EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Numbers: 4111587/2021, 4111588/2021, 4111964/2021 and 4111966/2021

Hearing held in Glasgow on 28 February 2022, 1 March 2022, 2 March 2022 3 March 2022 and 4 March 2022
Deliberations: 7 March 2022 and 8 March 2022

Employment Judge: D Hoey

Tribunal Member: L J Grime
Tribunal Member: A Matheson

Ms C Gedling	**First Claimant Represented by: Mr Musgrave (Trade union Representative)**
Mr A Brown	**Second Claimant Represented by: Mr Musgrave (Trade union Representative)**
Public and Commercial Services Union	**Respondent Represented by: Mr Brittenden (Counsel) Instructed by Messrs Thompsons**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

1. The following claims raised by the first claimant are dismissed upon their withdrawal by the first claimant during the Hearing: unlawful detriment (pursuant to section 146 of the Trade Union and Labour Relations (Consolidation) Act 1992, direct philosophical belief discrimination (pursuant

to sections 10 and 13 of the Equality Act 2010), victimisation (pursuant to section 27 of the Equality Act 2010), indirect discrimination (pursuant to section 19 of the Equality Act 2010, automatic unfair dismissal, harassment (pursuant to section 26 of the Equality Act 2010) and breach of contract.

2. The unanimous decision of the Tribunal is that the first claimant was not unfairly dismissed and that claim is dismissed.

3. The unanimous decision of the Tribunal is that the first claimant's claims in respect of breach of section 15, 20 and 21 of the Equality Act 2010 are ill founded and are dismissed.

4. The following claims raised by the second claimant are dismissed upon their withdrawal by the second claimant during the Hearing: unlawful detriment (pursuant to section 146 of the Trade Union and Labour Relations (Consolidation) Act 1992, direct philosophical belief discrimination (pursuant to sections 10 and 13 of the Equality Act 2010), automatic unfair dismissal, victimisation (pursuant to section 27 of the Equality Act 2010) and breach of contract.

5. The unanimous decision of the Tribunal is that the second claimant was not unfairly dismissed and that claim is dismissed.

6. Each of the claims raised by each claimant is therefore dismissed.

REASONS

1. This was a claim involving 2 separate claimants that had arisen as a result of the same set of facts. The claims had been combined.

2. The first claimant raised her claims in two separate ET1s that was presented on 1 and 28 October 2021. She raised claims for unlawful detriment (pursuant to section 146 of the Trade Union and Labour Relations (Consolidation) Act 1992, direct philosophical belief discrimination (pursuant to sections 10 and 13 of the Equality Act 2010), victimisation (pursuant to section 27 of the Equality Act 2010), indirect discrimination (pursuant to section 19 of the Equality Act 2010, unfair dismissal (including automatic unfair dismissal),

discrimination because of something arising in consequence of her disability (section 15 of the Equality Act 2010), harassment (pursuant to section 26 of the Equality Act 2010),a breach of the duty to make reasonable adjustments (section 20 and 21 of the Equality Act 2010) and breach of contract.

3. As the case had progressed the first claimant had decided to withdraw a number of her claims such that the only claims that were proceeding were (ordinary) unfair dismissal, discrimination because of something arising in consequence of her disability (section 15 of the Equality Acy 2010), a breach of the duty to make reasonable adjustments (sections 20 and 21 of the Equality Act 2010).

4. The second claimant raised his claims by an ET1 that was presented on 1 and 28 October 2021. He raised claims for unlawful detriment (pursuant to section 146 of the Trade Union and Labour Relations (Consolidation) Act 1992, direct philosophical belief discrimination (pursuant to sections 10 and 13 of the Equality Act 2010), victimisation (pursuant to section 27 of the Equality Act 2010), indirect discrimination (pursuant to section 19 of the Equality Act 2010, unfair dismissal (including automatic unfair dismissal), and breach of contract.

5. As the case had progressed the second claimant had decided to withdraw a number of his claims such that the only claim that was proceeding was (ordinary) unfair dismissal.

6. The hearing was conducted in person with the claimants' agent, the claimants and the respondent's agent attending the entire hearing, with witnesses attending as necessary, all being able to contribute to the hearing fairly. One witness attended the hearing remotely and there were no issues arising.

Case management

7. The parties had worked together to focus the issues in dispute and had provided a statement of agreed facts and a list of issues. The latter required

to be refined as the case progressed and as the claims became more focussed.

8. We agreed a timetable for the hearing of evidence and the parties worked together to assist the Tribunal in achieving the overriding objective, in dealing with matters justly and fairly taking account of the issues, cost and proportionality.

9. The respondent had conceded that the first claimant was a disabled person in terms of the Equality Act 2010.

10. The parties had also agreed the position in respect of financial losses with exception of pension loss and the period of loss which would be addressed if necessary.

Issues to be determined

11. The issues to be determined are as follows (which is based on the agreed list which was revised during submissions updated given the progress of the case).

Unfair dismissal

a. Did the respondent have a potentially fair reason to dismiss the claimants, namely conduct, or was the real reason the raising of workplace concerns?

b. Did the respondent act reasonably or unreasonably in treating that as sufficient to dismiss the claimants, taking account of whether the respondent had reasonable grounds to support its belief given the following issues:

   i. Did the respondent correctly and fairly apply its disciplinary policy; Specifically clauses: 3.5 (full investigation), 6.1 (fair investigation), 8.3 (proceeding with hearing whilst medically unfit) and 8.4 (not terminating suspension).

ii. Did the respondent adequately review each claimant's suspension; Specifically, the failure to supply written evidence.

iii. Did the respondent reasonably fail to offer each claimant alternative duties while on suspension.

iv. Did the respondent follow the grievance policy by reason of the delays in the process; Specifically, clauses 2.3 (requirement to hold a grievance meeting) 2.5 (disadvantage) and 2.6 (right to progress to next stage).

v. Did the respondent fully respond to each claimant's subject access request by specifically not informing the claimant which documents exist and which do not.

vi. Did the respondent assess and control workplace risks for each claimant. Specifically, not taking action on receipt of a stress risk assessment submission.

c. Would employment have ended in either event (applying the principles set out in **Polkey**)?

d. Did either claimant contribute to their dismissal such that any compensation should be reduced?

e. Did the respondent fail to comply with the ACAS Code of Practice (specifically paragraph 46)?

f. What compensation should be awarded in the event of a successful claim or claims?

Unfavourable treatment claim (section 15, Equality Act 2010)

g. the unfavourable treatment relied upon was the "need for face to face meetings" (but this was unclear and is considered below).

h. Was the unfavourable treatment because of something arising in consequence of the first claimant's disability?

i. If so, was proceeding with such a hearing a proportionate means of achieving a legitimate aim of upholding and maintaining disciplinary standards at work, including addressing complaints of bullying and avoiding undue delays in completing the disciplinary process.

Breach of the duty to make reasonable adjustments (section 20, Equality Act 2010)

j. The provision criterion or practice ("PCP") relied upon was the need for face to face meetings.

k. Did the PCP put the first claimant at a substantial disadvantage compared to someone without a disability?

l. There were no issues of knowledge in this case, the respondent conceding this element of the claim.

m. Did the respondent fail to take such steps as were reasonable to alleviate the disadvantage, the principal steps being to delay matters until face to face hearings were permitted?

Evidence

12. The parties had agreed productions running to 1949 pages.

13. The Tribunal heard from each claimant, Mr Evans (who was Director of Central Services), Mr Lockhart (who was National Organiser and the investigator), Ms Burnell (Head of HR, Learning and Development), Mr McCarthy (Head of Digital, Legal and Support, the dismissing officer) and Mr Watson (Head of General Secretary's Office and the appeal officer). The witnesses were each asked appropriate questions. The Tribunal ensured that the rules of evidence were understood and the claimants' agent was assisted, where appropriate, with the asking of questions. He confirmed that he had been able to present all relevant evidence to the Tribunal which each claimant wished. The Tribunal also explained the overriding objective including the need to ensure the parties were on an equal footing and that all decisions that

are taken are just and fair. The parties worked together to achieve the overriding objective.

Facts

14. The Tribunal is able to make the following findings of fact which it has done from the evidence submitted to it, both orally and in writing. The Tribunal only makes findings that are necessary to determine the issues before it (and not in relation to all disputes that arose nor in relation to all the evidence led before the Tribunal). Where there was a conflict in evidence, the conflict was resolved by considering the entire evidence and making a decision as to what was more likely than not to be the case. The statement of agreed facts the parties produced, which was finalised after the hearing has assisted the Tribunal in making relevant findings.

Background

15. The respondent is an independent trade union as defined by the Trade Union and Labour Relations (Consolidation) Act 1992. It has around 175 staff with offices across the country.

16. On 2 March 2012 the second claimant commenced employment as Industrial Officer (Band 4). He transferred to the Scotland and Northern Ireland Team with effect from 9 June 2014.

17. On 5 September 2016 the first claimant commenced employment as an Industrial Officer (Band 4).

18. Both claimants were employed to work in the Glasgow office.

19. The Scotland and Northern Ireland offices were combined administratively to form a “hub”. The claimants’ temporary line manager was Ms Boyd.

20. The respondent had a team of 4 HR professionals, including Ms Burnell assisted with 2 administrators.

21. Mr Evans was Director of Central Services and Mr Watson was Head of General Secretary's Office, both being at the same level of management.

Policy documents

22. The claimants were subject to a number of policy documents. The relevant policy documents for this hearing were as follows.

23. The **disciplinary procedure** is a contractual procedure which is designed to encourage employees to achieve and maintain standards of conduct and performance. The respondent undertakes to ensure employees are treated fairly and equitably in dealing with complaints about conduct. At each stage the Director of HR or their representative will be present at any formal meeting in an advisory capacity.

24. Clause 3.5 (under clause 3 which is headed "Principles") states that: "No formal disciplinary action will be taken against an employee until the case has been fully investigated. As part of the investigation the employee will be given the opportunity to make an initial response to the allegation before a formal hearing is convened."

25. The procedure has an informal stage (with minor matters dealt with at the time) and a formal stage. An investigation should take place with the investigation being conducted fairly. At the disciplinary hearing the employee has the chance to provide their response.

26. Clause 6.1 (under the heading "Formal stage") states that "Where conduct that may warrant disciplinary action is alleged, the matter will be investigated, at the earliest opportunity, by the employee's line manager. If the employee's Immediate line manager is unavailable or subject of an investigation/disciplinary hearing then another manager appointed by the General Secretary or representative/nominee will conduct the investigation. The investigation must be conducted fairly."

27. Clause 8 deals with "Suspension". Where gross misconduct is alleged the employee may be suspended when an investigation is undertaken.

Suspension is usually on full pay and will continue until either it is decided not to proceed or until a decision is made at a disciplinary hearing. The policy states at clause 8.3 that: "where an employee is certified as medically unfit to attend on the date of a hearing, it will be postponed and any suspension period extended until the employee is deemed to be medically fit to attend the hearing".

28. Clause 8.4 states that: "upon completion of the formal disciplinary procedure, if it is judged that the allegation against the employee was not proven, the suspension will be immediately terminated and the employee advised in writing of the decision within five working days".

29. An employee can appeal which will be considered by a manager who is "usually senior to the manager who was involved in the original decision".

30. The policy gives examples of conduct that could be regarded as gross misconduct which includes bullying or harassment.

31. The **grievance procedure** is also a contractual document and exists to allow employees to have grievances heard and settled fairly and promptly. Every effort should be made to deal with grievances informally before recourse is made to the formal process. Clause 2 deals with "Principles" and clause 2.3 states that: "where an informal solution cannot be reached, then the employee will be given the opportunity to state their case at a grievance meeting". Clause 2.5 states that: "no employee will be made to feel disadvantaged in any way because they have raised or pursued a grievance".

32. Clause 2.6 states that: "if at any stage of the grievance procedure the employee can show reasonable cause of dissatisfaction with the time taken to progress the grievance, they may refer it to the next stage".

33. Clause 2.10 states that: "the operation of the policy and procedures will be monitored at the end of each calendar year with reference to equal opportunities considerations".

34. Under the heading “reasons for exclusion from the procedure” (at clause 4) it is stated that employees will be excluded from using the procedure where the grievance is in connection with a matter for which the employee has been notified of the date of a formal disciplinary hearing in which case the grievance will not “hold up” the disciplinary process.

35. The **Dignity at Work policy** was designed to promoted the development and maintenance of a working environment where all staff are respected. It aims to prevent bullying, harassment and victimisation in the workplace. The policy makes it clear that no forms of bullying are tolerated. In some cases bullying can be considered gross misconduct that could lead to dismissal.

36. In terms of the policy line managers are responsible for positively promoting an environment that is free from bullying harassment and victimisation. They should be alert to the possibilities of bullying harassment and victimisation occurring and identify and deal with standards of behaviour that could be seen as offensive. All staff are responsible for their own conduct to ensure there is no bullying. If it is problem, the person responsible could be dismissed for gross misconduct.

37. While it may be hard to exactly define bullying, it is considered “offensive, intimidating, malicious or insulting behaviour, an abuse or misuse of power through means intended to undermine humiliate denigrate or injure the recipient”. It can include abuse and undue criticism in front of colleagues or others or insulting someone.

38. The policy sets out an informal stage (which would be raised with the line manager) and a formal stage (which would be investigated formally) with recommendations being made to the Director of HR/General Secretary as appropriate which could include proceeding under the disciplinary procedure.

First claimant provides health information

39. On 29 August 2017 the first claimant informed the respondent (via its human resources team) that she suffered from depression. The first claimant was given details of support services.

Letter of concern submitted

40. On 31 October 2019 the first claimant emailed Ms Burnell a "letter of concern" on behalf of 6 hub staff members at grades B2, B3 and B4 .That letter stated that there were a "number of issues in our hub having a negative/detrimental impact on our ability to deliver. The manner in which the recent temporary promotion arrangements were taken forward has brought this issue to the fore for a number of us. We are asking for action to be taken to put things right". The letter then dealt with decision making, hierarchies within grades, equality of opportunity for all team members, job roles and responsibilities and information sharing. The letter stated that: "We want to work collectively with you in addressing our concerns and suggest that conciliation would be a good way forward."

41. On 1 November 2019 Ms Burnell contacted the first claimant and sent details of a resolution meeting to the first claimant.

42. On 8 November 2019 the first claimant declined the resolution meeting explaining she had not been advised of the issues and would be unaccompanied. She said that she believed the outcome had been predetermined and while mediation had a variety of outcomes none had been suggested.

43. On 11 November 2019 Mr Burnell emailed all signatories to the letter of concern (which included both claimants) agreeing to a joint meeting. Ms Burnell cancelled that meeting on 21 November 2019 advising that she had further considered the issues and referred them to senior management to review and recommend the best course of action. The meeting scheduled for 25 November was cancelled.

44. On 26 November 2019 Mr Evans, Director of Central Services, sent an internal memo to the letter of concern signatories advising that he had considered the letter and wished to follow "due process". He considered the issues arising to amount to a grievance and that in accordance with the grievance policy, if possible, the matter should be dealt with informally which

failing via the formal route. He noted there was no provision for group grievances in the respondent's grievance procedure.

45. As to next steps he stated that individual meetings would be arranged with the line manager with HR in attendance. Thereafter HR would review what was said and consider the evidence and with senior management decide upon next steps.

46. The memo noted that there had been reference to recent temporary promotion appointments. He noted that such appointments are a matter for management with the sole consideration being operational requirements. While the disappointment of those who had been overlooked is understandable, it would be inappropriate to discuss such appointments.

47. Both claimants attended individual meetings with Ms Burnell and Ms Boyd, their temporary line manager, on 18 February 2020.

48. The respondent recognised the GMB trade union in respect of the staff cohort of which the claimants were members.

Temporary restructure

49. On 31 March 2020 Mr Evans sent a paper to GMB Officers: *Management in Confidence – Coronavirus Paper* for discussion at a meeting with General Secretary and HR on the following day. This set out the respondent's proposals to temporarily reorganise staff during the pandemic.

Team meeting to discuss restructure

50. On 3 April 2020, Ms Boyd (the temporary Band 5 manager for the team) convened a meeting of the Scotland and Northern Ireland Hub to discuss the reorganisation with staff. Both claimants attended this meeting which was convened remotely.

Concerns raised about both claimants following the meeting

51. On 3 April 2020, shortly following the meeting, Ms Boyd emailed Mr Evans her account of the team meeting stating that "both [claimants] acted unprofessionally, inappropriately and in way which violated my dignity at work". She also provided a written account of the team meeting. She explained that she had convened the meeting with all team members to communicate the information about the impending restructure. The second claimant had "hectored" Ms Boyd and that he raised issues about specific team members who had been temporarily promoted. Matters escalated with both claimants challenging the approach the respondent had taken. She stated that both claimants "began to shout" at her and were becoming inaudible. Ms Gibson said that she was going to leave the meeting as it was upsetting. Ms Boyd said she ended the meeting as she was visibly upset.

52. Mr Evans spoke with Ms Boyd and she typed up a note of the conversation on the following day. Ms Boyd advised Mr Evans that she had to abandon a team meeting due to the behaviour of both claimants and that she "could not go on like that". She explained that both claimants had been shouting at her and it was acrimonious. She felt that she had been humiliated by both claimants.

53. On the same day and shortly following the meeting, Ms Dunn emailed Ms Boyd recording her thoughts on the team meeting. She stated that the second claimant had made it clear that he was not happy and he was challenging the rationale. His attitude became more aggressive. Others contributed. The first claimant acted aggressively . Both claimants had then began to "hurl points" talking over each other and shouting. She noted that Ms Gibson said she would leave the meeting as she was upset at the bullying behaviours of both claimants. The meeting was ended. Ms Dunn said she was shocked by the behaviours on display.

54. Ms Alden-Gibson also emailed Ms Boyd with her account of the team meeting shortly following the meeting. She stated that she believed the way both claimants conducted themselves was "outrageous" and constituted bullying in her view, She considered the approach of the claimants to have been

unnecessarily aggressive and was embarrassing for Ms Boyd. Despite advising that individual issues were not to be raised both claimants had done so, arguing and interjecting. She stated that she "could not stress enough how unpleasant and uncomfortable their behaviour made me feel". She believed that both claimants had mounted a personal attack, that the content was completely inappropriate and the manner was "excessively hostile".

Claimants continue to work following meeting until their suspension

55. The new structure took effect from 6 April 2021 and both claimants carried out their duties within the new structure.

Claimants suspended on full pay

56. On 7 April 2020 each claimant was invited to separate meetings attended by Mr Evans and Ms Burnell. They were both suspended. The suspension letters (which were read out and sent to the claimants) explained that the claimants were suspended and would be required to attend a disciplinary investigation meeting: "This action is based on information which has reached management regarding an incident on 3rd April 2020 where it is alleged that at the Scotland and Northern Ireland Hub team meeting you were insubordinate towards your line manager. It is also alleged that you acted in an aggressive and bullying manner. The team meeting had to be abandoned due to staff members being upset, it is alleged, due to your behaviour."

57. The letter explained that either claimant could call Ms Burnell directly if they wished to discuss the matter. Neither claimant did so.

58. The suspension was on full pay and remained in place until their dismissal.

59. On 8 April 2020 both claimants responded to their suspension by a joint communication to Mr Evans. The first and second claimant are (and were) partners. They stated that they refuted the allegations of insubordination/bullying and considered them vexatious and malicious. They said that: "we will not tolerate this either professionally or personally. We believe that the timing of this and the way this has been handled constitute

intimidation and victimisation“. The second claimant advised Ms Burnell that he would provide a contact email address to receive correspondence.

60. Both claimants remained on suspension until their employment was terminated. Their suspension was reviewed on a weekly basis by Mr Evans and Ms Burnell during weekly catch up meetings. As nothing materially had changed their suspension remained in place.

Investigation

61. Mr Lockhart was appointed to investigate the team meeting of 3 April 2020 and determine what, if any, action was needed. He was given the report from Ms Boyd that had been prepared just after the meeting together with the emails from Ms Dunn and Ms Alden-Gibson also sent shortly after the meeting.

62. On 9 April 2020 Mr Lockhart asked Ms Burnell to obtain written statements from each of the attendees at the team meeting to commence his investigation.

63. On 22 April 2020 Ms Burnell emailed the second claimant asking for an email address because she was unable to send correspondence to his home address and she had not received an alternate address.

64. On 27 April 2020 both claimants email Mr Evans jointly asking various questions and providing an alternative email contact address. They explained that no details of the allegation had been given to them, they noted that the stress had taken its toll, particularly on the first claimant given her health situation. Both claimant provided a list of 9 items they sought, including whether the meeting of 3 April was recorded, whether there was a minute of it, copies of the complaints, what investigations had taken place, account taken of the fact this was one of the first remote meetings and why the suspension had not been lifted.

65. On 29 April 2020 both claimants were sent a copy of the letter Mr Evans had sent to them on 9 April 2020. That letter stated that the suspension letter and

disciplinary policy was sent on 7 April after the suspension had been confirmed verbally which email had been acknowledged by both claimants. The claimants had been asked to raise any issue with Ms Burnell but they had not. The claimants had asked that they be contacted on an email address to be supplied but had at that stage not provided any forwarding email address. Due to lockdown postal communication was not possible. The letter explained that the suspension was for the reasons stated and that an investigation will take place where both claimants can set out their response and provide relevant evidence. The investigator would determine next steps.

66. Later on 29 April 2020, Ms Burnell invited the second claimant to attend an investigation meeting with Mr Lockhart on 4 May 2020 with the first claimant receiving an identical communication on 30 April 2020. The investigation meeting was to take place remotely given lockdown, or by correspondence if preferred. The purpose of the investigation was to fully understand the events around the 3 April 2020 meeting when it was alleged the claimants were insubordinate acting in an aggressive and bullying manner with the team meeting having to be abandoned due to staff members being upset. The disciplinary procedure was included with the invite letter.

67. The first claimant asked for the meeting to be rescheduled to provide her more time to prepare. She said that: “my strong preference would be for this investigation meeting to take place face to face. However I am prepared to accept teleconference as an alternative in the exceptional circumstances of Covid 19”. She said that she would contact Ms Burrell if she had any further questions prior to the investigation meeting.

Claimants ask for pause in process until face to face meetings are possible

68. On 4 May 2020 the claimants emailed Mr Evans jointly raising various points about the suspension. They noted a number of the requests were outstanding with regard to the investigation. The claimants referred to ACAS guidance during the pandemic and to the need to consider the well being of staff. The claimants considered suspension a gross overreaction and reiterated their

view that the complaints were vexatious and malicious and that they considered they were being victimised. They concluded:: *" The actions you have taken so far and the fact that we are being treated as if we have already been judged by our employer means we can have no faith in the "fairness" of the investigation process. The seriousness of our situation, considered along with the ACAS guidance referred to above, leaves us no other option than to request that no further action takes place until face to face meetings are possible"*.

69. Mr Evans responded to both claimants on 6 May 2020 to confirm the postponement of the disciplinary investigation process until face to face meetings were possible. He explained the consequences that this would have on the delay in completing the investigation, and that it remained the respondent's preference to proceed by remote meetings. He noted it would be in the interests of all parties to avoid delay. He also noted that they could contact HR for support if required and that the investigation would be fair. He also noted that both claimant remained suspended. If the claimants had evidence that the complaints were vexatious, malicious or unfair that should be brought to the investigator's attention.

70. Both claimants were advised that the investigation meeting scheduled to take place on 7 May 2020 had been cancelled.

Investigation continues

71. On 7 May 2020 Mr Lockhart interviewed Ms Boyd at length. She believed that both claimants had acted inappropriately during the meeting by discussing specifics and by bullying her. She considered their individual conduct to be unprofessional and unacceptable.

72. On 23 June 2020 Ms Burnell emailed both claimants to advise that the respondent would not be opening its offices until 1 September 2020 at the earliest. The respondent therefore offered the option of holding a remote investigation meeting. Ms Burnell also signposted where the claimants could access wellbeing support.

73. On 30 June 2020 both claimants responded stating that their "strong preference" for a face to face meeting remained unchanged.

74. Mr Lockhart also sought a written account of the meeting from those who were present at the meeting. Those staff submitted their accounts.

75. Ms Flanagan said her recollection was hazy. Several legitimate questions had been asked about the restructure by various team members. When the first claimant was saying something Ms Boyd interjected saying it was incorrect. There was an exchange between the second claimant (whom she said lived with the first claimant and they were sharing the same camera). He raised issues about his situation. Ms Flanagan believed the situation was "tense/uncomfortable" with voices slightly raised and people speaking over each other. Ms Gibson felt it was inappropriate and left and Ms Boyd appeared upset and ended the call.

76. Mr Williamson (the most experienced team member) said that the second claimant had outlined his serious concerns. Ms Boyd noted that issues as to his personal situation were not for general discussion at that meeting and she would speak with him offline. The first claimant contributed and expressed similar views to those of the second claimant. He noted that the second claimant had shouted at Ms Boyd and became more agitated repeatedly demanding answers. The first claimant "joined in, equally agitated and they continued to press Ms Boyd". They were speaking over each other. The meeting had become more and more uncomfortable and unpleasant for all and Ms Gibson said she was leaving. The claimants did not relent and Ms Boyd was clearly shaken by the aggressive nature of their contribution closed the meeting.

77. Mr McQueen said the second claimant had been the first to ask questions with others too, including the first claimant. He noted things escalated with the first claimant making comments which Mr McQueen felt was empathising with Ms Boyd but that may have been misconstrued. Ms Boyd said the issues were not for discussion at the meeting. The meeting had become more heated and there "was a bit of toing and froing" with the claimants. There were "obvious

tensions in the meeting" and a colleague interjected as she was uncomfortable and felt it was "totally inappropriate". Ms Boyd had become visibly upset and closed the meeting.

78. Ms McKenzie said that the second claimant had asked a number of questions which Ms Boyd did not consider appropriate as they related to individuals. The first claimant had made comments but Ms McKenzie could not make out what was being said as both claimants and Ms Boyd had been talking at once. Ms Gibson had said she was leaving as she felt it was inappropriate and left the meeting. Ms Boyd became visibly upset and closed the meeting.

79. Ms Matthews said questions had been asked during the meeting with the second claimant raising valid points. Ms Gunn had asked questions pointing out the difficulties she had with the changes and carrying for her son. The first claimant spoke and Ms Boyd interrupted her saying that 121s were private and should not be discussed. Ms Matthews said Ms Boyd cut the first claimant off again and raised her voice, pointing her finger to the screen. Ms Gibson said she was not listening to it and left the call. Ms Matthews said it looked like Ms Boyd was crying and ended the meeting.

80. Ms Low said the second claimant had used emotive language and Ms Boyd explained that his personal concerns should be dealt with off line. The second claimant raised issues about specific individuals. Ms Low felt there was "a bit of a rabble" with both claimants trying to speak. Ms Boyd tried to intervene but there was a lot of "rabbled talking". Both claimants were "ranting". The tone of the claimants voices were raised. There was "extremely bullying behaviour" by the claimants. Ms Boyd was trying to bring the meeting back under control. Ms Low felt the claimants should not have put their concerns to the full meeting given there were new agency workers on the call. Ms Gibson had said she felt extremely uncomfortable and left the meeting. Ms Boyd was upset and ended the meeting. Ms Low had never seen such behaviours from team members before.

81. Ms Gunn said the second claimant had raised issues first. The first claimant had raised issued and Ms Boyd had explained that she took responsibility for

the decisions. Ms Boyd explained that it was inappropriate to discuss private conversations. Staff had been talking over each other. Ms Gibson interjected saying it was inappropriate. Ms Gunn noted that Ms Boyd was visibly upset and began to cry and the call was ended.

82. Mr Lawrie said a number of staff had asked questions, first the second claimant and later the first claimant. He noted that the second claimant had been talking over Ms Boyd. Ms Gibson had interjected saying it was inappropriate and Ms Boyd had got upset and ended the meeting.

83. Mr Lamond said Ms Boyd had asked for questions and everyone except the claimants had accepted the position. The claimants had become very frustrated and became aggressive towards Ms Boyd. He believed it had become personal with the claimants being fairly aggressive. Ms Boyd tried to diffuse the situation but the claimants had become more irate. Ms Boyd was visibly upset and Ms Gibson ended the call with both claimants continuing to challenge Ms Boyd who ended the meeting visibly upset. Mr Lamond believed the claimant "acted unprofessionally allowing a personal feud to attack Ms Boyd's professionalism in front of the full team".

84. Ms Lambie (one of the newest team members and a temporary worker) said the second claimant had raised his concerns !quite vehemently" and that he believed he had been demoted. Ms Boyd had explained that was not something to be discussed at the meeting but the meeting had become increasingly uncomfortable. A discussion took place between Ms Boyd and the first claimant which Ms Lambie could not fully hear. Ms Lambie "genuinely felt sorry for Ms Boyd as she was close to tears and had to cancel the meeting abruptly", Ms Lambie felt it was bullying the way both claimants spoke to Ms Boyd. She could not understand why the meeting ended so "horribly" given she had got on well with all those involved.

Claimants lodge a grievance

85. The country had gone into lockdown from the end of March 2020. The respondent's offices were closed but work was being done by staff at home.

86. On 4 November 2020 both claimants submitted formal grievances to Mr Evans. Both claimants argued that there had been a failure to follow due process (as they believed their suspension had not been regularly reviewed), they had been victimised (as the outcome had been predetermined and the respondent had acted upon vexatious and malicious allegations) and the respondent had failed in their duty of care (by failing to address work related stress and failing to address "longstanding issues within the hub". The first claimant also alleged that during the meeting on 3 April Ms Boyd allegedly acted in an aggressive and bullying manner to her.

Attempt to convene a remote investigation meeting

87. On 17 November 2020 Ms Burnell emailed both claimants. She noted that the respondent was also concerned about the delays in the process. The disciplinary investigation would proceed in December remotely which had been agreed with the trade union. The purpose of the investigation meeting was to explore what had occurred during the team meeting on 3 April 2020 and whether both claimants had acted unprofessionally in an aggressive and bulling manner. The second claimant was invited to an investigation meeting on 8 December 2020 to discuss the disciplinary investigation and grievance. The letter noted that as the grievances arose out of the disciplinary process, submissions with regard to those matters should be made to the investigating officer.

88. Numerous attempts were made to seek to convene an investigation meeting in December 2020 with various dates proposed. Both claimants sought further information before agreeing to attend an investigation meeting. No meeting took place in December.

89. On 24 November 2020 both claimants responded to the communication of 17 November 2020. The claimants alleged that the grievance did not arise out of the disciplinary procedure but concerned "substantial and serious failings to follow due process". The claimants asked questions about the status of the meeting and the definition of terms used, including what "serious act of insubordination" meant. The letter concluded "pending a satisfactory

response from you on the matters raised, I am provisionally confirming I will attend the meeting for 8 December.

90. The claimants did not feel able to attend the meeting given the lack of a detailed response to the issues they had raised. The meeting was therefore postponed. A further invite was issued to both claimants on 9 December for a meeting on 17 December. The communication noted that the grievances relate to circumstances surrounding the suspension and process and that both the grievance and disciplinary matters can be considered together. There were 2 options available dealing with both together at the same meeting or dealing with them in consecutive meetings.

91. On 14 December 2020 both claimants wrote to the respondent arguing that they had done nothing to warrant suspension and the allegations of misconduct were vexatious and malicious and that they believed their guilt had already been assumed. The letter concluded: “once you have provided a satisfactory response to all of the above we can discuss how best to take matters forward. “

92. On 15 December 2020 the respondent advised both claimants that the terms of their communication of 14 December 2020 supported dealing with the disciplinary matter and grievance matters in separate meetings with the disciplinary investigation meeting to proceed the following day. Further information was provided to the claimants as requested by them.

93. Both claimants replied shortly following that email stating that: “the answers you have given today are inadequate as they give me no time to prepare for such a meeting”. The claimants reiterated what they had said in their previous letter that once a satisfactory response had been provided a discussion can take place how best to take matters forward.”

Claimants asked to provide a written account of the meeting

94. On 17 December 2020 Ms Burnell sent an email to both claimants noting the failure to attend the investigation meeting. Both claimants were asked to provide a written statement concerning their recollection of events at the team

meeting on 3 April 2020 by 24 December 2020. That request was repeated on 18 December 2020.

No written account provided but issues raised

95. On 24 December 2020 both claimants wrote to Ms Burnell disputing their non attendance at the investigation meeting which they say had been provisionally set without consultation. They did not provide a written account of the team meeting. By correspondence they continued to raise concerns about the process, including the failure to define "insubordination".

96. The respondent gave the claimants further dates for meetings noting they had confirmed that they would attend a remote meeting. The respondent advised that the normal dictionary definition of insubordination applied, namely defiance of orders or refusal to obey orders. The respondent also noted that the subject access request was being progressed by the relevant department.

Progressing investigation and grievances become a dignity at work issue

97. On 18 January 2021 both claimants confirmed that they would attend the disciplinary investigation and grievance meeting. They stated that they wish their grievance heard under the Dignity at Work policy.

98. On 26 January 2021 the claimants were advised that the disciplinary investigation will be heard on the same day as the dignity at work complaint and the meeting would progress on 10 February 2021. The letter set out the process to be followed and purpose of both meetings. The disciplinary investigation meeting would consider the conduct at the team meeting on 3 April 2020 and the dignity at work complaint meeting would consider the allegations of failure to follow due process, victimisation and breach of duty of care (with the additional allegation in respect of the first claimant of bullying and harassment).

Investigation meetings with claimants – 10 February 2021

99. On 10 February 2021 both claimants attended the investigation meetings with Mr Lockhart.

100. The first claimant said that she *"did absolutely nothing"* and that *"nothing happened … [she didn't] have anything to report"*. She considered it to have been a normal team meeting and said that she had not responded to Ms Boyd's presentation .

101. When asked about what the first claimant said, she said that she was *"talked over and didn't get the chance to say anything very much at all" and* her contribution lasted a matter of *"seconds"*. She attributed her lack of recollection to the fact that the events happened 10 months ago and could not remember anything specific (or out the ordinary).

102. The first claimant said her intervention (lasting a matter of seconds) was after 50 minutes and denied saying anything at all in the preceding 50 minute period. She could not recall how the meeting ended and said that there was no *"mood"* of the meeting. She could not recall the point that she wanted to make at the meeting because of the passage of time.

103. The second claimant said he had difficulty recalling what had been said because the incident had occurred 10 months previously which was a point he repeatedly made. The second claimant positively asserted that Ms Boyd did not appear annoyed but was *"perfectly calm"*. He denied being annoyed, and stated that he *"wasn't happy, wasn't unhappy"*. When asked whether he would describe it as a calm and civil conversation, he did not answer the question, and said that it was an *"ordinary team meeting"*. When asked about the mood or tenor of the meeting, he did not answer the question. He could not explain how the meeting ended, nor how the meeting came to an end.

104. Following the disciplinary investigation meeting, Mr Lockhart discussed the dignity at work issues with each claimant. On 16 February 2021 the first claimant attended a reconvened Dignity At Work Investigation meeting with Mr Lockhart. The second claimant attended a reconvened Dignity At Work Investigation meeting the following day.

Conclusion of investigation process

105. Mr Lockhart considered the material that had been before him. Having done so he prepared an investigation report. In that report he explained the timescales (and the reasons for the delays, including the pandemic and the claimants' initial insistence to have the meetings face to face) and the suspension. He set out the background following the meeting of 3 April 2020.

106. Mr Lockhart had interviewed Ms Boyd who had set out her position with regard to the behaviour of both claimants. She had felt humiliated and mortified and was really upset.

107. Each of the staff present at the meeting had provided written witness statements in addition to the statements provided immediately following the meeting.

108. Mr Lockhart noted that the statements were consistent. The second claimant had been the first to raise questions which had been considered by Ms Boyd to be inappropriate questions. The second claimant had pressed for answers and there was shouting with one member of the meeting leaving early and Ms Boyd ending the meeting prematurely being visibly upset.

109. Mr Lockhart noted that there was a high degree of consistency in the way witnesses described the first claimant's contribution to the meeting. It had been described as "outrageous constitutes bullying", an "unnecessary aggressive attempt to undermine", "excessively hostile" and a personal attack. Another described it as "aggressive". Another said she was "ranting" and her behaviour was "extremely bullying". He noted that two of the participants were temporary/agency staff who had only been with the team for a short period of time and one said she felt sorry for Ms Boyd and that the first claimant had bullied her.

110. Mr Lockhart noted that the first claimant found it difficult to respond as she did not understand the allegations against her given the perceived lack of definition of insubordination. She alleged she did not know what she was supposed to have done. She had maintained that nothing untoward had

occurred during the meeting and that she had done "absolutely nothing". The first claimant had believed her contribution had lasted a matter of seconds and she believed Ms Boyd had talked over her.

111. Mr Lockhart concluded that on the balance of evidence at the meeting on 3 April 2020 the first claimant had behaved in an aggressive and bullying way with the meeting being abandoned because of the upset caused which was due to the first claimant's behaviour which was specifically directed to Ms Boyd which was an act of insubordination in the sense of undermining her line manager. The consistency of the evidence presented supported the position.

112. With regard to the second claimant, Mr Lockhart noted that witnesses consistently described the second claimant's behaviour as "outrageous" "bullying", "wholly inappropriate", "aggressive", "undermining", " arguing and interjecting", "a personal attack", "excessively hostile", "getting more aggressive", "agitated", "demanding", "didn't relent", "bullying", "harassing", "vehement" and "unprofessional".

113. Mr Lockhart noted that the second claimant had difficulty recalling what had been said during the meeting and that he had found it difficult to defend the position without a definition of insubordination. The second claimant did not consider his behaviour was inappropriate and that the meeting ended at a natural break.

114. Mr Lockhart concluded that on the balance of evidence presented the second claimant had behaved in a way that was aggressive and bullying and that the meeting had to be abandoned because staff members were upset which was due to the second claimant's behaviour which appeared to be specifically directed at Ms Boyd which was insubordination in the sense of undermining his line manager. He believed there was sufficient evidence to substantiate the accounts from the witness statements given their consistency

Invite to disciplinary hearing

115. On 23 March 2021 Mr Evans sent an invitation to the second claimant to attend a disciplinary hearing before Mr McCarthy on 13 April 2021. He

provided the relevant papers with that letter, including the investigation report and all the evidence that had been obtained. The disciplinary allegations were that "on 3rd April 2020, at the Scotland and Northern Ireland Hub team meeting, you were insubordinate towards your line manager and you acted in an aggressive and bullying manner. The team meeting had to be abandoned and staff members were upset, due to your behaviour"

116. On 26 March 2021 Mr Evans sent an invitation to the first claimant to attend a disciplinary hearing on 20 April 2021 (attaching the associated papers, including the investigation report and evidence that had been obtained during the investigation).

Claimants seek independent adjudicator

117. On 25 March 2021 the second claimant sent a letter to the General Secretary requesting the case be passed to an independent external investigator. He believed that members of the management team were victimising him. An identical letter had been sent by the first claimant on 29 March 2021.

118. The General Secretary responded on 31 March 2021 stating that an independent disciplinary hearing officer had been appointed, Mr McCarthy, to deal with the disciplinary hearing. The fact that a complaint had been raised against Mr Evans did not stop him from signing the formal letter of invitation. The HR team would advise on the process but have no influence upon the outcome. There was no need for an external party to deal with matters.

Claimants raise complaints about process

119. On 2 April 2021 both claimants wrote to Ms Burnell acknowledging receipt of the disciplinary invite letter but said that the investigation process was "fundamentally flawed". The claimants said their participation in the process is "under protest and on a without prejudice basis" and requested information pursuant to a subject access request and other documents and information.

Claimants submit subject access requests

120. On 8 April 2021 both claimants submitted subject access requests. These were passed to the department dealing with such requests.

121. On 13 April 2021 both claimants sent a further communication to Mr Burnell acknowledging a response from the data protection officer. They stated that they believed the investigation process to be flawed "fatally undermining the independence and integrity of the process". They participation in the process remained "under protest and on a without prejudice basis". A list of 9 specific items was requested and the claimant stated that they were nit in a position to confirm attendance at a disciplinary hearing "until such time as the union and their legal officers revied the disclosure and provided advice".

122. Ms Burnell advised the claimants that any comments about the subject access request should be referred to the data controller and on 19 April 2021 Ms Burnell provided the claimants with a response to the issues raised. The respondent had provided all documents in their possession pursuant to the subject access request.

Second invite to disciplinary hearing issued

123. On 23 April 2021 Ms Burnell sent the first claimant a second invitation to attend a disciplinary hearing on 25 May 2021. The second claimant was sent her second invitation on 24 May 2020. The letters stated that the new date took account a reasonable amount of time for the claimants to prepare for the hearing. The hearing was in respect of alleged conduct on 3 April 2020 when the claimants were insubordinate towards their line manager acting in a bullying and aggressive manner with the team meeting being abandoned and staff members upset because of their behaviour.

124. The letter noted that the full information had been sent to the claimants in March 2021 which included witness statements. If the claimants had further evidence on which they wished to rely, that could be brought to the hearing. The claimants were asked to confirm which trade union representative or colleague would accompany them to the meeting. The letter also noted that the outcome could be dismissal.

Grievances

125. On 4 May 2021 both claimants submitted grievances about the handling of the disciplinary/grievance process. They alleged there was an excessive delay in dealing with their dignity at work complaint and that the disciplinary and dignity at work processes had been separated. They also believed serious allegations about senior managers had not been given the same weight as the allegations against the claimants. They asked that the disciplinary hearing proposed for 24 May 2021 be cancelled.

Third invite to disciplinary hearing issued

126. On 11 May 2021 Ms Burnell sent a third invitation to the second claimant to attend a disciplinary hearing on 16 June 2021. The first claimant was invited to attend a hearing on 15 June 2021.

Claimants raise further concerns over process

127. On 13 May 2021 the claimants' agent wrote to Ms Burnell raising concern over the length of the suspension, procedural issues and delays with the dignity at work report and grievance outcomes, failure to fully comply with the subject access request and requests the respondent respond to a discrimination questionnaire and exhaust the dignity at work and grievance processes before proceeding with the disciplinary hearing.

128. Mr Burnell replied to the claimants' agent letter on 20 May 2021 noting that her role was to facilitate the process rather than influence it, with the decision being taken by the relevant officers. She noted that the respondent was following government guidance with face to face meetings only where absolutely essential, with the respondent following the protocol that had been agreed with the GMB. The failure to offer a face to face meeting could be raised at the hearing. Reference was also made to the first claimant's disability and that no adjustments had been suggested. The grievance meetings were to proceed on 24 and 25 May 2021 with the disciplinary hearings proceeding on 15 and 16 June 2021. By that stage the claimants would have received the dignity at work outcome.

129. On 21 May 2021 the claimants' agent noted that the second claimant's dignity at work complaint had been rejected and he wished to exercise his right of appeal. He also noted that the dignity at work complaint was inextricably linked to the disciplinary process. He also stated that an occupational health referral would assist in respect of the first claimant.

Dignity at work complaint outcome

130. On 15 April 2021 Mr Lockhart had provided a draft of his dignity at work report to Ms Burnell to check procedure. She had made some comment in relation to the report which Mr Lockhart considered. The outcome was his decision and Mr Burnell had not influenced him with regard to the decision. He took time to reflect upon the details the claimants had raised and the information before him

131. On 24 April 2021 Ms Burnell wrote to both claimants advising that the outcome in respect of the dignity at work complaint would be issued the following week.

132. Mr Lockhart's report in respect of the dignity at work complaints by both claimants were considered by Mr O'Connor who was Head of Bargaining .

133. On 21 May 2021 Mr O'Connor issued his outcome, rejecting the second claimant's dignity at work complaint. The complaint was rejected. Mr O'Connor concluded that there was no merit in any of the complaints. He agreed with the recommendations that had been made with regard to future issues. The second claimant was given the right to appeal.

134. Mr O'Connor report was based upon the investigation that had been undertaken by Mr Lockhart who had produced a report. Mr Lockhart had considered the complaints by the claimant, the interview with the second claimant and associated correspondence together with an interview with Ms Burnell and additional documents provided. All documents considered were attached to the report.

135. Mr Lockhart's report was detailed and thorough. He noted that the second claimant believed he was being treated less favourably compared to others

and that there was a lack of transparency and inequality of opportunity. The second claimant believed the treatment he had received had occurred over a number of years and culminated in his suspension which he considered to be vexatious and victimisation. He believed his suspension had been unnecessarily prolonged.

136. With regard to the failure to regularly review the suspension whilst it was not formally reviewed his suspension was kept under review on a regular basis. He did not consider there to be a failure to keep in touch but recommended a more formal system of so doing. Mr Lockhart found that the respondent did respond quickly and appropriately to questions raised and that there was no evidence that the allegations were vexatious or malicious. There was also no evidence that the outcome of the disciplinary investigation was predetermined.

137. Mr Lockhart found that the second claimant had been suitably updated and made a number of recommendations. There was nothing inappropriate with regard to how the claimant's absence had been taken into account. The complaints in the letter of concern had been given the chance to put their concerns forward.

138. On 4 June 2021 Mr O'Connor issued his written decision in respect of the first claimant's dignity at work complaint which he rejected. He considered the material before him, including the detailed report from Mr Lockhart.

139. Mr Lockhart's report was detailed and thorough. He examined what the first claimant had told him together with the correspondence he had been given and the responses he had obtained from the respondent. He was satisfied the decision to suspend the first claimant had been kept under regular review. While there was some gap in correspondence there was adequate contact as between the respondent and the first claimant. He considered that the respondent had responded quickly and appropriately to issues raised by the first claimant.

140. Mr Lockhart found no evidence that the allegations leading to her suspension were vexatious or malicious or that the outcome of the disciplinary investigation was predetermined. He was also satisfied sufficient support was given to the first claimant and made some recommendations. He was also satisfied the first claimant's health had been taken into account, noting that at no point had any adjustments been sought. He was satisfied the signatories to the letter of concern had been given the opportunity to set out their position. Finally he had not been presented with any evidence to suggest Ms Boyd's behaviour had any impact upon the first claimant's disability.

141. On 21 May 2021 the first claimant's agent wrote to Ms Burnell suggesting that an occupational health referral in respect of the first claimant would assist matters. That had been suggested by the Ms Burnell on 20 May 2021 to see if any adjustments were needed "going forward" (noting that no adjustments had been suggested prior to this point).

142. On 3 June 2021 Ms Burnell advised the claimants' agent that, as requested, the grievance meetings due to take place on 24 and 25 May for both claimants were postponed. Any issues with regard to delay could be raised at the disciplinary hearing. As the claimants' agent believed the dignity at work issues were inextricably linked the dignity at work appeal would be considered before the disciplinary hearing. Ms Burnell stated that a member of HR would be in touch with the first claimant with regard to an occupational health referral.

143. On 11 June 2021 the claimants' agent noted that as Covid19 restrictions were being "rescinded" a face to face meeting would be preferred. He also noted that an occupational health referral in respect of both claimants would be of assistance.

144. The reason why the claimants had sought a face to face meeting was solely because both claimants understood the seriousness of the matter and that their employment was at risk. In no sense whatsoever was the request to have the meetings face to face connected to the first claimant's disability.

145. On 17 June 2021 Ms Burnell confirmed to the claimants' agent that the dignity at work appeal would proceed before the disciplinary hearing. With regard to face to face meetings, while some restrictions regarding Covid 19 had been lifted, Government advice remained to work from home where possible and the respondent's offices were not opening until September 2021 at the earliest. The disciplinary and grievance meeting would take place remotely on 3 and 4 August 2021. She noted that contact would be made with the first claimant regarding an occupational health referral but it was unclear why a referral would assist for the second claimant. Next steps would be the dignity at work appeal and then disciplinary hearing. Any issues, including in respect of the grievance, could be raised at the disciplinary hearing.

146. On 25 June 2021 the claimants' agent wrote to Ms Burnell noting that he was preparing for the hearings but a number of requests for information were still outstanding. That included detail in respect of the subject access request with around 13 requests. He also asked for a reconsideration of the decision not to have face to face meetings as some staff had been given access to the office and asked the occupational health referrals be progressed.

Dignity at work appeal not progressed

147. On 30 June 2021 the claimants' agent submitted a dignity at work appeal for the second claimant advising that the document was password protected. Various requests were made to both claimants to provide the password. They do not provide it and Mr Watson was unable to access the document which was said to include an appeal.

148. The claimants' agent advised Mr Watson on 6 July 2021 that the password would only be provided once sufficient responses had been received to their outstanding requests.

149. On 13 July 2021 Mr Watson responded noting that as there had been no reply by the extended deadline of 12 July 2021 and as the password to allow the document had not been provided, the matter would be considered closed.

Further disciplinary hearing invite

150. On 12 July 2021 Ms Burnell sent the first claimant a fourth invitation to attend the disciplinary hearing on 4 August 2021 and set out options regarding dealing with the grievance issues.

Process continues

151. On 13 July 2021 the respondent sent the claimant a proposed Occupational Health referral document for her to check and sign.

152. On 15 July 2021 the claimants' agent advised Ms Burnell that the claimants were losing confidence in the respondent's ability to progress fairly. It was argued that Ms Burnell should not be involved as she had been referred to in the complaint. It was also noted that the claimants were "not yet in a position to accept the invites" for 3 and 4 August 2021 as further procedure would determine matters.

Further grievances lodged

153. On 21 July 2021 the claimants' agent lodged further grievances on behalf of both claimants. He noted that Ms Burnell was named and that the claimants had limited confidence in the respondent's ability to deal with the matters fairly and objectively and so ACAS early conciliation had been activated. Both grievances were dated 18 July 2021 and asserted bullying, harassment, victimisation and disability discrimination.

Progressing the issues

154. On 27 July 2021 Ms Burnell advised the claimants' agent that there was no reason to further delay the disciplinary hearings and that they would proceed on 3 and 4 August (whether or not the claimants choose to attend). She reminded the claimants that there were no dignity at work appeals outstanding.

155. On 29 July 2021 the claimants' agent noted his disappointment that the matter was proceeding which the claimants considered to be discriminatory. He anticipated fit notes being submitted and the hearings being postponed until the claimants' health improved.

156. On 2 August 2021 Ms Burnell responded to the claimants' agent's correspondence noting no fit note had been received and reminding the claimants of the advisory service if needed. She confirmed that the disciplinary hearings would be postponed until a judgment was made as to their progress.

Hearings postponed again due to illness

157. On 4 August 2021 Ms Burnell acknowledged fit notes that the claimants had provided and noted the disciplinary hearings had been postponed 4 times already on 20 April 2021, 25 May 2021, 15 June 2021 and 4 August 2021. The incident took place on 3 April 2020. She stated: "The respondent must give serious consideration to how to progress the disciplinary hearing. We must consider the health of our members of staff, the fit note and the impact of further delay on the claimant's health. Also, the seriousness of the allegations of misconduct and the impact of delay on the other staff affected by the allegation. We consider it is in the best interest of both respondent and staff members concerned if matters are resolved without further delay".

158. She stated that after due consideration the hearings would be delayed until 3 September 2021 (for the first claimant) and 31 August 2021 (for the second claimant) with no further delays. The claimants' agent was asked for suggestions to facilitate attendance. It was noted that one option would be for written representations to be provided. The claimants would be treated in the same way as other members of staff with the meetings held remotely.

Stress risk assessments submitted

159. On 18 August 2021 the claimants submitted stress risk assessment questionnaires. These documents would be considered by the respondent when a return to work was imminent to assist the return to work process.

Progressing to a fifth disciplinary hearing

160. On 18 August 2021 the claimants' agent responded to the communication of 4 August 2021 stating that disciplinary hearings were postponed because

relevant information had not been supplied, grievances should be concluded first and the employers approach was hampering the claimants' recovery from ill-health. On the same day the first claimant submitted her amended Occupational Health referral to HR together with a disability discrimination questionnaire, which the respondent completed and returned to the claimant.

161. On 19 August 2021 Ms Burnell sent the second claimant a fifth invitation to attend a disciplinary hearing for 31 August 2021, setting out options regarding addressing the grievance which could be raised at the hearing.

Further postponement

162. On 31 August 2021 the claimants' agent emailed Mr McCarthy seeking a further postponement of the disciplinary hearing as the claimants had been certified as unfit to attend work and that documents were still outstanding.

163. On 1 September 2021 Ms Burnell confirmed that the claimants' disciplinary hearing scheduled to proceed would be postponed.

164. On 8 September 2021 Ms Burnell advised that the disciplinary hearings for both claimants would be convened in the last week of September.

165. On 8 September 2021 Ms Burnell sent the second claimant a sixth invitation to disciplinary hearing on 29 September 2021. She also enclosed a copy of Twitter post dated 31 August 2021 and set out proposals in respect of the grievances to ensure the claimants were able to raise these matters. The first claimant was invited to attend a disciplinary hearing on 28 September 2021.

166. The reason why Mr McCarthy decided the hearing in respect of the claimants would proceed, despite their health position was because he believed the allegations were potentially very serious and the disciplinary process itself was the cause of their ill health such that delaying a resolution was likely to exacerbate their health concerns. Given the interrelation between the cause of the ill health and the procedure, it could only be resolved by proceeding with the hearing, rather than being postponed indefinitely. Mr McCarthy also considered that the respondent owed a duty of care not just to the claimants

but to other staff who were involved in the process, in particular those who had provided written statements. He also considered that the respondent had shown remarkable tolerance and patience in adjourning the hearings on five previous occasions and both claimants were on full pay. It was not reasonable in his considered opinion to maintain the status quo given the facts.

167. Mr McCarthy also considered that the position had been explained in clear terms to both claimants that there was a need to progress the hearing, and they were specifically invited to make suggestions to facilitate their attendance, or participation in the process, or the provision of written representations. Nothing tangible had been forthcoming in response to this invitation. There was no evidence before Mr McCarthy that suggested the claimants' health position was likely to improve in the near future or at all and he was concerned allowing further delay could be adverse to their health.

168. In light of the position Mr McCarthy determined that it was not reasonable to delay the position further.

Second claimant's twitter post

169. The Twitter post the second claimant had issued on 31 August 2021 contained the following text: " Up early on Tuesday and prepared for all the day will throw my way. I have spent my whole adult life fighting injustice and shouting on behalf of those whose voice is rarely heard. Stand up for what is right. Shine a light on hypocrisy and expose quislings where you see them."

Issues as to hearings and process

170. On 28 September 2021 the claimants' agent sought a postponement of the first claimant's hearing on 28 September 2021. He argued that the claimant continued to be unfit to attend. He noted that the occupational health referral was outstanding and that the allegations were misconceived, not competently investigated and unproven. He also argued documents were outstanding as were grievances.

171. The request was denied 30 minutes after receipt explaining that the issues arising should be referred to at the hearing. The claimants' agent replied stating that proceeding was against his advice and the claimant was unfit for work and unable to attend the hearing.

Disciplinary hearings for each claimant – September 2021

172. On 28 September 2021 the first claimant's disciplinary hearing took place attended by Mr McCarthy, Mr Lockhart and Ms Burnell. Mr McCarthy noted the first claimant's agent's email earlier that day and his response and confirmed that he had decided to proceed. Mr McCarthy considered the evidence and asked Mr Lockhart questions in connection with the witnesses and material that had been provided including the claimant's response.

173. Later that day the first claimant's agent provided a fit note and asked about the outcome of the hearing and was advised that a response would be provided at a meeting within 10 days with a written outcome issued.

174. The second claimant's disciplinary hearing was held on 29 September 2021 with the same attendees and again Mr McCarthy asked Mr Lockhart questions in connection with the investigation and the second claimant's response.

175. On 29 September 2021 Ms Burnell emailed the claimants' agent confirming that the respondent had not been informed that neither the claimant's agent nor the first claimant would not be attending and so the hearing had proceeded.

Occupational health referral comments

176. On 29 September 2021 the HR team within the respondent had contacted the first claimant with further comments on the occupational health referral. The referral was ultimately not progressed given the ongoing disciplinary hearing and the decision that it was in the interest of the claimants (and other staff) to avoid further delay. Mr McCarthy concluded that the fit note that had been submitted dealt with the health position of each claimant.

Outcome of disciplinary process

177. On 11 October 2021 Mr McCarthy produced the disciplinary outcome in respect of both claimants separately. The decisions were framed in similar terms. The decision was detailed and thorough and was the result of Mr McCarthy's detailed consideration of each claimant's position individually and the evidence before him.

178. In relation to the first claimant, the outcome letter ran to 14 pages examining in detail the investigation that had been carried out and the procedure that had been followed. His analysis was detailed and focussed and covered the procedural points that had arisen (including the issue with regard to grievances raises and the desire to delay the process further) and the substantive issues (considering in detail the investigation and what he considered the first claimant had done and why).

179. He concluded that he believed the first claimant had committed an act of serious insubordination at the team meeting on 3 April 2020 and accepted the evidence of Ms Boyd and other witnesses that the first claimant's behaviour amounted to bullying, and she had sought to undermine her manager in front of the Scotland and Northern Ireland Hub and two temporary agency workers.

180. He noted that Boyd said that the first claimant's behaviour during the meeting left her feeling humiliated, and "mortified" that this exchange had taken place in front of all the staff, including staff who were on short term agency contracts. Ms Boyd said that she felt undermined, that whilst the first claimant's contribution may not have been a pre-meditated attempt to undermine her it certainly had that effect. Beyond that Ms Boyd said that it was upsetting, that she was "really upset", and that the incident was "the worst thing that's happened at work."

181. He continued that instead of recognising that her insubordinate and bullying behaviour was wholly inappropriate and seeking to apologise, the first claimant continued to act in an insubordinate manner throughout the disciplinary process. The first claimant has consistently shown a lack of respect for the disciplinary process finding procedural ways to delay the

process, failing to give a credible account of her behaviour at the team meeting, making fatuous arguments about definitions.

182. At the investigation hearing she claimed she could not remember what had happened at the team meeting on 3 April 2020, her behaviour was not inappropriate and that it was a normal meeting and ended in the usual way. He concluded this evidence is not credible and an attempt to mislead the investigation officer.

183. He noted that the first claimant had shown no contrition for her actions and provided no explanation which could provide a reason or mitigation for why she behaved in an insubordinate and bullying way. PCS had a zero-tolerance approach to bullying. He found the public undermining of a newly appointed, young, female manager particularly unacceptable.

184. In short he concluded that the evidence showed that on the balance of probabilities at the team meeting 3 April 2020 the first claimant was insubordinate towards her line manager and she acted in an aggressive and bullying manner. The first claimant had shown no contrition but continued to act in an insubordinate manner. There was been a breach of trust. The first claimant's actions caused irreversible damage to the relationship of confidence and trust with the respondent and her actions made it impossible to allow her to remain working. He concluded the first claimant had committed a serious act of insubordination and the disciplinary penalty should be at level 4: dismissal with notice.

185. In relation to the second claimant the outcome letter ran to 15 pages examining in detail the investigation that had been carried out and the procedure that had been followed. His analysis was detailed and focussed and covered the procedural points that had arisen (including the issue with regard to grievances raises and the desire to delay the process further) and the substantive issues (considering in detail the investigation and what he considered the second claimant had done and why).

186. He concluded that the second claimant committed an act of serious insubordination at the team meeting on 3 April 2020 and accepted the evidence of Ms Boyd and other witnesses that the second claimant's behaviour amounted to bullying, and seeking to undermine his manager in front of the Scotland and Northern Ireland Hub and two temporary agency workers.

187. He noted that Ms Boyd said that second claimant's behaviour during the meeting left her feeling humiliated, and "mortified" that this exchange had taken place in front of all the staff, including staff who were on short term agency contracts. Ms Boyd said that she felt undermined, that whilst the second claimant's contribution may not have been a pre-meditated attempt to undermine her it certainly had that effect. Beyond that Ms Boyd said that it was upsetting, that she was "really upset", and that the incident was "the worst thing that's happened at work."

188. He said that instead of recognising that the second claimant's insubordinate and bullying behaviour was wholly inappropriate and seeking to apologise, the second claimant continued to act in an insubordinate manner throughout the disciplinary process. The second claimant was found to have consistently shown a lack of respect for the disciplinary process; finding procedural ways to delay the process, failing to give a credible account of his behaviour at the team meeting, making fatuous arguments about definitions.

189. Mr McCarthy noted that at the investigation hearing the second claimant claimed he could not remember what had happened at the team meeting on 3 April 2020, his behaviour was not inappropriate and that it was a normal meeting and ended in the usual way. Mr McCarthy concluded this evidence was not credible and an attempt to mislead the investigation officer.

190. He noted that on 31 August 2021, ahead of the disciplinary hearing, where the second claimant faced an allegation of insubordination and aggressive and bullying behaviour (which included shouting) towards a newly appointed young female manager, the second claimant continued his insubordination and bullying behaviour on Twitter. Given the nature of the allegations it was

hard to imagine a more inappropriate Twitter post. He found that the second claimant's Twitter post strongly suggested the second claimant and or his representative had misrepresented his fitness to attend the disciplinary process in order to frustrate and delay the process. The second claimant and his representative failed to inform him that they would not attend the hearing.

191. He reasoned that the second claimant had shown no contrition for his actions and provided no explanation which could provide a reason or mitigation for why he behaved in an insubordinate and bullying way. There was a zero-tolerance approach to bullying, and he found the public undermining of a newly appointed, young, female manager particularly unacceptable.

192. In short he found that the evidence showed that on the balance of probabilities at the team meeting 3 April 2020 the second claimant was insubordinate towards his line manager and he acted in an aggressive and bullying manner. The second claimant had shown no contrition but continued to act in an insubordinate manner. There has been a breach of trust. The second claimant's actions caused irreversible damage to the relationship of confidence and trust. Those actions made it impossible for the respondent to allow him to remain working for the respondent. He found the second claimant had committed a serious act of insubordination and the disciplinary penalty should be at level 4: dismissal with notice.

193. Mr McCarthy had considered the evidence and concluded that the claimants were individually guilty of gross misconduct. The witness statements were generally consistent, noting the way in which the meeting had progressed and the approach of both claimants, with the meeting having to be ended with Ms Boyd being upset. He concluded that the claimants were each guilty of gross misconduct. He concluded each claimant committed an act of serious insubordination at the meeting on 3 April 2020 and that the claimants' behaviour, considered individually, amounted to bullying, undermining the manager in front of other staff. He took into account this had been supported by the statements of staff with lengthy service as well as temporary staff, neither of whom had any reason not to tell the truth.

194. On 15 October 2021 Mr Evans issued written confirmation of termination of both claimant's employment with notice. That letter attached the disciplinary report which set out the reasons for dismissal. The claimants had been found to have been insubordinate to their line manager having acted in an aggressive and bullying manner at the team meeting on 3 April 2020. That had been corroborated by those present including 2 agency workers. The bullying and insubordinate behaviour led to the meeting being abandoned. Even with the witness statements no remorse was shown. The respondent had a zero tolerance approach to bullying and the claimants' actions were considered to have caused irreversible damage to the relationship of trust and confidence making it impossible to continue to employ the claimants.

Appeal against dismissal

195. On 18 November 2021 the claimants' agent submitted an appeal against dismissal for both claimants. In addition to enclosing the grounds of appeal the letter stated that: "I can also re-confirm that my members remain too unwell to attend in person and request the attached be considered to support their appeal. I would be grateful for confirmation of safe receipt and that the attached be considered at the forthcoming hearings."

196. The claimants' appeal argued that the contractual disciplinary policy had not been followed. This was in part alleged to be because the investigation failed to establish facts on the balance of probabilities. The appeal document noted that a significant proportion of witness evidence contradicted the investigator's preferred version of events. It was also unfair as the hearing proceeded despite the claimant being certified as unfit to work. A fair process had not been followed due to no alternative duties being offered during suspension and there had been inconsistency in treatment.

197. Suspension had not been reviewed regularly and the dignity at work complaint had not been fairly considered. In that regard the respondent had failed to act on serious allegations about Mr Evans and a number of grievances had remained outstanding. It was also alleged that those dealing with the matters

had not been sufficiently trained to deal with the processes and those hearing the matters were involved in the process.

198. It was also alleged to be unfair due to proceeding without seeking the input of the occupational health practitioner (as to securing advice about the claimants' fitness to attend) and without identifying risks to health and safety. Documents had been outstanding and face to face meetings should have been allowed.

199. Other mitigation had not been considered including length of service, It was argued that dismissal should be rescinded.

Appeal hearings convened

200. The appeal hearing was heard by Mr Watson. The appeal hearings took place on 24 November 2021. Neither claimant attended the hearing. They had been certified as unfit to work due to work-related stress and Mr Watson proceeded with both hearings in the absence of the claimants. Mr McCarthy was present at both hearings as was Ms Burnell. Mr Watson asked Mr McCarthy questions about the disciplinary hearing and issues arising. The claimants had provided all the issues they wished to be considered in writing.

Outcome of appeal process

201. On 9 December 2021 Mr Watson issued his appeal outcome rejecting both appeals. His decisions were fully reasoned and thorough. He had considered each of the claimant's position individually and the evidence before him, comprising the investigation and disciplinary material. His reasoning ran to 13 pages and he examined each ground of appeal thoroughly.

202. He noted that it was alleged that he was not an appropriate person to hear the appeal as it was alleged he had previously involvement in the case and was not trained in appeals and was named in a previous grievance. He noted that the policy was that a senior official hear the appeal which was what he was. He had no previous involvement in the process. While had been the appeal officer in the dignity at work matter, the appeal had not progressed.

He had not been given any notice of being subject of a grievance and while he had not specific training in hearing appeals he had extensive experience in dealing with complex complaints and in natural justice and fair hearings.

203. With regard to the first point of appeal, failure to carry out a fair investigation, he considered the evidence in detail. He noted that with only one exception the witness statements supported Mr Lockhart's conclusion. The statements were consistent in describing aggressive behaviour, shouting and upset displayed by Ms Boyd. He found that the partial quotation in the appeal submission did not provide evidence to reach the opposite conclusion. The decision of Mr McCarthy was a reasonable one to reach.

204. The second ground of appeal was that the disciplinary policy had not been followed by not thoroughly investigating matters. Mr Watson concluded that the appeal submission did not take into account the context of each statement and the outcome and findings were correct on the evidence presented.

205. The third ground of appeal was a failure to follow the policy in proceeding to hear the matter when the claimants were unfit. The policy stated that if an employee was unfit the hearing should have been suspended until medically fit. Mr Watson explained that he had asked why Mr McCarthy considered it in the interests of the claimants to proceed with the hearings. He explained that since the illness led the claimants to be unfit and the illness was caused by the disciplinary process, the only way to resolve matters was to progress the disciplinary hearings. It would not be fair to delay mattes indefinitely. The Twitter post of the second claimant suggested the claimant was fit to attend the hearing.

206. Mr Watson concluded that Mr McCarthy had faced a genuine dilemma. The specific provisions of the policy created a vicious circle whereby the illness caused by the disciplinary process including suspension would lead to indefinite delay of the disciplinary process which would cause more illness and in turn more delay. Proceeding to hear the matter was a reasonable response to a potentially intractable problem.

207. The next ground of appeal was failing to offer alternatives to suspension. Both claimants had remained on full pay and there was a concern about the seriousness of the allegations and impact on other staff if the claimants were to return to work. The decision to suspend the claimants was not considered to be inappropriate and did not undermine the fair process.

208. It was argued that the claimants were treated inconsistently to another case. The case relied upon was different from the present case.

209. With regard to the argument that the suspension was punitive and disproportionate much of the delay had been caused by the claimants and there had been material reasons for the absence of specific reviews.

210. The next ground of appeal related to the dignity at work process which Mr Watson noted was a separate process to the disciplinary process. He also noted that the allegation that the discrimination questionnaire had not been responded to was wrong as he had been advised a response had been sent.

211. The next ground of appeal related to allowing Mr Evans to be involved in the process despite alleged serious concerns having been raised. These were matters dealt with by the dignity at work complaint and no appeal had been progressed. This was not something about which Mr Watson had prior knowledge.

212. It was also argued that the grievance process should have been completed prior to the disciplinary process as they were “inextricably linked”. Mr McCarthy had advised Mr Watson that the claimants had been given the opportunity to present to him any issues they wished. A separate meeting had been offered but the claimants had not taken the respondent up on those offers.

213. It was also argued that those hearing matters had not been properly trained and that independent persons had not been identified. As no appeal against the dignity at work outcome had taken place Mr Watson had not been involved in matters. Mr Lockhart was an experienced and senior member of staff and

as with Mr Watson was supported by HR to ensure procedures were followed correctly.

214. The next ground of appeal related to the failure to await the occupational health intervention. Mr Watson noted that the fit notes specified work related stress. The decision was taken to proceed given the impact delay had upon the claimants' wellbeing. It was reasonable to proceed on that basis.

215. The next ground of appeal argued that the stress assessment had been ignored and proceedings continued despite failing to follow contract, failing to follow the ACAS Code failing to hear grievances and refer to occupational health. With exception of the contractual point regarding proceeding when unfit, the policy was followed properly. The ACAS Code was also followed. The claimants were given adequate opportunity to raise their grievances and the fit notes avoided the need for an occupational health report.

216. With regard to the assertion the process progressed without fully responding to the subject access request, Mr Watson explained that he had been advised the subject access request had been fully complied with.

217. The next ground of appeal was the decision to progress with a remote hearing, and not face to face. The respondent's offices were closed at the material times and access had to be operationally essential. A face to face meeting would require travel which was contrary to Government guidance at the time.

218. It was argued that new information had been included following the dismissal but no further information was provided to allow that ground of appeal to be considered. The claimants had been given all information that was taken into account and had the chance to make their representations.

219. With regard to the alleged failure to consider mitigation including length of service, Mr McCarthy explained he took into account the service of both claimants. He did not fail to consider the information before him.

220. Mr Watson concluded that it was regrettable that neither claimant attended the appeal hearing nor did their representative. He explained that he considered all the information before him, including the witness statements, dismissing officers reasons and each of the points raised by both claimants. None of the points the claimants raised in their appeal was upheld.

221. The only issue that was of merit was the breach of the clause within the disciplinary policy that suggested the hearing should not proceed until the fit note supported it. Mr Watson said he considered the repeated delays to the process and the efforts of the respondent to accommodate the claimants over a long period of time combined with the fact the claimants' illness were caused by the process and there was a danger of indefinite delays if the process was postponed for that reason. The breach of the contract was not in itself a sufficient reason to uphold the appeal .

222. Mr Watson concluded that the witness statements clearly supported Mr McCarthy's decision. The claimants' selective quotation from the statements in an attempt to claim the behaviour they were accused of did not happen was considered by him to be a particularly egregious example of their continuing insubordination . The claimants' continued denials of any misconduct and lack of contrition and mitigation for their behaviour supported the decision that both claimants had committed a serious act of insubordination that dismissal with notice should be the outcome.

223. Both claimants were informed of the outcome on 10 December 2021 with their last day of employment having been 15 October 2021.

Post employment earnings

224. Following their employment ending, neither claimant had been able to secure alternative work. They remained unfit to work as at the Tribunal hearing.

Findings for the purposes of contribution

225. The Tribunal is able to make the following findings in respect of the conduct of each claimant from the evidence that was led before it.

226. At the team meeting on 3 April 2020 the first claimant acted in an aggressive and bullying fashion in undermining her temporary manager in front of her colleagues. Her actions were such that the meeting required to be terminated early and her temporary line manager was visibly upset as a result of her actions.

227. At the team meeting in April 2020 the second claimant acted in an aggressive and bullying fashion in undermining his temporary manager in front of his colleagues. His actions were such that the meeting required to be terminated early and his temporary line manager was visibly upset as a result of his actions.

Observations on the evidence

228. This was not a case in which there were material factual disputes for the purposes of the claims. We were satisfied that each of the witnesses sought to provide evidence to the best of their recollection.

229. The Tribunal was able to make finding in respect of what occurred on the day in question from the evidence led before it. The Tribunal was satisfied that the respondent's conclusions were in fact what had occurred on the day.

230. The Tribunal found the witness statement evidence to have produced a clear and high degree of consistency as to key facts. The unprompted statements from staff with different positions supported this. It was very significant that neither claimant expressly suggested those who had provided a statement were not telling the truth. While the second claimant suggested in cross examination that there may have been some ulterior motive (such as having gained from the temporary promotion) the Tribunal did not consider that to have materially affected the ability of those individuals to provide a truthful statement. It did not give a reason for such individuals to misrepresent what each claimant had done at the team meeting.

231. From the Tribunal's detailed analysis of the evidence presented, which included the communications presented very shortly following the meeting in question and each of the claimant's responses, the Tribunal was satisfied that

both claimants had been guilty of the conduct alleged and that they had exhibited bullying behaviour and undermined their manager at the meeting.

232. The Tribunal did not consider the claimants' position in relation to the events on 3 April 2020 to be credible. Their position was that the meeting was essentially a normal team meeting. The first claimant alleged her involvement was minimal and the second claimant said the meeting ended at a natural break. The Tribunal did not find the claimants' evidence to be credible and reached the same conclusion that was reached by Mr Lockhart, Mr McCarthy and Mr Watson, based on the evidence led before the Tribunal (which was identical to the evidence before the respondent).

Law

Unfair dismissal

233. The Tribunal has to decide whether the employer had a reason for the dismissal which was one of the potentially fair reasons for dismissal within section 98(1) and (2) of the Employment Rights Act 1996 and whether it had a genuine belief in that reason. One of the potentially fair reasons is for matters relating to "conduct". The burden of proof here rests on the respondent who must persuade the Tribunal that it had a genuine belief that the employee committed the relevant misconduct and that belief was the reason for dismissal.

234. Once an employer has shown a potentially fair reason for dismissal within the meaning of section 98(2), the Tribunal must go on to decide whether the dismissal for that reason was fair or unfair which involves deciding whether the employer acted reasonably or unreasonably dismissing for the reason given in accordance with section 98(4).

235. Section 98(4) provides that the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer): "Depends on whether in the circumstances (including the size and administrative rescores of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing

the employee; and shall be determined in accordance with equity and the substantial merits of the case."

236. What a Tribunal must decide is not what it would have done but whether the employer acted reasonably; **Grundy (Teddington) Ltd v Willis HSBC Bank Plc (formerly Midland Bank plc) v Madden** 2000 ICR 1283. It should be recognised that different employers may reasonably react in different ways and it is unfair where the conduct or decision making fell outside the range of reasonable responses. The question is not whether a reasonable employer would dismiss but whether the decision fell within the range of responses open to a reasonable employer taking account of the fact different employers can equally reasonably reach different decisions. This applies both to the decision to dismiss and the procedure adopted.

237. Mr Justice Browne-Wilkinson in his judgement in **Iceland Frozen Foods Ltd v Jones** ICR 17, in the Employment Appeal Tribunal, summarised the law. The approach the Tribunal must adopt is as follows:

    i. "The starting out should always be the words of section 98(4) themselves

    ii. In applying the section, a Tribunal must consider the reasonableness of the employer's conduct, not simply whether they (the members of the Tribunal) consider the dismissal to be fair

    iii. In judging the reasonableness of the employer's conduct, a Tribunal must not substitute its decision as to what was the right course to adopt

    In many (though not all) cases there is a band of reasonable responses to the employee's conduct which in which the employer acting reasonably may take one view, another quite reasonably take another. The function of the Tribunal, as an industrial jury, is to determine whether in the circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which the reasonable employer

might have adopted. If the dismissal falls within the band the dismissal is fair, it is falls outside the band it is unfair."

238. In terms of procedural fairness, the (then) *House of Lords in* **Polkey v AE Dayton Services Ltd** 1988 ICR 142 *f*irmly establishes that procedural fairness is highly relevant to the reasonableness test under section 98(4). Where an employer fails to take appropriate procedural steps, the Tribunal is not permitted to ask in applying the reasonableness test whether it would have made any difference if the right procedure had been followed. If there is a failure to carry out a fair procedure, the dismissal will not be rendered fair because it did not affect the ultimate outcome; however, any compensation may be reduced. Lord Bridge set out in this case the procedural steps which an employer in the great majority of cases will be necessary for an employer to take to be considered to have acted reasonably in dismissing: "in the case of misconduct, the employer will normally not act reasonably unless he investigates the complaint of misconduct fully and fairly and hears whatever the employee wishes to say in his defence or in explanation or mitigation."

239. Where the employer relies on conduct as the fair reason for dismissal, it is for the employer to show that misconduct was the reason for dismissal. According to the Employment Appeal Tribunal in **British Home Stores v Burchell** 1980 ICR 303 the employer must show:

1. It believed the employee guilty of misconduct

2. It had in mind reasonable grounds upon which to sustain that belief

3. At the stage at which that belief was formed on those grounds it had carried out as much investigation into the matter as was reasonable in the circumstances.

4. The employer need not have conclusive evidence of misconduct but a genuine and reasonable belief, reasonably tested. The burden of proof is on the employer to show a fair reason but the second stage of reasonableness is a neutral burden. The Tribunal must be satisfied that the employer acted fairly and reasonably in all the circumstances

in dismissing for that reason, taking account of the size and resources of the employer, equity and the substantial merits of the case.

240. In some limited cases it may be permissible for Tribunals to "look behind" the stated reason for dismissal. In **Jhuti v Royal Mail** 2020 ICR 731 the Supreme Court held that in general Tribunals should focus upon the reason given by the decision maker, subject to exceptions, such as where someone in the hierarchy of responsibility above the employee determines that for one reason the employer should be dismissed but that reason is hidden behind an invented reason which the decision maker adopts. In those exceptional cases it is the Tribunal's duty to look beyond the invented reason. The Supreme Court noted that instances of decisions to dismiss in good faith, not just for a wrong reason, but or a reason which the employee's line manager has dishonestly constructed, will not be common.

241. In **Ilea v Gravett** 1988 IRLR 487 the Employment Appeal Tribunal considered the Burchill principles and held that those principles require an employer to prove, on the balance of probabilities that he believed, again on the balance of probabilities, that the employee was guilty of misconduct and that in all the circumstances based upon the knowledge of and after consideration of sufficient relevant facts and factors he could reasonably do so. In relation to whether the employer could reasonably believe in the guilt, there are an infinite variety of facts that can arise. At one extreme there will be cases where the employee is virtually caught in the act and at the other extreme the issue is one of pure inference. As the scale moves more towards the latter, the matter arising from inference, the amount of investigation and inquiry will increase. It may be that after hearing the employee further investigation ought reasonably to be made. The question is whether a reasonable employer could have reached the conclusion on the available relevant evidence.

242. In that case the Employment Appeal Tribunal upheld the Tribunal which found that the employer had not investigated the matter sufficiently and therefore did not have before them all the relevant facts and factors upon which they could reasonably have reached the genuine belief they held. The sufficiency

of the relevant evidence and the reasonableness of the conclusion are inextricably entwined.

243. The amount of investigation needed will vary from case to case. In **Gray Dunn v Edwards** EAT*/324/79* Lord McDonald stated that "it is now well settled that common sense places limits upon the degree of investigation required of an employer who is seized of information which points strongly towards the commission of a disciplinary offence which merits dismissal." In that case the Court found that further evidence would not have altered the outcome as the employer had shown that they would have taken the same course even if they had heard further evidence. That was a case which relied upon the now superseded **British Labour Pump v Byrne** 1979 IRLR 94 principle but emphasises that the amount of investigation needed will vary in each case. Thus in **RSPB v Croucher** 1984 IRLR 425 the Employment Appeal Tribunal held that where dishonest conduct is admitted there is very little by way of investigation needed since there is little doubt as to whether or not the misconduct occurred.

244. A Tribunal in assessing the fairness of a dismissal should avoid substituting what it considers necessary and instead consider what a reasonable employer would do, applying the statutory test, to ensure the employer had reasonable grounds to sustain the belief in the employee's guilt after as much investigation as was reasonable was carried out. *In* **Ulsterbus v Henderson** 1989 IRLR 251 the Northern Irish Court of Appeal found that a Tribunal was wrong to find that in certain circumstances a reasonable employer would carry out a quasi-judicial investigation with confrontation of witnesses and cross-examination of witnesses. In that case a careful and thorough investigation had been carried out and the appeal that took place involved a "most meticulous review of all the evidence" and considered whether there was any possibility that a mistake had been made. The court emphasised that the employer need only satisfy the Tribunal that they had reasonable grounds for their beliefs.

245. Where there are defects in a disciplinary procedure, these should be analysed in the context in which they occurred. The Employment Appeal Tribunal emphasised in **Fuller v Lloyds Bank** 1991 IRLR 336 that where there is a procedural defect, the question to be answered is whether the procedure amounted to a fair process. A dismissal will normally be unfair where there was a defect of such seriousness that the procedure itself was unfair or where the result of the defect taken overall was unfair. In considering the procedure, a Tribunal should apply the range of reasonable responses test and not what it would have done (see **Sainsburys v Hitt** 2003 IRLR 23).

246. The Court in **Babapulle v Ealing** 2013 IRLR 854 emphasised that a finding of gross misconduct does not automatically justify dismissal as a matter of law since mitigating factors should be taken into account and the employer must act reasonably. Length of service can be taken into account (**Strouthous v London Underground** 2004 IRLR 636).

247. In considering a claim for unfair dismissal by reason of conduct, the Tribunal is required to consider the terms of the ACAS Code of Practice on Disciplinary and Grievance matters. This sets out what a reasonable employer would normally do when considering dismissal by reason of conduct. This includes conducting the necessary investigations, inviting the employee to a meeting, conducting a fair meeting, issuing an outcome letter and allowing an appeal. Where a grievance has been raised during the process, it may be appropriate to pause the process and deal with the grievance or to deal with matter concurrently.

248. The reasonableness of the decision to dismiss is scrutinised at the time of the final decision to dismiss – at the conclusion of the appeal process (**West Midland v Tipton** 1986 ICR 192). This was confirmed in **Taylor v OCS** 2006 IRLR 613 where the Court of Appeal emphasised that there is no rule of law that only a rehearing upon appeal is capable of curing earlier defects (and that a mere review never is). The Tribunal should consider the disciplinary process as a whole and apply the statutory test and consider the fairness of the whole disciplinary process. If there was a defect in the process,

subsequent proceedings should be carefully considered. The statutory test should be considered in the round.

Compensation

249. Where a claimant has been unfairly dismissed compensation is awarded by way of a basic award (calculated as per section 119 of the Employment Rights act 1996) and a compensatory award, per section 123 of the Employment Rights Act 1996 ("the 1996 Act"), being such amount as is just and equitable so far as attributable to action taken by the employer.

Basic award

250. This is calculated in a similar way to a redundancy payment. The basic award is subject to reduction where the conduct of the employee before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to do so (section 122(2) Employment Rights Act 1996).

Compensatory award

251. This must reflect the losses sustained by the claimant as a result of the dismissal. In respect of this award it may be appropriate to make a deduction under the principle derived from the case of **Polkey**, if it is held that the dismissal was procedurally unfair but a fair dismissal would have taken place had the procedure followed been fair. That was considered in **Silifant v Powell** 1983 IRLR 91, and in **Software 2000 Ltd v Andrews** 2007 IRLR 568, although the latter case was decided on the statutory dismissal procedures that were later repealed. The case of **Ministry of Justice v Parry** 2013 ICR 311 is relevant too. The Tribunal must consider all the circumstances in deciding whether it is able to assess the chance of a fair dismissal (see **Frew v Springboig St John's School** UKEATS/0052/10). Further, if an employer wishes to advance a **Polkey** argument, it should be supported by evidence (**Compass v Ayodele** 2011 IRLR 802).

Reduction of the awards

252. The Tribunal may separately reduce the basic and compensatory awards under sections 122(2) and 123(6) of the Act respectively in the event of contributory conduct by the claimant but the tests are different.

253. Guidance on the amount of compensation was given in **Norton Tool Co Ltd v Tewson [1972] IRLR 86**. In **Nelson v BBC (No. 2) 1979 IRLR 346** it was held that in order for there to be contribution the conduct required to be culpable or blameworthy and included "perverse, foolish or if I may use a colloquialism, bloody minded as well as some, but not all, sorts of unreasonable conduct." Guidance on the assessment of contribution was also given by the Court of Appeal in **Hollier v Plysu Ltd [1983] IRLR 260**, which referred to taking a broad, common sense view of the situation, in deciding what part the claimant's conduct played in the dismissal. The Employment Appeal Tribunal proposed contribution levels of 100% (employee wholly to blame), 75% (employee mainly to blame), 50% (employee and employer equally to blame) and 25% (employee slightly to blame). That was not, however, specifically endorsed by the Court of Appeal and there is no reason a Tribunal has to follow these guidelines as they are a matter of common sense. The more serious and obviously 'wrong' an employee's conduct, the higher the deduction is likely to be.

254. A Tribunal should also consider whether there is an overlap between the **Polkey** principle and the issue of contribution (**Lenlyn UK Ltd v Kular UKEAT/0108/16).**

255. Thus, if the Tribunal finds that the employee has, by any action, caused or contributed to his dismissal, it shall reduce the amount as it considers just and equitable. There need be no causal connection between the dismissal and the conduct when a Tribunal considers a reduction to the basic award.

256. A deduction for contributory fault under s 123(6) can be made only in respect of conduct that persisted during the employment and which caused or contributed to the employer's decision to dismiss. It follows that the employee's conduct must be known to the employer prior to the dismissal.

257. In **Nelson v BBC (No 2)** [1979] IRLR 346 the Court of Appeal said that three factors must be satisfied for the tribunal to find there to be contributory conduct. The first of these is that the conduct must be culpable or blameworthy. The second is that it must have caused or contributed to the dismissal. The third is that it must be just and equitable to reduce the award by the proportion specified.

258. In **Steen v ASP Packaging Ltd** [2014] ICR 56 the Employment Appeal Tribunal stated that the application of those sections to any question of compensation arising from a finding of unfair dismissal requires a Tribunal to address the following: (1) it must identify the conduct which is said to give rise to possible contributory fault; (2) having identified that it must ask whether that conduct is blameworthy—the answer depends on what the employee actually did or failed to do, which is a matter of fact for the Tribunal to establish and which, once established, it is for the Tribunal to evaluate; (3) the Tribunal must ask for the purposes of section 123(6) of the Employment Rights Act 1996 if the conduct which it has identified and which it considers blameworthy caused or contributed to the dismissal to any extent. If it did cause or contribute to the dismissal to any extent then the Tribunal moves on to the next question; (4) this is to what extent the award should be reduced and to what extent it is just and equitable to reduce it. It will likely be an error of law if the Tribunal simply states its conclusion as to contributory fault and the appropriate deduction for it without dealing with these four matters. The court said that there is no need to address these matters at any greater length than is necessary to convey the essential reasoning and of its nature a particular percentage or fraction by which to reduce compensation is not susceptible to precise calculation but the factors which held to establish a particular percentage should be, even briefly, identified.

259. In **Steen** a finding of 100% contributory conduct was said to be an unusual finding but a permissible finding. A Tribunal should not simply assume that because there is no other reason for the dismissal therefore 100% contributory fault is appropriate. It may be the case but the percentage might

still require to be moderated in the light of what is just and equitable: see **Lemonious v Church Commissioners** UKEAT/0253/12.

260. If a claimant has received certain benefits, including Job Seeker's Allowance (as in this case), the Employment Protection (Recoupment of Jobseeker's Allowance and Income Support) Regulations 1996 apply. This means that the respondent must retain a portion of the sum due until the relevant Government department has issued a notice setting out what the claimant is to be paid and what is to be refunded to the Government.

Discrimination arising from disability

261. Section 39(2)(c) of the Equality Act 2010 prohibits discrimination against an employee by dismissing him. Section 15 of the Act reads as follows:-

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

262. Paragraph 5.6 of the Equality and Human Rights Commission Code of Practice ("the Code") provides that when considering discrimination arising from disability there is no need to compare a disabled person's treatment with than of another person. It is only necessary to demonstrate that the unfavourable treatment is because of something arising in consequence of the disability.

263. To succeed under section 15, the following must be made out:

(a) there must be unfavourable treatment (which the Code interprets widely saying it means that the disabled person 'must have been put at a disadvantage' (see para 5.7)).

(b) there must be "something" that arises in consequence of the claimant's disability;

(c) the unfavourable treatment must be because of (i.e. caused by) the something that arises in consequence of the disability; and

(d) the alleged discriminator cannot show that the unfavourable treatment is a proportionate means of achieving a legitimate aim.

266. Useful guidance on the proper approach was provided by Mrs Justice Simler in the well-known case of **Pnaiser v NHS England** 2016 IRLR 170:

> *"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. 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*."

267. As to justification, in paragraph 4.27 the Code considers the phrase "a proportionate means of achieving a legitimate aim" (albeit in the context of justification of indirect discrimination) and suggested that the question should be approached in two stages:- is the aim legal and non-discriminatory, and one

that represents a real, objective consideration? If so, is the means of achieving it proportionate – that is, appropriate and necessary in all the circumstances?

268. As to that second question, the Code goes on in paragraphs 4.30 – 4.32 to explain that this involves a balancing exercise between the discriminatory effect of the decision as against the reasons for applying it, taking into account all relevant facts. It goes on to say the following at paragraph 4.31: "*although not defined by the Act, the term "proportionate" is taken from EU directives and its meaning has been clarified by decisions of the CJEU (formerly the ECJ). EU law views treatment as proportionate if it is an "appropriate and necessary" means of achieving a legitimate aim. But "necessary" does not mean that the [unfavourable treatment] is the only possible way of achieving a legitimate aim; it is sufficient that the same aim could not be achieved by less discriminatory means."*

269. The Code at paragraph 4.26 states that *"it is for the employer to justify the provision, criterion or practice. So it is up to the employer to produce evidence to support their assertion that it is justified. Generalisations will not be sufficient to provide justification. It is not necessary for that justification to have been fully set out at the time the provision criterion or practice was applied. If challenged, the employer can set out the justification to the Employment Tribunal."*

270. In **Chief Constable v Homer** 2012 ICR 704 Baroness Hale stated that to be proportionate a measure has to be both an appropriate means of achieving the legitimate aim and reasonably necessary in order to do so. She approved earlier authorities which emphasised the objective must correspond to a real need and the means used must be appropriate with a view to achieving the objective and be necessary to that end. It is necessary to weigh the need against the seriousness of the detriment.

271. The question is whether the action is, objectively assessed, a proportionate means to achieve a legitimate end. The employer has to show (and the onus is on the employer to show) that the treatment is a proportionate means of achieving a legitimate aim. The Tribunal can take account of the reasonable needs of the respondent's business but the Tribunal must make its own

judgment as to whether the measure is reasonably necessary. There is no room for the range of reasonable response test.

272. The Tribunal is required to critically evaluate, in other words intensely analyse, the justification set out by the employer. The assessment is at the time the measure is applied and on the basis of information known at the time (even if the employer did not specifically advert to the justification position at that point). Flaws in the employer's decision-making process are irrelevant since what matters is the outcome and now how the decision is made.

273. There must firstly be a legitimate aim being pursued (which corresponds to a real need of the respondent), the measure must be capable of achieving that aim (ie it needs to be appropriate and reasonably necessary to achieve the aim and actually contribute to pursuit of the aim) and finally it must be proportionate. The discriminatory effect needs to be balanced against the legitimate aim considering the qualitative and quantitative effect and whether any lesser form of action could achieve the legitimate aim.

274. Chapter 5 of the Code contains useful guidance in applying the law in this area and the Tribunal has had regard to that guidance.

Reasonable adjustments

275. Section 39(5) of the Equality Act 2010 provides that a duty to make reasonable adjustments applies to an employer. Further provisions about that duty appear in sections 20 and 21 and Schedule 8. Paragraph 20 of Schedule 8 states: "A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know, … that an interested disabled person has a disability and is likely to be placed at the disadvantage". This is considered in chapter 6 of the Code.

276. The importance of a Tribunal going through each of the constituent parts of section 20 was emphasised by the Employment Appeal Tribunal in **Environment Agency v Rowan** 2008 ICR 218 and reinforced in **Royal Bank of Scotland v Ashton** 2011 ICR 632.

277. As to whether a "provision, criterion or practice" ("PCP") can be identified, the Code at paragraph 6.10 says the phrase is not defined by the Act but "should be construed widely so as to include for example any formal or informal policy, rules, practices, arrangements or qualifications including one off decisions and actions". The question of what will amount to a PCP was considered by the Employment Appeal Tribunal in **Nottingham City Transport Limited v Harvey** UKEAT/0032/12 and **Ishola v Transport for London** [2020] EWCA Civ 11.

278. For the duty to arise, the employee must be subjected to "substantial disadvantage in comparison to a person who is not disabled" and with reference to whether a disadvantage resulting from a provision, criterion or practice is substantial, section 212(1) defines "substantial" as being "more than minor or trivial". The question is whether the PCP has the effect of disadvantaging the disabled person more than trivially in comparison to those who do not have the disability *(***Sheikholeslami v University of Edinburgh,** 2018 IRLR 1090*).*

279. The obligation to take such steps as it is reasonable to have to take to avoid the disadvantage is one in respect of which the Code provides considerable assistance, not least the passages beginning at paragraph 6.23 onwards. A list of factors which might be taken into account appears at paragraph 6.28 and includes the practicability of the step, the financial and other costs of making the adjustment and the extent of any disruption caused, the extent of the employer's financial or other resources and the type and size of the employer.

280. Paragraph 6.29 makes clear that ultimately the test of the reasonableness of any step is an objective one depending on the circumstances of the case. It is for the Tribunal to assess this issue. Examples of reasonable adjustments in practice appear from paragraph 6.32 onwards.

Submissions

281. Both parties had prepared written submissions and were given the chance to comment upon each other's submissions in addition to making oral submissions. The Tribunal is grateful to both parties for taking the time to do so and for fairly refining the issues in dispute. The parties submissions were fully taken into account and the relevant submissions are set out below as appropriate when considering each issue.

Discussion and decision

282. The Tribunal considered the parties' submissions in detail together with the evidence that was provided to the Tribunal orally and in writing. The Tribunal was able to reach a unanimous decision. We shall approach each issue in turn.

Unfair dismissal: The reason for the dismissal

283. The first issue is to determine what the reason for the dismissal was. We considered each claimant's position separately. We are satisfied that the reason why each claimant was dismissed, the set of facts or beliefs that caused the respondent to dismiss each claimant, related to conduct, namely how each claimant had acted at the team meeting on 3 April 2020.

284. In his submissions the claimants' agent argued that there was another reason for the claimant's dismissal. In this regard the claimant's agent relied upon excerpts of the witness statements that had been obtained during the investigation process. In the list of issues the claimant's agent states that the real reason for the dismissals was the "raising of workplace concerns".

285. The claimants' agent noted that Mr Lawrie said there had been discussion between Ms Boyd and the first claimant. That Ms McKenzie noted the second claimant had asked questions and the first claimant had made her position known and then both claimants and Ms Boyd were all talking at once. Mr MacQueen had said that the second claimant was empathising with Ms Boyd and there was "toing and froing". Ms Matthews said the second claimant made valid points and when the second claimant spoke Ms Boyd interrupted her, pointed her finger into the screen and raised her voice. Ms Flanagan said

legitimate questions had been asked and when the second claimant made a contribution she said something that Ms Boyd had disagreed with and Ms Boyd interjected to say that what Cheryl was saying was incorrect. Finally he noted Ms Gunn said there had been questions asked.

286. The Tribunal carefully considered the statements that had been provided and the evidence of Mr Lockhart and Mr McCarthy in particular. The Tribunal was satisfied the reason why the claimants were dismissed was solely as a result of the claimants' conduct and for no other reason. The fact not all the witness statements were absolutely clear in saying the claimants had been guilty of the conduct found did not result in the reason for the claimants' dismissal being something other than conduct when viewed in the context of the process as a whole. The Tribunal does not uphold the claimants' agent's submission that the real reason was raising workplace concerns.

287. The claimants' agent submitted that the claimants agreed that a team meeting took place on the 3rd April 2020 and that some witnesses subsequently raised concerns about their conduct. However, the claimants deny that their conduct at the meeting was the reason for their dismissal as the respondent claims. It was submitted that witness evidence regarding the meeting on the 3rd April which form the basis of the dismissals was highly contradictory and the Tribunal was invited to conclude that dismissing officer cannot have had a reasonable belief in the Claimants were guilty of misconduct.

288. By reference to **Jhuti**, the claimants' agent submitted that the dismissing manager sought to justify the claimants' dismissal on grounds of conduct by relying only on the information known to him at the point of dismissal rather than what was actually known to the respondent at a corporate level. The claimants' agent argued that key facts and documents were withheld from the dismissing manager, specifically the outstanding grievances, occupational health referrals and stress risk assessments.

289. The respondent's agent submitted that **Jhuti** had no relevance or application given the facts of this case. There was no evidential basis for the assertion that some other person was involved in or directed the claimants' dismissal or

that there was some other reason for the claimants' dismissal. The respondent's agent submitted that if it were alleged that there was an invented reason for the dismissal, that would permeate not just decision maker's reasoning but each person who had provided a witness statement that supported the decision to dismiss. Any worker who had provided a statement that was unhelpful to the claimants must, if the claimants' analysis was correct, have been coerced or pressured to do so or there must have been some suggestion that the statements were not accurate. On the facts of this case there was no evidence of that and the claimants both stated that the authors of the witness statements had not told mistruths or had any specific reason to misrepresent what had occurred during the team meeting.

290. The respondent's agent noted that the evidence provided to the investigator had not been challenged and the assertion that there was an invented reason with someone in "senior management" directing dismissal was speculation only with no factual basis.

291. The Tribunal upholds the respondent's agent's submission in this regard. The Tribunal having carefully analysed the evidence before it did not uphold the claimants' agent's submission that the reason for the claimants' dismissal was something other than conduct. The Tribunal considered the evidence that had been provided carefully and found no basis for the claimants' submission.

292. The respondent's agent also submitted that it was not accepted that the respondent had withheld any documents from Mr McCarthy or Mr Watson. The grievances, occupational health assessment and risk assessment were not matters that were directly relevant to the allegation. The claimants had each been given an opportunity to set out what occurred. Each of the claimant stated they had done nothing wrong. The grievances, stress assessment and occupational health position did not have a bearing on what the evidence was in respect of what had happened on the day in question given the claimants' position that they had done nothing wrong. The Tribunal considered that submission to be meritorious.

293. The dismissing officer and appeal officer were clear and credible and the Tribunal was clearly satisfied that the reason for dismissal of each claimant was matters relating to conduct.

294. The claimants' agent argued it was "senior management" who was seeking to have the claimant dismissed. We found no evidence to support that contention. The reason for each of the claimant's dismissal was conduct, a potentially fair reason.

Did the respondent genuinely and reasonably believe in the guilt of each claimant

295. From the evidence presented to the Tribunal, the respondent held a genuine belief, on an honest basis, that the claimants were separately guilty of conduct at the team meeting on 3 April 2020 that justified each of their dismissals.

296. The Tribunal found the evidence of Mr McCarthy particularly compelling. He had analysed the investigation material that had been provided in detail. He had considered what each of the claimants said individually. He was clearly satisfied that both claimants had been guilty of gross misconduct at the meeting. He genuinely and honestly believed in the claimants' guilt. That was upheld upon appeal when Mr Watson considered all the evidence and concluded that Mr McCarthy was correct in his decision.

297. The Tribunal was satisfied that each claimant's position was considered individually and in detail. The evidence was analysed properly and fully and the respondent concluded that each claimant had been separately guilty of conduct that justified their individual dismissals.

Investigation

298. The next question was whether or not the respondent had arrived at their conclusion following as much investigation as was reasonable in all the circumstances. The Tribunal concluded that the investigation in respect of each individual claimant was reasonable.

299. The Tribunal considered the claimants' agent's argument that individuals should have been spoken to rather than their written statements considered. While some reasonable employers would have done so we concluded that an equally treasonable employer could have followed the procedure in this case.

300. There were a number of reasons for this.

301. Firstly the information that had been obtained very shortly following the meeting in question supported the conclusion that the investigator reached.

302. Secondly as Mr McCarthy set out in his response to questions in cross examination there was a very high level of consistency from each of the witness statements with regard to key aspects of the meeting, including the fact that an employee had interjected and Ms Boyd had been visibly upset. The specific information provided had been unprompted and was consistent.

303. Thirdly neither claimant had suggested that any of the witnesses were not telling the truth. There was no suggestion, for example, that any of the colleagues who had been clear as to the bullying nature of each claimant were seeking to unfairly misrepresent the position for a nefarious purpose. Neither claimant suggested any of their colleagues were not telling the truth. Given that position it was reasonable for Mr Lockhart and Mr McCarthy and Mr Watson to accept the evidence from those individuals. It was entirely possible that had others been asked more specific questions, they may well have confirmed what the other witnesses had said. Simply because a colleague had not stated the specifics of what had happened with regard to both claimant's conduct did not mean they supported the claimants' position. It was open to the claimants to produce any evidence that supported their position. They had not done so. The approach taken in this case was reasonable.

304. Finally both claimants were unable to fully recall what they said or did during that meeting during the disciplinary process. We considered that surprising given both claimants were able to recall significantly more details during their giving evidence to the Tribunal. Given the claimants were unable to recall anything specific it was not unreasonable for the investigation to focus upon

the very clear position that emerged from the written statements and what had been disclosed very shortly following the meeting.

305. The investigation that was followed in this case was fair and reasonable. While the claimants had argued that the complaints that had been made were malicious and false and that they had been victimised there was no proper basis for such an assertion. They were given a full opportunity to present their case during the disciplinary process (whether in person or otherwise). Their appeal submission did not provide any basis to challenge the general theme that had emerged from the evidence, and instead had taken some comments from the statements out of context. There was no suggestion the claimants had not been able to raise any substantive points about their dismissals and no issue they had raised had been omitted in the appeal officer's decision.

306. We considered carefully the position of each claimant during their dignity at work complaints and did not find any support for the assertion that had that information been fully taken into account, the outcome would have been any different. The claimants had put their case to the respondent in full via their appeal and those points were fully taken into account,

307. The investigation (and procedure that was adopted) fell within the range of responses open to a reasonable employer facing the facts of this case.

Specific challenges to the dismissal

Adequacy of investigation

308. The first specific challenge to the fairness of the dismissal related to the alleged failure of the respondent to correctly and fairly apply the disciplinary policy, particularly with regard to clauses 3.5 (full investigation), 6.1 (fair investigation), 8.3 (proceeding while medically unfit) and clause 8.4 (not terminating suspension).

309. The claimants' argent argued that the disciplinary investigation was not carried out fully and fairly both to the dismissing officer and again to the appeal officer. Clauses 3.5 requires the matter to be fully investigated and clause 6.1

requires the investigation to be fair. The claimants' agent argued that it was unreasonable in not interviewing all witnesses taking into account the size and resources of the organisation, the lack of consistency amongst the accounts and the respondent's status as a trade union meaning that "it should hold itself to the highest standards". The claimants' agent argued that put simply less than half of those present supported the allegations and it was unreasonable to prefer that evidence. At least one witness said the first claimant was empathetic.

310. The respondent's agent argued that the respondent is required to conduct a sufficient investigation into the alleged misconduct. The adequacy of the investigation should be adjudged by the yardstick of the standards of a reasonable employer. Although an employer must conduct a fair investigation, this falls short of requiring it to embark, upon a forensic or quasi-judicial investigation.

311. The respondent's agent argued that the Dignity at Work grievances raised in November 2020 which were investigated by Mr Lockhart were at best a distraction from the issues the Tribunal has to consider because the grievances raised did not specifically engage with how the claimants are alleged to have behaved on 3 April 2020, and the disciplinary allegations that they faced. The Tribunal accepts that submission. The claimants had been given a number of opportunities to set out their position during the disciplinary process - at an investigation meeting, disciplinary hearing and appeal. The claimants' position was that the meeting had been relatively uneventful and they had done nothing wrong. The first claimant believed she had contributed little (within a few seconds) and the second claimant said it was a normal meeting albeit he struggled during the process to recall what had happened. The respondent had clear evidence supporting the allegations in respect of each claimant separately and absent a reason to disbelieve that evidence, there was no reason why a reasonable employer would (or should) do more.

312. The respondent's agent argued that the respondent undertook a reasonable, fair and proportionate investigation into what happened at the team meeting.

Written statements were obtained from everyone who attended and in accordance with normal practice, written statements were asked for rather than interviewing each and every witness. Mr Lockhart had interviewed Ms Boyd and both claimants which was proportionate.

313. The respondent's agent noted that each witness who reported inappropriate behaviour did so unprompted – each were invited to give their account of what happened. Where a witness described bullying or aggressive behaviour, this was in response to an open invitation for evidence rather than being led to give evidence in support of any particular allegation. Finally there was no other witness who could have provided evidence as to what happened on 3 April 2020.

314. The claimants had given the respondent no evidence to require further investigation. The evidence given by Mr McCarthy in particular was compelling. He had forensically examined each of the witness statements and concluded, reasonably, that the evidence presented was broadly in agreement. Nobody had in fact said the claimants had not acted inappropriately as such. At no stage had either claimant suggested the witnesses were not telling the truth or misrepresenting the position.

315. From the evidence presented and given the context it was reasonable for the respondent to rely upon the written evidence that had been presented and to reach the conclusions they did. Mr Lockhart sought to be fair and gave the claimants the opportunity to add anything else they wished to add. The respondent's agent argued that given both claimants had a clear disciplinary record and had not been suspended before being suspended after a team meeting would have been something both claimants would have thought long and hard about. It was human nature to do so. Further given both claimants were partners and living together it was likely they would have spoken about it. The lack of recollection particularly by the second claimant of the meeting itself during the process given he gave very detailed evidence of all of the issues he had with team suggested he had not been credible during the

process in saying the meeting was not eventful and that he could not recall what happened.

316. The Tribunal considered that the respondent had carried out a reasonable investigation given the context of this case. The evidence was properly tested and a reasonable conclusion was reached. There were numerous accounts from those with different service, none of whom were said by the claimants to have misrepresented the position.

317. While the claimants' agent argued the respondent was subject to a higher standard, being a trade union, the law requires that the respondent act reasonably and fairly (as does the respondent's policy). The Tribunal was satisfied that the respondent did act fairly and reasonably with regard to the process undertaken and the investigation was that carried out.

Investigation reports

318. We considered, in assessing the fairness of the process, the reports that were obtained and the investigation that was undertaken. Mr Lockhart's investigation reports and evidence obtained relating to the disciplinary allegations were enclosed with the disciplinary invite letters sent to the claimants. Mr Lockhart's role was to determine whether or not there was a case to answer. He was not required to make definitive or exhaustive findings of fact. The respondent's agent argued the Tribunal should accept that there was more than ample evidence to support his conclusion that there was a case to answer in respect of both claimants. It was clear that something untoward occurred. Virtually all of the written statements referred to Ms Gibson (a relatively junior member of the Team) stating that something inappropriate had happened, and that she logged off the call as a result. All of the written accounts refer to Ms Boyd being upset, visibly upset, or tearful when she brought the meeting to a close. Four of the written statements made express (and unprompted) explicit reference to *"bullying"* behaviour" and Ms Boyd complained that their undermining behaviours *"violated [her] dignity"* – another way of describing bullying. Finally although not using express epithets of bullying, two others gave evidence as to the hostility directed

towards Ms Boyd at the meeting: Mr Lamond referred to *"aggressive"* behaviour and that they had mounted an *"attack"* on their manager and Mr Williamson refers to shouting and that Ms Boyd was shaken by the *"aggressive nature"* of their contributions.

319. The Tribunal accepted that from the evidence before the respondent, the approach that was taken was one which a reasonable employer could adopt. The fact another equally reasonable employer may have gone further did not alter the fact that this employer on the facts before the Tribunal acted fairly and reasonably in their approach to the allegations. That was a decision reached applying the industrial experience of the Tribunal.

320. The respondent's agent also noted that Mr Lockhart was concerned as to whether or not both claimants were being truthful in their accounts. Ms Boyd had described the meeting as the "worst meeting in her life". The fact the most experienced team member (Mr Williamson) chimed with the account given by one of the agency workers, Ms Lambie, (who had only been in the Team for a few months and who got on well with everyone) supported the conclusion reached. That was a significant reason why Mr McCarthy concluded it was reasonable to reach the conclusion he did. The Tribunal agrees.

321. The respondent's agent noted that both claimants were suspended within a matter of days of the team meeting and it was not a case of suspension taking place as a result of the discovery of a historical incident. They are bound to have ruminated over what happened at the meeting such as to cause their suspension. The claimants were likely to have discussed the matter and remembered more than they said at the time.

322. The respondent's agent argued that the Tribunal should accept there was no need to conduct further interviews. Both claimants accept that at no stage did they suggest that any witness was being dishonest or was lying. They both sought to rely upon the witness evidence (selectively) in their appeal submission. Neither raised any suggestion that any particular witness had prepared a misleading account because of some improper motivation. Mr McCarthy had stated that even if an allegation had been made against any

one person, this would not have altered the analysis given the balance of the evidence before him. Finally both claimants had months to challenge the witness accounts and did not. There was nothing to justify further interrogation of the witness evidence. The Tribunal upholds those submissions.

323. In all the circumstances the approach taken to the investigation was reasonable. The approach of the claimants to highlight parts of certain witness statements did not support the assertion the other evidence was incorrect or that the respondent acted unreasonably in reaching the conclusion that it did. Mr McCarthy had analysed the evidence that was obtained in great detail and reached a reasonable conclusion on the facts of this case.

324. From the information before the respondent the Tribunal finds that there was no breach of clauses 3.5 or 6.1 of the policy and that the investigation was full and fair.

Failure to follow policy

325. A key part of the claimants' agent's submissions was that the respondent has failed to follow its contractual disciplinary policy and this was because the respondent was hiding behind an invented reason for dismissal. The claimants; agent was unable to specify what the actual reason was that was alleged to be invented but the Tribunal carefully considered the evidence and found no evidence to support the claimants; contention. There was no specific evidence led by the claimants to support the position as in **Jhuti**. The claimants' agent accepted during submissions that this was a belief of the claimants rather than based upon any evidence. The Tribunal did not uphold the submission and accepted the submissions of the respondent's agent. The reason for the dismissal was the reason stated by the respondent, the claimants having been given a number of opportunities over a lengthy period to set out their response. The full facts and context were fairly taken into account in reaching a conclusion.

326. The respondent argued it was clear that Mr McCarthy possessed a genuine and honest belief that both claimants had committed acts of bullying and

insubordination as his findings were based upon a reasonable, fair, sufficient and proportionate investigation.

327. The respondent's agent argued that the suggestions put to Mr McCarthy (and Mr Watson) that this was part of a pre-meditated and orchestrated plan, or that they were directed to dismiss the claimants simply lacks evidential foundation. The respondent's agent argued this was a vague allegation which was illogical as it would mean that everyone who submitted a written account which was relied upon in support of the disciplinary case was equally directed to do so. It would have been reasonable to assume that if there was such foul play, one of their colleagues would have alerted the claimants to this. The Tribunal accepted that submission.

328. Mr McCarthy was clear as to why he reached the conclusions that he did on the evidence available and his outcome letter set the position out, The Tribunal accepted that evidence.

329. We did not accept that the respondent's policies had been materially breached. The investigation was fair and reasonable.

330. In reaching this decision the Tribunal considered the argument that the disciplinary policy states that where an employee is medically unfair to attend on the date of a hearing, the hearing will be postponed and suspension extended until the employee is deemed medically fit to attend the hearing.

331. The claimants' agent had argued this resulted in a breach of contract since both claimants had been subject to a fit note at the time of the hearing and proceeding with the hearing was therefore a breach of contract. The Tribunal considered that argument and concluded that even if it were a breach of contract, the decision to proceed, for the reasons given by Mr McCarthy at the time (and reconsidered by Mr Watson) were fair and reasonable and did not result in the dismissal being unfair.

332. The Tribunal took account of the respondent's agent's submissions in this regard. The provision is set within the context of the policy that deals with suspension and is set within provisions that deal with the continuation or

otherwise of suspension. In context it was argued that the provision did not mean in every case a hearing would require to be postponed as there ought to be implied into that clause the suggestion that the respondent could on occasion proceed and deal with the issue (where to do so is reasonable and potentially in the worker's interest). To find otherwise would require the respondent to continue to suspend, and pay the worker full pay, for an indefinite period, particularly in incapacity cases. The Tribunal considered there to be some merit in that submission but reached the conclusion that the respondent's breach of the explicit terms of the contractual policy did not in itself render the dismissal of either claimant unfair. The decision to proceed despite the health condition of each claimant was in the unusual circumstances of this case a fair and reasonable approach to take.

Not proceeding while medically unfit

333. In terms of clause 8.3 of the policy (under the heading "suspension") where an employee is medically unfit to attend on a date of hearing, it will be postponed and suspension extended until the employee is deemed to be medically fit to attend the hearing, In considering the fairness of the dismissal we considered whether the respondent acted fairly and reasonably in proceeding with the hearings despite the health position of both claimants.

334. On the morning of 28 September 2021 the first claimant's representative emailed to advise that she would not be attending because she was ill. Mr McCarthy responded to confirm that the hearing would proceed. The second claimant never informed Mr McCarthy that he would not be attending, or that his representative would not be present.

335. Mr McCarthy had postponed the hearings on two occasions previously and both claimants received a total of six invitations. Mr McCarthy's rationale for proceeding with the hearing was clear. The allegations were potentially very serious and delay in resolving them was potentially unfair to the claimants and others. Both claimants had accepted that the disciplinary process was the cause (at least in part) of their ill health and given the interrelation between the cause of the ill health and the procedure, Mr McCarthy reasoned that it

could only be resolved by proceeding with the hearing, rather than being postponed indefinitely. There was no evidence suggesting either claimant's health position would change in the short to medium term.

336. Mr McCarthy also noted that the respondent owed a duty of care not just to the claimants but to other staff who were involved in the process, in particular those who had provided written statements and the respondent had shown tolerance and patience in adjourning the hearings on five previous occasions.

337. Both claimants were on full-pay and the status quo could not be maintained given the position had been explained in clear terms to both claimants that there was a need to progress the hearing, and were specifically invited to make suggestions to facilitate their attendance, or participation in the process, or the provision of written representations. Nothing tangible had been forthcoming in response to this invitation.

338. Given the position was unlikely to change the respondent's required to make a decision. The first claimant conceded (fairly) during cross examination that the respondent faced a genuine dilemma and an intractable problem given the process and delay caused illness and the illness caused delay.

339. The decision to proceed and deal with the matter given the claimants' health position was a reasonable decision on the facts. The respondent had the material provided via the fit notes. While other reasonable employer may have chosen to delay matters further and await a change in the fitness position and refer the claimants to occupational health, the Tribunal, applying its industrial expertise, concluded that on the facts of this case and in light of the information before the respondent, an equally reasonable employer could have decided to proceed as the respondent did for the reasons given.

340. On the facts of this case the Tribunal was satisfied the respondent acted fairly and reasonably in deciding to proceed despite both claimants' health position (even if that did amount to a technical breach of clause 8.3 of the disciplinary policy). The claimants had set out their full response to the dismissal in their appeal submission

Suspension

341. The next challenge raised by the claimant was that clause 8.4 of the disciplinary policy was breached in that the suspension should have been terminated. The claimants' agent argued that the respondent failed to produce any written evidence that the claimants' suspensions were regularly reviewed and that considering the abundance of other written evidence in this case the Tribunal was invited to conclude the respondent's witness evidence (that the suspensions were reviewed during weekly update meetings) was not credible. The allegations that arose did potentially amount to gross misconduct and suspension was in principle a reasonable precautionary approach to take not least given the respondent's zero tolerance to bullying.

342. The respondent's agent argued that the Tribunal should accept the evidence of Mr Evans and Ms Burnell that the suspensions were routinely reviewed and the following points should be taken into account:

(1) The allegations were serious.

(2) Neither claimants had attended an investigation interview until 10 February 2021.

(3) The statements provided by others who were present at the team meeting supported the initial concerns raised on the day by Ms Boyd (supported by Ms Dunn and Ms Gibson).

(4) Both claimants had described the allegations as *"vexatious"* and *"malicious"*. In those circumstances, it was not viable to lift the suspensions and permit the claimants to return to their duties.

(5) Nothing had happened to justify the lifting of the suspension (particularly in the absence of any apology, offer of amends or contrition).

343. The Tribunal accepted the evidence of Mr Evans and Ms Burnell in that the claimants' suspension was routinely considered. Given the context in which the issues arose the Tribunal did not consider it surprising (or suspicious) that

there were no written records of the review. The claimants had made it clear that they did not wish to deal with matters remotely and wanted a face to face meeting. It was unclear at that time how long lockdown would last and what the position as to travel and returning to work would be.

344. The allegations were potentially very serious and given the nature of the work the claimants did and how it was organised and given the nature of the conduct (and risk of repetition) there were no other positions the claimants could be given.

345. The claimants were reasonably suspended and it was reasonable to continue the suspension pending the determination of the issues. The matter was kept under reasonable review. The respondent's actions in this regard did not render the dismissal of either claimant to be unfair. The terms of clause 8.4 were not breached. The allegation was reasonably found to be proven.

346. The Tribunal was satisfied that the claimants' suspension was kept under regular review. Although not done formally, there was no requirement to issue any formal letter of review (and none was alleged). The claimants understood that the matter was being progressed and knew that they were suspended. In the circumstances the approach taken by the respondent to the claimants' suspension (and its review) was fair and reasonable.

Alternative duties

347. The next ground of challenge by the claimants was that the respondent had failed to offer alternative duties while suspended. The claimants' agent argued that the respondent had failed to provide any evidence that it attempted to find alternative duties for the claimants and so the Tribunal was invited to conclude that the respondent had no intention of returning them to work.

348. The respondent's agent asked the Tribunal to take into account the fact that the respondent had no other presence in Scotland aside from the Scotland and Northern Irish Team Hub. The first claimant had accepted that it would

not have been appropriate for the claimants to have returned to the team while the investigation was ongoing given the nature of the allegations and she acknowledged that it would not have been possible to place the claimants in work teams which would not have brought them into contact with other members of the team. The respondent also argued that it owed a duty of care towards other staff. Given the nature and seriousness of the allegations, it was not feasible to simply place them in another team. Finally both claimants accepted that neither of them nor their representatives had identified a specific role for them to undertake, or raised this with the respondent.

349. The Tribunal considered that it was reasonable for the claimants to have been suspended pending a resolution of the disciplinary issue. That in itself was in accordance with the respondent's policy. Leaving aside the fact that neither claimant had identified any role in respect of which the claimants could have worked themselves, it would not have been appropriate on the facts of this case to have allowed the claimants to have returned to work in any capacity during their suspension. Suspension means that no work is provided, albeit the worker receives full pay. The allegations were very serious and the nature of the respondent's business was such that the claimants would inevitably require to work with (at some point) those who were part of the team (and had been involved in the investigation). Further given the ongoing pandemic and the issue had arisen during a remote call, it was not appropriate to allow the claimants to return to work in an environment where remote calls were likely to be more common.

350. The Tribunal considered that the respondent acted fairly and reasonably in not considering alternative duties nor in lifting the suspending during the disciplinary process.

Delay

351. The claimants' next challenge was that the grievance policy had not been followed "by reason of the delays in the process". The Tribunal considered whether the time taken to conclude the process was fair and reasonable.

352. The issue in this case is whether or not the dismissal (and the procedure relates thereto) was fair and reasonable. While the claimants had lodged a number of grievances, the claimants were both given numerous opportunities to set out their position during the disciplinary process.

353. The respondent's agent argued that the respondent genuinely wished to conduct an investigation without unnecessary delay. On 8 April 2020 the claimants informed the respondent that they would provide an email address for correspondence and only provided the email address on 27 April 2020. The 19 day delay was unexplained and further delay was attributable to the claimants. This was seen by the repeated requests by the claimants to adjourn the meetings and on 4 May 2020 both claimants asked that given the seriousness of the situation *"no further action"* should take place until face to face meetings are possible. On 23 June 2020, Ms Burnell emailed the claimants to advise that the respondent would not be opening its offices until 1 September 2020 *at the earliest* and offered the option of arranging a remote investigation meeting. Both claimants declined this offer.

354. On 17 November 2020 the respondent had informed the claimants that the GMB had agreed that disciplinary and grievance processes could be conducted remotely and steps were taken to arrange investigation meetings in December 2020. Both claimants refused to attend, stating that their attendance was *"provisional"* and subject to the provision of information. The claimants attended investigation meetings on 10 February 2020.

355. On the facts of this case the Tribunal does not consider the respondent to have acted unreasonably or unfairly in delaying matters. The respondent genuinely wished to progress matters and recognised the need for expedition. Equally the respondent recognised the need to seek to accommodate each claimant and their requests. The claimants had in fact asked that matters be delayed further and the disciplinary hearings be postponed. In the circumstances the respondent acted fairly and reasonably with regard to the time taken to progress the investigation and disciplinary process.

356. The Tribunal considered the terms of the grievance policy and the matters relied upon by the claimants in this regard. The Tribunal is satisfied that the claimants were both given a fair opportunity to state their position at a grievance meeting (and clause 2.3 was followed). If the claimants had issues that related to the disciplinary matters under consideration those matters could have been raised during the disciplinary hearings and that process was fair and reasonable.

357. The Tribunal did not consider that either claimant had been placed at a disadvantage in any way because they had raised or pursued a grievance (and there therefore was no breach of clause 2.5). The claimants' grievances were considered and the claimants were given the opportunity to set out any response to the disciplinary issue which they did.

358. The claimants were not deprived of the right to refer the grievance to the next stage if they were dissatisfied with the time taken (and clause 2.6 was not breached). Progressing the grievances was a matter for each claimant and the issues were considered by the respondent and a fair process was followed in an attempt to consider all of the issues expeditiously.

359. Clause 2.10 of the policy states that the operation of the policy and procedures will be monitored at the end of the calendar year with reference to equal opportunity considerations. The claimants suggested that was relevant to the grievances raised on 4 May 2021 and 21 July 2021. No explanation was given as to what any review would have done with regard to these grievances nor how it impacted upon the dismissal. No evidence was led as to any review (or absence of review). The requirement in terms of the policy was to review the policy and procedures rather than specific individual grievances.

360. The Tribunal fully considered whether the alleged failure to consider the claimants' grievances resulted in the dismissal being unfair. The respondent's agent argued this was a distraction and in any event is founded upon a false factual premise. The respondent's agent argued that the agreed evidence is that the claimants were asked on numerous occasions to provide the

password to enable Mr McCarthy to access their dignity at work appeal. They refused to cooperate and the process was closed. The claimants' dignity at work issues were fully considered and an appeal was therefore offered and not progressed. The Tribunal accepted that submission.

361. The fifth and sixth disciplinary invitations sent to both claimants set out options for their grievances to be progressed. Neither claimant engaged with these. The second claimant had accepted that he had been offered a grievance meeting in evidence.

362. In any event the Tribunal did not consider the respondent to have acted unfairly in proceeding with the disciplinary process on the facts. Any concerns the claimants had with regard to the specifics of the day in question (the allegation facing the claimants) were matters that could be raised during the disciplinary process.

363. The issue for the Tribunal is whether or not the dismissal and the process relating to the dismissal was fair, applying the legal tests. While the claimants argued the grievances were inextricably linked to the disciplinary process, the respondent did ensure the claimants were given full opportunity to set out their response to the disciplinary issues (and there was no suggestion of any specific issue in that regard having been omitted). Each point raised by both claimants was taken into full consideration. That process was fair and reasonable.

Subject access requests

364. It was argued that the failure to fully respond to the subject access request resulted in the dismissal being unfair. There was no evidence that the respondent had in fact failed to respond to the request and the first claimant had accepted in her evidence that this was speculation on the part of the claimants, there being nothing specific said to exist which had been withheld. No such documents were referred to during the Tribunal. The claimants' agent argued that by not informing the claimants about which documents existed and which did not the dismissal was unfair. The Tribunal rejected that

submission. The Tribunal did not consider the way in which the subject access request to have been processed to have materially affected the fairness of the dismissal. The respondent provided the claimant with the documents it held in relation to the claimants.

Stress risk assessment

365. The claimants argued that the failure to deal with he stress risk assessment resulted in their dismissal being unfair. Specifically it was argued that failing to take action on receipt of the stress risk assessment rendered the dismissal unfair. The Tribunal did not accept that argument. The respondent's approach to dealing with stress risk assessments, which was not challenged, was to deal with the risk assessment upon return to work to ensure workplace stressors are managed appropriately. The risk assessment that was submitted in this case had no bearing on the allegations facing each claimant and did not impact upon the fairness of the dismissal.

ACAS Code of Practice

366. In assessing whether or not the procedure undertaken was fair the Tribunal considered the ACAS Code. The Tribunal was satisfied that the matter had been fully and fairly investigated and that the claimants had both been given a full and fair opportunity to present their position at a disciplinary and appeal hearing. Both Mr McCarthy and Mr Watson approached their role with an open mind and were fully prepared to dismiss the allegations had the evidence justified it. They reached their own conclusion on the basis of the material before them, particularly including what the claimants had said throughout the process.

367. It was suggested in the list of issues that paragraph 46 of the Code was breached. Paragraph 46 states that where an employee raises a grievance during the disciplinary process the disciplinary process may be temporarily suspended to deal with the grievance. Where the disciplinary issue and grievance are related it may be appropriate to deal with both issues concurrently. We are satisfied that there was no breach of this clause. The

claimants were both given the option of dealing with their grievances and the disciplinary hearing was the opportunity for the claimants to set out their full response to the allegation. There was no breach of the ACAS Code.

368. Although not expressly argued by the claimants we also took account of the fact that Mr McCarthy and Mr Watson were at the same senior management grade. The Code of Practice states at paragraph 27 that an appeal should be dealt with impartially and wherever possible by a manager with no previous involvement in the case. That occurred in this case. Mr Watson was a senior manager with no previous involvement who considered matters and reached his own decision on the facts impartially having approached the matter with an open mind. There was no breach of the ACAS Code.

General assessment of fairness

369. The Tribunal considered the procedure that was adopted and each ground of challenge raised by the claimants in detail. The Tribunal has avoided applying counsel of perfection and assessed each part of the process and ground of challenge by applying the legal test. The Tribunal is satisfied that the procedure that was adopted and the conclusion that each claimant had been guilty of gross misconduct was a procedure and conclusion that an employer, acting reasonably, could follow and reach on the facts of this case, in light of the size and resources of the respondent, equity and substantial merits of the case. That was a decision reached both in respect of the specific challenges made in relation to the process but also having assessed the procedure and approach taken by the respondent generally.

Sanction

370. Even if the claimants had been reasonably found to have committed gross misconduct that did not automatically mean dismissal would be a fair outcome. The Tribunal must determine whether or not the decision to dismiss fell within the range or band of reasonable responses, recognising that whilst different employers may take a different approach to the same facts, each may be acting fairly.

371. The question is not whether this Tribunal would have dismissed but whether or not the decision of the respondent was fair and reasonable.

372. The respondent considered the outcome carefully. They took the view that the claimants' conduct, independently, was such as to justify their dismissal. The respondent concluded trust and confidence had been destroyed.

373. The Tribunal considered this carefully and concluded that the respondent had acted fairly and reasonably in deciding to dismiss each claimant on the facts.

374. Neither claimant had offered any form of apology or shown any remorse. Both claimants maintained that they had done nothing wrong, despite the obvious upset caused to Ms Boyd. Their position was resolute that they had done nothing wrong, even in the fact of the detailed witness statements they had seen for a number of months.

375. There was no mitigation before the respondent at the time and both claimants maintained their position that they had done nothing wrong during the process (and offered no apology even if their actions had been misinterpreted) despite the clear and overwhelming evidence of the impact upon their line manager of both claimants' behaviour. The second claimant had issued a twitter comment which was ill judged given the issues facing him.

376. On the facts of this case the decision to dismiss each of the claimants fell within the range of responses open to a reasonable employer. It was fair and reasonable on the facts.

377. With regard to the decision to dismiss, we have concluded that the decision was a decision that a reasonable employer could have taken. It was a decision that fell within the range of responses open to a reasonable employer.

378. Taking a step back and looking at the information the respondent had, the Tribunal concluded the respondent acted fairly and reasonably in dismissing each claimant by reason of conduct. We considered the size and resources of the respondent. That had allowed the respondent to delay dealing with matters pursuant to the claimants' requests and given the pandemic but there

came a point when the matter had to be determined. The time had been reached where an employer of the size and with the resources the respondent had could reasonably decide to dismiss each claimant on the facts.

379. The Tribunal also took account of equity and the substantial merits of this case. We balanced the effect of dismissal upon the claimants and the context with the needs of the respondent. The respondent acted fairly and reasonably in dismissing taking account of equity and the substantial merits of this case.

380. The dismissal of each claimant was accordingly fair.

Polkey

381. While not necessary to consider the unfair dismissal claim further, the Tribunal considered the position in respect of **Polkey** and contributory conduct had the dismissal been unfair.

382. The respondent's agent argued that this is a rare case where there is clear evidence to suggest that the decision to dismiss the claimants was inevitable as even now they vehemently refuse to acknowledge any wrongdoing, or at least any measure of inappropriate behaviour at all. The evidence of their mistrust of the respondent was said to be "palpably evident" by reference to the repeated assertions that Mr Lockhart, Mr McCarthy and Mr Watson had all been part of a conspiracy to dismiss them. It was also suggested that this mistrust was also evidenced by the fact that they believed that they were being persecuted for participating in trade union activities, for their philosophical beliefs, and for whistleblowing , all of which are now no longer being pursued.

383. The claimants' agent had made no specific submissions in this regard.

384. The Tribunal is satisfied that there were no procedural failures in this case. Even if there had been, the Tribunal is satisfied that the decision to proceed and deal with the issues in the light of the claimants' health was a failing (which rendered the dismissal unfair) the Tribunal would have found that dismissal was inevitable. The Tribunal was satisfied from the evidence before

the respondent that there was a 100% chance of a fair dismissal of each claimant. The information before the respondent in relation to the conduct of each claimant was such that their dismissal was inevitable.

Contributory conduct

385. The respondent argued that each claimant was 100% to blame for their dismissal and that compensation should be reduced accordingly in the event of an unfair dismissal finding.

386. The respondent relied upon the conduct of the claimants as reported in the balance of the witness statements and the evasive responses and "feigned lack of recollection of what happened" at the team meeting which plainly contributed to the decision to dismiss. The respondent also relied upon the lack of any apology, contrition, or remorse in respect of any conduct or inappropriate behaviour and the refusal to submit any written representations at the hearings on 28 and 29 September 2021.

387. With regard to the second claimant the respondent relied upon the inappropriate Twitter post on 31 August 2021 and that the second claimant was clearly unhappy with how he had been treated given his banding compared to others who had been given temporary promotion (and he had not). The respondent's agent argued that given his disaffection, it is clear that he was intemperate and angry at the meeting which was consistent with the witness accounts of him being *"irate"*, *"hostile"*, and shouting. On any view it was submitted that in a cruel and calculated manner, the second claimant sought to undermine his line manager in full view of the entire team. He questioned whether there was any utility in her role continuing to exist.

388. The Tribunal must firstly identify the conduct which is said to give rise to possible contributory fault. The conduct for both claimants was their approach to the team meeting in April 2020 and their actions in undermining Ms Boyd. Both claimants acted in a bullying and aggressive manner such that the meeting had to be terminated and Ms Boyd was visibly upset. Their actions took place in front of their colleagues at the team meeting.

389. The Tribunal next asked whether that conduct is blameworthy. The Tribunal is entirely satisfied each claimant was guilty of the conduct in question. As a matter of fact each claimant acted in an way that was totally inappropriate during the team meeting in front of their colleagues. Their actions were serious and amounted to bullying. We taken into account how those present described the conduct, and the fact the conduct was before the entire team.

390. The Tribunal then asked for the purposes of section 123(6) of the Employment Rights Act 1996 if the conduct which it has identified and which it considers blameworthy caused or contributed to the dismissal to any extent. Each claimant's conduct on the day in question was the sole reason for ach claimant's dismissal. There were no other reasons for their dismissal. The only reason for each claimant's dismissal was their conduct.

391. Finally the Tribunal considered what extent the award should be reduced and to what extent it is just and equitable to reduce it. The Tribunal concluded that each claimant was guilty of gross misconduct as a matter of fact. Their actions were such as to justify their dismissal. On the facts before this Tribunal the Tribunal would have found each claimant to have been 100% to blame for their dismissal such that it would have been just to have reduced any compensation found due by 100%. The Tribunal recognises that such decisions should be rare but considered on the facts of this case such an outcome would have been just. The nature of each claimant's conduct viewed in isolation was of sufficient seriousness, given the impact upon Ms Boyd and the other team members, that it would be just to have reduced both the compensatory and basic awards by 100% had the dismissal been unfair (applying the different tests pertaining to each award). The Tribunal reached this conclusion taking account of the Tribunal's views in relation to **Polkey** and avoided any unfair overlap.

Discrimination because of something arising in consequence of disability (section 15 Equality Act 2010)

392. The Tribunal turns now to the claim under section 15 of the Equality Act 2010 where it was alleged the claimant was subject to unfavourable treatment because of something arising in consequence of her disability.

Unfavourable treatment

393. The first claimant relies upon the *"need for face to face meetings"* as the unfavourable treatment. The first claimant's agent clarified during submissions that the treatment was in reality the requirement to attend a remote disciplinary meeting in this regard.

394. The Tribunal considered whether the need for face to face meetings or the requirement to attend a remote disciplinary meeting was unfavourable treatment. While in some situations such treatment could be seen as favourable, the Tribunal was prepared to accept on the facts of this case that the treatment could be unfavourable.

"because of something"

395. Having determined the unfavourable treatment (proceeding with a remote disciplinary hearing or the need for face to face meetings), the next issue was whether or not the unfavourable treatment (the proceeding to deal with matters remotely or the need for face to face meetings) was because of "something". The Tribunal had to determine what the "something" was for the purposes of this claim. Unusually for a claim such as this, it was not clear at all what the "something" was despite the claimant's agent having been given time to consider this issue carefully. This had not been set out with any clarity in the list of issues and the claimants' agent undertake to consider this fully. Regrettably the position was still unclear by the submissions stage.

396. The respondent's agent argued that the first claimant had not identified what the *"something" wa*s which is said to arise in consequence of her disability. The first claimant's agent had stated in the list of issues that had been agreed that the unfavourable treatment arose due to the claimant's alleged increased anxiety (which had arisen as a consequence of her disability - depression). The Tribunal asked the claimant's agent during submissions whether it was

the anxiety that was the "something" and the first claimant's agent confirmed that this was correct.

397. The Tribunal required to determine whether proceeding to deal with matters remotely (or the need for face to face meetings) was due to the claimant's anxiety in any way, except to a minor or trivial extent.

398. The respondent's agent argued that the disciplinary process was exclusively concerned with her misconduct at the team meeting. The *"need for face to face meetings"* was in no sense whatsoever because of the "something" (her anxiety). That was said to be dispositive of the matter.

399. The reason why the claimant was required to attend a remote meeting was because of the pandemic. There was no link between the unfavourable treatment (dealing with matters remotely or avoiding face to face meetings) and the claimant's anxiety (the "something" relied upon) in any sense.

400. The section 15 claim is ill founded.

401. While this was unclear, the Tribunal considered an alternative analysis which was to assume the "something" was the decision to proceed and deal with the matter remotely (rather than delay matters). The proceeding with the disciplinary hearing (the unfavourable treatment) could be regarded as linked to the decision to convene a remote hearing.

Did the "something" arise in consequence of the first claimant's disability

402. Even if the Tribunal's alternative analysis was correct, the first claimant's agent accepted that there was no evidence before the Tribunal linking the decision to proceed with a remote hearing to the first claimant's disability. The first claimant had been unable to access her GP due to the pandemic and no evidence had been led before the Tribunal with regard to any connection (in any way) between the disability and the need for face to face hearings (or an aversion to remote meetings). She had also not stated in evidence that her disability was in any way connected to her wishing face to face meetings. The

reason why a face to face meeting was important to the first claimant was due to the severity of the issues, and the fact her employment was at risk and was not connected with her disability. She had accepted the offer of a remote meeting due to the pandemic, making no reference to her disability being relevant.

403. As there was no evidence providing any link between the first claimant's disability and the need for face to face meetings, the claim must fail.

Justification

Legitimate aims - (i) upholding and maintaining disciplinary standards at work, including addressing complaints of bullying; (ii) avoiding undue delay in completing the disciplinary process.

404. For completeness the Tribunal considered whether had there been unfavourable treatment because of something arising in consequence of disability, the treatment would have been justified from the evidence led.

405. The Tribunal found that both aims were legitimate. This had not been disputed by the claimants. The respondent's agent argued that it was clear from the evidence led by Ms Burnell, Mr Evans, Mr McCarthy and Mr Watson that the respondent was pursuing a legitimate aim of upholding, maintaining and applying its disciplinary standards at work. All of the witnesses gave evidence that bullying was unacceptable, and that the respondent a zero tolerance attitude towards this type of behaviour.

406. The key issue, if it required to be considered, was whether or not the treatment was a proportionate means of achieving those aims.

407. The respondent's agent argued that the Tribunal was presented with evidence as to the proportionality of proceeding with the disciplinary process and avoiding undue delay. Ms Burnell had explained that there was a need to proceed because the ill health was caused by the disciplinary allegations. It was in the *"best interests"* to continue because the illness would *"only continue"*. The respondent owed a duty of care to other members of staff. The

case had taken 18 months and needed final closure. The rationale for proceeding was also explained in Mr McCarthy's dismissal report.

408. The claimant's agent relied upon **Secretary of State for Justice v Edwards UKEAT/0049/20** which had held at 15E:*"...that the respondent has somewhat closed its mind to the possibility that once the anxiety had lessened, and the stress had lessened, (the impact of the disability reduced) the claimant may have been able to engage with those matters in a more meaningful way and returned to work."*

409. The claimants' agent argued that the respondent has failed to seek medical advice via its occupational health advisors despite being asked to so by the claimant to proceeding with the disciplinary hearing. It is submitted that it was unreasonable and unfavourable treatment knowing the impact the process was having on the claimant.

410. We shall consider each legitimate interest in turn.

411. The first aim relied upon, **upholding and maintaining disciplinary standards at work, including addressing complaints of bullying** was a legitimate aim, and was conceded as such by the claimant's agent.

412. We assess the proportionality matter with regard to the information before the respondent as submitted by the claimant (which is identical to the information before us). In principle we find that proceeding with a remote hearing is capable of achieving the aim since given the context in which the matter was determined (where face to face meetings were not in accordance with Government guidance) proceeding to deal with the matter remotely would achieve the aim of upholding and maintaining standards since otherwise the matter would not be dealt with and disciplinary standards would not be upheld.

413. We must balance the discriminatory effect upon the claimant against the legitimate aim relied upon by the respondent. We consider this both from a qualitative and quantitative perspective. We did not consider there to be any discriminatory effects upon the first claimant of proceeding with a remote hearing. We did consider the importance to the respondent (and the claimant)

of managing disciplinary standards. It was important to the respondent given the impact upon staff and the zero tolerance approach to bullying that such behaviour is dealt with.

414. In this case we considered that proceeding with a remote hearing was a proportionate means of achieving the legitimate aim and reasonably necessary to achieve it. We take into account that there were other things that could have been done, including delaying a resolution until it was possible to deal with matters face to face or to have proceeded to have gone against Government guidance and held a face to face meeting. We did not consider that to be proportionate. The delays in this case were significant and the impact of further delay was potentially severe upon the first claimant and upon other staff such that the point had been reached in the Tribunal's judgment given the impact upon the respondent that proceeding to convene a remote hearing was proportionate. The evidence that was before the respondent was clear that there was no likelihood face to face hearings were likely to be permissible in the short term.

415. The second aim relied upon, **avoiding undue delay in completing the disciplinary process** was a legitimate aim, and was conceded as such by the claimant's agent.

416. We assess the proportionality with regard to the information before the respondent as submitted by the claimant (which is identical to the information before us). In principle we find that proceeding with a remote hearing when the respondent did is capable of achieving the aim since given the context in which the matter was determined (where face to face meetings were not in accordance with Government guidance) proceeding to deal with the matter would achieve the aim of avoiding undue delay since otherwise the matter would not be dealt with and further delays would be occasioned.

417. We must balance the discriminatory effect upon the first claimant against the legitimate aim relied upon by the respondent. We consider this both from a qualitative and quantitative perspective. We did not consider there to be any discriminatory effects upon the first claimant of proceeding with a remote

hearing without delay. We did consider the importance to the respondent of avoiding undue delay which was significant given the seriousness of the allegation and the impact not just upon the first claimant herself but also upon other staff and the respondent generally, given its zero tolerance to bullying. Proceeding to deal with the matter when the respondent did given the time that had already elapsed was proportionate.

418. In this case we considered that proceeding with a remote hearing without further delay was a proportionate means of achieving the legitimate aim and reasonably necessary to achieve it. We take into account that there were other things that could have been done, including delaying a resolution until it was possible to deal with matters face to face or to have proceeded to have gone against Government guidance and held a face to face meeting. We did not consider that to be proportionate. Unlike the case referred to by the claimants' agent in his submissions, in this case there was no evidence of any likely change in the claimants' health position. On the contrary, each of the claimants had accepted that it was the disciplinary process that was exacerbating their health condition. Further delays was highly likely to cause further adverse consequences for the claimants themselves.

419. The delays in this case were significant and the impact of further delay was potentially severe upon the first claimant and upon other staff such that the point had been reached in the Tribunal's judgment given the impact upon the respondent that proceeding to convene a remote hearing was proportionate. The evidence that was before the respondent was clear that there was no likelihood face to face hearings were likely to be permissible in the short term.

420. We considered that the respondent had discharged the onus of showing that proceeding to deal with the matter remotely when it did was a proportionate means of achieving each legitimate aim, given the importance of the issues, the time that had already passed and the need to resolve matters.

421. Given the aims relied upon were legitimate and having intensely analysed the evidence, as we concluded that dealing with the disciplinary process remotely

when it did was a proportionate means of achieving those aims, the claim in respect of section 15 of the Equality Act 2010 is therefore ill founded.

Breach of the duty to make reasonable adjustments: (sections 20 and 21 Equality Act 2010)

422. The Tribunal now turns to whether the respondent applied a provision criterion or practice (PCP) to the first claimant which put a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, the claim under sections 20 and 21.

Provision, criterion or practice ("PCP")

423. Firstly the Tribunal must identify the specific PCP or PCPs relied upon. While the list of issues had identified two separate PCPs (the arrangements for "proceeding with hearing" and the refusal to allow face to face meetings) during the submissions stage the first claimant's agent clarified that the PCP relied upon was the refusal to allow face to face meetings (which had then led to the decision to proceed with the disciplinary hearing remotely). The respondent did not dispute this was a PCP nor that it was applied to the first claimant.

Substantial disadvantage

424. The next issue is whether the PCP that was applied to the claimant in fact placed the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled.

425. The respondent's agent argued that the first claimant had not adduced any evidence that the PCPs relied upon (arrangements for proceeding with a hearing, and refusing to allow in person meetings) placed disabled people as a group (or particular group) at any particular disadvantage compared with non-disabled staff. That was dispositive of the issue. Having considered the evidence carefully, the Tribunal upholds that submission. There was no evidence presented by the first claimant that suggested proceeding with a remote hearing (and refusing a face to face meeting) created any

disadvantage to disabled persons with the same disability as the claimant's. The Tribunal did not consider this could be implied. The Tribunal did not consider it axiomatic that persons with depression/anxiety are put at a disadvantage in attending hearings remotely rather in person. It was equally possible that conducting such meetings remotely was preferential (namely an advantage and not a disadvantage) but in the absence of any evidence the Tribunal is unable to make any assumptions in this regard. That results in this claim being ill founded.

426. The respondent's agent also argued that there was no evidence before the Tribunal to suggest that first claimant was herself actually placed at any disadvantage in being asked to attend a remote investigation meeting or hearing (as opposed to any hearing). In this regard the respondent noted that on 30 April 2020 the first claimant expressed a preference for an in person meeting but stated: *"… However I am prepared to accept teleconference as an alternative in the exceptional circumstances of Covid-19"* and that she was able to participate in a remote investigation meeting on 10 February 2021.

427. The respondent's agent argued that the disadvantage complained of did not engage with the facts before the Tribunal. The reason why the first was not able to attend the dismissal hearing on 28 September 2021, or the appeal hearing on 24 November 2021 had nothing to do with the fact that it was being held remotely. She was unfit to attend and could not participate at all. There was no evidence that she could have attended if it had been in person.

428. The Tribunal considered the respondent's submission to have merit. On the facts before the Tribunal there was no evidence that the first claimant was at any disadvantage in having to conduct the meeting remotely. While it was argued (during submissions) that the claimant's anxiety was heightened as a consequence, there was no evidential basis for that submission.

Such steps as are reasonable to remove the disadvantage

429. The first claimant's agent submitted that the respondent failed to take such steps as is reasonable to have to take to avoid the disadvantage, namely to permit face-to-face hearings/meetings.

430. The respondent's agent argued that it is essential that the adjustment relied upon engages with the facts and/or has the likelihood of removing or lessening the disadvantage complained about. There must be a real prospect of the adjustments removing the disadvantage. It was argued that the position was analogous to the proposition that an employer is not required to implement an adjustment (e.g. purchasing equipment) in circumstances where an employee is off sick and not ready to return to work. Accordingly, the Tribunal should accept that the adjustments sought are abstract in nature.

431. The Tribunal considered the respondent's submissions on this point to have merit. There was no evidence before the Tribunal that had a face to face meeting been offered the first claimant would have been able to attend (such that the step being relied upon, having face to face meetings, would have avoided any disadvantage). The reason why the first claimant was unable to attend work was due to the disciplinary process *per se* – not the fact the meeting was to be remote. There was no evidence before the Tribunal to show that holding a face to face meeting would have removed any disadvantage. The position would have been the same had it been offered.

432. The Tribunal took account of the Equality and Human Rights Commission Code sets out some of the factors which might be taken into account when deciding what is a reasonable step to take. We did not consider the step relied upon would have been effective in preventing the substantial disadvantage.

433. We also did not consider the step to have been practicable in light of the fact of the Covid 19 pandemic restrictions at the time. Workers were required to work from home where possible and travel was restricted. The respondent's offices were only opened in exceptional circumstances and government advice required to be followed. Having a face to face meeting at the time was not reasonable. Equally delaying matters further was not reasonable on the facts.

434. The Tribunal took into account the financial and other costs of making the adjustment and the extent of any disruption and the extent of the employer's financial and other resources together with the type and size of the employer.

435. The Tribunal accepted the respondent's submission that arranging face to face meetings at the time in question was not reasonable.

436. The first claimant's claim in respect of sections 20 and 21 was ill founded.

Observations

437. The Tribunal wanted to reiterate our thanks to both agents who assisted the Tribunal to comply with the overriding objective. The Tribunal thanks both agents for their professionalism.

Employment Judge: David Hoey
Date of Judgment: 16 March 2022
Entered in register: 16 March 2022
and copied to parties