EMPLOYMENT TRIBUNALS

Claimant: Mr T Myles

Respondent: Leadec Ltd

Heard at: Manchester (by CVP) **On:** 12-19 July 2021
8-9 November 2021
(in Chambers)

Before: Employment Judge Ainscough
Mr A Egerton
Mr R Cunningham

REPRESENTATION:

Claimant: Ms Kponou, Solicitor
Respondent: Ms Hand, Counsel

JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The claim for unfair dismissal contrary to section 94 of the Employment Rights Act 1996 is successful.

2. The claim for a failure to make reasonable adjustments contrary to section 39 of the Equality Act 2010 is successful.

3. The claim for discrimination arising from disability contrary to section 39 of the Equality Act 2010 is successful.

4. The claim for harassment contrary to section 40 of the Equality Act 2010 is successful.

5. The claim for wrongful dismissal is successful.

REASONS

Introduction

1. This was a claim brought by the claimant via ACAS early conciliation on 8 May 2019 for unfair dismissal and disability discrimination. The claimant lodged his Employment Tribunal application on 25 June 2019, and the respondent submitted a response on 15 August 2019.

2. The claimant submitted amended particulars of claim on 3 June 2020 and the respondent submitted amended grounds of resistance on 19 October 2020.

3. The claimant worked as a baler collating cardboard and producing cardboard bales for the respondent, an industrial facilities company, with a contract to provide facility services to Jaguar at their Halewood site.

4. The claimant has an impairment which is akin to dyslexia and was assisted by the Tribunal with reading of documentation throughout the proceedings.

5. At the outset of the hearing the list of issues was amended and subsequently agreed. The claimant withdrew his claim for age discrimination. A separate Judgment reflecting this withdrawal has been produced.

Evidence

6. On the first day the Tribunal read the evidence, and on days two and three the Tribunal heard evidence from the claimant's partner, Sandra Williams; the claimant's son, Jamie Myles, and from the claimant.

7. On days four and five the Tribunal heard evidence from Jason Dickinson, the dismissing manager; Alan Dobson, the appeals manager; and Don Bradfield, the claimant's first line manager.

8. On day six the parties made submissions and the Tribunal spent the rest of the day deliberating.

9. The matter was listed for further deliberation on 8 and 9 November 2021.

The Issues

10. At the outset of the hearing, the parties had not agreed a List of Issues and it was necessary for the Tribunal to agree the following issues prior to hearing any evidence:

<u>Unfair dismissal</u>

11. It was common ground that the claimant was dismissed. The issues for the Tribunal were:

a. Can the respondent prove that the sole or main reason for the claimant's dismissal was the respondent's belief that the claimant had answered his mobile phone whilst driving a forklift truck?

b. Was this a reason that related to the claimant's conduct?

c. Did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant:

i. were there reasonable grounds for that belief;

ii. at the time the belief was formed had the respondent carried out a reasonable investigation;

iii. did the respondent otherwise act in a procedurally fair manner;

iv. was the dismissal within the range of reasonable responses?

d. Is there are chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reasons?

e. If the claimant was unfairly dismissed, did he cause or contribute to dismissal by blameworthy conduct?

Disability

12. The claimant's case was that at the relevant time from 29 January 2019 – 12 March 2019 he was disabled with a mental impairment "akin to dyslexia". Essentially, he has a life-long difficulty with reading.

13. The respondent conceded that the claimant was a disabled person as a result of an impairment which was "akin to dyslexia" during the relevant period from 29 January 2019 to 12 March 2019 but disputed that the claimant's managers had knowledge of his disability at the relevant time.

Duty to make adjustments

14. The respondent had the following provision, criterion or practice (PCP):

> Providing and relying on written information about procedure and disciplinary allegations for the purposes of a formal meeting.

15. The claimant's case was that this PCP put him at a substantial disadvantage compared to non-disabled persons. The disadvantage stemmed from his reading difficulty. He was put to that disadvantage at three meetings:

a. The investigation meeting;

b. The disciplinary meeting; and

c. The appeal meeting.

16. The issues for the Tribunal to decide, in respect of each of the three meetings, were:

a. Whether or not the PCP put the claimant to the alleged disadvantage;

b. Whether or not the respondent can show that it did not know of the disadvantage;

c. Whether or not the respondent can show that it could not reasonably have been expected to know of the disadvantage;

d. Whether or not it was reasonable for the respondent to have to make the following adjustments:

i. Providing the written information in advance of the meeting;

ii. Providing a colleague who would help the claimant read the information prior to the meeting; and

iii. Providing a colleague at the meeting itself for the same purpose.

iv. Providing the claimant with sufficient time with a reader to consider and prepare for any formal meeting

and

e. (in the case of the investigation meeting) whether the failure to make adjustments must be treated as having been done on a date on or after 9 February 2019, and if not, whether it would be just and equitable to extend the time limit.

Discrimination arising from disability

17. Did the respondent treat the claimant unfavourably by conducting formal meetings without making adjustments to assist claimant?

18. Did the claimant's difficulty reading and processing documentation arise from his disability?

19. Was the unfavourable treatment because of those things?

20. Was the treatment a proportionate means of achieving the legitimate aim of conducting a fair investigation, disciplinary and appeal procedure?

Harassment

21. The Tribunal will need to determine the following issues:

a. Was the conduct of providing and relying on written material (in other words, the PCP) at the three meetings unwanted?

b. Was it related to the claimant's disability?

c. Did the claimant perceive it as having the effect of creating the relevant adverse environment?

d. Would it be reasonable for the claimant to perceive it as having that effect?

e. The same time limit issues as above in relation to the investigation meeting.

Wrongful dismissal

22. The claimant was dismissed without notice. Was the respondent entitled to dismiss the claimant without notice by reason of the claimant's repudiatory breach?

Relevant Findings of Fact

23. The claimant was employed as a baler from 29 July 1991 to 12 February 2019. As part of that job, he operated a forklift truck. The respondent provides industrial services support to Jaguar Land Rover at their Halewood site. The claimant worked at the Halewood site until his dismissal. The respondent employs approximately 2,044 employees across various sites in the United Kingdom.

24. Prior to being known as "Leadec", the respondent was called "Voith Industrial Services".

25. The appeal manager, Alan Dobson, was the Accounts Manager for the respondent. The dismissing manager, Jason Dickinson, reported to Alan Dobson in his role as a Facilities Manager. Kristopher Fearnley was in a comparable role as a Waste Manager and also reported to Alan Dobson. Don Bradfield reported to Kristopher Fernley and was the claimant's immediate line manager.

26. The claimant operated in the waste management area on a forklift truck away from the Jaguar Land Rover production line. On the production line, employees used electronic vehicles known as "buggies" to move around the site. Leadec employees moved with more frequency because they were not on the production line.

27. Due to the size of the site, the accepted form of communication between staff whilst working for the respondent was the use of a mobile phone and/or radio. Not all staff had access to a radio, including the claimant. In the absence of a radio, mangers contacted staff via their personal mobile phone.

28. The claimant's contract of employment was with "Voith" from 9 January 2015.

Policies

29. The respondent operates a disciplinary policy that was not part of the claimant's contract but was set out in the Business Manual. The version that applied to the claimant's employment and termination of employment was dated 2017.

30. The disciplinary penalties applicable are counselling, warning, demotion, dismissal with notice and summary dismissal.

31. Misconduct is deemed as serious or gross examples of which are:

- Negligently or deliberately breaking safety or hygiene regulations;
- Any act likely to bring Leadec into disrepute;
- Serious breach of company policies or procedures; and
- Any such act of gravity that is inconsistent with continued employment.

32. The policy requires that notice of any alleged gross misconduct be given two full working days prior to a disciplinary hearing. The policy allows employees to put questions to any witnesses and ask for any witness to be called. The respondent has the right to adjourn the hearing to fully investigate if necessary.

33. The policy provides a right of appeal against dismissal within five working days.

34. The respondent operates an Equality and Dignity at Work policy and an Equal Opportunities policy. Both set out the legal parameters of the respondent's duties under the Equality Act 2010.

35. The respondent also operates a mobile phone policy and the version applicable to the claimant's employment was dated 2017. The policy applies to those who drive and may also use mobile phones and makes reference to the Health and Safety at Work Act 1974 and the Road Traffic Act.

36. At section 3 the policy states:

"*3.0 GENERAL POLICY*

The Company understands that mobile phones are an essential part of business life and the successful operation of its business. However, their use while driving cannot be justified where this compromises the safety of the user or others. The Company does not require any employee to make calls whilst driving and encourages drivers, where practicable, to switch off mobile phones whilst driving. As part of its overall health and safety policy, the Company is committed to reducing the risks which its employees face and create for others when using a mobile phone when driving or as part of their non-driving duties at work.

We ask all employees at all levels to play their part, and it is therefore the Company's policy that employees adhere to the following:

• A hand-held mobile phone or other similar hand-held device must not be held or used while driving a motor vehicle or other plant and mechanically propelled equipment;

> *• Employees should assess the risk of using a mobile phone and avoid, wherever possible, the use of hands-free mobile phones or other similar hands-free devices whilst driving. Specifically, this means that employees should:*
>
> > *• Not make any outgoing calls;*
> >
> > *• Normally, switch the phone to voicemail and return calls later when the vehicle is parked;*
> >
> > *• If an employee has to take a call, they should tell the caller that they are driving, that they must keep the conversation brief and that they will make further contact when the vehicle is parked and it is safe to do so."*

37. At paragraph 8.2, if an employee contacts another employee and establishes they are driving employees are advised to keep the call brief and contact their colleague again when they are safely parked.

38. The respondent has an emergency contact number for employees to give to their friends and family.

39. The respondent also operates a health and safety policy which gives a general summary of the Health and Safety at Work Act 1974 but makes no reference specifically to mobile phones or driving.

Training

40. The respondent operates a number of different training methods: Toolbox Talks, Single Point Lessons and Bulletins.

A. Toolbox Talks

41. A toolbox talk involves a supervisor telling employees about the content of a policy rather than handing out the policy. Each employee signs and attendance sheet to confirm they have received the talk.

42. The claimant received a toolbox talk on 4 March 2017 about the mobile phone policy. The talk included pictures and stated that an employee would face disciplinary action if they were found in breach of the policy.

43. The claimant also received a toolbox talk on 23 March 2018 which stated that a mobile phone was a distraction.

B. Single Point Lessons

44. Single point lessons are generated when there has been a particular incident and there is learning for the general workforce. These lessons are generated by managers and are delivered verbally. Documentation is not handed out to the workforce.

45. The claimant received a single point lesson on 4 November 2015 about the use of a mobile phone being strictly forbidden when driving. That lesson stated that anyone caught would face disciplinary action, up to and including dismissal. There

were pictures with a mobile phone crossed out. In evidence the claimant said he understood that he shouldn't use his phone at work.

46. The claimant also received a single point lesson on 3 June 2016 which was generated after somebody was seen using a mobile phone on a tug. That talk also highlighted that anyone caught doing so would be subject to formal disciplinary action.

C. Bulletins

47. Jaguar Land Rover issued employee bulletins which were applicable to all staff on the Halewood site including those who worked for contractors. Bulletins were sent to the respondent and distributed via a talk to the staff and signed for by each member of staff.

48. On 10 February 2016 the claimant received a Jaguar employee bulletin which stated that mobile phones were not permitted whilst working and could only be used during break times and in rest areas. In evidence the claimant said he was asked to carry a mobile phone whilst working so that his managers could make contact with him.

49. The respondent provided mechanical handling equipment training and where there were incidents likely to endanger life or property, retraining and retesting was a possible option, or more severe action.

50. Specifically, the claimant was trained in the use of a forklift truck in January 2017.

January 2019 incidents

51. On 21 January 2019 the claimant received a formal verbal warning following a determination that he had failed to comply with the appropriate health and safety provisions in the baler house on 3 January 2019. The claimant was informed that the warning would remain active on his file for a period of three months from the date of the hearing. The claimant was provided with the right of appeal but did not exercise this right.

52. On 29 January 2019 the claimant was operating a forklift truck. Whilst sat on the forklift truck, the claimant answered his mobile phone and spoke to his wife. At the same time Kristopher Fearnley was in the vicinity showing visitors around the site.

53. After the claimant ended the call, Kristopher Fearnley spoke to him about the use of the use of the phone whilst on the forklift truck. Kristopher Fearnley went back to the visitors and finished his tour and the claimant carried on working on the forklift truck.

54. After Kristopher Fearnley had completed his tour, he told Don Bradfield, the claimant's line manager, that he had witnessed the claimant using a mobile phone whilst driving the forklift truck. Kristopher Fearnley also reported the matter to his line manager, Alan Dobson, and was advised to speak to the Human Resources department. Kristopher Fearnley instructed Don Bradfield to meet with the claimant

to discuss the matter and stand him down from his normal duties and redeploy him to the cleaning department.

55. The claimant received a written notice of an investigation meeting and was told he was unable to have a trade union representative at that meeting.

56. On 30 January 2019 the claimant attended an investigation meeting with his line manager Don Bradfield and Kristopher Fearnley in attendance. During that meeting the claimant was asked a number of pre-prepared questions that Don Bradfield had typed onto two sheets of paper. Don Bradfield recorded the claimant's answers to each question in his own handwriting.

57. The claimant admitted to answering his phone whilst loading the skip wagon with his forklift truck. The claimant was asked if he understood the mobile phone policy and he told Don Bradfield that he knew he could not use a mobile phone whilst driving. The claimant explained that his wife had called him because his daughter had passed out at work.

58. The claimant was informed that the matter was to be treated as gross misconduct, that he was to be temporarily redeployed while the matter was investigated and that he could be dismissed. On the same date Kristopher Fearnley submitted a witness statement that stated he saw the claimant using his phone whilst driving the forklift truck.

Disciplinary

59. On 4 February 2019 the claimant was invited to attend a disciplinary hearing on 7 February 2019. The letter stated that the claimant would be required to discuss his alleged misconduct which appeared to be a breach of company policies, and an information pack was enclosed. The claimant was also advised he could bring a trade union representative to the meeting. The letter went on to state that dismissal could be the outcome of that hearing.

60. The disciplinary pack included the invite letter, the investigation notes from 30 January 2019, the witness statement of Kristopher Fearnley, the letter confirming redeployment to an alternative role, the toolbox talk from March 2017, the single point lessons from November 2015 and June 2016, the Jaguar bulletin from February 2016 and the disciplinary policy.

61. The hearing was subsequently rearranged to 12 February 2019 because the claimant’s trade union representative was unavailable.

62. The disciplinary letter and pack were hand delivered to the claimant at the request of the HR department. The claimant received the paperwork on 4 February 2019 and on 5 February 2019 he gave it to his trade union representative. As a result of the claimant's disability, he was unable to read the paperwork and was unable to ask anybody at his home address to assist him as a result of their personal commitments.

63. On 12 February 2019 the claimant met with his trade union representative for approximately 20 minutes before the start of the disciplinary hearing. The trade union representative failed to explain the content of the documents to the claimant.

64. The claimant and his trade union representative attended the disciplinary hearing which was chaired by Jason Dickinson who was assisted by Jackie Atkinson from HR. At the outset of the hearing, Jason Dickinson asked the claimant if he had received the pack and the claimant confirmed he had. Jason Dickinson subsequently read through the investigation minutes and the witness statement of Kristopher Fearnley. The claimant said he had nothing to add.

65. The claimant was then shown a toolbox talk from March 2017, the single point lesson from June 2016 and a single point lesson from November 2015 and was asked to comment. The claimant informed Jason Dickinson that he was dyslexic and that he could only read bits of things and if there was a picture, he knew what to do.

66. The claimant then told Jason Dickinson that he was stationary when he answered the phone and that the truck had rolled forward. He admitted he did not have the handbrake on and whilst it had rolled forward, he was not operating it. The claimant admitted that he should have put the handbrake on.

67. The claimant's trade union representative commented that managers and supervisors frequently contact operatives by phone. The HR representative stated that if the claimant had seen his wife's number, he should not have answered the phone. The trade union representative made the point that operatives should be told that they should not use a phone at all. Jason Dickinson maintained that there was a clear policy that phones should not be answered while operating a forklift truck.

68. The trade union representative named two individuals who had been caught on a phone while driving T6 machines and had not been treated in the same way as the claimant. Jason Dickinson subsequently read through the minutes and adjourned the meeting to make his decision.

69. During the adjournment, which lasted for approximately 16 minutes, Jason Dickinson attempted to discover more information about the two named comparators and whether there were alternative postings to which the claimant could be permanent redeployed that did not require him to drive.

70. On returning to the hearing, Jason Dickinson informed the claimant that he could find no record of the two named comparators. The claimant was also informed that Jason Dickinson had looked into transferring the claimant to another role but that there were no vacancies.

71. Jason Dickinson told the claimant that he would be summarily dismissed. Jason Dickinson was of the view that using a mobile whilst operating a forklift truck amounted to a deliberate breach of health and safety regulations and was an act which could bring the respondent into disrepute with its client and therefore was inconsistent with continued employment.

72. The claimant was advised of his right to appeal and when asked if he had any comment - the claimant declined to do so. The HR representative admitted that, as a result of the claimant's length of service, they had done all they could to avoid dismissal, which included looking for redeployment.

Appeal

73. On 17 February 2019 the claimant appealed the dismissal, stating that he had only answered his phone as he thought it was one of his bosses trying to get in touch with him. He also stated that there were a number of other people who had done this and were not disciplined. The claimant asked for the district trade union official to attend any appeal hearing.

74. On 18 February 2019 the respondent acknowledged the claimant's appeal and informed him that Alan Dobson would chair the appeal.

75. On 21 February 2019 witness statements were obtained from the named comparators and their line managers. All gave evidence that the operatives had been stationary in their vehicles when they answered their phones and were advised to get out the vehicles the next time the phone rang.

76. On the same day Kristopher Fearnley submitted a second witness statement in which he gave more detail about the state of the claimant's forklift truck when he saw him using his phone.

77. Kristopher Fearnley's evidence was that the claimant had a raised load at trailer bed height level and was on the phone for ten seconds before he noticed Kristopher Fearnley walking towards him. Kristopher Fearnley stated that the claimant only stopped his call when another colleague warned him of Kristopher Fearnley's presence and he subsequently saw Kristopher Fearnley.

78. On 8 March 2019 the appeal hearing pack was sent to the claimant by post. The pack contained the invite to the appeal hearing, the letter acknowledging receipt of the appeal, the appeal letter, the letter confirming dismissal, the disciplinary hearing notes, the invite to the rearranged disciplinary hearing and the disciplinary pack. This disciplinary pack included the additional witness statements that had been obtained from the comparators. A copy of this paperwork was also copied to the claimant's trade union representative, Carol Tallentire.

79. The disciplinary appeal hearing took place on 12 March 2019. The claimant had received the appeal papers on 11 March 2019 but was unable to obtain any assistance to read the documents as a result of his partner and daughter's personal commitments. The claimant recalls that the trade union representative did not read the paperwork to him, and he went into the meeting unaware of the content of the pack.

80. The appeal hearing was chaired by Alan Dobson and he was assisted by an HR adviser. The claimant was accompanied by two union representatives.

81. At the outset of the hearing the claimant said he felt he had been treated unfairly and should have got a warning as others did, as this was his first offence. The first witness statement of Kristopher Fearnley was put to the claimant and the claimant maintained that he stopped his vehicle to answer his phone. The subsequent statement from Kristopher Fearnley was then put to the claimant and he said that he did not hear anybody calling to him.

82. Alan Dobson disputed the claimant's assertion that this was his first offence and reminded him of his previous verbal warning and an incident that had occurred where he had fallen carrying a bottle on the stairs. Alan Dobson also took the view that the claimant had lied about the person making the call when he said he thought it was his manager as it was in fact his wife. The trade union representative asked for the claimant to be redeployed permanently.

83. It was Alan Dobson's view that the redeployment was temporary and not something that could be offered because it would send a message that "you could do what you liked and put two fingers up to the training". The claimant was informed that the decision would not be overturned. The trade union representative asked for an adjournment because she felt that there was an inference that the claimant had acted maliciously.

84. Following a 15 minute adjournment the claimant was asked if he wanted to add anything else and said he did not. Alan Dobson stated that he would not overturn the decision because there was a trust issue, that the claimant had told lies in his statement because it was not his first offence. Alan Dobson was of the view that the claimant would have been rolling in his forklift truck because he had failed to apply the handbrake. Alan Dobson was also of the view that if he overturned the decision the respondent would the lose the respect of the client.

Relevant Legal Principles

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

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

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

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

88. In a misconduct case the correct approach under section 98(4) was helpfully summarised by Elias LJ in **Turner v East Midlands Trains Limited [2013] ICR 525** in paragraphs 16-22. The most important point is that the test to be applied is of the range or band of reasonable responses, a test which originated in **British Home Stores v Burchell [1980] ICR 303**, but which was subsequently approved in a number of decisions of the Court of Appeal.

89. The "**Burchell** test" involves a consideration of three aspects of the employer's conduct. Firstly, did the employer carry out an investigation into the matter that was reasonable in the circumstances of the case? Secondly, did the employer believe that the employee was guilty of the misconduct complained of? Thirdly, did the employer have reasonable grounds for that belief? If the answer to each of those questions is "yes", the Employment Tribunal must then go on to decide whether the decision to dismiss the employee was within the band of reasonable responses, or whether that band falls short of encompassing termination of employment.

90. It is important that in carrying out this exercise the Tribunal must not substitute its own decision for that of the employer. The focus must be on the fairness of the investigation, dismissal and appeal, and not on whether the employee has suffered an injustice.

91. The band of reasonable responses test applies to all aspects of the dismissal process including the procedure adopted and whether the investigation was fair and appropriate. The appeal is to be treated as part and parcel of the dismissal process: **Taylor v OCS Group Ltd [2006] IRLR 613.**

92. Discrimination against an employee is prohibited by section 39(2) Equality Act 2010:

> **"An employer (A) must not discriminate against an employee of A's (B) –**
>
> **(a) as to B's terms of employment;**
>
> **(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;**
>
> **(c) by dismissing B;**
>
> **(d) by subjecting B to any other detriment."**

93. Harassment during employment is prohibited by section 40(1)(a).

<u>Discrimination arising from disability</u>

94. Section 15 of the Equality Act 2010 states that there will be discrimination arising from disability 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."

Reasonable adjustments

95. Section 20 of the Equality Act 2010 sets out the following duty:

20 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) ….

21 Failure to comply with duty

(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.

Harassment

96. The definition of harassment appears in section 26 which so far as material reads as follows:

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

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

(b) the conduct has the purpose or effect of

(i) violating B's dignity, or

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

> **(4) In deciding whether conduct has the effect referred to sub-section (1)(b), each of the following must be taken into account -**
>
> **(a) the perception of B;**
>
> **(b) the other circumstances of the case;**
>
> **(c) whether it is reasonable for the conduct to have that effect.**
>
> **(5) The relevant protected characteristics are …disability".**

Knowledge of disability

97. Section 15(2) of the Equality Act 2010 provides that unfavourable treatment will not amount to discrimination arising from disability if the employer does not know or could not reasonably be expected to know a disabled person had the disability in question.

98. An employer will not evade knowledge of a disability by simply saying they did not know about the disability. An employer has to prove that it could not reasonably be expected to know about it.

99. In accordance with Schedule 8 of the Equality Act 2010, in order to succeed with a claim for a failure to make reasonable adjustments, a claimant must prove not only that the respondent had knowledge of the claimant's disability but also had knowledge of the substantial disadvantage caused by the relevant provision, criterion or practice.

100. If the employer does have knowledge of both the employee's disability and the substantial disadvantage, any adjustment required must avoid the disadvantage and be reasonable.

101. In **Griffiths v Secretary of State for Work and Pensions 2017 ICR 160, CA,** Lord Justice Elias said :

> **'So far as efficacy is concerned, it may be that it is not clear whether the step proposed will be effective or not. It may still be reasonable to take the step notwithstanding that success is not guaranteed; the uncertainty is one of the factors to weigh up when assessing the question of reasonableness.'**

Code of Practice on Employment 2011

102. The Code of Practice on Employment issued by the Equality and Human Rights Commission in 2011 provides a detailed explanation of the legislation. The Tribunal must take into account any part of the Code that is relevant to the issues in this case.

103. In particular the Tribunal has considered:

(a) paragraphs 4.30 - 4.32 to decide whether the respondent's actions were proportionate to achieving a legitimate aim;

(b) paragraphs 5.13 – 5.16 to decide whether the respondent had knowledge of the claimant's disability.

(b) paragraphs 6.23 – 6.29 to decide whether the adjustments suggested were reasonable; and

(c) paragraphs 7.9 – 7.11 to decide whether acts of harassment were related to the claimant's disability.

Burden of Proof

104. The burden of proof provision appears in section 136 and provides as follows:

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

105. In **Hewage v Grampian Health Board [2012] ICR 1054** the Supreme Court approved guidance given by the Court of Appeal in **Igen Limited v Wong [2005] ICR 931**, as refined in **Madarassy v Nomura International PLC [2007] ICR 867** where Mummery LJ held that "could conclude", in the context of the burden of proof provisions, meant that a reasonable Tribunal could properly conclude from all the evidence before it, including the evidence adduced by the complainant in support of the allegations, such as evidence of a difference in status, a difference in treatment and the reason for the differential treatment.

106. Importantly, at paragraph 56, Mummery LJ held that the bare facts of a difference in status and a difference in treatment are not without more sufficient to amount to a prima facie case of unlawful discrimination. However, whether the burden of proof has shifted is in general terms to be assessed once all the evidence from both parties has been considered and evaluated. In some cases, however, the Tribunal may be able to make a positive finding about the reason why a particular action is taken which enables the Tribunal to dispense with formally considering the two stages.

Time Limits

107. Finally, the time limit for Equality Act claims appears in section 123 as follows:

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

> **(a) conduct extending over a period is to be treated as done at the end of the period;**
>
> **(b) failure to do something is to be treated as occurring when the person in question decided on it".**

108. In considering whether conduct extended over a period we had regard to the decision of the Court of Appeal in **Hendricks v Metropolitan Police Commissioner [2003] IRLR 96** and the Employment Appeals Tribunal in **Hale v Brighton and Sussex University Hospitals NHS Trust EAT 0342/16**.

Submissions

Respondent's Submissions

109. The respondent submitted that the claimant accepted he was breaching policy and therefore the real question was whether his dismissal for conduct was within the range of reasonable responses.

110. The respondent contended that the claimant had been caught red-handed and there was an acceptance from the claimant that he had been on the phone. The only discrepancy the respondent submitted, was whether the claimant was stationary.

111. The respondent submitted that there had been a consistent and honest investigation by Don Bradfield because he wrote down what the claimant said. The respondent relied on the fact that the claimant did not say he was stationary in the investigation meeting. The respondent submitted that Kristopher Fearnley's statements both state that the claimant was moving forward and therefore the respondent had a genuine belief. The respondent submitted that the policies were clear that phones should not be used whilst driving and therefore there was a genuine belief.

112. The respondent submitted that Alan Dobson had reasonable grounds to prefer Kristopher Fearnley's evidence over the claimant's evidence because there was no reason not to. The respondent submitted that both Jason Dickinson and Alan Dobson reasonably assessed the evidence before them.

113. The respondent submitted there had been a reasonable investigation because Jason Dickinson looked at the people named by the claimant and Alan Dobson obtained additional witness statements. The respondent invited the Tribunal to make a finding of fact as to whether the claimant was driving when taking the call.

114. The respondent submitted that the comparators were not guilty of the same thing. The respondent relied on the disciplinary policy that any serious breach of policy and procedure could amount to gross misconduct. The respondent submitted that both Jason Dickinson and Alan Dobson were reasonable in determining that retraining would not have the desired effect in light of the earlier health and safety breaches.

115. The respondent contended that the claimant has not pursued the fair procedure argument raised in the particulars of claim. The respondent also submitted that the claimant had not proven that the appeal hearing was unfair and

the outcome unreasonable. The respondent submitted that all things were considered including the claimant's disciplinary record, his length of service and whether he could be retrained.

116. The respondent submitted that if the Tribunal found that dismissal was unfair the claimant had contributed to his dismissal as a result of his own conduct.

117. The respondent submitted that a diagnosis of dyslexia did not mean that the impairment would meet the test set out at section 6 of the Equality Act 2010. The respondent pointed out that the diagnosis only came in late 2018 and by January 2019 the claimant was subject to disciplinaries.

118. The respondent submitted that the managers had no knowledge, and could not reasonably be expected to have knowledge, that the claimant was disabled. The respondent submitted that in any event the claimant did not suffer from a substantial disadvantage. The claimant had key documents read to him, and at the end of a hearing the minutes were read out. The respondent submitted that the notes show that the claimant was able to engage and even if he went in blind, he was able to respond and participate. The respondent submitted that the claimant had an idea what Kristopher Fearnley had said and he was able to participate.

119. The respondent stated that the claimant was accompanied by trade union representatives and they did not raise that the claimant was at a substantial disadvantage. The Tribunal was asked not to take into consideration that the claimant absorbed matters slowly. The respondent contended there was no evidence to show that the claimant had a slower verbal understanding of things.

120. The respondent submitted that while the provision, criterion or practice was accepted, the fact that each individual read out the documents meant that there was doubt over whether the provision, criterion or practice was actually applied. The respondent disputed that reasonable adjustments were needed because the claimant had a representative to provide support.

121. The respondent disputed that the failure to make reasonable adjustments could amount to unwanted conduct for the purposes of the harassment claim. It is the respondent’s case that an omission cannot amount to unwanted conduct for the purposes of harassment. The respondent also disputed that the claimant had the impact of the failure to make reasonable adjustments. The respondent stated that even if the claimant did feel those things, he did not raise it during the appeal hearing and this did not amount to harassment.

122. The respondent disputed that the unfavourable treatment was caused by the “something arising” from the claimant’s disability. The respondent also believed that it was justified in providing written documentation to allow a fair investigation and appeal.

Claimant's Submissions

123. The claimant submitted that he required the provision of information in an accessible format but there was no onus on him to suggest this adjustment and that the respondent knew he had difficulty reading.

124. The claimant submitted that his reading impairment was the cause of the unfavourable treatment and this put the claimant at a disadvantage which could have been avoided by implementing the reasonable adjustment. The claimant submitted that an omission can be a continuing act and therefore his claim was not out of time.

125. The Tribunal was asked to note that a specific diagnosis was not required to conclude that a person was disabled for the purposes of the Equality Act 2010. The claimant submitted that if the respondent did not have actual knowledge, it should have had constructive knowledge. In any event, the claimant submitted that disability had been conceded.

126. It was the claimant's position that the respondent knew about his condition and that Don Bradfield in particular, was aware from 2012 after speaking to the claimant's previous line manager. The claimant submitted that Don Bradfield would not have read out the minutes of the investigation meeting had he not been aware. It was also submitted that Jason Dickinson was aware, and this is why he did the same thing during the disciplinary hearing. The claimant submitted that both expected the trade union representative to read the papers to the claimant and therefore knew of the disability.

127. The claimant submitted that the respondent admitted it would have made adjustments had the claimant asked. The claimant contends that this undermines the justification defence for the discrimination arising from disability claim because written documents were not actually necessary. The Tribunal was asked to note that both hearings only lasted an hour and therefore there was not enough time to read out all of the information.

128. The claimant submitted that he did feel intimidated during the hearings. The claimant submitted that the failure to implement reasonable adjustments did have a hostile effect and this is indicative from his response to the questions.

129. The claimant submitted that Jason Dickinson's belief that there was an absolute prohibition on using phones while operating a forklift truck was not held on reasonable grounds. The claimant pointed out that Jason Dickinson was seeking to rely on the mobile phone policy, but this was not included in the disciplinary pack or the appeal pack. The claimant pointed out that when Jason Dickinson was asked about this, he actually made reference to the mechanical handling policy and clearly neither policy was a consideration for him when he made the decision to dismiss the claimant.

130. The claimant submitted that the mobile phone policy did not place an absolute prohibition on the use of a mobile phone. The claimant pointed out that Jason Dickinson was only seeking to rely on this policy because it was the only one that provided for dismissal should it be contravened.

131. The claimant submitted that the policy envisaged that calls could be taken briefly until the person could pull over. It was submitted that the claimant never had sight of the policies and relied on what his managers told him.

132. The claimant submitted that the respondent conducted an inadequate investigation because it was based on the premise that he had breached the mobile phone policy. The claimant maintained he was not driving whilst using his phone.

133. It was submitted that the policies differed as to whether a breach would amount to dismissal. The claimant submitted that he had not received specific training and had no way of knowing that what he was doing would amount to gross misconduct.

134. The Tribunal was asked to note that Don Bradfield admitted during evidence that it would not be unreasonable to call the claimant up to five times a day on his phone whilst he was driving and admitted that he never asked the claimant if he was driving. The claimant submitted that he understood he was allowed to take calls when operating the forklift truck.

135. It was submitted that it was Jason Dickinson's evidence that the claimant should not answer any call. The claimant submitted that the respondent had not pleaded this point and therefore that belief was not reasonable.

136. The Tribunal was asked to note that the investigation was biased and that Kristopher Fearnley had not given a full account. It was the claimant's belief that the investigation was tainted and this infected the whole process. The Tribunal was asked to accept the claimant's evidence over that of Kristopher Fearnley. The claimant said that the respondent unreasonably failed to test the evidence and that the statements obtained during the appeal hearing were slanted and the claimant was not given a proper opportunity to respond.

137. It was submitted that the claimant believed he could use his phone whilst operating the vehicle. The claimant submitted it was unreasonable to sack him for this. It was submitted that Jason Dickinson was uncertain as to the policies he had in mind when he made his decision to dismiss.

138. The claimant submitted he was denied a fair and reasonable opportunity to respond to the allegations because he was not aware of the content of the documentation. The claimant believed that the dismissal was outside the range of reasonable responses.

Discussion and Conclusions

Knowledge of disability

139. The Tribunal has approached the issue of knowledge by looking at whether each manager at each stage of the disciplinary procedure had actual or constructive knowledge of the claimant's disability.

Don Bradfield – Investigation Meeting

140. The Tribunal concludes that Don Bradfield did have actual knowledge of the claimant's disability because he admitted at paragraph 6 of his witness statement that he had knowledge of the claimant's difficulty reading and writing and he had obtained this knowledge from his predecessor in 2012.

141. Don Bradfield had knowledge of the fact that the claimant's impairment had a substantial and adverse effect on his ability to read and write because Don Bradfield had read out the answers given by the claimant before he asked the claimant to sign the note. It is not necessary to determine that Don Bradfield had specific knowledge

of the claimant's diagnosis of dyslexia in order for him to have knowledge of an impairment that meets the test at section 6 of the Equality Act 2010.

142. The Tribunal also determines that Don Bradfield had actual knowledge of the substantial disadvantage imposed by the PCP. During cross examination Don Bradfield admitted that he knew he would have to read the documents to the claimant.

Jason Dickinson – disciplinary hearing

143. Jason Dickinson was not Don Bradfield's line manager - the second line manager was in fact Kristopher Fearnley. However, because Kristopher Fearnley had witnessed the alleged incident on 29 January 2019, Jason Dickinson was asked to deal with the disciplinary hearing.

144. At paragraph 14 of Jason Dickinson's witness statement he recalls that dyslexia was revealed by the claimant at the disciplinary hearing and this was reflected in the notes of the disciplinary hearing. Jason Dickinson also admitted that he knew the claimant had difficulty reading. In further answers under cross examination Jason Dickinson admitted that the HR representative, Jackie Atkinson, also knew the claimant had difficulty reading and writing, and this is why they proceeded slowly so that the claimant understood. Jason Dickinson said that he read through the notes before the claimant signed them.

145. As a result, the Tribunal determines that Jason Dickinson had actual knowledge of the claimant's disability.

146. The Tribunal concludes that Jason Dickinson should have reasonably known that the claimant would be at a substantial disadvantage if documents were provided in writing prior to the hearing. The fact that Jason Dickinson read everything out to the claimant showed that he knew the claimant could not read and would be at a disadvantage if this were not done. Whilst there was an assumption by Jason Dickinson, as admitted in evidence, that the trade union representative would assist the claimant with the paperwork, neither he nor the HR representative checked as to whether this had happened.

147. The Tribunal does not accept that the claimant would not be at a substantial disadvantage because he had engaged a trade union representative. The onus was still on the respondent to check whether the claimant needed assistance with the paperwork that had been sent and no such checks were made.

Alan Dobson – appeal hearing

148. Alan Dobson was the line manager of Jason Dickinson and as a result dealt with the claimant's appeal. In his evidence, Alan Dobson admitted that he knew that the claimant had disclosed during the disciplinary hearing that he had difficulty reading. The appeal hearing pack contained the disciplinary hearing notes. However, Alan Dobson was not engaged with the claimant on a day-to-day basis and was two rungs of management removed.

149. The Tribunal does not conclude that Alan Dobson had actual knowledge of either the claimant's disability or that he would suffer from a substantial disadvantage

as a result of the application of the provision, criterion or practice. However, the Tribunal does determine that Alan Dobson should have had knowledge of both things. Alan Dobson was asked to deal with the appeal hearing and given the knowledge of Don Bradfield and Jason Dickinson, and the involvement of HR, should have been informed of the claimant's impairment.

Reasonable Adjustments Claim

Application of provision, criterion or practice

150. The PCP was conceded, although in submissions the respondent doubted whether it had been applied as a result of the managers' conduct during the hearings.

151. The Tribunal determines that the respondent did apply the provision, criterion or practice of relying on written information at the investigation meeting because the claimant was asked questions about the claimant's understanding of the mobile phone policy. This policy consists of four detailed pages of information and does not include pictures.

152. The Tribunal also determines that the respondent did apply the provision, criterion or practice of the provision of information in writing because all the information sent to the claimant prior to the disciplinary hearing and the appeal hearing was in writing.

Substantial Disadvantage

153. The Tribunal determines that the claimant was put at a substantial disadvantage during the investigation meeting. The respondent asked questions about the detailed mobile phone policy. There is no record that this policy was read out to the claimant during the meeting before the questions were asked. In addition, during cross examination, Don Bradfield only made reference to reading out the prepared questions and the claimant's answers.

154. The ACAS guidance on disciplinary procedures is clear: prior to a disciplinary hearing and an appeal hearing the employee should be provided with details of the allegations.

155. The provision of written material prior to the disciplinary and appeal hearings did place the claimant at a substantial disadvantage because he was unable to read it and fully understand the discussions at these meetings. The claimant was unable to ask anybody at home to assist and his trade union representative did not go through the paperwork prior to the start of the hearing.

Reasonable Adjustments

Investigation Meeting

156. The Tribunal concludes that it would have been a reasonable adjustment to provide the claimant with a copy of the mobile phone policy and access to a colleague who could read that document to him. Such adjustments would have assisted the claimant prior to being asked questions about it during the meeting. The

Tribunal has considered the size of the respondent and the availability of such a resource when reaching this decision

Disciplinary Meeting

157. Jason Dickinson did provide written material in advance of the meeting. It would have been a reasonable adjustment to provide a colleague to read through that material with the claimant prior to the start of the hearing. It was not enough to read that material out to the claimant during the hearing and expect him to respond. It was equally not appropriate to assume that because he had a trade union representative that that documentation would be conveyed to the claimant prior to the hearing.

Appeal Meeting

158. The appeal pack was sent by post to the claimant on 8 March 2019 but he did not receive it until 11 March 2019, one day before the appeal hearing. Therefore, the Tribunal cannot conclude that there was a failure to send the written material in advance of that hearing.

159. The Tribunal concludes that there was then a subsequent failure to provide the claimant with assistance to read through that documentation. Whilst the Tribunal has concluded that Alan Dobson did not have actual knowledge of the claimant's impairment or substantial disadvantage, he should have had knowledge in light of the knowledge of those managers who had previous dealings with the claimant. Similarly, it would have been a reasonable adjustment to provide a colleague to assist the claimant with understanding the documentation before he attended the appeal hearing.

Discrimination arising from disability

160. The Tribunal concludes that failure to provide the adjustments required by the claimant was unfavourable treatment because the claimant was unable to understand the disciplinary process.

161. The claimant required the adjustments because of his inability to read and therefore the unfavourable treatment was because of something arising from his disability.

162. Section 15 of the Equality Act 2010 does not require the respondent to be motivated by the fact the claimant cannot read but rather that the unfavourable treatment was because of something that arose as a consequence of the claimant’s disability.

163. The claimant is unable to read and therefore the provision of written documentation without assistance is unfavourable to the claimant.

164. The Tribunal accepts that the respondent had a legitimate aim of having a fair disciplinary process. However, the Tribunal disagrees that just providing the information in writing without assistance was proportionate to the achievement of that aim. The respondent has large resources and the Human Resources department was involved in this case. The Tribunal does not accept that the

respondent could not have made enquiries of the claimant as to his understanding of the information and whether he needed assistance.

Harassment

165. The list of issues records the unwanted conduct as the respondent providing and relying on written material at the three relevant meetings. This was a positive act and unwanted conduct. The claimant could not read the documentation and as a result did not fully understand the process.

166. The Tribunal concludes that the claimant reasonably found each hearing intimidating because of the provision and reliance on written material. The Tribunal also concludes that the claimant would have been offended by this treatment because of the respondent's lack of regard for his disability.

167. The Tribunal concludes that the unwanted conduct was related to the claimant's disability. The claimant's line managers had knowledge of his disability and knew he would be at a substantial disadvantage in the various hearings.

Time Limit

168. It was contended by the respondent that any act of discrimination that occurred during the investigation meeting on 30 January 2019 was out of time.

169. The claimant began early conciliation on 8 May 2019 and therefore any act of discrimination prior to 9 February 2019 was outside the normal three month time limit. This includes the investigation meeting.

170. The Tribunal has concluded that the claimant was subject to conduct extending over a period which began on 30 January 2019 and ended on 12 March 2019. There was a failure by the respondent to make adjustments on three occasions from the investigation meeting through to the appeal hearing such that it was one continuing act of discrimination.

171. In **Hale v Brighton and Sussex University Hospitals NHS Trust EAT 0342/16** the Employment Appeals Tribunal confirmed that an employee can rely upon a continuing state of affairs that begins with the instigation of a disciplinary procedure and ends with dismissal. Each time the respondent failed to make reasonable adjustments the claimant was subject to an act of discrimination.

Unfair Dismissal

172. The claimant was dismissed because of his conduct which is a fair reason for dismissal.

173. The Tribunal has considered whether the respondent acted reasonably in all the circumstances in treating the claimant's conduct as a sufficient reason to dismiss the claimant:

Investigation

174. There is a direct dispute of fact between the claimant and Kristopher Fearnley as to whether the claimant was stationary when he answered the call. Don Bradfield failed to speak to the other witnesses who were with Kristopher Fearnley on 29 January 2019.

175. Jason Dickinson did not conduct any further meaningful investigation once Don Bradfield had reached his conclusion. Jason Dickinson only made a cursory search for the comparator evidence on the respondent's HR system rather than specifically speaking to the comparators' line managers. Jason Dickinson also failed to ensure that the claimant had read and understood the paperwork sent to him to enable the claimant to properly respond during the disciplinary hearing.

176. Finally, whilst Alan Dobson did consider the comparator evidence put forward by the claimant, he did not seek to interview the witnesses that accompanied Kristopher Fearnley or ensure that the claimant properly understood the paperwork so that the claimant could adequately respond during the appeal hearing. The Tribunal therefore concludes that the respondent did not conduct a reasonable investigation.

Reasonable Belief/ Reasonable Grounds

177. Jason Dickinson determined the finding of gross misconduct based upon the document provided by Jaguar Land Rover that a mobile phone must not be used whilst working.

178. The claimant's primary function whilst working for the respondent was to operate a forklift truck. Don Bradfield admitted during evidence to calling the claimant at least five times a day on his mobile phone. The claimant gave evidence that he assumed it would be his manager calling and that is why he answered his phone.

179. When the Jaguar briefing note was put to Alan Dobson in evidence, he said that the direction was not practical and that he (and his managers) needed to be able to contact employees whilst out on site, given the size of the site.

180. The Tribunal determined that there was a general acceptance between Don Bradfield and Alan Dobson that using mobile phones as a way of contact during the working day was appropriate, provided it was safe to take a call, and therefore the Jaguar Briefing was not applied to the respondent's operations.

181. The Tribunal determines that the respondent deemed it acceptable to contact the claimant on his mobile phone whilst operating a forklift truck. Therefore, the Tribunal concludes that Jason Dickinson did not have a reasonable belief based on reasonable grounds when making the decision to dismiss the claimant.

182. Jason Dickinson dismissed the custom and practice of the managers using mobile phones to contact operatives when reaching his conclusion. The respondent's mobile phone policy was not considered by Jason Dickinson when he made the decision to dismiss and does not support the submission that Jason Dickinson had a genuine belief based on reasonable grounds.

183. In addition, Alan Dobson concluded that the claimant was lying and there was a trust issue. Alan Dobson's decision to uphold the dismissal was based on his lack of faith in the claimant rather than a review of the decision to dismiss.

184. Therefore, the Tribunal has concluded that the respondent's belief of the claimant's misconduct was not based on reasonable grounds.

Range of reasonable responses

185. The respondent did not conduct a proper investigation despite the direct dispute between the claimant and Kristopher Fearnley. The respondent failed to ensure the claimant understood the evidence before proceeding with the disciplinary and appeal hearings in order that he could properly respond to the allegations.

186. The decision to dismiss was based on a finding that the claimant had breached a policy that did not apply to the claimant's day to day work environment and was not put to the claimant in the investigation meeting. The decision to dismiss was taken without regard to the daily custom and practice of using mobile phones to contact operatives on site.

187. Jason Dickinson did actively consider redeploying the claimant and only opted to dismiss when he could not find a suitable vacancy. The Tribunal concludes that Jason Dickinson would have been content to carry on the claimant's employment if a suitable vacancy had arisen.

188. The decision to uphold the dismissal was based upon the appeal manager's opinion of the claimant as opposed to a proper review of the dismissal decision.

189. The Tribunal concludes that the claimant's dismissal was not within the range of reasonable responses.

Procedure

190. The common thread of the ACAS Code of Practice on disciplinary procedures is that an employee is aware of any allegations so that they can properly respond to those allegations during the disciplinary process.

191. The claimant required reasonable adjustments throughout the process to ensure he did understand the allegations. The respondent denied the claimant those adjustments and subjected him to an unfair procedure.

192. The Tribunal does not conclude that had there been a fair application of the disciplinary procedure that the claimant would have been dismissed in any event.

193. The decision to dismiss was based on a policy that did not apply to the respondent's operations in practice. The decision to uphold the decision to dismiss was based on the appeal manager's personal view of the claimant.

Claimant's conduct

194. The Tribunal determines that the claimant answered his mobile phone whilst operating a forklift truck because he assumed it was his manager trying to make

contact with him. The claimant's line managers deemed it acceptable to make contact with the claimant in this way when operating a forklift truck. The claimant was contacted in this way up to five times each day.

195. There was a direct dispute of fact as to whether the claimant was stationary when he took the call and therefore, whether it was safe to take the call. As a result of the lack of investigation the Tribunal cannot determine whether the claimant was stationary before he took the call.

196. The Tribunal cannot therefore conclude that the claimant's behaviour on 29 January 2019 contributed to his dismissal.

Wrongful Dismissal

197. The claimant was entitled to his notice pay on termination of employment and he has therefore been wrongfully dismissed.

Employment Judge Ainscough
Date: 24 January 2022

JUDGMENT AND REASONS SENT TO THE PARTIES ON
25 January 2022

FOR THE TRIBUNAL OFFICE