EMPLOYMENT TRIBUNALS

Claimant: Mr B Mistry

Respondent: Ofsted

HELD AT: Manchester **ON:** 6, 7, 8, 9, 10, 13, 14, 15, 16, 17 June (with 15 and 16 June in chambers) 2022

BEFORE: Employment Judge Johnson

MEMBERS: Mr D Wilson
Mr I Taylor

REPRESENTATION:

Claimant:
unrepresented
Respondent: Ms Amartey (counsel)

JUDGMENT

The judgment of the Tribunal is that:

(1) The complaint of direct disability discrimination contrary to section 13 Equality Act 2010 is not well founded. This means that this complaint is unsuccessful.

(2) The complaint of discrimination arising from a disability contrary to section 15 Equality Act 2010 is not well founded. This means that this complaint is unsuccessful.

(3) The complaint of a failure by the respondent to make reasonable adjustments contrary to sections 20 & 21 Equality Act 2010 is not well founded. This means that this complaint is unsuccessful.

(4) The complaint of victimisation contrary to section 27 Equality Act 2010 is not well founded. This means that this complaint is unsuccessful.

(5) The complaint of unfair dismissal contrary to section 94 Employment Rights Act 1996 is not well founded. This means that the claimant was fairly dismissed.

(6) The complaint for wrongful dismissal is not well founded. This means that this complaint is unsuccessful.

Background

1. This claim arises from the claimant's employment with the respondent working in an administrative role as an Advisor on Applications from 1 October 2009 until his summary dismissal on 16 September 2020.

2. The claimant presented his first claim form (under case number: 2402758/2020) to the Tribunal on 17 March 2020 following a period of early conciliation from 6 February 2020 until 17 March 2020. This claim was presented while he was still employed and he brought complaints of disability discrimination and unpaid annual leave entitlement, ('holiday pay').

3. The respondent presented a response on 7 May 2020 resisting the claim, although disability was accepted.

4. A second claim form was presented (under case number 2408596/2020) on 28 June 2020 following a period of early conciliation on 27 May 2020. He brought a further complaint of disability discrimination.

5. The respondent presented a further response on 7 August 2020, which took the form of an amended response, based upon the original version presented in relation to the first claim form. Disability was again accepted, but the claims brought were resisted.

6. Case management took place before Employment Judge ('EJ') Porter on 16 September 2020, but it was necessary to list the preliminary hearing case management the following month on 5 October 2020, because it was not possible to finalise the list of issues. However, both claims were combined and would be heard together.

7. At the next preliminary hearing case management before EJ Porter on 5 October 2020, it was determined that the case should be listed for a preliminary hearing to consider whether:

   a) Parts of the claims were presented out of time and if so, whether time should be extended;
   b) Whether the claimant should be given permission to amend the claims to include each of the claims identified in the two preliminary hearing case management hearings before EJ Porter; and,
   c) Whether the respondent's applications for strike out and/or a deposit order, should be allowed.

The case was also listed for a 15-day final hearing and these dates remained in place throughout the proceedings. With the consent of the respondent, the claimant was permitted to amend his claim to include complaints of unfair dismissal and disability discrimination relating to that dismissal.

8. The next preliminary hearing took place on 6 April 2021 before Employment Judge McDonald, and which required an additional day in chambers on 24 June 2021. At this point in the proceedings, the claimant was represented by a solicitor. EJ McDonald decided that some amendments would be allowed and the complaints remaining in these proceedings involved disability discrimination, unfair dismissal and wrongful dismissal, refused most the application for deposit orders and made case management orders, including the finalisation of the list of issues to be used at the final hearing.

The issues

9. It is understood that the list of issues took some time to be agreed and finalised, but a final version was available to the Tribunal at the beginning of this hearing, and which had been agreed by the parties. It was as follows:

a) Disability

The respondent concedes that the claimant was at the relevant time a disabled person within the meaning of the Act, in relation to a mental impairment, which it describes in its response as some form of Post-Traumatic Stress Disorder ('PTSD'). It is noted that the respondent refers to absences by the claimant by reason of anxiety and depression.

b) Time limits/limitation issues

Were all of the claimant's complaints presented within the time limits set out in sections 123(1)(a) & (b) of the Equality Act 2010 ('EQA')? Dealing with this issue may involve consideration of subsidiary issues including: whether there was an act and/or conduct extending over a period, and/or conduct extending over a period, and/or a series of similar acts or failures; whether time should be extended on a *'just and equitable'* basis; when the treatment complained about occurred.

c) Equality Act 2010 ('EQA') – section 13: direct discrimination because of disability

i) Has the respondent subjected the claimant to the following treatment – in or around November 2019 the refusal of the claimant's request for permanent home working.

ii) Was the treatment *'less favourable treatment',* i.e. did the respondent treat the claimant as alleged less favourably than it treated or would have treated others (*'comparators'*) in not materially different circumstances? The claimant relies on hypothetical comparators for most of these complaints. For the

claimant re his request for home working he relies also on an actual comparator, Karen Harris.

iii) If so, was this because of the claimant's disability?

d) EQA section 15: discrimination arising from disability

i) Did the respondent treat the claimant unfavourably by dismissing the claimant?

ii) If so, did the treatment arise from the claimant's disability? The claimant says that the 'something' arising from his disability was all or any of the following:

- The claimant's judgment being impaired in the period to which the allegations related.
- The claimant's memory being poor and so his being unable to account for his apparent errors in recording time.
- The claimant's coping strategies which he engaged in during working time being themselves something arising from his disability.

iii) If so, has the respondent shown that the unfavourable treatment was a proportionate means of achieving a legitimate aim?

iv) Alternatively, has the respondent shown that it did not know, and could not reasonably have been expected to know, that the claimant had the disability?

e) EQA sections 20 & 21: reasonable adjustments

i) Did the respondent not know and could it not reasonably have been expected to know that the claimant was a disabled person?

ii) A "PCP" is a provision, criterion or practice. Did the respondent have the following PCP(s):

- The requirement to work in the office.
- The practice of talking to all employees as if they do not have mental health issues.
- The PCP of providing team leaders to employees irrespective of sex.
- The requirement to work in the ARC Contact Admin Team.
- The PCP of not providing questions in advance of a disciplinary hearing.

iii) Did any of the following PCPs put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled at any relevant time, in that:

- The requirement to work in the office: a) increased the claimant's anxiety and could act as trigger points making the claimant unable to attend work or complete work satisfactorily, b) the claimant finds socialising with others very difficult; and, c) the claimant finds it difficult to trust people and it takes him a long time to be able to talk and relate to maangers and work colleagues

- The practice of talking to all employees as if they do not have mental health issues: a) increased the claimant's anxiety and could act as trigger points making the claimant unable to attend work or complete work satisfactorily, b) the claimant finds socialising with others very difficult; and, c) the claimant finds it difficult to trust people and it takes him a very long time to be able to talk and relate to managers and work colleagues.
- The PCP of providing team leaders to employees irrespective of sex: a) increased the claimant's anxiety and could act as trigger points making the claimant unable to attend work or complete work satisfactorily, b) the claimant finds it difficult to trust people and it takes him a long time to be able to talk and relate to managers and work colleagues; and, c) the claimant was unable to work with a male team leader because of his PTSD.
- The requirement to work in the ARC Contact Admin Team: a) increased the claimant's anxiety and could act as trigger points making the claimant unable to attend work or complete work satisfactorily; and, b) the claimant was unable to return to work in the same department because of his complaints about the conduct of managers in that department which triggered his anxiety.
- The PCP of not providing questions in advance of a disciplinary hearing: increased the claimant's anxiety and could act as trigger points making the claimant unable to attend work or complete work satisfactorily.

iv) Did the physical feature namely the nature of the light in the building during winter months, put the claimant at a substantial disadvantage in comparison with persons who are not disabled in that the winter light adversely affected his mood and ability to work effectively.

v) If so, did the respondent know or could it reasonably have been expected to know the claimant was likely to be placed at any such disadvantage.

vi) If the above PCPs put the claimant at a substantial disadvantage as set out above, were there steps that there were not taken that could have been taken by the respondent to avoid any such disadvantage? The burden of proof does not lie on the claimant, however it is helpful to know what steps the claimant alleges should have been taken and they are identified as follows:

- The requirement to work in the office: a) allow the claimant to work at home, (it was recommended by OH reports in 2017 and 2018 that the claimant should be allowed to work from home other than one day a week). This was not followed; and, b) allow permanent home working.
- The practice of talking to all employees if they do not have mental health issues: provide managers and work colleagues with training/guidance as to how to talk to people with mental health issues.
- The PCP of providing team leaders to employees irrespective of sex: a) change the claimant's line manager Matthew Ritson as requested; and, b) appoint a female team leader for the claimant's team.
- The requirement to work in the ARC Control Admin Team: redeploy the claimant to a different department.

- The PCP of not providing questions in advance in advance of a disciplinary hearing: give the claimant time to prepare answers to questions by emailing them to him before discussing them on the telephone or in the office.

vii) If so, would it have been reasonable fro the respondent to have to take those steps at any relevant time?

f) Victimisation under section 27 EQA

i) Did the claimant do a protected act or acts? The claimant relies upon the following:

- Formal grievance 11 January 2020
- Formal grievance April 2020
- The first claim form
- The second claim form
- His dismissal appeal letter

ii) Did the respondent subject the claimant to any detriments as follows:

- Elevating the allegations against him to 'misconduct'.
- Elevating the allegations against him from misconduct to gross misconduct.
- Dismissing him.
- Rejecting his appeal against dismissal.

iii) if so, was this because the claimant did a protected act and/or because the respondent believed the claimant had done, or might do, a protected act?

g) Unfair dismissal

i) Has the respondent shown the reason or principle reason for dismissal?

ii) Was it a potentially fair reason under section 98 Employment Rights Act 1996? The respondent says the dismissal was for misconduct.

iii) if the reason was misconduct, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? The Tribunal will usually decide, in particular whether:

- The respondent genuinely believed the claimant had committed misconduct.
- There were reasonable grounds for that belief.
- At the time the belief was formed the respondent had carried out a reasonable investigation.
- The respondent followed a reasonably fair procedure.
- Dismissal was within the band of reasonable responses.

h) Wrongful dismissal

i) What was the claimant's notice period?

- was the claimant paid for that notice period?

- If not, can the respondent prove that the claimant was guilty of gross misconduct which meant that the respondent was entitled to dismiss without notice?

Evidence used

10. Days 1 and 2 of the final hearing were used for reading by the Tribunal, once initial discussions had taken place concerning the way in which the hearing would be conducted.

11. The claimant gave witness evidence on Days 3 and 4 of the final hearing in support of his case and he did not call any other witnesses.

12. The respondent called the following witnesses in this order:

    a) Gemma Williams – first grievance hearing officer (Day 5);
    b) Nicholas Jones – first grievance appeal officer (Day 5);
    c) Gavin Hoult – line manager (Day 5);
    d) Lauren Hill – second grievance hearing officer (Day 6);
    e) Katie Kelly – second grievance appeal officer (Day 6);
    f) Susan Aldridge – disciplinary hearing decision manager (Day 6); and,
    g) Neil Greenwood – disciplinary appeal manager (Day 6).

13. It should be noted that on day 6, the claimant confirmed that he had no questions for the respondent witnesses Katie Kelly and Neil Greenwood. Both witnesses were available in the Tribunal to give oral evidence. As the Tribunal confirmed that the panel did not have any questions for these witnesses, their evidence was treated as being accepted and unchallenged.

14. The final hearing bundle was understood to have been a subject of some discussions between the parties and was not finally agreed until a short time before the final hearing. It consisted of more than 1,500 pages contained in 3 lever arch folders. It comprised of the proceedings, contracts and policies, correspondence, quantum documents and additional disclosure provided by the parties at a later date.

15. An issue which arose at the beginning of the hearing was a question of confidentiality and the claimant made an application concerning the possible anonymisation of his name in the proceedings. His application did not request precise orders to be made, but the Tribunal was happy to accept as an unrepresented party he was making an application relating to the application of Rule 50 (Privacy and restrictions on disclosure). Discussions took place on day 1 in order that this matter could be explored before we decided upon whether any orders under Rule 50 should be made.

16. Mr Mistry revealed that he was comfortable for the parties' names to remain a matter of public record. His real concern was the extent to which his disability would be considered in the judgment. Ms Amartey helpfully

agreed that as disability was conceded, her cross examination would be limited on this matter. She said that she saw no reason for the background to the disability to be the subject of much discussion, or for the judgment to deal with it significantly. The claimant confirmed that he was comfortable with the hearing continuing as an open hearing and agreed that while we would keep matters under review, he would not seek an order for reporting restrictions, a private hearing or an anonymity order. The Tribunal was satisfied that there was no reason to make any special arrangements, (other than to restrict its finding concerning the disability), as it did not need to make any findings under s.6 EQA. The hearing concluded without any further such applications being made by the claimant or being considered necessary and in the interests of justice by the Tribunal.

17. Taking into account the claimant's disability, the Tribunal were particularly concerned that adjustments would be appropriate to ensure that he could fully participate in the hearing, especially as he was unrepresented. The Tribunal considered the application of Rule 2 and took into account the relevant provisions of the Equal Treatment Bench Book. This included allowing additional time for breaks and where appropriate, early finishes each day to allow the claimant to review the day's proceedings and prepare for the next day. Assistance was also given with rephrasing questions being asked by the claimant during his cross examination of the respondent witnesses where appropriate It was also agreed that the delivery of the judgment would be given by CVP as this assisted both parties, (the hearing of evidence and submissions had taken in place in person at Alexandra House).

18. The claimant did make an application for additional disclosure while the Tribunal was reading the hearing bundles and witness evidence during days 1 and 2 of the final hearing. The Tribunal decided to refuse this application as they related to documentation which he had provided to his former solicitor and which he had been aware of for some considerable time and which could have been included as part of the final hearing bundle before the hearing began. The claimant had received them before the hearing and yet only disclosed them on the afternoon of day 1 of the hearing.

19. In any event, the documents disclosed appear to have included a lot of duplication and did not appear to be directly relevant to the issues to be considered ay the final hearing. The Tribunal noted that the documents had originally been in the claimant's possession and had been disclosed to his solicitor. Moreover, he was aware of the case management orders and there was significant evidence already available which had taken considerable time to be agreed and included both documents belonging to the respondent and claimant. Accordingly, it was not in accordance with the overriding objective to allow the application for disclosure. This decision was made on the understanding that the Tribunal would keep the question of disclosure under review and in the event, it became apparent that to the Tribunal that it was in the interests of justice for any of this additional documentation to be added to the bundle, then further consideration would be given. Ultimately, the need did not arise and (as is often the case in the

final hearing), large parts of the bundle were not referred to during the hearing of the evidence

Findings of fact

Background

20. The respondent ('Ofsted') is a governmental organisation which is responsible for the maintenance of standards in education across England and Wales. It has a number of regional offices, but this case is concerned with Ofsted's office in Manchester.

21. Although the Manchester office which is based at Piccadilly Gate in Store Street employed many staff, this case is primarily concerned with the Applications Regulatory & Contact ('ARC') Contact and Administration team. Ms Hill explained that this team was split into two sections with one focusing on the contact element of ARC and the other focusing on administration.

22. Ofsted employs many Human Resources (HR) and the Tribunal accepts that management had access to extensive HR support. The hearing bundle included numerous policies and procedures with a number of documents dealing with elements of the disciplinary process, grievance, managing attendance, stress, anti-bullying and the Mental Health First Aid ('MFHA') Line Managers' Resource. These amounted to more than 150 pages of documents, and they were referred to by the managers who gave evidence to the Tribunal and by Mr Mistry in terms of alleged procedural failures by management.

23. It was noted that these resources provided information to managers and considered that employees might have mental health and should be supported and not treated as problem employees. Of note was the MFHA, which was introduced by the Department of Health *'…to tackle stigma and discrimination surrounding mental ill health'.* The Stress Management Policy and Procedure reminded managers that *'injury to mental health is treated the same way as injury to physical health'.* The Grievance Procedure referred to the Workplace Adjustments document, which was a separate guidance document provided to Ofsted's managers and which reminded them of the employer's duty to make reasonable adjustments under the EQA. Each policy and procedure provided a list of useful resources in the concluding section, and it appeared to the Tribunal that a manager involved in any process when consulting the relevant document, would not be expected to treat it in isolation and would be placed in a position where relevant guidance for each employment scenario could be accessed.

24. The Tribunal also noted that these documents once launched, would be reviewed and updated on a regular basis, with the date of these exercises being recorded on the front sheet of each document.

The claimant and his disability

25. The claimant ('Mr Mistry') was employed as an Advisor on Applications which the Tribunal understood was an administration role with a great deal of his work involving the processing of data using IT. He began working for the respondent on 1 October 2009 and his employment continued without interruption until he was dismissed on 16 September 2020.

26. His contract of employment was set out in his letter of appointment dated 1 October 2019 and was augmented by an Employee Handbook which was referred to in this document. He was also informed in this letter that he was bound by the Civil Service Code. It also described his place of work as Ofsted's Manchester office but made reference to the possibility that his job could be '*re-designated as a home-based role'.* Hours of work were to be agreed with managers but would normally take place between the hours of 7:00 and 20:00 Monday to Friday, using flexi working. The Tribunal understood that time sheets would be completed to indicate what when employees worked and to regulate the time that they worked.

27. Overtime was also available with time outside of the core hours described being paid at time and a half, and Sunday working attracting payments at double time. By the date of termination, Mr Mistry was entitled to a minimum of 10 weeks-notice by his employer having completed 10 years of service by this date. He would be expected to give one month's notice if he resigned.

28. Ofsted accepted that Mr Mistry was disabled by reason of post traumatic stress disorder ('PTSD') and that they became aware of this condition during 2016. The fit notes which were included within the hearing bundle typically described the impairment arising from this PTSD as being depression and anxiety and this is a condition which Mr Mistry has continued to experience to the present day.

29. Ofsted have access to Occupational Health support and the evidence before the Tribunal showed that he was supported by OH from 29 January 2016 and these OH referrals appeared to continue through the remainder of his employment. Initially, OH believed that Mr Mistry would make a good recovery, but by 15 August 2016, OH determined that he was disabled within the meaning of s.6 EQA.

30. Initially the recommended support and adjustments were to allow Mr Mistry time away from his desk to perform mental health exercises, with by 23 March 2017, a recommendation being made that Mr Mistry be allowed to *'work more at home, if he is having a difficult time'.* By 30 January 2018, OH in response to questions from Ofsted management, recommended that in terms of home working:

'…working from home would be more suitable…if he is under pressure, but I understand that he can make a request to work from home for up to 3 days per week along with other employees. There is a risk with a prolonged period

of time away from the workplace that he could have further anxiety when he goes back, so a balance needs to be struck. I think he should be in the office at least once a week.

The Tribunal understood that this recommendation meant that Mr Mistry could work at home for 4 days each week, with 1 day in the office. Mr Mistry accepted in cross examination that he was permitted by management to work from home 4 days each week from December 2018.

31. As part of its procedures to support employees with disabilities or health conditions, Ofsted had a system of providing a *Workplace Adjustments Passport* ('WAP'). The rationale provided by the guidance notes on each WAP was that it provided 3 functions:

a) *'to support a conversation between you and your line manager about the disability or health condition and any workplace adjustments that might need to be made.*
b) *To record these conversations and the adjustments agreed.*
c) *To record any adjustments made as a supportive measure, usually on a temporary basis.'*

Mr Mistry was provided with a WAP and a copy was included within the bundle dated 29 November 2019. The adjustments identified within this document were as follows:

a) *'When Matt is working and available all feedback and other communications regarding Bav's [sic] performance and behaviour, will be delivered from Bav from Matt.*
b) *When Matt is due to go on leave, Matt will arrange a buddy/point-of-contact for Bav and will complete a handover, focusing on health and wellbeing. This buddy/point-of-contact will be responsible for delivering urgent feedback. Non-urgent feedback, and other communications regarding Bav's performance and behaviour will be delivered by Matt when he returns to work'.*

The WAP was created following discussions between Mr Mistry and his line manager Matthew Ritson and assistance from Andrew Cowler of HR during October 2019. However, the Tribunal noted that the adjustments included within the WAP did not include working from home.

32. The Tribunal noted that Mr Mistry's contract of employment provided at section 2.1 that *'…your post may be re-designated as a home-based role'.* Moreover, it was accepted by the parties that all employees could make applications for flexible working which could include a request to work from home as illustrated in the example provided in the hearing bundle and completed by Mr Mistry in June 2018. On balance, the Tribunal finds that there was a practice supported by Ofsted where all employees regardless of disability could apply for flexibility in terms of their working patterns and that it was not considered necessary by either management or Mr Mistry to include working from home as an adjustment at this stage, (and even

though the OH report does consider working from home as an adjustment to support Mr Mistry's ongoing health issues).

33. Mr Mistry appeared to be well supported by line management during 2019 and had a good relationship with Mr Ritson. However, an issue arose in September 2019 where during a workplace briefing Mr Mistry made what he considered to be a humorous (albeit flippant) comment referring to Ofsted management behaving like *'a cult'* in relation to recently launched Behaviours Document. Elizabeth Pendlebury, Senior Team Manager appeared to take exception to these comments and having considered the emails within the bundle, we felt that her reaction was disproportionate from the Tribunal's perspective reacted in a disproportionate way, seeking to escalate what was a trivial and light-hearted event into a HR matter. It is noted that Mr Ritson discussed the issue with Mr Cowler on behalf of Mr Mistry by email on 1 October 2019 and there was an agreement that the attempted escalation by Ms Pendlebury was unnecessary and unhelpful to Mr Mistry's perception of management in the workplace. This was ultimately what caused the WAP to be created and in an email on 3 October 2019, Mr Mistry spoke favourably of Mr Ritson, saying *'I have reflected on why I trust Matt. I really like Matt's approach and processing things; A lot of thought is put in his relationship from an empathetic approach.'*

34. Like many Ofsted employees and described above, Mr Mistry was entitled to request to work overtime outside of his contractual hours of 36 hours per week. It is noted that Mr Mistry's OH reports and his WAP did not preclude him from working overtime. Ofsted also provided a flexible working policy which included procedures for employees working overtime.

35. On Saturday 7 and Sunday 8 December 2019, Mr Mistry elected to work overtime. It was agreed that during this overtime he would work on completing outstanding EY3 applications for the respondent. This overtime was worked remotely from home and involved dealing with a backlog of work which needed to be processed. He claimed 8 hours overtime for each date.

36. A discussion took place on Thursday 12 December 2019 (following what appeared to a telephone conversation the previous day when Mr Mistry was presumably working from home), where Mr Ritson mentioned to Mr Mistry that he had concerns regarding his time recording and Mr Hoult explained that this meeting took place to warn Mr Mistry of the potential issues arising and it was agreed that he could a day's annual leave 13 December 2019, with matters being discussed more formally on Monday 16 December 2019. However, Mr Mistry reported sick on 16 December 2019 and during an email exchange with Mr Ritson on the same day, his underlying depression and anxiety was triggered by the warning of the issue relating to time recording. Mr Ritson said he would provide him with written questions on Thursday 18 December in order that a meeting could take place on Friday 19 December 2019. This appeared to be an adjustment to help manage Mr Mistry's anxieties.

First grievance

37. Mr Mistry remained absent for the remainder of 2019 and the absence continued into January 2020, with a Med3 fit note being provided on 14 January 2020 describing a *recurrent depressive disorder* and confirming that he would remain unwell until 17 February 2020. He continued to correspond with Mr Ritson and explained that he was suffering from extreme levels of anxiety. Mr Ritson planned a catch up call on 10 January 2020 and in accordance with agreed practice, emailed him with details of the issues that would be discussed, which related to his absence and support that could be offered. He also queried with Mr Ritson in an email about the list of reasonable adjustments and how it would be recorded.

38. In the meantime, Mr Mistry raised a grievance by email on 11 January 2020. The actual grievance was 11 pages in length and dealt with issues beginning in 2016 and ending in the autumn of 2019. Documents accompanied the grievance, and these were all provided to Nicholas Jones who was appointed as the grievance manager. He worked in the regulatory part of ARC as a senior regulatory professional and was separate to Mr Mistry's area of work. Mr Mistry was represented by his trade union Ben Farrow. He emailed Mr Mistry on 23 January 2020 inviting him to formal grievance meeting on 28 January 2020 and enclosed a formal letter of invitation.

39. Mr Mistry requested adjustments for the meeting and taking into account his anxiety about being asked questions, Mr Jones provided a Questions and Areas for discussion document on 27 January 2020 which identified areas for discussion so that Mr Mistry would understand the nature of the questions being asked in relation to his grievances, his condition and the resolutions which he sought. This approach was adopted by managers in relation to subsequent grievance and disciplinary hearings and struck a balance between attempting to ameliorate the anxieties experienced by Mr Mistry while ensuring that managers holding the meetings had sufficient flexibility to ask the questions that needed to be asked to fulfil the purpose of each meeting which took place.

40. The first grievance meeting took place on 28 January 2020 with Mr Jones chairing, Roy Barkley (note taker), Daiga Strupa (HR support) and Mr Mistry attending with Ben Farrow. A copy of the notes was prepared by Ms Strupa and Mr Jones sent them to Mr Mistry on 7 February 2020 and asking if parts of the grievance relating Ms Pendlebury could be shared with her and Mr Mistry agreed to this.

41. The allegations were in summary made against the following Ofsted managers:

    a) Matthew Ritson – apparently in relation to his handling of Mr Mistry's absence management.

b) Gavin Hoult (Team Manager ARC Contact and Administration) – historic issues but primarily relating to a request to narrow list of reasonable adjustments).
c) Elizabeth Pendlebury – her reaction to the claimant's seemingly flippant comment that management were 'behaving like a cult'.
d) Carolyn Purcell.
e) Claire Binks.
f) Helen Barrow.
g) Kelly Humphries.
h) A failure by the respondent to make reasonable adjustments over a 4-year period.
i) Relevant training not being provided the respondent so he could fulfil job role; and,
j) Concerns that HR misplaced specific documents.

42. On 29 January 2020, Mr Mistry emailed Mr Jones and thanked him *'for making yesterday a comfortable and a safe space for me to be heard.'* He provided details of policies which he felt had not been followed by management and suggested that he would like to change team leaders '*due to broken trust'.*

43. Mr Jones then made enquires in relation to all the allegations and spoke with all of those named in the grievance apart from Ms Humphries who was on maternity leave. Explored with Emma Exton (Deputy Director Operations), whether he could change line manager on 31 January 2020.

44. He produced his grievance decision which did not uphold any of the allegations and which was sent to Mr Mistry on 27 February 2020. He did recommend that he continue to work with his line manager to put a new WAP in place, while reminding him that any adjustments identified had to be reasonable.

45. In terms of findings, he determined as follows:

a) Matthew Ritson – Mr Jones reminded Mr Mistry of the previous positive account given by him and that he behaved correctly in managing his absence, was supportive and invited him to share information so that any OH referral was approved.

b) Gavin Hoult – some of the allegations went back several years, Mr Hoult had not recollection of the events and it was felt that the allegations were unsubstantiated. Additionally, it was considered reasonably for Mr Ritson to seek advice from Mr Hoult concerning WAP and reasonable adjustments.

c) Elizabeth Pendlebury – incident in 2019 – accepted they could have been dealt with better and acknowledged Mr Ritson and Mr Cowler helped resolve the matter but that there was no harassment or discrimination.

d) Carolyn Purcell – meeting 10 July 2019 and alleged failure to take action, but actions reasonable as Mr Mistry did not request any further action to be taken.

e) Claire Binks, Helen Barrow, Kelly Humphries was not accepted because in accordance with Ofsted's grievance procedure the issues raised were more than 3 months old and did not involve exceptional circumstances to enable to be investigated in any event.

f) Failure to make reasonable adjustments over a 4-year period. He listed the involvement of OH and mentioned that flexible working 4 days a week was allowed, SAD lighting approved of use in the office, time away from desk, omitted from contact centre training at his request, Mr Ritson as single point of contact and ongoing stress risk assessment. It was also noted that WAPs were employee led and that Mr Ritson continued to support him.

g) Training not being provided on the Cygnum IT system – training ongoing for all staff and would be beneficial to Mr Mistry and would be provided now that Mr Ritson had received this training.

h) HR misplaced documents – staff had since left and record store did not reveal them and could not be upheld.

46. The decision provided a right of appeal within 10 working days. He informed the named managers of the decision but explained that he could not provide details of that decision. He also told Ms Purcell that managers should be asked to familiarise themselves with Ofsted information on mental health and that Mr Ritson should continue to work on WAP and seek management support concerning training as appropriate.

<u>First grievance – appeal</u>

47. Mr Mistry gave notice of his appeal of the first grievance by email on 3 March 2020. Gemma Williams was appointed as a hearing officer and although of a similar grade to Mr Jones, worked in another team to both him and Mr Mistry. The appeal was a 7-page document and Ms Williams contacted Mr Mistry on 10 March 2020 inviting to an appeal meeting on 13 March 2020. She also prepared a list of questions and areas for discussion in advance of the hearing, and these were sent by email on 12 March 2020.

48. The appeal took place on 13 March 2020 with Ms Williams hearing it, supported by Sam Birtles (HR officer), Hinna Salam (note taker), Mr Mistry attending with Mr Farrow as union representative. She discussed the issues with Mr Mistry and then proceeded to investigate, although the arrival of Covid to the UK and the subsequent national lockdown affected her ability to progress the investigation to some extent and delayed a reply.

49. Her decision was sent to Mr Mistry on 27 March 2020, and she confirmed that she would not uphold the appeal because the original decision was fair

and reasonable. She did agree that a facilitated discussion could take place between Mr Mistry and Mr Ritson to complete the WAP and confirmed reasonable adjustments as follows:

a) frequent remote worker with flexi time and working from home 4 days a week. He was reminded that any applications for homeworking must be made using the flexible working policy process and a link provided to that document.

b) the use of Seasonal Affective Disorder ('SAD') lighting at both office and home.

c) time outs away from desk when overwhelmed to use coping mechanisms, helplines or meditation.

d) While Mr Ritson retained as line manager, consideration would be given to a 'supporting manager' in addition for a temporary period to provide support and to raise concerns.

e) Giving consideration to further training for managers on mental health

50. There is no need to make specific reference to each and every finding in this lengthy document, but the Tribunal has considered it and notes its contents. However, she noted that appropriate reasonable adjustments had been made as described by Mr Jones, that the WAP currently available was suitable, and the draft provided by Mr Mistry had been too long, hard to follow and contained a number of errors. She said that there was no evidence of bullying and harassment by managers and although additional information had been provided about Mr Ritson, Ms Williams remained of the view that he was a suitable line manager for Mr Mistry. She provided an appendix outlining her findings in relation to each ground of appeal and which could be used for further discussion with Mr Ritson when considering the ongoing WAP.

51. Having considered the grievance, the Tribunal felt that it was dealt with in a thorough manner and dealt with all the issues that were raised, even if Mr Mistry did not like their outcome. Enquiries were made once the allegations were identified at the meeting and despite this, the turnaround of both the initial grievance and the appeal was very swift, especially considering the number of allegations and arrival of the Covid pandemic and the restrictions this placed upon people. The findings were reasonable and considered the previous good relationship between Mr Ritson and Mr Mistry, recognised that management could not simply be changed unless serious issues were identified, but nonetheless pragmatic solutions were suggested and this was not a case where an employer closed down the grievance with a rejection, but instead, steps were recommended to support both Mr Mistry an others with mental health issues and as such it appeared to serve as a learning exercise for managers. It recognised that Mr Mistry remained absent on ill health grounds and steps were needed to be taken to give him confidence to return.

52. Mr Mistry returned to work on 14 April 2020 following a lengthy period of sickness absence, but unfortunately, he commenced a further period of sickness absence from 15 April 2020.

Second grievance

53. On 25 April 2020, Mr Mistry submitted a second grievance. It was 3 pages in length. Lauren Hill was appointed as the hearing officer and she was a senior manager who although working in the same department as Mr Mistry, she had no line management responsibility for him. Ms Hill confirmed to the Tribunal that she had recently married, and she had adopted her married name of Rowbotham. However, for the purposes of this judgment she is referred to as Ms Hill because her witness evidence used that name and thereby to avoid confusion.

54. She informed Mr Mistry of her appointment on 6 May 2020 and invited him to a meeting on 18 May 2020. It was acknowledged that the ongoing Covid pandemic would require meetings to take place remotely. Mr Mistry sent an email on 16 May 2020 requesting written questions to be sent to him before the meeting and these were sent to him before it took place.

55. The meeting took place on 18 May 2020 as arranged. Ms Hill acted as hearing officer, Mr Cowler as HR advisor, Andrew as note taker and Mr Os Isik trade union representative supporting Mr Mistry. The meting took place by Skype.

56. One issue which stood out as part of the second grievance was Mr Mistry's desire to have his line manager changed and he explained to Ms Hill that he wanted a female manger rather than a male manager, as this would be less triggering for his PTSD. She said that this was the first time that this request was made. He felt that Mr Ritson had raised issues regarding his performance at the return-to-work meeting and that this was inappropriate at that meeting. He also said that he wanted to be permanent home worker.

57. Ms Hill spent time investigating the allegations made within the second grievance and produced a decision letter on 26 June 2020. She identified 8 *themes* of complaint and decided not to uphold the grievance. However, she did identify a number of resolutions to support Mr Mistry back into work as follows:

    a) he would be assigned a new line manager from 21 May 2020 (Morgan Davies).

    b) mental health training was being provided to managers in the ARC.

    c) a further referral to OH would be made.

    d) a phased return to work would be discussed with the new line manager; and,

    e) the update of the ongoing WAP would be discussed with the new line manger.

58. In terms of the findings made in relation to the 8 themes, she noted as follows:

a) there was no harassment by Mr Ritson of Mr Mistry and that he was simply taking appropriate line management action in discussing performance matters and did so with the involvement of HR advice.

b) That Ofsted did not fail to put in place workplace adjustment and noted that Mr Mistry confirmed that he would put in an application for permanent home working. However, given his disability, it was recommended that discussions should take place with the new line manager.

c) It was necessary and appropriate for line managers to have regular contact with employees when they were absent through ill health to provide necessary support and weekly contact from Mr Ritson was reasonable and not excessive. These matters could of course be discussed but contact was a necessary part of the overall duty of care.

d) Mr Ritson behaved appropriately in raising performance issues at the return-to-work meeting, but his approach was deemed to be supportive and was exploring how best performance could be considered in the future.

e) Mr Ritson did not behave inappropriately when agreeing that Mr Mistry should work for 2 hours and when after Mr Mistry had said this had been completed at 10am, Mr Ritson asked where he was at 10.35am, this was not inappropriate.

f) The allegation that Mr Ritson was a trigger and requesting a new line manager was rejected although a new temporary line manager was identified and would be provided from 21 May 2020.

g) Mr Mistry was not bullied or harassed when Mr Ritson sending a return-to-work discussion, and which mentioned performance issues and he was following sickness absence procedures.

59. The decision letter prepared by Ms Hill was lengthy and ran to 21 pages. It was empathetic in tone and concluded with themes arising from the grievance and Ms Hill gave the impression that she was concerned about what happened following the decision being given and she tried to reassure Mr Mistry and reduce any anxieties that he had, especially as she recognised, he remained absent from work and required encouragement. In addition to explaining why she believed Mr Ritson had not harassed him, she also reassured Mr Mistry that he was free to apply for any roles within Ofsted and across the civil service if he did not wish to remain in ARC. He was also afforded a right of appeal.

60. Ms Hill was found by the Tribunal to be a credible and reliable witness and her written and oral evidence was consistent and accepted by the Tribunal. She appeared to deal with the matter thoroughly and had a good recollection of the events relating to the second grievance. On balance we find that she dealt with the matter thoughtfully and her conclusions were reasonable. The Tribunal noted that effectively, the grievance was about Mr Ritson. Although there were a number of issues raised, in reality the focus of this second grievance was in

relation to Mr Ritson's management of the sickness absence and the need to address the ongoing question of performance related issues when Mr Mistry returned to work. While returning to work after a long period of time was a subject of anxiety for Mr Mistry, the evidence indicates that regular contact was made at reasonable intervals, there was no medical evidence suggesting that it should take place in a different way and the reference at the return to work interview regarding ongoing performance was simply to remind Mr Mistry that it needed to be resolved at some stage rather than actually seeking to resolve the matter immediately on Mr Mistry's first day at work. The Tribunal agrees that this was not inappropriate behaviour on the part of Mr Ritson.

Second grievance – appeal

61. Mr Mistry submitted an appeal on 6 July 2020, and it was 2 pages in length. Katie Kelly was appointed as the appeal hearing officer. She worked outside of Mr Mistry's work area and was employed by Ofsted as a Senior Regulatory Professional. She contacted Mr Mistry on 14 July 2020 and explained that due to imminent annual leave, she would arrange a meeting at the end of July 2020, but due to Mr Mistry contracting Covid, further delay took place.

62. The meeting took place on 7 October 2020 and again it took place by Skype. Mr Isik accompanied Mr Mistry and the Tribunal felt that the appeal was held appropriately. There was a follow up investigation, and an outcome letter was sent on 4 November 2020 with the appeal not being upheld. However, Ms Kelly noted that a new line manager was being provided for Mr Mistry and the WAP would be discussed further.

63. Ms Kelly's evidence was not challenged by Mr Mistry and accordingly it is accepted. Her witness statement is credible and reliable and is supported by the relevant documents within the hearing bundle. She reached a fair decision in the grievance appeal and properly followed procedure even allowing for the challenges arising from the Covid pandemic and the need to deal with matters remotely.

Disciplinary process and dismissal

64. While Mr Mistry was absent through sickness and during the progression of the grievances, there remained an outstanding matter relating to his time recording and which had initially been raised by Mr Ritson in December 2019.

65. It was not until June 2020 that Ms Exton decided to appoint Susan Aldridge to act as a disciplinary officer as part of a disciplinary process being commenced against Mr Mistry. Ms Aldridge is a Principal Officer of Complaints about Schools and the National Inspection Planning Team. Joe Waters as Head of HR was appointed to support her in this process.

66. She appointed Carolyn Purcell (who is the Head of Contract and Administration for ARC), as her investigating officer in accordance with the disciplinary procedure. Although it was acknowledged that Ms Purcell had been named previously in the first grievance brought by Mr Mistry, it was decided on balance

that these allegations related to limited and historical matters, that many managers had been named in this grievance and that Ms Purcell had a good understanding of how the ARC team worked. The Tribunal considered whether it was inappropriate to appoint Ms Purcell to this role but concluded that Ms Aldridge's evidence was credible and that a sensible balancing exercise took place recognising the potential issues of Ms Purcell being named in a grievance. However, it is accepted that her involvement in that grievance was limited and as the primary focus of that grievance had been against Mr Ritson, Ms Pendlebury and Mr Hoult, her involvement would not give any perception of bias or prejudice to the investigation. It is also noted that her appointment was not raised as an issue of concern by Mr Mistry's union representative.

67. Ms Purcell sent Mr Mistry an invitation to a disciplinary investigation meeting on 24 June 2022. It was sent by letter on 12 June 2020 and explained the allegations and that they could if proven, amount to gross misconduct.

68. Mr Mistry remained absent from work, but the reasons given by Ms Aldridge for proceeding were:

    a) A significant amount of time had already passed.
    b) He had been attending meetings during his absence relating to grievance and sickness absence management; and,
    c) The disciplinary matter remained a barrier to him returning to work.

    In addition, Ms Aldridge noted that Mr Mistry had advised management that his GP was concerned that any investigation would be better proceedings sooner rather than later. Having considered these circumstances, the Tribunal finds that it was reasonable to proceed with the disciplinary process.

69. The allegations outlined in the letter of 12 June 2020 were as follows (845-7):

    a) 'On Saturday 7 December 2019, you claimed for eight hours of work as overtime but only undertook 2 hours and 54 minutes of work.
    b) On Sunday 8 December 2019, you claimed for eight hours of work as overtime but only undertook 1 hour and 31 minutes of work.
    c) You submitted a claim for overtime for hours you did not work. There is 11 hours and 35 minutes' worth of work outstanding.
    d) On Monday 9 December 2019, you recorded as undertaking work from 9 a.m. to 17:00, with a lunch break from 12:00 to 12:45, which amounted to 7 hours and 15 minutes on your flexi time sheet. But there is no work accounted for from 14:03 to 17:00.
    e) On Thursday 12 December 2019, you recorded on your daily worksheet as undertaking 6 hours and 55 minutes of work, with a lunch break from 10:45 to 11:30, you failed to complete your flexitime sheet on this day. There is no work accounted for from 7:49 am to 10:45.
    f) That your actions are considered dishonest and fraudulent.
    g) *That your actions are contrary to expected standard of an Ofsted employee and contrary to Civil Service Code, in particular of honesty of and integrity.'*

The letter explained that these matters if proven could amount to gross misconduct and reference was made to the disciplinary policy and procedure. Details of employee support was also provided if Mr Mistry found the process difficult.

70. The Tribunal noted that the Disciplinary procedure included in the hearing bundle provided full details of the procedure to be followed by the investigating officer and decision-making manager. It specifically stated that where there is gross misconduct, a possible sanction could be summary dismissal if the allegation is proven. While it is possible for an employee reading this letter to discover from the accompanying disciplinary procedure that the allegations could if proven result in summary dismissal, the Tribunal does feel that it would have been better to explicitly state this possibility within the actual letter itself.

71. Mr Mistry requested that a list of questions be provided before the investigatory meeting took place. Ms Purcell refused as she required immediate answers and each answer that he gave may also generate additional questions. However, in her email of 1 July 2020, she provided details of areas for discussion in order that Mr Mistry could understand the sorts of questions that would be asked. Considering how this matter was dealt with in the grievances, the Tribunal accepts that Ms Purcell took a proportionate and reasonable step in supporting Mr Mistry and his anxieties about the process in order that he would be able to participate in the disciplinary investigation.

72. An investigation meeting took place on 2 July 2020 as arranged and Mss Purcell produced a report. Mr Waters attended as advisor; Roy Barkley HR officer was present as a note taker. Mr Mistry and his union representative Mr Isik attended. Mr Mistry provided evidence as part of the investigation and the investigation report explained that while he was interviewed, no further witnesses needed to be interviewed. In relation to each of the allegations there was a case to answer. She specifically considered the definition of fraud and dishonesty using CIPFA (Chartered Institute of Public Finance Accountants) definition and the ***Ghosh*** test (which was provided in the criminal case decision of the same name) respectively and the Civil Service Code. She also considered Mr Mistry's arguments of mitigation and felt that nonetheless, the case should proceed to a disciplinary hearing before Ms Aldridge.

73. She acknowledged Mr Mistry's reference to his reasonable adjustments and identified the supportive steps taken including the provision of subject areas for discussion and questions to be asked. She disputed that his ill health should amount to mitigation for all of the allegations but acknowledged in relation to allegation 5 (identified in paragraph 75(e) above - the conversation regarding the allegations on 12 December 2019) may have been affected by his mood and explained why that day's flexi sheet was completed. Nonetheless, she recommended that all allegations should proceed to a disciplinary hearing.

74. The Tribunal accepts that although Ms Purcell did not give oral evidence or provide a witness statement, the available documents within the bundle demonstrated what was required as an investigating officer and identified that the allegations which should proceed to a disciplinary hearing. Moreover, she did not

attempt to predetermine the issues as being proven, but simply said that there was a case to answer.

75. Mr Mistry returned to work on 9 July 2020 and the same day he was given a letter by Ms Aldridge notifying him of his suspension and another letter inviting him to the disciplinary hearing on 20 July 2020. The disciplinary hearing, however, was rescheduled to 6 August 2020 and then to 4 September 2020 because Mr Mistry contracted Covid.

76. The disciplinary hearing took place on 4 September 2020. The disciplinary hearing notes identified as being present, Ms Aldridge as decision manager, Mr Water as Head of HR, Mr Barkley as HR officer and note taker, Mr Mistry and his union representative Mr Isik. It commenced at 9:00 and concluded at 10:38 and followed the familiar process of introductions, with Mr Mistry agreeing to respond to the allegations collectively and Ms Aldridge being recorded as asking questions as the hearing progressed.

77. It is noted that during the hearing, Mr Mistry said that he undertook coping strategies and accepted that over the weekend in question he undertook these strategies and continued to claim overtime on his time sheet. It should be noted that this was overtime which he volunteered to do and which he felt he was fit to do. He said that these strategies could last an hour but could be longer when working which included speaking with help groups to support his PTSD. He did not submit medical evidence during the hearing to support any contention that his poor decision making in relation to his decision to record overtime when not working related to his PTSD. He was not required to work overtime that weekend by management and the Tribunal was satisfied that the volunteering for overtime and the completion of time sheets was the responsibility of Mr Mistry and this responsibility was especially significant given that it was worked remotely and without management supervision, thereby placing a significant degree of trust on the employee concerned.

78. Mr Waters sent a copy of the hearing notes to Mr Mistry on 9 September 2020 for his approval and on 16 September 2020, Ms Aldridge sent the disciplinary outcome letter to him. It was 8 pages in length and provided a detailed explanation of why the decision had been made to dismiss him summarily on grounds of his misconduct.

79. All 7 allegations found to be proven and provided relevant extracts from the hearing notes to support the decisions reached. Ms Aldridge found that on Saturday 7 December 2019, Mr Mistry had only worked 2 hours and 54 minutes, but had submitted an overtime claim for 8 hours and on the following Sunday, only worked 1 hour and 31 minutes, yet submitted an overtime claim of 8 hours. The calculation of the time worked was carried out by the investigating manager and used Mr Mistry's daily worksheets and other data including time recorded as being spent on the relevant IT systems. Full details were provided in appendices to the investigation report. Reference was made to Mr Mistry admitting during the disciplinary meeting that during this weekend, he had sought to manage his mental health condition using coping strategies and spent time manually calculating historic overtime payments which he believed had been calculated

incorrectly by HR. Significantly, it was noted that majority of the time claimed as overtime had been spent on these non-work-related activities.

80. Mr Mistry was recorded as saying that he did not know that his behaviour was unacceptable and argued that these matters had not been written anywhere as a specific instruction. This was not accepted by Ms Aldridge as she was satisfied that a reasonable person would understand that when volunteering to work overtime, an employee understood that it was offered on the understanding that an employee would devote their time to specific tasks. Where admissions were not made in the disciplinary hearing regarding specific allegations, Ms Aldridge noted that they were made during the investigation meeting and the Tribunal notes that they were not subsequently denied by him. Ms Aldridge stated that had Mr Mistry known he was feeling unwell on the overtime days, he should have notified his line manager rather than claim overtime when not working, so that support could be put in place.

81. She paid attention to the question of fraud and while Mr Mistry was recorded as saying *'its not like I tried to fraud work',* she noted that:

'…you submitted a claim for 16 hours overtime, paid at an enhanced rate, yet by your own admission you chose to spend 11 hours 35 minutes of that overtime working on matters which were wholly unrelated to the tasks for which this period of overtime had been authorised'.

She went on to say that:

'In considering the element of dishonesty I have asked myself 'would an ordinary reasonable and honest person believe that this was dishonest? My conclusion is that they would…I cannot describe this as honest behaviour, or even a series of honest errors of judgment'.

She concluded by making references to the definition of fraud as provided by the Fraud Act 2006 and the provisions of the Civil Service Code, the latter allegation being considered proven because *'…your actions fell well below the high standards of integrity and honesty which Ofsted expect of its staff'.*

82. Ms Aldridge did go on to consider the mitigation which was put forward by Mr Mistry. She accepted that he had mental health issues by reason of his PTSD, but she did not think it affected Mr Mistry's decision making in terms of the allegations made against him. She noted that he freely volunteered for overtime and consciously submitted the claims knowing that he had not been working all day. She was especially concerned that his submissions contained:

'little or no acceptance of the errors you had made or acknowledgement of the seriousness of the matter. Having considered everything you said to me, I was left with the view that you felt it was reasonable to spend most of Saturday 7 September 2019 reviewing your own overtime.'

83. She provided an extract from the hearing notes of why she concluded this and her concerns that he would make the same mistakes in future. Ms Aldridge

concluded that there had gross misconduct. She considered whether a sanction short of dismissal should be imposed but felt that the submissions made by Mr Mistry did not merit such a decision. She therefore gave notice in the letter that she was imposing a sanction of summary dismissal with a deduction from any pay outstanding of the overtime payments from December 2019, which had been wrongly claimed. He was reminded of his right of appeal under the disciplinary procedure.

84. Ms Aldridge gave credible evidence on the whole reliable evidence. She had a good recall of the case and the information contained in relevant documents. The Tribunal did find her explanation during her oral evidence concerning the reason why Mr Mistry's mental health condition did not persuade her to support a lesser penalty to be slightly confused. However, having reviewed the evidence involved in her decision making during the disciplinary process, the Tribunal is satisfied that Mr Mistry did not provide convincing evidence to suggest that it caused or contributed to him undertaking the actions alleged and which were considered proven. Moreover, there was no suggestion that his PTSD caused the poor decision making which he admitted to, and he clearly was unable to accept responsibility for making claims for overtime which he had volunteered to do and where considerable time was spent not working. Ms Aldridge's decision letter was very thorough, and it was clear that a great deal of thought had gone into her considering the allegations and determining whether they were proven and whether Mr Mistry should be dismissed.

85. It is understood that two other employees who worked in the same department as Mr Mistry had also been dismissed for making overtime claims which did not reflect the time that they had worked and related to claims made in January and February 2020. Both were dismissed and Ms Aldridge confirmed that their treatment was consistent with the decision made in relation to Mr Mistry. Mr Mistry could have questioned Ms Aldridge further concerning this matter but chose not to do so and the Tribunal accepts that there were comparable employees who had been dismissed for similar allegations as Mr Mistry and that there was not evidence that they were disabled or had made protected acts under the EQA.

<u>Appeal against dismissal</u>

86. Mr Mistry brought an appeal against the decision to summarily dismiss him. Neil Greenwood, Director of Digital and Information was appointed as the hearing officer in October 2020 and his statement confirmed that he was an experienced manager with previous experience of disciplinary hearings including those where dismissal had taken place. An appeal hearing took place on 22 October 2020 and Mr Greenwood's statement provided a detailed explanation that appropriate preparatory steps took place including familiarisation of the papers, consideration of the grounds of appeal and discussions with the appointed HR Operations Manager John Shaw. He said that the grounds of appeal appeared to relate to systemic racism (rather than disability) within the ARC and his dismissal arose from his grievances concerning a failure to make reasonable adjustments.

87. Mr Mistry did not challenge the witness evidence of Mr Greenwood and he was present at the hearing, but the Tribunal accepted that he did not need to give oral evidence. Accordingly, his evidence was accepted by the Tribunal as unchallenged and his decision to reject the appeal was considered to be fair and reasonable and sufficient detail was provided to support this finding, both in terms of the witness statement and the documentation to which Mr Greenwood referred to in that statement.

The law

Disability discrimination

The Equality Act 2010

88. Section 6 Equality Act 2010 ('EQA') provides that a person has a disability if they have a physical or mental impairment, which has a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities.

89. Section 123 EQA provides that for the Tribunal to have jurisdiction to hear a complaint relating to workplace discrimination under the EQA, a complaint must be brought before the end of the period of 3 months starting with the date of the act to which the complaint relates, or such period as the Tribunal thinks just and equitable. Where conduct which is alleged to be discriminatory takes place over a period of time, it is to be treated as done at the end of that period.

90. Section 13 EQA provides that direct discrimination takes place when a person treats another less favourable because of their protected characteristic, than they treat or would treat others.

91. Section 15 EQA provides that discrimination arising from disability takes place when a person treats another unfavourably because of something arising as a consequence of their disability and they cannot show that the treatment is a proportionate means of achieving a legitimate aim.

92. Section 21 EQA provides that an employer fails its duty under section 20 EQA to make reasonable adjustments, where a provision criterion of practice ('PCP') in the workplace puts a disabled employee at a substantial disadvantage compared with persons who are not disabled. Additionally, the duty also applies to avoiding a disadvantage relating to physical features place a disabled employee at a significant disadvantage or where an auxiliary aid if provided could alleviate that disadvantage.

93. Section 27 EQA provides that victimisation arises a person subjects another to a detriment because they did a protected act, or they believe the person in question did or may do a protected act. Protected acts can include bringing proceedings under the EQA, giving evidence or providing evidence under the EQA, doing any other things for the purposes of or in connection

with the EQA, or making an allegation that the person responsible for the detriment or another person has contravened the EQA.

94. Section 136 EQA provides that in relation to the burden of proof, if there are facts from which the Tribunal could conclude that in the absence of any other explanation, that a person contravened the alleged provision of the EQA, the Tribunal must hold that the contravention occurred.

Caselaw

95. Mr Mistry referred to the case of ***York City Council v Grosset*** **[2018] ICR 1492.** In this case (and this is a summary and non-exhaustive description), the Court of Appeal considered section 15 EQA and that s.15(1)(a) the person who treated the person unfavourably did not have to be shown that the 'something' which gave rise to the treatment arose from the disability. Additionally, in terms of the test of *justification* under s.15(1)(b), the test was an objective one according to which the Tribunal had to make its own assessment as to the legitimate aim advanced by the respondent and whether the unfavourable treatment was disproportionate or not. During discussions with Mr Mistry in Tribunal, it appeared that his reason for referring to this case, was with regard to knowledge rather than justification.

96. In relation to the issues falling under the EQA, Ms Amartey referred to the cases (with a summary and non-exhaustive description of the decisions made) of:

a) ***Igen Ltd v Wong*** **[2005] EWCA Civ 142** – the leading case concerning s.136 EQA and it is for the claimant to prove on balance of probabilities facts from which the Tribunal *could* conclude, without an adequate explanation, that the respondent has committed an act of discrimination.

b) ***Madrassy v Nomura International Plc*** **[2007] IRLR 246** – it is for the claimant to prove on balance of probabilities facts from which the Tribunal *could* conclude, without an adequate explanation, that the respondent has committed an act of discrimination. The claimant must establish a prima facie case and the burden then shifts to the respondent, who is then required to show that it did not discriminate against the claimant.

c) ***Royal Mail Group v Efobi*** **[2021] UKSC 33** – the Supreme Court decision was that when considering the claimant's prima facie case at stage one under section 136 EQA, it should consider all of the evidence.

d) ***NCH Scotland v McHughs*** **[EAT] 0010/06** – the application of a PCP must be found to cause the substantial disadvantage that has been alleged.

e) ***Doran v Department of Work and Pensions*** **EAT 0017/14** – approved ***NCH Scotland*** (above)

Unfair dismissal

97. Section 94 of the Employment Rights Act 1996 ('ERA'), an employee has the right not to be unfairly dismissed. Section 98 ERA, provides that when determining the fairness of the dismissal, it is for the employer to show a potentially fair reason for the dismissal which in this case involves the reason of conduct. Where the employer has fulfilled the requirement to demonstrate a potentially fair reason, the Tribunal will determine whether it is fair or unfair by considering the circumstances (including the size and administrative resources of the employer's undertaking) and whether the employer acted reasonably or unreasonably in treating the reason as sufficient to dismiss the employee.

98. In relation to unfair dismissal, Ms Amartey referred to the cases of:

a) ***British Home Stores Ltd v Burchell*** **[1980] ICR 303, EAT –** the three stage test that should be applied to a dismissal relating to conduct, namely: i) the dismissing manager believed the employee guilty of misconduct; ii) it had reasonable grounds upon which toi sustain that belief; and, iii) 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.

b) ***Royal Society for the Protection of Birds v Croucher*** **[1984] ICR 604, EAT –** an investigation should be considered in the context of the admissions already made by the employee.

c) **Scottish and Southern Energy plc v Innes EAT 0043/10 –** confirmed ***RSPB*** (above)

Breach of contract

99. The Employment Tribunals Extension of Jurisdiction Order 1994 provides that proceedings for breach of contract may be brought before a Tribunal in respect of a claim for damages or any other sum (other than a claim for personal injuries and other excluded claims) where the claim arises or is outstanding on the termination of the employee's employment.

Discussion

100. It should be noted that the discussion takes into account a lengthy list of issues as provided above and as a consequence, it was a case where it was proportionate to focus upon those issues where the claimant had provided evidence in support of the allegations as some of the issues were not supported by his evidence. The claimant no doubt focused his answers in oral evidence and cross examination questions of respondent witnesses upon those issues which he felt were the most significant in his claim. Ultimately, what was clear to the Tribunal was that there were a number of issues where minimal if any attention was given by the claimant during the hearing and discussion therefore focuses upon those which received the

most attention during the hearing and which represented his best arguments. If he did not advance any evidence in support of a particular issue, it was clearly not going to result in that part of a complaint being successful.

Disability

101. The respondent has previously accepted that the claimant suffers from PTSD and its effects amount to impairments that are covered by section 6 EQA. Accordingly, there is no need to consider this particular issue any further and the complaints relating to the actual allegations of disability discrimination can be considered further by the Tribunal.

Direct discrimination

102. Ms Amartey was correct in her submissions that there was no evidence that Mr Mistry made a formal application for home working using the Ofsted flexible working procedure, which he was directed to by management on several occasions.

103. Nonetheless, the respondent's management did not refuse homeworking and they were guided by OH advice once they became aware of his disability from 2016. He was allowed to work from home 4 days per week which continued until he began a long period of sickness absence in December 2019.

104. Home working did not form part of the available WAP documents, although had Mr Mistry returned to work and not been dismissed, it is likely that it would have been a subject for further discussion between him and management and this was suggested in the second grievance outcome letter.

105. Inevitably the Covid pandemic and its arrival in the UK in March 2020 affected Ofsted's overall approach to home working and it appeared that most employees worked at home during the relevant lockdown periods. Mr Mistry would have been able to do so as well. In any event, there was clearly an understanding that home working was a consideration of the respondent from Mr Mistry's contract of employment and the references during the grievance process to the flexible working policy and applications being made for home working using this process, did not inform the Tribunal that a request for permanent home working would have been refused.

106. While management may have properly considered whether it would have been beneficial for Mr Mistry to work from home on every normal working day, (taking into account an earlier OH report as discussed in the findings of fact), the Tribunal saw no suggestion that such a request would necessarily have been refused from November 2019 and even so, it would only have occurred because updated OH advice having been obtained. As such, this would not amount to less favourable treatment because it would

have been heeding medical evidence rather than simply refusing the requested measures because of the disability in question.

107. However, in term of the treatment alleged by Mr Mistry in this complaint, the Tribunal did not hear any evidence from him which suggested that a request for permanent working had been made in or around November 2019 and that it had been refused. For the reasons given above, we are unable to find that there was evidence of the treatment alleged and as these basic facts had not been established, the Tribunal is unable to conclude that Mr Mistry was subjected to discriminatory treatment on grounds of his disability.

Discrimination arising from a disability (s.15 EQA)

108. It is unarguable that the respondent's decision to dismiss Mr Mistry amount to unfavourable treatment.

109. The more difficult question is whether the actual unfavourable treatment of dismissing Mr Mistry could have arisen from his disability of PTSD. It is argued by him that as a consequence of his disability, his judgment was impaired in relation to the disciplinary allegations made regarding the overtime claim. In addition, he says that his memory was poor and as a consequence, was unable to account for the errors recorded in his time sheets which suggested that he worked for 8 hours on the Saturday and Sunday in question. Moreover, the coping strategies which he said were employed on the days in question were required to allow him to manage his disability.

110. The Tribunal acknowledges that Mr Mistry's PTSD was a very difficult mental health problem to live with and it necessitated him taking steps to manage this condition such as undertaking meditation or contacting self-help groups to manage heightened levels of anxiety or other mental health issues. This appeared to be something that the respondent accepted, and he was allowed time out to do this. During normal working days this might take place without any difficulty and was something which he had been doing for a number of years once his condition had been identified in 2016.

111. The disciplinary hearing related to overtime rather than normal weekday contractual working and it was something which Mr Mistry applied for and which it could be expected he felt well enough to do. By the time of the overtime being worked in December 2019, he had a WAP in place and was aware of the lines of communication with management.

112. During the hearing, the Tribunal did not hear any oral evidence nor was it taken to any medical or other documentary evidence by Mr Mistry or the other witnesses which would show that the actual decision to wrongly claim overtime was somehow caused or contributed to by PTSD impairments. It was recognised that his impairments may have made it difficult to continue working the overtime that he had agreed to undertake. But that is different

from an impairment which causes an employee to make an erroneous overtime claim. There was no reason why Mr Mistry could not have stopped 'the clock' for time keeping purposes and focused on his well-being. He could have either stopped for the day or paused and resumed later on. He was not required to work the overtime in question and the Tribunal accepts that the respondent would not have criticised him for submitting a shorter overtime claim for the work actually done.

113. Additionally, some of the time which was not worked related to personal administration concerning historic overtime (rather than coping strategies), and clearly should not have been subject to an overtime claim. Ultimately, the action to dismiss was because of the decision to claim significant amounts of overtime over and above the time actually worked and resulting in payments being made for time not worked at the enhanced overtime rate. There was no real contrition on the part of Mr Mistry nor any attempt made to repay the amounts wrongly claimed.

114. The unfavourable treatment did not therefore arise from Mr Mistry's disability. Instead, it was because of his decision to claim overtime when he knew or could have reasonably been expected to know (with no evidence that the disability impaired this decision making), that he was not entitled to make such an overtime claim for the hours in question.

115. Mr Mistry failed to adduce evidence which supported his contention that there was section 15 EQA discrimination and accordingly this complaint must fail.

116. Although it is not strictly necessary to consider the defence of legitimate aim and proportionate means, it is briefly mentioned for the avoidance of doubt, should the Tribunal be wrong in finding that there was no discrimination arising from disability as described above.

117. It is a legitimate aim for all employers and especially those who received money from the public purse that only pay salary to its employees for work that is properly done and that it should engage disciplinary procedures where there is an arguable case that an employee has abused a system of time sheets by claiming salary to which they are not entitled. In paragraph 32 of their third response dated 11 February 2021, the respondent argues that it should take appropriate action to uphold standards of honesty, integrity and conduct in the workplace setting.

118. The Tribunal accepts that this was a genuine legitimate aim and that it acted proportionately in using its disciplinary process, (making adjustments as appropriate), and once the allegations had been proven, deciding that it amounted to gross misconduct with summary dismissal being the correct sanction. This was not a decision that was in any way tainted by discrimination related to Mr Mistry's disability.

Reasonable adjustments

119. In terms of the complaint that the respondent failed to comply with its duty to provide reasonable adjustments contrary to ss. 20 and 21 EQA, the Tribunal has first considered the PCPs relied upon in the list of issues.

120. In terms of whether there was a requirement to work in the office, the Tribunal has already found and discussed the respondent's willingness to consider flexible working which can include working from home. Once Mr Mistry notified the respondent of his disability in 2016, he was the subject of a number of OH reports with the report of 23 March 2017 first recommending home working as required and on an occasional basis. This increased to regular working from home of 1 to 2 days per week during 2018 and by December 2018, he was working 4 days a week from home. It is acknowledged that the OH report of 30 January 2018 raised caution concerning prolonged home working and that this might have increased Mr Mistry's anxiety and that he should work at least one day a week. This appeared to continue until the overtime incidents arose in December 2019 and the subsequent long term sickness absence and grievances being raised.

121. However, there was never any suggestion that a rigid requirement to work in the office would be applied and Mr Mistry was encouraged to make flexible working applications and with the support of OH, there was no reason to believe that home working would have been refused and the contract of employment even indicated that home working could be a possibility. This was not a PCP that existed within the respondent's workplace and Mr Mistry has not adduced any evidence to suggest that this situation may have existed.

122. In terms of Mr Mistry working in the office, it is accepted that there was medical evidence available which supported a contention that from time to time, his anxiety levels could become heightened. But as has been described above and in the findings of fact, he was not subjected to a restriction upon working from home other than where his OH physician determined that an attendance at work would be helpful. Had he made an application under the flexible working policy, it would have been granted subject to OH evidence and given that he was working 4 days a week at the time of his long-term sickness absence the Tribunal accepts suitable adjustments were made. These adjustments had developed in accordance with the OH evidence and by November 2019, Mr Mistry was being allowed home working and no flexible working application had been made seeking an extension to full home working and under these circumstances, appropriate adjustments had been made.

123. The Tribunal does not accept that a PCP existed within the workplace whereby there was a practice of speaking to employees as if they did not have mental health issues. This is a curious allegation, and it is difficult to see how it could amount to a PCP unless there was evidence that the respondent was dismissive of mental health as an issue among its

employees. Taking into account the evidence available to the Tribunal, this was clearly not the case with the respondent.

124. Reference has already been made to the policies and procedures and the training which took place to ensure that managers were aware of mental health issues in the workplace of Ofsted. This included the MHFA line manager resource. Employees had access to helplines such as PAM Assist and the disciplinary process letters included reference to these helplines anticipating the anxiety that these processes might cause.

125. An additional complication to this asserted PCP (and as alluded to by Ms Amartey in her submissions), is that mental health conditions manifest in many different ways and there is no one single way to speak with an employee so impaired. The respondent correctly acknowledged through its policies and procedures and training that it was a genuine concern and made OH referrals as appropriate, the evidence was that Mr Mistry was sensitively supported by many of his managers. The Tribunal cannot accept that this was a legitimate PCP.

126. Mr Mistry may have believed that there was a PCP that meant management talked to all employees as if they did not have mental health issues but as discussed above, the Tribunal does not accept that this was the case. However, even if it was and of course his belief that it was this alleged PCP which increased his anxiety, he was treated appropriately by managers in a sensitive way. Adjustments were put in place including OH referrals and further training for managers to ameliorate his concerns as a result of the grievances brought and to augment those workplace practices that were already in place by and before November 2019. Ultimately however, this was always a perception of Mr Mistry rather than an actual practice.

127. The asserted PCP of providing team leaders to employees irrespective of sex may well have existed within the respondent's workplace and this is not surprising given its obligation to follow the provisions of the EQA and to avoid discriminating on grounds of sex.

128. Mr Mistry worked well and happily with Mr Ritson until he was challenged about his performance following the December 2019 overtime weekend. Indeed, he was very positive of his treatment by him prior to that. In contrast, he fell out with Ms Pendlebury over the flippant comments that he made in October 2019. The Tribunal considers that Mr Ritson's condition made him very prone to anxiety if faced with a challenge from managers regardless of their sex. His conclusion that he reacted badly to male managers was perhaps understandable given his levels of anxiety, but it was not causative of his reaction rather a failure to recognise his heightened threat response arose from manager who happened to be male rather than because of him being male. The Tribunal finds that the real cause was the challenge from managers and the potential threat that felt because of that challenge, even though it arose from a reasonable management practice.

129. No medical evidence was provided to deal with this matter and the respondent during the second grievance (accepting that they needed to behave pragmatically), decided to look at a temporary alternative line manager and appointed Morgan Davies. This was a sensible adjustment, even though there was evidence provided by Mistry that a substantial disadvantage arose *because of* the alleged PCP in question.

130. There was no PCP requiring Mr Mistry to work in the ARC team. There was an expectation that employees would remain within their designated work role in accordance with their contract of employment unless they applied for a new role or they were transferred by the respondent. But there was no evidence of a requirement that once Mr Mistry began working for Ofsted he had to remain in the ARC department. Indeed, there was evidence during the hearing of managers who had started in one area and moved elsewhere as their career progressed. This was again a perception of Mr Mistry, but he fails to adduce evidence that persuades the Tribunal that on balance of probabilities, such a practice existed.

131. There was a PCP of not generally providing questions in advance of a disciplinary hearing. But the Tribunal noted that this was understandable because by its very nature, any investigation would be a dynamic process with questions requiring further questions seeking clarification or further information. There was clearly an understanding from managers that some support should be given to employees who were anxious and in Mr Mistry's case this involved giving a description of subject areas for discussion before a hearing took place.

132. There was a PCP in place concerning the not providing of questions in advance of disciplinary hearing and the Tribunal accepts that this had an effect upon Mr Mistry in that it increased his anxiety. However, this was managed sensibly by management throughout its procedures and a reasonable adjustment which balanced the need to inform Mr Mistry of what to expect along with the ability for questions to be asked as necessary on the day balanced the disadvantage that he experienced against the need for a fair and proper disciplinary process to take place. Mr Mistry was aware of the allegations made against him and which were set out in the disciplinary letters. It was unreasonable to provide all the questions at the disciplinary hearing as it would not be possible to anticipate all of the questions required and the follow up questions that might in turn arise. There are limitations as to what can amount to a reasonable adjustment in this situation, but the Tribunal accepts that they were provided in the way described above when requested in relation to each meeting and therefore were put in place as soon as the need arose.

133. These limitations were managed reasonably by Ms Purcell providing a list of the areas for discussion at the investigatory meeting and a copy of the full investigation report and following the actual disciplinary appeal, Mr

Mistry was permitted to comment upon the notes of the appeal hearing before a decision was reached.

134. The Tribunal accepted that Mr Mistry had been able to use a SAD light box at work since 2017 and indeed, this was referred to in his first grievance. And he acknowledged this during his oral evidence to the Tribunal. This adjustment was provided to Mr Mistry by the respondent and the evidence available to the Tribunal is that on balance it was available for his use both in home and work before November 2019.

135. Ultimately however, all of the elements of the reasonable adjustments complaint must fail, either because the alleged PCPs did not exist, that the substantial disadvantage did not relate to the PCP in question or that sufficient and reasonable adjustments were made.

Victimisation

136. The Tribunal acknowledges that the formal grievances brought on 11 January 2020 and April 2020, the first and second claim forms and the dismissal appeal letter could all amount to protected disclosures for the purpose of section 27 EQA. The real question to consider regarding this complaint was whether the detriments took place and if so, whether they were connected with these disclosures.

137. It is accepted that Mr Mistry was aware that his conduct may have been subject to scrutiny as early as his discussion with Mr Ritson on 12 December 2019 shortly before he commenced long term sickness absence. In any event, during the disciplinary investigation he was informed of the potential allegations and that they could amount to gross misconduct. In any investigation, the relevant manager appointed (in this case Ms Purcell), needed to keep an open mind as to the potential seriousness of conduct which needed to be answered to. Ms Purcell identified the potential fraudulent nature of the allegations identified and correctly warned that they did amount to gross misconduct. During an investigation, allegations can be recategorized as new information becomes available and this is a normal practice during a disciplinary process. This was also fair and reasonable in order that Mr Mistry could be kept properly informed and ensure he had trade union support. It was also in line with the disciplinary procedure and also the relevant ACAS Code of Practice.

138. The Tribunal is unable to find that these alleged detriments were in anyway connected with the protected acts and failed to adduce evidence supporting his contention either during his own cross examination or during his cross examination of the witnesses. It is likely that to some extent, both Ms Aldridge and Mr Greenwood would have been aware of some or all of the protected acts, though Mr Mistry did not challenge them concerning this knowledge to any significant degree. Mr Mistry accepted during his evidence that the allegations that he faced could amount to gross misconduct and in their unchallenged witness evidence, Ms Aldridge and Mr

Greenwood gave credible evidence that the alleged detriments which ultimately all relate to the decision to dismiss Mr Mistry. Accordingly, this complaint must fail.

Unfair dismissal

139. The respondent has shown that the reason for the dismissal was conduct and this reason has been advanced throughout the duration of this case since the second claim form bringing a complaint of unfair dismissal was presented.

140. Conduct is of course a potentially fair reason as provided by section 98(2)(b) ERA.

141. Having heard the evidence of Ms Aldridge and considered the unchallenged witness statement of Mr Greenwood, the Tribunal accepts that there was a genuine belief on the part of the dismissing manager that she genuinely believed that she was dismissing Mr Mistry by reason of his misconduct. Mr Mistry admitted what he had done and provided an explanation of what he was actually doing during the time where he was not working but claiming that he was working overtime. The investigation took these admissions into account and during the hearing, Mr Mistry accepted in cross examination that the allegations made against him were capable of amounting to gross misconduct.

142. Mr Mistry accepted that he had been instructed to work on EY3 applications for the respondent and acknowledged that he spent a significant period of the time for which overtime was claimed working on outstanding overtime calculations which he believed had been incorrectly calculated by HR and coping strategies. Ms Aldridge was clear that it was not the carrying out of these activities which was the issue, but his decision to claim overtime during these periods and she explained why it was unreasonable and was fraudulent and contrary to the Civil Service Code.

143. The investigation disciplinary hearing and appeal followed the respondent's disciplinary procedure and were adjusted to take account of Mr Mistry's mental health in terms of delaying the process until medical evidence supported the action being taken and ensuring he had information concerning the areas where questions would be asked before each meeting. Accordingly, the Tribunal did not find any flaws in the disciplinary procedure.

144. Ms Aldridge gave convincing and credible evidence that she considered a sanction which stopped short of dismissal. However, as has already been mentioned, she was satisfied as to the seriousness of the proven allegations and that they could amount to gross misconduct justifying dismissal. Mr Mistry admitted to the overtime claims but appeared to show no contrition or give any reassurance that he would not do the same again. While mitigation was considered, there was no medical evidence to suggest that the actual decision to claim the overtime for non-

worked time was caused or contributed to by his disability. There was no reason why he could have aborted his overtime and submitted time sheets for a shorter working day and his WAP provided that he could contact his managers if issues arose concerning work. This was not a case of an employee doing the best they could under difficult circumstances, but consciously lodging a claim for overtime that they were not entitled to make. Ultimately, the decision fell within the range of reasonable responses and while some managers may have imposed a lesser sanction, it is not the Tribunal's role to step into the shoes of Ms Aldridge as decision maker and it finds that she behaved reasonably in deciding to dismiss.

145. For the avoidance of doubt, Ms Aldridge confirmed that two other employees were both dismissed for similar misconduct as Mr Mistry and in this respect the respondent has behaved consistently in its decision to dismiss Mr Mistry.

146. Accordingly, the Tribunal finds that Mr Mistry was fairly dismissed by reason of conduct.

Wrongful dismissal

147. Mr Mistry was dismissed by reason of gross misconduct and as a consequence, the respondent was able to impose a sanction of summary dismissal, without giving contractual notice or making a payment in lieu of contractual notice. This complaint must therefore fail.

Time limits

148. The Tribunal did consider the application of time limits in relation to the complaints of discrimination in accordance with section 123. However, in light of its findings concerning the substantive acts of alleged discrimination this issue has limited relevance in this case and there is no need consider their application.

Conclusion

149. Accordingly, the findings of this Tribunal concerning the complaints brought by the claimant in this claim are as follows:

a) The complaint of direct disability discrimination contrary to section 13 Equality Act 2010 is not well founded. This means that this complaint is unsuccessful.

b) The complaint of discrimination arising from a disability contrary to section 15 Equality Act 2010 is not well founded. This means that this complaint is unsuccessful.

c) The complaint of a failure by the respondent to make reasonable adjustments contrary to sections 20 & 21 Equality Act 2010 is not well founded. This means that this complaint is unsuccessful.

d) The complaint of victimisation contrary to section 27 Equality Act 2010 is not well founded. This means that this complaint is unsuccessful.

e) The complaint of unfair dismissal contrary to section 94 Employment Rights Act 1996 is not well founded. This means that the claimant was fairly dismissed.

f) The complaint for wrongful dismissal is not well founded. This means that this complaint is unsuccessful.

_____

Employment Judge Johnson

Date 15 July 2022

JUDGMENT SENT TO THE PARTIES ON
21 July 2022

FOR THE TRIBUNAL OFFICE