EMPLOYMENT TRIBUNALS

Claimant: Mr D Mullin (known as :daniel-thomas:)

Respondents: (1) Derek Williams
(2) Amy Williams
(3) Sharon Porter
(4) Maurice Williams
(5) Carl Davin
(6) AFE Group Ltd T/A Millers Vanguard

Heard at: Manchester **On:** 7, 8, 9, 10, 11 September 2020

Before: Employment Judge Dunlop
Ms J Whistler
Mr I Frame

Representation

Claimant: In person
Respondents: Mr A Moore, Solicitor

JUDGMENT having been sent to the parties on 15 September 2020 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. By a claim form presented on 21 May 2019 the claimant brought claims against his former employer (the sixth respondent) and a number of its employees (the first to fifth respondents). The claim comprised a complaint of unfair dismissal and complaints of victimisation on the grounds of disability and religion or belief.

The Issues

2. A preliminary hearing took place in front of EJ Franey on 23 August 2019. The claimant's claim had been somewhat confused and, with EJ Franey's assistance, it was resolved into a List of Issues as follows:

Victimisation – section 27 Equality Act 2010

1. Did the claimant do a "protected act" on 22 June 2018 by asking the first respondent to make a reasonable adjustment under the Equality Act 2010?

2. If so, are the facts such that the Tribunal could conclude that because of the protected act the respondents subjected the claimant to a detriment in any of the following alleged respects:

- ***D1**: On 26 June 2018 in a telephone call Derek Williams threatened the claimant's position because he had no driving licence;*
- ***D2**: On 27 July 2018 Derek Williams and Amy Williams conducted a meeting which resulted in the claimant having to write a letter about his beliefs and get a doctor's note;*
- ***D3:** Amy Williams in a letter of 9 August 2018 declined to reimburse the claimant over the cost of getting to work and refusing to make the adjustment he sought;*
- ***D4**: In a telephone call on 2 September 2018 Derek Williams was hostile and accused the claimant of being off-handed with a colleague;*
- ***D5**: On 26 November 2018 the claimant was coerced into having a meeting with Derek Williams, Amy Williams, Sharon Porter and Mo Williams during which he was denied access to an impartial grievance procedure;*
- ***D6**: On 18 January 2019 in a meeting Derek Williams made a threat to the claimant about how things could change; and/or*
- ***D7**: The respondents decided to dismiss the claimant following a disciplinary hearing on 8 March 2019?*

3. If so, can the respondents nevertheless show that there was no contravention of section 27?

4. Insofar as any of the matters for which the claimant seeks a remedy occurred more than three months prior to the presentation of his claim, allowing for the effect of early conciliation, can the claimant show that they formed part of conduct over a period ending within three months?

Unfair Dismissal – Part X Employment Rights Act 1996

5. Can the respondents show that the reason or principal reason for dismissing the claimant was a reason which related to his conduct?

6. If so, was the dismissal fair or unfair under section 98(4)? This will include consideration of the following:

- *(a) Whether the respondents genuinely believed the claimant was guilty of misconduct;*
- *(b) Whether that belief was formed following such investigation into the matter as was reasonable;*
- *(c) Whether there were reasonable grounds for that belief;*
- *(d) Whether the respondents followed a reasonably fair procedure; and*
- *(e) Whether the decision t dismiss the claimant rather than take some other form of action fell within the band of reasonable responses.*

Unlawful Deductions from Pay

7. Was the deduction of £60 in respect of a float made upon termination of employment a deduction which was authorised by a relevant provision of the claimant's contract, or

alternatively had the claimant previously signified in writing his agreement or consent to the making of that deduction?

The Hearing

3. The hearing took place fully in person at Manchester Employment Tribunal. The panel heard the claim over four days and gave judgment on the fifth day. We heard from the following witnesses:

(1) For the claimant, :daniel-thomas: himself;

(2) For the respondent:

(a) Mr Derek Williams, Clean and Service Manager (First Respondent);

(b) Mr Carl Davin, Clean and Service Training and Development Recruitment Manager (Fifth Respondent);

(c) Ms Amy Williams, HR Manager (Second Respondent);

(d) Mr Maurice Williams, Operations Manager (Fourth Respondent);

(e) Ms Sharon Porter, Head of HR and Health and Safety (Third Respondent);

(f) Mr Nicholas Webb, Transport Manager

4. Mr Moore, who has had conduct of this case on behalf of all the respondents for a number of months, had attempted to agree a document bundle with the claimant in advance of the hearing, in accordance with EJ Franey's directions. Unfortunately, the claimant misinterpreted those directions and filed his own documents to the tribunal. He complied with the requirement (post Covid-19) to file those documents in advance to allow them to be quarantined, but they were filed as loose documents in a box file and only one copy was provided. A second copy had been provided to Mr Moore, but the absence of sufficient copies for the full tribunal panel and the witness table made it difficult to use the claimant's documents during the hearing.

5. We addressed this issue by assisting the claimant, when he wanted to refer to a document, to locate it in the respondents' bundle. The vast majority of his documents were duplicated in that bundle and we are grateful to Mr Moore for assisting with locating them when necessary throughout the hearing. On one or two occasions the document could not be found, but those proved to be minor points, and the Tribunal was able to assist the claimant by the Employment Judge reading the relevant part of the document to the witness (and lay members) before the claimant asked his question.

6. In addition, the box file contained a memory stick on which were stored audio recordings made by the claimant. Again, EJ Franey's directions had made provision for how audio recordings should be dealt with as evidence and, again, the claimant had either misunderstood or ignored those directions. We listened to some parts of the claimant's recordings (played by Mr Moore on equipment provided by the

respondent) during the course of the evidence. We listened to the recordings when requested to do so by the claimant but only where the claimant could explain how listening to them would help us resolve a matter in dispute. The claimant appeared to be under the impression that we would listen to the full recordings (for example, the entire disciplinary hearing) as part of our deliberations. The Employment Judge made it clear to the claimant that this was not the case, and that any relevant material needed to be introduced during the public hearing.

7. The claimant stated at the outset (as he had done at the preliminary hearing) that he wished to be addressed as "daniel" and not Mr Mullin. His preferred written form of his name is :daniel-thomas: and he regards this as his real name. He objects to the use of the title 'Mr', which he believes connotes subservience or slavery. He also objects to the use of capital letters in names. The Tribunal agreed that he would be addressed and referred to as daniel throughout the hearing. In this judgment we refer to him as "the claimant".

8. This is a convenient point to note that throughout the hearing the claimant periodically made reference to an obscure set of beliefs couched in quasi-legal terminology. He also embarked on cross-examination based on various print-outs of what appeared to be legal code or legislation from the United States of America and referred constantly to various witnesses and documents as being 'perjured' for a range of fanciful reasons (including, for example, the use of "poisonous" capital letters in headers of the respondent's witness statements, or the fact that a witness corrected erroneous cross references to page numbers in the bundle whilst confirming their statement). This approach hindered the claimant's presentation of his case and the Tribunal have disregarded those arguments has having no relevance to the issues we had to determine.

9. The final point to record about the conduct of the hearing was that the claimant made an application to exclude Mrs Porter (who was yet to give evidence) from the room during the evidence of Miss Williams. These were the two witnesses from the sixth respondent's HR department. The Tribunal heard submissions on this application from both parties and adjourned to consider the application, applying the test set out in Rule 43 of the Employment Tribunal Rules of Procedure, namely whether it would be in the interests of justice to do so. Having regard to the fact that Mrs Porter was a named respondent, and that the claimant had been unable to identify a conflict of evidence of the sort where the tribunal might benefit from hearing entirely independent accounts from the witnesses in question, the Tribunal declined to exclude Mrs Porter.

Findings of Fact

Background

10. From this point references to "the respondent" are to the sixth respondent only. The individual respondents are identified by name.

11. The respondent provides technical, cleaning and maintenance services for equipment and machinery found in supermarkets. We find that the respondent is a business with a high concern for its professional reputation – for example, the business uses liveried vehicles and requires staff to dress in uniform. It services five

major supermarkets. The supermarkets are household names and sensitive about their own reputations. Due to the nature of the business, the respondent relies on a small number of contracts with very big clients. We heard, and accept, that losing even just one of these contracts would have a huge impact on the business and would probably result in redundancies.

12. The claimant was employed from July 2009 as a Clean & Service Technician (CST). His role was to attend the supermarket premises to clean and service the equipment.

13. The CSTs, including the claimant, attended the respondent's premises in Bury on a Monday morning. They were provided with a van and details of their work for the week. They then travelled to the relevant location (which could be anywhere in the country), checked into a hotel, and travelled to the site to commence work. The majority of the work took place on Tuesday to Thursday, and the CSTs would travel back on Friday, returning the van and attending to any administration etc. before returning home. The respondent used a commercial booking agency called HTS to book hotel accommodation, and would frequently use the Travelodge chain.

14. The only exception to this working pattern related to two employees from Doncaster who had been transferred into the business under the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE") and had contracts which allowed them to work from home. They were not required to attend the depot. Some of the work was done by teams of two, but the claimant worked as a team of one, servicing smaller machines.

15. We find that the claimant was at all times good at his job and a valued employee.

16. The claimant is a post-transplant kidney patient, having received a transplant in 2015. For a period whilst he was waiting for a transplant the respondent permitted him to work within a two-hour travel time of his home, to facilitate his speedy access to hospital which would be necessary if a donor organ became available. The claimant complains that there was an occasion during this period where Carl Davin sent the claimant to Wales, with the result that he almost missed a transplant opportunity. We make no findings about that occasion, which is not relevant to the issues in this case. What is relevant is that the claimant had, prior to the events in this case, a long history of employment with the respondent and that the respondent had supported him through a significant episode of ill health (even if it perhaps did not always get that support completely right).

17. Following the successful kidney transplant the claimant decided to adopt a very strict "alkaline" diet. That was not mandated by his doctors, nor was it disapproved of by them. He believes that it helps him to manage his condition without resorting to drugs that might otherwise be necessary. In summary, the diet requires that he avoid processed food and eat food prepared from scratch, and that he should predominantly consume fresh fruit and vegetables.

18. The claimant also had a history of eye problems and has had eye surgery.

19. In terms of religion and belief, the claimant describes himself as a non-commercial Christian. He places importance on scripture and attempts to live in accordance with Christian percepts as laid down in the 1611 King James Bible. He does not subscribe to organized religion, which he describes as "commercial". His beliefs as to food and medication, combined with his Christian beliefs, form a personal philosophy which he describes as "synchronistic". He explained, for example, his belief that the ladder in the Biblical story of Jacob's ladder represents the human spine.

Driving licence and home stop policy

20. The key events for the purposes of the claim began in May 2018. On 30 May 2018 Derek Williams sent an email to all the CSTs reiterating that they were not permitted to go home between leaving the respondent's site in their company vehicles and proceeding to their hotels. As stated in the email, he had also informed them of this during a service meeting the previous week.

21. It had never been the case that technicians were permitted to go home but it appears that the practice of doing so had developed amongst a significant number of employees. This had been identified as a result of an efficiency exercise which analysed the vehicle tracker data. Following that exercise (and with a view to the costs to the company in time, fuel and excess mileage) Mr Williams took the decision that they should no longer happen and took steps to clearly communicate the to the employees affected.

22. It had been the claimant's practice to go home and collect food for the week before driving to his hotel. By taking his own food, he could ensure that he adhered to his alkaline diet. The new rule caused him a problem because it would be difficult to transport enough food for the week on the bus when he came to the depot on a Monday morning. We find that none of his managers had been aware until this point that he was transporting food in this way and therefore would not have been aware that the change would cause him particular difficulties.

23. One day later, on 31 May 2018, it came to the attention of the respondent's managers that the claimant's driving licence had expired. (Due to his sight issues, the claimant's driving licence is one which needs to be reissued at regular intervals.) The claimant contends that it was legally permissible for him to drive with the expired licence whilst waiting for a sight test. We make no finding as to whether that was actually the case or not. We are satisfied that the respondent's managers reasonably considered that they could not allow him to drive a company vehicle until the licence was properly renewed.

24. The respondent sent a pair of drivers to Scotland, where the claimant was working, to bring him back, along with the company vehicle he was using. The claimant was placed on holiday for a week to resolve the issue.

25. The claimant asserts that he went to Derek Williams office on 22 of June to raise his concern about no longer being able to collect his food. He says he was asking for a reasonable adjustment under the Equality Act 2010 ("EqA"). He claims that Mr Williams swore at him when he arrived in the office and then said "*what's your problem?*". The claimant says he explained briefly his medical concern and

asked for a reasonable adjustment. He claims this was a 'protected act' for the purposes of his victimisation claim. Mr Williams denies that any such conversation took place. Our findings on this are set out in the 'Discussion and Conclusions' section below.

26. It is not in dispute that Mr Williams phoned the claimant on 26 June 2018. The claimant recorded that conversation, we listened to the recording, and had regard to an agreed transcript produced during the course of the hearing. Mr Williams begins the conversation by asking the claimant "*where we up to with your driving licence?*" The claimant explains that he is waiting to hear from the DVLA and expects to receive the licence soon. Mr Williams responds: "*Right well if it hasn't you might want to consider looking for another job*". He later comments: "*if you can't drive a company vehicle come Monday morning you won't be going out to work".*

27. The claimant engages in an argument about whether or not he can legally drive, despite the licence having expired. Mr Williams has little truck with that argument. The claimant then says "*I have asked for a special requirement, a reasonable adjustment should I say*." Mr Williams responds: "*I don't know what you're talking about*." There is then a short discussion around the fact that the claimant has not been able to eat breakfast before Mr Williams says "*that's got nothing to do with your driving licence*" and the conversation reverts to discussion of the driving licence issue.

28. On 13 July the claimant submitted a timesheet and expenses claim. This included two claims of £7 for the cost of taking a taxi to work rather than the bus on Monday 2nd and Monday 9th of July. A note on the timesheet says "*Please refer to the Equality Act 2010 sections 1 and 7 enclosed also protected characteristics sections 4, and 6 & 10 also enclosed. I wish no animosity under the law only a reasoning.*" Alongside the timesheet the claimant submitted a print-off of section 20 Equality Act 2010 with subsections 1 and 7 highlighted. These sections refer to the duty to make reasonable adjustments in the case of disabled employees. Further print-offs referred to the sections of the Act which defined the protected characteristics of disability and religion or belief.

29. The timesheet was submitted to Derek Williams for authorisation. Mr Williams did not understand the references to the Equality Act and he therefore forwarded the material to Amy Williams who is the company's HR manager (and also his niece).

The pursuit of a 'reasonable adjustment'

30. Miss Williams met with the claimant on around 27 July 2018. There is no note of this meeting but it is summarised in an email of the same date she sent to Derek Williams. Miss Williams says that she found it difficult to understand the claimant's concern and the solution he was seeking. Having observed the claimant ourselves and also seen notes of other meetings and written material prepared by him, the panel fully accepts that it was most likely very difficult for Miss Williams to get to the bottom of what the problem was and what the solution might be. Her email shows that she had surmised that the claimant's wish to go home to collect food might be related to a potential disability and/or to a protected religion or belief. She asked him to put his request in writing in order that she could investigate and determine what to do.

31. Although he objected to this request the claimant did comply and provided a seven-page document headed 'Declaration of Religion and Belief'. The first page gives an account of his medical history and how he has found an alkaline diet to be a more effective way of managing his health post-transplant than medical interventions. He then states that this is supported by Biblical texts, and provides extensive quotations which take up most of the rest of the document. There is a reference on the final page to the respective cost of bus and taxi journeys, but no where does the claimant simply set out that he wants to be able to use his company vehicle to collect food, as he has done in the past, due to his beliefs and/or disability.

32. Amy Williams decided that it was reasonable to maintain the rule that the claimant could not take his work vehicle home (and also that the business would not refund the cost of taxis). This was communicated to the claimant in a letter dated 9 August 2018. There was nothing in that letter to indicate that he could challenge the decision or take the matter further, nor to indicate how he would do so within the respondent's procedures. The respondent accepts that that meeting and the letter did not constitute a grievance process.

33. Instead, Miss Williams offered to purchase suitable wheeled bags for the claimant to help him with transporting his food, including on public transport. This was subsequently done, although the claimant's evidence is that the bags were not practical and did not resolve the problem. We noted that in making arrangements to provide the bags Miss Williams also arranged for them to be 'branded' with the company logo. This is illustrative of the value the respondent placed on its operatives maintaining a professional appearance and enhancing the reputation of the business.

34. Around the same time, the respondent made arrangements with HTS for hotels to be notified of the claimant's dietary requirements to be provided with fruit and muesli for breakfast. This was following reports that the claimant had complained on occasions that no breakfast items were available which were compatible with his diet.

35. On 11 August 2018, the claimant used the respondent's whistle-blowing line to take his concern to Mr Smith, the Group CEO. The respondent's witnesses were concerned that that was not the right procedure, but we find that the claimant cannot be criticised for that, given that he was given no further recourse in Miss Williams' letter. Mr Smith then wrote to Miss Williams to establish what has happened and at that point he was particularly concerned about the claimant's allegations that the Mr Williams had sworn at him.

36. There was then more correspondence between Mr Smith and Miss Williams and separately between Mr Smith and the claimant and Miss Williams and the claimant. Mr Smith appears to have taken a particular interest in the case as his sister was a kidney transplant recipient. His correspondence shows that he is sympathetic to the claimant's concerns.

37. Although some adjustments had been made, it should have been clear to the respondent that the claimant wished to challenge the decision not to make an exception to the returning home policy. He attempted to do this through correspondence, and through a subject access request, the terms of which were

directed to demonstrating that there had been no "deep investigation" of his concerns, contrary to what had been said in Miss Williams' 9 August letter.

38. Correspondence from Miss Williams at this time just reiterates the original decision and attempts to draw the matter to a close. There is no offer of a grievance hearing. The response to the subject access request, by letter dated 20 August 2018, was similarly dismissive. No documents were actually identified or provided. Instead, Miss Williams reiterated the adjustments that had been made and concluded that "*this matter is now closed*." Again, there was no information given about the grievance procedure or any other avenue by which the claimant could challenge this decision.

39. He continued to pursue the matter with both Miss Williams and Mr Smith. Following Mr Smith's intervention, a meeting was convened with two directors of Miller Vanguard on 8 October. The claimant was once more asked to provide further information, which he did. The response (dated 20 November 2018 and again sent by Amy Williams) remained the same: that the adjustments already provided were sufficient.

40. Following that the claimant wrote again to Mr Smith on 25 November 2011. The emails starts "*I have been left with no other option but to raise a grievance, in regards to the discrimination, bullying and harassment, victimisation and even fraud (evidenced) that has occurred within the workplace*." He goes on to outline why in his view the proposed adjustments provided were insufficient. Mr Smith's reply envisages that a grievance meeting will be held and advises that any new grievance should be raised with Sharon Porter.

41. Mrs Porter's evidence was that if the claimant wanted to raise a grievance at that point he could have done so, but none came in. Of course, as far as the claimant was concerned, he had already raised his grievance in his email to Tim Smith when he had expressly said that was what he wanted to do.

42. Instead of arranging grievance hearing, a meeting was convened with Mrs Porter and the two Mr Williams' during which it was made clear to the claimant that a final decision had been taken and the only further step was to take legal action.

43. That was not, however, the end of the story, as the Claimant's continued correspondence with Mr Smith eventually paid off. Following further correspondence and meetings (the details of which are not relevant to this claim) Mr Smith overrode the decision and permitted the claimant to continue making home stops. By email dated 14 December 2018 the claimant was informed he would be able to take his company vehicle home to collect food on a temporary basis until 31 March 2019. That was later extended to then end of the year. (Any question of a further extension was overtaken by the claimant's dismissal in the intervening period.) The decision to allow the exception to the home stop policy might well have been reached earlier, and with less fuss, if the grievance process had been followed and someone objective had looked at whether it was reasonable to allow an exception to be made in the claimant's case.

The Travelodge Episode and Investigation

44. Matters were then relatively quiet until an incident occurred on 20 February 2019, when the claimant was staying at a Travelodge in Winnerish. A Field Based Auditor, Nick Swallow, was notified that the claimant has been "*kicked out of his digs due to an argument over a fried egg*". Mr Swallow notified Derek Williams and other staff, with the immediate priority being to secure alternative accommodation for the claimant for that evening.

45. Initially, the respondent was receiving their information second hand via HTS. It was suggested that the claimant had been rude and abusive to staff the previous day, and had been "going on about" political issues. An incident had then occurred early in the morning which had resulted in the manager phoning HTS and saying that he had evicted the claimant and was going to report the matter to the police. A fuller version was reported to Mr Swallow when he then established direct contact with the hotel.

46. The following day, Derek Williams was contacted by Thames Valley police, the basis for the call being to ensure that the business, as the claimant's employer were aware of the incident. The police reported that the Travelodge staff were content for there to be no further action from them, on the basis that the respondent were going to 'deal with it' internally.

47. The claimant was suspended in a meeting conducted by Carl Davin on 22 February 2019. During the meeting Mr Davin asked him to write a statement recording what had happened at the Travelodge whilst it was fresh in his mind. He duly provided a handwritten statement dated the same date. This confirmed that there had been a dispute over the hotel's inability to provide fried eggs, which had resulted in the claimant being evicted from the hotel. On the claimant's account, the hotel manager had been the aggressor, had threatened the claimant with violence and had called him a "fucking cunt". The claimant reported that, in response, he had called the manager a "fucking imbecile". He denied being racially abusive, which had been alleged by the Travelodge manager.

48. An investigatory interview was conducted by Mr Davin with the claimant on 25 February 2019. The claimant elaborated somewhat on his statement but gave a consistent account.

49. Further investigation into the matter was carried out predominantly by Mrs Porter, although this was not well documented. There was no investigation report and no formal process for deciding that whether the matter should proceed to a disciplinary hearing. Mrs Porter asked Travelodge to provide statements from those involved in the incident with the claimant. The statements which were initially provided were unsigned, and Mrs Porter asked for signed versions, which were then provided. Mrs Porter told us in evidence that she asked for CCTV records but this request was declined. There is no record in the documents, or in Mrs Porter's witness statement, about this request, and the claimant invited us to find it was never made. Our conclusions on this point are set out in the 'Discussions and Conclusions' section below.

Disciplinary Hearing and Dismissal

50. By letter dated 27 February 2019, the claimant was invited to a disciplinary meeting, to be conducted by Derek Williams on 1 March 2019. Mrs Porter told the Tribunal (and we accept) that the decision that the matter should proceed to a disciplinary was a 'joint decision' between Mr Davin, Derek Williams, Maurice Williams and HR (by which we assume she meant herself, and possibly Amy Williams).

51. The letter stated that the following allegations would be considered:
- *Racial abuse, verbal abuse and threatening behaviour towards hotel staff whilst representing Millers Vanguard.*
- *Continuous disruption caused by yourself, which is putting the company at disrepute."*

52. The letter warned the claimant that dismissal was one possible outcome of the disciplinary meeting. A disciplinary 'pack' was attached to the letter, containing notes of the two meetings with the claimant, his statement, four Travelodge statements, and "file notes held on your personnel file whereby similar events on other occasions have taken place". The latter category included two emails from January 2017 - the first from a Kent Police constable to Derek Williams regarding a complaint about a van driver using words of racial and religious abuse to a member of the public during a parking altercation, the second from Mr Williams to HR identifying the driver (from details given in the first email) as the claimant. There were a few further internal emails and emails between the respondent and HTS, documenting various occasions where the claimant had asked for amendments to be made to his bookings or complained about Travelodge accommodation.

53. The disciplinary hearing was rescheduled to take place on 8 March and to be heard by Nicholas Webb, who is the respondent's Transport Manager. Mr Webb had had no previous involvement in the investigation or the matters leading to it. He knew the claimant by sight, but had no involvement in managing him. He had informed Mr Williams about the driving licence issue the previous spring because reports from the service the business uses to monitor its drivers' licence status come to him, but he had not been involved with discussions with the claimant about the issue. The Tribunal is satisfied that he was an independent senior manager.

54. On 7 March 2019 Amy Williams emailed the claimant to provide him with an email from Travelodge which confirmed that the employees had consented to their statements being used, an email from the hotel manager which gave the police reference number for the incident and which advised him that the third Travelodge witness statement would be disregarded. This was because that statement did not name the claimant and the respondent had decided it would be unfair to rely on it.

55. The claimant provided Mrs Porter with a 6-page document responding to the allegations. As with much of the claimant's correspondence, this was both confused and confusing. There were misconceived references to the law of fraud and perjury, scriptural quotes and rhetorical questions ranging from "*Do you understand what a high salt intake does to the body?*" to "*Is it MILLERS policy to control a man's life?*". This document was never provided to Mr Webb. Mr Moore accepted that it should

have been and that that was a procedural defect with the respondent's dismissal process.

56. On the evening of 7 March whilst suspended, the claimant telephoned the Travelodge to attempt to obtain names and contact details for those who had provided witness statements against him. His purpose in doing so was, in his own words, to enable him to "*put a tort on them*". Mr Webb was made aware of this conversation, and discussed it with the claimant in the disciplinary hearing.

57. The disciplinary hearing took place on 8 March. The claimant recorded that meeting and the notes which appear in the bundle were described as a transcript. On review, it is clear that they are not a verbatim transcript of the recording, but rather a detailed note of the meeting made with reference to the recording. The general accuracy of that note has not been disputed, save in one respect.

58. It is the claimant's case that Mr Webb swore at the outset of the disciplinary hearing. The context of the allegation is this: it transpired that the person that the claimant had intended to have accompany him was unable to attend. (There was no request by the claimant to delay the hearing, and the fact he was unaccompanied forms no part of his complaint to the Tribunal.) When Mr Webb was informed about this at the start of the hearing by the claimant, he said (according to the claimant) "*fucking hell, that's a drag*". Mr Webb denies that he used such language, although he accepts he may have said "*bloody hell, that's a drag*". We therefore agreed to listen to the recording of the start of the meeting to assist with resolving this dispute. The quality of the recording is not perfect, particularly when it comes to Mr Webb who was evidently further away from the microphone than the claimant. A comment can be identified which could be the comment the claimant alleges was said, but could equally be the milder "bloody hell" version, or could be something else altogether. We discuss this further below in the 'Discussions and Conclusions' section.

59. Mr Webb opened the meeting by explaining that one of the Travelodge statements was being disregarded and identifying which one it was. There followed a detailed discussion about the episode at the Travelodge. Mr Webb then asked the claimant about previous occasions where he had concerns raised with HTS and Travelodge about breakfast choices. Mr Webb then asked the claimant whether he had contacted the Travelodge during his suspension. The claimant was open about the fact he had done so, as described above. The claimant was then asked about interactions with the police and described his conversations with the police around the Travelodge episode, he described the police as being supportive of his position. He then described in detail the 2017 incident which was referenced in the disciplinary pack. Again, the claimant's account of this incident was that the other party had been the aggressor. The discussion then went back to the Travelodge episode, and Mr Webb explored in detail the exchanges the claimant had had with Travelodge staff, both at check-in and over breakfast. The claimant was asked if he wanted to add anything and he provided a print out of a 'comment' he had posted on the Travelodge website. (We were not referred to that document itself and have not seen it.)

60. Following a short adjournment, Mr Webb announced his conclusion. Although he said he discounted the allegations of racism and that the claimant was being

'political' or 'bullying' he nevertheless considered that his actions, particularly in swearing at the hotel manager, had brought the business into disrepute and constituted gross misconduct. The notes then record the claimant seeking to dispute Mr Webb's conclusions and continue to put forward his arguments. Following some discussion, Mr Webb confirmed that he was dismissing the claimant, and also informed him that he had a right to appeal. Aside from that, the claimant was instructed not to call or email the business.

61. A letter confirming the decision to dismiss was sent on 11 March 2019. The reason given for the dismissal was:

> *"you have brought the company into serious disrepute involving:*
>
> - *The incident in question at Travelodge Winnerish which began two weeks prior to your arrival and continued throughout your stay until the hotel finally made the decision to dismiss you from the property and make a complaint to Millers Vanguard.*
> - *Escalated complaints to the police which has led to them reporting incidents to us.*
> - *Complaints received from Hotel Travel Solutions regarding your abrupt phone calls."*

62. There was a plethora of further correspondence from the claimant, much of it directed to Mr Smith, who pointed him back in to the appeal process. Eventually, an appeal was convened and heard by Peter Jones, the respondent's finance director, on 22 March 2019. The decision to dismiss the claimant for gross misconduct was upheld. We did not hear evidence from Mr Jones, who is no longer employed by the business.

63. The claimant's final payslip is dated 15 March 2019 and shows a £60 deduction. This was made by way of securing repayment of the same amount of money, which had been advanced to the claimant at an earlier stage of his employment as a 'float' to cover parking costs etc. to ensure that he was not out of pocket whilst waiting to claim for expenses.

The Law

64. Before setting out the legal authorities and principles that we had regard to, it might be helpful in this case to note some of things that we did *not* have to consider.

65. Firstly, we did not have to make any decision on whether the claimant was, at any material time, a person with a disability within s.6 Equality Act 2010 ("EqA"), or whether his beliefs as regards his health and diet amounted to a protected characteristic within s.10 EqA. This was because the only EqA claims were claims of victimisation. To succeed in a claim of victimisation, a claimant does not have to show that they actually have a protected characteristic.

66. With regard to the respondent's refusal to allow the claimant to use his work vehicle to collect food from his home between May and December 2018 (or alternatively to fund taxis for him) that might, in other circumstances, have given rise to a claim of failure to make reasonable adjustments under s20-21 EqA (based on his disability) and/or a claim of indirect discrimination (based on his protected belief). However, as discussed in the preliminary hearing before EJ Franey, the request to be exempted from the 'no home stop' policy was primarily relied on as the 'protected act' necessary for the purposes of a victimisation claim. EJ Franey observed that any claim in respect of failure to make reasonable adjustments would, in any event, be

out of time as the adjustment had in fact been made by Mr Smith from December 2018. In the circumstances, there was no claim of failure to reasonable adjustments for the tribunal to resolve. (The same would be true for any indirect discrimination claim on the grounds of religion or belief).

67. The list of issues, reproduced above, set down the issues which we would determine. The claimant did not seek, prior to the hearing or during it, to resile from that list. Despite this, much of his questioning of the respondent's witnesses appeared directed to trying to establish that his medical condition amounted to a disability, that his beliefs were of such a character as to fall within s.10 (he referred on several occasions to the case of **Grainger plc v Nicholson 2010 ICR 360**, which is a key authority on that point), and that the failure to amend the policy earlier had been discriminatory. We do not set out the law relevant to those questions, as we have not had to decide those questions.

Victimisation

68. Section 27 EqA provides:

> (1) A person (A) victimises another person (B) if A subjects B to a detriment because—
>
> (a) B does a protected act, or
>
> (b) A believes that B has done, or may do, a protected act.
>
> (2) Each of the following is a protected act—
>
> (a) bringing proceedings under this Act;
>
> (b) giving evidence or information in connection with proceedings under this Act;
>
> (c) doing any other thing for the purposes of or in connection with this Act;
>
> (d) making an allegation (whether or not express) that A or another person has contravened this Act.
>
> (3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

69. To succeed in this claim the claimant must first show that he has done a 'protected act'. Section 27(2)(c) is a broad 'mop-up' provision covering actions done "for the purposes of or in connection with" the EqA. The Court of Appeal in **Aziz v Trinity Street Taxis Ltd (1988) ICR 534** confirmed (in relation to the narrower wording of the Race Relations Act 1976, a predecessor to the EqA) that a protected act may be done by reference to the legislation "in the broad sense" and did not require the claimant to have in mind a specific provision of the legislation. This would certainly still be the case having regard to the more generous wording of s27(2)(c).

70. If a protected act is established, the claimant must then show that he has been subjected to a detriment, and that the reason he was subject to the detriment was because of the protected act.

71. We had regard to the guidance set out at paragraphs 9.8-9.10 of the EHRC Code of Practice on Employment, including the principle that a detriment is "*anything which the individual concerned might reasonably consider changed their position for the worse or put them at a disadvantage*". The test had both subjective and objective

elements, the Tribunal consider from the claimant's perspective whether he actually perceived that he had been put at such a disadvantage, but must also assess, objectively, whether that perception was reasonable (**Derbyshire v St Helens MBC [2007] ICR 841**).

72. In relation to whether any detriment was done "because of" the protected act. This requires the Tribunal to examine the reason why the respondent subjected the claimant to the detriment. That reason may be conscious or subconscious (**Nagarajan v London Regional Transport [1999] ICR 877**). A motivation which is discriminatory (including one which amounts to victimisation) will often not be admitted, or even acknowledged, by the person holding it.

73. The protected act need not be the only or main reason for the treatment, but it must be a significant cause. 'Significant' means that it was a material or effective cause, and does not import a higher standard than that (**Villalba v Merrill Lynch [2007] ICR 469**).

74. The detriment cannot be done "because of" the protected act, where the person subjecting the claimant to the detriment has no knowledge of the protected act. (**Scott v LB Hillingdon 2001 EWCA Civ 205**).

75. Where the protected act is a complaint of discrimination, a failure to investigate or hear a complaint of discrimination may well be a detriment but is unlikely to be a detriment done "because of" the protected act. The case of **A v Chief Constable of West Midlands Police EAT 0313/14** is an example; in that case the EAT observed that it is difficult to understand how the failure to hear a complaint fully could be caused by the making of the complaint in the first place.

76. Where the reason for the detriment is not the protected act itself, but the manner in which the claimant has carried out the protected act, the requisite connection might be absent (**Martin v Devonshires Solicitors [2011] ICR 352)**. However, this principle must be applied with care and requires the tribunal to make a precise distinction between the protected act itself and the related conduct, and assess the influence of each on the respondent's motivations.

77. Finally, we note that victimisation claims are subject to the shifting burden of proof, as set out in s.136 EqA. We therefore have to consider whether the claimant has established facts which show, in the absence of any other explanation, that unlawful victimisation has occurred. If he does so, then the claim will succeed unless the relevant respondents are able to show that they did not victimise the claimant.

Unfair dismissal

78. The respondent bears the burden of proving, on the balance of probabilities, that the claimant was dismissed for a potentially fair reason: s. 98 (1) Employment Rights Act 1996 ("ERA"). The respondent says the reason for dismissal was related to the claimant's conduct, which is a potentially fair reason.

79. Consideration must then be given to the general reasonableness of that dismissal under s.98(4) ERA. Section 98(4) ERA provides that the determination of the question of whether a dismissal is fair or unfair depends upon whether in the circumstances (including the respondent's size and administrative resources) the

respondent acted reasonably or unreasonably in treating misconduct as a sufficient reason for dismissing him. This should be determined in accordance with equity and the substantial merits of the case.

80. In considering the question of reasonableness, we have had regard to the decisions in **British Home Stores v. Burchell [1980] ICR 303**; **Iceland Frozen Foods Limited v. Jones [1993] ICR 17** and **Foley v. Post Office and Midland Bank plc v. Madden [2000] IRLR 82**.

81. In summary, these decisions require that we focus on whether the respondent held an honest belief that the claimant had carried out the acts of misconduct alleged, and whether it had a reasonable basis for that belief. We must not put ourselves in the position of the respondent and decide the fairness of the dismissal based on the we might have decided in that situation. In fact, it is not for us to reach any conclusions about what actually happened at the Travelodge. That, again, is something that the claimant (in common with many litigants in person coming to the Tribunal) struggled to keep in his mind. Instead, our function is to determine whether, in the circumstances, the respondent's decision to dismiss the claimant fell within the band of reasonable responses open to an employer.

82. In conduct cases, when considering the question of reasonableness, we are required to have regard to the test outlined in the **Burchell** case. The three elements of the test are:

83. Did the employer have a genuine belief that the employee was guilty of misconduct?

84. Did the employer have reasonable grounds for that belief?

85. Did the employer carry out a reasonable investigation in all the circumstances?

86. It was confirmed in **Sainsbury's Supermarket v Hitt 2003 ICR 111** that the 'band of reasonable responses' test applies equally to the employer's conduct of an investigation as it does to the employer's decision on sanction. Whilst an employer's investigation need not be as full or complete as, for example, a police investigation would be, it must nonetheless be even-handed, and should focus just as much on evidence which exculpates the employee as on that which tends to suggest he is guilty of the misconduct in question.

Discussion and conclusions

Victimisation

87. This claim was against all six respondents. We directed ourselves according to the List of Issues. The first issue was:

Did the claimant do a protected act on 22 June 2018 by asking the first respondent to make a reasonable adjustment under the Equality Act 2010?

88. We find that the claimant did go and see Derek Williams in the late morning on 22 June with the intention of asking for reasonable adjustments in relation to the

recently imposed policy that workers could no longer stop off at home. We are satisfied that the words "*for fuck sake*" were said as the claimant approached the office but not directed at him, and then the words "*what do you want?*" were also said. That was an abrupt response. Broadly, we make these findings because we prefer the claimant's evidence of this meeting (which was detailed, and which has remained consistent from an early stage) to Mr Williams' evidence. We do find Mr Williams to have been dishonest, his recollection is simply very vague as the exchange was short and did not register with him as being significant. Contrary to what the claimant suggests, however, we find that the abruptness on the part of Mr Williams was entirely due to the driving licence situation which remained unresolved.

89. That reaction disconcerted the claimant. We find he did say something at that point about needing to be able to follow a special diet and that in his mind he had made a request for an adjustment to the rule about going home. However, we also find that Mr Williams' abrupt reception inhibited the claimant and meant that he did not explain his request. Further, it would have come across in a confused manner. The upshot of this is that Mr Williams did not recognise the request that was being made. If he had, we are satisfied, he would have sought advice from HR. In reaching these conclusions we take account of the recorded phone call from a few days later where the claimant makes reference to having made a request for reasonable adjustments and Mr Williams appears to have no idea what he is talking about. Nonetheless we find that the claimant did make a request in connection with the EqA, and it was therefore a protected act.

90. For the avoidance of doubt, we are quite clear that the claimant's submission of the timesheet/expenses claim form, accompanied by print-outs of specific provisions of the EqA, on or around 13 July 2018 also amounted to a protected act. Although that was not expressly identified in the claim or the List of Issues, it was a follow-up to the conversations that were pleaded and the nature of the protected act is identical. If we were wrong in our conclusion that the protected act was completed on 22 June, then it was completed and crystalised on or around 13 July when the expenses claim was submitted.

91. We are satisfied that these were acts (separately and cumulatively) done for the purposes of and in connection with the EqA. The respondent did not seek to argue that the claimant was acting in bad faith, and it is therefore irrelevant whether he actually had the protected characteristics in question, or whether the action he was seeking from the respondent was actually required by the EqA.

92. Although it ultimately does not matter, we record for completeness that we find this protected act related to both of the potential characteristics of disability and religion and belief. Throughout the parties have used the shorthand of "asking for a reasonable adjustment". That would only strictly arise in respect of the disability, because there is no right to reasonable adjustments for religion or belief, but asking for a rule to be adjusted on the basis that the rule was (at least potentially) indirectly discriminatory on the grounds of religion or belief, would equally be a protected act. We will continue to use the shorthand of "asking for a reasonable adjustment", as the parties have done during the hearing.

Detriments

93. The second issue was: *if there was a protected act, are the facts such that the Tribunal could conclude that because of the protected act the respondent subjected the claimant to a detriment in any of the following alleged respects?* The various detriments relied on are then listed.

1. 26 June 2018 telephone call

94. The first alleged detriment was that on 26 June 2018 in a telephone call Derek Williams threatened the claimant's position because he had no driving licence. As noted above, we know exactly what was said in this call because we listened to the recording and had access to a prepared agreed transcript. That included the comments in relation to the driving licence, "*If it hasn't turned up you might want to consider looking for another job*" and "*if you can't drive a company vehicle come Monday morning you won't be going out to work*". We agree that was a threat to the claimant's position, and it was a detriment. However, we are satisfied that it was in no way related to the protected act. As we have found, Mr Williams had failed to appreciate that the claimant was asking for reasonable adjustments prior to the submission of the expenses claim and the involvement of HR. Although we have found that the claimant's previous conversation with him was a protected act, as Mr Williams did not understand that any such request was being made his position is analogous to respondents in other cases who have not been made aware of the protected act. Mr Williams did, on the other hand, have a serious concern about the fact that the claimant as a driver was unable to drive, and he was frustrated that the claimant seemed more concerned about disputing the legalities of that than about obtaining a renewed driving licence. We find that the detriment was entirely because of that concern and frustration, and unrelated to the protected act.

95. In respect of all subsequent detriments (which all post-date the submission of the timesheet/expenses claim), we find that all the relevant individuals were fully aware of the protected act at the relevant time.

2. *27 July 2018 meeting*

96. The second alleged detriment relied on is that on 27 July 2018 Derek Williams and Amy Williams conducted a meeting which resulted in the claimant having to write a letter about his beliefs and get a doctor's note. The content of that meeting is summarised in Amy Williams' email of the same date, and there is no real factual dispute about that summary. We find that there was no detriment here. Amy Williams was genuinely trying to understand what the claimant was asking for and how those needs related to either his disability or his beliefs. That was a reasonable and appropriate response in the circumstances. Even if the claimant perceived that this somehow changed his position for the worse, such a perception was unreasonable.

3. *9 August 2018 – refusal to reimburse taxi expenses*

97. The third alleged detriment is Amy Williams in a letter of 9 August 2018 declined to reimburse the claimant over the cost of getting to work and refusing to make the adjustments he had sought. In many ways this is a reasonable adjustments/indirect discrimination claim in disguise. Again, there is no real factual dispute here. As a matter of fact, the respondent, through Miss Williams, did refuse to reimburse the expenses. However, we find this was not a detriment, the

respondent had never reimbursed taxi expenses for the claimant nor for other employees. It had never given any indication that it would do so. It did not put the claimant in a worse position than he had been in previously or could have expected to be in. Rather, it was the imposition of the 'no going home' policy that put the claimant in a worse position. Although the claimant disagrees with the conclusion, the letter is written in a professional and respectful way. It does not denigrate the claimant or his purported disability or belief.

4. 2 September 2018 – telephone call

98. The fourth alleged detriment relied on is that in a telephone call on 2 September 2018 Derek Williams was hostile and accused the claimant of being offhanded with a colleague. The claimant did not give evidence about this issue in his witness statement and was cross examined on it briefly, during which he admitted he had apologised to Lucy Heron who was the colleague referred to. There was no evidence to enable us to make findings of fact about this conversation, and in any event we are satisfied that any irritation expressed by Mr Williams about this was not related to the protected act.

5. 26 November 2018 – meeting

99. The fifth alleged detriment is that on 26 November 2018 the claimant was coerced into having a meeting with Derek Williams, Amy Williams, Sharon Porter and Mo Williams during which he was denied access to an impartial grievance procedure. We have made findings of fact about the events leading up to this meeting at paragraphs 34-41 above.

100. At this point where this meeting occurred the claimant had made a request for adjustments which had been refused. Challenging such a refusal is the essence of what grievance processes are there for, however this decision was finalised without any of the safeguards of the grievance process. This would include a formal meeting, the objectivity of different levels of management reviewing the decision, and the right to be accompanied by somebody who might perhaps have put the claimant's case forward in a way that could be more clearly understood.

101. In fairness to the respondent, we accept that the claimant was very unclear in the way that he put forward his complaints and arguments, and that the involvement of Mr Smith to some extent perhaps confused things further. Nevertheless we find that a professional HR department should have offered a grievance within the 9 August letter without being prompted, and certainly should have acknowledged the initial challenge as a grievance and processed it within the grievance policy. The process of not offering a grievance meeting and instead seeking to draw the matter to a close culminated in the meeting of 26 November, which, again, the respondent sensibly acknowledges was not a grievance meeting.

102. We do not find that the claimant was coerced into the meeting, but we do find that he was denied access to an impartial grievance procedure. We are satisfied that this was a detriment.

103. But was it a detriment that the claimant was subject to *because of* the protected act? This is not a case where the grievance itself is said to be protected

act, but it is quite close to such a case. It is difficult to analyse alleged detriments that involve the failure to appropriately investigate or respond to a complaint. At the most simple level of analysis, if the claimant had not requested adjustments (the protected act) there would have been no refusal, no need for a grievance and no failure to offer one. However, this simple 'but for' causation is not sufficient in these circumstances. We have to look at the respondent's motivation in failing to conduct a grievance process.

104. Here we find that the cause of the respondent's failure was frustration and confusion on the part of Miss Williams and Ms Porter about how to deal with this matter. This stemmed both from the confusing way in which the claimant had made his request and sought to challenge it, but also from a lack of clarity and confidence within the respondent in dealing with this sort of issue. The respondent's missteps in relation to identifying that the claimant was bringing a grievance and actioning it might, in other circumstances, have been matters from which we could draw inferences and find that the burden of proof shifted in relation to identifying the motivation for failing to hold a grievance meeting, even where Mr Smith had essentially directed that this was to happen. However, having regard to the specific circumstances of this case, starting from the nature of the protected act itself and encompassing the way in which the claimant conducted himself in pursuing this issue and the confused correspondence between all of the people involved, we are satisfied that the failure to offer a grievance was not motivated, even partially, by the fact that the claimant had done a protected act.

6. ***18 January 2019 threat to the claimant***

105. The sixth alleged detriment relied on is that in a meeting on 18 January 2019 Derek Williams made a threat to the claimant about "how things could change". There was no evidence in chief from the claimant or cross-examination in relation this, and we have little on which to base any findings of fact. It is clear that a meeting did take place. The meeting arose because Mr Smith had, as we have said, effectively overruled the Millers Vanguard managers and determined that the claimant was to be allowed to make home stops, initially on a temporary basis. We are satisfied that the reference to circumstances changing was in this context, and we have nothing to base a conclusion that there was a threat. Therefore we do not find any detriment in relation to this meeting.

7. ***8 March 2019 - dismissal***

106. The final alleged detriment is that the respondent decided to dismiss the claimant following a disciplinary hearing on 8 March 2019. Obviously, it is agreed that this did take place and it clearly would be a detriment. We consider that the primary cause of the dismissal was the respondent's belief that the claimant had committed misconduct in relation to the Travelodge incident. That is not quite the end of the matter. We must be satisfied that discrimination (in this case victimisation) played no part whatsoever in the decision to dismiss. If, for example, the respondent would have treated another employee in the same circumstances who had not made the request for reasonable adjustments more leniently, then the victimisation case would succeed.

107. We have given this careful thought. We do consider that by this point Amy Williams and Derek Williams at least considered that the claimant was a difficult employee and may have welcomed the opportunity to dismiss him. However, it was not them that took the decision to dismiss. We find that Mr Webb's involvement was restricted to the disciplinary process and that his decision to dismiss was motivated entirely by his findings about what had happened in relation to the Travelodge incident and how the claimant had conducted himself afterwards. (We note that even the claimant appears to recognise that Mr Webb was independent from the Williams witnesses and their associates, as he has not named him as an individual respondent and did not allege in cross examination (as he did, for example, to Mr Davin) that Mr Webb was directed by them.) There is therefore no link between between the protected act and the detriment.

Victimisations - summary

108. For those reasons, no part of the victimisation claim succeeds. The victimisation claim is the only claim against the individual respondents. It follows that the claims against them fail in their entirety and are dismissed.

109. For completeness, we considered that if we had found the 'denial' of a grievance meeting on 26 November 2018 to be an act of victimisation it was a single act which was brought out of time and it would not be just and equitable to extend time to allow this claim to succeed. It was appropriate to consider the question of time limits, as that allegation was the closest the claimant came to establishing an act of victimisation, and we were concerned about how the respondent had dealt with that matter. However, those concerns must be viewed against the fact that the concession which had been sought by the claimant all along was ultimately granted by Mr Smith in December 2018. We consider that the claimant is misconceived in conflating the long-running, but ultimately resolved, dispute about adjustments with his eventual dismissal, and for that reason it would not be just and equitable to allow this part of the claim to proceed out of time.

Unfair Dismissal

110. We then turn to unfair dismissal. The first issue in relation to unfair dismissal is this: *can the respondent show that the reason or principal reason for dismissing the claimant was a reason which related to his conduct?* We find that it can. The respondent has shown that the principal reason was conduct. In relation to the specific conduct, it was primarily the conduct at the Travelodge. Although documents relating to other more historic matters were placed in the disciplinary pack, and referenced in the way the allegations were formulated, we accept Mr Webb's evidence that it was the Travelodge incident that was key to his decision. He was also influenced by the claimant's subsequent conduct in contacting the Travelodge with a view to "*putting a tort on*" the witnesses. We consider it was reasonable for him to take that conduct into account in assessing the seriousness of the claimant's actions and the risk of repetition. The other matters which had featured in the disciplinary pack played no more than a peripheral part in the decision.

111. The next issue is: *was the dismissal fair or unfair under section 98(4)?* In the List of Issues that is split into four sub issues.

112. Firstly, whether the respondent (in this case Mr Webb as the disciplining officer) genuinely believed that the claimant was guilty of misconduct. We find that he did genuinely believe that. It was suggested by the claimant that the witness statements from the Travelodge were fabricated, and their production was the result of a conspiracy involving the respondents and the Travelodge to "frame" the claimant for wrongdoing which would enable the respondent to dismiss him. We reject the idea of any conspiracy. We also accept Mr Webb's explanation for why he rejected some aspects of the Travelodge witness statements (the allegation of racial abuse) whilst accepting, broadly, the account of the claimant's disruptive conduct. He explained that he did not feel that the claimant was racially prejudiced, based on his discussions with the claimant. He found that this was likely to have been a misconception on the part of the Travelodge staff given the way the claimant presents himself and the fact that several of the witnesses appeared to have English as a second language.

113. The second sub-issue was whether that belief was formed following such investigation into the matter as was reasonable. The Tribunal appreciates that there is a difficulty in investigating an allegation of misconduct taking place away from the respondent's premises and involving witnesses that the respondent had no direct access to. The standard of reasonableness to be applied must reflect those circumstances. In this case the respondent obtained witness statements and where those were unsigned and undated asked for them to be supplied in a signed and dated form. That was an appropriate and reasonable procedure. They also acted correctly in allowing the claimant to put forward his side of events at both the investigation and disciplinary hearing stages.

114. There is an obligation, as the claimant correctly pointed out, to seek evidence which will exculpate an employee as well as evidence which will incriminate him. However, the respondent can only obtain that evidence that exists or can reasonably be expected to exist, and the claimant did not, for example, point to other witnesses who could have been interviewed and who might have provided another side of the story. The claimant did suggest that CCTV records from the Travelodge should have been sought, and we agree that this would have been an advisable step in these circumstances (although we accept that there is no guarantee that that material would actually have been helpful).

115. There was no evidence in the bundle or the witness statements that any enquiries were made of the Travelodge about CCTV footage. Mrs Porter told us when she was questioned that she had in fact sought it and that Travelodge had refused to provide it, citing GDPR reasons. The claimant was suspicious of this assertion because it came at a very late stage. It would have been good practice for the investigation documents to record that a request had been made and record the response. Part of conducting a fair investigation is demonstrating the steps that the investigation has taken even if some of those steps prove to be dead ends. However, we do accept that the request was made, in particular because of Mrs Porter's recollection which was detailed. For example, she recalled that she had been told that the recordings were image based only and would not include sound.

116. Overall, therefore, we are satisfied that this was a fair investigation and that it met the standards of reasonableness.

117. The next issue is whether there were reasonable grounds for the belief that the misconduct had been committed. The claimant says that the witness statements should have been rejected and he gave various reasons for that, many of which deployed spurious legalistic arguments about the form that such evidence should take. We do not accept any of those reasons were valid. We therefore find, based on the Travelodge statements, that Mr Webb did have reasonable grounds for his belief that misconduct had been committed.

118. The fourth sub-issue is whether the respondent followed a reasonably fair procedure. The Tribunal does have some procedural concerns with this dismissal. As noted above, we were surprised that there was no identified investigatory officer and that the decision to proceed to a disciplinary hearing was taken by committee, including Derek and Amy Williams who may have been influenced by the recently-concluded saga about adjustments. However, realistically this was not a borderline matter and the need for a disciplinary hearing was inevitable. As we have already said, Mr Webb acted independently in conducting that hearing and in making the decision to dismiss.

119. It seems that Miss Williams took responsibility for putting together a disciplinary pack but largely as an administrative exercise. As noted above, a document submitted by the claimant in his defence was not included. The exclusion of this document was acknowledged to be a procedural defect by Mr Moore and we find it understandably caused the claimant concern. That said, we have reviewed the document and are satisfied it would have made no difference at all to Mr Webb's conclusion. The claimant had the opportunity to put forward his position verbally at the disciplinary hearing and his document was also available at the appeal hearing. This error does not prevent this from being a fair disciplinary process, when looked at in the round.

120. We should raise one further complaint that was made about the procedure followed at the disciplinary hearing itself, and that was the allegation that Mr Webb had sworn during the disciplinary hearing, as discussed at paragraph 57 above.

121. Ultimately, we felt it was unnecessary to make a finding between the two witnesses as to which word was actually used. The reason for this is that even if the claimant was correct as to the word used it was clear to us from the context that the comment was not said in an offensive manner or directed at the claimant. If anything, the comment was empathetic and for that empathy to be expressed in crude language is in line with the general circumstances of this business and indeed many businesses. Listening to the conversation there was nothing in it to either reasonably offend the claimant or, crucially, to affect the fairness of the hearing that Mr Webb was undertaking. Whilst this may have been unprofessional, we reject any argument that a parallel can be drawn between Mr Webb's comment (whatever it was) and the claimant's own admission that he had called the Travelodge manager a "fucking imbecile".

122. Taking all those matters into account, this was not a perfect disciplinary procedure but it was one that meets the threshold of reasonableness that we have to apply.

123. The final issue then in relation to the unfair dismissal claim is whether the decision to dismiss the claimant rather than take some other form of action fell within the band of reasonable responses. We have no hesitation in finding this dismissal was within the band of reasonable responses. The context of the role that was being undertaken by the claimant is important. He was working alone at client sites. As we noted at the outset of this judgment, we fully accept the respondent's evidence about how important the business's professional reputation is considered to be and the steps that are taken to maintain it. This makes sense in the context of a business which had just a few major clients who are themselves sensitive to any sort of adverse publicity. We also find that Mr Webb's decision on sanction was influenced by the claimant's telephone call to the Travelodge during the investigation. We appreciate that the claimant believed he was acting within his rights to do so but fully understand Mr Webb's concerns about this and the lack of insight it showed. We accept that maintaining a reputation is critical for this business and that Mr Webb simply could not afford to take the risk of giving the claimant a warning and allowing such an incident to potentially occur again.

124. Overall, therefore, we find that this was a fair dismissal and the claimant's claim of unfair dismissal against the sixth respondent fails.

Unlawful deductions

125. The claimant brought a claim of unlawful deductions from wages under s. 13 ERA in respect of the £60 'float' money which was deducted from his final wage payment. During closing submissions, the respondent conceded that this claim was well-founded. The claimant therefore succeeds in that claim.

Employment Judge Dunlop
Date: 6 October 2020

REASONS SENT TO THE PARTIES ON
9 October 2020

FOR THE TRIBUNAL OFFICE