Case No. 2200492/20;
2202631/19;
2203493/19;

EMPLOYMENT TRIBUNALS

SITTING AT: **LONDON CENTRAL**

BEFORE: **EMPLOYMENT JUDGE F SPENCER**

MEMBERS: **MS P SLATTERY**
MS N SANDLER

BETWEEN: **MR P MCQUEEN** **CLAIMANT**

AND

GENERAL OPTICAL COUNCIL **RESPONDENT**

ON: **2ND -13 (and in chambers) 16 and 17 November 2020**

Appearances

For the Claimant: In person
For the Respondent: Mr J Boyd, counsel

RESERVED JUDGMENT

The Judgment of the Tribunal is that:

(i) The Claimant was not unfairly dismissed

(ii) The Claimant's claims of disability discrimination (direct discrimination, indirect discrimination, discrimination arising from disability and failure to make reasonable adjustments), victimisation and harassment are not well founded and are dismissed.

REASONS

Introduction

1. The Claimant, Philip McQueen, was employed by the Respondent from 31st July 2014 until his dismissal on 7th November 2019 as a registration officer.

2. The Claimant has lodged five claims in total against the Respondent. Two claims were heard in February 2020 by a different tribunal (the Goodman Tribunal). The Claimant was successful in part, but the Judgment has been appealed by the Claimant. Three further claims were before us which were presented on 11th July 2019, 15th September 2019 and 9th February 2020.

3. The first two claims dealt with matters from April 2015 to 25 February 2019. The claims before this tribunal deal with matters from 25 February 2019 until the conclusion of the disciplinary process.

4. The Claimant complains of:

    a. disability discrimination (failure to make reasonable adjustments,
    b. discrimination because of something arising from disability,
    c. direct disability discrimination
    d. indirect disability discrimination
    e. victimisation related to disability,
    f. harassment related to disability; and
    g. unfair dismissal.

5. Although the claim forms also alleged sex and race discrimination, the Claimant confirmed at the start of the hearing that he did not pursue those claims (which related to matters prior to the period before this tribunal) and those claims were withdrawn. The Claimant also accepted that matters occurring before 25 February were "res judicata" and not before this tribunal. The events before that date were however relevant as background to the present claims.

6. It was common ground, and not disputed, that the Claimant has dyslexia, Asperger's syndrome, neuro diversity, and left-sided hearing loss. Each amounts to a disability for the purposes of the Equality Act 2010. What was not conceded however was how those disabilities manifested themselves at work. An important issue was whether behaviour described as loss of temper or "meltdown" arose from his disabilities. Although those dealing with the Claimant at the Respondent did believe that the Claimant's behaviour arose from his disability, the Goodman Tribunal had concluded that it did not and we considered that we were bound by that in so far as it related to matters prior to 25th February 2019, but that if there

was new material before us arising after that date we were free to arrive at our own conclusions..

Conduct of the hearing

7. It was agreed at an earlier case management hearing that the Tribunal would make adjustments to accommodate the Claimant's disabilities. Exceptionally, therefore, the Claimant would be permitted to record the hearing on his recorder pen instead of taking notes, provided that he deleted all material at the end of the hearing, did not permit anyone else to listen to the recording (which was for his private use only) and that he did not listen to his cross-examination until after it had concluded. He was also offered breaks when he needed them.

8. The tribunal had an exceptionally large number of documents before it for an eight day hearing. We had nine lever arch files of documents, with each page double-sided, amounting to in excess of 5,500 pages. Much was not in chronological order so that chains of emails were interrupted, and it was difficult to follow through their logical sequence. As we explained at the start of the hearing, the Tribunal would not be able to read all those documents, and we only read the documents to which we were taken in chief or in cross examination. Nonetheless we were taken to, and read, a very large number of documents during the hearing. The number of documents is all the more remarkable when, to put matters in context, in the period before the Tribunal the Claimant was only at work for three days.

The Issues

9. The parties had been unable to agree a list of issues. Earlier attempts that case management hearings to clarify the issues had not been wholly successful. The Claimant had provided a lengthy Scott schedule setting out his various complaints dating back to 2014 and the sections of the Equality Act on which he relied, but without any proper legal analysis. In an attempt to assist the Claimant, the Respondent was ordered to draft a list of issues in conventional form to be sent to the Claimant so that he could insert any treatment or matters omitted. The Claimant did not do this, saying (in emails of 4 September) that to use the list provided by the Respondent would disadvantage him because of his disability, that he had a legal right not to use a list of issues separate to the claim particulars, which he believed did provide an analysis of the legal components required.

10. It was unfortunate therefore that we started the hearing without an agreed list of issues. The lengthy particulars of claim did not set out the issues with clarity but in large part simply said that everything that had occurred amounted to the various forms of discrimination, victimisation or harassment. The Scott schedule (290-310) stated that the "something

arising" from disability for the purposes of the section 15 claim was "reactions" – which we have clarified as set out below.

11. The PCP which put the Claimant at a substantial disadvantage for the purposes of the reasonable adjustments claim was said to be the "practice of not following policy". The reasonable adjustments sought were:

    a. Formalisation and adherence to written internal policy
    b. referral to occupational health
    c. emailing instructions
    d. the provision of a recorder pen
    e. bullet point notes
    f. headphones
    g. transcript audio recording
    h. experts report
    i. avoid harsh crticisms or careless remarks that could undermine confidence
    j. funding for training
    k. disability awareness training
    l. read medical information.

    (e. f. and g. were not in issue on the evidence before us and the Claimant's focus was primarily on adherence to policy and being able to use his recorder pen without seeking permission.)

12. At the start of the hearing the Claimant was asked in what respect the Respondent had not followed the various policies. The Claimant's response was that:

    a. during the disciplinary investigation the Respondent did not get an agreed statement from him
    b. he was not provided with a copy of his notes
    c. the notes in the investigation report were wrong
    d. the Respondent had not interviewed all the witnesses to his meltdown behaviour, and Vicky, Christian, Emma and Sabina should have been interviewed
    e. statements should have been taken before the investigation from his manager Mr Gearty and from Jacob Sanchez
    f. there was a long delay between the Claimant's suspension and the investigation interviews.

13. During the hearing the Claimant alleged additional breaches of policy to which we refer later in this judgment.

14. It was the Claimant's case that the particular disadvantage which he suffered if the Respondent did not follow its policy and procedure was that "I get serious anxiety, become distressed and it affects my behaviours".

15. From a combination of the particulars of claim, the Claimant's Scott schedule, the evidence which we heard and discussions with the Claimant during the hearing we understood the issues to be as follows

Disability discrimination

Failure to make reasonable adjustments

16. Did the Respondent apply a provision criterion or practice (the PCP) which put the Claimant at a substantial disadvantage in comparison with persons who are not so disabled? The Claimant relies on the following PCP's applied by the Respondent:

    a. a practice of failing to apply its own internal policies and procedures; (the main PCP relied on by the Claimant)
    b. the Respondent's insistence on using employees' first names;[1]
    c. a practice of not putting verbal instructions into writing; and
    d. the practice of requiring individuals to contribute to vocational training courses.

17. Did those PCPs put the Claimant at a substantial disadvantage in comparison to those that are not disabled? It is the Claimant's case that the above practices put him at a substantial disadvantage because they had an adverse effect on his communication and behaviour.

18. Did the Respondent take such steps as it was reasonable to have to take to avoid the disadvantage? It is the Claimant's case that the Respondent should have made the following adjustments-

    a. the adjustments referred to at paragraph 11 above and in particular following internal policies at all times
    b. ensuring that those against whom he had grievances addressed him as Mr McQueen
    c. providing the Claimant with a room where he could go to recover from anger on his own.
    d. Explaining to him how policy is applied or changed
    e. Allowing him not to have contact with those who he has alleged have breached policy
    f. Funding the Claimant's training course in totality
    g. obtaining a report from Naomi Burgess before commencing disciplinary procedures.

19. Would the Claimant be put at a substantial disadvantage in comparison with persons who are not disabled without the provision of an auxiliary aid? If so, did the Respondent provide that auxiliary aid? It is the Claimant's

[11] the Claimant said that this was part of the Respondents practice of not following policy in that the bullying and harassment policy required everyone to be treated with respect.

case that the Respondent withdrew a reasonable adjustment which they had provided (i.e. the provision of his recorder pen) when they required him to obtain permission before recording at work.

20. Did the Respondent know, or could it reasonably have been expected to that the Claimant was disabled and that he was likely to be placed at the disadvantage alleged?

    NB - The case management order made following a preliminary hearing in August 2020 suggested (paragraph 11) that the Claimant's case was that the PCP that should have been adjusted was the was Respondent's disciplinary policy, and that the Respondent should have made an adjustment by getting a report from Ms Burgess before using the disciplinary process as the Claimant "didn't know he had a problem. When asked about this at the start of the hearing the Claimant confirmed that this was not his case. He knew had a problem with meltdown behaviour and knew it was unacceptable; the adjustments to be made were to prevent him having a meltdown.

<u>Discrimination because of something arising from disability.</u>

21. Did the Respondent treat the Claimant unfavourably because of something arising from disability? The Claimant describes the "something arising" as his "reactions". Although this is described in the case management order as meaning his meltdown behaviour or short temper, in this hearing the something arising was described in wider terms as follows:

    a) the fact that he sent so many emails to the Respondent. (The Claimant described this as being "an expression of meltdown behaviour".)
    b) the fact that the Claimant could not think coherently when under stress
    c) the fact that, if under stress, he would have communication difficulties, talking over people and being rude
    d) the need for written instructions to be backed up by verbal communications
    e) the need for written confirmation of verbal instructions
    f) the need not to be approached in a manner that he perceived as confrontational
    g) anger or meltdown behaviour caused by sensory overload
    h) the need for strict adherence to written policy
    i) the need to complete his sentences when speaking without obstruction
    j) the need to be addressed formally by certain colleagues.
    k) the need to avoid contact with those that have offended him.

22. Was the Claimant treated unfavourably because of those matters which arose from his disability? In the Claimants particulars of claim the

unfavourable treatment relied on is (to paraphrase) the entire narrative of events. (In claim one he refers to the treatment described paragraphs 9 to 264, in claim 2 the treatment from paragraphs 265 to 288 and in claim 3 the treatment in paragraphs 289 to 308.)

23. Did the Respondent know or could it have reasonably been expected to know the Claimant had the disability alleged.

24. Was any such treatment objectively justified as a proportionate means of achieving a legitimate aim?

Direct disability discrimination

25. Did the Respondent treat the Claimant less favourably than it treats or would treat others who do not have his disabilities?

26. In the Claimants particulars of claim the less favourable treatment relied on is the same as for the section 15 claim i.e essentially everything that happened. However, in discussion with the tribunal the following matters were identified as being the particular unfavourable treatment relied on:

    a) not giving him a return to work meeting before his first day back
    b) not giving occupational health the right information by referring to the Claimant having mild Asperger's rather than "Asperger's traits"
    c) being verbally criticised and/or mocked by Lesley Longstone on 11 April 2019
    d) the conduct of HR in not investigating his complaints
    e) the refusal to obtain a specialist report from Naomi Burgess
    f) suspending the Claimant
    g) the Respondent's failure to follow policy
    h) subjecting the Claimant to an investigation and disciplinary procedure
    i) dismissing the Claimant

Indirect disability discrimination

27. Did the Respondent apply a PCP to the Claimant which it also applied, or would apply to others who did not have the Claimant's disability?

28. Did the Respondent apply the following PCPs?
    a) The shortlist criteria applied for the manager role that the Claimant applied for in May 2019;
    b) the application of the Respondent's disciplinary policy;
    c) the lack of adherence to policy and procedure.

29. Did those matters put the Claimant and others with a disability at a disadvantage?

30. Did those PCPs put the Claimant at that disadvantage? It is the Claimant's case that the application of the disciplinary process to him was a disadvantage because he would have to go through such a process more often than others because of his reactions (meltdowns and other manifestations of his disability).

Harassment

31. Did the Respondent engage in unwanted conduct related to the Claimant's disabilities which had the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him?

32. The unwanted conduct relied on by the Claimant in his particulars of claim is as for the direct disability and section 15 claims.

Victimisation

33. Did the Claimant do a protected act? The protected acts were defined in the case management orders as the claims to the tribunal on 11 August 2018 and 25th February 2019. The Claimant also relies on his many email complains and grievances and it was not disputed that the Claimant had complained repeatedly about failures to make reasonable adjustments and other matters which could be said to be breaches of the Equality Act. Further by the time of his dismissal he had submitted two further claims on 11th July and 15 September 2019. It was accepted that these were protected acts and that the real issue was one of causation.

34. Did the Respondent treat the Claimant unfavourably because he had alleged breaches of the Equality Act 2010? The unfavourable treatment relied on by the Claimant in his particulars of claim was again the entire narrative of events, although during the hearing the Claimant accepted that the claim for victimisation related essentially to the following matters:

    a. the failure to deal with the Claimant's complaint's in a timely or appropriate manner;
    b. not subjecting Nadia Patel and Michelle Norman to disciplinary action
    c. being subject to aggressive behaviour at his desk by Lesley Longstone on the morning of 11 April.
    d. Being subjected to an investigation and disciplinary procedure
    e. refusing to obtain a specialist report from Naomi Burgess
    f. inviting the Claimant to a grievance hearing with Gareth Hadley; not replacing him when the Claimant objected and then ending the grievance process when the Claimant refused to engage.

g. inviting the Claimant to a grievance hearing on 3 May 2019 in breach of policy in which his 4th and 10th April grievances would not be dealt with;
h. the dismissal process.

Unfair dismissal

35. What was the reason for the Claimant's dismissal, and was it a reason which amounts to a potentially fair reason within the terms of section 98 of the Employment Right Act? The Respondent's case is that the Claimant was dismissed for some other substantial reason, though it pleads both conduct and capability in the alternative.

36. Did the Respondent act reasonably in all the circumstances in treating that reason as a sufficient reason for dismissing the Claimant.

37. Did the Respondent follow a fair procedure and give the Claimant a chance to state his case?

Evidence

38. We heard evidence from the Claimant. For the Respondent we heard evidence from
    a. Mr Gareth Hadley – non-executive Chair of the Respondent's Council.
    b. Ms Sheila O'Neil, Interim head of HR from 15th April 2019 to December 2019
    c. Ms Lesley Longstone, Chief Executive of the Respondent
    d. Ms Lynda Rollason, an independent HR consultant engaged to investigate allegations of gross misconduct against the Claimant.
    e. Mr Tom Henery, HR Manager, who began his employment with the Respondent in August 2019.
    f. Ms Helen Tilley, a senior member of the Respondent's Council who took the decision to dismiss the Claimant.
    g. Ms Teresa Couppleditch, HR Manager at the Respondent from 28th February 2018 to July 2019.
    h. Ms Clare Minchington, a member of the Respondent's Council who heard the Claimant's appeal against his dismissal.

39. The evidence from Ms O'Neill, Ms Rollason and Ms Minchington was via video link. As described above, we had over 5000 pages of documents.

40. During the course of the tribunal hearing the view that we formed of the Claimant was that he was a highly functioning and intelligent individual. He had an extremely good grasp of the documents and of the points he wished to make. As with many dyslexics it is apparent that he expresses himself orally more clearly than he does in writing. We did not witness any

meltdown behaviour during the eight days of the hearing and we noted that in the early part of his employment, until things started to break down he had enjoyed the job and that he had got on well with, and was liked by, his team members We considered that the Claimant was honest in his views but that he lacked any ability to see matters from the point of view of anyone else or to understand the difficulties his approach presented for the Respondent. He had become obsessed with the events 2017 and 2018 but did not regard himself as responsible for any of his more extreme behavioural traits.

Findings of relevant fact
Background events

41. The Claimant was employed by the Respondent as a Registration Officer from 31 July 2014 until his dismissal on 11 November 2019. The Respondent is a statutory regulator. It has a duty under the Opticians Act to maintain a public register of optometrists and opticians qualified to practice in the UK. It is a registered charity, funded by the fees charged to registrants and has approximately 100 staff. Its Chief Executive officer is Ms Lesley Longstone who reports to 12 non-executive Council Members, whose role is to provide strategic direction to the Respondent. Its HR function at the relevant time consisted of three people, two of whom were junior administrators, though Mr Henery was employed an additional resource mainly to deal with the Claimant in August 2019.

42. As set out in the earlier Judgment, at the time the Claimant began his employment with the Respondent he had explained he had dyslexia and asked for "access to a word processor and a recording device for notes and meetings access to a proofreader if possible" as reasonable adjustments. At some point before the events with which this hearing dealt with, the Respondent was made aware that the Claimant had "a slight Asperger's trait".

43. It was the Claimant's case during the first hearing that were four matters arising from his disability. These were:

    a. a need for written instructions to be provided to backup verbal communications.
    b. Some physical adjustments in the workplace
    c. the need "not to be approached in a seemingly confrontational manner". It was his case that, if he was confronted, he would lose control and have a "meltdown".
    d. the need to stand up and speak.

44. The Respondent accepted that the first two arose from his disability, but disputed the latter two. The Tribunal concluded that second two matters did not arise from his disability. It also concluded that his loss of control and meltdowns did not arise from his disability but "because he had a short

temper and he resented being told what to do." We considered that we were bound by that finding insofar as the events prior to February 2019 were concerned, but, if there was any change in the medical or other evidence before us in relation to events after that date, we were free to arrive at our own conclusions.

45. To summarise briefly the events that led up to the current claims, the Claimant was employed in the registrations team of about eight people. He enjoyed the work and his role was made permanent in February 2015. In 2015 the Claimant had what is described as two "meltdowns" which culminated in a written warning. The previous tribunal accepted that this manager Nadia Patel found these confrontations or meltdowns intimidating and frightening. In 2017 the Claimant was required to attend a second disciplinary hearing on a charge of failing to follow a reasonable management instruction. The charge was found not proved and no further action was to be taken. However, the Claimant was unhappy and presented a grievance in July 2017 about his treatment, in particular the two disciplinary charges, his appraisal, and his job description. The complaints included complaints against all the members of the HR team, Nadia Patel and the Director of Resources Mr Webster. At some point Ms Patel ceased to be the Claimant's line manager and Mr Gearty became his manager. The Claimant had no issue with Mr Gearty.

46. The Respondent took an unacceptably long time to deal with that grievance, and this was ultimately found to be an act of unlawful victimisation by the previous tribunal. Eventually the grievance was investigated by an external adviser, Peter Cheer, and heard by Ms Longstone. The outcome was sent to the Claimant in January 2019. Some of his complaints were upheld and some were not. He was unhappy with the outcome, but he did not appeal.

47. There was an issue about the Claimant's recording pen provided to him by the Respondent as a reasonable adjustment. The Claimant had been allowed to record the grievance hearing. However, the Respondent noticed that the Claimant had left the pen in the room, still recording, when the panel was in private discussion. As a result, the pen was taken away in order to allow the Respondent to remove the recording of the panel discussion from the pen. Another pen was bought for the Claimant to use in the interim, but the Claimant refused to accept the pen as an alternative.

48. The Claimant had been on special leave from 10 December 2018 until he received the outcome of his grievance. On 24 January the Claimant was told he should come back to work or supply a fit note. The Claimant returned to work briefly on 8th February but there was an upset and he left again the same day and did not return. He covertly recorded a conversation with Ms Couppleditch which he subsequently sent to the Respondents as evidence of his allegation that there was "*an overt act of discrimination… To force the deletion of my personal notes taken using an*

auxiliary aid i.e. recorder pen" (609). He remained on sick leave until 9 April 2019.

49. On 8 February 2019 the Claimant submitted a grievance that he had been subjected, within the first hour of returning to work to "an overt act of disability discrimination". The email is unclear but he refers to "corrupt practices" "evidence tampering" and "spoilation of evidence". The complaint was acknowledged by HR (A93) who told the Claimant it would be managed in accordance with the grievance policy. The Claimant objected to it being dealt with under the grievance policy saying it should be dealt with in accordance with the bullying and harassment policy (BHP) and the conduct and performance policy (CAP) rather than under the grievance policy as his complaint was against HR. He was therefore advised to present his complaints to the Head of Governance, Nicola Ebdon, which he did on 19 February. Ms Ebdon responded on 22nd February.

50. Some of the grievance related to historic matters which had been dealt with under the earlier grievance. Mr Hadley wrote to the Claimant to tell him that, if he wished to appeal, he had to do so in accordance with the Grievance Procedure – otherwise Mr Hadley would not be involved in any further complaints. The Claimant did not appeal in accordance with the grievance procedure and Mr Hadley wrote to the Claimant on 13th February telling him that his previous grievances had now been closed because he had failed to appeal.

Medical evidence of disability

51. The tribunal had before it a number of medical reports as follows:

a. Dr McLoughlin-who diagnosed the Claimants dyslexia in July 2000 (A639). He described the Claimant as having high intelligence but lacking working memory.
b. Ms N Burgess, psychologist (A665) dated 25th February 2014 prepared, before the commencement of his employment with the Respondent, for the purposes of assisting with Employment Tribunal proceedings against his former employer.
c. Occupational Health report of Ms A Kavuna dated 11 June 2015 (A685)
d. medical report of Dr Ryan dated 15 March 2017 and his supplementary report dated 31st July 2017(A688 and A697)
e. Dr Pitkanen consultant neuropsychiatrist July 2017. He diagnosed dysexecutive syndrome (deficits in planning in cognitive flexibility) and recommended an MRI scan to determine whether the syndrome was the result of a childhood head injury or was due to possible Asperger's.
f. occupational health report from Dr Sperber 26th March 2019 (611).

52. As set out in the Goodman judgment the Claimant supplied a CV when he was in interviewed, explaining that he had dyslexia while stressing that he had an excellent standard in verbal and written communication. At the time that he commenced work he asked for adjustments to be made for his dyslexia: specifically "access to word processor, recording device for notes and meetings, access to a proofreader if possible". He provided Dr McLoughlin's report. He did not mention Asperger's at the time. The Claimant subsequently provided an updated CV in which he referred to having a "slight Asperger's treat" (sic) but there is no mention of meltdown behaviour. *The Goodman tribunal found that this did not come to the Respondent's attention until December 2018.*

53. The Burgess report was shown to Ms Kavuna of Occupational Health in 2015 but was not shown to the Respondent until the Claimant sent it to Ms Rollason during her disciplinary investigation. Ms Burgess had been asked by the Claimant's former employer whether "Mr McQueen's manner of addressing colleagues, and in particular the volume and level of his voice" related to or was caused by his diagnosed dyslexia". Ms Burgess concluded that his dyslexia was a severe and ongoing impairment undermining his ability to read, write and his working memory. She concluded that his combination of needs was "indicative of a neuro diverse pattern".

54. Ms Burgess found that the Claimant's his cognitive ability was at a superior level and that his strengths were quick understanding, solution focused, patient and often has a good memory. She did not consider that the Claimant had autism but he had "neuro diverse traits" and "a number of symptoms consonant with the possible likelihood of Asperger's syndrome". In relation to an Asperger's assessment the Claimant scored 25 – an overall score of 32 is the level at which referral would be triggered in the UK. However, he would have met the threshold criteria for DSM IV in the USA. She recorded that the Claimant had a loud voice and multi specific learning difficulties and that "under stress control falls away". She did not make any finding that lack of control of his emotions was related to neuro diversity or to his disability, although she commented that research showed that "difficulties in tone and volume co-exist with dyslexia and Asperger's syndrome".

55. Ms Burgess considered that his learning difficulties "affected his ability to follow and carry out instructions written and verbal, his behavioural fluidity and flexibility, the speed at which he worked, interpersonal relationships, communication patterns, body language and prosody and his response to stress". Ms Burgess did not recommend any particular adjustments but commented that "specialist training would be required to develop strategies for general use and specific other strategies for dealing with induced stress." This would have to be personally tailored to the individual.

56. The Respondent referred the Claimant to Occupational Health (Ms Kavuna) in May 2015 following a meltdown episode with Nadia Patel, the Claimant's previous line manager. At this point the Claimant showed her the Burgess report. She reported to the Respondent that the Claimant had Asperger's syndrome and neuro diversity. She recommended that the Claimant "needs to have any information particularly around any changes that are given to team members verbally backed up by written statements of those changes to allow him to process that change visually. He then needs time to read and process information." She recommended the use of a recording pen to be made available for team meetings (held every fortnight) and also that that there might be occasions when a one-to-one follow-up meeting is required to clarify any issues that he would not verbally picked up in a meeting. She found that the Claimant's disabilities "*can lead to him producing very inappropriate and loud speech when he becomes unsure of something he is being asked to do and it does seem that the incident with his line manager was an occasion that triggered this inappropriate language both in its volume and in its speed and as already stated earlier I would feel that it was not Mr McQueen's intention to be rude or disrespectful".* She felt that verbal instructions should be followed up with a written instruction but that he would have very little difficulties in the workplace if the recommendations set out above were in place. The way the Claimant had responded to his line manager "*was highly possibly due to his disability is not from any intention to be disrespectful or rude to the line managers".*

57. Although there was some delay the Goodman tribunal recorded that the recommended adjustments were in place by July 2017.

58. The Claimant was referred to occupational health again following further issues in March 2017 and met Dr Ryan. Dr Ryan suggested that the Claimant should not be required to take dictation notes and that access to work was contacted as a matter of priority to review his adjustments and that his behavioural issue should be assessed by a consultant psychiatrist.

59. Accordingly, the Respondent referred the Claimant to Dr Pitkanen, a consultant psychiatrist. He recorded the Claimant telling him that he could say things which others may interpret as rude and that people may perceive him to be angry as his voice fluctuate. He noted *that "when considering traits of Asperger's syndrome, there is a significant overlap with traumatic brain injury induced dysexecutive syndrome… I am not sure if he meets the diagnostic criteria for Developmental Disorder (i.e. Asperger's syndrome) or his presentation is caused by previous traumatic brain injury causing this executive syndrome.* In other words he does not diagnose either Asperger's or dis-executive syndrome and does not comment on whether the behaviour reported by the Claimant was a consequence of a head injury or Asperger's. In summary, he said that he could not comment on the Claimant's behavioural issues in the absence of a brain scan to consider whether his dysexecutive syndrome was caused

by a childhood brain injury. Despite this the parties have proceeded on the basis, and the Respondent has accepted, that the Claimant has Asperger's syndrome.

60. Dr Ryan reported to the Respondent on 31 July 2017 that comment on the Claimant's work capability could not be made until that investigation was carried out. That report was copied to the Claimant. The Respondent concluded that investigations by way of brain scan should be undertaken by the Claimant himself through the National Health.

61. The Claimant gave the Respondent the appendices to the Burgess report in July 2015, but these were not helpful in allowing them to understand the effects of his disability. It was not until August 2019 that the Claimant sent the full (slightly redacted) report to Ms Rollason as part of the investigation. The Claimant obtained a brain scan on the NHS on 15 May 2019 (2855) which was normal and showed no evidence of injury.

Events before this Tribunal.

62. We pick up the story on 25 February 2019 (the date of the presentation of the second of the claims before the earlier tribunal). At this point the Claimant was on sick leave and, as set out above, was extremely unhappy with the outcome of the grievance. He had been told that his previous grievances had now been closed because he had failed to appeal. Nonetheless he began to send very large numbers of lengthy emails to the Respondent – HR, to Mr Hadley, to his manager and others. The Claimant wanted disciplinary action to be taken against the people he had raised grievances about (Ms Patel, a colleague, Aaron Grell, Mr Webster and all of HR.) He was unhappy that he had not had his recorder pen returned. He said that he would not want to speak with any of the people he had raised his concerns about, and that Mr Webster, HR and NP would have to communicate with him through his line manager, Yeslin Gearty. Mr Grell should not speak to him at all. Those individuals should refer to him solely as "Mr McQueen" rather than Philip.

63. On 21st March the Claimant sent an email to the senior management team (forwarding an email that had been sent to HR on 20th March) complaining of "ongoing bullying harassment and victimisation". The complaint was against HR. The complaint is not wholly clear but the Claimant complains, amongst other things, that Ms Couppleditch had told him on 8th February that he would not get his recorder pen back and about information provided to HR and about historic issues. We cannot trace a reply from the Respondent to this email.

64. As the Claimant remained on sick leave, he was referred to occupational health. There was an issue as to the terms of the referral and the Claimant reported to the Respondent *"if I find the report has not been written or conducted in relation to the matters of concern and background I have*

provided I will take legal action against the OH and rescind my consent". In the end, due to that threat of legal action, an appointment with the first OH provider (Lincoln Occupational Health) did not go ahead (A 44).

65. The Claimant then attended an OH assessment with Dr Sperber on 20th March. Dr Sperber reported (611) that the Claimant "*has a background history of Asperger's syndrome and dyslexia, and at a neuropsychiatric assessment in June 2017 he was also diagnosed with dysexecutive syndrome. At the time it was felt it would be appropriate to investigate whether at least some of his symptoms were caused by head injury by undertaking a brain scan. However, I understand this investigation never went ahead*." (We note in passing that it did not appear to us that Dr Pitkanen had in fact diagnosed dysexecutive syndrome.)

66. Dr Sperber referred to the Claimant's grievances and his claim to the Employment Tribunal. In relation to the Claimant's hearing impairment, he states that the Claimant had requested clarification from management regarding the removal of barriers around his desk if he was not able to stand when speaking to colleagues. In relation to Asperger's and dyslexia Dr Sperber says this:

> "*With regards to other elements of his functional impairment, including speech, his behaviour and his productivity at work, further specialist investigations, as noted above, are required and further advice with regards to specific workplace adjustments can subsequently be requested from experts in this field such as the neuropsychiatrist who previously assessed Mr McQueen (Dr Pitkanen). Further investigations regarding this have not yet been pursued through the NHS by Mr McQueen's GP because, according to Mr Queen, he only received a copy of the 2017 neuropsychiatric report on 20th March 2019 and he had not yet consulted his GP regarding this. I suspect that this route is likely to take longer to achieve results when compared to organising this privately, due to NHS waiting lists…*
> *In terms of his current fitness for work, Mr McQueen is fit to return to work. He should be able to undertake his normal occupational duties, subject to previously advised workplace adjustments. However, performance and attendance issues are likely to persist was some extent at least until the issues described above have been addressed further."*

67. It has been a significant part of the Claimant's case that the Respondent did not organise and pay for the brain scan which had been recommended by Dr Pitkanen. The Respondent's view was that the Claimant had been sent a copy of Pitkanen report in July 2017, and they considered that this was something that he should follow up with his GP through the NHS. In fact the Claimant did consult his GP in 2019, and a brain scan on May 15th 2015 was normal and showed no brain injury.

68. On 3rd April 2019 Ms Longstone wrote to the Claimant to arrange his return to work. As regards the OH report she noted that some of his symptoms may have been caused by head injury and he was encouraged to follow it up with his GP. Their records indicated that the Claimant had been provided with a copy of the earlier report in July 2017. She stated that it was their view that all the reasonable adjustments which had been agreed had been implemented by the end of 2017 but, in relation to screens and barriers around his desk, this would be discussed on his return. She said that the Respondent was "*keen to have a clear understanding of how our disabilities are to be accommodated in the performance appraisal process going forward and suggest that this is something you discuss with Yeslin*". The Claimant could come to the office that week to collect his recording pen or it would be returned to him on his return to work on 9th April. The Claimant was also told that the complaints raised in his email of 20 March would not be considered as he had not appealed his original grievance.

69. Finally Ms Longstone said that they were expecting his return to work on 9th April and that "to support positive working relationships" he should comply with the following conditions:-

a. his line manager was Yeslin Gearty but he was expected to work professionally with Nadia Patel, Mark Webster and to take reasonable instruction from them when applicable
b. he was expected to work professionally with HR who would assist with his return to work
c. his behaviour was expected to be courteous and professional at all times and continued *"if there is a requirement for a one-to-one it is expected that this will be held in private. In this instance you would of course be allowed to use your recording pen to assist you in taking notes. However you should not use your pen, or any other equipment for recording, without requesting prior permission.*
d. If the above measures were not adhered to disciplinary action might need to be taken.

He was asked to sign and return letter to confirm that he agreed to the measures above.

70. There was a handwritten note at the end of the letter from Ms Longstone stating that she would be out on Tuesday but would be available for coffee with him before or during that week if it would be helpful. The Claimant did not come in to collect his pen.

71. The letter was firm in its tone, but the Claimant had been demanding disciplinary action against Ms Patel and others and had a history of explosive fits of anger at work. His return to work on 8th February had not been a success. He was aggrieved about his recorder pen. Ms Longstone wanted to set some clear expectations. However, the Claimant took the

letter very badly. He sent a string of unclear emails to Ms Longstone in response. One email was sent on 3rd April followed by four emails on 4th April, one of which is copied to Mr Hadley. (A158 – 162). The emails are in a confrontational and peremptory style. Amongst other things, the Claimant asks for confirmation of what warning had been given to the various individuals against whom he had presented his earlier grievance, complains that the Respondent will not arrange for a brain scan privately and therefore "will not be making any reasonable adjustments for my neuro diversity." He also said it was not appropriate reasonable or permissible to appeal against "corrupt practices" and complains about being told that he might be disciplined before he had even returned. The emails raise various historic issues but do not clearly raise the issue of the recorder pen**.** He also said that he wanted those against whom he had complained to call him Mr McQueen rather than Philip. (He did not sign and return the letter.)

72. It is important to record here that before this tribunal the Claimant has articulated that the issue which upset him about the recorder pen was the requirement that he should seek permission before using his recorder pen to record meetings. He said that in the past he had not had to seek permission, provided that he told the individual that he would be recording. This distinction/ complaint was not so clearly articulated at the time as his emails simply referred to reasonable adjustments remaining outstanding and not having been complied with and/or taken away. The Respondent rightly says that they had not realised that this was the distinction that he was making until the evidence that the Claimant gave to this tribunal. In fact, the purpose of the pen was identified in an email from Michelle Norman on 7 July 2017 (A1210) which stated that the Claimant would be using a recording pen *"in any meeting he is attending. This is to assist him with notetaking. The recording will be for this purpose only and the pen and its recording will not leave GOC premises. Prior to the start of any meeting he will inform those present that he is recording."*

<u>Return to work</u>

73. The Claimant returned to work on 9th April. He complains that when he came in

    a. he did not have access to his computer because HR had accessed his computer and changed his password.
    b. He did not have his recorder pen.
    c. his mouse wasn't working and certain things were different.
    d. he had not had a return to work meeting before his return

74. In fact the Claimant manager, Yeslin Gearty had requested that IT put an out of office message on the Claimant's email while he was absent, but they had been able to do so remotely without accessing his emails. Further, during his absence the Respondent had changed from a battery-powered mouse to wired ones, so the mouse the Claimant usually used

been replaced. The Claimants recorder pen had been locked away in the finance department to await his return.

75. Early in the morning there was an altercation when Ms Couppleditch approached the Claimant at his desk and he became agitated and aggrieved because she addressed him by his first name. The Claimant refused to speak to her in a private room and as the Claimant's volume escalated Mr Gearty was sufficiently concerned to ask the rest of the registration team to go into the kitchen until the Claimant calmed down. At 10 a.m the Claimant interrupted Ms Couppleditch who was on the phone to demand the return of his pen. It was returned by 10 that morning. Mr Gearty subsequently reported to Ms Rollason that it was his impression that the Claimant had come back to work *"expecting confrontation and was coiled up like a spring" (1501**)**.*

76. The Claimant then had a return to work meeting with Mr Gearty (618). When discussing his grievances the Claimant became very agitated and upset and started to talk loudly, building up to shouting at several points. His manager considered that the shouting was not directed at him nor was it intimidating, and "he understood that this was part of the Claimant's disability". The Claimant told his manager that he was upset that Ms Couppleditch had approached him at his desk rather than emailing him first, and that she had called Philip, rather than Mr McQueen. He was also upset by the letter of 3 April which he thought was setting him up to fail and meant he was inevitably going to be disciplined because of his disability. He was upset that the Respondent had refused to pay for a brain scan. He complained that the Respondent had withdrawn a reasonable adjustment related to the use of an auxiliary aid.

77. The next day 10th April 2019 there was an altercation in the reception area. The Claimant was in reception at about 3 pm talking with two employees, SM and Kate Pantol. Ms Couppleditch overheard the Claimant telling his colleagues that the Respondent was racist. Ms Couppleditch told the Claimant it was not appropriate to be having such conversations in a public area. The Claimant's evidence was as a result of the approach by Ms Couppleditch he had a sensory overload and a breakdown of his coping methods, and is unable to clearly recall what happened next.

78. Ms Couppleditch left to attend a meeting but while she was waiting in a meeting room the Claimant walked past the office ranting "racist racist racist". He then began to talk to another employee in a loud voice about discrimination and racism. Ms Couppleditch and a colleague, Alistair Bridge told the Claimant he should not be having such discussions in a public forum. This resulted Claimant becoming loud and confrontational challenging them about why it was not appropriate to talk about it. (The Claimant says he cannot recall what happened as he went into "meltdown".) After a few minutes Mr Bridge and the Claimant went into a meeting room to continue the conversation privately during which the

Claimant rehearsed his various complaints about the withdrawal of reasonable adjustments and Mr Bridge agreed to investigate his complaints. Later that day Mr Bridge sent an email to the Claimant suggesting a meeting on 12 April at 2.30 to investigate the grievance that the Claimant had raised in his email of 21st March 2019 (A185).

79. Ms Couppleditch reported this to Ms Longstone, Mr Webster and Ms Spence. It was agreed that Ms Longstone would arrange a discussion with the Claimant the next day about his behaviour to explain that it was not appropriate or acceptable and that they would review his behaviour going forward.

80. In his interview with the investigator, Ms Rollason Mr Gearty reported that when the Claimant returned he was clearly not well "I felt he was on the brink of an emotional breakdown" and that he was extremely agitated and in an extremely heightened state. Mr Gearty understood the Claimant's behaviour issues to be a result of his medical conditions – although he had never seen a full medical diagnosis with details of the Claimant's condition. "It was difficult to communicate with him and he was talking at me. At times it was as if he didn't really see me, he was screaming and shouting at me.' Mr Gearty also said that it was the *"worst working environment I can remember being a part of. People are terrified that they would be brought into – to the point that we did have people crying – from their welfare point of view – I was saying to TC and LL I cannot have another day like this. I can't expect them to sit next to him when they have a genuine concern of their own well-being – not physical – but the potential emotional – no one wanted to be in that situation they had seen him shout TC and were worried for themselves." "Those two days he was here after his return from long-term absence were horrendous."*

81. Ms Longstone went to see the Claimant at his desk the following day. She asked him if they could have a word in private about the events of the previous day. The Claimant became agitated and said he would not go and talk with her in a private room. She would need to send him an email requesting a meeting. A reasonable adjustment that had been agreed with him previously was that written confirmation would be sent him of information given verbally, particularly relating to changes or deviations from usual process. Ms Longstone's evidence was that she did not think that this request met those criteria, but she decided not to press the point and she went away to send an email requesting his attendance at a specific place in a few minutes time.

82. When the Claimant did not turn up at the meeting room Ms Longstone went back to the Claimant's desk to see what the problem was. the Claimant said he had not received any email. Ms Longstone said he must have deleted it by mistake and this upset the Claimant. It subsequently turned out that the email had been sent Claimant's personal email address, with which the Respondent had been corresponding while the

Claimant was absent. Nonetheless the Claimant agreed to meet with Miss Longstone and the meeting went ahead.

83. The meeting with Miss Longstone was not a success. It lasted for nearly 2 hours. The Claimant recorded it on his recorder pen. The Tribunal has read a transcript of that meeting and has listened to some sections of the recording. This confirms Ms Longstone's evidence that during the meeting she was barely able to speak to the Claimant who was confrontational, shouting and largely incoherent. Ms Longstone repeatedly tried to stop him and to say what she needed to say but each time she went to speak he interrupted and shouted over her. Throughout the hearing the Claimant remained standing ignoring Ms Longstone's request that he sit down. If he asked a question, he did not pause long enough to allow Ms Longstone to answer but would shout over her. Eventually Ms Longstone decided it was necessary to suspend the Claimant pending a disciplinary investigation. Ms Longstone said that at times she began to feel unsafe. *"I believe that Philip would never knowingly hurt anyone, but I also understand that his condition can mean that he isn't always fully in control of his behaviour. Although I understand that such behaviour can be a result of his disability I found being on the receiving end extremely challenging*." We do not accept the Claimant's evidence that Ms Longstone shouted at him at any point. At one point in the recording Ms Longstone says "Philip" three times at increased volume, but her intervention is roundly ignored, and the Claimant continues his monologue. This was clearly "meltdown" behaviour.

84. A letter of suspension was sent to the Claimant the same day by email (668) pending investigation into the following allegations which were said to be gross misconduct:

- "conduct that may bring the Council's name into disrepute i.e. vocalising in an inappropriate manner in a public place (reception) your claims that the organisation and HR have undertaken acts of discrimination, including racism
- serious inappropriate behaviour i.e disruptive and inappropriate conduct displayed from reception to the registration office and back, including reacting in an unprofessional manner to a reasonable instruction given to you by HR and shouting out discrimination and racist towards members of HR and management on numerous occasions and in front of a number of employees
- serious inappropriate behaviour: in your conduct with me and other members of staff today in the open office environment while other members of staff were attempting to work; as well as in the meeting room with me which also impacted members of staff in other meeting rooms and while external parties in attendance for hearing were in an adjacent room.

85. The Claimant was informed that he should not access the office without prior permission, not make contact with any colleagues or council members. The Claimant left shortly thereafter and did not return to work before his dismissal.

86. By 14.50 that day the Claimant had sent an email to Mr Bridge headed "Formal grievance – against HR for acts of continuing discrimination i.e. harassment". It is not clear if this is a new grievance or a continuation of the 21 March /4th April complaint. The Claimant stated that his complaint was against

    a. Mark Webster,
    b. Theresa Couppleditch,
    c. Megan Bibi
    d. Nadia Patel,
    e. Aaron Grell,
    f. Lesley Longstone and
    g. Gareth Hadley.

87. The grievance against both Ms Longstone and Mr Hadley was unspecific: *"[un]conscious providing aid and/or approval of contraventions of GOC policy, procedures or rules including CAP, Bullying and Harassment policy, Grievance policy".* The complaint against the other named individuals appeared to relate to historical matters. The Claimant said he would attend the grievance meeting (presumably the one which had already been arranged for the next day) but said that in the meantime he was suspended "awaiting my dismissal for being disabled".

88. In the event Mr Bridge postponed the 12th April meeting in order to review the new information and wrote suggesting rescheduling the meeting to 3rd May (as he was on leave until 23 April). The Claimant accepted this, and Ms O'Neill of HR wrote to the Claimant on 18th April (670) setting out the agenda; which was to clarify the issues, identify the employees he was raising concerns about and to identify what further investigation was required. It set out the "new" concerns as the Respondent understood them.

89. The Claimant then sent various emails to Ms O'Neill of HR alleging that the hearing was not being conducted in accordance with policy and raising historic matters. He suggested that his reasonable adjustments had been retracted "in regards to the use of my recorder pen for memory". Numerous further emails follow in unclear terms.

90. Mr Bridge postponed 3 May meeting because his son was not well. In the event, after a considerable correspondence with the Claimant (outlined below) no grievance meeting took place as the Claimant refused to engage with the process.

91. On 3rd May the Claimant was invited to an investigatory meeting on 10th May to investigate the allegations against him set out in his suspension letter. He was informed that the Respondent had appointed an external consultant, Lynda Rollason to conduct the investigation. The Claimant responded he was not available on that day, and alleging that Ms Rollason was not independent. The meeting was then rearranged for 17 May but the process was subsequently suspended in order to allow the grievance process to progress.

92. On 15 May 2019 the Claimant sent an unclear email to Mr Bridge and HR entitled "formal complaint under CAP and formal grievance under BHP of continued in recent acts of contraventions of the council's policies and procedures" (A172). This prompted a response from Mr Bridge apologising for the delay and suggesting 2pm on 21st May for a meeting to consider the 21st March grievance. (A170) The purpose of the meeting to clarify (i)the nature of the Claimant's grievance. (ii) who it related to and (ii) the outcome he was seeking.

93. The Claimant's response was that he had provided this information, there was no need to explain and a meeting was not required. He sought an external investigator. He stated that Mr Bridge should not investigate his grievances on the basis that his grievance was also against Mr Hadley, so that it would be a breach of the Respondent's policies for Mr Bridge to investigate the chair of the council (A168). The Claimant invited Mr Bridge to "*please review my formal grievances of 20th June 2017, 13th of July 2017, 5 April 2018 as well as concerns raised on 12 December."* These were all historic matters.

94. On 7 June Mr Bridge wrote to the Claimant summarising what he understood to be the Claimant's new grievances (869). He said that he would not consider grievances had been addressed in the previous grievance. Further emails followed. Mr Bridge did not accept that the Claimant's contention that it would be in breach of the Council's policies for him to investigate the Claimant's grievance. He explained that. the grievance policy made provision for an investigation to establish the facts before a hearing takes place and that the Chair of the Council (Mr Hadley) would conduct the grievance hearing. More emails were sent by the Claimant including a request for some 12 witnesses, including several council members, without stating why they were relevant(A466). Further correspondence followed including a further invitation to a grievance investigation meeting - until the Claimant wrote on 12 July to indicate that he would not engage as Mr Bridge could not hear a complaint against the CEO and Mr Hadley could not hear complaints about himself. They needed to obtain a report from Ms Burgess (1318). After further correspondence Mr Hadley then wrote to the Claimant on 25 July 2019 to state that the complaints process was now closed (1458).

95. We do not accept the Claimant's contention that he could not engage with the process as Mr Hadley could not hear the grievance. Although Mr Hadley was named in the Claimant's grievance of 21st March, that complaint was wholly unspecific. When pressed about this in evidence the Claimant said that his complaint against Mr Hadley was because he was named in the letter of 3rd April. The only reference to Mr Hadley in that letter was that Ms Longstone quoted from an email from the Claimant to Mr Hadley and herself. Further the only interaction that the Claimant and Mr Hadley had had were a few emails on the subject of whether the Claimant wished to appeal his earlier grievances. Given that the grievances were wholly unclear it was important that a senior member of management should investigate and understand what the complaints were.

96. The same day the Respondent invited the Claimant to attend an investigatory meeting with Ms Rollason on 31 July 2019.

97. During the same period the Claimant was demanding a specialist expert medical report saying that this was essential as to whether there should even be a case to answer. The Respondent told the Claimant that they would obtain a further report from Ms Burgess as part of the investigation (1670) Ms O'Neil emailed Ms Burgess on 2nd August to enquire and draft instructions were drawn up. Ms Burgess was on holiday and advised on 13th August that she would not be able to provide a report until the end of September at a cost of £4,300. The Respondent then decided that the combination of cost and the consequent delay to the disciplinary process was too much and decided not to pursue the report. (1647).

98. During this period the Claimant was also sending numbers of emails to members of senior management, HR and the various council members 1452 – 1455, 1521, 1529 -1530. These were generally either complaints or demands. Mr Henery was recruited, primarily to deal with the issues regarding the Claimant and he started in his role in August 2019.

The disciplinary process

99. In the meantime, the Respondent wrote to the Claimant asking him for permission to share his medical information with the investigator. They chased him again on 29 July when he had not responded. In any event by this time the Claimant had independently tracked down Ms Rollason's email address and had started to send her high volumes of emails and attachments direct to her to her and demanded that she send him written and signed answers to his questions (1529). In any event, it is accepted that Ms Rollason was in possession of the various occupational health reports including the Burgess report (1556).

100. On 30th July Ms Rollason had face-to-face interviews with Ms Couppleditch, Mr Gearty, Theo Miller, Dionne Spence, Nadia Patel and a

telephone interview with Mark Webster. Nadia Patel was interviewed as had been cited by Ms Couppleditch as being a witness to the Claimant's behaviour on 10th April but Ms Patel said that she could not recall this. We have set out some of Mr Gearty's evidence to Ms Rollason above.

101. On 6th August she had interviews with the Claimant, Kate Pentol, Terence Yates, and Jacob Sanchez who were said to have witnessed the Claimant's behaviour. On the same day the Claimant sent 29 documents to Ms Rollason's professional email address including the investigation report carried out by Mr Cheer in July 2018, various occupational health reports and information on how his conditions might manifest himself in behaviour.

102. It was Ms Rollason's evidence, confirmed by the transcript of the meeting which appeared in the bundle, that throughout the interview with the Claimant on 6th August he was very agitated, confrontational and at times his behaviour escalated to aggression. He was focused on his earlier grievances and shouted over her. The gist of his response to the events of 9-11th April was that he had had a meltdown at reception because the Respondent had not made reasonable adjustments, because Ms Couppleditch had "aggressed" him at reception and because the Respondent had not removed "the stuff" from his record. The Claimant also said he was also in overload on the 11th and that, in regard to Ms Longstone, she had shouted at him accused him of being dishonest when she had sent an email to the wrong address. Their conduct, the letter of 3rd April and the failure to make reasonable adjustments had caused meltdown. For example, telling him he couldn't be rude in the 3rd April letter was unreasonable. "I've got a disability in which I can sound rude and inappropriate without knowing I'm sounding rude and inappropriate".

103. In his emails to Ms Rollason and to HR the Claimant repeatedly referred to the removal of existing reasonable adjustments. In his interview with Ms Rollason the Claimant said that the instruction that the Claimant be required to obtain permission before recording on his recorder pen had removed his reasonable adjustment (1564). He rehearsed previous grievances and complained that by refusing to expunge everything from his record and not following policy the Respondent was in breach in policy and it was bullying.

104. Ms Rollason was unable to control the meeting or to ask any relevant questions The Claimant spoke almost uninterrupted for the first two hours of the meeting. Eventually Ms Rollason terminated meeting after the two hours 15 minutes. It was the Claimant's case that what caused him to have a "meltdown" in the investigation meeting was that the Respondent had refused to provide him with a bundle of documents so he would not have to explain everything and that was against policy and had caused him to go into overload. However, the notes of the meeting (1797) state that Ms

Rollason had the documents electronically and the Claimant had brought his own hard copies.

105. The upshot of the investigation was that Ms Rollason concluded that the Claimant had a prima facie case to answer on all three allegations and that the evidence for all three allegations pointed to conduct constituting gross misconduct. In relation to his disability, she noted that the Claimant had Asperger's symptoms, dyslexia, dysexecutive syndrome and hearing loss in his left ear and that she had read the various occupational health reports. *"However, what I could not establish from any of these was the extent to which PM's behaviour would be affected by one or all conditions. In other words, there is nothing that describes the behaviours in these allegations as to be expected by an employer."*

106. In her report Ms Rollason concluded that the grievance process undertaken by Ms Longstone in December 218, far from resolving the Claimant's complaints had inflamed the situation. She made the following observations

a) "PM, it seems to me, regards his conditions as absolving him from all responsibility for his own behaviour, and further that his conditions mean that the GOC must adhere to any adjustments he regards as reasonable. That is not the case."
b) Clearly the trust between GOC and PM has broken down, along with confidence in each other. The GOC has to meet its duty of care to all its employees, not just to PM, and it is for the GOC to consider whether it can do so when people are exposed to PM's behaviour
c) There were several witnesses who I felt were trying to cover up for PM or who did not want to be making statements about him which would result in complaints being made against them.

107. The investigation report was sent to the Claimant on 3rd September. We find that while there were others that could have been interviewed the investigation was a reasonable one and arrived at reasonable conclusions.

108. In the meantime, Mr Henery had been appointed in August and his primary role at that time was to deal with the Claimant. The Claimant continued to send huge numbers of emails to Mr Henery and others. Some of these were about the disciplinary process, but they were combined with complaints. Mr Henery told the Tribunal that he tried to clarify and engage but that he "got nowhere". He had had had one phone call with the Claimant, but the Claimant had been shouting and abusive on the phone to him and thereafter they only communicated by email. He told the tribunal that he could not get to the bottom of what adjustments had been withdrawn and that it was not clear from the Claimant's very many emails exactly what the Claimant wanted, and that whenever he asked questions the Claimant deflected them and did not answer in specific terms. Mr Henery's evidence was that he could not open a grievance investigation or

appoint an investigator unless he was able to identify what the allegations were and who it was against. We accept Mr Henery's evidence that he tried very hard to understand the Claimant issues but that he got "berated and bombarded with emails". "We wanted to see what we could do to help and support, but as every opportunity I was closed down." From what we have seen of the email trail that is a fair summary. On 10 September the Claimant sent 17 emails. It is wholly unsurprising that Mr Henery felt that in the barrage of information that he was receiving he might miss some point that the Claimant was making, for which he would subsequently be criticised.

109. On 10th September 2019 the Claimant was invited to a disciplinary hearing (1853) on 18 September to be chaired by Helen Tilley. Mr Henery would attend in an advisory capacity. The Claimant was advised of his right to be accompanied. He was not told who would be presenting the case on behalf of the Respondent

110. Rather surprisingly the purpose of the hearing is not said to be a consideration of the allegations which were the subject of the investigation. Instead the letter, inviting the Claimant to the hearing

    a. rehearses that there had been an investigation into the allegations set out in the letter of 11th April 2019,
    b. states that alongside those matters the Claimant had raised a number of grievances which it had proved impossible to address due to the Claimant's repeated challenges
    c. states that, at the Claimant's request, the investigation had been more wide-ranging than initially anticipated and whilst concluding there was a case to answer for gross misconduct "it also references the mitigating circumstances" and recognises the impact of his disability is on these issues.
    d. notes the impact "which these issues and your behaviour" has had on other employees and refers to its duty to protect the health and safety of employees and the reputational risk
    e. notes that the Claimant had made contact via email with various colleagues in breach of the terms of his suspension.

    It then continues :"*taking all of this into account, whilst recognising that it is an unfortunate situation, I am of the view that we have to consider the termination of your employment. However, rather than seeing this as an issue of gross misconduct, in view of the impact which your disabilities have on your ability to control your behaviour, and the wider concerns regarding the impact of this situation on others, it seems to me that the more appropriate question is whether all trust and confidence between you and the GOC has broken down such that your continued employment has become unsustainable."* In other words, the Respondent has accepted that the Claimant's behaviour during his brief return to work arose from his disabilities.

111. Further documents were sent to the Claimant to include occupational health and medical information, documents relating to reasonable adjustments, emails relating to grievances and emails where the Claimant had contacted email sent during his suspension.

112. Many more emails followed. The Claimant emailed to say he understood the letter as saying he could not call witnesses (1935) e.g. Jack, Emma Christian or Vicky". He asked for statements from senior managers to confirm that he had contacted them about his grievances. Mr Henery asked for clarification of which witnesses he wanted and which documentation. He provided the Claimant with pro forma schedule in which he could identify his witnesses, why he wanted them to attend, and what relevant each one had to the allegations. The Claimant unhelpfully refused to comply saying he had provided answers to all the questions in his previous emails (1894).

113. On 12th September the Claimant submitted a lengthy document (1880) headed "initial response, questions and preamble questions" purporting to provide his response to the disciplinary charges. Although hard to follow, it is partly complaint, partly demand, and partly an accusation of victimisation and abuse of power. He complains about "removing my reasonable adjustment about my recorder pen" and says that that management failures have caused him to be facing the current disciplinary action. Tucked away in the middle of this document is a reference to the fact that the Claimant had obtained a brain scan and complaining that the Respondent had refused to get an expert's report. In relation to the allegation that the Claimant had contacted colleagues on numerous occasions in breach of his suspension the Claimant said he had only contacted the Senior Management Team, Ms Ebdon, HR, his line manager and Keith Watts. He queried whether he was facing a disciplinary for raising complaints about failures to follow written policy. He says that HR should have advised the Council members that if he had questions or anxiety he was going to send emails to manage his anxiety." More emails followed, the Claimant saying that he could not be dismissed for pursuing complaints in good faith.

114. On 14th September the Claimant submitted a fit note for work-related stress and the hearing was postponed. The Claimant was then referred to occupational health to assess his fitness to attend the hearing. The Claimant attended the assessment but wanted to amend the report which was sent to him. The OHP refused to do so and wrote to the Claimant "*the purpose of providing you with a copy of the report prior to its being sent to your employer is to provide you with the opportunity to highlight any factual inaccuracies – not to amend the report with regards to the medical opinion".* As a result, the Claimant withheld his consent to the report being provided to the Respondent. (C633-C635).

115. The disciplinary hearing was rescheduled for 25th October. The Claimant stated he could not attend because he had a personal appointment. The hearing was rescheduled to 1 November 2019 (2183). The Claimant was informed that, as this was the third time the meeting had been rescheduled at his request, if he failed to attend on the hearing would go ahead in his absence.

116. In the meantime the Claimant wanted confirmation about whether the hearing was being conducted under the CAP. Mr Henery responded (2176) attaching a document "outlining each allegation as per the Conduct Attendance and Performance Policy. (2177). The allegations were identified as follows

    a) Allegation one- These were the three allegations set out in the investigation report relating to the events of 9th to 11th April
    b) Allegation two- serious breach of the council's policies procedures or rules. "*You have raised a number of grievances but it has proved impossible to appropriately address these due to your repeated challenges to procedure being followed by the GOC, the independence of any relevant manager to deal with them and your failure to fully engage with the grievance process when requested to do so. This has left the GOC with a little option but to decline to address these issues any further"*
    c) Allegation three - breach of data protection confidentiality or information governance rule . *"You have made contact by email with various colleagues on numerous occasions and in breach of the terms of the suspension".*

    Despite the framing of the above as allegations the Claimant was told that "*rather than seeing this as an issue of gross misconduct, in view of the impact which your disabilities have on your ability to control your behaviour, and the wider concerns regarding the impact of the situation on others, it seems to me that the more appropriate question is whether all trust and confidence between you and the GOC has broken down such that your continued employment has become unsustainable*."

117. The Claimant did not attend the hearing on 1st November. He told the Respondent that he could not engage because "none of the Council's policies procedures or rules are being observed in this process and the dismissal hearing." (2479) He told the Tribunal he was "unable to" because it was not in accordance with procedure, ("no right to witnesses, did not say who the presenting manager was, insufficient notice of the hearing, 4 months delay, no signed statement from me" etc) but that he had no problem with the appeal because it was in accordance with procedure. It went ahead in his absence. Mr Henery presented the case and Ms Tilley was advised by Ms O'Neill head of HR. the hearing, which was recorded (2449 onwards) is described as a *"hearing to consider gross misconduct allegations against Philip McQueen"*. The Claimant is correct when he

complains that he was not told that Mr Henery would present the case for management and that the letter giving notice of the hearing had said that Mr. Henery would attend in an advisory capacity (and there was no mention of Ms O'Neill at all.)

118. The outcome was sent to the Claimant on 7th November (2502). Ms Tilley concluded that the Claimant was guilty of all three allegations. In relation to the events of the 9th -11th April she concluded that the Claimant's behaviour was unacceptable and amounted to gross misconduct, but that his disability "may have contributed to the way you behaved". Nonetheless she said that having read the medical evidence she concluded that "there were no reasonable adjustments that could be made to accommodate that type of behaviour".

119. She also concluded that, in emailing a number of GOC employees, the Claimant had breached the conditions of his suspension. In addition, she concluded that the Claimant had frustrated the process of dealing with the grievances that he submitted.

120. In the dismissal letter Ms Tilley records that having considered those matters and upheld the gross misconduct allegations she wanted to identify "if any of the above behaviours could be caused by your disability and if so what reasonable adjustments were put in place to support you". She continues "*I accept that you do have a number of disabilities and may suffer from meltdowns as part of your medical condition. As such your condition may have contributed to the way you behaved on 10th and 11th of April and subsequently."* However, having considered the medical assessments *"I am satisfied that there are no reasonable adjustments that can be made by the GOC to support the type of behaviour which occurred on 10th and 11 April 2019" and "your behaviour when you have meltdowns/episodes can have an extremely adverse impact upon your colleagues and as such, impacts upon the service we provide. Whilst we have a duty to you as our employee, we also have a duty toward all staff and as regulator we have a duty to enforce high standards of behaviour"*

121. In relation to the grievances Ms Tilley writes, *whilst I would not want to discourage any employee from raising concerns, I have concluded that you have not behaved in a reasonable manner whilst your grievances have been investigated. At each stage you have frustrated the process by claiming that the organisation has failed to make reasonable adjustments and has misrepresented the procedure and you have refused to cooperate*".

122. The Claimant appealed on 8 November 2019 with a lengthy document (2658-2667 and 2683-2724). As with many of the Claimant's communications it did not make sense. The Respondent wrote to the Claimant to ask him to clarify certain matters, but the response was also not clear. Eventually Ms Minchington, a senior council member who had

been engaged to hear the appeal summarised the Claimant's grounds of appeal into 14 points on 27th November. The Claimant asked for witness statements to be obtained from Emma Duffy, Jack Healy, Christian Glenister and Vicky Young, who he said had witnessed the events of 9-11 April.

123. The Respondent wrote to each of them but only Ms Young provided a statement. (2768) She was critical that Ms Longstone had not sent the Claimant an email to ask him to come to a meeting.

124. The Claimant attended the appeal meeting on 13th December. The appeal meeting was before two Council members namely Ms Minchington and Ms Forte.

125. The hearing was recorded. At the start of the hearing the Claimant had his recorder pen read out his opening statement.

126. The transcript of that hearing indicates that during the appeal hearing the Claimant displayed similar behaviours to those that he had displayed at the investigation. At the start of the appeal hearing and audio recording of the Claimant's statement was played. During the hearing the Claimant became agitated and aggressive, raised his voice at times and talked over both of the Council members. There was not time during the tribunal hearing to listen to the audio recording of the appeal hearing but it is clear from the transcript that the Claimant spoke at length, though not very coherently. He said that he required an adjustment to prevent him going into overload and that the specific adjustment which he sought to prevent him going into overload was to "follow the policy and procedure as it is written" and that the Respondent should not have sent him the letter of 3 April which withdrew his adjustments.

127. On 14th January, the Claimant attended an appeal outcome meeting. His appeal was dismissed. A letter confirming the outcome was sent to the Claimant same day (2801).

<u>The Claimant's grievances</u>

128. The Claimant wrote very many letters of complaint most of which were in terms which were not clear and were largely specific as to the matters complained of. For that reason, it was often hard to distinguish which of those emails represented a separate grievance and which were rehashes of grievances which he had already presented.

129. It is fair to say that the Claimant sent a constant stream of emails often many in one day. By way of example on 10 September the Claimant sent Mr Henery 17 emails (1946 onwards). It is often hard to identify which of those emails are new grievances and which are simply repeats or further information relating to existing grievances. Some grievances became

subsumed into later grievances. Broadly we understand the Claimant's grievances to be as follows:

a) 8 February 2019
b) 21st March 2019
c) 4 April 2019
d) 10/11 April 2019
e) 15 May 2019
f) 11 July 2019

130. The focus of all of these grievances is largely on historical matters. Mr Bridge tried hard to distil the Claimant's issues in an email to the Claimant of 7 June (869) but the response from the Claimant was to dispute both the issues and the arrangements that had been suggested. His attempts to clarify matters in emails from the 8- 24 June do not really help. He does not respond to Mr Bridge's repeated questions as to whether the Claimant would give consent to him seeing medical information. The Claimant's emails are unclear and can be high-handed in tone. (For an example see A167 from the Claimant to Mr Bridge. "*If you are not sure do ask and I will gladly advise on policy to ensure you do not fall foul of the Council's written policies and procedures*".)

131. The Claimant's demand for an external investigator appears to be on the basis that Mr Bridge could not investigate complaints about Mr Hadley and/or Lesley Longstone as they were senior to him. He has been unable to point to any clear policy which requires this. We would agree as a general policy an investigation should be carried out by a more senior manager, but Mr Bridge was himself part of the senior management team and the Claimant's complaints needed to be clarified. In any event the complaint about both Lesley Longstone and Mr Hadley was so vague and unspecific as to be meaningless. Having appointed an external investigator to consider the Claimant previous historic matters it is not surprising that the Respondent wished to keep matters in-house, at least until such time as they knew what the complaints were and whether they all related to historic matters or not. After the grievance process was closed down by Mr Hadley the Claimant continued to send many emails of complaint but, as Mr Henery says, the emails were in a form that was very hard to deal with.

Training grant

132. In 2017 the Respondent had agreed that the Claimant could undertake a level 3 diploma in business and administration through the Open University. The Claimant said this was arranged as a reasonable adjustment while the Respondent states that it was simply a normal development opportunity. On balance we prefer the Respondent evidence in this regard. In any event, the Respondent arranged the course on the Claimant's behalf and paid the fees for it in the first instance, the fees then

being deducted from the Claimants salary via payroll. The Respondent also agreed to pay a fee to cover the Claimant's exam.

133. The Claimant was still doing the course in April 2019 when he was suspended. The course was due to be completed by 15 May. On 7 May 2019 the Claimant emailed the Respondent saying he was not able to complete the course due to his absence from work and because the last eight months had been filled with work related stress and anxiety. He asked the Respondent to pay £600 required to fund an extension. On 16th May Ms O'Neill (who had joined the Respondent in mid-April) asked him to advise on what progress had been made on the course to date. The Claimant refused to answer. Instead, he sent a number of belligerent emails. In the end, the Respondent agreed to fund his extension as requested. The Claimant says that it was "offensive" to ask him what progress had been made, when he had been off work for 4 months, but it is plainly a legitimate question to ask.

134. The Claimant alleges that "by 28th June 2019 my extension request had not been adequately acted on, resulting on me being removed from the training program by the Open University". Although the Tribunal did not have a date on which the funding was provided, Ms O'Neill had sent off the relevant forms to the Open University as requested by 26th June (1016) and there was no evidence before us that the Claimant had been removed from the training program because his extension request had "not been adequately acted on".

Application for management role

135. *The Claimant complains that on 20th May 2019 he had been "denied an opportunity to interview for a manager's role due to an unfair process applied, as HR applied a shortlist PCP criteria which differed from the advert… Added to the fact I have a condition which is adverse to change""* (WS 169). The Claimant's complaint in this regard is not at all clear. In cross examination he said he had applied for the post of international registration manager and that the job competencies were advertised as (i) previous management experience; OR (ii) experience of international registration. The Claimant said that he focused on previous management experience but he had not included information about the "little bit of experience I had" about international registration. The reason he had focused too much on management experience and not included information about international registration was because of his dyslexia.

136. It is apparent from the sifting form completed by his manager Mr Gearty (690) that lack of evidence of knowledge about international registration was only one of the factors for which he was rejected. He was also rejected because he had not demonstrated sufficiently his management experience or any other key skills.

The law

Duty to make reasonable adjustments

137. Section 39(5) of the Equality Act 2010 imposes a duty to make reasonable adjustments on an employer. Section 20 provides that where a provision, criterion or practice (a PCP) applied by or on behalf of an employer, places the disabled person concerned at a substantial disadvantage in comparison with persons who are not disabled, it is the duty of the employer to take such steps as it is reasonable to have to take in order to avoid the disadvantage. Section 21 of the Equality Act provides that an employer discriminates against a disabled person if it fails to comply with a duty to make reasonable adjustments. This duty necessarily involves the disabled person being more favourably treated than in recognition of their special needs.

138. The test of reasonableness imports an objective standard. The Tribunal must examine the issue not just from the perspective of the Claimant but also take into account wider implications including the operational objectives of the employer.

139. The adjustment contended for need not remove entirely the disadvantage. *In Leeds Teaching Hospital NHS Trust v Foster*, *[2011] EqLR 1075*, when the EAT again emphasised that when considering whether an adjustment is reasonable it is sufficient for a tribunal to find that there would be 'a prospect' of the adjustment removing the disadvantage—there does not have to be a 'good' or 'real' prospect of that occurring.

140. In Ishola v Transport for London 2020 EWCA Civ 112 the Court of Appeal held that the function of the PCP in a reasonable adjustment context is to identify what it is about the employer's management of the employee or its operation that causes substantial disadvantage to the disabled employee in comparison to others. To test whether the pcp is discriminatory, it must be capable of being applied to others, because the comparison of the disadvantage it causes has to be made by reference to a comparator, including a hypothetical one.

141. The Code of Practice on Employment 2011 (chapter 6) gives guidance e in determining whether it is reasonable for employers to have to take a particular step to *comply with a duty to make adjustments. What is a reasonable step for an employer to take will depend on the circumstances of the particular case.*

142. *In* Environment Agency v *Rowan 2008 ICR 218* and *General Dynamics Information Technology Ltd v Carranza 2015 IRLR 4 the EAT* gave general guidance on the approach to be taken in the reasonable adjustment claims. A tribunal must identify: (a) the PCP applied by or on behalf of the employer, (b) the identity of non-disabled comparators (where appropriate), and (c) the nature and extent of the substantial disadvantage

suffered by the Claimant. Once these matters were identified then the Tribunal will be able to assess the likelihood of adjustments alleviating those disadvantages identified. The issue is whether the employer had made reasonable adjustments as matter of fact, not whether it failed to consider them.

143. It is now well established that "steps" are not merely mental processes such as the making of an assessment; rather they are the practical actions which are to be taken to avoid the disadvantage. As Langstaff P put it in Ashton (paragraph 24):**"***The focus is upon the practical result of the measures which can be taken. It is not - and it is an error - for the focus to be upon the process of reasoning by which a possible adjustment was considered."*

144. Para 20 (1) of Schedule 8 to the Equality Act also provides that a person is not subject to a duty to make reasonable adjustments if he does not know, and could not reasonably be expected to know, that the disabled person has a disability and is likely to be placed at a disadvantage by the PCP. An employer is required to make reasonable enquiries as to whether an employee is disabled and as to the effect of that disability.

Discrimination arising from disability.

145. Section 15 of the Equality Act 2010 provides that:

> (1) A person (A) discriminates against a disabled person (B) if—
> (a) A treats B unfavourably because of something arising in consequence of B's disability, and
> (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.
>
> (2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

146. Although A must know or have been expected to know that the Claimant was disabled, it is not necessary for A to know that the "something" arose in consequence of that disability. (City of York V Grosset 2018 IRLR 746).

147. In Psainer v NHS England 2016 IRLR 170 EAT Simler J said "*a Tribunal must first identify whether there was unfavourable treatment and by whom. No question of comparison arises. The Tribunal must determine what caused the impugned treatment, or what was the reason for It. The focus at this stage is on the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required. The something that causes the unfavourable treatment need not be the main or sole reason, but must have a significant (or more then trivial) influence of the unfavourable treatment and so be an effective reason or cause for* it."

148. Discrimination arising from disability can be justified if the employer can show that the treatment was a proportionate means of achieving a legitimate aim. This is a balancing act which does not depend on the subjective thought process of the employer and is not to be decided by reference to an analysis of the employer's thoughts and actions which would be appropriate in a reasonableness consideration. The question is whether the dismissal is, objectively assessed, a proportionate means to achieve a legitimate end irrespective of the process adopted by the employer (DL Insurance Services Ltd v O'Connor UKEAT/0230/17).

Direct discrimination and indirect discrimination.

149. Section 39 of the Equality Act 2010 prohibits an employer discriminating against or victimising its employees by dismissing them or subjecting them to any other detriment. Section 40 prohibits an employer from harassing its employees.

150. Section 13 defines direct discrimination as follows:- "A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favorably than A treats or would treat others". .Disability is a protected characteristic.

151. Section 19 defines indirect discrimination as follows:-

"(1) A person (A) discriminates against another (B) if A applies to B a provision criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

(2) for the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to the relevant protected characteristic of B's if-

a. A applies, or would apply, it to persons with whom B does not share the characteristic,

b. it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

c. it puts, or would put, B at a disadvantage, and

d. A cannot show it to be a proportionate means of achieving a legitimate aim."

Harassment

152. Section 40 prohibits an employer from harassing its employees. Section 26 defines harassment as follows

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

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

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

(i) violating B's dignity, or

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

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—

(a) the perception of B;

(b) the other circumstances of the case;

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

153. As to victimisation section 27 provides that

"(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 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."

154. If it is accepted that the Claimant has done a protected act, the Claimant must show that he or she was subjected to the detriment because he did a protected act; a causal connection is required although, as with direct discrimination the motive may be subconscious, and the protected act may only be part of the reason for the treatment. In some cases, the reason for the treatment may be the manner in which a Claimant pursues his complaints, or some other reason which is properly separable from the complaint itself. (Martin v Devonshire's Solicitors 2011 ICR 352.)

155. Proving and finding discrimination is always difficult because it involves making a finding about a person's state of mind and why he has acted in a certain way towards another, in circumstances where he may not even be conscious of the underlying reason and will in any event be determined to explain his motives or reasons for what he has done in a way which does not involve discrimination. For this reason, the burden of proof (at section 136) provides that it is for the Claimant to prove the primary facts from which a reasonable Tribunal could properly conclude from all the evidence

before it, in the absence of an adequate explanation, that there has been a contravention of the Equality Act. If a Claimant does not prove such facts he will fail – a mere feeling that there has been unlawful discrimination, harassment or victimisation is not enough. Once the Claimant has shown these primary facts then the burden shifts to the Respondent and discrimination is presumed unless the Respondent can show otherwise. (see Ayodole v City Link and another 2107 EWCA Civ 1913.)

156. An action that is complained of must be either direct discrimination or harassment but it cannot be both. Equally such an action cannot be both harassment and victimisation. it must be one or the other. (Section 212).

Unfair dismissal

157. Section 94 of the ERA sets out the well-known right not to be unfairly dismissed. It is for the Respondent to show that the reason for the Claimant's dismissal is a potentially fair reason for dismissal within the terms of section 98(1). Section (1)(a) provides that conduct is a potentially fair reason for dismissal. Section (1)(b) provides that it is potentially fair to dismiss for "some other substantial reason".

158. An irremediable breakdown in working relationship or a "loss of trust and confidence" may be a substantial reason for dismissal within the terms of subsection (1) (b). However, in nearly all cases where an employee is dismissed for misconduct, an employer will have lost trust and confidence in him or her. In determining the reason for a dismissal there is a distinction between dismissing an employee for his conduct in causing a breakdown of relationships and dismissing him for the fact that those relationships had broken down.

159. If the Respondent can establish a potentially fair reason for then the Tribunal will go on to consider whether the dismissal was fair or unfair within the terms of section 98(4). The answer to this question "depends on whether in the circumstances (including the size and administrative resources of the employers undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissal and shall be determined in accordance with equity and the substantial merits of the case."

160. The reasonableness of the employer's decision is to be judged on the evidence available to it at the time of the decision: *Dick v Glasgow University* [1993] IRLR 581 CS**.**

161. It is settled law that in unfair dismissal claims, the function of a tribunal is to review the fairness of the employer's decision, not to substitute its own view for that of the employer. The issue is whether the decision to dismiss fell within the band of reasonable responses for an employer to take with regard to the misconduct in question. (see *Post Office v Foley* 2000 IRLR 827 *London Ambulance Service NHS Trust v Small* [2009], [2009] IRLR

563, and *Graham v Secretary of State for Work and Pensions (Jobcentre Plus)* 2012 IRLR 759).

162. The band of reasonable responses test applies as much when considering the reasonableness of the employer's investigation as it does to the decision to dismiss (*Sainsbury's Supermarkets Ltd v Hitt* 2003 IRLR 23.) In *Shrestha V Genesis Housing Association ltd 2015 IRLR 300* the Court of Appeal said this "To say that each line of defence must be investigated unless it is manifestly false or unarguable is to adopt too narrow an approach and to add an unwarranted gloss to the Burchell test. The investigation should be looked at as a whole in assessing the question of reasonableness. As part of the process of investigating the employer must of course consider all defences adduced by the employee, but whether and to what extent it is necessary to carry out specific enquiry into them in order to meet the Burchell test will depend on the circumstances as a whole. …what mattered was the reasonableness of the investigation as a whole.

163. It is also important that the Claimant is given a fair hearing and a chance to state his or her case. However, as regards to procedure the question for us is not what the best procedure would have been but whether the procedure which was in fact adopted by the Respondent was within the range of reasonable responses. The ACAS Code of Practice on disciplinary and grievance procedures sets out six steps that employers should normally follow when handling disciplinary matters. These are to:

    a. Establish the facts of each case
    b. Inform the employee of the problem
    c. Hold a meeting with the employee to discuss the problem
    d. Allow the employee to be accompanied
    e. Decide on appropriate action
    f. Provide the employee the opportunity to appeal

<u>Conclusions</u>
<u>Discrimination arising from disability.</u>

164. We start first with the Claimant's disability. As we have said disability is not disputed. What is disputed is the extent of the manifestations of that disability. The first issue was to determine the something" that arose from the Claimant's disability.

165. As set out above the Claimant says that the following arise from his disability

    a) the fact that he sent so many emails to the Respondent. (The Claimant described this as being "an expression of meltdown behaviour".)

b) the fact that the Claimant could not think coherently when under stress

c) the fact that, if under stress, he would have communication difficulties, talking over people and being rude

d) the need for written instructions to be backed up by verbal communications

e) the need for written confirmation of verbal instructions

f) the need not to be approached in a manner that he perceived as confrontational

g) anger or meltdown behaviour caused by sensory overload

h) the need for strict adherence to written policy

i) the need to complete his sentences when speaking without obstruction

j) the need to be addressed formally by certain colleagues

k) the need to avoid contact with those that have offended him.

In the period of the matters in dispute (February to November 2019) this was not articulated in quite those terms. The Claimant did constantly assert more generally that his "behaviour" arose from his disability, just as, in a general way, the Respondent accepted that.

166. Ms Burgess reported that "under stress control falls away" and that specialist training would be required to enable him to develop strategies to deal with this. Ms Kavuna (who had seen the Burgess report) recommended that information on changes to work processes were backed up in writing. She said that the Claimant "*needs to have any information particularly around any changes that are given to team members verbally backed up by written statements of those changes to allow him to process that change visually. He then needs time to read and process information."* She said that there *"might be occasions when a one-to-one follow-up meeting is required to clarify any issues that he would not have verbally picked up in a meeting",* but she certainly does not state that all verbal instructions need to be placed in writing nor that all written instructions need to be confirmed verbally, however simple. In evidence the Claimant suggested that even a verbal instruction to get a cup of coffee would need to be put in writing "because I will forget what you asked me to do". We do not accept that. There is no medical evidence that is the case and seems highly unlikely given that for much of the Claimant's employment he performed well.

167. In 2015 Ms Kavuna had also found that the Claimant's disabilities "*can lead to him producing very inappropriate and loud speech when he becomes unsure of something he is being asked to do and it does seem that the incident with his line manager was an occasion that triggered this inappropriate language both in its volume and in its speed and as already stated earlier I would feel that it was not Mr McQueen's intention to be rude or disrespectful".* She felt that verbal instructions should be followed up with a written instruction but that he would have very little difficulties in the workplace if the recommendations set out above were in place. The way the Claimant had responded to his line manager at that time "*was highly possibly due to his disability is not from any intention to be disrespectful or rude to the line managers".*

168. The Goodman tribunal determined that the Claimant's meltdown behaviour did not arise from disability but because he had a short temper and resented being told what to do. There was no medical evidence before this tribunal which would have thrown doubt on that finding or which would suggest that the Claimant's pleaded disabilities had significantly worsened between February 2019 and April 2019 when the Claimant came back to work and behaved badly in his dealings with colleagues and particularly Ms Longstone.

169. There was no material before us from which we could conclude that the excessive sending of emails, the need for strict adherence to written policy, the need to complete sentences when speaking without obstruction, the need to be addressed formally by certain colleagues, or the need to avoid contact with those that have offended him arose from his disability. Although the Claimant refers to "need" in this context, there was no evidence that there was any such "need", rather than a preference born out of the Claimant's perception (unjustified as we find) that he was being treated unfairly. As far as policy and procedure was concerned the Claimant was not insisting on compliance with policies but with compliance with his own highly subjective view of how those policies should be interpreted.

170. More difficult was whether the Claimant's "meltdown behaviour from 9-11th April arose from his disability. When the Claimant returned to work in April he was in a heightened state of stress. What is difficult to unravel from that is whether the stress was because of his disability, or because he remained aggrieved by the matters which were the subject of his grievance and because he resented the instructions in the 3rd April letter. Ms Kavuna referred to inappropriate and loud speech when "he becomes unsure of something he has been asked to do." None of the episodes in that period related to bad behaviour resulting from being "unsure of what he was asked to do".

171. In cross examination the Claimant had a tendency to attribute <u>any</u> bad behaviour on his part to fault by others. For example, when questioned

about the Claimant's behaviour during his investigation interview the Claimant said that Ms Rollason failure to provide the documents that he requested in advance of the interview or to answer the questions that he set out in his "preamble" had resulted in a meltdown. The letter of 3 April "which removed my reasonable adjustments" that caused his "meltdown behaviour" from 9th to 11th April. The Respondent's failure to follow policy (as the Claimant saw it) had enhanced his anxiety and resulted in him sending so many emails.

172. Although finely balanced we conclude that the Claimant's behaviour from 9-11th April did not arise from disability but from resentment at the 3rd April letter and historic behaviour which he perceived to be unfair.

173. Having said that, the Respondent was operating on the basis that the Claimant's meltdown behaviour did arise from his Asperger's or neuro-diversity. The extreme nature of the behaviour exhibited by the Claimant in the three days during which he returned to work gave us some concerns that the meltdowns during this period might, as the Respondent had accepted, be disability related. However, if it was, (and we are wrong about our conclusion that the behaviour from 9th -11th April was not disability related), we are satisfied that the treatment that the Claimant received was justified. (paragraphs 177-179 below.)

174. We do not think that the Claimant's subsequent behaviour at the investigation interview and the appeal or the other matters set out above can be described as arising from his disability. He had been able to work well when not challenged in any way. It arose from his unjustified sense of grievance.

175. The Claimant is particularly aggrieved that the Respondent did not obtain a further medical report, but in deciding whether behaviour arose from disability, the Tribunal has to go on the medical evidence before it. It was always open to the Claimant to obtain his own additional medical evidence to present to this tribunal. By the time he attended the investigation interview he had had a brain scan which was normal.

176. If we are wrong and the meltdown behaviour on 9-11th April did arise from his disability, then the Claimant was treated unfavourably for a reason arising from disability in that he was suspended, subjected to a disciplinary process and ultimately dismissed. However, the Respondent had by then implemented all the recommended reasonable adjustments (we do not accept that his recorder pen was withdrawn) and the treatment he received was justified as a proportionate means of achieving a legitimate aim.

177. The Claimant's behaviour was upsetting for everyone. Mr Gearty had had to remove his team to the kitchen when the Claimant had had a meltdown because Ms Couppleditch had called him Philip rather than Mr McQueen. He had shouted at Ms Longstone for over two hours. He had had a

meltdown in reception. Mr. Gearty's evidence to Ms Rollason as to the effect that he had had on his team was compelling. The Respondent was entitled to suspend him pending an enquiry. (The Claimant accepts that "it was horrible for everyone" but said that that the meltdown was because the Respondent had not put in place the adjustments he needed, they had removed his recorder pen and refused to call him Mr McQueen, but we do not accept that, see below.)

178. It may have been that had the Claimant calmed down once he had been sent home and apologised and co-operated with the process things might have been different, but he did not. He remained fixated by historic matters. Genuine and concerted efforts were made by the Respondent to understand the nature of the Claimant's new grievances. He was told that he would be entitled to appeal aspects of the earlier grievances which had not been upheld. The Claimant chose not to. Mr Henery made significant efforts to try and respond to the voluminous correspondence that the Claimant was sending by email and remained at all times patient and courteous, despite the peremptory tone of the Claimant's emails.

179. By November the Claimant's lack of insight into his behaviour made his continued employment impossible. When challenged in cross examination about why calling him Philip was a breach of the BHP the Claimant said it was *"because calling me Philip will upset me and because my disability means that once I have something in my head it is hard to change that perception and once I perceive that they aren't doing something properly then I will be upset."* And again "*Teresa Couppleditch wanting to talk about issues and doing things I have asked her not to do at my desk is super insulting*". The Claimant told Ms Rollason that telling him that he was expected to be courteous and professional at all times was unreasonable since they knew tht he could sound rude without meaning to sound rude, but his behaviour had gone far beyond simple rudeness.

180. By 9th April all recommended reasonable adjustments were in place (see the Goodman Judgment). The Claimant says that the Respondent should "never have allowed him to come back to work" but OH had certified him fit and the decision was for the Claimant to make. It would be impossible to manage an individual who is liable to go into meltdown for the smallest of perceived injustices. The Claimant told the Tribunal "once I perceive they aren't doing something right I will be upset".

<u>Failure to make reasonable adjustments</u>

181. The pcp relied on by the Claimant is putting him at a substantial disadvantage was said to be "a practice of not following internal policies and procedures", and the disadvantage is that such failures had an adverse effect on the Claimant's communication and behaviour.

182. We do not accept that the Respondent had a policy of not complying with

policy and procedure. While there were clearly a couple of relatively minor procedural errors they were not enough to amount to a practice or a policy required to establish a pcp. In Ishola v Transport for London the Court of Appeal said that a pcp carried "the connotation of a state of affairs (whether framed positively or negatively and however informal) indicating how similar cases are generally treated or how a similar case would be treated it if occurred again". A 'practice' connoted 'some form of continuum in the sense that it is the way in which things generally were or will be done.

183. Secondly, even had there been such a practice or policy, there was no evidence to suggest that the Claimant's disabilities put him at substantial disadvantage in comparison to others that were not disabled. The Kavuna report did suggest that changes to work processes were backed up in writing, but that is a completely different to the claim being made by the Claimant that any failure to adhere to policy and procedure had an adverse effect on his behaviour. In any event, it was apparent that what the Claimant meant by adherence to policy was not in fact adherence to policy on an objective basis, but adherence to his own subjective interpretation of the relevant policy.

184. By way of example, the Claimant claims that the Respondent breached paragraph 8.14 of the Bullying and Harassment Policy (BHP). This provides that where a grievance is not upheld "the HR Department will support the complainant and the alleged harasser/bully and other relevant managers in making arrangements for both parties to continue working together and to help to repair working relationships." The Claimant alleges that the following actions were in breach of that policy

- not agreeing that those people against whom he was aggrieved should call him calling him Mr McQueen
- insisting (in the letter of 3rd April) that he continue to work with and take instructions from Nadia Patel and Mark Webster.

Neither of those are breaches of the BHP. They just do not accord with what the Claimant wants to do. The Respondent not unreasonably considered that requiring some individuals, but not others, to call him Mr McQueen was not the way to repair working relationships

185. Equally in relation to the Conduct Attendance and Performance policy (CAP) the Claimant alleges that the Respondent did not send him the notes of his interview with Ms Rollason to review and sign. The CAP (at appendix 6) provides that the Respondent will keep a record of what was said in an investigation meeting and that the interviewee would be asked to check it to ensure that it accurately relays what they said and then sign and date it". The investigator's notes of the interview with the Claimant were not agreed with or signed by him; but the Claimant had recorded the interview with Ms Rollason on his pen and had provided her a full written

transcript of the interview which was included in the investigation report. Since the Claimant had provided the transcript a signature "to ensure that the notes were accurate" was unnecessary, and the failure to send him notes to review and sign did not put him at a disadvantage.

186. The Claimant alleges a breach of policy in that Ms Rollason had not interviewed all the witnesses to the Claimant's behaviour on 9th and 10th April. In fact, the policy indicates that it is the investigating officer who should determine who needs to be interviewed (para 5.2 page 371) and not the person against whom the allegations are made. While Ms Rollason did not interview all of the Claimant's team, we consider that she interviewed a reasonable selection of witnesses, and in any event the Claimant does not (and did not) deny that he had meltdown behaviour on those days. The delay between the events and the investigation was because the Respondent was seeking to deal with the Claimant's grievance.

187. The Claimant is on firmer ground when he says that that the letter inviting him to the disciplinary hearing did not include the name of the presenting officer or the names of the witnesses who management would call. It also did not state the stage of the CAP that the hearing represented. These were technical breaches of the CAP but there was no evidence to suggest that by reason of the Claimant's disability this breach put him at a particular disadvantage in relation to others that were not disabled.

188. In contrast when the Respondent seeks to rely adherence to policy, such as insisting that the Claimant appealed the outcome of his grievance rather than issuing a new grievance about historic matters, it is the Claimant who decides that he does not wish to follow policy.

189. The second pcp relied on is "the Respondent's insistence on using employees first names." There was a practice at the Respondent that employees should be on first name terms. The Claimant's case is that he would be put at a disadvantage by this policy in comparison to others who were not disabled because, if those he was aggrieved about called him Philip, it was likely to cause meltdown. We do not accept that there was any evidence that this might be the case. Equally, though not pleaded as far as we could tell, we do not accept the Claimant's case that being required to communicate with Ms Couppleditch, Mr Webster, Ms Patel and Mr Grell and Ms Bibi (a junior HR employee) put him at a disadvantage because it was likely to cause meltdown behaviour.

190. The third pcp that the is Claimant relies on "a practice of not putting verbal instructions into writing." The particular complaint made by the Claimant in this regard was the instruction by Ms Couppleditch and Ms Longstone that they might have a word with the Claimant in private. We accept that there was a practice at the Respondent that straightforward instructions of this nature were not put into writing but we do not accept that this was a

practice which would put the Claimant at a substantial disadvantage. Ms Kavuna had recommended that changes to policy be backed up in writing but there was no evidence that the Claimant would not be able to process information asking him to join a member of management in a meeting.

191. Finally, the Claimant relies on the practice of requiring individuals to contribute to vocational training courses. It is not disputed that the Respondent would require individuals to contribute to vocational training courses but there was no evidence that that would put the Claimant at a significant disadvantage in comparison to others that were not disabled. (In any event in evidence, his complaint was different in that he complained about delay in acting on/funding his extension request, rather than that he had been required to contribute.)

192. We therefore do not accept that the Claimant was put at a disadvantage by any of the pleaded pcps, so that the duty to make adjustments did not arise. During the evidence (not pleaded but put forward during the disciplinary appeal) the Claimant said that the Respondent should have made a room available to him where he could go to calm down when he was about to have a meltdown. However there was a prayer room available at the Respondent and the Claimant had not availed himself of it.

193. The Claimant was aggrieved by the failure to get another report from Ms Burgess. A report is not an adjustment of itself but a means by which an employer can identify what practical steps it can take to alleviate a disadvantage. We do not accept that the Claimant was at a disadvantage by the pleaded pcps. The Respondent had put in place all the adjustments recommended by OH, who in turn had seen those bits of the Burgess report that the Claimant had chosen to share. The adjustment that the Claimant sought was “adherence to policy” but what he really wanted was for the Respondent to reopen all his old grievances and to subject Ms Patel and others to the disciplinary process.

194. The recorder pen was an adjustment which had been recommended and provided to alleviate the disadvantage around processing information because of his dyslexia, and we do not accept that it had been withdrawn by the instruction that he should get permission to record. The Claimant cannot show that he was put at a disadvantage by this instruction as there was no evidence that anyone had ever refused him permission to record, or that they were likely to do so. Nor had it been withdrawn when the Respondent kept it after the grievance hearing in December 2018. The Claimant was offered a replacement while the pen was being looked at to delete the recording and chose not to accept it. In any event this was a work related adjustment and the Claimant had not been at work during this period.

<u>Direct discrimination</u>

195. We do not accept that the events which culminated in the Claimant's dismissal either singly or cumulatively were significantly influenced by the fact that he was a disabled person. On the contrary, the Respondent appears to have accepted that the Claimant's behaviour resulted from his disability and they gave him significantly more leeway in dealing with him on this basis than they would have done if he had not been disabled. Had it not been for the Claimant's disabilities, it is likely that they would have taken a stricter approach Claimant's episodes of meltdown behaviour and the repeated challenges to process.

Harassment

196. Although the Claimant cites (effectively) everything that happened as acts of harassment the focus of those complaints is "the withdrawal of previously agreed reasonable adjustments" in 3 April letter, alleged aggressive behaviour towards the Claimant by Ms Couppleditch on 10 April 2019 and by Lesley Longstone on 11th April 2019, the appointment of Mr Hadley to hear the Claimant's grievance (and the Respondent's refusal to replace him), the refusal to obtain an expert specialist report, the refusal to call him Mr McQueen, the failure to follow CAP policy and suspension and dismissal.

197. We do not regard the letter of 3rd April as harassment. It was simply proper but firm management, setting clear expectations following an unsuccessful return to work on 8th February when the Claimant had covertly recorded Ms Couppleditch on his recorder pen and remained aggrieved. Nor do we regard the letter as removing his reasonable adjustments. It is simply courteous to ask people if they mind recording, and no doubt if there had been any objection on unreasonable grounds this could have been dealt with at the time.

198. We do not accept that there was aggressive behaviour towards the Claimant by either Ms Longstone or Ms Couppleditch during his return to work. Both simply sought to have private meetings with the Claimant; nor was it aggressive or harassment to refuse to address him as Mr McQueen. If the Claimant regarded these as acts of harassment it was not reasonable for him to have done so. A decision not to get an expert's report cannot properly be describes as harassment. It was a decision that the Claimant disagreed with and no more.

199. We have dealt with the appointment of Mr Hadley. He was the chair of the Council and an appropriate individual to deal with the Claimant's grievance. It was not conduct that can be characterised as harassment, nor was it related to his disability

200. While dismissal can be an act of harassment, (Urso v DWP 25 Jan 2107 (EAT)) it would be more usual to regard it as direct discrimination (if the dismissal had been influenced by a protected characteristic.) But for

behaviour to be regarded as harassment, the proscribed effect must have been caused by the employer's conduct, and here the dismissal came about because of the Claimant's conduct.

Indirect discrimination

201. Neither side made any submissions on the indirect disability discrimination case. In the Claimant's Scott Schedule he refers to section 19 in relation to the application for the managers role. "The Tribunal applied a shortlist criteria that differed from the advert". In evidence the Claimant's complaint was not so much the criteria that were applied but that, because of his dyslexia, he had a tendency to mis-read or misunderstand the questions. That is a different case altogether. We do not accept that the Respondent had a policy of failing to adhere to its policy and procedure (see our comments above).

202. The Claimant's case that the application of the disciplinary process put him at a disadvantage is essentially the same as his section 15 claim which we have considered above, and the same conclusions apply to the claim as bought as a section 19 (indirect discrimination) claim. If (contrary to our findings) the meltdown behaviour was a function of his disability, then the Claimant was put at a substantial disadvantage by the application of the disciplinary process. However, as we have found, the application of the disciplinary policy and the Claimant's dismissal was a proportionate means of achieving a legitimate aim (see paragraphs 176-179 above).

Victimisation

203. There is no dispute that the Claimant had complained repeatedly of breaches of the Equality Act. Did the Respondent treat him unfavourably because of those complaints?

204. It is the Claimant's case that the whole chain of events from 9th April onwards was influenced by his complaints. We do not accept that as a broad characterisation. Objectively speaking the Claimant was treated with respect on his return to work and was only suspended because of his behaviour as described above. During his absence on suspension and pending the disciplinary investigation and hearing the Respondent sought patiently to respond to the voluminous emails that the Claimant was sending. There was some delay between the 21st March complaint and Mr Bridge's response on 10th April, but this was not excessive. Thereafter the Respondent sought hard to understand the Claimant's grievances but in the end the Claimant's fixation with historical matters clearly got in the way and prevented them from making progress.

205. The Claimant claims that the Respondent did not deal with his grievances in a timely and appropriate fashion, and that they did not do so because he had done various protected acts. There was a small delay in

acknowledging and arranging a meeting to investigate the 21st March grievances, but then a meeting was promptly arranged for the 12th April. That meeting then needed to be postponed because of the events of 9-11th. Mr Bridge was then on leave to 23rd April and a second postponement occurred because his son was ill. None of this was delay influenced by protected acts. Subsequent attempts to clarify the issues were frustrated by the Claimant.

206. The Claimant wanted the Respondent to subject his former manager and others to disciplinary action. They did not do so (and the Claimant did not raise this point in cross examination) but that was not because of, or linked to, the fact that the Claimant had complained. We do not accept that it was a breach of policy for Mr Bridge to investigate the Claimant's grievance or for Mr Hadley to hear it, or that the invitation to a hearing on 3rd May was a detriment.

207. We had more difficulty with deciding whether or not the dismissal process itself was an act of victimisation. In expanding the terms of reference from Ms Rollason's investigation to consider the Claimant's email correspondence and subsequently dismissing him in part because of those emails we considered to what extent the Respondent was treating him unfavourably because he had raised grievances or whether, (as the Respondent submits), Ms Tilley decided to dismiss him because the Claimant had frustrated the grievance process.

208. The dismissal letter records this. "*It has proven impossible to appropriately address previous grievances. This is due to your claims that reasonable adjustments have not been made to the procedure being adopted, allegations that the GOC is applying the incorrect procedure and general lack of co-operation. You have also challenged the independence of any relevant manager to deal with your grievance and you have failed to attend meetings when requested to do so. This is evidenced in letters sent to you by Gareth Hadley on 25th and 16th July 2019.The high volume of emails you have sent to numerous GOC employees and council members have continued to frustrate the process of dealing with grievances you continue to submit. Your overall approach to the grievance process and failure to comply with GOC policy regarding grievances has resulted in GOC being unable to progress your grievances."*

209. Having seen much of this email correspondence we accept that it had proved impossible to appropriately address the Claimant's grievances. He refused to appeal the 2018 grievance and then refused to engage with Mr Bridge and Mr Hadley in relation to subsequent grievances. After Mr Hadley closed down the grievance process the Claimant continued to send a huge volume of emails which were hard to read or understand and he did not engage with the Respondent's efforts to get clarity.

210. The Claimant accepts that he did contact many colleagues and council

members after he was suspended but says that these were all complaints about his treatment (that he was not seeking to influence the disciplinary process) and in turning this into a disciplinary matter the Respondent was victimising him for making these complaints in good faith. Further the Claimant says that the volume of email sending related to his disability.

211. We do not accept the latter point. As for the former, Ms Tilley told the Tribunal that the Claimant had always been free to contact HR and Mr Bridge (who had been charged with investigating his grievance) but that he should not have contacted Council members and colleagues. It was not the complaints themselves but the sheer volume of emails and the free use of the cc function, coupled with the fact that each time the Respondent tried to engage they were thwarted.

212. Having seen many of these emails the Tribunal accepts that it was not the complaints themselves but the way it was done. The Respondent was drowning in the sheer volume of emails and they had over many months genuinely sought to pin down the Claimant's concerns, which (with the exception of his demand that the Respondent should obtain a further report form Ms Burgess), remained wholly opaque. We find that the Claimant was not subjected to the disciplinary process because he complained but because he did not do so appropriately, would not accept the outcome of an earlier grievance process, would not appeal and would not or could not clarify his new grievances sufficiently to allow the Respondent to address them.

Unfair dismissal

213. The first issue for the Tribunal to consider was what was the principal reason for the Claimant's dismissal. In her evidence Ms Tilley told the Tribunal that Ms Rollason had concluded that there was prima facie case to answer in respect of the events of 9th to 11th April but referenced the Claimant's disabilities as being mitigating circumstances. The Tribunal finds that a somewhat surprising conclusion. We did not read Ms Rollason's report in that way. Although Ms Rollason says that the Claimant had conditions which affect his behaviours, she also said that she could not ascertain from the medical reports *"the extent to which the Claimant's behaviour would be affected by one or all of the conditions. In other words, there is nothing that describes the behaviours in these allegations as to be expected of by an employer".* Her conclusion was that the Claimant regarded his conditions *"as absolving him from all responsibility for his own behaviour – that is not the case*". In other words, just as we have done, Ms Rollason concluded that the events of 9-11 April were not a function of his disability.

214. In any event Ms Tilley evidently decided that the Claimant's disabilities did have an impact on his ability to control his behaviour. It was for that reason that she decided that the issue was not simply one of gross misconduct,

but whether the employment relationship had irreparably broken down. This involved *"an analysis of the historic background that led to his to dismissal, but also Philip's conduct during his suspension the alleged breach of his return to work conditions and his continuous challenges to process being followed in the month prior to his eventual dismissal".*

215. We accept that in deciding to dismiss the Claimant Ms Tilley took into account all those factors. We accept, as she said, that it was clear that the Claimant no longer trusted HR or (perhaps with the exception of Mr Gearty) management at the Respondent and that relations had broken down. Nonetheless, we find that the Claimant was, in reality, dismissed because of his conduct in causing that breakdown.

216. We find that the Respondent had a genuine belief on reasonable grounds that the Claimant had behaved very badly on his return to work and that, even if it was because of his disability, this was behaviour that they could not tolerate.

217. We considered whether, having moved the terms of reference for the disciplinary hearing beyond the events of 9th -11th April to include the Claimant's conduct during his suspension, and his "repeated challenges to the grievance policy", the Respondent should have carried out a further investigation but, after some deliberation, we have concluded that there was no need to do so. The email correspondence was clear. The Respondent's CAP provides that "Where a matter is routine or straightforward, there will be no need to conduct a separate investigation", (338). There was no issue but that the Claimant had in fact sent emails to various members of senior management and others during his suspension. He had refused to engage in the grievance process with Mr Bridge. After 25th July he continued to send in complaints which had been shut down by Mr Hadley and in terms which remained unclear. These emails were scattered throughout our bundles (examples are at 2026, 2028etc.)

218. In our view there was enough evidence in the emails for these matters to proceed straight to a disciplinary hearing provided that the manager hearing the disciplinary properly understood the issues and was able to take into account any explanations or submissions put to her by the Claimant. It was unfortunate that the Claimant did not attend the disciplinary hearing and his various email submissions consisted of further complaints, (that his recorder pen had been withdrawn, that it was not acceptable for Mr Hadley to have heard his grievance, that there was abuse of power, that he was being victimised) rather than an attempt to explain or apologise. He also had a further chance to put his case at the appeal.

219. We also find that although it is true that there was some shifting of the goalposts there was sufficient time between the notice of the charges, as it were, and the disciplinary hearing, for the Claimant to respond and to say

what he needed to say in response, challenge or mitigation. He did not attend but he sent emails and had a second chance to so during the appeal. We conclude that notwithstanding the shift in the charges the Claimant had a proper opportunity to put his case.

220. As to the reasonableness of the decision to dismiss, we have little doubt that the Claimant had by his conduct both in April and subsequently become wholly impossible to manage. The Claimant's refusal or inability to accept that his behaviour in April had been unacceptable, and his insistence throughout the disciplinary process that the Respondent was wholly at fault without allowing the Respondent to address his grievances in an orderly fashion made it impossible to retain him in their employment.

Employment Judge Spencer
17th December 2020

JUDGMENT SENT TO THE PARTIES ON

17/12/2020.

FOR THE TRIBUNAL OFFICE