EMPLOYMENT TRIBUNALS

Claimant | **Respondent**

Mr M Litchfield Kelly v **London Borough of Greenwich**

Heard at: **London South Employment Tribunal**

On: **1 November – 9 November 2021**

Before: **EJ Webster**
Ms S Dengate
Mr R Singh

Appearances
For the Claimant: **In person**
For the Respondent: **Mr Magee (Counsel)**

RESERVED JUDGMENT

1. The Claimant's claims for direct disability discrimination are not upheld and are dismissed.
2. The Claimant's claims for discrimination arising out of his disability are not upheld and are dismissed.
3. The Claimant's claims for failure to make reasonable adjustments are partially upheld insofar as is set out below.

REASONS

The Hearing

4. The hearing was heard in person save that one of the Tribunal panel (Mr Singh) attended by way of CVP and one of the witnesses (Mr Hoggan) attended by CVP. Both remote attendances were agreed to by both parties from the outset of the hearing.

5. We were provided with a very large bundle of documents both digitally and in hard copy. In addition we received 2 additional small bundles; one from each party.

6. We had written witness statements for all the witnesses, all of whom also appeared before the tribunal. We heard from:
   (i) The Claimant
   (ii) Mr D Hoggan (the claimant's trade union representative) (**DH)**
   (iii) Mr R Whaley (Head of Design and Commercial and the claimant's line manager at the time of dismissal) **RW**
   (iv) Ms N Hogan (Deputy Head of Design and Commercial, temporary manager of the Claimant) **NH**
   (v) Ms N Dawson (manager of the Corporate Employment Scheme for the respondent) **ND**
   (vi) Ms S Bristow (Design manager for the respondent) **SB**
   (vii) Mr M Higgins (Principal HR Adviser for the respondent) **MH**
   (viii) Mr S Godfrey (Assistant Director for Central and Corporate services for the respondent) **SG**
   (ix) Mr K Thangathurai (HR Manager and business partner for communities and environment for the respondent) **KT**
   (x) Ms F Kroll (senior manager for the respondent) **FK**

7. After reading the papers, the Tribunal suggested, and the parties both agreed, that an individual employee working for the respondent, who was not giving evidence, but was referred to frequently in the facts of the case, ought to be anonymised in accordance with Rule 50 of the Employment Tribunal Rules due to her personal background. She is therefore referred to as Witness A throughout this judgment. As this had not been raised previously the witness statements and papers were not redacted – however we all agreed that should a member of the public or press wish to see any documents which referred to her, they must be anonymised beforehand. In the event, any observers did not request sight of any papers.

8. The Tribunal read the statements and papers on day one, heard evidence days 2-5 and submissions in the morning of day 6. The Tribunal deliberated on days 6 and 7.

9. Breaks were taken on a regular basis to assist all those involved and the Tribunal worked with the parties to ensure that the claimant in particular was able to prepare and ask his questions and submissions effectively. This included sometimes assisting the claimant when he was cross-examining the respondent witnesses.

The Issues

10. The List of Issues had been agreed at a previous hearing with EJ Bryant QC. The claimant was legally represented at an earlier stage of these proceedings and that legal representative had drafted the pleadings. At the outset of the hearing the Tribunal agreed with the parties that these remained the issues and

we went through them in detail. The respondent raised concerns regarding the s15 Equality Act 2010 claims and the Tribunal explained to the claimant the steps required to establish discrimination in accordance with s15 Equality Act 2010 and asked him to consider the pleadings and whether they reflected the claims he was bringing. He was asked overnight to confirm whether he intended to bring the claims as pleaded and to clarify various aspects of these claims and the reasonable adjustments claims. On Day 2 of the hearing he confirmed that he wished to proceed with the pleadings as drafted by his then legal adviser. He also provided the requested clarity which is reflected in the List of Issues below.

11. **Jurisdiction (Section 123 Equality Act 2010)**
    a. The date of receipt by ACAS of the EC Notification is 15 June 2019.
    b. Is any act or omission relied upon by the Claimant in support of his claim for disability discrimination, which occurred on or prior to 16 March 2019 out of time?
    c. If so, was there a continuing act ending with an act/ omission that was brought in time?
    d. If not, is it just and equitable to extend time?

12. **Disability (Section 6 EQA 2010)**
    a. Was the Claimant a disabled person at the relevant time? The Claimant relies upon ADHD, EUPD, OCD, bipolar, severe anxiety and/or depression.

    The respondent has conceded that the claimant was disabled by reason of these conditions at the relevant time.

    b. If so, did the Respondent know or could it reasonably have been expected to know that the Claimant was so disabled at the relevant time? The Claimant will aver the Respondent had knowledge since March 2018.
       The respondent denies knowledge of the disability and knowledge of any substantial disadvantage.

13. **Direct Discrimination (Section 13 EQA 2010)**
    a. Did the Respondent treat the Claimant less favourably than it would treat a hypothetical comparator whose circumstances are not materially different to the Claimant's because of his disabilities (or any of them) by committing any of the following acts or omissions?
    (i) Ross Whaley overturning the Claimant's agreed annual leave and refusing the Claimant's further request to take the leave in August 2018
    (ii) Refusing to pay the Claimant for additional hours worked in September 2018
    (iii) Ross Whaley's complaint in September 2018 about the Claimant being "unmanageable" and that he needed to "tow the line".
    (iv) Rose Whaley reprimanding the Claimant and reminding him that he could be sacked at any time when he asked the Respondent to pay

interest on a payday loan which the Claimant was forced to take out because the Respondent had paid him late.

(v) Ignoring the Claimant's attempts to explain his mental health conditions and dismissing them as the Claimant being "dramatic and complaining" in October 2018

(vi) In November 2018, Ross Whaley telling the Claimant to get a job done which meant he would have to work through the night, which meant working 36 hours without sleep, and allowing the Claimant to work 19 days without a day off. In short, failing to ensure the Claimant took adequate rest breaks and failing to provide him with any compensatory rest.

(vii) Dismissing the Claimant's applications for a mentor dated October 2018 and January 2019;

(viii) Failing to honour its agreement to reschedule the disciplinary / end of probation hearing in June 2019; failing to reschedule it in light of his medical status; failing to offer the Claimant counselling sessions and failing to keep him up-to-date with disciplinary proceedings;

(ix) Holding the disciplinary hearing / end of probation hearing in his absence and in the absence of a representative, and dismissing the Claimant without notice or fair process, and without taking into account his disabilities

(x) Dumping the Claimant's personal equipment in a box, in a mess and with items missing, and failing to reply to the Claimant's email chasing the missing equipment

(xi) Refusing to overturn the dismissal despite three of the six grounds of appeal being upheld and in circumstances where the Claimant was given no choice to present evidence, nor informed of the allegations and that the hearing was held in his absence without his knowledge.

14. Discrimination arising from disability (Section 15 EQA 2010)

a. Did the Respondent treat the Claimant unfavourably by committing any of the acts set out below?

NOTE: The Claimant clarified which of the below unfavourable treatment related to which 'something arising' out of in writing on Day 2. Therefore next to each alleged unfavourable treatment is the 'something arising' that the claimant relied on for this treatment.

9.1

(i) Ross Whaley overturning the Claimant's agreed annual leave and refusing the Claimant's further request to take the leave in August 2018.
The Claimant's need to take adequate rest

(ii) Refusing to pay the Claimant for additional hours worked in September 2018.
The claimant follows instructions literally

(iii) Ross Whaley's complaint in September 2018 about the Claimant being "unmanageable" and that he needed to "tow the line".

The claimant follows instructions literally

(iv) Ross Whaley reprimanding the Claimant and reminding him that he could be sacked at any time when he asked the Respondent to pay interest on a payday loan which the Claimant was forced to take out because the Respondent had paid him late

The Claimant's blindness to the respondent's business politics

(v) Ignoring the Claimant's attempts to explain his mental health conditions and dismissing them as the Claimant being "dramatic and complaining" in October 2018

The Claimant's anxiety and stress/blindness to social politics/cues

(vi) In November 2018, failing to pay the Claimant for extra hours worked, failing to explain its unwritten rules in relation to working extra hours, and Ross Whaley's reprimanding of him for doing so

The claimant follows instructions literally and blindness to social politics/cues

(vii) Failing or refusing to pay the Claimant's expenses in a timely fashion, and telling him it would take 3 months for the expenses to be paid, which was untrue

The Claimant's anxiety and stress

(viii) Failing in March 2019 to explain to the Claimant adequately or at all the disciplinary process such that he properly understood it

The claim's anxiety and stress and that he need to understand the process which was or should have been followed.

(ix) At the first formal disciplinary investigation meeting on 24 April 2019, the Claimant was deprived the opportunity to fairly respond to the allegations before him. The allegations were presented to him in a narrow fashion, accusing him rather than seeking to understand the truth of the matter. The Claimant's Trade Union representative reminded the Respondent of the Claimant's disabilities to which the investigating officer said he was unaware. Even so, the fact of the Claimant's disability and/or any of them was ignored and the Respondent pressed ahead without making any adjustments to the manner in which the questions were being put to the Claimant. The Respondent further took the Claimant's explanation of how his disability manifests itself when he is under stress and struggling to understand the circumstances. The Respondent used this against him

The frank way in which the claimant expresses himself and/or the stress and anxiety that manifested.

(x) The Respondent continued to keep the Claimant in the dark as to the progress of the investigation. The Claimant was provided with three working days' notice to attend a "final probation meeting at which he could be dismissed", together with a substantial report and notes which he had not previously seen. This was the first time after nine weeks of suspension that the Claimant had been provided in writing with the allegations that he was facing. The Claimant had requested a copy of the meeting notes from the

first meeting. The Respondent failed to provide an accurate or complete copy, and what was provided was provided as late as possible.
The claim's anxiety and stress and that he need to understand the process which he was subjected to.

(xi) Failing to provide the Claimant with the attachments referred to in the investigation report and telling him he was not entitled to see them, thereby withholding relevant evidence
The stress and anxiety that manifested.

(xii) Subjecting the Claimant to significant undue pressure to attend the meeting in the absence of his representative.
The stress and anxiety that manifested.

(xiii) Holding the disciplinary hearing / end of probation hearing in his absence and in the absence of a representative, and dismissing the Claimant without notice or fair process, and without taking into account his disabilities
The claim's anxiety and stress and that he need to understand the process which he was subjected to.

(xiv) Dumping the Claimant's personal equipment in a box, in a mess and with items missing, and failing to reply to the Claimant's email chasing the missing equipment
No something arising was provided by the Claimant.

(xv) Refusing to overturn the dismissal despite three of the six grounds of appeal being upheld and in circumstances where the Claimant was given no choice to present evidence, nor informed of the allegations and that the hearing was held in his absence without his knowledge.
The claim's anxiety and stress and that he need to understand the process which he was subjected to.

9.2 If so, was this because of something arising in consequence of the Claimant's disability? The something arising includes: need to take adequate rest; need for regular/structured contact with family; need for routine; following instructions literally; blindness to social politics/cues; anxiety and stress; need to understand processes; frank, blunt and/or inappropriate expression.

9.3 If so, were the acts a proportionate means of achieving a legitimate aim? The Respondent to confirm legitimate aim(s) relied upon.

Failure to make reasonable adjustments (Sections 20-21 EQA 2010)

NOTE: The Claimant clarified which of the PCPs caused which substantial disadvantage in writing on Day 2. Therefore next to each alleged disadvantage is the PCP that the claimant relied on.

10.1 Did the Respondent have the following PCPs and, if so, were they applied to the Claimant?

(i) PCP1: The annual leave policy and/or practice of refusing annual leave requests to new employees or to employees early on their employment;

Substantial disadvantage (a) and (b)

(ii) PCP2: The practice of allowing employees to start employment without an induction or clear instruction about the working environment;
Substantial disadvantage (a)

(iii) PCP3: The requirement / practice of working in an open plan office and/or without a fixed or quiet desk;
Substantial disadvantage (a) and (c)

(iv) PCP3 [*two PCP 3s were in the list and we have not relabelled them to avoid confusion]:* The requirement/ practice of expecting employees to know they should not work outside of their contracted hours or excessive hours without telling them expressly;
Substantial disadvantage (a) and (b)

(v) PCP4: The practice of refusing applications for mentors for disability-related issues or from disabled applicants;
Substantial disadvantage (d), (c) and (a)

(vi) PCP5: The practice of paying employees late (salary or expenses);
Substantial disadvantage (a)

(vii) PCP6: The practice of labelling employees who require more management than the average employee such labels as "dramatic" or "complaining";
Substantial disadvantage (a) and (c)

(viii) PCP7: The requirement to train other members of staff (including those who are vulnerable);
Substantial disadvantage (a) and (c)

(ix) PCP8: The practice of subjecting employees to disciplinary proceedings (including suspension, investigation and hearings) without adequate explanation, information and support;
Substantial disadvantage (a) and (e)

(x) PCP9: The practice of proceeding with disciplinary/end of probation hearings in circumstances where the employee cannot attend and/or not keeping the employee up-to-date with proceedings;
Substantial disadvantage (e) and (a)

10.2 If so, did the above PCPs put C at a substantial disadvantage in comparison with persons who are not disabled? C says: -

(a) Exacerbation or onset of mental health issues such as anxiety / stress, insomnia, depression;

(b) More likely to work excessive hours/ outside of working hours, forfeiting adequate rest, wages, and putting him at risk of reprimand/disciplinary action;

(c) Negative impact on productivity / employment / relationships with colleagues;

(d) More likely to have his mentor application refused and therefore not benefit from having a mentor at work;

(e) More likely to be unable to attend a disciplinary/end of probation hearing due to sick leave / disability-related reasons, putting him at greater risk of dismissal or termination of employment;

10.3 If so, did R know, or could it reasonably be expected to know, that the C was likely to be placed at the relevant disadvantage?

10.4 If so, did R fail to take such steps as are reasonable to avoid the disadvantage? C contends that relevant reasonable adjustments were:

10.4.1 Adjusting the annual leave policy and/or allowing the Claimant to take (previously agreed) leave as requested;

10.4.2 Providing him with an induction and clear guidance about the working environment upon joining;

10.4.3 Providing him with a quiet place and fixed desk to work from;

10.4.4 Clearly explaining unwritten rules about how the Respondent operates – for example, internal politics or not working outside of contracted hours – so as to ensure he properly understood them;

10.4.5 Granting his mentor applications;

10.4.6 Expediting the Claimant's late payment (salary and expenses) or paying interest on his payday loan;

10.4.7 Not labelling the Claimant as "dramatic and complaining" and/or adopting a listening, pastoral approach to the Claimant's mental health issues;

10.4.8 Removing the Claimant's responsibility to train the trainee or offer additional help;

10.4.9 Providing the Claimant with clear and comprehensive allegations at an early stage, so as to ensure he understood the case against him and could properly prepare a defence with regard to his disabilities;

10.4.10 Providing the Claimant with clear and detailed explanation, guidance, and support during the disciplinary process; for example, giving clear reasons for suspension, the disciplinary policy/ the relevant papers in good time and in a coherent manner and a neutral point of contact;

10.4.11 Taking the Claimant's disabilities into account when conducting the disciplinary process (suspension, investigation, disciplinary, appeal); for example, by ensuring the relevant officers were made aware of his disabilities and that they took OH advice, so as to adjust to the process (including the hearings) to ensure he was given a fair process/hearing; for example, by reframing questions, giving additional time to prepare etc.

10.4.12 Keeping the Claimant up-to-date with disciplinary proceedings;

10.4.13 Rescheduling the disciplinary hearing so as to ensure the Claimant or his representative could attend;

10.4.14 Not dismissing the Claimant or terminating the employment relationship;

10.4.15 Overturning the decision to dismiss/ upholding the appeal.

15. **Breach of Contract**
    a. Did the Respondent fail to comply with its own grievance procedure in failing to deal with it as part of the appeal against dismissal?

16. **Holiday Pay**
    a. Did the Respondent fail to pay the Claimant in lieu of his untaken holiday accrued up to the Termination Date?

17. **Unpaid wages**
    a. The Claimant was required during the course of his employment to record his working hours. Where he worked more than 35 hours per week, the Claimant was entitled to take time paid off in lieu (TOIL). The Claimant accrued 16.5 hours between 14 January and 22 March 2019. By suspending the Claimant, the Claimant was precluded from taking his paid time off in lieu and it therefore continued to accrue this TOIL. Did the Respondent fail to pay the Claimant for time off in lieu?
    b. Did the Respondent fail to pay the Claimant unpaid salary?

<u>Facts</u>

18. We have only made findings of fact in relation to matters which assisted us in reaching our conclusions on the issues above. All our findings have been reached on the balance of probabilities.

19. The claimant worked with or for the respondent from March 2018. He initially worked as a bus driver through the GLLaB scheme. This was a scheme run by the respondent which aimed to employ residents within Greenwich who were long term unemployed and faced various challenges to obtaining employment. He worked for the GLLaB scheme for 6 months. During that time he primarily drove a bus but he also commenced working one day a week making films with the Communications department within the respondent. The GLLaB scheme placements normally end after 6 months, but because of the claimant's film making skills, SG created an agency role within the Communication department as a film maker to try to establish a business case for the claimant to become a permanent employee. This period as an agency staff member was meant to last 6 weeks but was extended to 13 weeks. Once that was completed and the business case successfully made, the claimant was directly employed by the respondent until his employment was terminated.

20. In very broad summary, the Respondent witnesses told us that their perception was that the claimant was doing well at work until allegations of sexual harassment were made against him by witness A. Thereafter, they suspended him, investigated the situation, and then dismissed him by reason of gross misconduct. The claimant had a different perception of his time at work and states that he was struggling with managing his workload and how he fitted in to the workplace throughout his time in the communications department - from

being an agency member of staff until his dismissal and that his requests for help regarding his mental health were ignored.

21. The claimant's background was as a filmmaker. He had previously run his own business and is passionate about filmmaking. When he started working for GLLaB, he had had difficulties in the near past, including; the collapse of his business due to a gambling addiction, homelessness and separation from his family.

22. He started working for the Respondent in the GLLaB department on 1 March 2018. Whilst there he primarily worked as a bus driver but became involved in film making for SG at the respondent. He then moved onto an agency worker contract on 10 September 2018 and started working solely within the communications department. That role was initially scheduled to last 6 weeks but was extended to 13 weeks. The claimant interviewed for and was successful in obtaining a permanent contract on 10 December 2018.

Claimant's health

23. The claimant is diagnosed with ADHD, EUPD, OCD, bipolar, severe anxiety and/or depression. The respondent conceded at an earlier stage of these proceedings that the claimant was disabled for the purposes of the Equality Act 2010 by reason of all the above conditions. It did not accept that the claimant had autism and the claimant has confirmed that although he was initially told that he probably had autism; since issuing these proceedings he has had a diagnosis for ADHD and EUPD as opposed to autism. Several of the claimant's documents regarding this case were prepared before he had that definitive diagnosis. He agreed in evidence that any reference to autism and the possible symptoms of that no longer applied to him.

24. From the medical evidence we were provided with we accept that the various conditions, both cumulatively and separately have a substantial, long term impact on the claimant's ability to carry out day to day activities. The OH report at page 153 confirms that the claimant has had depression and anxiety since 2010. The date of the diagnosis for bipolar is not clear, but any such condition is well known to be life long and whilst its impact can vary both over time for each individual and in severity across different individuals, we accept that it is a condition that has a substantial, negative impact on any individual's ability to carry out day to day activities.

25. The Claimant told the respondent about his various health issues in a piecemeal fashion. The respondent has asserted that the claimant was only ever really clear and open regarding his homelessness and gambling addiction as opposed to his health. We disagree. The following represent either

occasions on which the claimant informed the respondent about his health, or they show that they noticed or knew about his health.

(i) Application to join the GLLaB scheme dated 24th November 2017 (p486)

"I had to shut it down due to ill health, suffering from depression. I have not really worked for the last 2 years, having been on and off medication."

(ii) Application form 1st December 2017. Mental/ emotional health problems is circled - 1st December 2017 (p509)

ADDITIONAL COMMENTS (IF REQUIRED)

Vulnerability/employment barriers
Please record any learning disabilities, physical/mental/emotional health problems, substance misuse.

(iii) Client development notes from Sarah Elder - 29th November 2017 (p870)

Maverick has been unemployed for 3 years, he previously owned a media company 'Neath films' Maverick had a mental health issue that caused the company to go in to liquidation. Maverick does not claim any benefits and has

No. The customer is not available to start work in the next two weeks as he will need to have his CV revised. Maverick has stated he has no interview clothing and has low confidence. Maverick suffers with long term mental health (depression) which initially caused him to become unemployed. Maverick would like to undertake some courses to build his self confidence back up. Maverick would like to undertake a CV course.

(iv) Triage form by Nina Dawson 1st December 2017

How is their appearance/presentation for their GLLaB appointment with you?	
Dressed for interview	3
Smart casual	2
Untidy	1
Poor grooming	-1
Poor Hygiene	-1

Ask the client if they have a lot going on in their life at the moment that is causing anxiety	
Yes	0
No	3
A few things but they are manageable	1

(v) Email to his then line manager Jamie on April 24th informing of an appointment regarding the claimant's autism/ asperger's diagnosis. (p544)

"This is a vital appointment for my mental health as it refers to my Austin's/ [sic] *Aspergers diagnosis*."

(vi) Email and attachment on 25th May 2018 from Zoe Davies, Comms and Social Media Manager, to senior council staff about the Leader's Borough Tour (581)

"The day will be filmed by Maverick Litchfield…., an award winning filmmaker whose life fell apart in due to mental illness. After being unemployed for 2 years GLLaB offered him a GLLP placement working 28 hours a week, driving their outreach bus 3 days a week and working with the Council's Film Unit one day a week."

(vii) 6th July 2018 Claimant's email to various managers within the respondent (p623)

"I have just received notice that I have an appointment with my psychiatrist at Oxleas on July 19th at 10am. This is with regards my ongoing mental health."

(viii) 2nd August Claimant's email to managers about a follow up slot with Psychiatrist (p641)
"I have just been informed that I have been given a follow up slot with my psychiatrist on Tuesday"

(ix) Claimant's application for mentorship scheme – 8 October 2018 (pg877) There are several references to his health and difficulties at work in this document but the most clear is:

"I have been diagnosed as both Bi-Polar, Anxiety and Asperger's but I do not take medication. I manage the condition by eating well, exercising, getting plenty of sleep. The one aspect I am struggling to manage is anxiety as I feel I have no support at the council and I have had a written warning which has upset me and given me strong feelings

of anxiety, which I have to hide. I have just focused on my work, which gives me joy and pleasure."

(x) Respondent's OH report dated 31 December 2018 – this is seen by someone in HR but filed away and not viewed by other HR managers or the claimant's managers
"As detailed in your referral Mr Litchfield-Kelly report the onset of symptoms of anxiety and depression started back in 2010 which he links exclusively to personal issues following relationship breakdown and various other addictions. He is known with Oxleas mental health services as has had recurrent episodes of mental health issue; he however does not have any diagnosis but reports to have been advised by a psychiatrist that he suffers from bipolar. He further informs me that an Asperger's assessment has been scheduled for the 2021 with Lewisham Hospital London.
….
In my opinion based on the information gathered today, Mr Litchfield-Kelly is fit to undertake the full requirement for his role. I understand that he is currently at work undertaking the full remit of his role without any reported concerns.

Recommendations to Manager / HR:

Based on the information provided today, there appears to be no adjustment indicated today."

(xi) Second application for mentorship scheme – this repeats the information provided in the first application as set out above.

(xii) 15 March 2019 (p889) – Email to Mark Higgins
I suffer a range of health conditions, including Autism, Bi-Polar, Anxiety and I am a recovering addict. (This is well known by my managers and I have always been upfront and honest about my health and background. None of this effects my ability to do my job to highest professional industry standards, which is clear from the work I have produced and the positive feedback from all my clients). I must take care of my health at this stressful time, and I have booked an appointment with my GP and as a recovering gambling addict I am now attending Gambler's Anonymous (GA) as I cannot afford a relapse. Gambling addiction ruined my life, leaving me destitute and homeless with the loss of my family and company in 2015. Until I found work with GLLaB on the GLLP programme in March of 2018, which is how I ended up at the council, my life was chaotic with me on and off various medications, seeing mental health specialists etc.

(xiii) 23 April 2019 - Email to Mark Higgins (p887)

"I have also been prescribed medication by my GP as my depression has returned, affecting my anxiety and sleep."

(xiv) 23 May 2019 - Email to Mark Higgins informing the respondent he was too unwell to attend the disciplinary hearing.

Dear Ross and Mark

I am writing to inform you that my health has seriously deteriorated over the last 5 days. I have a history of mental health issues as I have explained and the stress brought on by this current situation has resulted in a relapse. I saw my GP yesterday who has declared me unfit for work and I have been prescribed anti-depressants. My GP has signed the sick note for a month from yesterday.

I spoke with Danny Hogan my union rep last night. I am in no fit state to attend the probation meeting on 3rd June nor return to work. I have a new GP appointment the week beginning 17th June to assess my health. Right now I am going to focus on my health. Having been seriously ill and suicidal prior to finding work with GLLaB I can not afford further relapses.

I am hoping that we can have the meeting the week beginning the 24th June. For that to happen I need to focus on recovery.

I will remain in contact with both of you and Danny with regards my health.

26. On all of the above occasions, the claimant, at the very least, mentions that he has a history of mental health difficulties. He does not, as asserted by the respondent, limit the information to being about his homelessness and gambling addiction. In other places he refers clearly to anxiety, stress, depression and bi polar though not necessarily all at the same time. His emails to Mark Higgins around the time of the suspension and disciplinary process clearly indicate that the claimant is experiencing a relapse of some of his conditions. All of this correspondence is with the respondent. The Tribunal understands that the correspondence before September 2018 was with the managers at GLLaB and there is no guarantee that they will have passed this information on to the managers within the respondent. However the managers, within GLLaB, to the best of our knowledge, were all employed directly by the respondent.

27. Further the HR department were fully aware of these conditions from 31 December when they received the HR report. The fact that it did not flag that any reasonable adjustments were required does not mean that the respondent did not know that the claimant had these conditions.

<u>Issues with managers</u>

28. As an overall observation, we conclude, based on all the evidence we heard and were taken to, that except for the manner in which the allegations of sexual harassment were dealt with, the respondent and its managers treated the claimant with care and respect and with a desire to make his transition into a permanent member of staff work for him and them. SG, a senior manager, was heavily invested in working with the claimant. This was borne out by his emails at the time and his evidence to us. The claimant was perceived as being a favourite of SG's by other members of staff. SG had meetings with him and worked directly with him on a number of projects. Whilst this is our phrase and

was not put to the parties, we consider that the claimant was seen by SG at the very least as a 'poster boy' for the GLLab scheme. This meant that there was an expectation amongst the respondent managers that they needed to be(and were) understanding and willing to put in the additional management time they felt the claimant required given the lengthy period he had been out of the work place and the challenges he had faced.

29. The claimant states that until he was working as an agency worker for the respondent (so after he had finished at the GLLaB scheme) he had very few if any problems but things changed as he became integrated into working full time within the communications department.

30. He states that he had significant problems settling in to work including not having a proper induction, not knowing how he fitted within the management/personnel structure of the respondent nor how he fitted into the office space. He has reported difficulties with having to work in an open plan office without a fixed desk. In contrast, the respondent states that efforts were made to integrate him in all of these areas and to explain the policies and processes to him.

31. We find that the claimant was well supported during his first few weeks and that whilst he may have felt ill at ease, he was provided with his own desk within a couple of weeks and any unease he felt was not displayed to those around him who universally described him as appearing to be outgoing and confident. He did not raise any concerns regarding these situations at the outset. He first started to flag his concerns in the first mentorship application which we address further below.

32. We find that although the claimant was busy and had a lot of work to do, the managers around the claimant including RW, NH and ND and SB, were all invested in ensuring that the claimant's position worked. To that end they proactively and compassionately managed him giving him both face to face time as well as confirming conversations and discussions in writing. All written correspondence to the claimant at this time was fair and reasonable and detailed. We accept all the 3 managers' evidence that when they did challenge the claimant's behaviour they did so in a calm and reasonable manner and were not aggressive or uncaring as suggested by the claimant. We consider that although the claimant before us was stating that he felt lost and incredibly anxious working in such a large organisation, the reality was that when the respondent managers pointed out areas of his behaviour that he needed to change in order to work within such an organisation, he responded badly either by challenging their authority (NH) or by interpreting it as a formal sanction and a 'telling off'. This was not what we find happened on those occasions. The examples relied upon by the claimant was the 'cup incident' with Ms Bristow (he alleged she shouted at him for using someone else's cup) and RW informing the claimant that he must get authority before incurring additional

hours whilst he was an agency staff member. We accept the respondent witnesses' version of those incidents. We accept that Ms Bristow told the claimant calmly that he ought not to use other people's mugs in the communal kitchen and showed him where the general mugs were that he could use. We do not accept that there was any shouting or hostility towards the claimant. At this stage, RW and SG in particular are heavily invested in making the claimant's position within the organisation work and we do not accept that any of the managers were out to discipline the claimant unnecessarily. They were attempting to manage him and he misinterpreted that.

33. The claimant states that he was promised annual leave by SG and that RW overturned that agreement. We do not agree. We accept that SG may have said something along the lines of believing it wouldn't be a problem but that the claimant would need to speak to his line manager. However, because the claimant was an agency worker under an agency contract, RW could not let him take annual leave until he had accrued it. This was set out in his contract (pg 637, paragraph 3.4). We accept that this was the reason RW refused the claimant's leave. We also note that he made every effort to suggest an alternative solution to the claimant such as taking two half days the following week. Whilst this may not have met his childcare needs, the reason RW refused the leave was the claimant's contractual position at the time.

34. We accept that the claimant put in additional hours in an attempt to impress the respondent and his managers regarding his work ethic and his abilities as a film maker. However, we also accept that RW had clearly told him on 14 September that he ought not to work overtime without getting express authority to do so (p688). We do not accept that RW was angry with the claimant or that he was reprimanded. Instead RW found a solution which paid the claimant half his overtime and allowed him TOIL in respect of the remaining hours. We accept that the rules around overtime would have been discussed with him at the beginning of his work as an agency staff member by RW and that prior to that Nicola Hogan would also have discussed hours with the claimant.

35. The claimant asserted that another reason that he worked these additional hours was his tendency to follow orders to the letter. Had that really been the case in this instance, we consider that he would not have worked the additional hours as he had been clearly told not to work additional hours without permission. He was motivated by his love of film making and his desire to do that well, not by his desire or compulsion to follow rules. The rules he had been told to follow about overtime were clearly not followed. He chose to ignore them. We accept that he knew the rules around overtime but that this was overridden by his desire to work in a particular way and finish the projects to a standard that he wanted regardless of how long it took and regardless of the fact that it meant breaking the clear rules he had been asked to follow.

36. We do not accept the claimant's specific allegation that SG told him that Ross Whaley told him that the claimant was "unmanageable" and that he needed to "tow the line". We accept that SG may have had a meeting with the claimant where his performance was discussed but neither RW nor SG wanted to get rid of the claimant or pressurised him in this way. The written evidence of emails from RW suggest the contrary and we do not consider it plausible that this would then translate into a comment about the claimant being unmanageable either to SG or that SG would then repeat to the claimant.

37. We conclude the same regarding the claimant's allegation regarding the late payment to him whilst he was an agency member of staff. The claimant submitted his hours and RW signed them off. We accept the respondent's evidence that there was then a technical error and the hours were not properly logged on the system (or similar). As a result the claimant was not paid until the following week and had to obtain a payday loan. We accept that employees should not be placed in this position – nevertheless, the reason for that situation was a computer error. We do not accept, as suggested by the claimant, that there was a deliberate failure to sign off the hours because the claimant had applied for the mentorship scheme (see below). We note that RW assisted the claimant by ensuring that the pay day loan was paid off by the respondent. We do not accept that RW would have told the claimant that he could be sacked at any point. There would be no reason for RW to make such comments and we cannot see how or why he would want to make the claimant feel insecure in his work at this point in time.

<u>Mentorship application</u>

38. When the claimant submitted his first mentorship application in October 2018 (pg 1657) NH's response was to forward it to RW saying that she thought the claimant was 'playing the victim'. There then follows a meeting between RW and NH to discuss the application after which the claimant is told that he is not eligible to join the scheme because he is agency staff member but that they would consider it if he became a permanent member of staff. We accept their evidence that this was the reason for the rejection. We accept that evidence because the emails thereafter offer the claimant alternative support and when he submits his next application in January it is progressed differently.

39. Nevertheless the language that NH uses is unfortunate. She stated in evidence that this was her perception of how the claimant reacted whenever she asked him to work differently or told him that he had done something wrong. She therefore interpreted the covering email to the mentorship application as his response to her having had to speak to the claimant the week before regarding his work. She said that he found it difficult to accept any criticism and would respond by rejecting her advice or requests. We do not consider that by making the comment she was commenting on the health issues he raises, rather that she was commenting on the context he outlined and suggesting that he was exaggerating by saying that he had received a written warning when he had not

and was now looking for reassurance based on that exaggeration. She should not have used the language she used but we do not consider that it was about the claimant's health, but his approach to the application he was making.

40. NH was about to hand over the line management of the claimant to RW once his role was permanent and for this reason she passed the claimant's mentorship application to RW. In her response to the claimant she did not dismiss his health or any aspect of his email as being dramatic and complaining. To the contrary she clearly explained what had happened and engaged fully with him. She also stated that his management would move to RW who would be able to provide him with more time. We accept RW's evidence that his intention was to actively mentor the claimant until he was an employee and could access the mentorship scheme. We also accept the various evidence that we heard that the mentorship scheme was designed specifically for people like the claimant who had additional needs in the workplace whether they be disability related or otherwise. Before handing the management of the claimant to RW, NH responded by reassuring the claimant in writing that he had not done anything wrong to date. Her email is clear and not rude or derogatory in any way. It does not suggest any feelings that the claimant's application was being dismissed for being dramatic. We also accept that because they could not provide him with a mentor at that time it was agreed that RW would informally mentor him until he was eligible.

<u>Hours worked</u>

41. In November 2018, the claimant states that he worked through the night and worked 36 hours straight. Subsequently he also states that he worked 19 days in a row without a day off as he worked two weekends in a row.

42. We address the night working first. We accept that RW knew that the claimant was working late. The WhatsApp messages (pgs 711-713) continue to be from both RW and the claimant until after midnight. The claimant is updating RW as to the progress of the rendering process that he was undertaking. However, there are no messages from RW after 12.34. There is one from the claimant at 01.30 and then no more from either party until 6.30am. The respondent's case is that the claimant did not work through the night. It is unclear to us whether he did. We do find that is not clear from his messages to RW that the claimant intends to work through the night nor that the project required him to do so. He says in his messages that the rendering would be left over night. The claimant has told us that the computer kept crashing because of the size of the process so he could not leave it. This may well be the case but that does not mean that he effectively communicated this to RW through his messages. On balance we do not accept that he worked all night though it is clear that he worked late and had a lot of work on. The claimant described himself frequently as an 'oversharer' and we consider that had he in fact worked all night, he would have said so explicitly in the messages the next day.

43. Even if we accept the claimant's evidence that he did work all night we do not accept that it was expected or requested by RW or anyone at the respondent and accept RW's evidence that he was actively trying to encourage the claimant not to work outside his hours because he didn't have the budget to pay for that level of overtime. We also accept that had the claimant said he could not complete the work for any reason, they would have dealt with it together the next day. This was clearly RW's position in writing in September (see above) and nothing indicates that it had changed for this project. We accept that there was a tight deadline but the respondent relied on the claimant's assurance and expertise that he could complete the job. It is only once the job starts and the equipment starts failing that the claimant's expectations of how long the work will take changes. He did not effectively communicate that to the respondent. Had he related to RW that the time needed to complete the job had extended or was unmanageable without working through the night we accept RW's evidence that he would have dealt with it in a way that did not reflect badly on the claimant.

44. We were not told about which 19 days were worked in a row without break. However piecing together the evidence in the claimant's witness statement and his emails about the hours he worked, we believe that he worked across 2 weekends. He sought authority to work the second weekend from NH who was covering in RW's absence. We accept that he did work for 19 days straight. However, not all the days were full time and he specifically requested to work the second additional weekend. He has said that the workload was such that he felt forced to work that time. We do not agree that there was any pressure from the respondent to work additional hours. We accept that the claimant had a lot of work and was asked to meet various deadlines. However, we also accept that were he to have made the respondent aware that he was having difficulties meeting those deadlines, help would have been provided or his workload amended. We accept RW's evidence that he was trying to manage the claimant's hours at this time because he did not have the budget to pay him all the additional hours as an agency staff member.

<u>Second mentorship application</u>

45. The claimant applied for and was successful in obtaining the permanent role in the communications department. He was coached for the interview and SG and RW both actively wanted the claimant to get the role which he did.

46. Once the claimant had become an employee for the respondent in December 2018, he applied for the mentorship scheme again. This demonstrates that he understood on the first occasion that the rejection was not personal but was because of his contractual position at that time. The application he submitted was almost identical. Had he felt personally rejected as he now asserts, we believe that he would not have submitted a second application.

47. The second application was promptly responded to by SG via email at p1720. That email is kind and compassionate and expresses concern at the way the claimant is feeling. The claimant then withdraws a vital paragraph about how he was struggling, stating that he had included it by mistake and was feeling fine. He told us that he did this because he wanted to avoid confrontation. It is not clear why he believes that this was confrontational. He has made it clear throughout the hearing that he was open and willing to share his health issues and struggles and so we do not accept that he suddenly became embarrassed about the contents of the paragraph. Instead we consider that he withdrew the paragraph because it no longer reflected how he felt at the time.

48. We also do not accept that at any point the respondent rejected this application. It is clear that they are going to put it forward for discussion and that in the meantime SG and RW would do everything they could to support the claimant. Had he not withdrawn the paragraph we believe that any such assistance would have been greater and more immediate. There was no reason for SG to doubt the claimant's sincerity when he withdrew the paragraph. We accept that the claimant was reaching out for help – but we do not accept that the respondent refused that help, either in respect of the granting of the mentorship or previously when he was not eligible for the mentor scheme.

Witness A

49. Witness A started working for the respondent via the GLLab scheme. She had a difficult domestic background which was known to the respondent and became known to the claimant. She was supported by the same managers to start work in the communications department and they wanted her to be trained up to work with the claimant. The intention was for the claimant to provide her with support and assistance until she could undertake similar work to him. The claimant first met Witness A at work on 3 January 2019.

50. We do not accept that the claimant struggled to work with Witness A or support and train her. All his email correspondence with managers at this time show that he was happy and excited to be working with her (something he accepted in evidence) as do all the relevant Whatsapp messages we have seen. We therefore do not consider that his working relationship with Witness A was in any way negative for him.

51. We also consider that his responsibilities towards Witness A in terms of training and support were not as extensive as he now seeks to suggest. He put forward various training programmes and work flows for her but was told that RW would be managing her and that he was not her manager but her peer. We accept however that he did train her and did provide her with assistance with her work as was expected in the team.

52. In or around late February 2019, Witness A made an allegation to her line manager regarding the behaviour of the claimant towards her. The timeline

regarding her coming forward was confused and confusing. The detail of what was said when is also not entirely clear. However we consider that it is more likely than not that she reported her concerns about harassment orally on 27 February 2019 and then confirmed this in the investigation statement we were provided with on page 1356.

<u>Suspension and disciplinary process</u>

53. As a result, the claimant was suspended by RW on a meeting at the end of the day on 11 March 2019. He received a letter stating that he had been suspended on 12 March – the respondent witnesses clarified that this should have said from 12 March as opposed to on 12 March as he had worked his full hours on 11 March.

54. The claimant accepted during evidence that in light of the allegations against him it was appropriate that he was suspended. We accept the respondent's evidence that it is normal in suspensions for them to escort the person from the building. We also accept RW's evidence that he informed the claimant that he was accused of sexual harassment but not by whom. The claimant has said that this was insufficient information at this stage but it is not clear what else he believes he ought to have been told.

55. The claimant was still on his probation period and the respondent operated a separate policy covering misconduct and dismissal during a probation period (p 1877). It is in effect a curtailed process in which an investigation takes place and then, instead of a disciplinary hearing, the meeting is called a probation review meeting. That meeting can lead to dismissal or an extension of the probation period. It was explained to us that a probation review meeting is only held if there has been misconduct or under performance. If the employee passes probation then the meeting is called something else.

56. After he was suspended, the claimant emailed MH on 15 March 2019 (pg 723) asking him for support and information. Relevant sections of that email are as follows:

"I suffer a range of health conditions, including Autism, Bi-Polar, Anxiety and I am a recovering addict.
…..
Going forwards, I will need access to my work emails which contain important evidence I will need to present my case. Please advise on this.

When can I expect to receive a detailed description of the allegations made against me so that i can prepare my defence?

What is the process the council has with regards matters such as these? (The letter said that a copy of the disciplinary procedure was enclosed, but

does that refer to the letter itself rather than the process structure? Only the 3 pages i have attached to this email were in the envelope I received).

Can you confirm the date the letter I received was written, as there is no date on the letter. Can I also ask if it is council policy to send letters such as these on blank paper, rather than headed council stationary?

Will I be informed of who the investigating officer is?

How long do these situations usually take, and what kind of timeline/ schedule do you think we are looking at? This would be helpful for my health, so I can manage expectations."

57. MH responds to this email on 18 March 2019 (p722). That email from MH does not ask if the claimant needs support regarding his health save for repeating his entitlement to the counselling sessions the claimant is already using. Further, he does not answer the majority of the questions above apart from telling him the date of the letter and informing the claimant that the disciplinary policy does not apply. Despite this answer, he does not then attach a copy of the probation policy that does apply. This means that the claimant had no timetable or understanding of how long the process might take; no understanding of how they were undertaking the investigation, and he still remained unclear as to when or how he would be able to respond to the allegations against him. MH does answer various other questions that the claimant asks in that email which we do not quote. Nevertheless, MH was unable to explain in evidence why he failed to respond properly to the above questions. The respondent appeared to suggest that the claimant could have accessed the various procedures via the intranet but he had no access to the intranet during his suspension. They also appeared to suggest that the claimant's union representative ought to have been able to explain the process to him. Whilst this may have been the case, it is clear from the claimant's email to MH that he has not been provided with that information and there is no explanation as to why MH did not provide it in response to direct questions and requests. Further we do not consider that it is sufficient for an employer to assume that an employee is getting all relevant information regarding such a process from their union representative particularly in circumstances where the individual has directly asked for information.

58. Subsequently, the claimant attended an investigation meeting on 24 April 2019. The meeting was rescheduled due to the availability of his union representative. Prior to this there was a 3 week delay before the investigating officer interviewed Witness A or undertook any investigation as far as we can tell. No explanation was provided by the respondent for that delay.

59. The meeting was conducted by JW and MH. In that meeting JW read out the allegations to the claimant. We accept DH's evidence that there did not seem to be any real attempt to listen to the claimant's explanation in response to the allegations. It was agreed that the Claimant was prevented from sharing any of the WhatsApp messages with Witness A that he considered important evidence. We accept DH's overall observations that this was a badly run investigation meeting that provided the claimant with little opportunity to properly respond to the allegations being put to him. DH is an experienced TU representative and his criticisms were largely upheld by FK in the appeal.

60. JW prepared a report which stated that there was a case to answer (p897). That document is not dated but it was sent to the claimant who received it on 14 May 2019. The report was short. It is based on the interview with the claimant and Witness A's written report and a meeting with Witness A.

61. The claimant was then invited to the probation review meeting. His union representative could not make the initial date so it was rescheduled to 3 June 2019. The claimant was then sent an incomplete set of documents regarding the investigation. No explanation was given to us by MH as to why an incomplete set of documents was sent nor why he failed to send the claimant the missing documents when asked. RW was also unable to provide an explanation for this simply saying that he was following HR's lead that all relevant documents had been provided. We accept that not all of the documents listed in the email were sent to the claimant.

62. There was a telephone call from KT on Friday 17 May 2019. The claimant alleges that during the call KT attempted to pressurise the claimant into attending the meeting on Monday without his union representative. The claimant also asserts that this was done under false pretences namely that they were keen to get him back into work and that he would be found guilty but his probation period would be extended.

63. We think it's more likely that not that KT expressed a desire to have the meeting on the Monday despite knowing that DH could not attend. We consider that he did this because he felt it was best for everybody to get the meeting over and done with due to the stress it was placing everyone under. Whether he pressurised the claimant is less clear but it does seem to us badly judged to call an employee and suggest that they attend a meeting without their union representative; regardless of motive.

64. We do not accept that KT would have told the claimant that he would be found guilty and his probation period extended. This is implausible particularly in light of the severity of the allegations and the subsequent decision made. We accept that the possibility of his probation period being extended was one of the possible outcomes that was explained to him – not that he was told that it would be the outcome.

65. The claimant then became unwell. His email dated 23 May 2019 (914) clearly states that he is having a relapse of his mental health conditions and that he is not able to attend the meeting. MH replies at page 916. We consider that this email from MH could easily be interpreted as meaning that the meeting on 3 June will be rescheduled. Whilst MH now says that he meant that he would get in touch again to confirm whether it had been rescheduled, that is not how any member of this Tribunal read the email and we cannot see that this is anything other than a legitimate reading of its meaning by the claimant and his union representative. In addition, MH never follows up this email to say that the meeting cannot be rescheduled and is going ahead. Neither MH nor anybody else involved in this process ever informs the claimant that the meeting could progress in his absence.

66. MH then went on holiday and appears to have done little or nothing in terms of a handover to KT who was taking over the HR support role. Nobody from the respondent reschedules the meeting or informs the claimant or his union representative that they will not be rescheduling it. When neither the claimant nor his representative arrive, RW, with the assistance of KT, decided to go ahead. We find that they probably knew that the claimant was not going to attend before the day as the notes of disciplinary meeting appear to state that they were not expecting the claimant to attend. It is possible that they were expecting DH but it is not clear on what basis they reached that conclusion. We accept DH's evidence that he had taken the day off and would not have taken the day off had he thought that the claimant's hearing would go ahead. Further, that he would only have attended without the claimant if the claimant had given him express permission to do so. The respondent witnesses referred to various conversations with DH but no express details, times, dates or matters discussed were ever provided to us to suggest that this matter had been discussed and that DH had been told that it was going ahead.

67. The claimant's covering email to the sick note clearly states that the claimant is having a relapse. As indicated above we have found that the respondent was aware of the claimant's various mental health issues at this point and although MH may not have been personally aware until this point, this email clearly sets out a history of mental health conditions as the backdrop to the claimant being signed off. We find it troubling that an HR professional with over 20 years' experience did not consider this a matter which he needed to enquire further about. Despite having this information he took no steps whatsoever to explore the claimant's health background before proceeding with the process any further. That no referral to Occupational Health was made or even considered by MH is also troubling at this point in a disciplinary process, particularly in such a large employer with significant resources. Further there is no evidence that HR spoke to DH at this point or engaged in any investigations into, or considerations of, the claimant's health whatsoever.

68. The claimant was allowed additional counselling sessions because RW signed them off – but he was not told about this by MH who appears to have failed to forward the information to the claimant after RW signs it off 3 days later.

69. The lack of communication from MH at this point is surprising. We believe it may have occurred due to his annual leave but his failure to adequately respond to the claimant's emails and his apparent ensuing failure to inform KT about the situation meant that the claimant did not know that the meeting was going ahead.

70. Both KT and RW state that they decided to proceed with the probation review meeting and dismiss the claimant in his absence because the situation had been ongoing for some time, they had already rescheduled the meeting once and had a policy that they did not reschedule such meetings twice. Both confirmed that they did not consider referring the claimant to OH at this point in time, nor that they considered his health or his health history when deciding whether to continue with the meeting.

71. It is clear that the claimant was entirely unaware that the hearing had occurred and did not find out until he received a letter dismissing him. The date of the letter is in dispute as there appear to be several versions – however, the claimant received it on 11 June and that version was dated 10 June. He appealed against that decision.

Return of property

72. After his employment ended the claimant attempted to get his property back. He states that they failed to return significant amounts of property. We heard little if any evidence regarding this matter. The respondent states that they returned everything. The claimant sent the respondent a list of items that were not returned. On balance we consider that the respondent made every effort to return the claimant's belongings to him. If items were missing it was because they could not be found. On balance we do not accept that they would fail to return property to the claimant or treat the claimant's property with disrespect.

Expenses payments

73. During the claimant's suspension there was a delay in paying him some legitimate expenses that he had incurred during his time at work. The reason for the delay was put down to human error. We accept that this was the reason. Although the claimant states that the explanation that expenses can take 3 months when he normally received them within 3 weeks as evidence that they were trying to delay paying him, we conclude that in fact this is the respondent stating the contractual position and in any event, the claimant is paid the expenses within a few weeks.

Grievance

74. After the claimant received his dismissal letter, he submitted a grievance dated 21 June 2019 (p941). That grievance dealt with his entire employment history and made several allegations of discrimination against various managers. The grievance largely sets out the same matters as have provided the basis for the claims before this Tribunal.

75. No separate process was entered into regarding this grievance. It was not in dispute that DH accepted, at the beginning of the appeal hearing on 3 September, that the grievance could be dealt with at the same time as the appeal. We accept that it was agreed that it dealt with largely the same issues as the appeal and so did not need separate consideration.

76. FK considered the claimant's grievance and RW's response to the grievance during the appeal process. She does not make reference to the claimant's grievance in her appeal outcome letter. We accept her evidence to the tribunal that although not expressly referenced in the letter, she was intending to respond to both the grievance and the appeal with that outcome letter. We accept that evidence.

77. The respondent's grievance process (para 1.7, 1936), as the claimant quotes in his grievance letter, expressly states that it will not deal with matters that are over 3 months old and it will not deal with matters around a dismissal. Almost all the matters that it raised were either linked to the disciplinary process (suspension, investigation and probation review meeting) or were more than 3 months earlier.

Appeal against dismissal

78. The claimant submitted his appeal on 22 June 2019. The appeal hearing was heard on 3 September 2019 by FK. The claimant did not attend the appeal hearing but gave express permission for DH to appear on his behalf. Prior to the appeal hearing the claimant submitted two very full statements and a large amount of evidence in the form of WhatsApp messages amongst other things. We accept that FK considered everything that the claimant submitted as part of the appeals and grievance process.

79. FK upheld three of 6 grounds of the appeal:

(i) That the investigation was not thorough and fair
(ii) That the probation review meeting went ahead in his absence
(iii) That the claimant was prevented from putting forward evidence at the investigatory stage.

80. There was a very detailed appeal report before us which demonstrates that FK considered all the points that the claimant raised at the appeal stage. We note however that she did not revert to the claimant with the additional information

she obtained from Witness A particularly with regard to the additional WhatsApp messages that the claimant did not disclose. Those messages were interpreted by FK as further predatory behaviour by the claimant to Witness A as they appear to be suggesting that they move in together. In evidence before us she said that she had considered the additional information to be relevant to the same matters that the claimant had already been told about as opposed to raising new issues. We find it troubling that in an appeal where it has been found that the original dismissal process was unfair because the individual was not given a chance to properly defend themselves, the person hearing the appeal should repeat the same mistake and not give the claimant an opportunity to comment on all the evidence upon which the appeal decision was being reached. At the tribunal hearing the claimant did not put forward any further explanation for any additional information that Witness A gave FK. He did explain the WhatsApp messages that appeared to suggest Witness A moved in to the same building as him – but he did not explain why they had been missed out of the evidence he provided to FK other than to say it was an oversight.

81. We accept however that FK's refusal to overturn the original decision was based on her genuine belief that the claimant had sexually harassed Witness A and that whilst she accepted that the original process and investigation was unfair, the right outcome had been reached because she considered that all the evidence, including that provided by the claimant, confirmed that in her opinion, the claimant had done what he was being accused of. We accept that she based that decision on the evidence she had before her and that included everything that the claimant had submitted to demonstrate that he had not done what he was being accused of.

82. The claimant and DH confirmed in evidence that they were able to put forward all of the claimant's concerns and evidence at the appeal stage. They accepted that the claimant chose not to attend the hearing and permitted DH to attend in his absence and that DH was provided with the opportunity to make the claimant's case fully.

The Law

83. S 6 Equality Act 2010 Disability

(1) A person (P) has a disability if—

(a) P has a physical or mental impairment, and

(b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.

(2) A reference to a disabled person is a reference to a person who has a disability.

(3) In relation to the protected characteristic of disability—

(a) a reference to a person who has a particular protected characteristic is a reference to a person who has a particular disability;

(b) a reference to persons who share a protected characteristic is a reference to persons who have the same disability.

84. **S13 Equality Act 2010 – Direct Discrimination**
Section 13 EqA provides: *"A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."*

85. Section 23 EqA provides:

(1) On a comparison of cases for the purposes of section 13…there must be no material difference between the circumstances relating to each case.
(2) The circumstances relating to a case include each person's abilities if –
on a comparison for the purposes of section 13, the protected characteristic is disability…

86. In ***Nagarajan v London Regional Transport*** [1999] IRLR 572, the House of Lords held that if the protected characteristic had a 'significant influence' on the outcome, discrimination would be made out. The crucial question in every case is, '*why the complainant received less favourable treatment…Was it on the grounds of [the protected characteristic]? Or was it for some other reason..?*'.

87. In ***Shamoon v Chief Constable of the Royal Ulster Constabulary*** [2003] ICR 337 at [11-12], Lord Nicholls:

'[…] employment Tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the Claimant was treated as she was. Was it on the proscribed ground which is the foundation of the application? That will call for an examination of all the facts of the case. Or was it for some other reason? If the latter, the application fails. If the former, there will be usually be no difficulty in deciding whether the treatment, afforded to the Claimant on the proscribed ground, was less favourable than was or would have been afforded to others.

The most convenient and appropriate way to tackle the issues arising on any discrimination application must always depend upon the nature of the issues and all the circumstances of the case. There will be cases where it is convenient to decide the less favourable treatment issue first. But, for the reason set out above, when formulating their decisions employment Tribunals may find it helpful to consider whether they should postpone determining the less favourable treatment issue until after they have decided why the treatment was afforded to the Claimant […]'

88. Since ***Shamoon***, the appellate courts have broadly encouraged Tribunals to address both stages of the statutory test by considering the single 'reason why' question: was it on the proscribed ground, or was it for some other reason?

Underhill J summarised this line of authority in ***Martin v Devonshire's Solicitors*** [2011] ICR 352 at [30]:

> *'Elias J (President) in Islington London Borough Council v Ladele (Liberty intervening) [2009] ICR 387 developed this point, describing the purpose of considering the hypothetical or actual treatment of comparators as essentially evidential, and indeed doubting the value of the exercise for that purpose in most cases-see at paras 35–37. Other cases in this Tribunal have repeated these messages- see, e.g., D'Silva v NATFHE [2008] IRLR 412, para 30 and City of Edinburgh v Dickson (unreported), 2 December 2009 , para 37; though there seems so far to have been little impact on the hold that "the hypothetical comparator" appears to have on the imaginations of practitioners and Tribunals.'*

89. **Owen v Amec Foster Wheeler Energy** Ltd [2019] EWCA Civ 822 sets out how a Tribunal ought to approach the comparison exercise.. Mr Owen had multiple health issues and was denied an overseas posting because medical concerns were raised in an occupational health assessment. Mr Owen argued that the reason the employer did not allow him to be posted overseas was the outcome of his medical assessment and that this was indissociable from his disabilities. He argued that, regardless of any benign motive that Amec may have had, there was a necessary and inherent link between the reason Amec made the decision and his disabilities. The Court of Appeal rejected this argument – the hypothetical comparator was a person who was not disabled but who was also deemed to be a high medical risk. That person would have been treated in exactly the same way. The Court of Appeal observed that the concept of disability is not binary and a person's health is not always entirely irrelevant to their ability to do a job.

90. S 15 Equality Act 2010 Discrimination arising from disability

91. Section 15 EQA 2010 provides as follows:

(1) A person (A) discriminates against a disabled person (B) if –
- *(a) A treats B unfavourably because of something arising in consequence of B's disability, and*
- *(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.*

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability."

92. In ***Pnaiser v NHS England*** [2016] IRLR 170 the EAT gave the following guidance:

> *(a) A tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.*
> *(b) The tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again,*

just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a s.15 case. The "something" that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.

(c) Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant: see Nagarajan v London Regional Transport [1999] IRLR 572. A discriminatory motive is emphatically not (and never has been) a core consideration before any prima facie case of discrimination arises, contrary to Miss Jeram's submission (for example at paragraph 17 of her skeleton).

(d) The tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is 'something arising in consequence of B's disability'. That expression 'arising in consequence of' could describe a range of causal links. Having regard to the legislative history of s.15 of the Act (described comprehensively by Elisabeth Laing J in Hall), the statutory purpose which appears from the wording of s.15, namely to provide protection in cases where the consequence or effects of a disability lead to unfavourable treatment, and the availability of a justification defence, the causal link between the something that causes unfavourable treatment and the disability may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.

(e) For example, in Land Registry v Houghton UKEAT/0149/14, [2015] All ER (D) 284 (Feb) a bonus payment was refused by A because B had a warning. The warning was given for absence by a different manager. The absence arose from disability. The tribunal and HHJ Clark in the EAT had no difficulty in concluding that the statutory test was met. However, the more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact.

(f) This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.

(g) Miss Jeram argued that "a subjective approach infects the whole of section 15" by virtue of the requirement of knowledge in s.15(2) so that there must be, as she put it, "discriminatory motivation" and the alleged discriminator must know that the "something" that causes the treatment arises in consequence of disability. She relied on paragraphs 26–34 of Weerasinghe as supporting this approach, but in my judgment those paragraphs read properly do not support her submission, and indeed paragraph 34 highlights the difference between the two stages – the "because of" stage involving A's explanation for the treatment (and conscious or unconscious reasons for it) and the "something arising in consequence" stage involving consideration of whether (as a matter of fact rather than belief) the "something" was a consequence of the disability.

(h) Moreover, the statutory language of s.15(2) makes clear (as Miss Jeram accepts) that the knowledge required is of the disability only, and does not

extend to a requirement of knowledge that the "something" leading to the unfavourable treatment is a consequence of the disability. Had this been required the statute would have said so. Moreover, the effect of s.15 would be substantially restricted on Miss Jeram's construction, and there would be little or no difference between a direct disability discrimination claim under s.13 and a discrimination arising from disability claim under s.15.

93. As to what is unfavourable treatment, see the Equality and Human Rights Commission Code of Practice gives the following guidance: *"For discrimination arising from disability to occur, a disabled person must have been treated 'unfavourably'. This means that he or she must have been put at a disadvantage. Often, the disadvantage will be obvious and it will be clear that the treatment has been unfavourable; for example, a person may have been refused a job, denied a work opportunity or dismissed from their employment. But sometimes unfavourable treatment may be less obvious. Even if an employer thinks that they are acting in the best interests of a disabled person, they may still treat that person unfavourably."*

94. The Code does not replace the statutory words but gives helpful guidance and an indication of the relatively low threshold sufficient to trigger the requirement for justification: ***Trustees of Swansea Assurance Scheme v Williams*** [2019] ICR 230 (per Lord Carnwath at para 27).

95. As to the requirement for knowledge of disability on the part of the employer, there need only be actual or constructive knowledge as to the disability itself, not the causal link between the disability and its consequent effects which led to the unfavourable treatment: ***City of York Council v Grosset*** [2018] IRLR 746, Court of Appeal.

96. S 20 Equality Act - Duty to make adjustments

(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

(2) The duty comprises the following three requirements.

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

(4) The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.

(6) Where the first or third requirement relates to the provision of information, the steps which it is reasonable for A to have to take include steps for ensuring that in the circumstances concerned the information is provided in an accessible format.

(7) A person (A) who is subject to a duty to make reasonable adjustments is not (subject to express provision to the contrary) entitled to require a disabled person, in relation to whom A is required to comply with the duty, to pay to any extent A's costs of complying with the duty.

97. S 21 Equality Act - Failure to comply with duty to make reasonable adjustments

(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.

(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

(3) A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purpose of establishing whether A has contravened this Act by virtue of subsection (2); a failure to comply is, accordingly, not actionable by virtue of another provision of this Act or otherwise.

98. **Schedule 8, Equality Act 2010** states that the duty to make reasonable adjustments arises unless the employer can show that it did not know or “could not reasonably be expected to know" that the employee is disabled or that there was a substantial disadvantage.

99. Case law and the EHRC Code suggest that knowledge will sometimes be imputed to the employer. The EHRC Code advises that employers must "do all they can reasonably be expected to do" to find out this information.

100. An employer is not under a duty to make reasonable adjustments unless it knows or ought to know the employee has a disability and is likely to be placed at the substantial disadvantage in question (per paragraph 20(1) Schedule 8, EA 2010)

101. Guidance for a tribunal's approach to reasonable adjustments was given in ***Environment Agency v Rowan*** [2008] ICR 218:

- The PCP must be identified;
- The identity of the non-disabled comparators must be identified (where appropriate);
- The nature and extent of the substantial disadvantage suffered by C must be identified;
- The reasonableness of the adjustment claimed must be analysed.

102. The duty does not arise however unless the employer knows or ought reasonably to know that the employee is disabled *and* that the PCP put him at a substantial disadvantage. The EHRC *Code of Practice on Employment* gives useful guidance on knowledge particularly at paragraph 5.15.

103. In ***Tarbuck v Sainsbury's Supermarkets*** [2006] IRLR 664**,** the EAT held that the the only question is whether the employer has *substantively* complied with its obligations or not.

104. It is for the tribunal to assess for itself the reasonableness of adjustments. The Equality and Human Rights Commission Code of Practice gives useful guidance at paragraphs 6.28 and 6.29 upon potentially relevant factors.

Time Limits

105. S.123(1)(a) EqA provides that:

> *(1) [Subject to [sections 140A and 140B],] Proceedings on a complaint within section 120 may not be brought after the end of—*
> *(a) the period of 3 months starting with the date of the act to which the complaint relates, or (b) such other period as the employment tribunal thinks just and equitable.*
> *[…]*
> *(3) For the purposes of this section--*
> *(a) conduct extending over a period is to be treated as done at the end of the period;*
> *(b) failure to do something is to be treated as occurring when the person in question decided*
> *on it.*
> *(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something--*
> *(a) when P does an act inconsistent with doing it, or*
> *(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.*

106. The three-month time limit is paused during ACAS early conciliation: the period starting with the day after conciliation is initiated, and ending with the day of the ACAS certificate, does not count (s.140B(3) EqA). If the ordinary time limit would expire during the period beginning with the date on which the employee contacts ACAS, and ending one month after the day of the ACAS

certificate, then the time limit is extended, so that it expires one month after the day of the ACAS certificate (s.140B(4) EqA).

107. S.123(3)(a) EqA provides that conduct extending over a period is to be treated as done at the end of the period. In ***Hendricks v Commissioner of Police of the Metropolis*** [2003] ICR 530, the Court of Appeal held that Tribunals should not take too literal an approach: the focus should be on the substance of the complaint that the employer was responsible for an ongoing situation or a continuing state of affairs, in which an employee was treated in a discriminatory manner.

108. The law in respect of continuing conduct is different in the context of reasonable adjustments. The tribunal was referred to the cases of ***Matuszowicz v Kingston Upon Hull City Council*** [2009] ICR 1170 and ***Abertawe University Local Health Board v Morgan*** [2018] ICR 1194 by Mr Mitchell.

109. In ***Abertawe*** the Court of Appeal essentially built upon the jurisprudence of ***Matuszowicz.*** It held as follows (this is extracted from the headnote, which in our view accurately captures the principles):

> *section 123(4) of the Equality Act 2010 dealt only with the question of when time began to run for the purpose of calculating the time limit for bringing proceedings in relation to acts or omissions which extended over a period; that, in the case of omissions, the approach taken in section 123(4) was to establish a default rule that time began to run at the end of the period in which the employer might reasonably have been expected to comply with the relevant duty; that ascertaining when the employer might reasonably have been expected to comply with its duty was not the same as ascertaining when the duty to comply began; that pursuant to section 20(3) of the Act, the duty to comply with the relevant 2010 requirement began as soon as the employer was able to take steps which it was reasonable for it to have to take to avoid the relevant disadvantage; that, in contrast, the period in which the employer might reasonably have been expected to comply with its duty ought in principle to be assessed from the Claimant's point of view, having regard to the facts known or which ought reasonably to have been known by the Claimant at the relevant time; and that, accordingly, there was no inconsistency between the tribunal's finding that time did not begin to run for bringing the reasonable adjustments claim until August and its conclusion that the claim 1 2011 was well founded.*

110. S.123(1)(b) EqA provides that the Tribunal may extend the three-month limitation period, where it considers it just and equitable to do so. That is a very broad discretion. In exercising it, the Tribunal should have regard to all the relevant circumstances, which may include factors such as: the reason for the delay; whether the Claimant was aware of his right to claim and/or of the time limits; whether he acted promptly when he became aware of his rights; the conduct of the employer; the length of the extension sought; the extent to which the cogency of the evidence has been affected by the delay; and the balance of prejudice (***Abertawe***).

111. S136 Equality Act 2010 - The Burden of Proof

S.136(2) provides that if there are facts from which the court or tribunal could decide, in the absence of any other explanation, that a person (A) contravened a provision of the EqA, the court must hold that the contravention occurred; and S.136(3) provides that S.136(2) does not apply if A shows that he or she did not contravene the relevant provision.

112. The EHRC Employment Code states that 'a claimant alleging that they have experienced an unlawful act must prove facts from which an employment tribunal could decide or draw an inference that such an act has occurred' – para 15.32. If such facts are proved, 'to successfully defend a claim, the respondent will have to prove, on the balance of probabilities, that they did not act unlawfully' – para 15.34.

113. The leading case on this point remains Igen Ltd (formerly Leeds Careers Guidance) and ors v Wong and other cases 2005 ICR 931. This was further explored in *Madarassy v Nomura International plc 2007 ICR 867, CA*; and confirmed in *Hewage v Grampian Health Board 2012 ICR 1054, SC*.

114. In the case of Igen, the Court of Appeal established that the correct approach for an employment tribunal to take to the burden of proof entails a two-stage analysis. At the first stage the claimant has to prove facts from which the tribunal could infer that discrimination has taken place (on the balance of probabilities). If so proven, the second stage is engaged, whereby the burden then 'shifts' to the respondent to prove on the balance of probabilities, that the treatment in question was 'in no sense whatsoever' on the protected ground.

115. The Court of Appeal in *Barton v Investec Henderson Crosthwaite Securities Ltd 2003 ICR 1205, EAT*, gave guidelines as follows:

(i) it is for the claimant to prove, on the balance of probabilities, facts from which the employment tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination. If the claimant does not prove such facts, the claim will fail

(ii) in deciding whether there are such facts it is important to bear in mind that it is unusual to find direct evidence of discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In many cases the discrimination will not be intentional but merely based on the assumption that 'he or she would not have fitted in'

(iii) The outcome at this stage will usually depend on what inferences it is proper to draw from the primary facts found by the tribunal

(iv) The tribunal does not have to reach a definitive determination that such facts would lead it to conclude that there was discrimination — it merely has to decide what inferences could be draw

(v) in considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts

(vi) these inferences could include any that it is just and equitable to draw from an evasive or equivocal reply to a request for information

(vii) inferences may also be drawn from any failure to comply with a relevant Code of Practice

(viii) when there are facts from which inferences could be drawn that the respondent has treated the claimant less favourably on a protected ground, the burden of proof moves to the respondent

(ix) it is then for the respondent to prove that it did not commit or, as the case may be, is not to be treated as having committed that act

(x) to discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that its treatment of the claimant was in no sense whatsoever on the protected ground

(xi) not only must the respondent provide an explanation for the facts proved by the claimant, from which the inferences could be drawn, but that explanation must be adequate to prove, on the balance of probabilities, that the protected characteristic was no part of the reason for the treatment

(xii) since the respondent would generally be in possession of the facts necessary to provide an explanation, the tribunal would normally expect cogent evidence to discharge that burden — in particular, the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or any Code of Practice.

Discussion and Conclusions

Knowledge of Disability

116. The respondent had actual and imputed knowledge of the claimant's disabilities at the relevant time. It is, as the claimant stated in his submissions, inconceivable that a respondent of the size and resources of the respondent is arguing that it did not know about the claimant's disability when the claimant told them either completely or in part on numerous occasions and specifically asked for help in respect of those conditions on at least 3 occasions. Their own OH report confirmed that he had depression, anxiety and bipolar. It is not clear from the report that these were historical conditions that were no longer valid diagnoses. The fact that the claimant did not require adjustments for his day to day working life does not mean that he was not disabled nor that the respondent had not been told that he had conditions which, on reasonable enquiry or consideration would have informed them that he was disabled at the relevant time. Although his managers may have chosen not to obtain further advice or support from OH, that does not mean that they can rely on their lack of understanding to suggest that they did not have or could not reasonably be expected to have knowledge. This is particularly the case when several of the witnesses put forward in their witness statements that they had significant understandings of disabilities and reasonable adjustments because of the nature of the work they did or the people they worked with. It is reasonable for a Tribunal to expect such a well informed group of managers within such a large employer, to have made the basic enquiries which they could have made on any of the occasions when the claimant told them about his health conditions.

117. In any event, the emails that the claimant sends to MH once he is suspended are very clear both in terms of the health conditions he has and in terms of the assistance and information he is asking for.

118. We address whether the respondent had knowledge of the possible disadvantage regarding any PCPs in the section under Reasonable Adjustments below.

<u>Direct Discrimination</u>

119. Our findings of fact are such that we do not accept that the following incidents occurred either at all, or in the manner described by the claimant in his pleadings:

(i) Ross Whaley overturning the Claimant's agreed annual leave and refusing the Claimant's further request to take the leave in August 2018 (6.2)1

(ii) Refusing to pay the Claimant for additional hours worked in September 2018 (7.3)

(iii) Ross Whaley's complaint in September 2018 about the Claimant being "unmanageable" and that he needed to "tow the line". (7.6)

(iv) Rose Whaley reprimanding the Claimant and reminding him that he could be sacked at any time when he asked the Respondent to pay interest on a payday loan which the Claimant was forced to take out because the Respondent had paid him late. (8.2)

(v) Ignoring the Claimant's attempts to explain his mental health conditions and dismissing them as the Claimant being "dramatic and complaining" in October 2018 (8.4)

(vi) In November 2018, Ross Whaley telling the Claimant to get a job done which meant he would have to work through the night, which meant working 36 hours without sleep, and allowing the Claimant to work 19 days without a day off. In short, failing to ensure the Claimant took adequate rest breaks and failing to provide him with any compensatory rest. (9.1)

(vii) Dismissing the Claimant's applications for a mentor dated October 2018 and January 2019; (11)

(viii) Dumping the Claimant's personal equipment in a box, in a mess and with items missing, and failing to reply to the Claimant's email chasing the missing equipment (15.3)

120. It therefore follows that in those circumstances, these claims must fail as we consider that the alleged treatment did not occur or did not occur in the way the claimant describes in his claim.

121. The incidents that we accept happened are:

(i) Failing to honour its agreement to reschedule the disciplinary / end of probation hearing in June 2019; failing to reschedule it in light of his

medical status; failing to offer the Claimant counselling sessions and failing to keep him up-to-date with disciplinary proceedings;

(ii) Holding the disciplinary hearing / end of probation hearing in his absence and in the absence of a representative, and dismissing the Claimant without notice or fair process, and without taking into account his disabilities (15.2)

(iii) Refusing to overturn the dismissal despite three of the six grounds of appeal being upheld and in circumstances where the Claimant was given no choice to present evidence, nor informed of the allegations and that the hearing was held in his absence without his knowledge.

122. It was accepted by the respondent that these incidents would be considered in time. They all occur on or after 16 March 2019.

123. These incidents could all amount to less favourable treatment. However, we do not consider that with regard to any of the above 3 incidents, that the claimant has provided us with any evidence to suggest that they were less favourable treatment that occurred because of his disability. His arguments throughout have been that the treatment he received exacerbated his conditions or were more difficult to deal with because of his conditions as opposed to being the motive (conscious or subconscious) for the respondent's actions. He does not assert that they occurred because of his disabilities.

124. No comparator was discussed or referred to other than that the claimant agreed that there was no real comparator when we discussed the list of issues. We have therefore considered whether the above three incidents were less favourable treatment than a hypothetical comparator would have received. The hypothetical comparator must be someone in materially the same circumstances but without the claimant's disabilities. We have therefore compared the claimant's treatment to the treatment of a person who was on probation and had had sexual harassment allegations made against them but did not have the health conditions relied upon by the claimant.

125. The claimant did not put to the respondent witnesses, or set out in his pleadings, witness statement or his submissions, that a person in the same circumstances (on probation and accused of sexual harassment) but who did not have his conditions, would have been treated any differently. He has simply asserted that the treatment put him at a disadvantage or exacerbated his conditions. There has been no difference of treatment argument made at all. We have taken into account the fact that the claimant is a litigant in person, and have not expected to see this argument made formally or using legal language. Nevertheless, there has been a complete absence of allusions to less favourable treatment when compared to someone else who was not disabled. In addition there has been a complete absence of evidence that suggests that the claimant thinks that the respondent treated him less favourably than they would have treated a comparator in the same circumstances. His argument has

been that because of his disabilities he found it more difficult to cope with the situations or treatment not that the respondent's motives, conscious or unconscious, were his disabilities.

126. We have however considered all three incidents to consider the 'reason why' they occurred. The respondent did fail to reschedule the end of probationary review meeting and failed to inform the claimant that they were going ahead in his absence. We consider that the respondent had a policy of not rearranging meetings where they had already been rearranged once and they applied this policy here. They wanted to get the process over and done with and were dealing with serious allegations of sexual harassment from a colleague of the claimant's. It was this that motivated them. We do not consider that the claimant's disabilities were the 'reason why' behind any of their decisions regarding the way in which the disciplinary process was conducted. Instead the 'reasons why' were the allegations against him, their policy of not postponing meetings more than once and MH's apparent ineptitude at dealing with the process and keeping everyone, including the claimant, up to speed with what was happening at least partly because of his annual leave. We have criticised MH's performance but it was not put to him in cross examination, nor do we feel that any other evidence was provided, that suggested that MH's performance in this matter occurred consciously or subconsciously because of the claimant's disabilities. The reason for the claimant's treatment and the process such as it was, was that the claimant was still on probation and had had serious allegations made against him.

127. We also conclude that this was even more clearly the reason why FK did not uphold the claimant's appeal despite finding that three of his grounds of appeal were upheld. She did not overturn the claimant's dismissal because she considered that the allegations of sexual harassment were well founded and that was the reason for the treatment. She would have treated anybody about whom such allegations and evidence was found, in the same way.

128. We therefore do not uphold any of the claimant's claims for direct discrimination.

Discrimination arising from Disability (s15 Equality Act)

129. At the outset of the hearing the Tribunal explained to the claimant how s15 Equality Act claims worked and what steps were needed to establish such a claim. Respondent's counsel flagged from the beginning of the hearing that he considered that the claims were misconceived in the way that they were drafted. The claimant was given an opportunity to consider this on the first day but stated on the second morning that he did not wish to change his pleadings. He provided helpful clarification regarding what the 'something arising' was for each incident.

130. In all cases, the claimant has said that the 'something arising' from his disability was what happened to him as a result of the negative treatment he relied upon. So, for example he stated:

"Ross Whaley overturning the Claimant's agreed annual leave and refusing the Claimant's further request to take the leave in August 2018 (6.2)
Unfavourable treatment because of something arising in consequence of his disability namely discrimination arising out of disability (pursuant to section 15(1) of the EA2010).The something arising in consequence of his disability is the claimants need to take adequate rest".

131. At no point has the claimant addressed how his need to take adequate rest caused RW to turn down his leave requirement. Instead it is clear that he considers the failure to allow him to take leave disadvantaged him because he is someone who needed adequate rest due to his disabilities. The causation has been reversed from that required by the statute. Whilst the tribunal has carefully considered this situation as it applies to the entirety of the claimant's s15 claim, we note that he was represented by respected employment solicitors at the time that these pleadings were drafted.

132. We address each remaining point very briefly in turn as we consider that this analysis broadly applies to almost every part of the claim brought, though to different degrees.

133. Refusing to pay the Claimant for additional hours worked in September 2018.

The claimant follows instructions literally

We found that the respondent did not pay the claimant because he did not obtain authority to work overtime as he had previously been requested to do.
Even if the claimant could establish that he followed instructions literally (which we found he did not do in this particular instance) and this meant that he worked overtime, this did not cause him to not be paid. He was not paid overtime because he had not obtained authority first not because he followed instructions literally.

134. Ross Whaley's complaint in September 2018 about the Claimant being "unmanageable" and that he needed to "tow the line".

The claimant follows instructions literally

We found that this did not occur as a finding of fact.

135. Ross Whaley reprimanding the Claimant and reminding him that he could be sacked at any time when he asked the Respondent to pay interest on

a payday loan which the Claimant was forced to take out because the Respondent had paid him late

The Claimant's blindness to the respondent's business politics.

We found that this did not occur as a finding of fact.

136. Ignoring the Claimant's attempts to explain his mental health conditions and dismissing them as the Claimant being "dramatic and complaining" in October 2018

The Claimant's anxiety and stress/blindness to social politics/cues.

We found that this did not occur as a finding of fact.

137. In November 2018, failing to pay the Claimant for extra hours worked, failing to explain its unwritten rules in relation to working extra hours, and Ross Whaley's reprimanding of him for doing so

The claimant follows instructions literally and blindness to social politics/cues

We found that most of the above did not occur as we found that RW did explain the rules to the claimant and he did not reprimand him when he did worked overtime contrary to those rules. However the claimant was not paid for some of the unauthorised overtime. This was not done because of the claimant following instructions literally and/or a blindness to social politics/cues. This was done because he did not comply with the rules that he had been asked to comply with.

138. Failing or refusing to pay the Claimant's expenses in a timely fashion, and telling him it would take 3 months for the expenses to be paid, which was untrue

The Claimant's anxiety and stress

It was not the Claimant's anxiety and stress which caused the respondent not to pay the claimant's expenses at the time that he was expecting them to be paid. The claimant's argument was that any delay or alleged failure caused him stress. This does not follow the causation requirements under s15 Equality Act 2010 as discussed above.

139. Failing in March 2019 to explain to the Claimant adequately or at all the disciplinary process such that he properly understood it

The claim's anxiety and stress and that he need to understand the process which was or should have been followed.

It was not the Claimant's anxiety and stress or his need to understand the process, which caused the respondent not to explain the disciplinary process. The claimant's argument was that the respondent's failures caused

him anxiety and stress and meant that he was disadvantaged because he needed to properly understand the process. This does not follow the causation requirements under s15 Equality Act 2010 as discussed above.

140. At the first formal disciplinary investigation meeting on 24 April 2019, the Claimant was deprived the opportunity to fairly respond to the allegations before him. The allegations were presented to him in a narrow fashion, accusing him rather than seeking to understand the truth of the matter. The Claimant's Trade Union representative reminded the Respondent of the Claimant's disabilities to which the investigating officer said he was unaware. Even so, the fact of the Claimant's disability and/or any of them was ignored and the Respondent pressed ahead without making any adjustments to the manner in which the questions were being put to the Claimant. The Respondent further took the Claimant's explanation of how his disability manifests itself when he is under stress and struggling to understand the circumstances. The Respondent used this against him

The frank way in which the claimant expresses himself and/or the stress and anxiety that manifested.

The claimant did not put the case that it was the frank way in which the claimant expressed himself and/or the stress and anxiety he experienced that caused any of the respondent's failures to allow the claimant to respond to the allegations, or caused them to ignore his disabilities or caused them to fail to make adjustments.

The claimant's case was that the respondent badly managed the investigation hearing in such a way that it put him at a disadvantage because of the frank way in which the claimant expressed himself and exacerbated his stress and anxiety. This does not follow the causation requirements under s15 Equality Act 2010 as discussed above.

141. The Respondent continued to keep the Claimant in the dark as to the progress of the investigation. The Claimant was provided with three working days' notice to attend a "final probation meeting at which he could be dismissed", together with a substantial report and notes which he had not previously seen. This was the first time after nine weeks of suspension that the Claimant had been provided in writing with the allegations that he was facing. The Claimant had requested a copy of the meeting notes from the first meeting. The Respondent failed to provide an accurate or complete copy, and what was provided was provided as late as possible.

The claim's anxiety and stress and that he need to understand the process which he was subjected to.

It was not the Claimant's anxiety and stress or his need to understand the process, which caused the respondent to act as described above. The claimant's argument was that the respondent's alleged failures caused him anxiety and stress and meant that he was disadvantaged because he

needed to properly understand the process. This does not follow the causation requirements under s15 Equality Act 2010 as discussed above.

142. Failing to provide the Claimant with the attachments referred to in the investigation report and telling him he was not entitled to see them, thereby withholding relevant evidence

The stress and anxiety that manifested.

It was not because of the Claimant's anxiety and stress that the respondent did not give him the attachments. The failure to provide the attachments caused the claimant anxiety and stress. This does not follow the causation requirements under s15 Equality Act 2010 as discussed above.

143. Subjecting the Claimant to significant undue pressure to attend the meeting in the absence of his representative.

The stress and anxiety that manifested.

It was not because of the Claimant's anxiety and stress that the respondent allegedly put the claimant under such pressure. Any such pressure (though we did not find that there was undue pressure exerted) would have been what caused any anxiety and stress. This does not follow the causation requirements under s15 Equality Act 2010 as discussed above.

144. Holding the disciplinary hearing / end of probation hearing in his absence and in the absence of a representative, and dismissing the Claimant without notice or fair process, and without taking into account his disabilities

The claim's anxiety and stress and that he need to understand the process which he was subjected to.

It was not because of the Claimant's anxiety and stress or his need to understand the process, that the respondent proceeded with the disciplinary hearing. The claimant's argument was that the respondent's alleged failures caused him anxiety and stress and meant that he was disadvantaged because he needed to properly understand the process. This does not follow the causation requirements under s15 Equality Act 2010 as discussed above.

145. Dumping the Claimant's personal equipment in a box, in a mess and with items missing, and failing to reply to the Claimant's email chasing the missing equipment

No something arising was provided by the Claimant.

We did not find that this occurred as a finding of fact.

146. Refusing to overturn the dismissal despite three of the six grounds of appeal being upheld and in circumstances where the Claimant was given no choice to present evidence, nor informed of the allegations and that the hearing was held in his absence without his knowledge.

The claim's anxiety and stress and that he need to understand the process which he was subjected to.
It was not because of the Claimant's anxiety and stress or his need to understand the process, that the respondent decided not to uphold his appeal. The claimant's argument was that the respondent's failure to uphold the appeal caused him anxiety and stress and meant that he was disadvantaged because he needed to properly understand the process. This does not followt the causation requirements under s15 Equality Act 2010 as discussed above.

147. We therefore do not uphold any part of the claimant's claim under s 15 Equality Act 2010 on the basis that the claims appear largely misconceived and the causal link between the 'something arising' relied upon and the detrimental treatment has not been established throughout.

<u>Reasonable adjustments – s20-21 Equality Act 2010</u>

148. Based on our factual conclusions above, we find that the following PCPs did not exist:

i. PCP1: The annual leave policy and/or practice of refusing annual leave requests to new employees or to employees early on their employment;
ii. PCP2: The practice of allowing employees to start employment without an induction or clear instruction about the working environment;
iii. PCP3: The requirement/ practice of expecting employees to know they should not work outside of their contracted hours or excessive hours without telling them expressly;
iv. PCP4: The practice of refusing applications for mentors for disability-related issues or from disabled applicants;
v. PCP5: The practice of paying employees late (salary or expenses);
vi. PCP6: The practice of labelling employees who require more management than the average employee such labels as "dramatic" or "complaining";

149. We find that the following four did exist:

i. PCP3: The requirement / practice of working in an open plan office and/or without a fixed or quiet desk;
ii. PCP7: The requirement to train other members of staff (including those who are vulnerable);
iii. PCP8: The practice of subjecting employees to disciplinary proceedings (including suspension, investigation and hearings) without adequate explanation, information and support;
iv. PCP9: The practice of proceeding with disciplinary/end of probation hearings in circumstances where the employee cannot

attend and/or not keeping the employee up-to-date with proceedings;

150. With regard to PCP3, we consider that although the respondent did operate an open plan office, the claimant was provided with a fixed desk within a very short time period and that he consistently had access to quiet and private working space if he needed it. Therefore adjustments were made so that the claimant could work effectively and these offset any disadvantage the open plan office may have caused. We also note that the respondent's Occupational Health report did not suggest that any such adjustment was necessary and we therefore consider that it is unlikely that the respondent ought to have known that such a PCP placed the claimant at a disadvantage. They nevertheless made the adjustments in any event because he asked. There was therefore no failure to make reasonable adjustments to any such practice and this claim is not upheld.

151. The claimant was asked to train and support other members of staff and in particular Witness A. The claimant has not shown that he was in any way disadvantaged by this PCP. It is clear from all the correspondence we were taken to that the claimant enjoyed working with Witness A, that he was clearly told that his managers were responsible for her line management but that he was expected to provide support as her peer. The claimant has not provided us with any evidence that this actually disadvantaged him. He provided no facts to suggest that his working with Witness A, other than her making a complaint about him, put him at a disadvantage. We do not accept that it was the respondent's decision to ask him to train and support her that caused her to make a complaint about him. Further, we do not think that the respondent could reasonably be expected to know that the claimant would suffer from the disadvantage he now relies upon (that he became stressed) given that he was overwhelmingly positive about working with Witness A including the opportunity to train her. We have accepted that they knew or ought reasonably to have known about his anxiety, stress and bipolar. Nevertheless, training and mentoring another individual is not necessarily a disadvantage and the disadvantage that the claimant relies upon is that it exacerbated his mental health issues and had a negative impact on his productivity/employment/relationships. Yet at the relevant time everything the claimant told the respondent was that he enjoyed working with Witness A and we find that he was not placed at the disadvantages he now relies upon by working with her as he enjoyed working with her and he has not demonstrated to us that he suffered from any ill effects due to working with her - until she made a complaint against him.

152. The final two PCPs (8 and 9) overlap somewhat. It was not argued by the respondent that either of them were not capable of being a PCP. Nevertheless we have considered this on the basis that both are expressed as

being failures to do something. The EHRC Employment Code states the term 'provision, criterion or practice' is capable of covering a wide range of conduct.

'The phrase… is not defined by the Act but it should be construed widely so as to include, for example, any formal or informal policies, rules, practices, arrangements, criteria, conditions, prerequisites, qualifications or provisions' — para 4.5.

153. Although this is not an indirect discrimination claim, the existence of a PCP relies on the same case law. The failure to do something or the negative treatment of someone is not always a PCP as found in Taiwo v Olaigbe and anor EAT 0254/12 where the EAT held that 'the mistreatment of migrant workers' did not amount to a valid PCP. It was also discussed in Onu v Akwiwu and anor 2013 ICR 1039, EAT, which was ultimately upheld by the Supreme Court— in Onu v Akwiwu and anor; Taiwo v Olaigbe and anor 2016 ICR 756, SC — where they held that the exploitation of workers who are vulnerable because of their immigration status is not a PCP that can be applied to workers who are not so vulnerable, so applying it to the claimants could not amount to indirect discrimination within the meaning of the EqA.

154. The cases of Lamb v The Business Academy Bexley UKEAT/0226/15, and Williams v Governing Body of Alderman Davies Church in Wales Primary School UKEAT/0108/19 established that a "general or habitual" approach to a process was sufficient even if it could not be shown to be applied on each and every occasion.

155. Taking PCP 8 first. This is drafted as "The practice of subjecting employees to disciplinary proceedings (including suspension, investigation and hearings) without adequate explanation, information and support.". It is not a PCP specific to disabled people and could apply equally to any member of staff accused of misconduct. We conclude that this amounts to a PCP in that it describes the respondent's general approach to the disciplinary process, particularly as it applied during a probationary period. It is not a one-off act or omission but permeated much of the process.

156. We find that the respondent applied this PCP to the claimant. They failed to provide the claimant with any adequate information, explanation or support during the investigation process or the probation review meeting. His emails to MH went either unanswered or were not answered in full. The claimant was therefore left to guess at how long the investigation might take, what information he may or may not be provided with, and whether he would get any support with regards to his health issues during the process. He was not told that the probationary review meeting was going ahead, either at all, or in his absence. The respondent may have explained why he was being suspended but there the explanations stopped. During the investigation meeting the claimant was told what the allegations were by way of the investigator reading out the

allegations. We therefore consider that some information was provided to the claimant. What was lacking was any information about the process, the length of time it might take, what the investigation would consist of, what evidence was being considered, copies of the correct policy being provided or the fact that the vital meeting of the probation review was going ahead and/or could go ahead in his absence.

157. As discussed above the respondent knew or ought reasonably to have known that the claimant had significant mental health issues and yet at no point considered whether it had any obligations to the claimant to adjust its process as a result. They rely on not knowing about his conditions as the reason – but it is very clear that they did, as already discussed above. They accepted in evidence that no thought was given at all to adjusting any part of the disciplinary process at this stage despite the claimant's clear requests for help and information and subsequently for the hearing to be postponed.

158. We conclude that the failure to keep someone informed as to what was happening during the process when they have the health conditions of the claimant, does place them at a substantial disadvantage compared to someone without the same mental health issues. Whilst it could be stressful for anybody to go through such a process, the failures in this regard would place someone with such conditions at a substantial disadvantage because such uncertainty and lack of information will inevitably negatively affect them more and they will be less able to cope or deal with such a lack of information and understanding.

159. Reasonable adjustments to the practice of failing to provide that information would be for the HR officer to respond to the questions being asked by the individual involved, provide a timetable for the investigation, provide the employee with copies of the policies which are being followed, provide the documents which they stated were attached to the emails and notify the individual that meetings are proceeding. Such adjustments would be easy to achieve and are eminently reasonable.

160. We accept that the claimant was told what he needed to be told at the point of suspension and that his suspension process was not unreasonable. We also accept that the claimant was given access to some support in the form of counselling sessions and the option of speaking to RW. However these were not adjustments to the process as they were something provided to everyone or at least they were meant to be provided to everyone. We accept that the respondent was not under an obligation to necessarily provide a different person for the claimant to contact other than RW given their previous good relationship and no explanation by the claimant as to why his trust in RW had vanished in the circumstances.

161. Nevertheless, the PCP of subjecting employees to disciplinary proceedings without adequate explanation or information was clearly applied

after his suspension and permeated throughout the probation review process apart from the appeal which we address below.

162. With regard to the decision to go ahead in the claimant's absence. We conclude that this was a clear policy that the respondent witnesses confirmed in evidence. They said that it was policy for the respondent not to reschedule formal meetings more than once regardless of the reason for non-attendance on the second meeting. It was not in writing in any of their policies but both HR representatives confirmed that this was their policy in these situations. A person with the claimant's disabilities is more likely to be off sick during a stressful process such as disciplinary action and therefore far more likely to be unable to attend a meeting in such circumstances. We find that the respondent ought reasonably to have been aware of the substantial disadvantage that this placed the claimant at given his mental health conditions.

163. A reasonable adjustment would have been to postpone the meeting – not necessarily indefinitely, but to the date that the claimant had clearly suggested when his sick note ran out. The respondent has made much of the delays in the investigation and probation process and the need to resolve it as soon as possible. However much of the delay was caused by matters outside the claimant's control such as the 3 weeks at the outset of the investigation process before anyone at all was spoken to and his union representative's unavailability. Other than his request to postpone the 3 June meeting due to his health, all other delays were caused by other parties. It was therefore reasonable for the 3 June meeting to be postponed by another couple of weeks or for the respondent to consider referring the claimant to Occupational Health to determine whether he was fit to attend a disciplinary meeting.

164. In addition it would have been very simple for the respondent to properly communicate with the claimant regarding their policy of not postponing hearings more than once so that he would know that the meeting was going to occur in his absence and make a decision about whether to attend despite his ill health or send his trade union representative in his absence as he did for the appeal hearing.

165. The respondent failed to undertake any consideration of any adjustments whatsoever, deciding to go ahead in the claimant's absence despite knowing how unwell he said he was and we therefore uphold this part of the claimant's claim.

166. We accept that the respondent's appeal process 'made good' these errors and enabled the claimant to take part properly in the process and put his case via his trade union representative. The claimant was provided with all information and support necessary to engage in the appeal process and he accepted, as did his union representative, that he was enabled to take part

properly in that process. We therefore conclude that the PCP 8 and 9 were not in operation during the appeal process.

167. Nevertheless, this is not an unfair dismissal claim – as Mr Magee was keen to point out during submissions on behalf of the respondent. This works both ways though because rectifying procedural errors cannot exonerate the respondent from acts of discrimination even if it would have exonerated them in an unfair dismissal claim. The respondent cannot 'make good' on any acts of discrimination that may have occurred during another part of the process by carrying out a fair appeals process. This may 'correct' an unfair dismissal, but that is not available to a respondent as a defence to a discrimination claim. We have already concluded that they failed to make reasonable adjustments to PCPs 8 and 9. We accept that the appeals process was broadly well run and thorough (though they ought to have provided the claimant with the opportunity to comment on the additional WhatsApp messages from Witness A). Nevertheless the failure to make adjustments to the earlier part of the process cannot be undone. We note that it may limit any injury to the claimant but we do not accept that subsequent good practise voids previous discrimination.

168. For these reasons we therefore uphold the claimant's claims under s20-21 Equality Act 2010 insofar as the respondent failed to make reasonable adjustments to PCPs 8 and 9.

169. The remainder of the claimant's claims under s20-21 Equality Act 2010 are not upheld.

Breach of Contract

170. It is not clear what term of the claimant's contract he alleges was breached. The claimant's grievance was dated 21 June whilst he was still an employee though the decision to dismiss him had already been made. There was a grievance procedure in place which specifically excluded using the grievance procedure to address concerns about a disciplinary process. The claimant's grievance was about the disciplinary process but included allegations of discrimination prior to that. Therefore in theory we accept that the respondent ought to have considered the grievance separately.

171. However, at the outset of the appeal hearing, DH agreed that the claimant's grievance could be dealt with within the appeal process because it dealt with the same issues. This is recorded in the minutes of the meeting and DH's witness evidence did not contradict that. FK's written appeal outcome does not specifically address the claimant's grievance but it does address every ground of appeal. In a situation where a trade union representative has agreed that the matters raised in the grievance are the same as that in the appeal it is not clear how the claimant's contract has been breached as his representative has agreed on his behalf that the matters can be dealt with together and in

effect that they are one and the same. We accept that some aspects of the grievance were not specifically addressed in the outcome letter, but it is clear that FK had considered the claimant's grievance as it formed part of the appeal pack as did RW's response to the grievance. We conclude therefore that when she wrote her appeal outcome letter the substance of the grievance was considered and formed part of her decision making process.

172. We therefore find that there was no breach of contract and the claimant's claim is not upheld.

173. In any event, even if the claimant's representative had not waived the claimant's right to have it dealt with separately, it is hard to see what financial loss (the only remedy available in a breach of contract claim) the claimant has suffered as a result of any such breach. He made no arguments on this point.

Holiday Pay

174. The claimant's claim for holiday pay centred on the fact that he considered his date of termination was 10 July instead of 7 July. This is due to the date of the dismissal letter being received. He is correct in saying that if he did not receive the dismissal letter until 10 June then his date of termination would be 10 July. Nevertheless this does not mean that he would accrue additional annual leave in those 3-4 days difference. He has not set out how this would have accrued or how much leave he believed he was owed.

175. We do not consider that he has accrued any additional annual leave during this period and therefore this claim is not upheld. Did the Respondent fail to pay the Claimant in lieu of his untaken holiday accrued up to the Termination Date?

Unpaid wages

176. The claimant's claim for unpaid wages focusses on the claimant having worked 16.5 hours TOIL prior to being suspended. This figure was not disputed by the respondent. The claimant asserts that by suspending the Claimant, the Claimant was precluded from taking his paid time off in lieu and that this therefore ought to be paid to him. The respondent accepts that it has not paid the claimant in respect of 16.5 hours but says that it exercised its discretion and paid him one month's notice pay even though he was dismissed for gross misconduct and that he could have taken the TOIL during his suspension.

177. We were not provided with the respondent's TOIL policy. It was not made clear to us as to how TOIL is dealt with on the termination of someone's employment. The claimant did not set out to us why he considered he was contractually entitled to the TOIL on termination save for what he says in the

pleadings which is that he believes that as he was prevented from taking it because he was suspended, he should be paid for it.

178. The evidence provided to us on this part of the claim was incredibly sparse by both sides. However the burden of proof is on the claimant to establish that he was contractually entitled to payment of this money in these circumstances. He has not done that. He has not established that he was entitled to be paid for any unused TOIL. There are many possible variations to such a scheme such as the possibility that he would normally be expected to use his TOIL during suspension or that TOIL was ever paid out on termination of employment rather than there being a 'use it or lose it' policy applied or that it would be incorporated into any discretionary notice pay. We cannot therefore assume that the respondent's TOIL policy was such that the claimant was contractually entitled to be paid on termination. Very little about this matter was put forward to us during the hearing. Therefore, in the absence of the claimant establishing that he was contractually entitled to TOIL on termination, we do not uphold this part of the claimant's claim.

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Employment Judge Webster
Date: 29 November 2021

Sent to the parties on
Date: 13 December 2021