



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr John Gibbin  
**Respondent:** Leicester City Council

**Heard at:** Leicester Hearing Centre, 5a New Walk, Leicester, LE1 6TE  
In person and by video

**On:** 21, 22, 23, 24 and 25 March 2022 (in person)  
1 August 2022 (by video link)  
2 and 3 August 2022 (deliberations – parties did not attend)

**Before:** Employment Judge Adkinson sitting with  
Ms L Woodward  
Ms D Newton

## Appearances

**For the claimant:** Mr N Bidnell-Edwards, Counsel  
**For the respondent:** Mr J Heard, Counsel

## JUDGMENT

After hearing from the parties the Tribunal UNANIMOUSLY concludes that:

1. The claims were presented in time.
2. The following claims of discrimination arising from a disability are well-founded and succeed:
  - 2.1. between September 2019 and March 2019, Mr Craig made comments about the Claimant's demeanour like "you look like you have no enthusiasm", "you want to buck your ideas up, going around like that" and "[you] needed a good kick up the arse",
  - 2.2. requesting an interception report from the Respondent's IT Department to access the Claimant's account to check what he had been doing;
  - 2.3. being invited to attend investigatory meetings on 6 November and 4 December 2019;
  - 2.4. issuing the Claimant with a formal warning in respect of his attendance;

3. The following claims of failing to make reasonable adjustments are well-founded and succeed:
  - 3.1. Failing to make reasonable adjustments as follows:
    - 3.1.1. the respondent should not have pursued a formal investigation;
    - 3.1.2. the respondent should not have pursued the claimant at this time;
    - 3.1.3. the respondent should have addressed the matter informally;
    - 3.1.4. Should not have issued him with a formal warning.
4. All other claims fail and are dismissed, therefore.
5. Directions for a remedy hearing will follow separately.

## REASONS

1. The claimant (Mr Gibbin) brings 5 claims of discrimination arising from a disability, cross-referenced to 8 alleged matters arising from his disability of depression. Mr Gibbin also makes 3 standalone allegations of failures to make reasonable adjustments. The respondent (the City Council) denies all claims.

### *Hearing*

2. The hearing between 21 and 25 March 2022 took place in person. The case could not conclude in that period and so submissions were made on 1 August 2022. By agreement the parties appeared by cloud video platform. The Tribunal then took a further 2 days to deliberate.
3. The claimant was represented by Mr N Bidnell-Edwards, Counsel. The respondent was represented by Mr J Heard, Counsel. We thank both for their help they gave to the Tribunal.
4. We heard oral evidence from the following people, and have taken it into account in making our decisions, namely:
  - 4.1. On the claimant's behalf
    - 4.1.1. Mr John Gibbin,
    - 4.1.2. Mr Ty Denton, Mr Gibbin's trade union representative,
    - 4.1.3. Mr Ricky Riley, Level A Technician and shared Mr Gibbin's job while in Mr Wingell's team.
  - 4.2. On the respondent's behalf
    - 4.2.1. Mr Peter Wingell, then Team Leader, line manager to the claimant and inferior to Mr Farmer.
    - 4.2.2. Mr Aidy Farmer, then Repairs Manager, superior to Mr Wingell but below Mr Craig,

- 4.2.3. Mr Ian Craig, then Head of Service (Housing), superior to Mr Farmer
  - 4.2.4. Mr Stephen Kerry, then Fleet Services Manager and disciplinary investigating officer,
  - 4.2.5. Ms Charlotte McGraw, Head of Services and decision maker at the disciplinary hearing, and
  - 4.2.6. Ms Caroline Carpendale, decision maker at the disciplinary appeal hearing.
5. There was an agreed bundle of about 870 pages. As we indicated we would do at the start of the hearing, we have taken into account those documents to which the parties have referred us.
6. The morning of the first day was used to enable the Tribunal to read in.
7. There was a delay starting on the second day because of an incident allegedly involving Mr Riley and some of the respondent's witnesses. After time for reflection neither party made any applications arising from the alleged incident. We therefore say no more about it except to say we have not taken it into account in determining the facts or conclusions in this case.
8. During the hearing Mr Gibbin applied to amend his claim in this respect: he had alleged 8 things arising from his disability of depression. He sought to add "Something Arising 1" to Claim 4. The details of what these cover is clear in the list of issues. The City Council opposed the application. After hearing arguments from both parties we unanimously allowed the application.
9. We gave full reasons at the time. In summary we considered the guidance in **Vaughan v Modality Partnership [2021] ICR 535 EAT** and cases cited therein. We recognised that
  - 9.1. the amendment was very late,
  - 9.2. there was no explanation for the delay making the application or why it arose only now,
  - 9.3. on becoming legally represented had applied once before to amend his case substantially and been granted permission to do so, and
  - 9.4. there was not a formal written application.
10. However the amendment meant the case reflected what was Mr Gibbin's real case. It was apparent that the City Council had understood the case really to be that and the evidence so far had addressed the issue. There was no real need to call new witnesses, no suggestion that witnesses would have to be recalled or there would be a need to carry out a further disclosure exercise. It did not add a new cause of action but expanded one already there. Questions had already been put about Something Arising 1 and Claim 4 so it was already in effect covered. The amendment would not affect how the City Council defended the case.

11. We concluded that the hardship and prejudice of denying the application outweighed the hardship that would follow if we allowed it. Therefore we granted it.
12. On the final day there was a power cut on one of the electricity phases that fed the Tribunal building. Therefore it was not safe to use the building. HM Courts and Tribunals Service managed to find alternative accommodation in the nearby Magistrates' Court, and so the Tribunal relocated there. This also caused an unfortunate, significant loss of time.
13. There was not enough time to hear submissions. Therefore we listed the matter to allow submissions, and for the Tribunal immediately afterwards to then consider its decision and prepare a reserved judgment. By agreement, those submissions were delivered by video link to save expense and travel. There was an inevitable delay caused by co-ordinating everyone's availability. Deliberations took longer than expected and so there has been further delay preparing this judgment.
14. No party has complained that the proceedings have been unfair in any way. The Tribunal is satisfied that the hearing was a fair one.
15. By agreement we have considered only liability.

#### **Issues**

16. Mr Gibbin has not presented his claims in a logical or clear manner. Instead he has decided to create a web where claims cross-reference each other and sometimes occlude the real issue. However the Tribunal can only determine the issues that the parties put before us and that is what we seek to do.
17. The parties agreed a list of issues. This was based on the amended claim as permitted by Employment Judge Ahmed on 1 February 2022 and which is set out in a Scott Schedule.
18. The list was amended to reflect the further amendment we permitted at the hearing.
19. We have also cross-referenced the list of issues to the Scott Schedule because the pleadings set out the case to meet and the respondent's precise reply and concessions, and also to confirm the real issues against which the case must be judged (**Chandhok v Tirkey [2015] ICR 527 EAT**).
20. Having done that, we agree the list reflected broadly what we had to decide.
21. However we have re-ordered it to reflect what we believe is a more logical way of approaching the issues given the fact that the claimant has presented many of his claims in effect as a web of many alleged matters arising from his disability causing many alleged instances of unfavourable treatment. For example, we think that is better to work out what actually arose from his disability first and then decide whether there was unfavourable treatment and how it was linked.
22. We have also simplified the list in places where the parties had tried to reflect the burdens of proof. Instead we have posed it as straight questions.

23. We have used the wording the parties agreed to describe alleged the provision, criteria and practices, substantial disadvantages, reasonable adjustments, somethings that arise from disability and unfavourable treatment, and the proportionate means of achieving legitimate aims. In our view they accurately reflect the case pleaded.
24. There is no dispute Mr Gibbin was at all relevant times disabled because of depression.
25. The list therefore is as follows:

***Time limits***

26. Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 2 August 2020 may not have been brought in time.
27. Were the discrimination complaints made within the time limit in the **Equality Act 2010 section 123**? We must consider:
  - 27.1. Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?
  - 27.2. If not, was there conduct extending over a period?
  - 27.3. If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?
  - 27.4. If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:
    - 27.4.1. Why were the complaints not made to the Tribunal in time?
    - 27.4.2. In any event, is it just and equitable in all the circumstances to extend time?

***Knowledge of disability***

28. Did the respondent know or could it reasonably have been expected to know that
  - 28.1. the claimant had the disability? If so, from what date?
  - 28.2. (in relation to the failure to make reasonable adjustments claim) the disability meant that the claimant was likely to be placed at the disadvantage the claimant asserts he was placed at?

***Discrimination arising from disability (Equality Act 2010 section 15)***

*The somethings that arise from the claimant's disability*

29. Did the following things arise from the claimant's disability:
  - 29.1. **Something Arising 1:** between September 2018 and March 2019
    - 29.1.1. outwardly manifested himself such that he appeared visibly upset in the workplace;
    - 29.1.2. caused him to work less;

- 29.1.3. caused him to have no enthusiasm for his work;  
and/or
- 29.1.4. caused him to be tearful in the workplace
- 29.2. **Something arising 2:** Mr Gibbin's complaint to Mr Craig on 27 March 2019, namely that he believed his mental health was suffering because of the bullying he received from Mr Farmer?
- 29.3. **Something arising 3:** on 30 April 2019 Mr Gibbin met with Mr Burgin to complain about the treatment he received from Mr Farmer?
- 29.4. **Something arising 4:** on 3 June 2019 Mr Gibbin requested a change to his work pattern from Mr Farmer and explained that in addition to his own needs he needed to support his partner, who was depressed, because Graham, her son, and the Claimant's stepson had passed away?
- 29.5. **Something arising 5:** on 27 June 2019 he attended the Respondent's premises at the end of the working day, whilst signed off with depression, and used the Respondent's IT facilities to apply for a role in another department?
- 29.6. **Something arising 6:** when the Claimant was questioned by Mr Farmer and/or Mr Craig the Claimant did not explain that the reason why he was using the Respondent's IT facilities outside of working hours, and whilst off sick, was because he was applying for a different acting up role as a Senior Technician so he would not have to work with Mr Farmer?
- 29.7. **Something arising 7:** the Claimant's historical use of the Respondent's IT facilities to store and email personal content which included politically incorrect and material some would find offensive?
- 29.8. **Something arising 8:** Mr Gibbin was absent between 6 June 2019 and 16 July 2019?

*The claims of unfavourable treatment*

**Claim 1:** *From September 2018 to March 2019, the Claimant received criticisms of his work and negative statements about his attitude*

- 30. Did the respondent treat the claimant unfavourably in that:
  - 30.1. Between September 2018 and March 2019, did Mr Farmer:
    - 30.1.1. tell the Claimant that his work was inadequate when the Claimant was instructed to produce a business case for a planned communal area maintenance programme?
    - 30.1.2. Frequently tell the Claimant that what he had done was not what he wanted, without being more specific.
  - 30.2. Between September 2019 and March 2019, did Mr Craig make comments about the Claimant's demeanour like

“you look like you have no enthusiasm”, “you want to buck your ideas up, going around like that” and “[you] needed a good kick up the arse”?

31. Did the respondent treat the claimant unfavourably because of Something Arising 1?
32. Has the Respondent shown that any unfavourable treatment was a proportionate means of achieving a legitimate aim? Namely
  - 32.1. To support and motivate employees to produce work of a satisfactory standard, and/or;
  - 32.2. To raise and address performance issues with employees.

**Claim 2:** *On 3 April 2019 the Claimant’s flexible working request was refused*

33. Did the respondent treat the claimant unfavourably on 3 April 2019 when his flexible working request was refused by Mr Farmer?
34. Did the respondent treat the claimant unfavourably because of Something Arising 2?
35. Has the Respondent shown that any unfavourable treatment was a proportionate means of achieving a legitimate aim? (see above)

**Claim 3:** *On 3 June 2019 Mr Farmer replied to the Claimant’s flexible working request*

36. Did the respondent treat the claimant unfavourably as follows: on 3 June 2019 Mr Farmer replied to the Claimant’s flexible working request by saying “*well now Graham has died, there is no reason to carry on with the flexible working arrangement because there was no business need for it.*”
37. Did the following arise from his depression:
38. Was the unfavourable treatment because of
  - 38.1. Something Arising 2?
  - 38.2. Something Arising 3? and/or
  - 38.3. Something Arising 4?
39. Has the Respondent shown that any unfavourable treatment was a proportionate means of achieving a legitimate aim? (see above)
40. Has the Respondent shown that any unfavourable treatment arising in consequence of the Claimant’s depression was a proportionate means of achieving a legitimate aim? Namely
  - 40.1. The Respondent’s requirement to manage its employee’s working hours according to business need.

**Claim 4:** *The Respondent investigated the Claimant’s use of its IT facilities and subjected him to a disciplinary process*

41. Did the respondent treat the claimant unfavourably as follows:
  - 41.1. Mr Farmer questioned the Claimant about his attendance at the Respondent’s premises and his use of its IT facilities whilst the Claimant was signed off sick;

- 41.2. Mr Farmer discussed the matter with Mr Craig with the result that an interception request was made to the Respondent's IT Department to access the Claimant's account to check what he had been doing;
  - 41.3. the Claimant was informed of allegations in letters dated 23 October and 18 November 2019 and invited to attend investigatory meetings on 6 November and 4 December 2019;
  - 41.4. on 4 December the Claimant was informed that there was a case against him;
  - 41.5. the Respondent held a disciplinary hearing for the Claimant on 4 and 5 March 2020;
  - 41.6. on 5 March 2020 Ms McGraw issued the Claimant with a final written warning, confirmed by letter dated 18 March 2020;
  - 41.7. on 15 October 2020 Ms Carpendale dismissed the Claimant's appeal?
42. Did the following arise from the claimant's depression:
- 42.1. on 27 June 2019 he attended the Respondent's premises at the end of the working day, whilst signed off with depression, and used the Respondent's IT facilities to apply for a role in another department ("Something Arising 5");
  - 42.2. when the Claimant was questioned by Mr Farmer and/or Mr Craig the Claimant did not explain that the reason why he was using the Respondent's IT facilities outside of working hours, and whilst off sick, was because he was applying for a different acting up role as a Senior Technician so he would not have to work with Mr Farmer ("Something Arising 6");
  - 42.3. the Claimant's historical use of the Respondent's IT facilities to store and email personal content which included politically incorrect and material some would find offensive ("Something Arising 7")?.
43. Was any unfavourable treatment because of Something Arising 1, 2, 3, 5, 6 and/or 7?
44. Has the Respondent shown that any unfavourable treatment arising in consequence of the Claimant's depression was a proportionate means of achieving a legitimate aim?
45. Specifically, the Respondent relies on the following, allegedly legitimate aims:
- 45.1. Maintaining appropriate standards of conduct in the workplace, and/or
  - 45.2. Investigating suspicious and/or concerning behaviour.

**Claim 5:** *Issuing the Claimant with a formal warning in respect of his attendance*

46. Did the respondent treat the claimant unfavourably as follows: on 6 August 2019 he received a formal warning in respect of his attendance?



47. Did the following arise from the claimant's depression:
- 47.1. Did the respondent treat the claimant unfavourably because of something arising 8.
48. Has the Respondent shown that any unfavourable treatment arising in consequence of the Claimant's depression was a proportionate means of achieving a legitimate aim? Specifically, the Respondent relies on the following, allegedly legitimate aim:
- 48.1. Maintaining consistent levels of attendance to allow efficient delivery of the service.

***Reasonable Adjustments (Equality Act 2010 sections 20 and 21)***

*Knowledge of disability – additional criterion*

49. Did the respondent know, or could it reasonably have been expected to know, that the claimant was likely to be placed at the disadvantage?

***Claim 6: The disciplinary proceedings in respect of the Claimant's use of the Respondent's IT facilities***

50. **PCP 1:** Did the Respondent operate the following provision, criterion or practice (PCP) of investigating staff who attend work premises whilst signed off sick?
51. Has the Claimant shown that PCP1 placed the claimant at a substantial disadvantage compared to non-disabled people because it exacerbated his depression?
52. What, if anything, would have amounted to reasonable adjustments? The claimant suggested
- 52.1. Mr Farmer and Mr Craig should have not ordered an IT Interception,
- 52.2. They should not have pursued a formal investigation,
- 52.3. They should not have pursued the claimant at this time,
- 52.4. They should have addressed the matter informally,
- 52.5. They should have shown "compassion" to the claimant.

***Claim 7: Subjecting the Claimant to disciplinary proceedings***

53. **PCP2:** Did the Respondent operate a PCP "...of subjecting disciplinary procedures to staff who have used the Respondent's IT facilities to send personal emails and to store personal content which included politically incorrect material and material that some people would find offensive?"
54. Did PCP2 place the claimant at a substantial disadvantage compared to non-disabled people in that his depression was exacerbated by the stress of the Disciplinary Proceedings?
55. What, if anything, would have amounted to reasonable adjustments? The claimant suggested
- 55.1. Mr Farmer and Mr Craig should have not ordered an IT Interception,

- 55.2. should not have pursued a formal investigation,
- 55.3. should not have pursued the claimant at this time,
- 55.4. should have addressed the matter informally
- 55.5. should have shown "compassion" to the claimant.

**Claim 8: Issuing the Claimant with a formal warning in respect of his attendance**

- 56. **PCP3:** Did the Respondent operate a PCP of issuing warnings to staff who were repeatedly absent?
- 57. Has the Claimant shown that he was placed at a substantial disadvantage in that his depression meant that it was more likely that he would be absent?
- 58. What, if anything, would have amounted to reasonable adjustments? The Claimant suggested that the Respondent should not have issued him with a formal warning.

**Findings of fact**

***Witnesses generally***

- 59. We first set out our views of the witnesses because this affects how we weighed up the evidence.

*Mr Gibbin*

- 60. Generally we found him to be a credible witness. However, he came across to us as being very particular and fixed in his view. He seemed to attribute absolutely everything to his disability and seemed incapable or unwilling to take a step back to assess whether or not that was actually the case. Therefore, we have had to treat his evidence with some circumspect when there are conflicts on the issues.

*Mr Riley*

- 61. We consider that Mr Riley was overall an honest and credible witness once he had calmed down and after being reminded that his role there was to answer questions put to him. We found the evidence that he gave was honest, clear and credible. In particular, he made a number of concessions and he did not attempt to fill in gaps in his knowledge and was clear about things which he was not privy to and did not know.

*Mr Denton*

- 62. We found Mr Denton to be a credible witness but his evidence in our view does not take the case any further forward and therefore we have had no regard to it.

*Mr Wingell*

- 63. On the whole, we found Mr Wingell to be a credible witness. It is quite clear that he tried hard to assist Mr Gibbin with flexible working; that he understood Mr Gibbin's personality and his predicament. In particular, although he was called by Leicester City Council, he did suggest and he accepted that the treatment of Mr Gibbin was poor by Leicester City Council. In particular, he was not particularly complementary about

Leicester City Council's own Human Resources (HR) team. His willingness to concede the Council's failings clearly supports his credibility.

*Mr Farmer*

64. We found Mr Farmer to be an unreliable witness. Our reasons for this are as follows.
65. As will be seen later, one of the key allegations in this case relates to an interception of Mr Gibbin's use of his computer so they could see the files he had stored on the Council's IT system and the emails he had sent. He explained to us in clear terms in evidence that the reason that he had decided that the interception was necessary was because of concerns about data protection. He emphasised how data protection had been a very live issue within the local authority at the time and was therefore at the forefront of his mind.
66. However, the contemporaneous documents that he completed to commence the interception request with Leicester City Council's IT Department do not mention data protection at all. If data protection were at the forefront of his mind, it would have been on those documents. In fact it was the IT department alone that raised the issue some time later and without the prompting from anyone else. The emphasis he put on data protection and the stark contrast with what the documents show in our view seriously undermines his credibility.
67. The second aspect is that he was unable to give to us what we considered any reasonable explanation as to why he felt the need to get other managers to accompany him when he saw the Mr Gibbin had come into work out of hours to access his computer. There is no suggestion that Mr Gibbin was abusive, aggressive or misbehaving. When he was pressed for an explanation he was not able to give one: he was evasive. We were left very much with the impression that Mr Farmer's actions were motivated not by the concerns he expressed but by other reasons which he was unwilling to share. The only other explanation is a hostile animus towards Mr Gibbin. We concluded the evidence showed that was the case and this undermines the evidence he did give to the Tribunal on all issues because nothing shows he was capable or did put it to one side.

*Mr Craig*

68. We found that Mr Craig was an unreliable witness. The manner in which he gave his evidence came across to us as being evasive. There was a significant number of occasions when he claimed to be unable to remember a significant number of things, yet seemed to remember clearly things favourable to the respondent's case. We accept human memory is frail and affected by the passage of time. We acknowledge events were a long time ago and over a long period. We acknowledge he has retired and so the stimuli that might help keep recollects fresh are no longer present. We do not accept that this is the sort of situation where memory fails so it only remembers the favourable things and none of the more difficult aspects.
69. He also asserted that he had clear delegated authority to authorise interception requests though the policy on such requests says that in fact he was not senior enough to do so. That in particular in our view is

significant because when the Tribunal asked him about this authority that he possessed he was unable to provide any detail about who delegated it, when it was delegated it, on what basis they delegated it, whether it was set out in writing, whether it related to one thing or more than one thing, whether it was time limited or unlimited or indeed any of the other information one might expect to have if one has been approved to deal with something which Leicester City Council's policies say must be authorised by someone at a level senior to Mr Craig and which was so serious. Mr Craig could not explain why the authority had been delegated to him in the first place, which seemed a reasonable thing he should be able to answer since it is both contrary to Leicester City Council's own policy and an unnecessary thing to have occurred.

70. Mr Craig also talked to us in evidence about targets and Mr Gibbin's performance as being of some concern. However he was unable to give any information about these targets. It is also in contrast to the tenor of Mr Craig's evidence that management of Mr Gibbin was for Mr Wingell, then Mr Farmer and that he would be involved only if an issue was raised with him.

71. Finally, we also reflect on the fact that Mr Craig appeared to be someone who was quite happy to remain in ignorance of various matters. For example, he did not read the occupational health reports or know what they said about any proposed reasonable adjustments. It seemed to us that he simply left such matters to HR and Mr Farmer to deal with. That gives us an indication that even if that is not strictly being evasive in evidence, it is certainly the case that his involvement in this case was somewhat limited.

*Mr Kerry*

72. We found Mr Kerry to be a credible witness. He was honest enough to say that there were some failings in his investigation, for example the failing to be able to take into account any question of disability (though to be fair to him, HR had not told him about it), and that there may have been an overreaction in relation to some of the allegations. He also accepted that he himself did not quite understand the reason for the disciplinary proceedings being commenced because Mr Riley who had also committed a serious act, potentially contrary to Leicester City Council's own policy, had received an informal warning.

*Ms McGraw*

73. Ms McGraw carried out the disciplinary hearing. We found her evidence to generally be vague and it had the feeling that what we were being given were the expected answers rather than actual answers relevant to the questions being put. We say this because on a number of occasions the Tribunal and Counsel for Mr Gibbin had to remind Ms McGraw what had actually been asked and direct her to answer that particular question.

74. She also was unaware of Mr Gibbin's disability and whilst as Leicester City Council fairly said that was something the trade union could have brought to her attention, it is also something that HR should have brought to her attention. However she conceded that she had been provided with the occupational health reports but had in fact not read them. This seriously

undermines the suggestion she dealt with the disciplinary matter in the thorough and proper way that she suggests. We got the impression, therefore, that her dealing with this in this case is somewhat superficial and as a result we do not really find her evidence particularly helpful.

*Ms Carpendale*

75. Ms Carpendale dealt with the disciplinary appeal. Again, we found her evidence to be quite vague. Her dealings with things appears to have been rather superficial and she took a lot of things that she was told on trust. During the course of her evidence, seemed to give the impression that a lot of the questions, for example to do with Mr Gibbin's disability and the occupational health, were matters for HR rather than her and as HR had not told her about them, they were not of her concern. We were therefore left with the impression that she was someone who was in essence had dealt with things in a rather superficial way and had a superficial involvement. Again, she also had to be repeatedly pulled back to the question that had actually been asked of her during evidence. We found on the whole, therefore, her evidence is not particularly credible.

***Observation about the respondent's HR team***

76. We did not hear any evidence from anyone at the HR team for the Council. This is not a surprise. The general tenor of the evidence from the Council's own witnesses is that HR did nothing of any value in this case. They appear to have provided no guidance to any of the relevant players. While we acknowledge we have not heard from them, and we do not criticise any individual member of HR, we believe we can say that HR failed to perform to a reasonable standard and insofar as any question depends on HR support we conclude it was not provided, unless we set out a contrary view below. We come to this conclusion on the evidence of the respondent's own witnesses.

***Facts proper***

77. With those observations about the witnesses, we turn then to making our findings of fact.

***About the respondent***

78. Leicester City Council is a local authority that is responsible for the provision of services to the residents of the City of Leicester. It is a large employer and there is nothing to suggest that it has any particular feature that means it cannot be expected to conduct its employment affairs like any other large employer.

***About the claimant***

79. Mr Gibbin has a long history of employment with Leicester City Council. From 1977 to 1987, the Council employed him as a plumber. From 17 June 1997 he was re-employed by Leicester City Council as a plumber and progressed from job to job. At all times material to this claim, he was employed as a technician in Leicester City Council's Housing Department.
80. He was a member of a team headed up by Mr Wingell. This was one of the repairs team who were responsible for planning for large repair projects that

the Council was to undertake to its properties. There were a number of teams in the department who operated separately to each other and were headed by a person of equivalent seniority to Mr Wingell. He in turn answered to Mr Farmer, who in turn answered to Mr Craig. They were part of the Housing Department and it is Mr Chris Burgin who was the Divisional Director for Housing at all material times.

**Relevant policies**

81. At all times relevant to Mr Gibbin’s employment there were a number of policies in place. One of those policies was the guidance on how to lawfully carry out surveillance version 1.3 on 18 February 2019. The policy sets out how surveillance might be used:
- “[what is described as ‘Comms Data’] Acquiring communications data - the ‘who, when and where’ of communications, such as a telephone billing or subscriber details, or when an email was sent....
- “Access to staff members’ electronic data protected by encryption or passwords”
82. The guidance makes clear that this the **Regulation of Investigatory Powers Act 2008** does not apply to the interception for members of staff. No one has suggested that that assertion is incorrect and we therefore proceed on the assumption it is right.
83. The guidance then sets out that the appropriate forms must be completed:
84. “What to do with your Completed Non-RIPA Staff Surveillance Forms
- “You must pass the non-RIPA application form and any supporting documentary evidence to your **Divisional Director** [our emphasis] for a signature, and then to:
- “a) The Corporate Investigations Team for staff communication data
- “b) The Information Governance Manager for staff non-communications data”
- For the sake of simplicity we will simply describe the investigations teams as “Corporate Investigations”.
85. Mr Gibbin’s employment was also subject to an IT acceptable use policy. The one that has been shown to the Tribunal is version 10, which is dated March 2020 but there is no suggestion that it differs in any significant way at any point during the period relevant to this case. At paragraph 4 under the sub-heading “Unacceptable Use” it says as follows:
- “4. Unacceptable Use
- “The following activities are in general prohibited when using the Councils IT Facilities including from a personal device. The list is indicative rather than exhaustive.
- “4.1 The network may not be used directly or indirectly by a member of staff for the creation, manipulation, transmission or storage of;

4.1.1 Any offensive, obscene or indecent images, data or other material, or any data capable of being resolved into obscene or indecent images or material. ...

“4.1.5 Material which promotes discrimination on the basis of race, gender or religion or belief, disability, age or sexual orientation. ...

“4.1.9 Material that brings the Council into disrepute....”

86. Leicester City Council also had a surveillance policy but nothing turns on that for the purposes of this case.

87. Mr Gibbin was subject to a Code of Conduct for employees. At paragraph 4.2 under the heading “Respect for others” it says:

“The City Council wishes to create an environment where all its employees are treated with dignity and respect. All members of the community, clients and the other employees have the right to be treated with fairness and equity regardless of age, disability, gender, gender reassignment, marriage or civil partnership, pregnancy or maternity, race, religion or belief, sex or sexual orientation.

“You should be aware that your behaviour may inadvertently intimidate or offend other employees or service users. You should refrain from; the displaying of offensive sexist or racist material or wearing T-shirts or other clothing, badges or tattoos which convey an offensive message, making racist comments, swearing, rudeness or non-verbal behaviour which intimidates or offends others and making sexually suggestive or sexist remarks.

“The Council take harassment, discrimination, victimisation and bullying very seriously and will investigate all reports in line with relevant policies.”

88. Leicester City Council also has in place a disciplinary procedure and policy. It is common ground that the policy provides that the following could be subject to disciplinary proceedings:

88.1. doing something that might bring Leicester City Council into disrepute;

88.2. the use of the Council’s IT facilities to store or access inappropriate material

Otherwise, the disciplinary policy has not been relied upon in any great detail. We are satisfied that Leicester City Council has followed the procedure laid down.

89. The Council also has a grievance procedure policy that we have not been referred to in any detail. Nothing appears to turn on it so we consider it no further.

90. Leicester City Council also has in place a stress management policy but, again, we have not been referred to that and nothing appears to turn on it.

***The claimant’s mental health***

91. Mr Gibbin has had depression (among other mental health conditions) since 1986 that he says has been mainly due to work related stress. It is only depression that is relevant to this case.

***The respondent's knowledge of his depression***

92. In 2002, Mr Gibbin alleged he was subject to bullying and a malicious disciplinary procedure at Leicester City Council. Whether or not that is true does not matter. What does matter is that he was ill with work related stress and anxiety and his doctor signed him off work between 27 May 2002 and 7 July 2002. When he returned to work a certificate relating to his absence was completed by a supervisor at Leicester City Council called Mr Addison and it stated the reason for absence was depression. Therefore since 27 May 2002 the Council has been aware Mr Gibbin has had one episode of depression.
93. In 2014, the Council transferred Mr Gibbin to the section which Mr Farmer managed because the section in which Mr Gibbin worked had closed. At about that time, his depression reoccurred. Although Mr Gibbin asserted in cross-examination that it was entirely due to Mr Farmer that it recurred, we do not accept that. In his own evidence-in-chief Mr Gibbin suggests rather it was connected with the transfer itself.
94. Mr Gibbin alleged that from this point he made Leicester City Council aware on a number of occasions between 2014 and the commencement of proceedings that he was suffering from depression. We do not accept this. Mr Gibbin's evidence about this is very vague. He says only that he made Leicester City Council aware; it gives us no detail about when, where, to whom or how.
95. During 2016 and until July 2017, Mr Gibbin was seconded to a different team. He did not work with any of the respondent's witnesses in this case.
96. In June 2017, Mr Gibbin submitted a request for flexible retirement, which was granted. Mr Gibbin's working hours were therefore reduced to 22 hours.
97. In July 2017, he returned to his substantive role in the repairs team, which Mr Farmer was still manager of.
98. From about June 2018, Mr Gibbin's work, both in quality and in amount, started to decrease. While there was no formal process monitoring his performance, the drop in productivity was obvious to Mr Farmer. Mr Gibbin also was tearful at work and was crying. Mr Gibbin described himself as often being lost in negative thoughts. This tallied with the evidence of Mr Gibbin's General Practitioner (GP), Dr Khunti, who in a letter dated 23 February 2021 confirmed that Mr Gibbin had been taking antidepressants since 2014 due to work related stress and low self-esteem. This also tallied with Mr Wingell's own evidence about Mr Gibbin and how he sometimes seemed at work.
99. Mr Gibbin alleges that he worked less. We do not accept that is correct. "working less" and being "less productive" are two different things, as the lay members observed. One might still be working for the same number of hours but simply not producing anything of worth from it. The productivity in that example would have dropped but the worker is not actually working less. Besides working less is consistent with any number of situations. We do not see it is inherently likely to arise from depression. There is no evidence showing a link beyond assertion.



100. Finally it tallies with what Mr Farmer wrote in his interception request on 28 June 2019 to Mr Craig:
- “I am looking for help with information on the activities and usage of the above PC.
- “The user [i.e. Mr Gibbin] reports to one of my Team Leaders, I have noted with his team leader a suspected drop in productivity of the user over the last 6 months and would like to understand and confirm that the PC is being used on [Leicester City Council] business only during the users working hours ...”
- The date of the correspondence (28 June 2019) clearly means that “the last 6 months” would have been December 2018 onwards.
101. Given the long-standing nature of his depression and the evidence from Mr Gibbin, Mr Wingell and Mr Farmer about this, the letter from his GP, and the inherent plausibility of a decline in mental health from time to time (whatever the reason for it occurring) and that it was certainly obvious by December 2018, we find as a fact that from 1 June 2018 Mr Gibbin was displaying behaviour in the workplace consistent with his depression and which was reasonably noticeable to others.
102. Mr Gibbin has a close relationship with his stepson. In September 2018, his stepson fell seriously ill. The details do not matter except that he required serious and significant medical care and it placed a heavy emotional burden on Mr Gibbin. This further caused him to deteriorate at work and he would often find himself tearful and crying. At work he became lost in negative thoughts.
103. He told Mr Wingell and Mr Farmer about his stepson’s illness.
104. Mr Gibbin’s behaviour at work manifesting his depression continued at all relevant times.
105. Thus we find as a fact that his depression outwardly manifested themselves as described; did cause him to have no enthusiasm for work and did cause him to be tearful in the workplace.

**Mr Gibbin’s IT use**

106. Mr Gibbin’s work was carried out on a computer. Mr Gibbin has, as we understand it, a computer that was different from the normal workstations available to employees at Leicester City Council because the software Mr Gibbin required to perform his work made a more intense use of resources and so required a more powerful computer.
107. During his time at Leicester City Council, Mr Gibbin developed a habit of using his computer during breaks to read news and other websites to look at material which he saw as light-hearted or light relief. He sometimes downloaded images and stored them on his work computer or the part of the Council’s file server allocated to his use (called the “homedrive”). The location of the files is not relevant.
108. Mr Gibbin was also sent what might be described as non-serious images or documents, which he then stored on his computer or homedrive and would look at from time to time.

109. Although Mr Gibbin said he did this because of his depression, the Tribunal rejects that. There is nothing to support that his behaviour arose from depression, whether wholly or in part. It may have done. However what Mr Gibbin did seemed to us, particularly to the Lay Members who have experience of this kind of activity in the workplace, to be something that happens with many people in some workplaces who have access to computers (and often regardless of whether private use is permitted). His conduct in this regard did not seem to be such that it could be said to be more likely to be consistent with depression than otherwise, because it is not uncommon amongst people without depression. We also cannot accept his bare assertion considering our view of him as a witness. We would have expected to see some objective evidence (e.g. a doctor's letter or report) – there is none.

***The offending documents collected by the claimant***

110. We have been shown the images that were seized from his computer and since it forms the bulk of the allegations against him, it is relevant to describe them. They were collected over the whole of his employment.

*Photo of pillar boxes*

111. Mr Gibbin saved an email with the subject heading: "Old-Trafford-post-boxes-170805" with the subject "Royal Mail of Islam". Attached was a spoof news article and photograph. The photograph features four runners dressed up as Royal Mail pillar boxes with the text

"Breaking news"

"Royal Mail has been caught by a group of Islamic businessmen, a spokesman said, we want to keep the traditional image of the Royal Mail, whilst also reflecting our own values.

"See below for the new uniform for women employees"

112. Mr Gibbin suggests that this picture is neither racist nor offensive. He compared it to an article published in The Daily Telegraph and written by The Rt Hon Boris Johnson MP who was subsequently Prime Minister in which he compared women in burkas to "looking like letter boxes". The Tribunal expresses no view on whether this is good or bad taste and whether or not this is racist. It is not our job to determine or police humour. We are all aware the comments were seen as controversial and a number of people said they were offended. All we can safely say is that this is something which might reasonably be seen as offensive or derogatory of followers of Islam in particular. We also feel confident we can take note that Leicester has a significant Muslim population.

*Photo of Mr Riley*

113. The second photographs were two photographs which featured Mr Riley. The photograph clearly shows Mr Riley is stood in a Leicester City Council office. He is wearing a Leicester City Council fleece – it has Leicester City Council's logo on it and the words "Leicester City Council" written on it. He is wearing a lanyard that shows that he works for Leicester City Council. He is stood upright in the photograph with what appears to be a 12-inch-long dildo stuck to his head. The second photograph shows that where the

object had been put on his forehead, there was now a red mark. It does not take much imagination to see that that the first image is the sort of thing that might well bring Leicester City Council into disrepute if it got out into the public domain, as was conceded in cross-examination.

114. Mr Gibbin did not take the photo and was not present when it was taken. He did not request that Mr Riley send the photo to him.
115. The Tribunal notes that no formal action was taken against Mr Riley for this action despite the fact that if the photo he staged was released to the public, it could so easily bring Leicester City Council into disrepute. We think that is important when evaluating Council's actions towards Mr Gibbin.

*The Microsoft Word document*

116. There was a Microsoft Word document which had embedded within it a number of recordings of Tannoy announcements from an airport. The ruse was that the person recording them had apparently asked the airport's information desk to call out for certain imaginary people but whose names when said out loud sounded rude in English.

*Photos of cats*

117. Mr Gibbin also had on his computer a number of photographs of cats. These were downloaded from Twitter in November 2015. They feature images such as kittens holding rifles shooting out of windows; images of cats modified to look like spaceships from Star Wars; a cat being held at gunpoint; a cat hidden in a box of almond cookies; a cat disguised as a dog; a cat apparently dressed up undergoing beauty therapy and a cat hiding in a suitcase. These photographs from Twitter need to be seen in the context of what was taking place at the time and which was revealed in one of the other documents saved on Mr Gibbin's computer:
118. "On Sunday night, as a major anti-terror police operation was under way in Brussels, authorities asked the public not to report officers' movements online.
119. "The Belgian capital has been on lockdown since Saturday amid a search for suspected Paris attacks gunman Salah Abdeslam.
120. "On Twitter, the hashtag #BrusselsLockdown had been the term of choice for people discussing the raids.
121. "But on Sunday night, the term was overtaken by Twitter users posting pictures and videos of cats, to make sure that any leaking of operational details were drowned out...."

*Other photos*

122. The other images included
- 122.1. a photograph of two young women apparently dressed for a night out in snowy conditions with the tag "Three things that don't get cold in winter. Polar Bears, Penguins and slags";
- 122.2. a photograph of a van with "KEITH VASS [sic.] IS A KNOB! painted on it. It should be pointed out at this point that Keith Vaz was the MP for Leicester East;

- 122.3. a picture of two snowmen apparently having sex. Mr Gibbin suggested that was not necessarily what the image showed but we think to suggest otherwise is naïve.
- 122.4. an image from Viz Magazine based on the 1920's image of the Jolly Fisherman that promoted Skegness but instead of the original caption of "Skegness is so embracing", it reads: "Skegness is fucking shit".

***June 2018 – the business case feedback***

123. In June 2018 or thereabouts, Mr Gibbin was asked to work on the preparation of various business cases for a planned construction and maintenance programme for the Housing Department. The documents that he produced after researching the various costs and so forth were not in a form or style that Leicester City Council wanted. Mr Farmer told Mr Gibbin that they were inadequate documents and not what Leicester City Council wanted. He, however, did not give any more detail about how the documents could be better or what was actually wanted. The Tribunal observed
  - 123.1. Although Mr Gibbin may not have been corrected as to what Mr Farmer felt was wrong with the documents, he had worked in Leicester City Council long enough and have access to the policies and materials and so forth to enable him to determine how these things should be structured. We were left very much with the impression that this is an example of Mr Gibbin's inflexibility in that he had always done things the way that he was doing these documents and he was not prepared to consider doing it in a different way.
  - 123.2. However, the fact that it was never explained to him satisfactorily what was wrong with them and how they could be corrected is indicative of the lack of support that Leicester City Council gave to Mr Gibbin.

***His depression June 2018 to March 2019***

124. We set out above how the depression manifested itself.
125. Mr Craig said he was unaware of this because he would be working in a different office, it was Mr Farmer who was reporting to him and that he personally would not have direct interactions with Mr Gibbin. We do not accept this and conclude that Mr Craig was both aware of how Mr Gibbin was when at work and interacted with him on a number of occasions.
126. During this time, Mr Craig on a number of occasions said things to the effect of:
  - 126.1. "You look like you have no enthusiasm";
  - 126.2. " You want to book your ideas up going around like that" and at a meeting in particular where Mr Gibbin was talking about alleged bullying from Mr Farmer and his mental health, he said that Mr Gibbin needed "a good kick up the arse".

127. Mr Craig denies all of this. However we find as a fact this is what happened for the following reasons
- 127.1. Mr Craig is not a believable witness;
  - 127.2. While Mr Gibbin was unreliable in a number of respects, we felt he was reliable on this issue;
  - 127.3. We were not persuaded that the office is so laid out or so big or that the various layers of management and the teams were so segregated from each other that they were simply unable or unlikely to ever see each other;
  - 127.4. The conduct of Mr Craig and Mr Farmer at and after the later incident of Mr Gibbin attending out of hours to access his computer all point to a lack of support and rather more to contemptuous behaviour towards him;
  - 127.5. What Mr Gibbin alleges about Mr Craig said seems to us to tally with the general lack of support in the office, as demonstrated by Mr Farmer failing to explain to Mr Gibbin how his documents were wrong and the lack of support from HR.

***November 2018 to 5 February 2019***

128. In November 2018, Mr Gibbin was off work for unrelated medical reasons. He returned to work on 2 January 2019. A return-to-work meeting was conducted and no further action was taken in regard of it.
129. Shortly after his return-to-work meeting, he was off work again to have planned surgery for carpal tunnel syndrome in both wrists. He returned to work from that on 5 February 2019..

***His return to work***

130. Mr Wingell held a return-to-work meeting. At this meeting Mr Gibbin told Mr Wingell, that his stepson's illness had become terminal. Mr Wingell recorded:
- “Referred John to occupational health service today, waiting for recommendations - support to help him on day to day repairs.
- “John has got problems with his home life, dropped him a lifeline, that any time he needs a chat. Don't hesitate.
- “Advised John that depending on O.H.S report I shall be going through [Attendance Management Procedure] (stage 1).”

***Occupational health report of 13 February 2019***

131. Mr Gibbin was assessed by occupational health. Mr Gibbin's occupational health report of 13 February 2019 says that in their view Mr Gibbin was fit to continue his other role and that it was unlikely that Mr Gibbin would be disabled because of the surgery.
132. The occupational health report was very much focussed on the surgery that he had had to his carpal tunnel and not on the depression.

**Leave from 15 February 2019**

133. Mr Gibbin began a period of holiday leave on 15 February 2019. During his leave, he was invited to a meeting of the attendance management procedure. By agreement that meeting took place on 6 March 2019. The outcome of that meeting was a first warning. Mr Wingell said the reason for the warning was that it was not sustainable to have 27 days away from work and advised that he must reduce his absences as a priority. Mr Gibbin accepted that conclusion.

**Carer's passport**

134. At the same time, they had discussions about how he had to care for his stepson and as a result they created a document known as a carer's passport. This document, signed by both Mr Gibbin and Mr Wingell, records the parties agreed the following arrangement:

“Adjustment to working hours in any week. Flexibility to work any days/part days, providing it totals 22 hours (currently working Wed/Fri)

“Any shortfalls to be made up with:-

“Annual leave, holiday, flexi.”

135. It was agreed that this would start on 6 March 2019 and run through to 6 May 2019 when it would be reviewed.

**Return to work on 13 March 2019 and successful application for compressed hours**

136. On 13 March when he returned to work.

137. That day he emailed Ms Webster copying in Mr Denton, his Union representative, requesting to compress his monthly hours into three working weeks so that he could have a fourth week off. He explained that he had used up a considerable amount of his annual leave to look after his stepson and he expected he would need more time when his stepson passed away. He said that by allowing himself to have a fourth week off, it would enable him to spend more time with his stepson and partner. He believed it would benefit the organisation as the extended working weeks would enable him to concentrate on complete projects with colleagues more easily than currently was the case.

138. Mr Gibbin sent the proposal to Mr Farmer on 15 March 2019 so that Mr Farmer would be able to take it into account and as directed by Ms Webster. Mr Farmer responded on 18 March 2019:

“Due to your current circumstances and with the proviso that your line manager can accommodate it, I am willing to support this on a month-by-month basis for the short term. I would need [Mr Wingell] to be in agreement that it would work for the team and that where possible we would have prior knowledge of when the non-working week would be so work could be planned around it. I would also want a monitoring system which I would suggest the corporate flexi sheet would work as that works on a 4-week cycle.

“[Mr Wingell] please see me to discuss.”

139. Mr Gibbin responded on 20 March accepting this proposal.

***Retraction of offer of compressed hours***

140. On 20 March 2019 following discussions between him and Ms Webster, Mr Farmer changed his mind and refused the request. Although we do not have notes of the meeting between Mr Farmer and Ms Webster, Mr Gibbin's email to his union representative says that he was informed that the reason was that Mr Gibbin had 44 hours of time off in lieu remaining and therefore did not require a change to his work pattern. Mr Gibbin asserted that he believed that was incorrect.

141. Discussions continued promoted by Mr Craig to try and see if the flexible working request could be made to work. On 28 March 2019, Mr Gibbin's General Practitioner, Dr A Bayford, wrote a letter asking that Leicester City Council consider the working arrangements and comparing what it was that Mr Gibbin was seeking. However, we note in the letter it does not say that such an arrangement was supported medically.

***Meeting with Mr Craig on 27 March 2019***

142. Mr Gibbin says that he met with Mr Craig on 27 March 2019. There is no doubt the meeting took place. Mr Gibbin however specifically alleges he told Mr Craig he believed his mental health was suffering because of the bullying he received from Mr Farmer.

143. We find as a fact he did not say this. Mr Gibbin's evidence is so vague on this, as to be unreliable. He said in cross-examination he did not remember the conversation well – in fact it seemed to us he had no recollection of it. While we reflect on the quality of Mr Craig's evidence, there was nothing in it to make up for the poor quality of Mr Gibbin's evidence.

***Carer's passport to remain in place***

144. Mr Craig, Mr Farmer, Mr Wingell and Mr Gibbin all tried to arrange the meetings without success. On 3 April 2019, Mr Wingell confirmed that the existing arrangements under the carer's passport would remain in place.

***5 April 2019 complaint to Mr Burgin***

145. On 5 April 2019, Mr Gibbin raised matters with Mr Burgin. He said that issues he raised were unresolved, and that his attempts to resolve them had been unsuccessful. A meeting was arranged for 30 April 2019.

***Application to become an apprentice***

146. On 25 April 2019, Mr Gibbin applied to become an apprentice. Ultimately that application was not supported by his managers and was rejected.

147. Mr Gibbin complains about the decision not to support the application and its rejection being an act of bullying. We reject that. He was already a well-qualified and experienced technician. The idea that he should take a step back and commence an apprenticeship seems to us to be completely unrealistic. Moreover, it seems to have been done mainly as a way to get away from what he perceived to be his tormentors, Mr Craig and Mr Farmer, rather than from a genuine interest in the apprenticeship. In our view, it is

perfectly reasonable and proper not to support the application and we cannot see it sheds any light on whether or not there has been any discrimination in this claim.

**30 April 2019 meeting with Mr Burgin**

148. On 30 April 2019, Mr Gibbin met with Mr Burgin.
149. There was a discussion about Mr Gibbin's situation and depression.
150. Mr Gibbin alleges that he specifically complained about the treatment he received from Mr Farmer. We reject that specific allegation. In his evidence-in-chief (paragraph 23) he made no mention of Mr Farmer when he described the meeting.
151. Mr Gibbin made note of the meeting and sent it to Mr Burgin on 1 May 2019. Having read it we note it does not support the specific allegation either. We thus conclude Mr Gibbin did not raise alleged bullying by Mr Farmer.
152. Besides there is nothing beyond assertion to show Mr Gibbin would have made the allegations of Mr Farmer's alleged bullying as a result of his depression. It is as consistent with the behaviour of anyone – depressed or not – who believes they are bullied.

**8 May 2019 to 15 May 2019 absence**

153. On 8 May 2019, Mr Gibbin's stepson passed away. Mr Gibbin took time away from work because of the effect of his stepson's death. He returned on 15 May and asked that the flexible working arrangements under the carer's passport remain in place.

**Carer's passport revoked and meeting 3 June 2019**

154. A meeting was arranged to discuss the continuation of the carer's passport. On 3 June 2019 that meeting took place between Mr Gibbin, Mr Wingell and Mr Farmer. They discussed the carer's passport remaining in place and that was refused.
155. During the course of the meeting, Mr Gibbin alleged that Mr Wingell commented how ill he was looking and that he was worried. We accept that that was said by Mr Wingell; it ties in with Mr Wingell's own evidence about Mr Gibbin not looking well and with the evidence about how the depression was manifested in the workplace and it is inherently plausible when one takes into account that Mr Gibbin's depression was manifesting itself in the workplace and had now been exacerbated by the death of his stepson. We therefore find that it must have been apparent to Mr Farmer since Mr Wingell was able to see it.
156. Mr Gibbin alleged that he also said he needed to change his work pattern to spend some quality time with his partner, who was depressed with the loss of her son, and enough time to rest and recover between blocks of work. The carer's passport of course would have provided this since it was three weeks on, one week off. We accept that that was said by Mr Gibbin. It fits with the general evidence about the effect of his partner's own ill health, and it seems entirely plausible given the circumstances at that time.
157. Mr Gibbin alleged that Mr Farmer said during the course of that meeting:



“Well now Graham has died, there is no reason to carry on with the flexible working arrangement [because] there was no business need for it, and they would not be able to provide cover during the time I was off”

(Mr Gibbin’s witness statement paragraph 25).

After careful consideration, the Tribunal is satisfied that Mr Farmer said those words. It is worth bearing in mind Mr Farmer had made some adjustments. However on balance we believe the evidence shows a lack of sensitivity and support in the Council which makes it more likely Mr Farmer said these words which are plainly lacking in support and sensitivity. Our reasons are as follows

- 157.1. the general unreliability of Mr Farmer;
  - 157.2. the lack of support from HR which is more likely to reflect the attitude in the workplace than otherwise. Likewise Mr Craig’s comments are likely to reflect the general attitude in the workplace.
  - 157.3. the general lack of sympathy in the workplace. For example, although whether or not it was Mr Farmer’s decision to refuse the request for flexible working or HR strongarming him to refuse it (and we suspect the latter) Mr Farmer made a decision to grant compressed hours and then withdrew it.
  - 157.4. It seems to us to be entirely plausible that these words in the circumstances of this case would have been said.
158. Mr Gibbin also alleged that on 3 June he explained to Mr Farmer that, in addition to his own needs, he needed to support his partner who was depressed because of his step-son’s death. He alleges this this is something that arose from his depression. We reject that. There is no evidence to show his depression was in any way a causative factor of him making this request. It is far more likely that this arose from his tragic family circumstances and is as consistent with a non-depressed person making the request as Mr Gibbin.
159. Mr Wingell confirmed the outcome in an email on 3 June 2019 saying:  
“...you will revert back to your normal days of working Wednesday to Friday...”

### **6 June 2019 sick leave**

160. In response to this on 6 June 2019, Mr Gibbin’s depression took a turn for the worse and Mr Gibbin commenced a period of sickness absence. The fit note issued at the time completed by Mr Gibbin’s GP confirmed depression as being the reason he was unfit for work.

### **Occupational health report of 13 June 2019**

161. As a result of being off work for depression, he attended occupational health and they produced a report on 13 June 2019.
162. The occupational health report said that Mr Gibbin was not currently fit for his role. It said that Mr Gibbin perceived he had been bullied and victimised by management and that his family issues had compounded this. It said

that he was likely to require another 2 - 3 months to enable him to access appropriate treatment to help his health improve. Under the question:

“Is the case covered by disability legislation and if so what adjustments should be considered?”

the occupation health said:

“Yes, from the information provided today it is possible that Mr Gibbin’s condition does meet the criteria for disability legislation. Although this can only be confirmed by an employment tribunal.”

163. We note during the course of the evidence, the Council’s witnesses said that since it was only an Employment Tribunal that could consider disability, it was not an issue for them to consider. Apart from being arguably legally wrong, and we note that it was not a point pursued by Leicester City Council in closing submissions. What is important though it is clear evidence that the Council simply brushed it to one side. The lay members were surprised that no-one in HR thought to pursue this observation or raise the consequences with his managers. It is in our view yet more evidence of indifference on the Council’s part to Mr Gibbin’s depression.

**Events of 27 June 2019**

164. Mr Gibbin’s computer was at some point due to be upgraded. He was concerned that work he had on his computer might be lost if he did not remove it from the computer prior to the upgrade. Mr Gibbin had also used his computer for compiling a grievance. He was also intending to use his computer to make an application for alternative employment within Leicester City Council (although of course he could have done the latter 2 things from any machine, including a home PC or a PC in a library).
165. Because Mr Gibbin wanted to access the documents on his computer but he was signed off sick, he contacted Mr Burgin and sought permission to come in at the end of the working day. The reason he asked for the end of the working day was because he felt that if he attended during the working day he would meet Mr Farmer and Mr Craig and that would simply promote a continuation of what he perceived as mistreatment. Mr Burgin agreed to this request. As well as having permission to come in and copy files, he had permission from Mr Burgin to use his computer to apply for this alternative role in the City Council. Mr Burgin did not inform anyone else that he had given Mr Gibbin permission to be there.
166. So on 27 June 2019 and with Mr Burgin’s permission, Mr Gibbin attended work at the end of the working day and started to use his computer.
167. Whilst he was at his computer at about 5 o’clock in the evening, Mr Farmer was still present. He saw Mr Gibbin on the computer and then he disappeared. He came back with Mr Craig and a Rob Pallatt. The three of them came into the office and asked Mr Gibbin if he was better and what he was doing. Mr Gibbin told them that he was saving work to the server; he did not tell them that he was applying for another position nor did he tell them that Mr Burgin had given him permission to come into the office at the end of the day, notwithstanding the fact he was signed off sick. However, they did not ask him who had given him permission to be there either.

168. The managers then gave him a stress action plan to complete and fill out and return to them. The three managers then left the office. Shortly after they came back in together. The managers stood in a position that was behind him so that they were encircling and behind Mr Gibbin, looking at Mr Gibbin's computer desktop. Mr Gibbin describes himself as being uncomfortable, intimidated and nervous because of all this. We accept that this is how it would have made him feel. People standing behind one whilst working on a computer screen is something that quite naturally could make people feel uncomfortable since having people standing behind one in close proximity is something that many find uncomfortable in any event. We accept it must be particularly so if one is suffering from depression and these are people with whom you have towards them a mistrust, whether justified or not. That is inherently plausible and reflects Mr Gibbin's clear perception.
169. Mr Gibbin was particularly worried by the fact they might have seen him applying for jobs and the fact that on his desktop in the top centre of his screen there was a folder marked "grievance", albeit we accept Leicester City Council's evidence that they did not see this.
170. At no point did Mr Farmer, Mr Craig or Mr Pallatt ask Mr Gibbin to leave.
171. Based on the evidence we heard and the circumstances, we are satisfied that what took place here was heavy handed and intimidating. To present to a person signed off sick with a stress management plan complete and return, to disappear and bring more managers back and then for three people to stand behind someone whilst that person uses the computer would feel inherently intimidating and unwelcome. It is also unnecessary. We cannot see why 3 people were required. There was no good explanation as to why Mr Farmer felt he had to fetch the others. This leads us to conclude it was at best insensitive or at worst intended to intimidate.
172. We are also quite satisfied that this reaction from Mr Farmer, Mr Craig and Mr Pallatt was a unique response to Mr Gibbin being there. There is nothing to show that they would have reacted that way had they seen any other member of staff signed off as sick being there. We come to this conclusion because of the way they had interacted with Mr Gibbin in the past and because of his lengthy sickness, number of interactions and lack of support for the effects of his disability leads us to conclude it is more likely that it was him rather than sickness that prompted this behaviour. We appreciate they did not know that Mr Burgin had given permission. However that lack of knowledge was not the reason for their behaviour. It seems to us such a unique occurrence that to have some sort of practice or provision or policy or criteria on that basis is frankly fanciful. This was genuinely a one-off.
173. That said it is quite understandable if a person is signed off sick one does not expect to find them in the office, particularly at the end of the working day. So, while the manner in which they conducted this interaction was in our view aggressive; was intimidating and unnecessarily unpleasant, we believe that actually raising the issue and being concerned and suspicious about the reason for Mr Gibbin's presence are all entirely understandable and justifiable.

**Reaction to Mr Gibbin's attendance**

174. Mr Farmer and Mr Craig decided that the appropriate next step was to find out what he had used the computer for. Therefore they made a request that Corporate Investigation access the records to establish what Mr Gibbin had been using the computer for and what files he had.
175. In the Tribunal's view, this seems to have been to deploy what Mr Gibbin described as the "nuclear option". It seems to have been to go to the most severe, and in our view, disproportionate step straightaway. Puzzled as to why Mr Gibbin had been there, one would have expected Mr Farmer and Mr Craig first to take steps to establish why he had been there. One obvious avenue might have been to contact Mr Gibbin the next day by telephone to ask further questions. Certainly, the Lay Members of the Tribunal see this might well have been a reasonable step. However, we accept the evidence of Mr Craig and Mr Farmer on this point that that might have been seen to have been too intrusive or aggressive. The Tribunal is conscious of the number of contradictory complaints that it sees where people for example complain they have been contacted whilst off sick and people who complain that they have not been contacted whilst off sick. Therefore, we think it is reasonable that Mr Farmer and Mr Craig did not follow this particular course of action.
176. However, a more significant and obvious route would have been to have raised the matter with Mr Burgin themselves. He is after all the Director and, had they done that, Mr Burgin in our view most likely would have said something to the effect of that he had given Mr Gibbin permission to be at work.
177. Besides Mr Craig and Mr Farmer needed Mr Burgin to sign off the interception request in accordance with the policy. While Mr Craig asserts he had delegated powers, we reject that – he did not have the authority to approve the interception request. He could not tell us when they were delegated, who delegated them, whether the delegation was limited or general, could not tell us if the delegation was in writing or on what basis they had been delegated. We also note the policies make no mention of the power to delegate. If the power existed in relation to such a sensitive area, then we expect it would be spelt out clearly. We accept that his signature was good enough for Corporate Investigations. However having considered the policies, we conclude they were wrong to accept it.
178. Mr Farmer told us he believed at the time that the interception was justified because of data protection concerns. We reject the idea that this was on his mind for the following reasons. When an interception investigation is requested, it is necessary to complete a form. On 5 July, the request was sent to the Corporate Investigation Team. The request Mr Farmer completed (approved by Mr Craig) read:
- "Nature of enquiry: My concern is last week ... I discovered [Mr Gibbin] was in the IMC at his desk hole on Long Term Sick leave, unannounced, after 5pm. When challenged he explained he was backing up files and clearing his desktop to his [Leicester City Council] personal drive in preparation for

a replacement PC. This gave me concerns as this action highly unusual and I need to understand what he was doing.

“Why is the information to establish the nature of what he was doing on the required PC? at work when he has been certified sick by his GP was he deleting content or moving content. Was the content Personal or [Leicester City Council]”

The form then says they want email tracker logs from 1 February 2019 to 20 June 2019. There was no explanation as to why it needed to go back that far. We cannot see one. Internet logs from 1 May 2019 to 1 July 2019. We see no reason to go that far back either. Under further relevant information, it is written:

“To confirm that the PC is being used on [Leicester City Council] business only during the users working hours (the user works part time Wednesday to Friday on flexitime). Part of his role does require internet usage and searches for construction techniques, materials and products including prices.

“The person has been on Absence since 4th June 2019.

“Could ICT please advise if they are able to produce a copy of the h:drive from back-up server prior to 27/06/2019 to identify any documents that were saved on [Mr Gibbin’s home drive] which could have been deleted when [Mr Gibbin] came into the office.

“Also, after cloning the PC, are we able to access any deleted documents? One would assume that after [Mr Gibbin] copies the documents from his PC he would have deleted them as well ... and probably emptied the re-cycle bin?”

179. The form has been competed in detail and thoroughly. That form contains no reference whatsoever to data protection. If it were front and centre on his mind as alleged, it would undoubtedly have appeared in the form in our view. Furthermore it was Corporate Investigations themselves later who raised the issue of potential data protection issues.

***Return to work on 17 July 2019 and occupational health report on 24 July 2019***

180. Mr Gibbin attended a return-to-work meeting with Mr Wingell on 17 July 2019 and was further referred to occupational health. They reported on 24 July in the following terms:

“In my clinical opinion I think this case is likely to be covered by the Equality Act 2010 although ultimately this would be a legal decision rather than a medical decision. Management may wish to consider making Mr Gibbin’s move into another section at work as a permanent adjustment.”

181. The council never considered moving Mr Gibbin.

***Outcome of the Corporate Investigation***

182. On 26 July 2019, the investigations team reported there was no relevant internet usage.

***Final warning over attendance***

183. On 14 August 2019, Mr Gibbin was given a final warning in respect of his attendance for a period of just under one year.

***Further investigation by corporate investigations***

184. On 2 September 2019, of their own decision, Corporate Investigations decided to undertake another search to see whether the Data Protection Act had been breached. This was the first time that data protection was raised as a possibility. We do not know what prompted this investigation but we do not know the impetus did not come from Mr Farmer.

185. Corporate Investigations found the pictures that we have described earlier on in this Judgment, including the one with Mr Riley

***Commencement of formal proceedings against Mr Gibbin but not Mr Riley***

186. Mr Riley was dealt with informally.

187. This is not the approach that was taken towards Mr Gibbin, however. Instead, a formal investigation was launched, and Mr Kerry was appointed as the investigator in October 2019. He invited Mr Gibbin to an investigatory meeting and that took place on 6 November 2019.

188. In that investigation the following exchanges took place:

“SK : I would first like to ask you about this photograph [this is reference to the photograph of Mr Riley with a dildo stuck on his head]. Were you present when this incident occurred?

“JG : No, I was not present, I don't know who was there, I wasn't

“SK: Do you know who brought the object into work

“JG : I became aware of the object when the picture was emailed to me, I did save the picture on my computer

“SK: Did you take the photograph?

“JG: No I did not take the picture

“... ”

“JG : The picture was emailed to me and I probably should have reported it and I admit I copied it to my computer and I also sent it to my home phone to show my partner. I had this as his profile picture.”

189. He was then asked about the photograph of the runners dressed up as pillar boxes. He said about why he had it:

“JG Don't know, I am not a racist, it was just a jokey thing, it was not long after the Boris Johnson thing”

“SK Why did you not report it to management?

“JG I didn't think it was serious

“SK The item is still on your PC

“SD Why didn't you think it was serious? Do you think it would be serious if this was out in the public domain? Do you think this should be on an [Leicester City Council] PC?

“JG No, I just didn’t think it was serious”

[SD is Sharron Daley, Human Resources Advisor.]

190. He then continued to explain that he accepted the other documents on his computer were not appropriate. He had simply saved them, however, because he believed that they were joking.

191. When asked about the Belgium tweeting cat pictures during a meme, it was said:

“SK: ‘Belgians tweet cat pictures during’ - memes of kittens, during Brussels Terror attack again did this get on onto your PC?

“JG It was sent to me, this was a BBC article, I copied it

“...

“SK Why have you kept it?

“JG I don’t know

“SK Do you think it is appropriate particularly as an [Leicester City Council] employee?

“JG No possibly not, but these were from a BBC website.”

192. It was suggested at one point those pictures might show he supported terrorism. In our view no reasonable employer could ever have thought that.

193. When asked about the picture of the black van with the reference to Keith Vaz on it, he said that the photograph had come from New Parks Boulevard in Leicester; that it had been on the BBC television programme “Have I Got News for You”, and he saw it on the BBC website every day when he logged in to read the news in his own time. He said that he had saved it because he thought it was amusing.

194. He explained the snowman picture was essentially an image that he had on a Christmas card at home from about 2016. He did not think it was serious; he found it mildly amusing.

195. He accepted it was not appropriate to have the poster from Viz relating to Skegness on his computer.

196. At the end he said:

“I just hope that this doesn’t get me the sack, it just seems petty and it’s not that serious, but I am here to help with the investigation”.

197. At the second meeting, he was asked further questions about the BBC picture and asked why only part of the article had been saved to his computer and he was asked questions about what occurred when he came into work that time.

198. At the end of the meeting, they said:

“SK I have reviewed all the material we have and there are six minors and two majors 8 offensive/racist nature, 6 examples of where the information stored whilst should not be on your drive it is of a minor nature and the work emails that you sent to your home email address is inappropriate and had the potential for a data breach. Is there anything

that you would like to add before we adjourn for me to consider the way forward?

“SK There are six minors and two major items

“SD Can you think what the two majors maybe

“JG I can think of three, the picture of the two young ladies, the people dressed up as pillar boxes, the picture of [Mr Riley] and the Airport Gag. That’s actually four.

“JG There was nothing suspect, extremist or terror related. I accept that all that you have found shouldn’t be on it but in my view it is not extreme/wrong.

“SD What do you consider to be extreme

“JG Pornography, terrorist, inciting violence, sexist. In my opinion it is no worse than what you see on TV. I wasn’t distributing to people who would be offended. The issue with Bejal folder was on a previous shared drive and I copied that over. I have now removed everything, but you can get it back if you need it.

“I realise that I have done wrong and have wasted everybody’s time. I feel the gravity of the situation is disproportionate I admit there may be 2 (changes to 3 then 4) items that could cause offence. It was wrong and I hold my hands up to that. In the years and years working at [Leicester City Council] I may have made a mistake of judgment, I have changed my ways and bring my own iPad into the office to use.”

199. There was some extras exchanges and a short adjournment Mr Kerry returned and said:

“SK Thanks for coming back, I have listened to all that you have had to say today and the previous meeting and given it careful consideration but due to there being eight majors and the nature of the material I will be taking the case forward as Gross Misconduct.

“TD/JG We thought you said there were only two majors

“SK No eight”

200. It is unsatisfactory that the number of “majors” and “minors” appears to vary so much.

***Grievance of 8 January 2020***

201. On 8 January 2020, Mr Gibbins submitted a grievance complaining about the nature of the hostile working environment, lack of being trained, refusal to give him training, a failure to provide him with enough resources, undermining his decisions and finding fault with what he did, trivial adjustments of timesheets and petty behaviour, attempting to stop flexible working, refusing his holiday cancellations due to sickness, harassing whilst working for Technical Services, a complaint about a business case and recharge sheets, complaints about schedules of rates, which is a document which sets out the necessary rates with a view to calculating the work that needs doing and a complaint about job applications that he had made. Further, complaints about training and a complaint about the refusal of



flexible working request that he had put in. The complaint about the PC interception and the disciplinary process. The final written warning for his absence and withholding information requested under Subject Access Request.

202. We do not believe that considering the grievance itself takes us any further forward in our deliberations, save to say that some aspects of it did interfere with disciplinary matters that followed.
203. It was addressed to a Mr Nicholls, Head of Service (Housing). Mr Nicholls did respond to it in which, in short, he rejected most of the grievances that had been raised. The exception to that was the complaint about the PC interception and the disciplinary process that was deferred by Mr Nicholls to be dealt with as part of the disciplinary process itself.

### ***Invitation to a disciplinary hearing***

204. Mr Gibbin was told that the matter would progress to a disciplinary hearing on 23 January. The letter said so far as relevant:
- “John Gibbin Used a Leicester City Council (LCC) PC and works email account to conduct personal/family matters not related to his work at LCC.
- “Mr Gibbin stored personal information on the H:drive which is intended for work related documents only.
- “The sending and storing of inappropriate images on a Leicester City Council PC
- “The above allegations are contrary to Leicester City Council ICT Policies....”
- “... the allegations are serious and that if it is decided that they have been substantiated, they could be regarded as gross misconduct and you could be dismissed without notice. It is, therefore, vital that you attend the Disciplinary Hearing and again, I would strongly advise that you are represented.”
205. Mr Gibbin submitted his response to the allegations. We do not believe the response takes the case further forward.

### ***Disciplinary hearing***

206. The disciplinary hearing took place over 4 and 5 March 2020. The meeting began with Ms McGraw (who chaired the meeting) addressing the grievance and the proportionality of the interception. Whilst undoubtedly important to Mr Gibbin, having read it we do not believe it takes the case any further forward.
207. The Disciplinary Committee then went on to deal with the various allegations. During the meeting Mr Kerry conceded that the pictures of the kittens relating to the Belgium terror attacks was in fact supporting of terrorism and not objectionable when seen in context, except of course it should not have been on the computer in any case.
208. During the course of the meeting, he is asked about the images of the young women for example:
- “CM where did the image of the young women come from?”

“JG I can’t say for sure, but I think it came from a manager of a small team. I didn’t download it, but I can’t be 100% certain. Again, when [Mr Kerry] showed it to me I was shocked because I had forgotten about it.

“CM why did you choose not to just delete it?

“JG I don’t know why really, I found them amusing at the time. It’s like recipes and walks, I just save them.

“CM did you find them all amusing?

“JG at the time when a lot of these came I was in a very dark place and they just made me smile. I’m not defending it; I was foolish and I realise that now having gone through this. I have gone through my PC and won’t save things again.

“CM my interpretation was that there was some defence in that some of the images were in the public domain?

“JG the van and Banksy are both in the public domain very much, the others I’m not sure where they came from.

“CM but being in the public domain doesn’t make it acceptable.

“JG no, I understand that now. We all have different views and thresholds of what is acceptable or offensive. I can only say what offends me, but I understand that others might be offended and I try not to offend anyone.”

209. Eventually the meeting adjourned and Ms McGraw announced her conclusions:

“Allegation 1: You used Leicester City Council PC and works email accounts to conduct personal/family matters not related to his work at [Leicester City Council];

“By your own admission, you used a works email account to send and receive emails related to personal/financial matters. You accepted that this was not appropriate and that you were in breach of the Council’s policies regarding acceptable use.

“Allegation 2: You stored personal information on the H:drive which is intended for work-related documents only;

“By your own admission you stored personal information on the H:drive over a prolonged period of time.

“With regards to justification, I consider that the decision to request an interception was entirely appropriate given the prevailing circumstances at the time.

“Crucially, you agreed that you may have looked suspicious. In addition, you chose not to notify either your manager or Head of Service that you had permission from the Director of Housing to be at work that evening. Had you done so it is likely this may have allayed any concerns regarding your reasons to be at work.

Ms McGraw went on to find that the interception was not disproportionate.

“Allegation 3: You sent and stored inappropriate images on a Leicester City Council PC.

“I consider this allegation to be the most serious of the three. I have considered the images you stored on your PC, and it is material that I consider to be highly offensive and derogatory.

“I consider a number of the images to be of a sexist, racist and offensive nature. When questioned with regards to why you saved the images to your PC, you stated you found them funny. This is a serious error in your judgement and much can be surmised from your response. You accept that you shared the image of your colleague, with the phallic object stuck to his head, with your wife sending this from your Leicester City Council email address. In doing so you put the Council at risk of reputational harm.

“What is really going on here is that you acknowledged you should not have done this and knew it was wrong, and yet still went ahead and did it; which raises serious questions concerning your attitude and integrity.

“When questioned as to whether you thought it appropriate to refer to women as ‘slags’ you referred to this as a joke. In relation to the image of two snowmen, you indicated that there was nothing offensive in this image and that anyone who found this offensive was seeing something which wasn’t intended.

“In consideration of the appropriate sanction I genuinely considered dismissal as one of my options. However, on balance, I took account of the following factors of mitigation which persuaded me to draw back from dismissing you;

“The interception identified only 8 images spanning more than 10 years. Whilst some of these were of a very serious nature, I do not consider the number of images to be excessive or of the more extreme kind;

“You were not involved in the creation or distribution of the offensive material;

“You have no previous conduct issues in relation to misuse of IT, including the storage of inappropriate material on your computer.”

210. She decided to deliver a final written warning for a period of one year.
211. No account was taken in the disciplinary process of Mr Gibbin’s disability; that was not drawn to Ms McGraw’s attention by HR. We find that somewhat surprising given the clear statement in the most recent occupational health reports that Mr Gibbin was disabled, at least in the medical view, because of his depression. We think that surely that was something that ought to have been taken into account and it shows something of a slack approach in our view and it is a dismissive approach of Leicester City Council towards his disabilities. It appears also to accord with the dismissive attitude displayed at times by e.g. Mr Craig.

### ***Appeal***

212. Mr Gibbin appealed against the disciplinary outcome and that was conducted by Ms Carpendale. The appeal was delayed because of the impact of covid-19. It took place on 15 October 2020.

213. Mr Gibbin raised in the appeal meeting as follows (page 602):
- “JG said that the council’s policy on the allegation of bullying is that they have a zero-tolerance policy and that any allegations of bullying would be investigated thoroughly, I don’t believe my allegation of bullying was investigated thoroughly, this disciplinary was bought by people who have a spiteful campaign against me. I was and still am very ill, suffer with mental illness and depression and I have been poorly treated. SN has been good; he did look at the letter and no doubt took advise from HR, but I don’t feel that this has been dealt with appropriately. As the council’s own policy is zero tolerance but not dealt with as such CB thought it was serious enough to move me, he was very sympathetic and, in an email, he said he was sorry to hear, it is very disappointing.
- “I bought up previous incidents and what followed was a malicious disciplinary, asking TD to confirm that this was the case.”
214. It is therefore quite clear that Ms Carpendale had been alerted to the fact that Mr Gibbin was relying on depression and mental illness, that these may well have had an impact on matters and that the disciplinary had begun as a vindictive stroke. Ms Carpendale had the OH report but had not read it. No one in HR had alerted Ms Carpendale to the report, the contents of it, to the fact that Mr Gibbin is disabled or to warn her that some adjustments might be required. There is no good reason for this. In our view, it is a serious oversight and something for which there is no proper and decent explanation. In our view, this again is something that shows Leicester City Council’s general slack and indifferent approach to Mr Gibbin’s disability.
215. The outcome was that the appeal was dismissed by Ms Carpendale and the final written warning remained live.
216. Mr Gibbin commenced early conciliation on 1 November 2020; the certificate was issued on 2 November 2020; he presented his claim on 8 December 2020.

## Law

### *Discrimination arising from a disability*

217. The Equality Act 2010 section 15 provides
- “Discrimination arising from disability
- “(1) A person (A) discriminates against a disabled person (B) if—
- “(a) A treats B unfavourably because of something arising in consequence of B's disability, and
- “(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.
- “(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.”
218. “Knowledge” in **sub-section (2)** relates to the disability itself, not the something that arises from it: **City of York Council v Grosset [2018] ICR 1492 CA**. Something that arises includes anything that is the result, effect or outcome of a disabled person’s disability: The code [5.9].

219. The approach to cases under **section 15** was explained in **Pnaiser v NHS England aor [2016] IRLR 170** (after referring to the previous authorities):
- 219.1. the Tribunal had to identify whether there was unfavourable treatment and by whom;
  - 219.2. it had to determine what caused the treatment. The focus was on the reason in the mind of the alleged discriminator, and an examination of the conscious or unconscious thought processes of that person might be required;
  - 219.3. the motive of the alleged discriminator in acting as he did was irrelevant;
  - 219.4. the Tribunal had to determine whether the reason was "something arising in consequence of [the claimant's] disability", which could describe a range of causal links;
  - 219.5. that stage of the causation test involved an objective question and did not depend on the thought processes of the alleged discriminator;
  - 219.6. the knowledge required was of the disability; it did not extend to a requirement of knowledge that the "something" leading to the unfavourable treatment was a consequence of the disability.
220. In **Williams v Trustees of Swansea University Pension and Assurance Scheme aor [2019] ICR 230 UKSC** the Supreme Court suggested at [27] "I agree [...] that in most cases (including the present) little is likely to be gained by seeking to draw narrow distinctions between the word "unfavourably" in section 15 and analogous concepts such as "disadvantage" or "detriment" found in other provisions, nor between an objective and a "subjective/objective" approach. While the passages in the Code of Practice to which [Counsel] draws attention cannot replace the statutory words, they do in my view provide helpful advice as to the relatively low threshold of disadvantage which is sufficient to trigger the requirement to justify under this section."
221. The parts of the code referred to are that the claimant must have been put to a disadvantage (**The Employment Statutory Code of Practice [5.7]**) and that it is enough the claimant can reasonably say they would have preferred to be treated differently (**The Code [4.9]**). This reflects case law on detriment: A detriment is where claimant believes he has been subjected to a disadvantage and that belief is reasonable: **West Yorkshire police v Khan 2001 ICR 1065 UKHL**; **Shamoon v Chief Constable of the Royal Ulster Constabulary 2003 ICR 33 UKHL**; **Derbyshire aors v St Helens MBC 2007 ICR 841 UKHL**; **Barclays Bank plc v Kapur [1995] IRLR 87 CA**; **Employment code [9.8]-[9.9]**.

***Failure to make reasonable adjustments***

222. The **Equality Act 2010 sections 20** and **21** provide:  
"20 Duty to make adjustments

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

“(2) The duty comprises the following three requirements.

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

“ ...

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

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

“(8) A reference in section 21 or 22 or an applicable Schedule to the first is to be construed in accordance with this section....

“(13) [confirms the applicable schedule for work is schedule 8]

“21 Failure to comply with duty

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

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

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

223. **Schedule 8** confirms employment is a relevant matter and that the employer is liable for any PCP carried out by the employer itself or on its behalf.

224. Substantial means more than minor or trivial: see **section 212**.

225. In **Environment Agency v Rowan [2008] ICR 218 (EAT)**, the Appeal Tribunal said the Tribunal needs to look at

225.1. the overall picture;

225.2. the PCP applied by or on behalf of the employer, or the relevant physical feature of the premises occupied by the employer;

225.3. the identity of non-disabled comparators (where appropriate), and

- 225.4. the nature and extent of the substantial disadvantage suffered by the claimant.
226. The purpose of identification of the PCP is to identify what it is about the employer's operation that causes disadvantage to the employee: **General Dynamics Information Technology Ltd v Carranza [2015] ICR 169 (EAT)**. The relevant disadvantage must however bear some relation to the disability: **Lalli v Spirit Housing Ltd [2012] HLR 30 (CA)**.
227. The Tribunal has to ask whether the PCP put the disabled employee at a substantial disadvantage compared with a non-disabled employee. If they are treated equally but there is a disproportionate impact on the disabled person, then there is a substantial disadvantage: **Smith v Churchills Stairlifts plc [2006] ICR 524 (CA)**; **Griffiths v Secretary of State for Work and Pensions [2017] ICR 160 (CA)**
228. Any modification of, or qualification to, the PCP in question which would or might remove the substantial disadvantage caused by the PCP is capable of amounting to a relevant step in **section 20(3)**. The only question was whether it was reasonable for it to be taken: **Griffiths**. That step may require treating the employee more favourably: **O'Hanlon v Revenue and Customs Commissioners [2007] ICR 1359 (CA)**.
229. Knowledge in **sections 20 and 21** means actual or constructive knowledge both (i) that the employee was disabled, and (ii) that he or she was disadvantaged by the disability (i.e. by a PCP or physical feature of the workplace): **Wilcox v Birmingham CAB Services Ltd UKEAT/0293/10 (EAT)**.
230. The test of reasonableness is objective. The Tribunal must decide for itself if a proposed adjustment was reasonable. Relevant factors to consider are set out in the code at [6.28] and [6.33] and we have borne those lists in mind. The Tribunal bears in mind the focus is on practical outcome not the methodology that the employer applied or failed to apply. If an adjustment is not reasonable, the too-ing and fro-ing beforehand is not relevant: **Royal Bank of Scotland v Ashton [2011] ICR 632 (EAT)**.

***Burden of proof: Equality Act 2010***

231. The **Equality Act 2010 section 136** sets out the way that the burden of proof operates in claims under the legislation, and was explained in **Igen Ltd aors v Wong aors [2005] IRLR 258 CA**; **Efobi v Royal Mail Group Ltd [2019] 2 All ER 917 CA**; **[2021] 1 WLR 3863 UKSC**; **Hewage v Grampian Health Board [2012] ICR 1054 UKSC** and **Madarassy v Nomura International plc [2007] ICR 867 CA**.
232. At the first stage, the Tribunal must consider whether the claimant has proved facts on the balance of probabilities from which the Tribunal could properly conclude that the respondent has committed an unlawful act of discrimination or harassment. The Tribunal presumes there is an absence of an adequate explanation for the respondent at this stage but it can take into account the respondent's evidence is assessing if the claimant has discharged the burden of proof. At this stage it is irrelevant that the respondent has not adduced an explanation.

233. It is not enough for a claimant to prove bare facts. They only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal 'could conclude' that the respondent had committed an unlawful act of discrimination or harassment: **Madarassy at [56]; Efofi UKSC at [46]**. There must instead be some evidential basis on which the Tribunal could properly infer that the protected characteristic either consciously or subconsciously was the cause of the treatment.
234. The Tribunal may look at the circumstances and, in appropriate cases, draw inferences from breaches of, for example, codes of practice or policies.
235. If the claimant succeeds in showing that there is, on the face of it, unlawful discrimination or harassment, then the Tribunal must uphold the claim unless the respondent proves that it did not commit or was not to be treated as having committed the alleged act. The standard of proof is the balance of probabilities. It does not matter if the conduct was unreasonable or not sensible: The question is if the conduct was discriminatory.
236. In **Efofi UKSC** and **Hewage** the Court said it is important not to make too much of the role of the burden of proof provisions. As Lord Hope said at [32]:
- "They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other."

***Time limits for claims under the Equality Act 2010 and continuing acts***

237. The **Equality Act 2010 section 123** require a claim to be presented within 3 months of the detriment/less favourable treatment, or such other period as the Tribunal thinks just and equitable. Where there is conduct extending over a period of time, time runs from the end of that period. To decide if there was a continuing act, the Tribunal must look at the substance and ongoing state of affairs to determine if the claimant was treated less favourably over that period: **Lyfar v Brighton and Sussex University Hospitals Trust [2006] EWCA Civ 1548 CA**.
238. When deciding whether to extend time the factors in the **Limitation Act 1980 section 33** can be a useful aide but are not prescriptive: **Southwark London Borough Council v Afolabi 2003 ICR 800 CA**. They are not a framework for thinking. Their relevance depends on the facts of the particular case.
239. Ultimately the Tribunal has a broad discretion when weighing up all the circumstances, and looking at all the circumstances is the best approach. The length of delay and reasons for it are always relevant, as is the prejudice to the respondent if a claim that is out of time is allowed to proceed: **Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] ICR 1194 CA; Adedeji v University Hospitals Birmingham NHS Foundation Trust [2021] EWCA Civ 23**. We remind ourselves too that there is a public interest in enforcing time limits.



## Conclusions

### ***Knowledge of disability***

240. Based on our findings of fact, we are satisfied that Leicester City Council at the very least should have known that Mr Gibbin was disabled because of depression from September 2018. We rely on our findings of fact we set out above about how he behaved at work and what others had noticed. We have had regard to paragraph **5.13-5.15** of the Code. The example at **5.15** is particularly telling:

“A disabled man who has depression has been at a particular workplace for two years. He has a good attendance and performance record. In recent weeks, however, he has become emotional and upset at work for no apparent reason. He has also been repeatedly late for work and has made some mistakes in his work. The worker is disciplined without being given any opportunity to explain that his difficulties at work arise from a disability and that recently the effects of his depression have worsened.

“The sudden deterioration in the worker’s time-keeping and performance and the change in his behaviour at work should have alerted the employer to the possibility that that these were connected to a disability. It is likely to be reasonable to expect the employer to explore with the worker the reason for these changes and whether the difficulties are because of something arising in consequence of a disability.”

241. The above shows there was plenty of evidence that Mr Gibbin was suffering and pointed to depression. The Council knew he had had depression before. He was crying at work. His performance diminished. It called for an enquiry. They did not make any such enquiry.

242. Because the effects started to manifest themselves in June 2018, we are satisfied that 1 June 2018 is a reasonable date to conclude that the Council should have known of his disability. It is possible the Council should have known before then, but it is not necessary for us to decide that.

243. We are also satisfied that if the respondent had made the enquiries that it would have been reasonable to make, it would have known that the claimant suffered the disadvantages we have set out below under the failures to make reasonable adjustments because they would have been obvious on reasonable enquiry.

### **Discrimination arising from disability (Equality Act 2010 section 15)**

#### ***Did the following somethings arise from the claimant’s disability?***

***Something arising 1: between September 2018 and March 2019 he (a) outwardly manifested himself such that he appeared visibly upset in the workplace; (b) caused him to work less; (c) caused him to have no enthusiasm for his work; and/or (d) caused him to be tearful in the workplace***

244. The Tribunal concludes that he (a) outwardly manifested himself such that he appeared visibly upset in the workplace; (c) caused him to have no enthusiasm for his work; and (d) caused him to be tearful in the workplace arose from his disability of depression. Mr Wingell observed that Mr Gibbin appeared to have no enthusiasm for his work. Mr Craig’s comments about

Mr Gibbin were prompted in our view about how Mr Gibbin appeared the in the workplace which supports (a) and (c).

245. We do not accept that (b) has been shown to arise from his depression. We found as fact it was his productivity that dropped off, not that he was working less. Besides we do not accept that depression in and of itself means he would work less. There is no medical or other evidence to show a causal link. Therefore this does not arise from his depression.

***Something arising 2: Mr Gibbin's complaint to Mr Craig on 27 March 2019, namely that he believed his mental health was suffering because of the bullying he received from Mr Farmer?***

246. Mr Gibbin's evidence about this is too vague. In cross-examination he told us he did not remember the conversation well and indeed appeared not to remember it at all. Taking in account our view of Mr Gibbin as a witness, we find as a fact he did not make the complaint.

247. Besides we would not have concluded any such complaint arose from his depression. The allegation is that he reported that his belief that his mental health was suffering from what he perceived as bullying. This alleged behaviour is as consistent with not having depression as having depression. There is no evidence beyond assertion this was in any way connected to his depression. There would have been no proven causal link in our judgment.

***Something arising 3: on 30 April 2019 Mr Gibbin met with Mr Burgin to complain about the treatment he received from Mr Farmer?***

248. This did not happen. It is telling that in paragraph 23 of the claimant's statement that he adopted as his evidence-in-chief and did not correct, and in which he discusses the meeting, he does not once mention Mr Farmer.

249. Besides, beyond mere assertion, there is no evidence that shows this was in any way connected with his depression. In the context of the allegation, it is as consistent with the behaviour one might expect from a non-depressed employee as from a depressed one.

***Something arising 4: on 3 June 2019 Mr Gibbin requested a change to his work pattern from Mr Farmer and explained that in addition to his own needs he needed to support his partner, who was depressed, because Graham, her son, and the Claimant's stepson had passed away?***

250. We do not accept this request arose from his depression. It is quite apparent on its face that it arose from his tragic personal family circumstances. The behaviour and request are as consistent with what one might expect from a non-depressed employee in the circumstances as from a depressed employee. There is no evidence to show a link beyond assertion that there is one.

***Something arising 5: on 27 June 2019 he attended the Respondent's premises at the end of the working day, whilst signed off with depression, and used the Respondent's IT facilities to apply for a role in another department?***

251. Based on the evidence we accept that he attended out of hours because of his depression. The circumstantial evidence in our view supports the fact

that his depression left him vulnerable and unable to face meeting with Mr Farmer and Mr Craig. It is inherently plausible he would feel that way. We do not think the request to attend and attendance out of hours could be described as typical or expected behaviour from a non-depressed person.

252. We do not accept that the use of the City Council's IT facilities to apply for another role is something that arose from depression. There is no evidence that his depression meant he had to use the respondent's IT facilities to make the applications.

**Something arising 6:** *when the Claimant was questioned by Mr Farmer and/or Mr Craig the Claimant did not explain that the reason why he was using the Respondent's IT facilities outside of working hours, and whilst off sick, was because he was applying for a different acting up role as a Senior Technician so he would not have to work with Mr Farmer?*

253. We conclude this arose from his disability. We are satisfied that his depression left him vulnerable and not as strong-willed as a reasonable person without depression might be. This is apparent from the tenor of his evidence. We are satisfied that three managers gathering around the claimant is going to increase that vulnerability. He sought permission to attend after work to avoid meeting them which is consistent with the suggestion that meeting them was what he wanted to avoid. In the circumstances it is inherently plausible he would feel unable to explain to them the reason why he was there, since it would put him in potential conflict with Mr Farmer.

**Something arising 7:** *the Claimant's historical use of the Respondent's IT facilities to store and email personal content which included politically incorrect and material some would find offensive?*

254. We do not accept this arose from his depression. The lay members in particular observed that such an activity is common in the workplace and rarely linked to depression or other disability but simply what employees (and a lot of people generally) do. Beyond the assertion there is nothing that shows a causal link between depression and this behaviour. In the circumstances we do not accept that the assertion is enough to show a link.

**Something arising 8:** *Mr Gibbin was absent between 6 June 2019 and 16 July 2019?*

255. The medical FIT notes confirm this was the case. We have no reason to doubt them.

*Summary of findings on somethings arising*

256. In summary:

- 256.1. Something arising 1 arose from Mr Gibbin's depression but only insofar as (a) outwardly manifested himself such that he appeared visibly upset in the workplace; (c) caused him to have no enthusiasm for his work; and/or (d) caused him to be tearful in the workplace,
- 256.2. Something arising 2 did not arise from his depression;
- 256.3. Something arising 3 did not arise from his depression;

- 256.4. Something arising 4 did not arise from his depression;
- 256.5. Something arising 5 arose from Mr Gibbin's depression insofar as he attended out of hours;
- 256.6. Something arising 6 arose from Mr Gibbin's depression;
- 256.7. Something arising 7 did not arise from his depression; and
- 256.8. Something arising 8 arose from Mr Gibbin's depression.

**Claims that can be dismissed therefore at this stage**

- 257. **Claim 2 fails** because it is contingent on something arising 2. It is therefore dismissed.
- 258. **Claim 3 fails** because it is contingent on somethings arising 2, 3, and 4. It is therefore dismissed.

**The claims of unfavourable treatment**

**Claim 1:** *From September 2018 to March 2019, the Claimant received criticisms of his work and negative statements about his attitude*

*Did the respondent treat the claimant unfavourably in that:*

**(a)** *Between September 2018 and March 2019, did Mr Farmer: (i) tell the Claimant that his work was inadequate when the Claimant was instructed to produce a business case for a planned communal area maintenance programme? (ii) And, frequently tell the Claimant that what he had done was not what he wanted, without being more specific.*

- 259. Based on our findings of fact, we conclude that Mr Farmer did both of these things.

**(b)** *Between September 2019 and March 2019, did Mr Craig make comments about the Claimant's demeanour like "you look like you have no enthusiasm", "you want to buck your ideas up, going around like that" and "[you] needed a good kick up the arse"?*

- 260. Based on our findings of fact, we conclude that Mr Craig said this to Mr Gibbin.

*Did the respondent treat the claimant unfavourably because of something arising 1?*

- 261. We are not satisfied that **Claim 1(a)** is linked to something arising 1. The fact is that Mr Farmer felt Mr Gibbin's work was inadequate. He would have expressed himself as he did to any employee whose work he believed was inadequate. Mr Gibbin's depression was nothing to the point. This part of the claim fails.

- 262. Mr Craig did however speak the Mr Gibbin the way he did because he was reacting to how Mr Gibbin's depression manifested itself in the workplace. There is a clear causal link.

*Has the Respondent shown that any Mr Craig's comments were a proportionate means of achieving a legitimate aim? namely (a) to support and motivate employees*

*to produce work of a satisfactory standard, and/or (b) to raise and address performance issues with employees.*

263. We are satisfied that the proposed aims are legitimate. We consider them to be self-evidently legitimate aims of any employer.

264. We are not satisfied the comments are a proportionate means of achieving those aims. The terms used are unhelpful, unsympathetic and borderline derogatory. They offer no support to Mr Gibbin. The lay members in particular emphasised that from their experience in the workplace that this cannot reasonably be described as motivating and are far from what could reasonably be expected as a way of raising performance issues with an employee. The lay members would point out Mr Craig's approach to an employee with depression belongs to a bygone age and not to a contemporary workplace that avers it takes equal opportunities seriously. The Employment Judge agrees with these observations.

#### *Summary of **Claim 1***

265. **Claim 1** succeeds but only insofar as it relates to the allegation that Between September 2019 and March 2019, Mr Craig made comments about the Claimant's demeanour like "you look like you have no enthusiasm", "you want to buck your ideas up, going around like that" and "[you] needed a good kick up the arse", subject to time limits.

266. Other allegations within claim 1 are dismissed.

**Claim 4:** *The Respondent investigated the Claimant's use of its IT facilities and subjected him to a disciplinary process*

*Did the respondent treat the claimant unfavourably as follows:*

**(a)** *Mr Farmer questioned the Claimant about his attendance at the Respondent's premises and his use of its IT facilities whilst the Claimant was signed off sick;*

267. We do not accept that this is unfavourable treatment. While Mr Gibbin might prefer not to be asked about his attendance, that expectation is not reasonable. We acknowledge he had the permission of Mr Burgin. However it seems not unreasonable for Mr Farmer to ask any member of staff who had shown up to work while on long-term sick leave at the end of the working day and was accessing the computer why they were there. It might have been better if Mr Burgin had told Mr Farmer (equally that may have undermined the whole idea of seeking to do this so as to avoid Mr Farmer). However it is apparent Mr Farmer did not know of Mr Burgin's consent. The question was quite reasonable.

268. **Claim 4(a)** fails.

**(b)** *Mr Farmer discussed the matter with Mr Craig with the result that an interception request was made to the Respondent's IT Department to access the Claimant's account to check what he had been doing;*

269. The thing that is wrong here is the request of the interception report. It is inherently intrusive. It is in our view plainly unfavourable treatment because it is reasonable not to want to be subjected to one.

*(c) the Claimant was informed of allegations in letters dated 23 October and 18 November 2019 and invited to attend investigatory meetings on 6 November and 4 December 2019;*

270. In our view being asked to attend an investigatory meeting is unfavourable treatment. It is the start of a disciplinary process (even if it goes no further). It is reasonable to want not to be involved in such a meeting dealing with allegations against oneself.

*(d) on 4 December the Claimant was informed that there was a case against him;*

271. We think this is plainly unfavourable for the reason that is perfectly reasonable not to want to be told there is a disciplinary case against him.

*(e) the Respondent held a disciplinary hearing for the Claimant on 4 and 5 March 2020;*

*(f) on 5 March 2020 Ms McGraw issued the Claimant with a final written warning, confirmed by letter dated 18 March 2020; and*

*(g) on 15 October 2020 Ms Carpendale dismissed the Claimant's appeal?*

272. We conclude these are plainly unfavourable treatments.

*Was any unfavourable treatment because of something arising 1?*

273. We have seen no evidence that shows a causal link between something arising 1 and the unfavourable treatments. There is nothing in our view that suggests that they did any of the matters above because Mr Gibbin (a) outwardly manifested himself such that he appeared visibly upset in the workplace; (c) caused him to have no enthusiasm for his work; and (d) caused him to be tearful in the workplace arose from his disability of depression.

274. **Claims 4(b)-(g)** fail insofar as they depend on something arising 1.

*Was any unfavourable treatment because of something arising 5?*

275. We are satisfied that the interception request (**claim 4(b)**) arose from something arising 5. The reason it was requested was because of suspicion about why Mr Gibbin was in the office after hours when on long-term sick. He was there because of his depression and the resultant wish to avoid contact with Mr Craig and Mr Farmer.

276. We are also satisfied that the allegation and invitation to attend the investigatory meeting (**claim 4(c)**) arose from something arising 5. There is a direct link between the interception, the results and the investigatory process. We do not accept that there is a break because it is based on what was found on the computer rather than on the interception. If the interception had not been ordered the investigatory invite and making of allegations would not have happened.

277. We do not however accept that the remainder of **claim 4** is linked to something arising 5. By the time he was informed there was a case against him, the investigatory meeting had taken evidence from him and others before the respondent took that decision that there was a case. The decision was not based solely on the material found, but on other evidence. In our view the steps taken render null the initial link to something arising 5

to such an extent that it is no longer a causative factor. We are fortified in this conclusion in the fact that Mr Kerry approached the investigation independently and impartially. We are satisfied that if he concluded that there was no case to answer then matters would have proceeded no further. In our view this supports the fact the remainder of events relied on in claim 4 would not have happened. We do not believe there is any evidence to show that the respondent would have proceeded with a disciplinary case in any event.

*Was any unfavourable treatment because of something arising 6?*

278. For similar reasons we believe that **claim 4(b) and claim 4(c)** happened because of something arising 6 because it was his failure to answer that led to the justification to order the interception.

279. However for the same reasons given above, we conclude that **claims 4(d) to 4(g)** cannot sensibly be linked to something arising 6.

*Are the following legitimate aims? (a) Maintaining appropriate standards of conduct in the workplace, and/or (b) Investigating suspicious and/or concerning behaviour.*

280. In our opinion both of these are plain legitimate aims.

*Did the respondent act proportionately?*

281. We conclude the City Council did not act proportionately.

281.1. Neither Mr Craig nor Mr Farmer asked appropriate questions of Mr Gibbin after the event when matters were less tense, e.g. by telephone or by email, to establish why he was there. That was a far less intrusive step than to order an intercept or invite him to a formal investigation meeting.

281.2. Mr Farmer and Mr Craig could quite easily and sensibly have spoken to Mr Burgin about their concerns. He would have confirmed Mr Gibbin had his permission to be there. This would have stopped the whole process in its tracks.

281.3. Mr Craig authorised the interception. He did not have the power to do so under the City Council's own policy. The policy recognises how intrusive it is. There was no good reason for departing from the policy – evidence would not have been lost for example. It is disproportionate to ignore one's own policy where the consequences of doing so are so intrusive.

*Summary of **claim 4***

282. **Claims 4(b) and (c)** succeed subject to time limits. The remainder of **claim 4** fails and is dismissed.

**Claim 5: Issuing the Claimant with a formal warning in respect of his attendance**

*Did the respondent treat the claimant unfavourably as follows: on 14 August 2019 he received a formal warning in respect of his attendance?*

283. The City Council did issue a formal warning in respect of his attendance. We are satisfied that this is in the circumstances unfavourable treatment. Mr Gibbin did not want the warning and it is reasonable not to want such a warning.

*Was it because of something arising 8?*

284. Yes, it was because of his absences between 6 June 2019 and 16 July 2019 which was because of depression.

*Is the following a legitimate aim: Maintaining consistent levels of attendance to allow efficient delivery of the service?*

285. The Tribunal concludes that this is a legitimate aim without hesitation.

*Has the Respondent shown that any unfavourable treatment arising in consequence of the Claimant's depression was a proportionate means of achieving that legitimate aim?*

286. The Tribunal concludes the City Council's action was not proportionate. There appeared to be no proper enquiry into the absence and no evidence of any consideration of adjustments to trigger points (yet alone actual adjustments). It is not proportionate to not even consider those issues but go straight to a written warning.

*Summary of claim 5*

287. **Claim 5** succeeds subject to time limits.

#### **Reasonable Adjustments (Equality Act 2010 sections 20 and 21)**

288. In the claims below we have sought to identify the time when the adjustment should have been made. The parties have not addressed us on the issue of when time started to run for these claims. We therefore have based our judgment on the information we do have and our understanding of the law.

289. We have reflected on the date for when any adjustment should have been made. We appreciate the difference between a one-off decision albeit with continuing consequences (date is the one-off decision: **Barclays Bank plc v Kapur and ors 1991 ICR 208 UKHL, Sourgrin v Haringey Health Authority [1992] ICR 650 CA**), a continuing state of affairs (e.g. **Kapur**) and a decision that is reviewed from time to time and amounts in essence to a continuing state of affairs (**Owusu v London Fire and Civil Defence Authority [1995] IRLR 574 EAT**).

**Claim 6:** *The disciplinary proceedings in respect of the Claimant's use of the Respondent's IT facilities*

**PCP 1:** *Did the Respondent operate the following PCP of investigating staff who attend work premises whilst signed off sick?*

290. The respondent did not have such a PCP. In our opinion the evidence points only to the conclusion that what happened to Mr Gibbin was unique to him. There is no evidence to show that if any other employee attended work premises whilst signed off sick, they too would be subject to an investigation.

*Summary of claim 6*

291. **Claim 6** fails.

**Claim 7:** *Subjecting the Claimant to disciplinary proceedings*

**PCP2:** *Did the Respondent operate a PCP "...of subjecting disciplinary procedures to staff who have used the Respondent's IT facilities to send personal emails and to store*



*personal content which included politically incorrect material and material that some people would find offensive?”*

292. The respondent accepted in its amended response that it operated a PCP of

“invoking disciplinary procedure against employees who misused its IT facilities.”

293. We conclude this is a more precise and accurate description of the actual PCP that the claimant’s description, though in practical terms we do not see it makes any real difference in this case. Neither party has suggested it does.

*Did PCP2 place the claimant at a substantial disadvantage compared to non-disabled people in that his depression was exacerbated by the stress of the disciplinary proceedings?*

294. We conclude PCP2 did subject Mr Gibbin to a substantial disadvantage compared to non-disabled employees. The manner he gave evidence to us shows how stress and challenging situations affect him. We are acutely aware that when we rely on how he gave evidence we are applying the manifestation of his disability now quite a way back in time. However there is no suggestion his depression or how it manifests itself has worsened since the relevant time from any party and in particular not from the respondent’s witnesses who dealt with him at the time.

295. We also believe it is consistent with a person suffering depression that disciplinary proceedings would exacerbate it.

*What, if anything, would have amounted to reasonable adjustments? The claimant suggested*

*(a) Mr Farmer and Mr Craig should have not ordered an IT Interception*

296. The Tribunal has thought carefully about this allegation. The lay members would emphasise that they wholeheartedly agree there should not have been an interception. In summary it was heavy-handed, could have been avoided and probably would have been if they had spoken to Mr Burgin to get his authority as the policy required, rather than ignoring their own policy and Mr Craig authorising it himself when he had no power to do so. The Employment Judge agrees with the lay members. This was not justified.

297. That said, it is not a reasonable adjustment to alleviate PCP2. His stress was exacerbated by the disciplinary proceedings. The interception was not part of those proceedings. The result from the interception were and they are what triggered it. Mr Gibbin did not know of the interception at the time. If they had not done anything with the results, he would most likely never have known. Therefore the interception itself had no effect.

298. This is not a reasonable adjustment because it would make no difference.

*(b) should not have pursued a formal investigation*

*(c) should not have pursued the claimant at this time*

299. The Tribunal takes these suggestions together. The lay members acknowledged that whilst it is possible to start disciplinary processes whilst

on sick leave, in these specific circumstances that decision was not necessary without further advice being sought on the impact of his disability. A serious allegation that was time-sensitive perhaps might justify it. The Employment Judge agrees.

300. We noted in this case that
- 300.1. The claimant is away on sick leave for depression,
  - 300.2. The evidence had been preserved. The key evidence is the data that is fixed and objective. It would not be expected to deteriorate in the time before Mr Gibbin was expected to return.
  - 300.3. The data was not personal data that had been shared. There was no allegation of confidential data that had been removed or that Mr Gibbin's continued employment risked sharing confidential data.
  - 300.4. There was no ongoing threat or other risk to the City Council resulting from a delay.
  - 300.5. Whatever one makes of the material on his computer, it was not pornographic and no-one has suggested it was illegal.
301. However pursuing Mr Gibbin at a time when he was ill with depression was clearly going to put him at a substantial disadvantage compared to a non-disabled person. Thus he was not going to be able to react with the clarity and composure one might expect of a non-disabled person. He was not going to have a reasonable chance to present his best case. The adjustments would alleviate that substantial disadvantage.
302. The investigation began in October 2019 (the exact date is not clear). That is the date for the adjustment of not pursuing the formal investigation.
303. The date for "not pursuing the claimant at this time" in our view represents a continuum. While they should not have started, but have waited until he returned to work or was fit enough, they were able at any time to stop the process. Instead they chose at each stage to continue it. We see this more akin to a way of continually operating that is discriminatory rather than a one-off decision that has consequences. The last date for stopping the pursuit of the claimant was the outcome of the disciplinary on 5 March 2020. Below we set out the whole of the disciplinary was a continuum. We think however that in the context of this adjustment a distinction can be made. The City Council do not pursue the claimant any longer after they have dealt with the disciplinary hearing. What happens next is because he continues the process. In the example below it was open to the council at any time to decide to deal with matters informally, even during the appeal. In this allegation the disciplinary process would go no further forward absent the claimant's own effort. The appeal cannot sensible be described as "pursuing the claimant"
- (d) should have addressed the matter informally*
304. An informal resolution would clearly have alleviated the substantial disadvantage.

305. We concluded it is one that should have been made. The City Council made a lot of the potential reputational damage if the pictures had been released to a third party e.g. the local newspaper. The most striking photo however is that of Mr Riley with a dildo on his forehead. As we noted he was clearly in a City Council office, wearing City Council-branded fleece with a City-Council lanyard. His action would clearly risk reputational damage. It is easy to see how the City Council might be perceived if it were revealed that its employees were posing for such photos while at work. It is therefore telling that Mr Riley was dealt with informally.
306. We accept there are other documents and images. They have to be weighed against Mr Gibbin's illness and the effect of procedures on him. We do not believe reasonable person would conclude the other documents are so bad that only formal action is appropriate. Instead the reasonable person would have reflected on the totality, the fact the claimant had depression and how it affected him and on the decision to subject Mr Riley to an informal process only, and would then have concluded that this would be a reasonable adjustment.
307. We view the disciplinary process as a continuum. While it has various steps within it, it is all part of one process and procedure. It is akin to a practice, process, regime (whichever word best suits) extending over a period. It starts with the investigation and concludes with the outcome of the appeal. The fact it is one process is underlined by the fact it is all one policy that governs it rather than discrete policies. We do not believe the fact it may end at any stage (e.g. the investigation results in no case to answer, or the disciplinary hearing dismisses the allegation, or there is no appeal) undermines that because unless a conscious decision is taken that halts the process, it will continue.
308. At any time before the conclusion of the appeal, the respondent could have decided to deal with the matter informally. We see no reason why the appeal could not have concluded that the matter should in the circumstances be dealt with informally. After that there is no more action. The appeal was dismissed on 26 October 2020 when the decision on appeal was committed to writing and sent to the claimant. We conclude therefore the date for this claim is 26 October 2020. We see nothing before that date that shows the respondent had either decided once and for all not to make the adjustment or (given the existence of the appeal with the adjustment as an outcome) that it could reasonably be inferred before then that the respondent was not going to make that adjustment.

*(e) should have shown "compassion" to the claimant*

309. This suggestion is so vague as to be meaningless. Mr Gibbin never explained what he meant by "compassion", never explained how the City Council should have shown "compassion" or what difference it would have made.

*Summary of **claim 7***

310. **Claim 7** succeeds in that the City Council should have made the following reasonable adjustments: (b) should not have pursued a formal investigation

(c) should not have pursued the claimant at this time (d) should have addressed the matter informally. This is subject to time limits

**Claim 8:** *Issuing the Claimant with a formal warning in respect of his attendance*

**PCP3:** *Did the Respondent operate a PCP of issuing warnings to staff who were repeatedly absent?*

311. The City Council accepted in its amended response that it had a PCP of “Requiring its employees to maintain consistent attendance at work failing which the employee would be subject to the respondent’s attendance management procedures.”

Again we think this is a more precise and accurate reflection of the actual PCP but again think little to nothing turns on it.

*Has the Claimant shown that he was placed at a substantial disadvantage in that his depression meant that it was more likely that he would be absent?*

312. We are satisfied that he has shown that the final warning was likely to place him under more stress and worry because of his depression than might be expected of a non-disabled employee. This is because of his absence history and because it is inherently plausible feature of depression.

*What, if anything, would have amounted to reasonable adjustments? The Claimant suggested that the Respondent should not have issued him with a formal warning.*

313. We agree this would be a reasonable adjustment. To issue a person prone to absences because of their disability with a formal warning is likely to add to the stress that put the claimant at a substantial disadvantage. The absence that resulted in the warning was 17 days and was for depression. In our view it would have been reasonable on this occasion not to issue a formal warning. The effect would have been to adjust the trigger point which is a reasonable adjustment. There is no suggestion that his absences caused particular problems beyond those one might expect from normal sickness absences.

314. The time for making the adjustment was 14 August 2019 when he was formally issued with the final written warning. It is also apparent at that time the City Council was not going to make the adjustment.

*Summary of claim 8*

315. **Claim 8** succeeds subject to time limits.

**Time limits**

316. Now the Tribunal has reached its conclusions on the above, it is able to assess what acts or omissions occurred and so determine if the claim is in time, whether there is a continuing act and whether to extend time (if appropriate) – noting unproven allegations cannot be part of a continuing act: see **South Western Ambulance Service NHS Foundation Trust v King [2020] IRLR 168 EAT**.

*Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?*

317. The claim was presented on 8 December 2020. Day A was 1 November 2020. The net effect of early conciliation is that any claim from before 2 August 2020 is out of time.
318. Therefore:
- 318.1. **Claim 1** which relates to the period September 2018 to March 2019 is prima facie out of time.
  - 318.2. **Claim 4(b)** relates to the interception request. That was on 5 July 2020 when the request was formally submitted. The claim prima facie out of time.
  - 318.3. **Claim 4(c)** relates to events between 23 October 2019 and 4 December 2019. The claim is prima facie out of time.
  - 318.4. **Claim 5** relates to the formal warning on 14 August 2019. It is prima facie out of time.
  - 318.5. **Claim 7 with reasonable adjustment (b)** arose in October 2019. **Reasonable adjustment (c)** arose on 5 March 2020. The claims are prima facie out of time.
  - 318.6. **Claim 7 with reasonable adjustment (d)** arose on 23 October 2020. It is in time.
  - 318.7. **Claim 8** arose on 14 August 2019. It is prima facie out of time.

*Was there conduct extending over a period, so that the claims prima facie out of time are in fact in time?*

319. We have looked at the substance of the complaints. What we see is a continuing theme throughout that the City Council had no regard for the claimant's disability or its effects on him.
- 319.1. He was addressed in derogatory terms,
  - 319.2. He was subjected to an invasive intercept request approved by the person who was derogatory towards him,
  - 319.3. This led to a disciplinary process that was discriminatory.
320. While the warning for depression-related absence is a different character, it still involves fundamentally the Council failing to have regard to or thought for his disability.
321. Therefore we are satisfied that the proven allegations are a continuing act ending on 23 October 2020. Therefore the claims are in time.

## **Conclusions**

322. The following claims succeed:
- 322.1. **Claim 1** succeeds but only insofar as it relates to the allegation that between September 2019 and March 2019, Mr Craig made comments about the Claimant's demeanour like "you look like you have no enthusiasm", "you want to buck your ideas up, going around like that" and "[you] needed a good kick up the arse",

- 322.2. **Claims 4(b) and (c)** succeed,
- 322.3. **Claim 5** succeeds,
- 322.4. **Claim 7** succeeds in that the City Council should have made the following reasonable adjustments: (b) should not have pursued a formal investigation (c) should not have pursued the claimant at this time (d) should have addressed the matter informally.
- 322.5. **Claim 8** succeeds.
323. All other claims fail and are dismissed.
324. Directions will be issued separately to address remedy.

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Employment Judge Adkinson

Date: 24 October 2022

#### Notes

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