



EMPLOYMENT TRIBUNALS

Claimant

Mr Gareth Ruddock

Respondent

v

The Driver and Vehicle Standards
Agency

Heard at: Norwich

On: 26 – 30 September 2022

In Chambers: 3 October 2022

Before: Employment Judge M Warren

Members: Mr C Grant and Mr B McSweeney

Appearances

For the Claimants: In person

For the Respondent: Mr P Livingston, Counsel

RESERVED JUDGMENT

The Claimant's claims for unfair dismissal, disability discrimination, breach of contract and for unpaid wages fail and are dismissed.

REASONS

Background

1. By a claim form presented on 25 November 2020, Mr Ruddock has brought claims of unfair dismissal, disability discrimination, for unlawful deduction from wages and for what he has described as holiday pay but which is a claim in fact for breach of contract, not a claim under the Working Time Regulations 1998.
2. The matter came before Employment Judge Ord at a Telephone Closed Preliminary Hearing on 11 October 2021. Whilst the issues were discussed at that Preliminary Hearing, a final List of Issues was agreed between the parties in April 2022.

3. An Application by the Respondent to amend its Response was first made in its Agenda for the Preliminary Hearing, reiterated in an email of 19 October 2021 and again on 16 November 2021, but was not dealt with at the time. Leave to Amend was granted by Employment Judge Laidler on 8 February 2022, Amended Grounds of Resistance filed and served on 9 March 2022.
4. In the Amended Grounds of Resistance, the Respondent accepted that Mr Ruddock was a disabled person by reason of depression at all material times and that it had knowledge of such disability, (paragraph 20). It did not accept that his anxiety and depression had any impact on his memory, (paragraph 29).

Evidence

5. This hearing was conducted by Cloud Video Platform (CVP) and there were refreshingly few technical issues.
6. Mr Ruddock did not call any witnesses other than himself. He provided a full and comprehensive witness statement.
7. The Respondent called the following witnesses, who also provided witness statements:
 - 7.1. Mr Andrew Griffiths, Mr Ruddock's Manager at the time;
 - 7.2. Mr Craig Lambourn, Investigating Officer;
 - 7.3. Miss Kelly Francis, Decision Maker, (dismissal);
 - 7.4. Mr Christopher Dormand, Decision Maker, (appeal); and
 - 7.5. Mr Gary Glaister, a colleague.
8. We were provided with a properly paginated and indexed Bundle of documents in PDF format running to page number 820.
9. At the outset of the case, we read the witness statements and either read or looked at in our discretion, the documents referred to in the witness statements. We explained to the parties we have not and will not read the Bundle in its entirety and that they must make sure they take us to relevant passages in the documents during the cross examination of witnesses.
10. Additionally, we were provided with:
 - 10.1. An agreed chronology;
 - 10.2. A cast list;
 - 10.3. Written closing submissions from Mr Ruddock; and
 - 10.4. Written closing submissions from Mr Livingstone.
11. We also heard oral submissions from the parties at the conclusion of the evidence.
12. We heard oral evidence from each of the witnesses.

13. In accordance with Health and Safety Guidance, we took a break of ten minutes every 50 minutes. We also took breaks whenever they were requested by Mr Ruddock, as they occasionally were.

The Issues

14. We were provided with an Agreed List of Issues which the parties confirmed to us at the outset, we could rely upon as identifying the relevant issues to be decided in this case. As it happened, during evidence when I explained to Mr Ruddock that a finding of direct discrimination would require a finding that, consciously or unconsciously, the motive of the alleged discriminator would have been that Mr Ruddock was disabled, he withdrew his allegations of direct discrimination.
15. Similarly, when I explained to Mr Ruddock that harassment per se is not protected by employment law and that harassment contrary to the Equality Act 2010, requires the matters complained of to be related to disability, he withdrew a significant number of his allegations of harassment.
16. There is no criticism of Mr Ruddock in the withdrawals that he made. He is a litigant in person and it is understandable that he is not familiar with these concepts of employment discrimination law. He is to be commended for the sensible decisions he made to withdraw aspects of his claim.
17. The List of Issues as agreed between the parties is replicated by way of cutting and pasting below. In respect of those allegations withdrawn, I have identified by typing in bold the word, "**Withdrawn**" at the beginning of the relevant paragraph.

Unfair dismissal (section 94 Employment Rights Act 1996 ("ERA"))

1. What was the reason or principal reason for dismissal? Was it a potentially fair reason within the meaning of section 98(2) ERA?
2. The Respondent asserts that the reason was misconduct, which is a potentially fair reason. The following sub-issues fall to be determined:
 - 2.1. Did the Respondent genuinely believe that the Claimant had committed the alleged misconduct, namely that:
 - 2.1.1. On 15 December 2019 the Claimant drove recklessly on DVSA property with a member of the public in his vehicle; and

2.1.2. On 27 December 2019 the Claimant failed to follow DVSA policy by taking a candidate on a test without seeing his licence first.

2.2. Were there reasonable grounds for the Respondent's belief?

2.3. At the time the belief was formed, had the Respondent carried out a reasonable investigation?

3. Was dismissal within the range of reasonable responses?

4. The Claimant's allegations of unfairness are:

4.1. The Claimant asserts that the first allegation at paragraph 2.1.1 above (concerning 15 December 2019) did not occur, and therefore all actions undertaken by the Respondent in respect of this allegation were unreasonable;

4.2. The Claimant asserts that the second allegation at paragraph 2.1.2 above (concerning 27 December 2019) did not occur as the Respondent describes. The Claimant relies on the following assertions to support this statement:

4.2.1. The Decision Maker's (Kelly Francis) dismissal letter states her belief that there was *"no intent by you (Claimant) to breach policy and procedure and you had done it as a gesture to provide a good customer service"*; and

4.2.2. The Decision Maker relied on accusations of lying against the Claimant as she gave no credibility to the Claimant's disability.

4.3. The Claimant asserts that the first and second allegations (concerning 15 December 2019 and 27 December 2019), were known to the Respondent and were considered by the managers involved as not worthy of investigation. The Claimant contends that these were added solely for the purposes of attempting to show reasonable cause for dismissal;

4.4. The Claimant asserts that the third allegation was unproven and therefore the potential option of dismissal should have been removed by the Respondent and it was not reasonable for the Respondent to retain the option of dismissal. The Claimant asserts that the potential outcome of dismissal should have been removed as an option when the apparent 'trigger point' of the allegation concerning 31 January 2020 was deemed to be unfounded; and

4.5. The Respondent failed to follow the ACAS Code of Practice in its treatment of the Claimant.

Disability status (section 6 Equality Act 2010 (“EA”))

5. It is agreed that at the material time i.e. from 18 January 2019 to 13 October 2020, the Claimant had a disability as defined by the EA, namely depression, and that the Respondent had knowledge of that disability.

Direct disability discrimination (section 13 EA)

6. **All claims under this heading are withdrawn** - The allegations of detrimental treatment are:
- 6.1. Did the Investigating Officer (Craig Lambourn) extend the scope of the investigation by:
- 6.1.1. Asking questions of witnesses with the intention of eliciting evidence of additional alleged misconduct against the Claimant; and
 - 6.1.2. Allowing the use of derogatory terms about the Claimant in the investigation i.e. “childish” and “immature”;
 - 6.1.3. Questioning witnesses on whether they thought the Claimant was truthful.
- 6.2. Did the Decision Maker (Kelly Francis) fail to provide full documentation, namely:
- 6.2.1. Unedited versions of journals for 24 October 2019, 15 and 27 December 2019;
 - 6.2.2. Gary Glaister’s fact finding statement dated 3 February 2020;
 - 6.2.3. Undated statement from Paul Gubbins;
 - 6.2.4. Email from Andrew Griffiths outlining potential reputational damage arising from the alleged incident of 15 December 2019;
 - 6.2.5. Transcripts / contemporaneous notes of the following:
 - 6.2.5.1. Investigating Officer and Martyn Mills on 6 April 2020 at 20:21. And any other conversations/messages occurring between December 2019 and October 2020;
 - 6.2.5.2. Investigating Officer and John from 1on1 Rider Training Ltd on 6 May 2020. And any other conversations/messages occurring between December 2019 and October 2020;
 - 6.2.5.3. Investigating Officer and Decision Maker, between the start of the Investigation and the date of the decision to dismiss;

6.2.6. Email Andrew Griffiths to Investigating Officer dated 4 May 2020;

6.2.7. Email of Investigating Officer to Decision Maker dated 10 August 2020.

6.3. Did the Appeals Officer (Christopher Dormand) use incorrect information in his decision letter dated 13 October 2020, namely did he make a reference to reputational damage which related to the third allegation, which had not been upheld.

6.4. Did the Appeals Officer collude with the Decision Maker after the Appeal Meeting on 6th October 2020 and prior to 13th October 2020 when Appeal was not upheld? The Claimant alleges that there was collusion because the appeal report dated 13 October 2020 stated that the Appeals Officer was in contact with the Decision Maker before writing the report. The Claimant asserts that this contact was unnecessary, as that the Appeals Officer had access to the reports.

7. Insofar as the detrimental treatment is admitted or proven, did the Respondent treat the Claimant less favourably than it treated or would treat a hypothetical non-disabled comparator?

8. If the Claimant was treated less favourably than a comparator, what was the reason for the difference in treatment? Has the Claimant proved primary facts from which the Tribunal could fairly and properly conclude that the difference in treatment was because of the Claimant's disability?

Discrimination arising from disability (section 15 EA)

9. The detriments relied upon by the Claimant for this claim are:

9.1. That the allegation at paragraph 2.1.1 formed part of the disciplinary charges against him. The Respondent admits that the allegation at paragraph 2.1.1 above formed part of the disciplinary charges against the Claimant;

9.2. The Respondent refused to acknowledge the Claimant's disability and its effect, despite a disability notification form, back to work discussions, fit notes, stress at work forms, occupational health reports and meetings in which the issue was raised;

9.3. The Claimant has confirmed that the allegation against Mr Bettle from 18 January 2019 is background information and not an allegation of discrimination.

10. Did the following things arise in consequence of the Claimant's disability: depression following dependant's diagnosis of Leukaemia: memory loss?

11. Insofar as the matter at paragraph 10 is admitted or proven, did the Respondent treat the Claimant unfavourably because of his memory loss?
12. If so, was this a proportionate means of achieving a legitimate aim?

Indirect disability discrimination (section 19 EA)

13. Did the Respondent apply to following PCP: conducting a disciplinary process over a protracted period of time, namely a period of ten months from 16 December 2019 to 13 October 2020?
14. Did the Respondent apply the PCP to the Claimant?
15. Did the Respondent apply the PCP to persons with whom the Claimant does not share the protected characteristic, or would it have done?
16. Did the PCP put the Claimant at a disadvantage? The Claimant asserts that he was disadvantaged as his memory deteriorated over time.
17. Was the PCP a proportionate means of achieving a legitimate aim?

Harassment (section 26 EA)

18. The allegations of unwanted conduct are:
 - 18.1. **Withdrawn** Did the Respondent include information and evidence regarding tyre tracks at the Leighton Buzzard driving test centre, that the Respondent knew or ought to have known could not reasonably have been caused by the Claimant?
 - 18.2. **Withdrawn** Did the Decision Maker ignore additional information, namely:
 - 18.2.1. The Respondent's manager's guide to disciplinary procedures;
 - 18.2.2. Martyn Mills witness statement.
 - 18.3. Did the Investigating Officer and Decision Maker make an assumption that the Claimant was guilty?
 - 18.4. **Withdrawn** Did the Investigating Officer ask leading questions and allow references to previous disciplinary matters?

18.5. **Withdrawn** Did the Decision Maker collude with the Investigating Officer and Appeals Officer? The Claimant relies on items referred to in the appeal report and other communications referred to throughout the process, specifically multiple emails and references to other conversations therein.

18.6. **Withdrawn** Did a member of staff raise a complaint against the Claimant concerning his alleged behaviour at Leighton Buzzard (allegation at paragraph 2.1.1 above) and maliciously make statements concerning a previous disciplinary, under a line of questioning that was instigated by the Investigating Officer?

18.7. Did the Decision Officer attempt to limit the Claimant's future employment by placing the Claimant on the Cabinet Office's Internal Fraud database?

18.8. Did the Decision Officer commit fraud by omission against the Claimant by attempting to conceal her actions by providing an alternate Dismissal Letter to the Claimant than that stored on DVSA computer records?

18.9. **Withdrawn** The Dismissal Letter of 26 August 2020. Specifically the Claimant asserts that between March 2020 and beyond the end of the process, the UK was in a countrywide lockdown, prohibiting the movement of people. All Driving Test Centres were closed during this period. The Decision Officer suggested in her email to the Investigation Officer on 29 June 2020 that she hadn't been to the Leighton Buzzard Driving Test Centre. In her Dismissal Letter of 26 August 2020 she then states that she had previously visited the site and had intimate knowledge allowing her to make the deductions that: **foregoing withdrawn, but the Claimant says Miss Francis made the following deductions which amounted to harassment related to disability:**

18.9.1 The Claimant was lying about where his car was parked.

18.9.2 That it would have been shorter to walk to the affected area.

18.9.3 That the Claimant was using a car to replicate an issue identified by a motorbike riding candidate.

18.9.4 Her insistence that she knew it would take "no more than one minute to walk to the MOD1 area."

18.9.5 Her insistence that “As you know, the process is that once a test has finished the result would stand” - which the Claimant was able to give a reasonable reason why this was not the case.

19. Was the alleged conduct related to the Claimant’s disability?

20. Did the alleged conduct have the purpose or effect of:

20.1 Violating the Claimant’s dignity; or

20.2 Creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant.

Unauthorised deduction from wages (section 13 ERA)

21. Were the wages paid to the Claimant under his final payslip £300 less than should have been paid to him?

22. Was the Respondent authorised to make a deduction to recover an overpayment that had been paid to the Claimant?

Holiday pay claim

23. Did the Respondent, on 15 December 2019, authorise an additional three weeks of paid leave a year?

24. Did the Respondent fail to pay the claimant for annual leave the Claimant had accrued but not taken when their employment ended?

25. What was the Claimant’s leave year?

26. How much of the leave year had passed when the Claimant’s employment ended?

27. How much leave had accrued for the year by that date?

28. How much paid leave had the Claimant taken in the year?

29. Were any days carried over from previous holiday years?

30. How many days remain unpaid?

31. What is the relevant daily rate of pay?

Jurisdiction (time limits)

32. The claim form was presented on 25 November 2020. The ACAS early conciliation process ran from 14 October to 14 November 2020. Accordingly, and bearing in mind the effects of ACAS early conciliation, any act or omission which took place before 15 July 2020 is potentially out of time.
33. The unfair dismissal and unauthorised deduction from wages claims appear to have been presented in time. In respect of the EA claims that were presented out of time, the Tribunal will need to consider:
- 33.1 Whether any of the matters occurring before 15 July 2020 form part of conduct extending over a period (within in the meaning of s.123(3)(a) EA) ending on or after 15 July 2020;
- 33.2 If it would be just and equitable to extend time pursuant to s.123(1)(b) EA.

Remedy

Remedy for unfair dismissal

34. The Claimant has indicated that he wishes to be reinstated to his previous employment. Should the Tribunal order reinstatement? Would reinstatement be practicable and, if the Claimant caused or contributed to the dismissal, would it be just to order reinstatement?
35. If a basic award is payable to the Claimant, would it be just and equitable to reduce the value of this because of the Claimant's conduct? The Respondent relies on the alleged misconduct at paragraph 2.1 above. If so, to what extent.
36. If a compensatory award is to be made, what is the just and equitable level of compensation, having regard to the following sub-issues:
- 36.1 What financial loss has been caused to the Claimant by the dismissal?
- 36.2 Has the Claimant taken reasonable steps to mitigate his loss?
- 36.3 Is there a chance that the Claimant would have been fairly dismissed in any event? If so, by how much should the compensation be reduced?
- 36.4 Did the Claimant cause or contribute to the dismissal by his blameworthy conduct? The Respondent relies on the alleged misconduct at paragraph 2.1 above. If so, would it be just and equitable to reduce compensation and, if so, by what proportion?

36.5 Does the statutory cap of fifty-two weeks' pay apply?

36.6 The Claimant asserts that the claim should be increased to reflect the Respondent's refusal to Conciliate with ACAS, and refusal to accept Judicial Mediation? The Respondent asserts that the Tribunal does not have this power. The Respondent also asserts that the Tribunal does not have the power to consider any communications between any party and ACAS

Remedy for discrimination claims

37. Has the Claimant proven that he suffered injury to feelings because of any proven discrimination?

38. Has the Claimant suffered any pecuniary loss as a result of any proven discrimination, and, if so:

38.1. Has the Claimant taken reasonable steps to mitigate his loss?

38.2. Did the unlawful action make any difference to the outcome?

38.3. The Claimant asserts that compensation should be increased to reflect the alleged detrimental behaviour of the Respondent and their Representatives as set out below. The Respondent asserts that the Tribunal does not have the power to increase compensation for these reasons and/or to the extent that the Claimant refers to further potential acts of discrimination the Claimant has not applied to amend his claim and therefore these matters do not form part of the claim, such that these are not issues in the claim. The parties have not been able to resolve this issue between themselves and leave it for the Tribunal's determination:

38.3.1. Have the Respondent and their Representatives refused to respond to questions/queries within a reasonable timeframe?

38.3.2. Have the Respondent and their Representatives caused a detriment to the Claimant by supplying required information so late as to not allow sufficient time for the Claimant to gain advice as needed?

38.3.3. Have the Respondent and their Representatives caused a detriment to the Claimant by refusing to mediate through ACAS or by Judicial Assessment and

Judicial Mediation? The Respondent also asserts that the Tribunal does not have the power to consider any communications between any party and ACAS

38.3.4. Does this refusal amount to Direct Discrimination in itself due to the Respondents knowledge of the Claimant's mental health disability?

38.3.5. Has the Claimant suffered any post-employment discrimination or detriment due to the behaviour of the Respondent and their Representatives?

38.3.6. Should this be seen as Direct Discrimination in itself due to the Respondent's knowledge of the Claimant's mental health disability?

38.3.7. Should the actions of the Respondent been seen as fraudulent due to the Respondents attempts to disguise their actions, contrary to the duty of care that exists beyond the employment contract?

38.3.8. Should this be seen as Direct Discrimination in itself due to the Respondent's knowledge of the Claimant's mental health disability?

Remedy for unauthorised deduction from wages claim

39. If an unauthorised deduction from wages was made, what is owed to the Claimant?

Remedy for holiday pay claim

40. What sums are payable to the Claimant in respect of accrued but untaken holiday on termination?

The Law

Discrimination and the Burden of Proof

18. In respect of the burden of proof, s.136 reads as follows:

“(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred;

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.”

19. It is therefore for the Claimant to prove facts from which the tribunal could properly conclude, absent explanation from the Respondent, that there had been discrimination. If he does so, the burden of proof shifts to the Respondent to prove to the tribunal that in fact, there was no discrimination.
20. This does not mean that we should only consider the Claimant's evidence at the first stage; Madarassy v Nomura International plc [2007] IRLR 246 CA is authority for the proposition that a Tribunal may consider all the evidence at the first stage in order to make findings of primary fact and assess whether there is a *prima facie* case; there is a difference between factual evidence and explanation.

Disability Related Discrimination

21. Disability Related discrimination is defined at s.15 as follows:
 - (1) *A person (A) discriminates against a disabled person (B) if—*
 - (a) *A treats B unfavourably because of something arising in consequence of B's disability, and*
 - (b) *A cannot show that the treatment is a proportionate means of achieving a legitimate aim.*
 - (2) *Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.*
22. Determining whether treatment is unfavourable does not require any element of comparison, as is required in deciding whether treatment is less favourable for the purposes of direct discrimination. There is a relatively low threshold of disadvantage for treatment to be regarded as unfavourable. It entails perhaps placing a hurdle in front of someone, creating a particular difficulty or disadvantaging a person, see Williams v Trustees of Swansea University Pension and Assurance Scheme [2019] UKSC.
23. There are 2 separate causative steps: firstly, the disability has the consequence of causing something and secondly, the treatment complained of as unfavourable must be because of that particular something, (Basildon & Thurrock NHS Foundation Trust v Weerasinghe UKEAT/0397/14/RN)
24. There is no requirement that the employer was aware that the disability caused the particular something, City of York Council v Grosset [2018] EWCA Civ 1105 although, as the Court of Appeal observed in that case, if the employer knows of the disability, it would be, "wise to look into the matter more carefully before taking the unfavourable treatment".

25. Simler P, (as she then was) reviewed the authorities and gave helpful guidance on the correct approach to s15 in Pnaiser v NHS England [2016] IRLR 170 which may be summarised as follows:
 - 25.1. The tribunal should first identify whether the claimant was treated unfavourably and if so, by whom.
 - 25.2. Secondly, the tribunal should determine what caused the treatment, focussing on the reason in the mind of the alleged discriminator, possibly requiring consideration of the conscious or unconscious thought processes of that person, but keeping in mind that the actual motive is irrelevant.
 - 25.3. Thirdly, the tribunal must then determine whether the reason for the unfavourable treatment was the, “something arising” in consequence of the claimant’s disability. There could be a range of causal links. The question of causation is an objective test and does not entail consideration of the thought processes of the alleged discriminator.
26. If there has been such treatment, we should then go on to ask, as set out at s.15(1)(b), whether the unfavourable treatment can be justified. This requires us to determine:
 - 26.1. Whether there was a legitimate aim, unrelated to discrimination;
 - 26.2. Whether the treatment was capable of achieving that aim, and
 - 26.3. Whether the treatment was a proportionate means of achieving that aim, having regard to the relevant facts and taking into account the possibility of other means of achieving that aim.
27. In the context of section 15, the burden of proof provisions of section 136 means that the claimant will have to show:
 - 27.1. That he was disabled at the relevant time;
 - 27.2. That he had been subjected to unfavourable treatment;
 - 27.3. A link between the unfavourable treatment and the, “something”, and
 - 27.4. Evidence from which the tribunal could properly conclude that the, “something” was an effective cause of the unfavourable treatment.
28. If the claimant proves facts from which the tribunal could conclude that there was section 15 discrimination in this way, the burden of proof shifts to the respondent to prove a non-discriminatory explanation, or justification.

Indirect Discrimination

29. Indirect discrimination is defined at s.19 as follows:

- “(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B’s.
- (2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B’s if –
- (a) A applies, or would apply, it to persons with whom B does not share the characteristic,
 - (b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
 - (c) it puts, or would put, B at that disadvantage, and
 - (d) A cannot show it to be a proportionate means of achieving a legitimate aim.”

30. The effect of s.136 is that it is for the claimant to show *prima facie* the existence of a provision, criterion or practice, (PCP) and that such PCP placed the claimant’s group sharing his protected characteristic at a disadvantage as compared to another group that does not share his protected characteristic and that the PCP was applied to the claimant which resulted in him being subjected to that disadvantage. These are primary facts which the tribunal has to find before the burden of proof shifts to the respondent, see Project Management Institute v Latif [2007] IRLR 579 and Bethnal Green and Shoreditch Education Trust v Jeanne Dippenaar UKEAT/0064/15/JOJ.

31. The decision of Mrs Justice Simler DBE, (then President) in Lamb v the Business Academy Bexley UKEAT/0226/JOJ assists with identifying what is and what is not, a PCP. The phrase is to be construed broadly, having regard to the statute’s purpose of eliminating discrimination against those who suffer from disability. It may in certain circumstances include one-off decisions, (paragraph 26). She approved though, the comments of the former President, Langstaff J in Nottingham City Transport Ltd v Harvey UKEAT/0032/12 where he referred to, “practice” as having an element of repetition. In the former case, a teacher was dismissed after a long period of absence during which a grievance was investigated and an outcome provided. The PCP was the requirement to return to work without a proper and fair investigation. There were repeated failures to properly investigate and repeated delays; that was a practice. In the latter case, a claimant suffering from depression, returning to work and confused by a new swipe card system, altered his time sheet. The EAT held that the one-off application of a flawed disciplinary procedure did not amount to a,

“practice”. More recently in Ishola v Transport for London 2020 EWCA Civ 112, CA, Lady Justice Simler, (as she now is) affirmed that approach, the Court of Appeal holding that the words provision criterion or practice carry the connotation of a state of affairs indicating how similar cases will be treated in the future; a one off act can amount to a practice if there is some indication that it would be repeated if similar circumstances were to arise in the future. She said at paragraph 35 that the words:

“...are not terms of art but ordinary English words ... they are broad and overlapping... not to be narrowly construed or unjustifiably limited in their application”.

32. She also said at paragraph 37, that not every unfair act amounts to a PCP. If such an act is found not to be direct discrimination, it would be wrong by a process of abstraction, to seek to convert it into the application of a PCP.
33. A PCP may be formal or informal and there is no requirement that the employee should be expressly ordered, or coerced, into complying. It may be no more than a strong formal request, see United First Partners Research v Carreras [2018] EWCA Civ 323.
34. The obligation is on the employer to show that the PCP complained of is a proportionate means of achieving a legitimate aim, (“objective justification”). The employer must establish that it was pursuing a legitimate aim and that the measures it was taking were appropriate and legitimate. To demonstrate proportionality, the employer is not required to show that there was no alternative course of action, but that the measures taken were reasonably necessary (Hardys & Hansons Plc v Lax [2005] EWCA Civ 846).

Harassment

35. Harassment is defined at s.26:

“(1) A person (A) harasses another (B) if—

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

(b) the conduct has the purpose or effect of—

(i) violating B's dignity, or

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

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—

(a) the perception of B;

(b) the other circumstances of the case;

(c) *whether it is reasonable for the conduct to have that effect.*

(5) *The relevant protected characteristics are—*

...

disability;

....”

36. We will refer to that henceforth as the proscribed environment. There are three factors to take into account:

36.1. The perception of the Claimant;

36.2. The other circumstances of the case, and

36.3. Whether it is reasonable for the conduct to have that effect.

37. The conduct complained of that is said to give rise to the proscribed environment must be related to the protected characteristic, in this case, disability. That means the Tribunal must look at the context in which the conduct occurred. It also means that general bullying and harassment, in the colloquial sense, is not protected by the Equality Act; protection from such behaviour only arises if it is related in some way to the protected characteristic. See Warby v Wunda Group Plc UKEAT/0434/11/CEA

38. HHJ Richardson observed in Hartley v Foreign and Commonwealth Office Services UKEAT/0033/15/LA at paragraph 23:

“The question posed by section 26(1) is whether A's conduct related to the protected characteristic. This is a broad test, requiring an evaluation by the Employment Tribunal of the evidence in the round — recognising, of course, that witnesses will not readily volunteer that a remark was related to a protected characteristic. In some cases the burden of proof provisions may be important, though they have not played any part in submissions on this appeal. The Equality Code says (paragraph 7.9):

‘7.9. Unwanted conduct ‘related to’ a protected characteristic has a broad meaning in that the conduct does not have to be because of the protected characteristic.’ ...”

39. The motivation and thought processes of those accused of harassment may be relevant to the question of whether their conduct amounted to harassment, see Unite the Union v Nailard [2018] IRLR 730 at paragraphs 108 -109.

Unfair Dismissal.

40. Section 94 of the Employment Rights Act 1996 contains the right not to be unfairly dismissed. Section 98 at subsections (1) and (2) set out five

potentially fair reasons for dismissal, one of which at subsection (2)(b) is the conduct of the employee. Section 98(4) then sets out the test of fairness to be applied if the employer is able to show that the reason for dismissal was one of those potentially fair reasons. The test of fairness reads:

“Where the employer has fulfilled the requirement of subsection (1) the determination of the question whether the dismissal was fair or unfair (having regard to the reason shown by the employer)

(a) depends on whether in the circumstances including the size and administrative resources of the employer’s undertaking the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and

(b) shall be determined in accordance with equity and the substantial merits of the case.”

41. We have guidance from the appeal courts on how to apply that test where the grounds for dismissal relied upon by the employer is misconduct. The first is the test set out in the case of British Home Stores v Burchell [1980] ICR 303. The Tribunal must be satisfied that the employer holds a genuine belief, based upon reasonable grounds and reached after a reasonable investigation. It is for the employer to show the genuine belief, the burden of proof in respect of the reasonable grounds and the investigation is neutral.
42. If the employer is able to satisfy that test, the Employment Tribunal must go on to apply the test set out in Iceland Frozen Foods Ltd v Jones [1982] IRLR 439. The function of the Tribunal is to determine whether in the particular circumstances a decision to dismiss fell within the band of reasonable responses which a reasonable employer might have adopted. If a dismissal falls within the band the dismissal is fair, if the dismissal falls outside the band it is unfair. In judging the reasonableness of the employer’s conduct, the Tribunal must not substitute its decision as to what was the right course to adopt for that of the employer.
43. The band of reasonable responses test also applies to the question of whether or not the employer’s investigation into the alleged misconduct was reasonable in all the circumstances. See Sainsbury v Hitt [2003] IRLR 23.
44. Earlier conduct the subject of an expired warning may still be relevant to the ultimate decision to dismiss, see Mummery LJ in Airbus UK Limited v Webb [2008] ICR 561, CA. What would be wrong, is to use an expired warning as a trigger for dismissal.
45. The investigation should be into what the employee wishes to say in mitigation as well as in defence or explanation of the alleged misconduct.

46. Mitigation must be actively considered by the decision maker.
47. We should look at the overall fairness of the process together with the reason for dismissal. It might well be that despite some procedural imperfections, the employer acted reasonably in treating the misconduct as sufficient reason for dismissal, see Taylor v OCS [2006] IRLR 613.
48. In this case, the Respondents say that Mr Ruddock was guilty of gross misconduct justifying dismissal without warning. The test for gross misconduct, or repudiation, is that the conduct must so undermine the trust and confidence which is inherent in the particular contract of employment that the employer should no longer be required to retain the employee in its employment, see Neary v Dean of Westminster Special Commissions [1999] IRLR 288.

The Facts

49. The Respondent is a Government Agency whose responsibilities include driving tests. Mr Ruddock's employment with the Respondent as an Examiner commenced on 4 January 2016.
50. The following Policies are relevant to this case:
 - 50.1. Carrying Out Driving Tests: Examiner Guidance which provides very clearly at 1.11 and 2.05 that before a driving test an Examiner must carefully check a candidate's entitlement by checking their Driving Licence.
 - 50.2. The Respondent's Disciplinary Policy, which starts at page 633. At page 639: gross misconduct warranting dismissal without notice is said to include conduct serious enough to do irreparable damage to the working relationship between the employee and the employer. Amongst the non-exhaustive examples given at page 641 is conduct bringing the Respondent into disrepute.
51. In April 2018, Mr Ruddock's young son was diagnosed with a serious illness. This has impacted on Mr Ruddock's mental health. An Occupational Health Report of January 2019, (page 121) refers to symptoms of stress and depression. The Report includes the following,

“Mr Ruddock feels fully capable of undertaking his job role, and he reports no concentration impacts or other factors which might affect his judgement or safety at work. If he is excessively tired he has been advised not to drive.”
52. At a hearing on 18 January 2019, in which Mr Ruddock was appealing against a final written warning, he said to the Appeal Officer, (page 138)

that there had been a number of occasions when he could not remember things.

53. On 19 January 2020, Mr Ruddock completed a Disability Notification form, (page 124) in which he formally notified the Respondent that he considers himself to meet the Equality Act 2010 definition of a disabled person by reason of depression following his son's diagnosis. There is no express reference to memory loss.

54. In a further Occupational Health Report of 26 February 2019, (page 144) the Respondents were informed that Mr Ruddock reported,

"While he was at work his concentration was poor and he found himself distracted by thoughts of his son. This progressively worsened over the course of several months, and he reports being less focused on the job. Although he is now on medication, he continues to experience symptoms of sleep disruption, fluctuating mood, being "closed off" and he is quick to get angry".

55. At that point, Mr Ruddock was said not to be fit to continue in his role.

56. In due course, he returned to work.

57. Arising out of the issues surrounding the earlier mentioned warning, a Dispute Resolution meeting took place on 6 December 2019 before a Mr R Williams in respect of a complaint by Mr Ruddock that he had been discriminated against. Mr Williams' decision was to not uphold Mr Ruddock's complaint. In his outcome letter of 15 December 2019, Mr Williams made some references to adjustments which had been made for Mr Ruddock including,

"an additional three weeks' paid leave agreed in a 12 month period, (sometimes referred to as parental leave)".

Mr Williams also wrote,

"Your condition is a long term condition; I recommend that your Manager should now treat this condition as one that falls under the Equality Act 2010. You talked about the counselling you are participating in; this is something that I recommend time is provided for under DVSA Disability Adjustment Leave Policy".

58. 15 December 2019 is also the date on which, as we shall soon learn, Mr Ruddock was alleged to have driven his car inappropriately on the Respondent's premises with a Driving Instructor as a passenger.

59. On 27 December 2019, Mr Ruddock was alleged to have allowed a candidate to undertake a second motor cycle driving test without having first produced a valid driving licence. We will refer to the candidate as DK. At the time, Mr Ruddock's Manager was a Mr Gubbins, who was based at

Cambridge. Mr Ruddock was scheduled to be transferred from Cambridge to Bury St Edmunds and had conducted testing from Bury St Edmunds on 27 December 2019.

60. On 2 January 2020, the Manager at Bury St Edmunds, (Mr Griffiths) reported by email to Mr Gubbins that he had heard from other Examiners at Bury St Edmunds, that Mr Ruddock had allowed a candidate who had forgotten his licence, to undertake the test whilst his instructor went away to get it. Mr Griffiths leaves it to Mr Gubbins to take the appropriate action. He receives an out of office reply. He assumed Mr Gubbins would deal with it.
61. On 31 January 2020, a number of Vehicle Examiners reported to Mr Griffiths that a Driving Instructor, Mr Evans, had reported observing Mr Ruddock driving his black Ford Capri motor car inappropriately. He received a text message from an Examiner, Mr Bean, to say that he should speak to another Examiner, Mr Glaister, regarding the manner in which a black Ford Capri had been driven. Mr Griffiths spoke to Mr Glaister, who reported that Mr Evans told him he had followed a black Ford Capri into the car park used by the Respondents. The driver had been revving the vehicle's engine and fishtailing around a corner at speed. Mr Glaister said that he was appalled to subsequently see the black Ford Capri parked outside the Respondent's premises in the area where Examiners parked their cars. During this conversation, Mr Glaister also told Mr Griffiths that Mr Ruddock had a few weeks earlier, boasted in the office to Examiners present that when driving his Mini at the Leighton Buzzard test site, he had driven an Instructor fast around the site, scaring him.
62. Mr Griffiths then spoke to Mr Evans himself, (page 462) who confirmed the account previously relayed to him by Mr Glaister. Mr Evans' is recorded as having said that he did not wish his name to be attached to this report because he was worried about future implications.
63. It is a feature of this case that Driving Instructors are reluctant to come forward and give evidence against a Driving Examiner for fear this may be held against them in the future should that Examiner subsequently be involved in examining candidates put forward by that Instructor.
64. Mr Griffiths was made aware of Facebook postings exchanged between Driving Instructors referring in disapproving terms, to the apparent manner of Mr Ruddock's driving in his black Ford Capri, a photograph of which was posted.
65. On 4 February 2020, Mr Griffiths took a statement from Mr Evans, (page 212),

"I saw a black Capri coming into the car park. At the bottom of the car park its wheels span and the back end slid away as he gave it too much throttle. He exited the car park by the Test Centre. The

pedestrian – she wasn't at the junction at the time the back slid away but was there a few seconds afterwards... That was the last thing I saw of the car until I came to the Test Centre with a pupil a short while later. I was shocked to see it there..."

66. He explained how he had asked whose the car was and found out it was that of Mr Ruddock and he expressed his shock that it belonged to an Examiner because of the driving.
67. Also on 4 February 2020, Mr Griffiths received an email from another Examiner based at Bury St Edmunds, Mr Moss. He informed Mr Griffiths that he had overheard a conversation between Mr Ruddock and a Bike Instructor, (who we will refer to as V) the gist of which was Mr Ruddock agreed to take pupil GK out on his test whilst V went back to where the licence had been left. He also reported later hearing Mr Ruddock complaining that V had been talking loudly to other instructors and candidates as to how helpful Mr Ruddock had been.
68. Mr Griffiths conveyed these matters to a Human Resources Case Worker who advised that these matters should be investigated further and that Mr Ruddock should be suspended in the meantime. He was advised that the Respondent was aware of, "*personal stressors*" for the Claimant and that he should be urged to seek support from his GP, that he be reminded of the availability of the Employee Assist Program and encouraged to agree to a referral to Occupational Health.
69. In due course, Mr Ruddock was suspended, on 11 February 2016. Mr Griffiths' explanation for the delay was that Mr Ruddock was at the time on detachment, (in other words conducting tests elsewhere) and suspension would have involved cancelling tests. It is fair to say that Mr Griffiths did not appear to regard the matters as seriously as others, such as Human Resources, did.
70. Mr Griffiths spoke to Mr Ruddock on 11 February 2016, a note of the conversations is at page 206. Mr Ruddock said there had been nothing unusual about his drive into work the previous Friday. He said he,

"takes it easy in that car because it is so light on the rear end".

He said there was nothing unusual about the day that he went into the office at Bury St Edmunds between Christmas and New Year. He said that on the occasion that he had been deployed to Leighton Buzzard, he had stayed overnight in a hotel and travelled in his Mini. He recalled having difficulty getting onto the site as the site access person wanted to see his ID and to put blue crystals down because there was oil on the ground. He recalled that trainers present were somebody called Martin and another person called John. He said he had to tell somebody off for,

"powering it around the site".

He said that he might have put his foot down leaving the site, but his Mini Cooper is loud. It is subsequent to that conversation that Mr Ruddock was suspended, by the HR Adviser Miss Bainbridge.

71. Subsequently, Mr Lambourn was allocated to investigate. He was provided with written terms of reference which are at page 208. They refer to four allegations. Rather oddly, the fourth allegation is the reputational damage made by reason of the Facebook postings, which really arises out of the first allegation, the manner in which he had driven his Ford Capri on the morning of 31 January 2020.

72. The terms of reference make express reference to having regard to Mr Ruddock's wellbeing and welfare. As to the scope of investigation, it says,

"The investigation will focus on the allegations outlined in Section 1 above as well as any other misconduct that may become evident during these enquiries."

Mr Ruddock objects to those terms of reference, but they are not unusual or inappropriate.

73. The country went into lockdown on 23 March 2020. This caused all sorts of problems for the Respondent, not surprisingly and in common with most other businesses and organisations at that time. All tests were cancelled. There was understandable administrative disruption to start with. There was no provision in place for remote meetings. Trade Union approval was required before Microsoft Teams could be used. There was a lot of work involved in contacting Instructors and Candidates.

74. By letter dated 1 April 2020, Mr Ruddock was invited to a meeting with Mr Lambourn by Teams on 14 April 2020. Three specific allegations were set out in this letter, (page 245):

74.1. That on 15 December 2019, he had driven inappropriately with a member of the public in his car on a DVSA site;

74.2. That on 27 December 2019, he conducted a Riding Test without checking the candidate's driving licence first; and

74.3. That on 31 January 2020, he had driven into the Bury St Edmunds premises' car park in a reckless manner.

75. On 2 April 2020, Mr Lambourn invited a number of other witnesses to attend investigatory meetings, (pages 247 – 264). He also wrote to everybody who had a test at Leighton Buzzard on 15 December 2020 and asked them to get in touch with him. He approached the candidates' instructors and on 6 April 2020, spoke to one such, a Mr Mills, who subsequently wrote two emails on 14 April 2020, (page 274 and 275). Mr Mills was anxious for reassurance there would be no repercussions for him and expressed that he was unhappy being involved. Mr Lambourn gave

assurances there would be no repercussions following, which Mr Mills wrote,

“As discussed he acted in an unprofessional manner... Myself and two students were present but ready to go... If you’re asking was he being unprofessional and acting stupidly, yes. Was this whilst on DVSA time, no it wasn’t.”

76. Pausing for a moment, Mr Ruddock argued before the Respondent and us that it is not evident that Mr Mills was referring to his driving. With the greatest of respect, it certainly is. The context of the conversation between Mr Lambourn and Mr Mills was obviously about the allegation of his driving on the site.

77. Notes of Mr Lambourn’s interview with Mr Glaister, (an examiner based at Bury St Edmunds) is at page 395. He referred to Mr Ruddock having come into the office at Bury St Edmunds just before Christmas and informing those present,

“Whilst he was at Leighton Buzzard he got an Instructor in his car and took him around the area trying to scare the shit out of him. I said to him, “What about the candidates?”, he said I told them to stay indoors and keep the doors closed to keep themselves safe”.

78. With regard the allegation concerning DK’s licence, Mr Glaister was not present at the time but reported hearing about it from colleagues afterwards.

79. Mr Glaister reported Mr Evans’ asking him who the black Ford Capri belonged to and when asked why, explaining how he had seen it accelerate hard around a corner so that the back end fishtailed and that the vehicle had continued to drive at great speed into the car park. He reported Mr Evans as expressing his disgust.

80. The notes of Mr Lambourn’s meeting with Mr Griffiths began at page 336. He confirmed that Mr Moss, a Driving Examiner, was concerned about Mr Ruddock having taken a candidate out on a test without having first seen his licence. He also confirmed what he had heard from others in the office as to Mr Ruddock’s boasting about Leighton Buzzard. Finally, he confirmed the text he had received from Mr Bean and his conversation with Mr Evans about the way the black Ford Capri had been seen to be driving. He also confirmed to Mr Lambourn what Mr Ruddock had said to him on 11 February 2020, as noted above.

81. Mr Lambourn also spoke to an instructor called Mr Melon; the note of that meeting begins at page 403. He recalled Mr Ruddock talking about Leighton Buzzard. He said,

“He mentioned in the office with everyone present that he had done this and I thought, that’s a bit strange he shouldn’t be doing that, he

said it wasn't a member of the public it was actually with another instructor, one of the bike instructors. That I can say did happen, because that is what he told us... He said... is that he went into the Mod 1 Area with another Instructor and took the car and drove around, I thought this was a bit strange."

82. Mr Lambourn's interview with Mr Bean, also an Examiner, is at page 310. He is reported as saying:

"He was saying he had done it, whether or not it was all talk, or he was trying to impress us. He did say that this was an act he had carried out... He mentioned he had frightened an instructor by the manner in which he was driving around the site he was on, he had him in the car. I wasn't paying that much attention at the time. I do recall him saying fright."

83. Mr Bean confirms he did not directly hear about the licence issue at the time as he was on leave, he said that,

"It was widely reported when I came back"

84. Mr Lambourn interviewed a fourth Examiner, Mr Greenway, on 14 April 2020. The note of that meeting begins at page 391. He is reported as saying regarding the Leighton Buzzard incident,

"He came into the office and said that he had closed the site up and taken his Mini around with one of the bike instructors in the car and said that the candidates were in the waiting room, but that's only from his words. Whether that's true or if he was acting in a large fashion, I don't know".

85. Mr Greenway also confirmed he had not been in the office when the licence incident had occurred, but that he had heard about it afterwards. When asked whether he would consider taking a test without seeing a licence he had replied,

"Good gosh no".

86. None of the examiners reported having seen the driving incident with the black Ford Capri.

87. Mr Lambourn enquired of Mr Gubbins on 14 April 2020 by email, why he had not taken action on the licence point. Mr Gubbins' explanation by email, page 273, was that he had been on annual leave when he had heard from Mr Griffiths. On his return from annual leave he was then unable to discuss it with Mr Ruddock as he was away on a course and he said he was also under the impression that Mr Griffiths was going to deal with it, because it was an incident which occurred at his Test Centre. He explained that within six days of returning from annual leave, he was then

absent on sick leave for four weeks, not returning until mid-February, by which time Mr Ruddock had been transferred to Bury St Edmunds.

88. On 15 April 2020, Mr Lambourn spoke to Mr Moss, a Driving Examiner. The note of this meeting begins at page 400. He had only heard about the Leighton Buzzard incident through others. However, he gave a full account of how he had overheard the conversation between Mr Ruddock and V, regarding DK's licence. He also explained how he had subsequently heard Mr Ruddock cursing in the kitchen because either V or the candidate had been telling the others what he had done.
89. Mr Lambourn also spoke to Mr Ruddock on 15 April 2020, the notes of this meeting are at page 321. Mr Ruddock begins by denying that he was working on 15 December 2019 because it was a Sunday. Mr Lambourn challenges him, indicating the Respondent's system showed that he was working that day, Mr Ruddock responded that, in effect, it had just occurred to him that he was working that day. This is implausible. Mr Ruddock knew from the letter he had received inviting him to this meeting two weeks earlier that he was accused of driving recklessly on a DVSA site on 15 December 2019. It is implausible that he would not have carefully checked whether he was working that day and it is implausible that he would not have recalled that it was at a weekend and that the previous night he had stayed in a hotel, away from his family.
90. Mr Ruddock said during this meeting that the instructor known as John had told him that there was a spot on the site where, "everybody" was having trouble so they jumped in the car to have a look at it. He denied that anybody could have misconstrued what had happened as reckless. He explained that he had told everybody to go inside the building. He said that his car,

"pops and bangs because it is set up as a circuit race car although it is street legal".

He thought perhaps the popping and banging lead people to misconstrue something. He said that he had driven slower than the candidates would during the exercises.

91. When asked about the licence for DK, he said the candidate had come in with an expired licence. He proceeded to give a detailed account of his conversation with DK and V about the expired licence. He claimed that it was acceptable to take people out on a test who had produced an expired licence. He recited that V had called out aloud, how Mr Ruddock had helped him out.
92. With regard to his black Ford Capri, he described it as a 3.9 Rover V8 with 250 horse power, rear wheel drive and limited slip differential, built for straight line drag racing. He said he could remember the rear end slipping out, he was unsure whether there was oil on the road, he did not check. He said that he did not intentionally power slide around a corner.

93. The Tribunal notes the detail provided by Mr Ruddock, particularly with regard to DK's licence and the Leighton Buzzard incident.
94. On 4 May 2020, Mr Griffiths sent an email to Mr Lambourn to report on gossip he had heard that others were reporting hearing talk of an examiner,

“carrying out doughnuts at Leighton Buzzard Test Centre”.

We mention it because Mr Ruddock has focused on it. Mr Lambourn and Ms Kelly are both clear and we accept, this information was regarded as mere gossip and discounted by both of them. The person reporting it, Mr Ward, was Manager of the Leighton Buzzard site. He reported directly to Mr Lambourn on 4 May 2020, (page 358) that he had not been aware of any reported problems on the Leighton Buzzard test surface up until November 2019, when he ceased to be Manager of the site.

95. Mr Ward's successor, a Ms Smith, wrote to Mr Lambourn on 6 May 2020, (page 361) to confirm she had not received any complaints about the surface of the training area. She reported, however, one of her members of staff reported on a Monday morning on or around 16 December 2019, tyre marks on the surface.
96. On 6 May 2020, Mr Lambourn spoke to the Instructor known as John who had been in the car with Mr Ruddock on 17 December 2019 at Leighton Buzzard. He was not prepared to provide a statement.
97. The Tribunal notes that contrary to generally accepted good employee relations practice, Mr Lambourn did not make notes of conversations with people which did not subsequently result in the preparation of statements; a practice he tells us he has now changed, and that he does now make such notes.
98. On 11 May 2020, Mr Griffiths wrote to Mr Ruddock to inform him the previously appointed Decision Maker was having to be replaced, which was causing a delay, (page 367).
99. On 15 June 2020, Mr Ruddock had to chase Mr Griffiths again for progress, expressing eagerness for a resolution, (page 371). That appears to have prompted Mr Griffiths, who then made a referral to Occupational Health, (page 375).
100. Shortly afterwards, on 19 June 2020, Mr Lambourn provided a report to the newly appointed Decision Maker Ms Francis, including with his report the various relevant documents, (page 380 – 388).
101. An Occupational Health Report was produced based upon an assessment on 25 June 2020. The Report includes the following:

“Functionally, Mr Ruddock demonstrated clear rational thought processes, no discernible decreases in concentration or memory, and appeared emotionally appropriate surrounding our topics of conversation”.

102. The reference to there being no discernible issue as to memory is of particular note.
103. On 29 June 2020, Ms Francis made contact with Mr Ruddock. She explained that she had asked some questions of Mr Lambourn and confirmed that she had heard via Miss Bainbridge of HR that Occupational Health had confirmed that he was fit to take part.
104. On 9 July 2020, Mr Lambourn made enquiries of Ms Smith relating to her earlier reference of tyre marks. She replied, (page 416) and confirmed that the tyre marks had been reported to her by somebody called Mr Ennis on 16 December 2020, she had looked for them herself and made a note about them in her diary. She also confirmed that it would take two minutes fifty five seconds to walk all the way around the site and she provided a series of photographs of the site. The Tribunal has been able to see these photographs and has found them most helpful, in particular in visualising, in light of Mr Ruddock’s explanation, where his car was parked, where the alleged suspect area was and how far away one was from the other.
105. Mr Lambourn also entered into further correspondence with DK regarding his licence, which confirmed it had not been a case of him producing an expired licence, but that he had forgotten his licence and his Instructor V, had gone back to get it whilst he went out on the test with Mr Ruddock.
106. In light of the additional information, Mr Lambourn updated his report and provided a further copy to Ms Francis.
107. On 4 August 2020, Ms Francis emailed Mr Ruddock to check that he was fit to take part in a Disciplinary Hearing, (page 446). He confirmed that he was, (page 445). Ms Francis then issued a letter inviting Mr Ruddock to attend a Disciplinary Meeting. The charges were clearly set out. The up to date Report from Mr Lambourn and the documents relied upon were enclosed. The letter warned Mr Ruddock that a potential outcome of the meeting would be dismissal. He was advised of his right to be accompanied by a Trade Union Representative or work colleague.
108. This is a convenient moment to note that throughout the process up until this point, Mr Griffiths at kept in regular contact with Mr Ruddock by email and telephone, as noted in an email Mr Griffiths wrote to Mr Lambourn dated 12 June 2020 at page 369. We accept Mr Griffiths’ evidence that this list of contacts is accurate.
109. Mr Ruddock attended the scheduled Disciplinary Hearing on 12 August 2020 but without a representative. He said that he had only received notice of the hearing date the day before. Ms Francis postponed the

Disciplinary Hearing to 20 August 2020, so as to allow Mr Ruddock time to arrange for a companion to accompany him.

110. On 19 August 2020, Mr Lambourn received and forwarded to Ms Francis information from DVLA to the effect that DK had not had an expired licence.
111. The Disciplinary Hearing took place on 20 August 2020, the minutes are at page 468. Mr Ruddock was accompanied by a work colleague, Mr Martin. Ms Francis was accompanied by an HR Case Worker, Ms White, and a note taker, Mr Shelton. We note the following:
 - 111.1. Ms Francis began by noting the Occupational Health Report, which confirmed that Mr Ruddock was fit to take part in the process and no adjustments were required. Mr Ruddock confirmed that he was happy to proceed. He also confirmed that he did not require a stress risk assessment.
 - 111.2. In regard to the Leighton Buzzard incident, Mr Ruddock confirmed that looking back, it was a bad decision. He said he knew there were problems on the testing surface and he wanted to get home.
 - 111.3. Mr Ruddock confirmed that his car had been parked under an awning that extends over one end of the building opposite the gated entrance.
 - 111.4. Mr Ruddock offered as an explanation for the reports from his four colleagues as to what they say he said to them, that he knew of no reason why they would make it up, but thought it was a case of Chinese whispers, with them mixing up conversations about his making the Driving Instructor jump by coming around a corner. He denied saying anything about scaring him. That was not a credible explanation, when the reports from four individuals each recorded the same conversation with them about how he had taken out the Instructor John on the testing surface at Leighton Buzzard.
 - 111.5. Mr Ruddock was unable to explain why the Driving Instructor John would refuse to give a statement at all.
 - 111.6. Mr Ruddock was unable to explain why Mr Mills would describe his behaviour as unprofessional, offering that perhaps it was because he had somebody in his car. That is not credible.
 - 111.7. Mr Ruddock confirmed that the candidates were asked to wait in the building.
 - 111.8. Mr Ruddock said that a candidate, (singular), raised an issue which he wanted to check.

- 111.9. Mr Ruddock suggested that Mr Lambourn going back to and seeking clarification from Mr Mills amounted to harassment. Not a suggestion with any merit. Mr Mills was a witness, Mr Lambourn's obligations were to do his best to obtain evidence from him. Mr Ruddock will have had legitimate cause for complaint if no attempt had been made to obtain a clear statement from Mr Mills, (or John).
- 111.10. With regard to the DK licence incident, Mr Ruddock could confirm that he did not recall not seeing a licence, did not think he had ever taken anybody out without a licence and said that he could have sworn that DK had an expired licence. He said he could recall taking someone out with an expired licence and he was not sure if it was the same person.
- 111.11. Mr Ruddock confirmed that in January he had spoken to Mr Griffiths about the DK incident and said that he had not taken anybody out without a licence.
- 111.12. With regard to the Ford Capri incident on 31 January 2020, Ms Francis commented,

"In honesty I am not going to waste time questioning on this one. It is one person's word against another".

- 111.13. In terms of mitigation, when asked, Mr Ruddock said he never drove his cars recklessly. He admitted he drove an instructor onto the test surface, but said he mitigated the risks, wanted to get home to his son and he knew there were issues on the main road, it was hard being away from his family and he wanted to be sure there would be no recourse (presumably in relation to the complaint about the surface).
- 111.14. Ms Francis said that she was going to contact Mr Mills to seek clarification of his use of the word, *"unprofessional"*.
112. Ms Francis contacted Mr Mills by email as to why he thought Mr Ruddock's behaviour had been unprofessional, was that due to the manner of his driving, taking John in his car, or both? Mr Mills replied on 20 August 2020,

"I will clarify I do not believe Gareth was unprofessional".

He goes on to complain about the stress caused for his customers by their being approached by DVSA, causing them to worry that their test results would be null and void. He referred to Mr Ruddock as a caring professional Examiner who was good with his clients. He concluded by asking whether anything was being done about the way the investigation had been handled, particularly as his clients felt harassed.

113. In a second email sent a few minutes later, Mr Mills further commented that he was not happy being approached again about this matter. He commented,

“Please note that the comments were given under duress at the time and reluctantly to the best of my knowledge...”

114. Clearly Mr Mills was annoyed at being approached again some four months after the first approach and annoyed about his students having been approached in the first place. To describe the Respondent’s approach as, “*harassment*” does not appear to be justified.
115. We should observe that in forwarding these emails subsequently to Mr Ruddock, Ms Francis deleted the third paragraph of Mr Mills’ first email which queried whether any action was to be taken with regard to the way the investigation had been handled. It was wrong and inappropriate of Ms Francis to make that deletion; Mr Ruddock was entitled to see Mr Mills’ reply in full. However, it seems to us nothing turns on the point.
116. Ms Francis’ decision was to dismiss Mr Ruddock. This was confirmed in a letter dated 26 August 2020 which begins at page 498. She held the allegation regarding the driving of the Ford Capri on 31 January 2020 as not proven. She found the allegations relating to driving at Leighton Buzzard and allowing a candidate to take a test without seeing his driving licence first, as proven. She considered both to amount to gross misconduct. We note the following of her findings from the letter of dismissal:
- 116.1. Mr Ruddock had initially alleged that he had seen an expired driving licence.
- 116.2. Mr Moss had overheard a conversation which confirmed no licence had been presented at all.
- 116.3. Two weeks later, Mr Ruddock had denied to Mr Griffiths taking anyone on a test without seeing their licence during January.
- 116.4. In respect of DV, she thought that Mr Ruddock had not intended to breach policy and his actions were a gesture to provide good customer service.
- 116.5. However, she referred to significant reputational implications for the Respondent and that the incident had the potential to impact on colleagues who may face that challenge in the future, if they refused to allow a candidate to take a test without producing their licence.
- 116.6. She found that Mr Ruddock had been dishonest, giving three different versions of events, none of which were the truth. She

- found he had tried to cover up his error, giving cause for concern as to his honesty and integrity. The letter went on to conclude that the relationship between Mr Ruddock and the Respondent had broken down irretrievably.
- 116.7. As regard to the incident at Leighton Buzzard, Ms Francis noted Mr Ruddock's explanation was that he had agreed he had taken John onto the test area in his car, he said he had driven slowly to look at a problem where two candidates had failed that day, claiming the area was slippery. He wanted to make sure there were no complaints. He had driven to the site to save time. He wanted to get home to his seriously ill child and was concerned about delays due to roadworks on his way home.
- 116.8. She noted that neither Mr Ruddock nor John, nor anybody else had reported issues with the test surface.
- 116.9. Ms Francis did not accept that any time was saved by driving to the putative problem area of the test surface, rather than walking there. She made this observation based upon her personal knowledge of the site, the photographs provided and the comment by the Site Manager that it takes two and a half minutes to walk around the entire site. Ms Francis' assessment was that it would have taken a minute to have walked to the putative problem area.
- 116.10. She referred to four colleagues witnessing the conversation in which he had referred to acting in a, "large fashion", "frightening" or seeking to, "scare the shit out of John. We observe that is not strictly true, one referred to his acting in a large fashion although that may be a reference to the way that he was speaking, one referred to his saying that he was scaring the shit out of John and one referred to his frightening him.
- 116.11. She noted that Mr Mills had retracted his statement. She also noted that John had been unwilling to give a statement at all, even to say there had been no wrongdoing.
- 116.12. She concluded that given the inconsistencies in Mr Ruddock's version of events compared to the evidence of his four colleagues, on the balance of probability, he had driven recklessly on the Leighton Buzzard site with a member of the public in his car. She found his explanation unreasonable. She commented that the Respondent was a road safety organisation and therefore expects Examiners to set an example and role model safe driving. Again, she concludes the relationship between Mr Ruddock and DVSA had broken down irretrievably.
- 116.13. She found that Mr Ruddock had not been honest on either account, which had thrown his integrity into question so that the

Respondent could no longer trust him to act in a manner upholding the purpose of DVSA or having any confidence in his integrity, a core value of the Civil Service Code.

117. In drafting her dismissal letter, Ms Francis used a template. The template included a standard paragraph informing the addressee that because their misconduct involved fraud or dishonesty, the Cabinet Office would be informed so that the individual would be placed on the Internal Fraud Database. The dismissal letter sent to Mr Ruddock did not contain that paragraph. No such report was made to the Cabinet Office. The version of the dismissal letter sent to the Appeal Officer did contain that paragraph, which therefore subsequently came to the attention of Mr Ruddock. We accept Ms Francis explanation that this was an administrative error. The final and official version of the dismissal letter did not contain that paragraph and no such report was made to the Cabinet Office.
118. Mr Ruddock appealed against dismissal. His appeal letter begins at page 506. In summary, his seven points of appeal were:
 - 118.1. Mr Lambourn's investigation was unfair and biased;
 - 118.2. Mr Lambourn applied unfair reasoning and made assumptions not supported in evidence;
 - 118.3. Ms Francis' reasoning was unfair, not giving weight to evidence Mr Ruddock had provided disproving allegations;
 - 118.4. Mr Lambourn and Ms Francis had failed to adhere to the Respondent's Guidelines and Policies;
 - 118.5. Ms Francis had presumed that Mr Ruddock was guilty;
 - 118.6. Ms Francis had asserted that Mr Ruddock had lied throughout the disciplinary process; and
 - 118.7. Trust and confidence was not broken.
119. The appeal letter contains extensive detail, running to 16 pages. Mr Ruddock mentions his disability in the context that the process had affected his mental health, not in the context that his mental health affected his ability to give an accurate account of things.
120. By letter dated 23 September 2020, Mr Ruddock was invited to an Appeal Meeting on 6 October 2020.
121. The Appeal Hearing took place as scheduled on 6 October 2020 before Mr Dormand. He did not have a Human Resources Advisor present, but there was a note taker. Mr Ruddock chose not to be accompanied. We make

the following observations about the Appeal Meeting, the minutes of which begin at page 548:

121.1. Mr Dormand asked whether any reasonable adjustments were required and Mr Ruddock confirmed not.

121.2. The meeting was conducted by Teams.

121.3. Mr Ruddock repeated his suggestion that Mr Mills reference to, “*unprofessional*” may have been a reference to his taking John in his car.

121.4. Mr Ruddock said he took John in the car so that there was an instructor’s eye on the putative problem, so that the Candidates would,

“get the view of somebody they trusted”.

122. After the Hearing, Mr Dormand contacted a Human Resources Advisor to query what weight should be given to the information provided by Mr Ruddock’s colleagues who reported his conversation with them. He also queried whether it was correct that previous disciplinary matters could be considered in determining the level of penalty; he had seen that there had been mention of a previous disciplinary matter, but the Investigating Officer had made no mention of the outcome. In her reply, (page 537) Ms Nel suggested that with regard to the evidence of Mr Ruddock’s colleagues, he should consider what reason they might have to lie. She suggested that as the Department for Transport worked on the basis of trust, they could be relied upon as witnesses if there appeared to be consistency in what was being reported. It was suggested he should ask himself on the balance of probability, was it reasonable to believe that they were telling the truth? That seems to us to be sensible advice. She suggested that the Decision Manager could be asked whether the previous disciplinary issue had been considered as part of her outcome?

123. Mr Dormand gave his decision in a letter with an attached Report dated 13 October 2020. The letter is at page 554 and the Report at 556. He wrote in summary:

“There is no additional evidence to contradict the original findings of the Investigation Officer and the subsequent decision by Kelly Francis.

Whilst Mr Ruddock provided a comprehensive letter covering seven issues that he felt were incorrect, these were not grounded in fact but were understandably based upon his perception of how things were managed by the Investigating Officer (IO) and Decision Officer (DO). His issues were largely based on the premise that the IO and DO were biased in their approach leading to an unfair outcome. However, given the evidence that the DO was presented with and

suitable consideration given to the absence of contradictory evidence (despite the IO's attempts to gather video footage of any events and gather statements from witnesses which might have supported either side of the allegations) along with the reputational damage that has been done to the Agency (as indicated by the local Driving Instructors Facebook evidence) it is my view that the decision was correct and proportionate in the circumstances".

124. Reference at the end of that passage to the Facebook evidence is unfortunate, as the only Facebook evidence related to the allegations about Mr Ruddock's driving on 31 December 2019 in his Ford Capri, which were held to be unproven.
125. We note the following observations by Mr Dormand in his Report:
 - 125.1. He wrote that he was, "*very conscious*" of the potential impact of the meeting on Mr Ruddock's mental health, he had regard to the Occupational Health Assessment and he noted that a stress risk assessment had been declined.
 - 125.2. He noted that Mr Ruddock could not offer an explanation as to what Mr Mills might have meant when he referred to his being, "*unprofessional*". He noted that Mr Mills' statement had been given in the context of being asked what he had witnessed in relation to Mr Ruddock driving his car and considered it a reasonable assumption by the DO that this related to the manner in which the car was being driven. Of course ultimately, Ms Francis disregarded Mr Mills' evidence.
 - 125.3. Mr Dormand noted Mr Ruddock's reference in mitigation to his son's long term illness and that this might have been in the back of his mind when he allowed DK to take his test without producing his licence. He noted that he was visibly upset at the suggestion of being dishonest.
 - 125.4. Mr Dormand confirmed he had communicated with Ms Francis, who had clarified her approach to the evidence from Mr Ruddock's colleagues and that in respect of the earlier disciplinary matter, although initial reference had been made to it, she had not considered it in determining the outcome. She considered that unnecessary in light of the severity of the incidents.
126. With regard to the holiday pay and wages claim, we note the following facts:
 - 126.1. In the Grievance outcome of 15 December 2019, Mr Williams noted adjustments which had been made for Mr Ruddock including,

“an additional three weeks paid leave agreed in a 12 month period (sometimes referred to as parental leave)”.

- 126.2. In March 2019, the Respondent had paid Mr Ruddock in error, a bonus of £300. The Respondent sought repayment from him in email correspondence between April and August 2019, (pages 184 – 189) without success.

Conclusions

Direct Disability Discrimination

127. All allegations of direct disability discrimination were withdrawn during the course of the Hearing.

Discrimination Arising from Disability

128. The Respondent accepts that the allegation that Mr Ruddock was driving recklessly formed part of the disciplinary charges against him and therefore the detriment asserted at 9.1 of the List of Issues is accepted.
129. A second detriment relied upon, at paragraph 9.2, is the Respondent refusing to acknowledge Mr Ruddock’s disability and its effect. We note the following:
- 129.1. The terms of reference at page 208 refer to giving consideration to Mr Ruddock’s wellbeing and welfare.
- 129.2. Mr Griffiths made many telephone calls to Mr Ruddock to keep in touch and support him, (page 369).
- 129.3. The Respondent obtained an Occupational Health Report which confirmed that he was fine and did not require adjustments, (page 409) which Ms Francis considered with Human Resources, (page 412).
- 129.4. Ms Francis asked Mr Ruddock if he wanted a risk assessment, we find he knew very well what that was and he declined, (pages 125 and 164).
- 129.5. Mr Ruddock confirmed that he was fine to continue in the Disciplinary Hearing, (page 468).
- 129.6. Mr Ruddock did not raise his disability at all himself during the Investigation and Disciplinary Hearing, although he did raise it on Appeal. His point was that because he was disabled, the Respondents should be held to a higher standard in terms of accuracy and fairness, (page 521).

- 129.7. At the start of the Appeal Hearing on 6 October 2020, Mr Dormand asked Mr Ruddock if he needed any reasonable adjustments and Mr Ruddock confirmed that he did not, (page 548).
- 129.8. Mr Dormand expressly recorded in his decision rationale that he was very conscious of the potential impact of the meeting and the appeal in general on Mr Ruddock's mental welfare and that he did have regard to the Occupational Health Assessment, (page 557).
- 129.9. We were not referred during evidence to fit notes or back to work discussions and none of these were put to the Respondent's witnesses.
- 129.10. Mr Ruddock appears never to have mentioned to the Respondent that memory loss was an affect of his disability and as such, that it was affecting his ability to respond to the charges against him.
- 129.11. Mr Ruddock did not and does not argue that memory loss caused him either to drive the instructor on the test surface at Leighton Buzzard or that it was a reason for not checking DK's licence before going out on the test.
- 129.12. The Occupational Health Report of June 2020 expressly stated that memory loss was not an issue.
130. In light of the foregoing, the Respondent clearly had regard to Mr Ruddock's disability and considered what impact it may have had on him. Mr Ruddock did not argue before the Respondent that the affect of his disability was that he could not remember events, nor has he produced evidence either to the Respondent or to the Tribunal during the hearing to the effect that is the case. The second alleged detriment is not therefore upheld.
131. That brings us to consider whether something arising from his disability forced Mr Ruddock to drive recklessly, which led to the Respondent considering that as a disciplinary charge against him.
132. Mr Ruddock's case, (paragraphs 10 and 11 of the list of issues) is that memory loss is the, "something arising". We have no medical evidence before us that Mr Ruddock's depression caused him to have memory loss. Mr Ruddock has acknowledged that.
133. In the Occupational Health Report of January 2019, the advisor stated there was no evidence to suggest that Mr Ruddock's symptoms were impacting on his concentration or attention. The Occupational Health Report of June 2020 expressly stated that there were no discernible decreases in concentration or memory, (page 409).
134. The only evidence that we have that memory loss arose as a consequence of Mr Ruddock's depression, is his assertion to that effect.

135. It is notable on the facts, that Mr Ruddock's memory seems to have improved as events unfolded. This goes to his credibility.
136. Mr Ruddock's assertion that memory loss was his problems in dealing with the Respondent during the disciplinary process is not credible. We refer again to the Occupational Health Reports. The assertions that he made to the Respondent, (see below) and to us, were not credible. We find that Mr Ruddock did not suffer from memory loss.
137. Memory loss did not arise from Mr Ruddock's disability. Furthermore, nothing suggests memory loss caused Mr Ruddock to drive as he did at Leighton Buzzard on 15 December 2019. Mr Ruddock has not proven the primary facts necessary to shift the burden of proof to the Respondent and therefore this aspect to his claim fails.

Indirect Disability Discrimination

138. We note that no failure to make reasonable adjustments claim has been advanced, which strikes us as unusual. Nonetheless, it is not clear to us that one could have been advanced anyway. No adjustments were recommended in the Occupational Health Reports and none were suggested by Mr Ruddock at the time, nor before us, nor that appear obvious to us. Had there been a problem with memory loss, perhaps an argument might have been possible that the Respondent failed to take into account memory loss as a reasonable adjustment, but we have found that there was no issue with memory loss.
139. The PCP contended for in the indirect discrimination claim is the Respondent conducting a disciplinary process over a protracted period of time. This is a one off occurrence in Mr Ruddock's case, at an exceptional time, during the first lockdown.
140. Mr Ruddock said to us that his complaint was really about the investigation, he was not complaining about delay in the dismissal and appeal process.
141. It is perhaps arguable that if non-disabled people were facing a disciplinary investigation and subsequent charges at the same period of time, they would have faced the same delays and so perhaps there is a PCP and Section 19(2)(a) is engaged as it, "would apply" to persons with whom he does not share the characteristic of disability.
142. However, there is no evidence that Mr Ruddock was actually disadvantaged by the delay. Indeed, the reverse would appear to be the case as his memory (if it was ever a problem and we have found that it was not) appears to have improved. The finding is of course that memory never was a problem and therefore there is no disadvantage in the inevitable delay at that extraordinary time. He was of course, on full pay.

143. There was no disadvantage in fact as required by Section 19(2)(c). Mr Ruddock has failed to prove the necessary primary facts to shift the burden of proof to the Respondent and therefore this claim fails.

Harassment Related to Disability

144. We consider each allegation in the List of Issues, (those that have not been withdrawn) in turn.

144.1. *That Mr Lambourn and Ms Francis made an assumption that Mr Ruddock was guilty (paragraph 18.3):*

144.1.1. They made no such assumption. Whilst there was clear evidence that Mr Ruddock was guilty, both approached the matter with an open mind;

144.1.2. With regard to the fact that Ms Francis had a draft question, “*why did you lie?*” we accept her evidence, that was simply a provisional draft question;

144.1.3. Ms Francis reached a conclusion that Mr Ruddock was guilty of the two charges based upon the evidence before her, which had nothing to do with his disability;

144.1.4. In any event, Mr Ruddock admitted the second charge, only his denial of reckless driving on the test surface at Leighton Buzzard was at issue;

144.1.5. Discounting the third charge in relation to the manner in which the black Ford Capri had been driven and discounting the evidence of Mr Mills, is not the act of a person assuming guilt; and

144.1.6. In any event, this does not relate to Mr Ruddock’s disability.

144.2. *Ms Francis reporting Mr Ruddock to the Cabinet Fraud Office, (paragraphs 18.7 and 18.8):*

144.2.1. We accept Ms Francis’ evidence that the offending paragraph was left in an earlier draft of the dismissal letter copied to Mr Dormand and was an error on her part. We accept that it was never sent to the Cabinet Fraud Office, that no report was made to the Cabinet Fraud Office and there was no concealment on her part. The, “*discovery*” of the offending paragraph in the copy of the letter before Mr Dormand, post dismissal, could not, be reasonably regarded as giving rise to the proscribed environment. Mr Ruddock’s employment had come to an end in any event.

144.3. *Deductions alleged to have been made by Ms Francis as listed at 18.9 of the List of Issues:*

144.3.1. She did not make any deduction on where Mr Ruddock was parked at Leighton Buzzard, she accepted what he had said, see the bottom of page 500, which accords with Mr Ruddock's description to us;

144.3.2. She did deduce that it would have been shorter, (in time) for Mr Ruddock to have walked to the area that he said required inspection, rather than getting into his car and driving there. Having seen the photographs and heard Mr Ruddock's explanation to us, we find that was a perfectly reasonable deduction to have made. It does not seem to make sense for Mr Ruddock to have got into his car to drive and look at the area in question. In any event, this has nothing to do with his disability;

144.3.3. She did not deduce that Mr Ruddock was trying to use his car to replicate an issue as identified by a motorbike. That is not what she says in the penultimate paragraph of her outcome letter, at page 500. This has nothing to do with Mr Ruddock's disability;

144.3.4. She did conclude that it would take no more than a minute to walk to the area in question. That was a genuine conclusion based on the evidence before her, a reasonable conclusion for her to reach and not in any way related to Mr Ruddock's disability; and

144.3.5. She did conclude that once the test process was finished, the test result would stand. It seemed to us a reasonable conclusion to reach, specifically as if there had been a problem, it would have been checked before the paperwork was complete as noted by Ms Francis in the second paragraph at page 501. In any event, this had nothing to do with Mr Ruddock's disability.

145. Mr Ruddock has not proven primary facts from which we could conclude, absent an explanation from the Respondent, that its conduct amounted to harassment. None of the matters could reasonably be perceived as creating the proscribed atmosphere. For these reasons, the complaint of disability related harassment fails as therefore, does his complaint of disability discrimination.

Unfair Dismissal

146. Having heard the evidence of Ms Francis and Mr Dormand, we find that they both genuinely believed that Mr Ruddock was guilty of driving

recklessly on the test surface of Leighton Buzzard and of conducting a driving test with DK without his having produced his licence.

147. The question for the Tribunal then, is whether they had reasonable grounds for that belief.
148. In relation to the incident at Leighton Buzzard, the Respondents had the following evidence:
 - 148.1. Four colleagues stated that he had been boasting about his actions, two of them saying he had done so in explicit terms;
 - 148.2. Mr Mills' initial email was clear corroboratory evidence. Ms Francis subsequently disregarding that evidence was generous on her part. Mr Dormand did not disregard it. We note what Mr Dormand wrote about this at the foot of page 559 in his reasoning as quoted above and we agree with him. It was part of the reason he upheld the dismissal on appeal and it was reasonable for him to do so.
 - 148.3. There was a lack of a statement of exoneration from Mr Mills and from John, as one would have expected if there was no truth in the allegation;
 - 148.4. Somebody had found tyre marks the next day;
 - 148.5. Mr Ruddock's denial lacked credibility for the following reasons:
 - 148.5.1. Why get in the car to drive to a spot so nearby?
 - 148.5.2. To have done so would then have entailed physically getting out of the car to inspect the area in question, because as Mr Ruddock said, he was not trying to replicate the characteristics of a motorbike;
 - 148.5.3. If he was not going to drive in the fashion alleged, why insist on everybody going into the building?
 - 148.5.4. No report was made to the Site Manager about a problem on the surface, either then or the next working day;
 - 148.5.5. Nobody supported his version of events; and
 - 148.5.6. There was an overarching sense that Mr Ruddock was not being honest, see below.
149. With regard to the failure to see DK's licence before going out on the test the Respondent had:

- 149.1. Mr Moss' reported overheard conversation;
 - 149.2. Evidence from DK and his Instructor which confirmed what Mr Moss said he had overheard; and
 - 149.3. Mr Ruddock gave an account and asserted he had been shown an expired licence which was not at all credible and gave the Respondent reasonable cause to doubt his honesty overall.
150. The Respondent's decision makers had reasonable grounds for reaching their conclusions.
 151. The next question for the Tribunal is whether those reasonable grounds were reached after the conducting of a reasonable investigation. The investigation does not have to be perfect. In our view a thorough investigation was conducted. Mr Ruddock and six witnesses were interviewed. Mr Ruddock did not suggest that anybody else should have been interviewed. The Respondents went to some lengths to identify third party witnesses and tried to obtain statements from them. The Respondents spoke to Managers of the site at Leighton Buzzard. They sought Occupational Health advice. Ms Francis followed up on points raised by Mr Ruddock and asked Mr Lambourn to investigate further.
 152. In our judgement, a reasonable investigation was conducted.
 153. The next question for the Tribunal is therefore whether the decision to dismiss lay within the range of reasonable responses? Was it a decision that a reasonable employer could have made in all the circumstances? It is not a question of whether or not the Tribunal would have made that decision.
 154. Mr Ruddock says at 4.1 of the List of Issues, that the Leighton Buzzard incident did not occur. The Respondent is entitled to find that it did.
 155. Mr Ruddock asserts that the DK incident did not occur as the Respondent describes. Mr Ruddock points to the finding by Ms Francis that he had no intent. He complains of her relying upon her finding that he had lied and she took no account of his disability. For reasons we have set out above, we find that Ms Francis did take account of his disability, that it provided no excuse or explanation and that she was entitled to find that he had been lying.
 156. At 4.3 of the List of Issues, Mr Ruddock suggests that the managers involved had decided that the first and second allegations, Leighton Buzzard and DK, were not worthy of investigation. That is not correct.
 157. Mr Ruddock says at 4.4 of the List of Issues that the third allegation, (relating to the black Ford Capri) was unproven and the potential of dismissal should not have been under consideration.

158. Mr Griffiths passed the DK incident onto Mr Ruddock's then Manager, Mr Gubbins.
159. Mr Griffiths did not take action in regarding the Leighton Buzzard incident and it does seem that he was prompted to take action by the black Ford Capri incident, which was subsequently found unproven, (in the Tribunal's view, generously). Because of that, Mr Ruddock says the potential penalty for the other two matters should have been reduced. Both allegations clearly have the potential to bring the Respondent into disrepute. It is obvious the Respondent would not want driving examiners using their test pans for reckless, inappropriate driving in front of candidates. There is clear significant scope for damage to the Respondent's reputation.
160. It is obvious that a candidate's Driving Licence should be checked before every test, without fail. Failing to do so clearly goes to the heart of an examiner's employment and undermines trust and confidence and damages the Respondent's reputation. Ms Francis generously accepted that Mr Ruddock had no intent, but that was undermined by Mr Ruddock subsequently lying about what had happened.
161. In the Tribunal's view, the decision to dismiss for both the Leighton Buzzard and DK incidents, was within the range of reasonable responses.
162. Our conclusion to that effect is reinforced by the Respondents justifiably finding that Mr Ruddock had not been honest with them in respect of either investigation, thereby destroying mutual trust and confidence. In particular, they found that he was not being honest by:
 - 162.1. Telling Mr Griffiths that there had been nothing unusual about the day at Leighton Buzzard and that he had not taken anybody out for a test without a licence;
 - 162.2. Initially saying that John had said that everybody was having troubles with that particular spot on the test pan, but later saying that it was one or two;
 - 162.3. Mr Ruddock said that he wanted to go home, which is why he had used the car, but later he had said if he had found anything wrong, he would have allowed the candidate to take the test again; and
 - 162.4. In respect of the DK incident, he said that DK had produced an expired licence.
163. The ACAS Code of Practice appears to have been followed.
164. Mr Ruddock criticises conversations between Mr Lambourn and Ms Francis and later between Ms Francis and Mr Dormand. Those communications were appropriate and as one would expect to see in a situation such as this and there was no inappropriate collusion.

165. The claim of unfair dismissal fails.

Claim for Wages and Holiday Pay

166. The Respondent was entitled to seek to recover Mr Ruddock's overpaid wages, money that he was not due and that had been paid to him in error.

167. The reference to holiday pay is a misnomer. We see at page 200 as noted above, the reference to parental leave; an additional three weeks paid leave during a 12 month period and the Respondent had acknowledged that he could take that leave going forward. However, Mr Ruddock was off work at home, he had that time at home whilst he was suspended.

168. Mr Ruddock also says that he was entitled to additional disability adjustment leave in accordance with the Respondent's Policy. We refer to page 201. It was a recommendation made. The same argument applies, during the period in question Mr Ruddock was off work at home receiving full pay so he did not need disability adjustment leave. At no time did he need time off for counselling.

Employment Judge M Warren

Date: 22 December 2022

Sent to the parties on: 23 December 22

For the Tribunal Office.