excess of 100 miles in any week."**

48. Rules 15-23 were concerned with gross misconduct which would render an employee liable to instant dismissal. They included an obligation to avoid "gross immorality" whilst on company business.

49. After the examples of gross misconduct came a clause requiring employees to refrain from indulging in any activity or pursuit that conflicted with the business carried on by the company.

Arrangements from late 2015

50. At the time the respondent took over the claimant's employment the warehouse in Burnley closed and he became based at the Blackpool warehouse. He was allowed to keep the company van at home. He would drive to Blackpool each morning to load up the van before his deliveries.

51. The deliveries he had to make were set by the warehouse manager, Mr Forster. Mr Forster was aware that the claimant lived in Burnley and therefore would regularly schedule the last delivery of the day to be in East Lancashire, meaning that the claimant could go home after it rather than drive back to Blackpool. Although this was convenient for the claimant, it also saved the company the extra fuel cost of the van going to Blackpool and back when there would be no work to be done at the warehouse, or insufficient time to do any meaningful work.

Late 2016

52. The claimant coped with these arrangements up to August 2016. That month one of the three drivers left, leaving just the claimant and a colleague. The workload on the two of them increased considerably. That remained the position for the rest of 2016.

53. In October 2016 tracking systems were introduced on the vans. The claimant was notified of this by a letter which appeared at page 103. The letter said that the system would be an invaluable tool in improving productivity. It would ensure that management were fully aware of workloads and driving hours and therefore ensure that employees were not asked to work unreasonably long hours. The system could identify drivers who went long periods without breaks or who were travelling at high speeds to reach appointments on time.

Holiday Issue December 2016

54. In December 2016 the claimant raised the holiday issue again. He supplied some notes about it (which we did not see) to the director, Ben Bullough, and the response of 9 December 2016 at page 158 said that advice had been taken from the employment law advisers. The letter said that it was simply a matter of bad fortune that the claimant did not work Mondays. The claimant replied by a letter of 13 December 2016 (page 159). By his calculation he had 2.5 holidays due. Because of the pattern he had agreed to work over Christmas he was owed another half day. His letter ended as follows:

> **"I consider the extra half day more than reasonable in view of the many hours unpaid overtime that I had undertaken this year and not taking the half day that I was entitled to in the previous year (and various days due in previous years). I have been working for roughly an extra half day per week for many weeks and am wondering, for how long will this unsatisfactory situation continue?"**

55. Pausing there, it is important to note that this was a reference by the claimant to the extra work he had had to do since the third driver left in August. However, the letter did not make any mention of his head injury or its effects.

56. Mr Bullough responded on 20 December 2016 at page 160. The extra half day was agreed. The letter ended by thanking the claimant for his commitment to the company. It said:

> **"Whilst writing, it would be wrong if I did not take the opportunity to thank you for the commitment that you do show to the company, you are one of our longer serving members and have seen the unfortunate turmoil that we have undergone over recent times with redundancies. It is largely thanks to the commitment that you show to our customers that we are able to avoid further redundancies and we appreciate that. It would be impossible for me to say when I expect the difficult time we have faced to improve and in the meantime I am sure that we can count on your continued support."**

57. The claimant understood this letter to mean that there was no prospect of further drivers being recruited. In fact that had already happened. Two new drivers had been recruited in December 2016 and after initial training and induction became effective in January 2017. The workload of the claimant reduced to manageable levels.

Meeting 21 or 22 December 2016

58. The claimant's case was that after receiving the letter of 20 December he had a discussion with Rod Bullough and Ben Bullough. According to his witness statement (paragraph 19) during the meeting he said that not having any break and finishing late virtually every day resulted in him feeling too tired to drive safely. His evidence was that Rod Bullough suggested that the claimant looked for an alternative job where he could wind down. The claimant refused to do that.

59. In cross examination Mr Bullough said there had been a discussion but that the claimant said that the job was fine. He did not recall the claimant having mentioned fatigue or having said he was too tired to drive safely. He denied any knowledge of fatigue on the claimant's part. We did not have any evidence from Ben Bullough.

60. That was an important dispute of fact to which we will return in our conclusions (paragraph 125 below).

January 2017

61. The introduction of two additional drivers in January 2017 meant there were now four drivers doing work that had prior to August 2016 been done by three drivers. The workload reduced. The claimant later said that he had a discussion with Steve Forster around that time in which the claimant was told there was no point in him ringing the warehouse after his last delivery each day because workloads were light. It was agreed that he could clean the van if he got home earlier than his finish time (page 132).

7 March 2017

62. On Tuesday 7 March 2017 the claimant worked as normal. The tracker log (page 104) showed that he arrived home at 13:25. He had worked through his one hour unpaid break, meaning that after taking his break he had 2½ hours of working time before his scheduled finish time of 5.00pm. He cleaned and washed the exterior and interior of the van.

63. Around this time Mr Bullough had heard talk in the office about deliveries being missed, predominantly by the claimant. He became suspicious and started to look at tracker records. These were automatically sent to his mobile phone. It was when considering these records that he saw the tracker record for 7 March 2017. He decided to take matters further.

Meetings 15 and 16 March 2017

64. On 15 March 2017 there was a drivers' meeting. Rod Bullough was present. A note taken by Steve Forster appeared at page 105. It recorded that all the drivers said they had been busy. A paragraph about what the claimant said was as follows:

> **"John said, 'I take my lunch at the end of my drops at home and it appears that I have finished early but I do wash the van'. Rod replied, 'so you wash the van every day?' John replied, 'No'. Rod then replied, 'Please keep the vans clean and check all the oil levels are checked when we refuel and make [sure] brakes and pads are serviced regularly. I do not want to be paying for brake discs and callipers when the pads just need changing'."**

65. The claimant did not accept that this note was entirely accurate. He later said (pages 135-136) that he had not responded when asked if all the drivers were busy, and had said he would only wash the van if he had time when he got home. These notes were not sent to him to approve at the time.

66. Rod Bullough spoke to the claimant the next day, Thursday 16 March 2017. The claimant was asked about Tuesday 7 March 2017. He was able to remember that he had cleaned the van inside and out because that was unusual. A note of the discussion taken by Mr Forster appeared at page 106. The claimant said:

> **"On that Tuesday I cleaned the van, it wouldn't make sense to drive back to Blackpool then back to Burnley."**

67. Mr Bullough told him to ring the office to see if there was anything needed doing. He also said that the claimant had lunch every day whereas no-one did: they usually ate "on the go". The meeting ended with Mr Bullough saying:

> **"I'll think about my decision today."**

68. This puzzled the claimant as he did not realise there was any decision to make. He had not been told that this was some kind of investigative meeting.

17 March 2017

69. On Friday 17 March 2017 the tracker recorded that the claimant arrived home at 2.37pm. He had undertaken a delivery at Poplar Street in Blackburn at around 2.00pm. He had not returned to the warehouse in Blackpool before finishing work at 4.30pm.

70. Mr Bullough investigated this. He obtained a signed statement from Mr Forster on 23 March 2017 (page 108). In its entirety Mr Forster's statement read as follows:

> **"I am the warehouse manager and I allocate work to the drivers and control their working hours. I now know that on 7 March 2017 John Gough was at home at 1.25pm. I**

**did not give him permission to go home early. He started work at 7.37am that day and his finish time should have been 5.00pm.**

**I also know that on Friday 17 March John Gough was at home at 2.37pm. I did not give him permission to go home early. He started work at 7.31am that day and his finish time should have been 4.30pm.**

**On 16 March 2017 I was present at a drivers' meeting with Rod Bullough and John Gough. Rod told the drivers they cannot just go home early and had to either come back to work if they finished drops early or at the very least, to call in to ask what other work needs doing. John Gough knows that anyway because has been a driver for nearly ten years. This issue has only come to light since the trackers were fitted onto the vehicles."**

24 March 2017

71. On Friday 24 March 2017 the claimant spent about 55 minutes in mid afternoon collecting his daughter from school. The plan had been for his wife to do it but she was delayed at the airport collecting their son. This divergence from his delivery routes was recorded in the tracker information at page 109. Mr Bullough received from Mr Forster a handwritten note analysing this information for 24 March at page 111.

Disciplinary Invitation 29 March 2017

72. An invitation to a disciplinary hearing was issued on 29 March 2017 (page 113). The letter referred to the meetings of 15 and 16 March as "investigatory meetings". The letter went on as follows:

**"The Company would like to discuss an issue/s relating to your conduct, in particular:-**

**On 7 March 2017 you were at home for 1.25pm and did not return to work and/or make contact with work. You did not have permission to go home early.**

**On 17 March 2017 you were at home at 2.37pm and did not return to work and/or make contact with work. You did not have permission to go home early and this was only the day after you were told not to do so by Mr Bullough.**

**On Friday 24 March 2017 you went off route to 13 Booth Place, Haslingden; you had no deliveries for this address and the time to backtrack and time on site was 55 minutes. You went home at 4.36pm.**

**At the disciplinary hearing these issues will be discussed with you and you will have a chance to explain your actions. If your explanation is not considered satisfactory and there are no extenuating circumstances, you will be issued with a disciplinary sanction with your conduct in accordance with the Company's dismissal and disciplinary procedure. One such sanction could be your summary dismissal.**

**A copy of the Company's dismissal and disciplinary procedure may be found at R Duckworth (Wholesale) Limited offices and I have enclosed copies of the evidence that will be relied upon in the hearing."**

73. The documents enclosed included the tracker reports for the three dates in question and the statement of Mr Forster. The notes of the meetings on 15 and 16 March were not enclosed.

Disciplinary hearing 31 March 2017

74. The disciplinary hearing took place on 31 March 2017 before Mr Bullough. Linda Slaney attended to take a note. The claimant was asked whether he wanted to have Steve Forster with him but he declined. The notes appeared at pages 114-119. The claimant later pointed out some omissions from those notes (page 135).

75. In relation to 7 March 2017, the claimant accepted he was home at 1.25pm and said he probably washed the van. He made clear he could not actually remember but was assuming that was the case. He said that Mr Forster would have phoned if he had needed him. He accepted he had been to Lancaster Hospital and therefore had driven past the end of the M55, 15 minutes from the Blackpool warehouse, but he had deliveries to complete in Burnley afterwards.

76. In relation to 17 March 2017, the notes recorded that the claimant said:

> **"I'm pretty sure I spoke to Steve [Forster] when I was in Blackburn."**

77. He said he had been given permission to go home early by Steve Forster.

78. In relation to 24 March 2017, the claimant said he had used his lunch break to pick up his daughter from school. He had not known in advance he would be doing this but his wife had to go to the airport. Two deliveries had been missed that day: one because there was no-one at the premises, and the second because by the time he could get there it would have been too late. The claimant said that since the meeting on 16 March 2017 he had been given more work by Steve Forster and definitely not had a full hour's lunch break since then. He said that Steve Forster had told him that things would be easier.

79. Steve Forster gave the claimant a lift home after the meeting. It was only after the meeting that the claimant was given a copy of the Company Rules.

Dismissal 3 April 2017

80. The decision to dismiss the claimant was confirmed by a letter of 3 April 2017 at pages 120-121. After setting out the allegations Mr Bullough explained his decision as follows:

> **"You conceded that on Tuesday to Thursday you finished work at 5.00pm and at 4.30pm on Friday; you agreed that on 7 March 2017 you were at home for 1.25pm and 'probably washed the van'. You agreed that you made no contact with work but took it upon yourself to go home early. You claimed a full day's pay.**
>
> **You agreed that on 17 March 2017 you were at home at 2.37pm and that your finish time was 4.30pm. You 'assumed you washed the van', you said that Steve gave you permission to go home but he denies that. You claimed a full day's pay.**
>
> **On 24 March 2017 you failed to deliver goods to two clients but chose instead to go to your daughter's school and drive her home in the company van without permission.**
>
> **I regard this behaviour as gross misconduct and after considering your lack of mitigation together with your history of employment with the company I find that summary dismissal is an appropriate sanction. You will be paid for any accrued but untaken holiday."**

81. The letter gave the claimant the right of appeal.

82. The letter did not identify which of the company rules the claimant was said to have breached; nor did it expand on what was meant by the "history of employment". In his oral evidence to our hearing Mr Bullough explained that he took into account previous verbal and written warnings which the claimant had received, which were not live in March 2017. He said that he had no paperwork about these warnings but relied only on what others had told him.

Appeal Letter 10 April 2017

83. The claimant appealed by a letter of 10 April 2017 at pages 122-126. He made the following points:

(a) He did not understand how 24 March could be viewed as a disciplinary matter given that he picked his daughter up during his 16 minute unpaid lunch break; there was no connection between that break and the fact that two deliveries were not completed that day. He had recently carried his daughter in the van during personal time without any objection from the company even though Steve Forster had known about it, and had done unpaid work.

(b) On 17 March he had rung Steve Forster to confirm that he should go home, probably between 1.30pm and 2.15pm. Telephone records could be obtained from Vodafone to confirm that.

(c) He had no memory of the events of 7 March, not least because of memory damage from his head injury, but might have been able to explain what had happened had he been asked about it the following day. Accounting for his one hour lunch break, and the time taken to wash the clean the van externally and internally, it would have been well past 4.00pm and then no point driving to Blackpool which takes about an hour. The statement of Mr Forster was "clearly incorrect" because he said the claimant had not rung him on 17 March but he had.

(d) The claimant explained occasions when he had used his own time or money for the benefit of the company, including purchasing a satellite navigation system to save time and then reclaiming the cost.

(e) He had not been spoken to about concerns about his performance at any time.

(f) There had been an earlier incident where company fuel was used for a private journey by one of the employees: that person was required to pay for the fuel but not disciplined.

(g) He had not been told what disciplinary charge he had to defend himself against and did not understand how there could be a conclusion that was gross misconduct.

(h) He wanted someone independent of the respondent to conduct the appeal.

(i) He asked for copies of all minutes from meetings and his employment file.

(j) He suggested that the charges had been manufactured to remove him from employment for practical and financial reasons. The respondent wanted a van and a driver available five days a week in Blackpool, and an employee capable of working through all breaks and after 5.00pm without being paid. The claimant was unable to meet these requirements because of his disability. The holiday entitlement had been factor as was the planned recovery time from the hernia surgery set for April 2017.

Appeal Correspondence April – June 2017

84. The appeal letter was acknowledged by Mr Alf Murphy of ELS on 21 April 2017 (page 127). He had not seen the Forster statement and asked for a copy. ELS were going to chair the appeal.

85. The claimant emailed asking for the appeal to be held after 10 May, and asking for the minutes. After this exchange of emails in late April he heard nothing further for some time. He sent emails on 2 and 22 May (page 130) asking for copies of the documents he had requested. They were not sent until 2 June (page 131). The documents sent were draft copies of the letters which had been issued to the claimant, together with an incomplete copy of his letter of appeal. He also received the minutes of 31 March.

86. On 5 June 2017 the claimant emailed Alf Murphy to point out inaccuracies in the minutes. His email appeared at pages 134-137. He said he had still not received his written employment record. He suggested that Mr Forster was the one who should be disciplined if he had not planned out the routes correctly. He had never been told before 16 March to ring work when he got home after completing deliveries. In the section of his email adding notes and comments to the minutes of the various meetings, he made the point that Mr Bullough had never checked the phone records to see whether the claimant rang Mr Forster on 17 March 2017. It had been highly likely that he and Mr Forster agreed on 7 March that he would clean the van when he got home after his deliveries. The note of the disciplinary hearing was inaccurate because the claimant had said he was sure he had rung Steve, not that he was "pretty sure".

87. The claimant sent a further email on 9 June (pages 132-133). It said the following:

> **"When Duckworths closed the Burnley branch and I was loading the van in Blackpool, there was talk of sometimes loading the day before and setting our delivering from home in Burnley. So, when Duckworths got the two new drivers and my workload indicated that I was going to complete the deliveries early (and before Steve [Forster] had told me to expect workload to be light whilst the new drivers were inducted), I rang Steve on several occasions (I remember once from Manchester) to check if I should return to Blackpool to load. On every occasion I was told to go home. I was also told on some mornings not to return to Blackpool because there would be nothing to do. Thus the precedent of going home after finishing deliveries had been set prior to 7 March. During my discussion with Steve regarding the role of the new drivers it got mentioned that there was no point ringing him every day that workload was light. When**

> **Steve wanted me to load in Blackpool in the afternoon (e.g. to deliver to Burnley Council in the morning), he told me so and arranged my route to make this practical.**
>
> **I had an agreement – certainly with Steve, my direct manager – that if I completed my deliveries and had time when I got home that I would clean the van…Thus I did have permission to go home "early" and had done so prior to 7 March without a requirement to contract Duckworths and when I had contacted Duckworths I had always been told not to return to Blackpool.**
>
> **As stated previously, on 17 March I did ring Steve. Therefore the statement in the dismissal letter is simply incorrect. Mr Bullough made no attempt to verify that I made a telephone call (which would have cost him £10 plus telephone calls to Vodafone) so his investigation was rather cursory."**

88. On 12 June 2017 the claimant was invited by email to an appeal meeting on 16 June. He was given the right to be accompanied. He decided not to attend and confirmed this on 15 June 2017 (page 142). Alf Murphy replied to say that the full papers would be read and a decision letter sent later that day.

Appeal Decision 26 June 2017

89. In fact it was not Alf Murphy who heard the appeal, it was his son and colleague, Kevin Murphy. Mr Murphy confirmed his decision in a letter of 26 June 2017 at pages 144-146. He rejected the appeal. He confirmed that he had seen the claimant's emails of 5 and 9 June.

90. After reciting what was said in the notes of meetings and the claimant's appeal correspondence, Mr Murphy addressed each of the three occasions. He concluded that Mr Bullough had reached a reasonable conclusion on all three and that the decision to dismiss the claimant for gross misconduct should stand. He placed weight upon Mr Forster's signed statement of 23 March 2017 and said:

> **"I have no hesitation in finding that his account of not giving you permission to go home is an accurate account."**

91. Mr Murphy had contacted Mr Forster. His letter said the following:

> **"In your appeal letter dated 10 April 2017 you claimed that it took less than 50 minutes to collect your daughter from school on 24 March 2017. You said that you were entitled to a 60 minute lunch break but I could find no such entitlement in your contract of employment. The contract dictated that your line manager, Mr Forster, would control your hours of work and so I contacted Mr Forster by telephone to enquire. He told me that there was no entitlement to a 60 minute lunch break but that drivers would simply stop for a sandwich and a drink around midday.**
>
> **Either way however, I find that you had no authority to use your employer's vehicle and fuel during work time to collect your daughter from school and that it was wrong of you to do so. The detail in your appeal letter did not convince me otherwise I am afraid."**

92. In his oral evidence Mr Murphy said that he had not asked Mr Forster specifically about whether he had received a telephone call on 17 March, but that Mr Forster confirmed that his witness statement of 23 March was correct. However, neither the appeal outcome letter nor his witness statement contained any record of him having spoken to Mr Forster about events of 17 March as opposed to the lunch

break issue about 24 March. Mr Murphy said no notes were kept of his discussions with Mr Forster. We will return to this issue in our conclusions.

93. The appeal outcome letter also did not specify which disciplinary rules had been broken so as to amount to gross misconduct. In his oral evidence Mr Murphy explained that he considered the claimant to have been in breach of the clause about private use (clause 14) and in particular the obligation to pay personally for fuel used for private purposes, and in breach of the rule about not competing with the respondent and the prohibition over gross immorality. He explained, however, that like Mr Bullough he did not consider any one of these instances in isolation to be gross misconduct: it was the cumulative effect of all three.

94. There was no further right of appeal.

After the Appeal

95. The claimant contacted ACAS to initiate early conciliation on 29 June 2017. He had still not received the appeal outcome letter by then. He sent an email on 5 July 2017 asking about it (page 147). A copy was emailed later that day (page 149).

96. The claimant presented his claim form on 8 August 2017, a couple of weeks after Employment Tribunal fees were declared unlawful by the Supreme Court.

**Submissions**

97. At the conclusion of the evidence we received a submission from each party.

Respondent's Submission

98. On behalf of the respondent Mrs Ormond made an oral submission. She invited us to disregard any new factual information raised by the claimant in his submission which had not featured in the evidence. She suggested this was a simple case based on the question of whether the claimant had acted in a way for which he had no permission but that the claimant had sought to transform it into a different case altogether. She invited us to find him a less than reliable witness given what she described as the pedantic, evasive and challenging approach he took in cross examination.

99. After that introduction Mrs Ormond addressed the issues one by one. On the reasonable adjustments complaint, she denied that any PCP had been applied as alleged, relying on the agency drivers who had been employed, and suggested that in any event there was no substantial disadvantage. The claimant would have said so in his letter at page 159 had that been the case. She submitted that the respondent had no knowledge of the claimant being a disabled person, whether actual or constructive. The evidence from the claimant about who he had dealt with in 2012 and what information he had supplied was unclear. Nothing had been transmitted to Mr Bullough in any event. She accepted, however, that if that information had been provided by the claimant in 2012 it would be reasonable to expect it to be recorded and retained by the respondent.

100. In any event Mrs Ormond submitted that there was no knowledge of any substantial disadvantage to the claimant in the period between August and

December 2016. His letter at page 159 referred only to an "unsatisfactory situation". On his own case he had not raised the issue of fatigue and its effects upon him until the verbal discussion a few days later. By that stage the new drivers had already been recruited. She invited us to dismiss the reasonable adjustments complaint.

101. In relation to the complaint of discrimination arising from disability, we were invited to dismiss that as well. Mrs Ormond relied on the earlier points about knowledge of disability but said in any event Mr Bullough had confirmed that the claimant's disability was not even in his mind. Fundamentally this was a dismissal simply because of the misconduct by the claimant on the three dates in question and had nothing to do with his disability, either directly or indirectly.

102. Turning to the unfair dismissal complaint, Mrs Ormond reiterated the case as to the reason for dismissal and then addressed a number of the individual points on which the claimant relied set out after paragraph 14 of the List of Issues. The claimant had been asked reasonably promptly about events of 7 March, being a week later. Mr Forster had been interviewed and confirmed that he had not given permission for an early finish on either 7 or 17 March. Use of the tracker information was reasonable: it was not done covertly. The claimant had been informed that trackers were fitted. The claimant had all the information before his disciplinary hearing and had his chance to have his say. It was reasonable for Mr Bullough to prefer the information from Mr Forster than what the claimant said. The signed statement from Mr Forster was so clear that it was reasonable not to investigate any further about the alleged discussion in January 2017 and the telephone call of 17 March. There was no breach of the ACAS Code of Practice. The investigatory stage was handled fairly. There was no requirement that the claimant be informed that there was an investigatory meeting. Accordingly she submitted that the dismissal met all the aspects of the **Burchell** test.

103. As to whether dismissal was a reasonable sanction, she relied on the limited resources of this family-run company. It was reasonable to view the three instances of failing to act in accordance with management instructions as amounting to gross misconduct. The incident of 17 March was particularly serious given that the claimant had been told only the previous day that he had to ring the office to get permission. She reminded the Tribunal of the danger of substituting its own view for that of the employer.

104. As to the appeal, she accepted that it had been delayed. The claimant had been unwell and did not want to attend a hearing. However, that delay was not detrimental. The claimant had the documents and put his case fully on paper. There was no impartiality by Mr Murphy: he had not previously been involved.

105. We invited Mrs Ormond to address us on Mr Bullough mentioning the previous warnings. This was a point not put to the claimant. Mrs Ormond invited us to find that this had not been part of the reason for dismissal. It was simply something of which Mr Bullough was aware.

106. As to the potential remedy issues, Mrs Ormond submitted that if the procedure was found to be unfair or further investigation needed, the same result would have occurred within two weeks. There should be a 100% reduction for contributory fault given the claimant's actions on all three dates, and there had been no breach of the ACAS Code of Practice, let alone any unreasonable breach.

Claimant's Submission

107. Prior to hearing oral submissions, the Tribunal read the claimant's written submission which ran to 21 pages, and also the nine page extract from a document which contained his comments on the response form. The position taken by the claimant in those submissions is a matter of record and reference should be made to them.

108. In oral submissions the claimant's son made a number of brief points on his behalf. Broadly, his position on the issues to be determined can be summarised as follows.

109. There had been a breach of the duty to make reasonable adjustments. There had been excessive work for the claimant in the period between August and December 2016. His disability had been known to the respondent because he had provided medical information in 2012. It should have been apparent that he should not have been placed under that excessive workload in that period. This was linked to his dismissal because the real reason for dismissal related to his disability.

110. In relation to discrimination arising from disability the claimant relied on the same points about knowledge of disability and submitted that the true reason for the dismissal was what appeared in his appeal letter at page 126. The company wanted a van and a driver available five days a week in Blackpool, and an employee prepared to work through breaks and after 5.00pm without being paid. His inability to do this arose in consequence of his disability. The disciplinary allegations were not the real reason he had been dismissed.

111. In relation to unfair dismissal the claimant relied on the same point about the real reason for dismissal. If we were against him on that, and it was genuinely a conduct dismissal, he submitted that it had been procedurally unfair as well as substantively unfair. The conclusions reached by Mr Bullough were simply wrong. Mr Forster should have been re-interviewed about the agreement reached in January and about the telephone call on 17 March. The failure to investigate properly was replicated at the appeal stage. There had been no proper impartial consideration of his appeal. The delay alone had been a breach of the ACAS Code of Practice. We were invited to find that there was an unfair dismissal.

112. In relation to possible remedy issues Mr Gough submitted that there should be the maximum increase available in relation to the ACAS Code of Practice, that there should be no reduction for contributory fault because he had behaved in no way that could be considered culpable or unreasonable, and that there should not be any reduction because a fair procedure and fair process could only have led to him remaining in employment.

113. The remainder of these reasons contains our conclusions and a summary of our reasoning on each issue.

**Discussion and Conclusions - Reasonable Adjustments**

114. The first complaint we addressed was the breach of a duty to make reasonable adjustments which was set out in issues 1-5 of the agreed list.

PCP

115. Issue 1 was whether a provision, criterion or practice ("PCP") had been applied. The allegation was essentially about excessive workload between August and December 2016 after a driver left and the employed drivers went down from three to two.

116. There was some reference made in the oral evidence to there having been agency drivers in this period, but the evidence before the Tribunal supported the claimant's case that his workload was indeed higher during these four months. The respondent's own further particulars at page 90 showed that the employed drivers working for the respondent went down from three to two, and then back up to four in December 2016. There was no evidence about the extent of agency driver usage in late 2016 although we accepted Mr Bullough's evidence that there had been some agency drivers used by the end of December.

117. We noted also that the letter of 20 December 2016 (page 160) thanked the claimant for his commitment to the company in the recent difficult times.

118. Putting these matters together we accepted the claimant's case that the workload was unsatisfactory (see his letter of 13 December at page 159). The Tribunal accepted the claimant's evidence in paragraphs 13-15 of his witness statement that in this period he did have too much work and was not able to take the breaks that he needed On balance the Tribunal concluded the respondent had applied a PCP in that four month period of expecting two drivers to do the work previously carried out by three.

Substantial Disadvantage

119. Issue 2 was whether that PCP placed the claimant at a substantial disadvantage. Under section 21(2) of the Equality Act 2010 any disadvantage which is more than minor or trivial will be substantial.

120. The respondent pointed out that there was no mention of such disadvantage in the claimant's letter at page 159. However, that was a letter predominantly about holidays and about the extra half day. The Tribunal accepted the claimant's evidence in paragraphs 13-15 of his witness statement that having been unable to take breaks he would get home shattered each day; he had no real family time and he was not able to recuperate properly before going back into work on Tuesday of the following week. That evidence was consistent with the evidence of Dr Shakespeare at page 169 that the claimant would need regular rest periods if he was able to cope. That disadvantage was neither trivial nor minor, and therefore we concluded there was a substantial disadvantage to the claimant in this period.

Knowledge of Disability

121. Issue 3 was about knowledge of disability and had two limbs. The first limb was about knowledge that the claimant had a disability. This is a question not just of actual knowledge but whether the respondent ought reasonably to have known, and it is a question of corporate knowledge rather than the knowledge of any individual manager. The Equality and Human Rights Commission Code (paragraph 5.18) makes clear that employers need to ensure there are means for bringing information

about disabled people together to make it easier to fulfil their duties under the Equality Act 2010. An obvious method of doing that is to collate such information on a personnel file.

122. The Tribunal had to make a factual finding about what information the claimant had given to his employer in 2012. We concluded he had supplied some or all of Dr Laraway's report at pages 161-167 in support of seeking an adjustment to his working pattern. We had no evidence from his managers at the time or from Ben Bullough to counter that evidence from the claimant. It is clear that by 11 May he told Dr Shakespeare that he had told his employer of the position and that there had been contact with the disability employment adviser. It was in September 2012 that his working pattern was altered to a four day working week. The Tribunal was satisfied that his employer was aware of the thrust of Dr Laraway's report in or around May 2012.

123. The fact that the claimant was then employed by a different company is not significant. The claimant transferred under the Transfer of Undertakings (Protection of Employment) Regulations in late 2015 to the current respondent, and under regulation 4 anything done by or on behalf of the transferor is treated as done by or on behalf of the transferee. It is normal in a TUPE transfer for employment records of transferring employees to be transferred over. A transferring employer who fails to do that acts unreasonably. It follows that this respondent ought reasonably to have known that the claimant was a disabled person from the information he provided in 2012. It was not reasonable if that information had been lost through poor record-keeping or poor communication at the time of transfer.

Knowledge of Substantial Disadvantage

124. The second limb of issue 3 was whether the respondent knew or ought reasonably to have known that the claimant was likely to be at the substantial disadvantage of not being able to take breaks due to excessive work. The four days arrangement had worked well up to August 2016. There was no evidence the claimant raised this issue with the respondent until the end of December. In paragraph 16 of his witness statement he said he had discussed his workload with Mr Forster but that had been pointless, so he raised it by his letter of 13 December. That letter, however, was in oblique terms. It referred to an unsatisfactory situation but did not explain why that was. We concluded as a fact that the claimant had not told the respondent about the problems with fatigue before the meeting on 21 or 22 December.

125. Whether he had mentioned the problem at that meeting was disputed. Mr Bullough said in his evidence that he did not recall the claimant raising that matter. That fell short of a categorical denial. No notes of that meeting were produced by either side. The claimant maintained he had told Mr Bullough about the position. That was consistent with his appeal letter of 10 April 2017 at page 126 where he said they had discussed his "tiredness under the excessive unpaid workload". We rejected Mrs Ormond's suggestion that the claimant did not give his evidence in a credible way. On the contrary, we were satisfied he sought to answer questions in a truthful way. Further, it was a discussion about workload and a natural time for the claimant to talk about the impact on him of the extra workload since August. We

found as a fact that the claimant told Mr Bullough on this occasion that he was suffering from fatigue and on occasion felt too tired to drive safely.

126. Accordingly the respondent did have the requisite knowledge by late December 2017 and that is when the duty to make reasonable adjustments arose.

Breach of Duty?

127. However, by that stage the adjustments had already been made. The two additional drivers had been recruited and it was reasonable for it to take a few weeks for them to be fully inducted, trained and in place in early 2017.

128. It follows that the respondent did not fail in its duty to make reasonable adjustments. Given that two additional drivers had already been recruited and would be in place shortly, no further steps were needed. The substantial disadvantage was about to be removed. This claim failed on its merits. There was no need for us to consider time limits.

**Discussion and Conclusions - Discrimination Arising From Disability**

129. We then turned to the second complaint, a breach of the duty under section 15 not to discriminate against an employee because of something arising in consequence of disability.

Knowledge of Disability

130. Issue 6 concerned knowledge of disability. It was the same as issue 3(a) and for the same reasons (paragraphs 121-123 above) we concluded the respondent had failed to show that it could not reasonably have been expected to have known that the claimant had a disability.

Causation – the "Something"

131. Issue 7 was where this matter turned. Dismissal was plainly unfavourable treatment, but what was the reason? This was a crucial issue in the case overall. The reason for dismissal overlapped with the unfair dismissal complaint, although the legal tests differed.

132. Setting aside for the moment the different legal tests, we first had to make a factual finding about the set of facts or beliefs in the mind of Mr Bullough that caused him to dismiss the claimant. Broadly, Mr Bullough's case was that it was solely the views he had about how the claimant had behaved on those three days in March 2017, whereas the claimant said there were other reasons at play.

133. We noted that matters emerged in Mr Bullough's evidence which never featured in the disciplinary process or in his witness statement. He made reference in his oral evidence at our hearing to earlier verbal and written warnings given to the claimant, and he said he had overheard in the office discussion about missed deliveries which were predominantly down to the claimant. Noting those matters and the evidence from both sides in this case we made the following factual findings.

134. This was a business which was going through difficult times. Mr Bullough explained very clearly how the workforce had shrunk. He had lost quite a lot of

administrative support. An employed driver who left in August 2016 was not immediately replaced. The letter from Ben Bullough of 20 December 2016 at page 160 recognised the unfortunate turmoil over recent times, and of course also recognised the claimant's commitment.

135. For historic reasons the claimant was in an unusual position compared to the other drivers. He was the only driver based in Burnley and therefore the company had agreed that he could drive at the company's expense from Burnley to Blackpool and back each day. That was contrary to the position in the Company Rules, where a driver with a van at home would pay for travel to work. That was a relatively generous gesture, no doubt reflecting the fact that the claimant had been based at Burnley for some years when that warehouse closed.

136. Importantly, the Tribunal was also satisfied that before the events of March 2017 arose Mr Bullough had a negative impression of the claimant. He referred in his oral evidence to an awareness the claimant had had verbal and written warnings in the past even though those warnings had expired and no documentary records of them were available.

137. We also found as a fact that Mr Bullough did hear in the office discussions about deliveries being missed and he formed the view that the driver involved was predominantly, though not solely, the claimant. He also overheard something about deliveries on a Friday being done on a Tuesday which made him consider that this was an issue about the claimant's work. For those reasons, we concluded, Mr Bullough started to scrutinise the claimant's tracker reports, and on doing so he saw that on 7 March the claimant had arrived home in Burnley at 1.25pm when he had been due to work until 5.00pm. The consequence of that realisation was that Mr Bullough decided to investigate matters further. He convened the drivers meeting of which the notes appear at page 105. The disciplinary invitation letter at page 113 subsequently recognised that this was in fact an investigatory meeting although that was not explained. The purpose of the meeting was to enable Mr Bullough to form a view about the claimant compared to the other drivers. He established at the meeting that all the drivers said they were busy. The other drivers, Chris and Nigel, said they were not taking lunch breaks. The claimant said he was taking lunch breaks at the end of his drops and then washing the van. He emphasised that he was not washing the van every day.

138. Mr Bullough took this further in an individual meeting with the claimant the following day. The notes appeared at page 106. He raised the issue of the tracker report from 7 March. The claimant spoke about cleaning the van, and it was Mr Bullough who raised the question of the lunch break. He said:

> **"You have lunch every day. Nobody else does. We usually eat on the go."**

139. The Tribunal concluded that Mr Bullough had been surprised and concerned to hear the previous day that the claimant took a full lunch break every day. That was contrary to his understanding of how the drivers were operating, and how indeed he operated when he had done driving work in the past. Hearing that on 15 March 2017 reinforced his adverse view of the claimant.

140. Mr Bullough at this stage was still considering disciplinary action against the claimant for the events of 7 March alone. That was why the individual meeting ended

by him saying that he would consider his decision. A few days later he saw the tracker information from 17 March showing the claimant was back home in Burnley before 2.40pm on a day when he was due to finish at 4.30pm. That prompted Mr Bullough to speak to Mr Forster about this, resulting in Mr Forster's witness statement of about a week later at page 108.

141. We accepted Mr Bullough's oral evidence that when he first approached Mr Forster about the claimant's working patterns Mr Forster referred to the claimant as "a little shit", a very derogatory term that would have reinforced the negative view of Mr Bullough still further. We also noted that Mr Forster's statement was very clear: he said categorically he had not given the claimant permission to go home early on 7 or 17 March.

142. Before matters could be taken any further a third issue arose about the tracker report of 24 March (pages 109-110) where the claimant appeared to have deviated from his route to Booth Place at approximately 3.48pm resulting in him being off route for about 50 minutes or so. Mr Bullough asked Mr Forster to do an analysis of the tracker information which appeared at page 111, and it was evident Mr Forster reached the conclusion that the claimant had missed two deliveries and had wasted over an hour when an earlier break of some eight minutes was taken into account. Mr Bullough decided to pursue disciplinary proceedings at this stage.

143. We will address in more detail shortly the flaws in the disciplinary procedures and investigation, but in broad terms we were satisfied that Mr Bullough failed to carry out a reasonable investigation and failed to give proper consideration to the explanations the claimant raised in the disciplinary process.

144. Putting all that together, we found that Mr Bullough decided to dismiss the claimant because of a combination of two reasons. The first was the belief the claimant had acted inappropriately on the three dates in March 2017. The second was the fact that the claimant had been insisting on having a one hour lunch break every day while other drivers did not. Mr Bullough saw that as out of step and showing a lack of commitment.

145. The Tribunal was unanimously satisfied that the second reason had a material influence on Mr Bullough's decision even though it was not the predominant reason for the dismissal.

146. We were satisfied that the other issues raised in paragraph 8 of the List of Issues did not have a material influence:

- The fuel costs of the van being driven between Burnley and Blackpool were not a significant factor: that arrangement had been in place since late 2015 and there were regularly items that could be picked up on route.

- The fact the claimant did not work Mondays and the van was not available was not significant. We accepted Mr Bullough's evidence that Monday was generally the quietest day.

- The agreement about holidays reached in December 2016 was not a significant factor; that was a minor matter.

- The impending absence for two weeks because of a hernia operation did not play any significant part in Mr Bullough's thinking: he had already recruited two extra drivers in December 2016 which would help cover that absence.

In Consequence of Disability

147. The Tribunal was satisfied that the claimant having to take proper lunch breaks (part of his arrangements since 2012) was something which arose in consequence of his disability. That was evident from the report of Dr Laraway about the effects of fatigue on him, and from the claimant's own evidence.

148. The Court of Appeal confirmed in **City of York Council v Grosset** that there is no need for the decision maker to be aware that the "something" under section 15 is linked to the disability: that is simply an objective matter for the Tribunal to assess.

149. Even though we were satisfied that Mr Bullough personally did not realise that the lunch break issue was a consequence of disability, it was. The claimant established a breach of section 15(1)(a).

150. The respondent sensibly did not seek to rely on a justification defence under section 15(1)(b), and therefore it followed that the complaint of discrimination arising from disability succeeded in relation to the decision to dismiss the claimant.

**Discussion and Conclusions - Unfair Dismissal**

151. The Tribunal turned then to the complaint of unfair dismissal (issues 9-14).

Genuine Belief

152. Issue 9 was whether the respondent genuinely believed the claimant was guilty of misconduct. We were satisfied Mr Bullough did genuinely believe that. He thought the claimant had been guilty of misconduct on those three dates in March 2017.

Reasonable Grounds and Reasonable Investigation - General

153. Issues 10 and 11 concerned whether there were reasonable grounds for that belief and whether the respondent had carried out such investigation as was reasonable. We considered it convenient to deal with those matters together but to address each of the three allegations in turn.

154. We reminded ourselves that the key point here is the Tribunal must not substitute its own decision for that of the employer. Instead we have to ask ourselves whether this employer acted within the band of reasonable responses. As Mrs Ormond rightly reminded us, section 98 requires us to take into account the size and resources of the employer. This was a small employer, essentially a family firm, with limited administrative and HR support, although it did have access to external employment law consultants.

Reasonable Grounds and Reasonable Investigation - 7 March Allegation

155. We were satisfied there were reasonable grounds for Mr Bullough to suspect that the claimant had simply finished early without permission. He had the tracker report confirming the movements of the claimant, which of course were not disputed. He had his own view about how long it would take to wash a vehicle and he had his own view that the claimant should not have a full hour lunch break but instead should "eat on the go" like the other drivers. Importantly, he also had the signed statement of Mr Forster.

156. However, the Tribunal concluded that the degree of investigation fell below what would reasonably be required in this situation, even for a relatively small employer. The claimant was facing allegations of gross misconduct. He had been employed for nearly ten years and at the time of these matters arising had a clean disciplinary record; indeed he had been thanked for his commitment at the end of December. In those circumstances the degree of investigation which an employer acting reasonably would have undertaken would have gone beyond that which Mr Bullough undertook.

157. In particular, Mr Bullough failed in his obligation to do a reasonable investigation by not going to Mr Forster to ask him specifically about the claimant's case that it had been agreed earlier in the year that he did not have to ring in any more because the recruitment of the two new drivers meant that there would be an easy time for a while. Mr Bullough never checked that with Mr Forster and a reasonable employer would have done.

158. Nor did he consider properly the claimant's case as to the need for a break. Mr Bullough told the claimant in the disciplinary hearing on 31 March at the top of page 116 that the claimant was the only person having a proper lunch break. He had overlooked what the claimant told him about fatigue on 21 or 22 December 2016.

159. Nor did Mr Bullough think to query with Mr Forster why he was scheduling the claimant a delivery route where the last delivery on that day ended in Padiham or Burnley around 1.00pm. He simply accepted the earlier written statement from Mr Forster at face value and failed to give any consideration to the possibility Mr Forster was in fact protecting his own back.

160. Even taking into account the limited size and resources of this employer, therefore, the Tribunal concluded that the investigation fell outside the band of reasonable responses. These were simple investigatory steps which had no cost attached and which could have been done easily and quickly.

Reasonable Grounds and Reasonable Investigation - 17 March Allegation

161. We were satisfied Mr Bullough did have reasonable grounds for concluding that he claimant had not rung in for permission because he had a witness statement from Mr Forster saying that no permission had been granted.

162. However again the Tribunal concluded that the respondent fell outside the range of reasonable responses in its investigations. In the disciplinary hearing, as recorded at page 116, the claimant said, according to the notes, he was "pretty sure" that he had rung Mr Forster from Blackburn. The claimant did not accept that the

notes were accurate; he claimed to have said he was sure (not just "pretty sure") and to have mentioned telephone records. However, even taking the notes as the only record, it is clear that Mr Bullough gave no credence to this account even though the claimant had given the approximate time of the call to within a few minutes. He made no enquiry then of Mr Forster or of Mr Forster's phone records. Mr Forster's witness statement of 23 March was simply taken as the final word.

163. This was a rudimentary investigatory step on behalf of an employee facing dismissal for gross misconduct after significant service and with a clean disciplinary record. The possibility that such an enquiry would have shown that a call was made by the claimant, and that this might in turn have jogged Mr Forster's memory, was ignored or overlooked by Mr Bullough. The failure to make that enquiry took the investigation outside the band of reasonable responses.

Reasonable Grounds and Reasonable Investigation - 24 March Allegation

164. There were three different elements here: the time spent in the deviation from the route; the carrying of a passenger, and the use of fuel (and perhaps wear and tear on the company vehicle).

165. In relation to time, the analysis conducted by Mr Forster in the note at page 111 concluded that leaving aside the earlier break in the day the claimant had wasted 55 minutes of time. That was based on the assumption the claimant was not entitled to any break time but in fact the claimant was paid for an hour less than his working hours each day. There were no reasonable grounds for the view he had done anything wrong by stopping doing his deliveries during the course of the working day and having a break of up to 60 minutes. The view that doing this had caused two deliveries to be missed was a view which, on the face of it, was borne out by Mr Forster's analysis on page 111. Yet even if that resulted in later deliveries being missed, which the claimant disputed, that was a problem with the scheduling of the route, not a problem which could reasonably be laid at the door of the claimant.

166. In relation to carrying a passenger, rule 13(f) in the Company Rules prohibited that during business hours, but it is unclear whether business hours would include unpaid break time. In any event it was not made clear to the claimant this was prohibited so there would be no reasonable grounds for a conclusion against him on that point.

167. In relation to fuel and any wear and tear element, clause 14 of the Rules permitted drivers to use the vans for private purposes with no requirement to get permission for trips under 100 miles. The claimant was required to pay for fuel. He used the van for private purposes to collect his daughter on Friday 24 March. His next working day was Tuesday 28 March. There was no evidence the claimant was asked to pay for the fuel and had refused. The disciplinary letter was issued the following day, Wednesday 29 March. There was no reasonable ground for viewing as misconduct a failure by the claimant to pay for that fuel within only two working days of using the van for private purposes.

168. It follows therefore that in relation to 7 and 17 March the respondent failed to carry out a reasonable investigation, whilst in relation to 24 March there were no reasonable grounds for the belief the claimant was guilty of misconduct.

Procedural Fairness

169. Issue 12 concerned procedure.

170. The claimant should have been told that the meetings on 15 and 16 March 2017 were investigatory meetings. However, that in itself did not result in unfairness because he had a chance to explain matters fully at the disciplinary stage. We concluded the disciplinary invitation was reasonably clear. We accepted that the claimant, as a person who needs meticulous detail and absolute clarity, did not himself find it clear enough, but the standard is that of reasonableness not of the subjective requirements of the individual employee. There is no requirement for an exhaustive technical explanation of disciplinary charges. It was reasonably clear in the sense the claimant knew which three days were in issue and knew that his movements on the days in question were what he had to deal with at the disciplinary hearing.

171. Further, the right to be accompanied was offered and we were satisfied that at the meeting on 31 March 2017 the claimant had his chance to have his say. We rejected the claimant's case that meeting was handled in a combative way by Mr Bullough so as to result in any procedural unfairness. We were satisfied, however, that Mr Bullough did want to confront the claimant with the allegations; his negative view of the claimant had been reinforced by what he believed had gone on on these three days, and we were also satisfied that he did not give proper credence to the claimant's explanations during the meeting.

172. In relation to the dismissal letter, we were satisfied again that it was reasonably clear. There is no requirement for an employer to set out exhaustively the basis for the findings against the claimant or details of the relevant rules and how precisely there has been a conclusion there was gross misconduct. Given the size and resources of this employer the correspondence was in reasonably clear terms, and therefore overall the procedure prior to the appeal was reasonably fair.

Appeal

173. Issue 13 concerned the fairness of the appeal. We noted that Mr Murphy undertook a review rather than a complete re-hearing. There is nothing inherently unfair in that, but of course a review is less likely than a complete re-hearing to correct flaws in a dismissal decision.

174. We also noted that Mr Murphy was in a better position than Mr Bullough in terms of the information available. Bearing in mind that the claimant communicated more effectively in writing than verbally, Mr Murphy benefitted from the claimant's detailed appeal letter of 10 April at page 122 and his emails of 5 and 9 June between pages 132 and 137.

175. Dealing first with the procedural aspects of the appeal, we agreed with the claimant that the delay and lack of explanation between April and June was unsatisfactory, and in itself it amounted to a breach of the ACAS Code of Practice. We rejected Mrs Ormond’s argument that the claimant was advantaged by that delay. The emails he sent in June could have been sent much earlier on had the appeal hearing been arranged promptly. However, that delay alone had no significant impact on the fairness of the procedure because Mr Murphy, when he

came to be tasked with the appeal, had all the information before him in written form from an earlier stage.

176. As for Mr Murphy's impartiality, we were satisfied the appeal was dealt with fairly. The ACAS Code of Practice does not require appeals to be dealt with outside the company; they can be fair even if they are dealt with by a different manager employed by the same company. Mr Murphy had not previously been involved in any significant degree with the respondent, and not previously involved in this case. It was fair to appoint him to deal with the appeal.

177. The key question, however, was whether on appeal Mr Murphy corrected the flaws which we found existed in Mr Bullough's decision.

178. The Tribunal had to make a factual finding here about the extent of contact between Mr Murphy and Mr Forster. The outcome letter at page 144 only mentioned contact with Mr Forster on page 145 where Mr Murphy rang him to check about the lunch break: it contained no record of any discussion between the two of them other than that point. Three paragraphs later the appeal outcome letter explained that Mr Murphy had "no hesitation" in accepting Mr Forster's written statement.

179. We noted that Mr Murphy's witness statement made no mention of any contact at all with Mr Forster, and he said that no notes had been kept of his contact with Mr Forster. In cross examination and in answer to questions from the Tribunal Mr Murphy said he had asked Mr Forster about the telephone call alleged by the claimant on 17 March, and that Mr Forster had confirmed that no permission had been granted, but when pressed on that point he said he could not recall whether he had discussed that with Mr Forster or not.

180. Putting these matters together the Tribunal found as a fact that Mr Murphy only asked Mr Forster about the lunch breaks issue and otherwise did not probe Mr Forster about any other points in the appeal.

181. Having made that finding of fact we considered whether Mr Murphy's appeal had corrected the flaws in how Mr Bullough dealt with the three disciplinary issues. In relation to 7 March we found that Mr Forster was not asked at the appeal stage about the January 2017 agreement that the claimant would not have to ring in any longer, even though the claimant had made this point in clear terms in his email of 9 June at page 132: he said there that Steve Forster had told him there was no point in ringing every day. Mr Murphy if acting fairly would have gone back to Mr Forster about this point.

182. As for 17 March, even though the claimant made the point about telephone records in his appeal documents Mr Murphy failed to explore that, and again like Mr Bullough he failed to appreciate that if there was evidence a phone call had been made from Blackburn at around 2.00pm that day it might have jogged Mr Forster's memory about what had been discussed and might have resulted in that allegation falling away.

183. Finally, in relation to 24 March, Mr Murphy in his evidence to our hearing ended up saying that the use of the company fuel was the main issue. He appeared to accept Mr Forster's statement that there was no lunch break, but he ignored the fact that the claimant was only paid for eight hours of every nine hour working day.

Mr Murphy also failed to address what the claimant said in his appeal letter about his disability and the need for him to take breaks. He failed to go back to Mr Forster about the question of whether the break taken to pick up the claimant's daughter had actually had any impact on the claimant's ability to carry out the two missing deliveries, despite the claimant having explained that that was not the case in his appeal documentation.

184. Nor did he investigate the claimant's case that the real reason for Mr Bullough's decision was "other factors". The claimant made that clear in his appeal letter at page 126 but Mr Murphy failed to undertake any investigations with Mr Bullough about that.

185. In summary, save for the delay in getting the matter to Mr Murphy, the appeal was procedurally fair and impartial, but it failed to correct the flaws in the investigation by Mr Bullough.

Sanction

186. Issue 14 was whether the decision to dismiss the claimant fell within the band of reasonable responses. That issue cannot really be addressed by this Tribunal given our conclusion that the **Burchell** test was not met. The lack of reasonable investigation of 7 and 17 March and the fact there were no reasonable grounds for concluding that there was misconduct on 24 March meant that the decision to dismiss could not fall within the band of reasonable responses, even given the cumulative effect of the events of 7 and 17 March.

Unfairness - Summary

187. In summary, therefore, the Tribunal concluded that the dismissal was unfair. Mr Bullough did not go into the disciplinary proceedings with an open mind. He was influenced by his previous negative view of the claimant, what he heard about missed deliveries and the discovery that the claimant was having a full lunch break every day when the other drivers did not.

188. The consequence of him not having an open mind meant that he accepted at face value what Mr Forster said in his written statement; he did not give any credence to the claimant's explanations and failed, therefore, to carry out a reasonable investigation of the points the claimant raised in the disciplinary hearing on 31 March. That led to his decision to dismiss the claimant being unfair, and for reasons explained the appeal stage failed to correct those flaws.

189. For those reasons, therefore, the Tribunal unanimously found that the claimant had been unfairly dismissed.

**Discussion and Conclusions - Remedy Issues**

Legal Principles

190. There were three aspects of remedy which were addressed in this hearing even though there will be a further remedy hearing. The relevant legal principles can be summarised as follows.

191. If an unfair dismissal complaint is well founded, remedy is determined by sections 112 onwards. Where re-employment is not sought, compensation is awarded through the basic award and compensatory award.

192. The basic award is a mathematical formula determined by section 119. Under section 122(2) it can be reduced because of the employee's conduct:

> **"Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly."**

193. The compensatory award is primarily governed by section 123 as follows:

> **"(1) Subject to the provisions of this section and sections 124, 124A and 126, the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer….**
>
> **(6) Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding……"**

194. Section 123(1) means that compensation can be reduced if the Tribunal considers that a fair procedure might have led to the same result, even if that would have taken longer – see **Polkey v A E Dayton Services Limited [1988] ICR 142** and the subsequent guidance from the Employment Appeal Tribunal in **Software 2000 v Andrews & others [2007] ICR 825** (leaving aside that part of the guidance relating to the repealed statutory dispute resolution procedures).

195. The leading authority on section 123(6) remains the decision of the Court of Appeal in **Nelson v British Broadcasting Corporation (No. 2) [1980] ICR 111**. The Tribunal must be satisfied that the relevant action by the claimant was culpable or blameworthy, that it caused or contributed to the dismissal, and that it would be just and equitable to reduce the award.

196. As to culpability, Brandon LJ said that:

> **"…it also includes conduct which, while not amounting to a breach of contract or a tort, is nevertheless perverse or foolish or, if I may use the colloquialism, bloody-minded. It may also include action which, though not meriting any of those more pejorative epithets, is nevertheless unreasonable in all the circumstances. I should not, however, go as far as to say that all unreasonable conduct is necessarily culpable or blameworthy; it must depend on the degree of unreasonableness involved."**

197. An unreasonable failure to follow the ACAS Code of Practice by an employer can result in an increase of up to 25% in the compensatory award: section 207A Trade Union and Labour Relations (Consolidation) Act 1992.

<u>ACAS Code Increase</u>

198. In relation to the ACAS Code, the only breach of the Code (as opposed to the Guide which does not have the same relevance to remedy) was the delay at the

appeal stage, but that was not an unreasonable breach given that it did not really create any unfairness and given the claimant's preference for written communication. We were satisfied that no increase to any compensation would be appropriate for breach of the ACAS Code of Practice.

Contributory Fault

199. In relation to contributory fault, it is for the Tribunal to make its own decision on whether the claimant had behaved in a manner which was culpable, blameworthy or otherwise unreasonable based on the evidence we have heard in this case. We were not restricted to evaluating the employer's view of matters. The Tribunal was satisfied unanimously that the claimant behaved appropriately on all three occasions in March 2017, and there was no culpable conduct which could justify any reduction in compensation.

Just and Equitable Reduction to Compensatory Award

200. Finally, we turned our minds to the question of whether any reduction to the compensatory award for unfair dismissal would be appropriate based on the **Polkey** principle. This inherently requires some speculation by the Tribunal based on the evidence we have heard in the case. We had to reconstruct what would have happened if the respondent had dealt with matters fairly.

201. The key issue in this case was the failure to go back to Mr Forster to explore properly the explanations the claimant gave. We had to speculate what Mr Forster would have said if the respondent had gone back to him about the January agreement and about the evidence of the phone call made on 17 March, and about the fact that drivers were allowed to have unpaid breaks given the way they were paid.

202. We accepted the claimant's evidence that after the disciplinary hearing on 31 March when Mr Forster gave him a lift back from Blackpool Mr Forster told the claimant he did in fact recall having given permission on 17 March. The fact that the claimant did not make that point in his appeal is surprising, as Mrs Ormond pointed out, but we concluded that was attributable to the fact that he was all at sea, in procedural terms, and not really sure what was happening. It was not omitted because it did not happen.

203. In relation to 24 March the Tribunal concluded the claimant could never have been fairly dismissed on this point. There was simply no misconduct, and an employer acting reasonably could not have reached that view.

204. In relation to 17 March the Tribunal concluded there was a high probability Mr Forster would have changed his statement and would have accepted he had given permission. We based that on two matters: firstly that there would have been, had the respondent investigated it reasonably, evidence that a telephone call had been made from Blackburn after the last delivery (the Vodaphone call record appeared at page 151), and secondly he had said to the claimant on 31 March 2017 that in fact he did recall having given permission.

205. As for 7 March the Tribunal were satisfied it was less likely Mr Forster would have admitted that there had been an agreement in January that the claimant did not have to ring in any more.

206. In reconstructing what would have happened we bore in mind that none of these matters amounted to gross misconduct in isolation. If left with two allegations, namely 7 and 17 March, the respondent might reasonably have taken the view that the claimant should be dismissed for gross misconduct, but the chances of that happening were limited because of the likelihood that the 17 March allegation would have fallen away because of the telephone call issue.

207. Taking into account all the evidence in this case, and noting the claimant's length of service, clean record and what he said at the appeal stage about his disability impacting on his need for a break, we were satisfied that if the respondent had acted fairly there was a 25% chance the claimant would have been dismissed. The compensatory award should be reduced by 25% in relation to losses after dismissal.

208. All remaining matters as to remedy will be addressed at the remedy hearing fixed for **18 October 2018.** The parties are encouraged to explore on a "without prejudice" basis whether they can reach agreement on the appropriate remedy to save the costs of that further hearing.

_____

Employment Judge Franey

16 August 2018

REASONS SENT TO THE PARTIES ON

20 August 2018

FOR THE TRIBUNAL OFFICE