EMPLOYMENT TRIBUNALS

Claimant:		**Respondent:**
Mr W Huntley	**v**	Siemens Healthcare Ltd

Heard at:	Reading (on a hybrid basis)	**On:** 11-14, 19-21 April & 21-25 November 2022
Before:	Employment Judge Anstis Mr A Scott Mr P Miller	

Appearances
For the Claimant: In person (11-14,19-21 April 2022)
Mr R Downey (counsel) (21-25 November 2022)
For the Respondent: Ms W Miller (counsel)

JUDGMENT

The claimant's claims are dismissed.

REASONS

INTRODUCTION

1. The claimant brings claims against the respondent. As will appear below, the scope of those claims changed at various points during the course of the hearing. By the end of the hearing there were six complaints of disability discrimination and a claim of (ordinary) unfair dismissal. All other claims were withdrawn and we dismiss them on withdrawal.

2. These written reasons are produced following a request by the respondent made at the hearing.

THE ISSUES, AND EVENTS DURING THE HEARING

3. We will set out what occurred during the hearing at greater length than we usually would, because this description also explains the way in which the issues changed as the hearing progressed.

Day 1 – 11 April 2022

4. The first morning of the hearing was taken up with matters of case management: first, the question of any adaptations to tribunal procedure that may be necessary in order to accommodate the claimant's disabilities and other medical conditions. The claimant was provided by the tribunal with what the claimant considered to be a suitable chair to accommodate his back condition, and indicated that he would like regular breaks. These were agreed at ten minutes break every hour.

5. The hearing proceeded on a hybrid basis, with the respondent's representative and all the respondent's witnesses attending by CVP. Mr Miller also attended by CVP. The claimant and his witness (who was also assisting him in this claim) attended in person, along with Mr Scott and the employment judge.

6. For reasons given orally at the time, we decided that the claimant should give evidence first.

7. There followed a lengthy discussion concerning the issues in the case. The tribunal bundle contained a "statement of legal and factual issues" which had been agreed between the parties. In discussion, the following matters arose:

    a. The claimant identified all of his claims of disability discrimination as relating to his spine injury and depression and anxiety. The respondent accepted that his spine injury amounted to a disability at all material times and that his depression and anxiety had been a disability from 3 June 2020 onwards. Since no part of the claimant's disability discrimination claim depended on any disability other than his spine injury and his depression and anxiety, it was not necessary for the tribunal to address questions in relation to whether his other medical conditions amounted to disabilities. The only outstanding point on the question of disability was whether the claimant's disability of depression and anxiety had started earlier than 3 June 2020.

    b. The tribunal invited the claimant to consider how the "something arising in consequence of disability" (as stated in para 13 of the list of issues) related to the alleged discrimination arising from a disability (addressed in para 11 of the list of issues), as this was not clear.

    c. The respondent outlined whether it did or did not accept that it had and applied the PCPs alleged by the claimant in relation to his claims of a failure to make reasonable adjustments.

    d. We invited the claimant to consider how the "protected acts" set out in the accompanying table to the list of issues related to the detriments set out in the table. In particular, it appeared to the tribunal that the "protected act" at point 13 was unclear and that if the dates referred to for the detriments at 19 and 20 were correct then (i) 19 could not have been caused by any protected act and (ii) 20 could only have been caused (if at all) by the protected act referred to at point 13.

e. We invited the claimant to consider what his case was in relation to how those responsible for the individual detriments (if that is what they were) and his dismissal were aware of the protected acts or (as the case may be) protected disclosures.

f. We asked the respondent to provide by 18:00 that day an amended list of issues and a document setting out whether it accepted that the various protected acts (or protected disclosures) had occurred in the terms set out by the claimant, whether it accepted they were protected acts (or protected disclosures as the case may be) and if not, why not.

8. We understand that the claimant had had legal assistance in preparing the original list of issues, but it became apparent as the case progressed that the claimant had not carried out any recent review of the list of issues we were working to.

9. In discussion with the parties we determined that the hearing should proceed to consider liability first and then (to the extent necessary) remedy.

10. The tribunal then adjourned from 13:00 until 14:00 on Tuesday 12 April 2022 in order to read into the case.

Day 2 – 12 April 2022

11. The respondent carried out the necessary amendments to the list of issues and submitted a revised list of issues to us.

12. On resuming the hearing at 14:00 there were further discussions with the claimant during which he identified which of the "something arising from a disability" related to the individual allegations of discrimination arising from a disability. We incorporated that in the list of issues, as well as inviting the claimant to consider whether those parts of his claim were really meant as claims of discrimination arising from a disability, as they did not seem easily to fit within the concept of discrimination arising from a disability.

13. We went on to discuss with the claimant his alleged protected acts. During the course of this, the claimant identified the protected act at point 13 as being contained within two occupational health reports, but it did not seem to us that those occupational health reports contained any protected disclosures. The claimant's position was that the occupational health reports recommended adjustments that were not made, and that that amounted to victimisation. While we could see that such points may amount to a failure to make reasonable adjustments, it was not apparent to us that that would fit within the statutory concept of victimisation. We also pointed out to the claimant that it appeared that his statement (at para 94) identified far more protected acts than appeared on the list of issues. After a short adjournment and further discussion, the claimant asked for time to take legal advice. We granted this, adjourning at around 15:30 with a view to restarting at 10:00 the following day.

Day 3 – 13 April 2022

14. The claimant was able to take legal advice in that time, and on the morning of 13 April 2022 submitted revisions to the list of issues, which effectively withdrew point 13 as a "protected act", and in consequence accepted that what had been the detriment at point 19 could not be a detriment resulting from a protected act. He said that the list of protected acts set out in his statement was encompassed within the protected acts listed in the list of issues – as we understand it he considered them to be the same points put in a slightly different form - so there was no need for any further amendment to the list of protected acts in the list of issues.

15. The claimant's new version of the list of issues also incorporated within the list of issues (rather than an appendix) the alleged protected acts and allegations of victimisation. It was not clear to us when these had been added. The claimant said that he was working from a draft prepared by the respondent, although the most recent version of the list of issues compiled by the respondent that we had seen did not contain these additions. The claimant accepted that while the headings of the protected acts were incorporated in the list of issues it was the appendix that contained the relevant wording he relied on in each of the relevant document as constituting or recording the protected act.

16. The claimant also explained that, as regards his dismissal, it would be his case that despite the ostensible independence of Ms Barry (the dismissing officer) she had been prevailed upon by other members of management (and HR) to ensure that he was dismissed.

17. The claimant proceeded to give his evidence and be questioned by Ms Miller for the remainder of the day, with breaks being taken for ten minutes every hour.

Day 4 – 14 April 2022

18. The claimant continued his evidence on the fourth day of the hearing, but on resuming after the lunch break said that he did not feel able to continue with his evidence and requested an early adjournment for the day. After consideration, the tribunal granted this adjournment and, in order that he could have what appeared to be the necessary recovery time over the long Easter weekend, released him from his oath for the long weekend. This was on the basis that he had completed his evidence in the areas he had been questioned on, and with the tribunal and respondent to be alert in case of any suggestion that his evidence had been interfered with over the long weekend.

19. Later that afternoon the tribunal (as previously indicated to the parties) sent "version 4" of the list of issues for the parties to consider. This had been prepared by the tribunal and was intended to be the authoritative version of the list of issues, incorporating everything about the list that had been discussed so far.

Day 5 – 19 April 2022

20. The claimant was sworn in again and his evidence resumed on 19 April 2022, continuing for the whole day.

21. During the day, Ms Miller gave the respondent's comments on version 4 of the list of issues, pointing out that the alleged detriment identified at 21(a) as an act of victimisation could not be victimisation as it occurred before the first alleged protected act. The claimant acknowledged this, but would not accept the removal of this alleged detriment, a position he maintained when we revisited the point the following day.

Day 6 – 20 April 2022

22. During the course of cross-examination on 14 and 19 April 2022, in addition to other problems that there may be with the alleged protected disclosures, the claimant accepted that he could not identify any of the detriments listed on the list of issues as having been caused or contributed to by his alleged protected disclosures. In consequence, he agreed that all of the alleged protected disclosures should be "crossed out" from the list of issues, at least so far as the question of any detriment was concerned.

23. While the two are distinct legal concepts, the claimant's dismissal had been included in the list of detriments in the list of issues. It was not clear to us whether the claimant had intended the "crossing out" of the alleged protected disclosures to also extend to his claim of automatic unfair dismissal. In answer to questions from the tribunal (and subsequent further cross-examination from Ms Miller) the claimant said that wished to continue with his claim of automatic unfair dismissal, and that it was his case that the main reason for his dismissal was the protected disclosure (or disclosures) noted at point 30, para 2, 3 and the middle of the three references to para 4.

24. The claimant was challenged on this by Ms Miller, and in particular on how he was going to establish a link between this disclosure and his dismissal almost a year later by Ms Barry. The claimant said that the recipient of the disclosure had sent it to Louise Malyon, who in turn would have made it known within HR and management, and that this then lead to his dismissal. He accepted that he had no evidence that his had happened.

25. At the conclusion of the claimant's evidence, we felt bound to point out to him the many difficulties that there appeared to be with his case following the conclusion of his evidence. Given his evidence, the claim in relation to protected disclosure detriments could not continue. The most prominent of his remaining claims was that of automatic unfair dismissal. For this to succeed it appeared at this point that he would have to show that Louise Malyon had made a further disclosure of his one remaining alleged protected disclosure, also (on his case) that the colleague who he was to work with at Heyford Park's evidence had been interfered with by someone in management (yet the claimant had not yet

identified any material inaccuracy in the record of that evidence, nor who had tampered with it and why they had tampered with it), and that in some way Ms Barry's decision was tainted by his protected disclosure. As the claimant accepted, he had no direct evidence to support any of these propositions, and his case seemed to rely on what he may obtain from the respondent's witnesses in cross-examination.

26. While acknowledging that it was possible that he would end up proving this, we cautioned him to consider carefully whether this was a proper basis on which to proceed, particularly in a case which would now go part-heard and was likely to be relisted for a substantial period of time later in the year. We also pointed out to him that there remained considerable difficulties in his linking of the "something arising from disability" with the detriments that he said resulted from that "something arising", as well as, on the face of it, considerable time problems with his disability discrimination claim. The claimant had not given any explanation of any delay in making his claim in his witness statement. In cross-examination he had said that at the relevant time he was in poor health and reliant on advice he was receiving, but it appeared that with the assistance of that advisor he had in that time produced a number of detailed and lengthy grievances, including citation of relevant case law and statute, and it was not obvious to us at this stage how he could do this at that point but not also submit an employment tribunal claim.

27. In his response to version 4 of the list of issues, the claimant said that the "something arising from a disability" in relation to item 9(b) should be (a), (b) and (c) rather than (d) as previously identified. Ms Miller later objected to this as an attempt to amend the claimant's claim, but that point was not resolved at the time.

28. The day continued with the evidence of Paul Johnson (for the claimant) and the start of the evidence of Richard Joyce (the claimant's line manager) for the respondent.

Day 7 – 21 April 2022

29. The claimant's questioning of Mr Joyce continued to a break around 11:00, following which at first Ms Miller and later the claimant had difficulty in resuming the hearing because of problems either with the CVP system or internet connectivity. The claimant's internet problems persisted, and the tribunal took a lunch break from 11:30 – 13:00 in the hope that the claimant may be able to relocate to an area where internet connection was available or the problems may have been resolved.

30. On resuming the hearing, the claimant eventually joined by telephone. He said that internet connectivity was down in his street and was being worked on by an engineer, but it was not clear when it would be resolved. By this point it was clear that there was little prospect of completing Mr Joyce's evidence that day, even if the claimant were to regain internet connectivity. The remainder of the

day, through to around 14:30, was taken up with making arrangements to resume the hearing, eventually agreed as the resumption of a hybrid hearing from 21-25 November 2022, with a view to the respondent's evidence being completed in three days, allowing two days for submissions and deliberation by the tribunal.

31. Provision was made by way of a separate order for the creation of version 6 of the list of issues, to include the claimant's financial claims.

32. Before concluding this section of the hearing, the tribunal repeated its observations made the previous day to the claimant about the difficulties he may face with his claim. This was with a view to the claimant taking legal advice which, if it was to be taken, the tribunal suggested should be taken at an early stage rather than just before the resumption of the hearing.

33. By 14:30 the claimant had not regained his internet connection, and shortly after this the tribunal concluded for the day, to resume in November. The delay in resuming the hearing was caused by difficulties in finding a full week everyone who needed to could attend for. Mr Joyce was released from his oath rather than being kept on oath for more than six months prior to the resumption of his evidence in November.

34. At the conclusion of the hearing an order (dated 21 April 2022) was made providing for the respondent to prepare version 6 of the list of issues with a reply then due from the claimant within seven days.

Day 8 – 21 November 2022

35. The hearing resumed on 21 November 2022, by which time the claimant had instructed Mr Downey as his advocate on a direct access basis. For the whole of this week the hearing was hybrid, with the parties and witnesses attending remotely (by CVP) and the tribunal panel being the only people in the hearing room.

36. There was further discussion concerning the list of issues (version 6) at the start of the hearing. The respondent had prepared this version in accordance with the order that resulted from the April hearing. The claimant had not replied to it and Mr Downey had played no part in drafting or responding to it. It appeared to the tribunal that there remained a number of problems with the list of issues, but Mr Downey's position was that he was bound to follow version 6 of the list of issues in pursuing the claimant's claim. We questioned Mr Downey in particular on how the claimant could show that he had been subject to a detriment which apparently pre-dated his first alleged protected act. Mr Downey said that that first detriment arose in anticipation that the claimant would do a protected act. On the question of how the claimant would seek to draw a link between his (alleged) protected disclosures and eventual dismissal, it was Mr Downey's position that the dismissal had been brought about by the allegations against him having been framed as issues of dishonesty, and that the person

who had done that (exactly who was yet to be established) had done it because of the alleged protected disclosures. As such, it appeared no direct allegations were made against the person who decided to dismiss the claimant – Jo Barry – who had, on the claimant's case, been innocently misled as to the nature of the misconduct. The tribunal repeated earlier observations concerning the difficulties that there seemed to be with the claimant's claim of discrimination arising from disability.

37. Ms Miller indicated that since the previous hearing Ms Barry was no longer available to the respondent as a witness owing to a series of personal difficulties. She submitted an affidavit and medical evidence from Ms Barry.

38. The tribunal took until 13:00 to read back into the case and, after further discussions concerning the list of issues, resumed Mr Joyce's evidence from 13:30 to 16:00.

Day 9 – 22 November 2022

39. Mr Joyce's evidence was complete by lunchtime on 22 November 2022. By the conclusion of his evidence it was no longer part of the claimant's case that Mr Joyce was responsible for the allegations against him including allegations of dishonesty, nor that any actions Mr Joyce took were motivated by any protected disclosures made by the claimant or were taken in anticipation that the claimant may raise allegations of discrimination. No suggestion was put to Mr Joyce that he anticipated the claimant may carry out protected acts, and there was no evidence to contradict Mr Joyce's position that he had not been aware of the alleged protected disclosures until the claimant brought his employment tribunal claim.

40. Following Mr Joyce we heard evidence from Andrew Williams, who was Mr Joyce's manager. Unfortunately previous problems with the CVP system continued, particularly affecting Mr Downey's cross-examination of Mr Williams, which took longer than necessary due to periodic disconnections and interference for both Mr Downey and Mr Williams. Later in the afternoon we commenced the evidence of Roger Shergill, the HR specialist who, amongst other things, had provided HR support to the person who carried out the investigation into the claimant's alleged misconduct.

Day 10 – 23 November 2022

41. Mr Shergill's evidence was completed in the morning of the tenth day, and we moved on to the evidence of John Wright, who dealt with the claimant's grievances. In cross-examination, Mr Downey identified what he considered to be weaknesses in Mr Wright's handling of the grievances, before then challenging him that the reason for those deficiencies was because of matters arising from the claimant's disability. Mr Wright rejected that accusation.

42. It was not at all clear to us on what basis the claimant identified any causative link between the identified matters arising from his disability (diminished cognitive function and being signed off work) and Mr Wright's handling of his grievance. We asked Mr Downey what evidence the claimant would rely on from which we could conclude that there had been discrimination. Mr Downey's point was that the grievance concerned matters in relation to the claimant's health and, when not resolved to his satisfaction, worsened or did not improve his health. We indicated to Mr Downey that we did not see how this suggested that Mr Wright handled the grievance in a particular way because of something arising from the claimant's disability, and urged Mr Downey to consider this point carefully with his client ahead of any closing submissions. It appeared to us that this indicated an error that possibly affected most if not all of the claimant's claims of discrimination arising from a disability.

43. Following Mr Wright's evidence we heard from Marlen Suller and Fiona Mawson.

Day 11 – 24 November 2022

44. Louise Malyon was the final witness for the respondent, and her evidence was complete shortly before 11:00 on Thursday 24 November 2022. Mr Downey had previously indicated that he would like time at the conclusion of the evidence for further discussions with his client, and the tribunal agreed to resume at 12:00. The tribunal also invited Mr Downey to discuss any time issues on the disability discrimination claims with the claimant, and Ms Miller volunteered to send to Mr Downey extracts from the claimant's oral evidence on this point, in order to help his discussions.

45. With the help of Mr Downey, the claimant then reduced his claims to seven "effective claims". Those "effective claims" were described by reference to v6 of the list of issues, and are set out in the appendix to this decision, together with the elements of v6 of the list of issues that they refer to. They include claims of discrimination arising from a disability, failure to make reasonable adjustments and (ordinary) unfair dismissal only.

46. Although not set out on the "effective claims" document, there remained issues to be determined on whether the claimant was disabled by reason of depression and anxiety at an earlier point to that conceded by the respondent, along with questions as regards the time limits applicable to the claimant's disability discrimination claims. Given the findings we have made on the merits of those claims we have not found it necessary to determine either of those questions in this judgment – though we have pointed out that some of the claims appear to be substantially out of time.

47. Given that we are now dealing with a much smaller number of claims the reasons for this judgment can be much shorter than it otherwise would be. This late reduction in the scope of the claimant's claims was welcome, but the respondent was right to question why it had not been done earlier, and there

seemed to us to remain many obvious problems with the way in which the claimant put his disability discrimination claims.

48. Having heard and read the parties' closing submissions, we adjourned to 14:00 on Friday 25 November 2022, by when we anticipated being able to give the parties our decision. We did so, along with oral reasons. Written reasons were then requested by the respondent and these are those reasons.

THE FACTS

Background

49. The claimant was a long-serving field service engineer for the respondent. His technical skills and experience were well regarded. He worked in repairing and maintaining magnetic resonance imaging ("MRI") equipment sold and maintained by the respondent. This equipment was typically used in hospitals and other healthcare or research establishments. It was large and heavy, so generally speaking had to be repaired and maintained on the site it was installed in. This required Mr Huntley to travel (by car) to the site. Sometimes this would involve diversions from the most direct route so that he could pick up any parts needed for the job. He lived near Bath. He worked in the respondent's south west and Wales region, which involved travel in an area from Southampton down to Cornwall. Occasionally he could be called upon to do work outside his home region.

50. The claimant's work in the region was managed by Richard Joyce, who at the time was Customer Service Manager for the south west and Wales region.

51. The respondent's customers would arrange services calls via the Customer Contact Centre (or CCC). The CCC was responsible for the day-to-day scheduling of work for the claimant and his colleagues. Typically the claimant and his colleagues would be notified on the next day's work by way of an update on the "myCosmos" scheduling app. While this was sometimes referred to as a PDA notification, we understand that at the relevant time it would have been a notification to an app on his work phone. This update would usually come through in the late afternoon the day before the work was due to be done.

52. Apart from scheduled servicing work, the respondent's customers require their machines to be repaired as quickly as possible. These machines are large and costly investments, and any down time on a machine is liable to mean (at least in a healthcare setting) the cancellation of appointments that patients may have been waiting for for a long time.

53. While a field service engineer will usually work on their own, two engineers will sometimes be assigned to a job. Typically this will be because the job is recognised as being unusually complex or involves heavy lifting. Some of the components used in the respondent's MRI machines are very heavy.

54. The claimant has two disabilities. The first is a spine or back condition which is accepted by the respondent to have been a disability at all material times for the purposes of his claim. The second is depression and anxiety which is accepted by the respondent to have been a disability from 3 June 2020 onwards and said by the claimant to have been a disability from before then.

Disability discrimination claims arising prior to August 2019

55. Despite the efforts that had gone into compiling the list of issues, and Mr Downey's work on the list of "effective claims" it remained somewhat unclear when some of the disability discrimination claims first arose. Items 1, 5 and 6 seem to refer to particular incidents that can be dated, all of which relate to the grievance appeals. 2, 3 and 4 appear to be more general matters, although it seems likely that the claimant had in mind the second disciplinary process against him when referring to item 2. We will address item 2 on that basis. That leaves two complaints of reasonable adjustments relating to the respondent's working practices, both being PCPs that the respondent accepts it had.

56. These are "*when allocating work, the respondent supplied expected arrival times to engineers*" and "*the respondent utilised GPS devices … to check journey data and the location of the engineer*".

57. There are many problems with the way these claims are put.

58. First, looking at time, these seem to have been PCPs since almost time immemorial. We did not hear specific evidence on the point, but it seems to us likely that the respondent has, though one means or another, supplied expected arrival times to its field engineers for as long as it has employed field engineers. The GPS tracking will have been a more recent innovation but it is hardly new technology these days. No-one gave us any idea when this had been introduced, but it was active at the time of the claimant's first disciplinary hearing in 2018.

59. A failure to make a reasonable adjustment is usually to be taken as an omission, and in the absence of evidence on when the person decided not to do that thing would typically be dated from "*the expiry of the period in which* [the person] *might reasonably be expected to do it*"(s123(4)(a) of the Equality Act 2010). In view of our findings on the merits of these points it is not necessary for us to put a date on that, but they would appear to be a number of years before the claimant submitted his claim. These points primarily relate to the claimant's back condition, which is long-standing. If there was a failure to make reasonable adjustments on these points they occurred several years before the claimant brought his claims.

60. Second, it is not at all clear how these are said to disadvantage people with the claimant's disability. Although the claimant cites wider disadvantages, we don't see how either PCP disadvantaged him so far as "managing his responses" (15(a)) or "reduced ability to concentrate etc." (15(d)) are concerned. The

essence of what he relies on appears to be 15(b) (taken together with parts of 15(d)) – that his disabilities meant that he took longer to drive (including breaks) to locations than would be the case if he was not disabled and 15(c) – that the GPS monitoring pressurised him to miss breaks.

61. We do not see how setting an arrival time (as such) particularly disadvantages someone who may take longer to drive to a particular location. The reasonable adjustments suggested by the claimant relate to allowing him additional time to travel to appointments, or "reducing triggers for lateness". His argument seems to be not so much that the setting of arrival times was a problem, but that because of his disabilities he would be set more generous or later arrival times than others. However, the PCP he relies on as putting him at a disadvantage is the simple setting of an arrival time. If his complaint is that arrival time is too early then that would seem to require identification of a different PCP to simply the setting of an arrival time – but no such PCP is alleged.

62. The position is similar with the PCP of "*utilising GPS devices … to check journey data and the location of the engineer*". The claimant's point seems to be that this meant that he was forced to compromise his health by travelling without taking the necessary breaks, but we do not see that this follows from the simple monitoring of engineers' location and arrival times. It has always been the claimant's case that with appropriate allowance being made in travel time he is perfectly capable of doing his job. As before, the claimant's argument seems to be with the actual arrival times he was set, not the fact of being monitored or set an arrival time. A simple PCP of being able to check journey data and location does not disadvantage a person with the claimant's disabilities. We note that one of the reasonable adjustments suggested by the claimant in this context was the removal of his line manager – but we do not see how that would alleviate any effect of the identified PCP. Any other manager would still be able to use the GPS system in the same way.

63. The difficulties that there are with this are clear from Mr Downey's written outline closing submissions. For (3) he says "*The substantial disadvantage to the claimant was because the ETAs were used to monitor performance. The claimant's back condition and the effect on his mental disability of his responses made it more likely that he would not meet the assigned ETA*." None of that is a criticism of the PCP alleged: setting an arrival time. For (4) he says "*The substantial disadvantage to the claimant was because the satnav was used as a tool to monitor performance by Mr Joyce. The claimant's back condition and the effect on his mental disability on the management of his responses made it more likely that he would not meet the assigned ETA and the knowledge that he was being monitored by Mr Joyce put pressure on the claimant to miss breaks*". That is a criticism of a different PCP to the one alleged.

64. The third problem is that both PCPs appear to be very sensible and obvious PCPs applied by the respondent. It is not at all clear what possible adjustment could be made to a PCP of supplying expected arrival times. None of the

adjustments suggested by the claimant relate to alternatives to supplying expected arrival times. The most obvious adjustments: supplying a leaving time or not supplying any time at all seem impossible in any environment in which customers are entitled to have an expectation as to when repair or servicing work would be carried out.

65. The ability to monitor location by GPS is not something that is so obviously necessary or essential for the respondent's business, but again it is not at all clear how the adjustments contended for by the claimant could have any effect on the PCP. They are about allowing extra time for travel, not alternatives to monitoring him or his colleagues via GPS. It might be said that the obvious adjustment here is to remove the GPS devices or turn the monitoring function off, but it is not at all clear how this would improve matters for the claimant. It would not relieve him of his obligations to attend at the scheduled arrival time, nor would it prevent him from being subject to customer complaints and possibly disciplinary procedures if he were late.

66. Neither of those matters amount to an unlawful failure to make reasonable adjustments by the respondent.

9 & 10 August 2019

67. Friday 9 August 2019 was the last day of a period of holiday for the claimant. He had been away in Cornwall and had endured what seems to be a difficult journey home.

68. The claimant was due to work the following day: Saturday 10 August 2019. The CCC had assigned him to work together with a colleague at a site in Heyford Park, north of Oxford. This was outside his normal region. The notification of this was sent to his myCosmos app by the CCC at 16:50 (it seems to be mistakenly referred to as 15:50 in some materials), giving him an arrival time at Heyford Park of 10:00.

69. We will refer in due course to what emerged during the course of the respondent's investigation into the events of 9 & 10 August 2019, but simply note for now that the colleague who he was due to work with contacted the claimant around 21:00 on 9 August 2019 to discuss the next day's work. He had a conversation with the claimant on WhatsApp. The contents of that conversation disturbed him, and he reported it to his manager, Mel Kony, who happened to be the duty manager for that weekend. She, in turn, contacted Mr Joyce.

70. On 16 August 2019 Mr Joyce sent an email to a number of the respondent's HR staff which included the following:

> *"I have received feedback of a late arrival from Will on his recent weekend working from another service manager (Mel Kony). I am still reviewing the information but it would seem he has called the Customer*

Care Centre Saturday morning to adjust the start time of the job to cover for the fact he was not on time. I will provide further information once I have completed my investigation."

71. We do not need to go into the detail of the claimant's previous disciplinary process, but he was at the time subject to a first written warning concerning timekeeping.

72. On 20 August 2019 Mr Joyce wrote to Roger Shergill of the respondent's HR department, and others, saying:

"Please find below a timeline of events relating to the recent episode of Will's lateness, this was brought to my attention by Mel. This was a highly sensitive system that had been down for multiple days, whilst it was a weekend and there was no customer presence, it was important to spend as much time troubleshooting the issue. We have traced the calls through the cloud and looked at the SAP tasks to give accurate timings. The outcome of the day was he, nor the other engineer, were able to find a solution and further troubleshooting was necessary from the Monday.

Friday 9th August
Call assigned to Will at 15:50 for 10am Saturday 10th August
Will was on holiday so no call was made, but reasonable adjustment were made to his start time (10:00) for him to be able to arrive in time.
Journey time on Google Maps from home to customer location suggests journey time between 1hr50 – 2hr20 meaning a 7:30 departure for 10:00 start was reasonable
Engineers are expected to check their calls for the following day up until 6pm.

Saturday 10th August
07:39 Voicemail left with Will by the CCC to ask him to 'ETA his call'
08:00 Phone call to Customer Care Centre Saturday morning from Will stated he "just got back from holiday and looked at call this morning because there was nothing on PDA yesterday afternoon…I'm supposed to be in Heyford Park and nobody's told me... I've just looked at the ETA and it's not going to be manageable … could you reassign me for a time I'm able to make … from here it's nearly 3 hours… I've got a bad back and I'm suppose to have driving breaks… it will be 11:30…somebody needs to let me know"
[CCC] "we didn't want to contact you as you were on holiday"
"my back is flakey so I don't really want to be doing long drives…it's a duty of care from the manager and someone should look at that but I guess nobody has…I'll get on my way"
10:57 Arrival onsite 57 minutes late of original assignment

> *For his holiday he was in Cornwall which [I believe] he chose to drive to, he returned on the Friday before his known working Saturday – i.e. he has probably put a lot of stress on his back whilst on holiday which has impacted his ability to return to work fully fit.*
>
> *At this stage I have been informed by Will (prior to my knowledge of his late arrival), that he needed to take a couple of rests en route due to it being a long drive. Informally I have also been advised the other engineer on the job rung him on Friday afternoon/evening to discuss the job so he was well aware of his requirement to be at the job on Saturday.*
>
> *Will is on holiday for the remaining of this week and next week. Please can you advise what next steps to take."*

73. What happened next is not entirely clear, but on 12 September 2019 Andy Stevens of the respondent wrote to the claimant inviting him to a "disciplinary investigative meeting. The invitation letter says "*I will be investigating the allegations made against you regarding your conduct on 10th August 2019*". As Mr Downey and the claimant both pointed out, it does not say what those allegations were.

The implementation of a formal disciplinary procedure

74. This appears to be an appropriate point to look at the claimant's allegation that "*the respondent applied the PCP of a formal disciplinary process for acts of misconduct*". That is accepted by the respondent to be a PCP it applied, and is said by the claimant to have disadvantaged him as a disabled person.

75. Mr Downey puts it this way in his outline closing submissions:

> *"The PCP places disabled persons such as the claimant at a substantial disadvantage compared to those without the disability because of the effect of the disability on the cognitive function when exposed to stress and because of the reduced ability to concentrate, fatigue and forgetfulness as evidenced by the claimant's actual reaction to the institution of the disciplinary proceedings against him."*

76. This way of putting things seems to have the same kind of problems that arose with the earlier PCPs.

77. First, it seems to be obvious that this is something a respondent should do. If there is perceived to be misconduct then a formal disciplinary process is typically regarded as necessary and an important procedural safeguard protecting the interests of the claimant. The problems become apparent if one considers what adjustments might be made. The alternatives seem to be that the respondent should take no steps in relation to misconduct, or should apply no procedure at all in considering misconduct. Neither of those can be right. There remains the possibility that the adjustment required is the implementation

of an informal, rather than formal, disciplinary process – but we cannot see how that can be correct particularly where, as in this case, the eventual allegation of misconduct is an allegation of gross misconduct that the claimant could have been dismissed for.

78. At previously, something is gained by looking at the reasonable adjustments proposed by the claimant. These included implementing occupational health recommendations, not disciplining him at all, consulting occupational health and various adjustments to the formal disciplinary process. He talks of "*implementing an informal approach (such as holding an investigation meeting with the claimant)*" – but in fact that was what was done. There was an investigation meeting.

79. None of those suggestions are really about not following a formal disciplinary procedure. If misconduct was suspected then the claimant was bound to be answerable for it in one way or another, and it seems to us that a formal disciplinary procedure is the appropriate way of doing so. Whether adjustments to that procedure should have been made along the way is another question, but not one that the claimant has put before this tribunal. This did not amount to an unlawful failure to make a reasonable adjustment.

The investigation

80. The claimant objected to Andy Stevens as the investigator, and the investigation was eventually conducted by Oliver Jordan. We will come on to the one criticism made by the claimant of the investigation, but note for now that Mr Jordan seems to have taken all necessary steps in his investigation, and on 16 October 2019 produced his "investigation report". This was shared with the claimant and included as appendices the evidence that Mr Jordan had taken during the investigation.

81. Mr Jordan describes his investigation as "*seeking to address the following allegations: lateness, dishonesty, professional conduct*". His "summary of findings identifies two issues. Only the first is relevant to this case: "*the lateness and dishonesty of William Huntley regarding his actions on and around 10th August 2019 relating to customer service job MR48 at Heyford Park*".

82. Of those, it is the "dishonesty" point that is said by the respondent to have led to the claimant's dismissal. This is how Mr Jordan describes his findings:

> *"Melissa Kony, Customer Service Manager reported the incident to Richard Joyce Customer Service Manager who has direct line management responsibility for William.*
>
> *William was on annual leave on Friday 9th August and was driving back from Cornwall. He had his phone with him whilst on annual leave evidenced by his usage (appendix 3 – phone bill itemisation). It is standard practice for the customer care centre (CCC) to assign calls*

using mcCosmos and no further interaction (i.e. phone call) between the CCC and engineer is required unless clarification is needed.

William was aware of the job on the night of Friday 9th August evidenced by a WhatsApp conversation between him … a fellow engineer (appendix 4 – WhatsApp messenger screenshots). During a WhatsApp phone call at between 21:00 and 21:30 William specifically asked [the colleague] *not to mention to his manager that he knew about the call.* [The colleague] *stated during his interview, "I thought this was a bit odd and I immediately rang my manager Mel Kony to let her know of our conversation and that I thought William may not turn up to the job". A written statement has been provided by Melissa Kony which substantiates* [the colleague]*'s comments.*

Furthermore, during a phone conversation (appendix 5 – CCC phone recording) with … the CCC William indicates his lack of knowledge about the job "there was nothing on my PDA yesterday afternoon and I'm supposed to be in Heyford Park and nobody has told me". This indicates he had checked his iPhone and would have seen a notification on mcCosmos on Friday 9th August and must have been aware of the job. This is clearly dishonest.

On at least two occasions (call 08:00 and 09:32) William asked "to be reassigned to a time he can do", which is dishonest and is trying to manipulate start times of jobs in order to avoid being late."

83. We set out below some of the specific points the investigation covered.

84. At 21:01 the colleague he was due to work with sent him these messages to the WhatsApp account on his work phone:

> *"Hi Will hope you are well, I believe you're coming to work with me tomorrow at He*
> *… to work with me at Heyford*
> *Not sure if you've been there before, it's quite a way for you! Do you need instructions or extra info to* [find] *the place.*
> *You can ring if you're around this evening."*

85. The claimant called his colleague on WhatsApp almost immediately. The call lasted just over 12 minutes.

86. This call prompted his colleague to call his (the colleague's) manager, Mel Kony, who was also the duty manager for that weekend. She later gave this account of that call:

> *"On Friday 9th August around 9pm (possibly a little later) I received a panicked phone call* [from the claimant's colleague] *regarding his job on*

MR 48 for the following day. He explained that WH had been assigned as a pair of hands with him at Heyford Park. He stated that he had just received a call from WH explaining that he wouldn't be able to attend the job the following day as he wasn't aware that he was weekend working and that he had just driven back from Cornwall I believe and that his back was in bad shape. He explained that WH had made comments about Management not looking after their CSE's and why would they assign him to a job so far away. As it was passed 8pm and the CCC was closed there wasn't much we could do, and I would investigate this first thing in the morning."

87. Mel Kony describes her discussion with the claimant's colleague being interrupted as the claimant was calling his colleague back on WhatsApp. According to the WhatsApp records this would have been at 21:33. Her account of events continues as follows:

> *"*[He] *then interrupted me and stated that WH was calling back so he would need to take the call.* [He] *called back not long after saying never mind WH has agreed to do the job, however he would not be there for the 10am start time he was assigned as it was a 3 hour drive for him and he would need to take rest breaks on his way there due to his back and recommendations from Occupational Health.* [He] *also stated that WH had asked him not to mention to me or anyone that they had spoken and that he was initially declining the job. I left the conversation there and stated to* [the colleague] *to give me a call in the morning if he was concerned and I would sort it out."*

88. An exchange between the claimant and his colleague followed by text message on WhatsApp between 21:51 and 21:57:

> *"what time were* [you] *assigned?*
> *0900 but no hard n fast rules. I can make a start before you get there so no problem! See you there around mid morning."*

89. During his investigatory meeting, the claimant's colleague said:

> *"Colleague - I contacted* [the claimant] *Friday evening around 9pm … I like to make sure the other person is fully aware. When I spoke to him, he seemed not to want me to say anything to my line manager about it, which I was a bit puzzled by … It was due to be his working weekend which he had tried to change over to another weekend, but it didn't go through. He had just got back from a holiday in Cornwall.* [The work] *may have been a surprise to him.*
>
> *Investigator - Are you clear that he asked you not to say anything about the WhatsApp call to your manager*

Colleague – Yes and I don't understand why he asked that. Will has previously been a spokesman in his region, which he had since stepped down from."

90. The one specific criticism made by Mr Downey of the investigation was that the allegations against the claimant were not identified and set out prior to the investigation meeting. We acknowledge that, but Mr Downey has not suggested that this is, for instance, a requirement of the ACAS Code of Practice. The nature of an investigation may well be to discover what happened and therefore what allegations an individual should face. The important point is that an individual should know the allegation prior to the disciplinary hearing, not prior to an investigation.

91. It is also plain that the question of dishonesty was raised with the claimant during his investigation meeting, and that the claimant's evidence was not that he was unaware of the allegations at all, but that he was unaware of the allegations until "14 minutes into" the investigation meeting. See, for example, para 63(II) of his witness statement: "*Only after 14 minutes into the meeting did Mr Jordan and Mr Shergill declare the allegation …*".

92. The core of Mr Downey's closing submissions on the question of unfair dismissal was that the allegation of dishonesty had never properly been understood by the claimant or put to him. As Mr Downey acknowledged, if we were to find that this was the case it could only be by an analysis of the disciplinary hearing notes, since it had not been any part of the claimant's evidence that he was unaware of the allegation of dishonesty by the time of the disciplinary hearing. As we pointed out to Mr Downey, following his dismissal the claimant submitted an appeal letter containing 50 grounds of appeal, none of which was that he had not, by the time of the disciplinary hearing, properly understood or had the chance to address the allegation of dishonesty made against him.

Grievances

93. The claimant was off work sick for much of this period, but in December 2019 raised two grievances. We do not need to refer to them in any detail except to note that they were dealt with by the respondent and a remarkably detailed outcome letter was sent to the claimant on 10 February 2020. To the extent that the claimant has claims in relation to this, it is in relation to his appeal against the grievance findings, not the conduct or conclusions of the original grievance hearing.

The grievance appeal

94. The grievance outcome letter concluded with these words: "*You have the right to appeal against this decision within 5 days of receipt of this letter.*" It is said by the claimant that this is a PCP that put him at a substantial disadvantage. The respondent denies that it applied this PCP to the claimant.

95. As Mr Downey puts it in his written outline submissions, this "*was clearly a standard practice*". The difficulty for the claimant is that he says that this PCP was applied to him. It was not. He wrote a brief email indicating his intention to appeal on 17 February 2020, and this was accepted by the respondent as a sufficient basis on which to proceed with the appeal. The 5-day PCP was not applied to him. This did not amount to an unlawful failure to make reasonable adjustments.

96. By a letter dated 27 February 2020 the claimant was invited to a grievance appeal meeting to take place in person at the office of a sister company of the respondent's in Chippenham. On 2 March 2020 the claimant replied requesting, as a reasonable adjustment, that the meeting be held no more than a 30 minute drive from his home. He also made points as to the timing of the meeting and availability of his trade union representative. The meeting was rescheduled, but remained face to face at the same site in Chippenham.

97. On 9 March 2020 the claimant wrote contending that the Chippenham location was not just "slightly over" 30 minutes' drive time, and saying that he would not be attending the grievance meeting.

98. In response, the grievance appeal officer indicated that she would look to arrange a meeting in Bath as "*I do think that it is always beneficial to meet face to face*". The claimant immediately wrote reiterating that he would not attend such a meeting, and on 12 March 2020 submitted a lengthy "grievances appeal document". This was considered by the grievance appeal officer and the claimant was notified of the outcome of his appeal in a letter dated 8 April 2020.

99. Two complaints arise out of this. The first is that to require him to attend a face to face grievance appeal meeting amounted to discrimination arising from a disability. Mr Downey puts it this way in his written outline submissions:

> *"By insisting on a face to face meeting and seeking to arrange it outside the parameters of the requests made by persisting with the same when the claimant made it clear he was not attending due to the effects of his depression and anxiety* [the grievance appeal officer] *treated the claimant unfavourably.*
>
> *The unfavourable treatment of the claimant occurred because she disregarded his requests. These requests were made because of the effects of the disability on the claimant and, accordingly, amounted to discrimination arising from disability."*

100. Again, we find a number of problems with this claim.

101. The connection required by s15 of the Equality Act 2010 is that the unfavourable treatment arises "because of" something arising in consequence of the individual's disability.

102. We accept that a broad view can be taken of "because of", and even "something arising in consequence of the disability" – there does not need to be an immediate link (Pnaiser v NHS England [2016] IRLR 170, as cited by Mr Downey). However, there does need to be a causative link of some sort. It has never been suggested by the claimant that the grievance appeal officer would have taken a different approach in conducting any other grievance appeal. Conscious motivation is not necessary (Pnaiser), but it has not been suggested at any point that the grievance appeal officer's approach to this was influenced in any way by matters arising from the claimant's disability. If there is a disability discrimination issue here, it appears to be much better addressed as a question of reasonable adjustments. This did not amount to unlawful discrimination arising from a disability.

103. The claimant does bring a complaint of a failure to make reasonable adjustments. This is based on a PCP of "*requiring attendance at a grievance appeal meeting*". The respondent does not accept that it had or applied such a PCP.

104. The problem with the way in which this is put – "requiring attendance" – is that the respondent has never required the claimant's attendance at a grievance appeal hearing. He was offered multiple opportunities to attend but when he did not the grievance appeal hearing proceeded and he received an outcome based on his written submissions. There was no requirement to attend in order for his appeal to be considered, and this did not amount to an unlawful failure to make reasonable adjustments.

105. A theme of this case and the hearing has been the very great difficulties the claimant has had with his original claims in relation to protected disclosures (now all withdrawn) and disability discrimination. Despite the legal advice that the claimant appears to have had along the way, and encouragement given by the tribunal during the hearing, he appears to have given very little thought to how those claims are framed and what might be necessary to prove them (or, in the case of the disability discrimination claims, from what material we may have concluded that there was disability discrimination). Even in the limited form eventually pursued by Mr Downey each disability discrimination claim appears to us to have obvious and fundamental flaws.

The disciplinary hearing

106. There remains the question of unfair dismissal, and the disciplinary hearing that led to the claimant's dismissal.

107. As we have mentioned before the focus here has been on the allegation of dishonesty. The respondent's witnesses have readily accepted that that is the only point that could have justified the claimant's dismissal.

108. The claimant had originally been invited to a disciplinary hearing to take place on 7 November 2019 this was to address two allegations:

"- Continued misconduct in relation to lateness
o Namely due to a request for amendment to start time to avoid a lateness trigger
- Loss of trust/confidence and concerns re: employee integrity
o This item will cover the dishonest nature of the claim to be unaware of the job allocated on 10th August 2019."

109. We do not see from this that the claimant can have been in any doubt as to the allegation of dishonesty – it was his claim to be unaware of the job allocated on 10 August 2019 that was said to be dishonest.

110. The hearing was substantially delayed, but eventually took place on 10 July 2020. It was conducted by Jo Barry, assisted by Fiona Mawson of HR. As we have mentioned earlier, Ms Barry was not available to give evidence and had instead submitted a sworn witness statement. Mr Downey properly did not suggest that we should draw adverse inferences from her non-attendance at the hearing, but we accept in principle that the weight we place on her evidence may well be less than it would be if she had attended.

111. The decision to dismiss the claimant was not made on that day. Ms Barry and Ms Mawson carried out a number of further interviews, including a further meeting with the claimant. The outcome of this was a letter dated 10 August 2020, which contained the following conclusions in relation to the dishonesty issue:

> *"Appendix 4 provides evidence from* [the colleague's] *phone that he proactively messaged you via WhatsApp on Friday 9th August 2019 at 21:01 regarding the call at Heyford Park asking if you needed 'instructions or extra info' on how to find it. You then called* [the colleague] *via WhatsApp at 21:07 for 12 minutes and then again at 21:33 for a further 4 minutes. There was a subsequent message that you sent at 21:51 where you asked* [the colleague] *what time he had been assigned. This demonstrates that you did have knowledge of the call at Heyford Park and that you had been assigned to it for the following day.*
>
> *Your response to this was that you had been on holiday in Cornwall, had had a six hour drive home that day, your back was giving you aggravation and that when you got home, you took sedatives and anti-inflammatories. You said that you "don't have a great deal of recollection of the message with* [the colleague]*" and that you "can't really remember" why you had a conversation with him. You also suggested you were "having some finger problems on the phone" as you "rang one of your old hockey friends around midnight." However, the length of the calls to* [the colleague]*, as outlined above, were of 12 minutes and 4 minutes suggesting they were more than 'finger problems.'*

From the investigatory meetings with [the colleague] *(Appendix 8 & 21) and the investigatory meeting with Mel Kony (*[the colleague's] *Manager) (Appendix 9),* [the colleague] *stated that you "had asked him not to mention to his line manager that you had spoken." You said that you don't recall that conversation.*

…

When you called the Customer Care Centre at 8am … (Appendix 5), you made no reference to there being any question about you being needed at Heyford Park. On that call you said that "I have just picked up my call for this morning and there was nothing on my PDA yesterday afternoon claiming that I was meant to be in Heyford Park and no-one has told me. I've looked at the ETA and it's not going to be manageable."

From all the evidence available to me relating to the allegation of dishonesty, I have a reasonable belief that you did know about the call at Heyford Park prior to 8am on Saturday 10th August 2019 through your WhatsApp messages and phone calls with [the colleague] *on Friday 9th August 2019 ...*

I have also considered the evidence contained within Appendices 8 & 9 which relate to your WhatsApp calls with [the colleague] *on Friday 9th August 2019 where you asked* [the colleague] *not to tell his Manager that you had spoken. I have reasonable belief from this evidence and from our conversations that you were requesting that* [the colleague] *cover for you, for the fact that you knew about the call at Heyford Park, the evening before. In doing so, you were attempting to involve another employee in your dishonesty.*

My findings on this point are therefore that this constitutes Gross Misconduct. This level of dishonesty is an implicit breach of the trust and confidence required in your role which goes to the core of your contract of employment."

112. Ms Barry's witness statement is in very similar terms:

"From all the evidence available to me relating to the allegation of dishonesty, I had a reasonable belief that Mr Huntley did know about the call at Heyford Park prior to 8am on Saturday 10th August 2019 through his WhatsApp messages and phone calls with [the colleague] *on Friday 9th August 2019 ...*

I also considered Mr Huntley's WhatsApp calls with [the colleague] *on Friday 9th August 2019 where he asked* [the colleague] *not to tell his Manager that they had spoken. I had a reasonable belief from this evidence and from our conversations that he was requesting that* [the

colleague] *cover for him for the fact that he knew about the call at Heyford Park, the evening before. In doing so, he was attempting to involve another employee in his dishonesty."*

113. Mr Downey had a number of related points as to how (as he saw it) the failure by the respondent to properly address the dishonesty allegation lead to the claimant's dismissal being unfair.

114. We are bound to say that we consider this to be a bold submission, given the lack of any evidence from the claimant that he was confused by or unaware of the allegation at the hearing, or that he had not had a proper opportunity to address it. However, we accept that there will be circumstances in which analysis of the relevant materials suggests that there has been unfairness that the individual themselves has not complained of.

115. Mr Downey addresses unfairness in terms of the Burchell test. He says that the respondent's failure to properly approach the allegation of dishonesty means that the dismissing officer cannot have had a genuine belief that the claimant committed such misconduct and, second, that there were no reasonable grounds for believing that the claimant had committed such misconduct. He goes on to say that "*the claimant therefore never had a proper opportunity to respond to the allegation that was being relied upon by the respondent as gross misconduct.*"

116. We have taken up Mr Downey's invitation to review the notes of the disciplinary hearing. Our starting point is that the disciplinary invitation appears to us to be clear about the dishonesty: "*the dishonest nature of the claim to be unaware of the job allocated on 10th August 2019*".

117. The claim to be unaware of the job allocated arose most obviously in the transcript of the claimant's conversation with the CCC: "*I'm supposed to be in Heyford Park and nobody has told me*". That was plainly untrue. Even if the claimant had not received or seen his formal notification, his colleague had told him about his Heyford Park assignment on the evening of 9 August 2019.

118. Mr Downey sought at various points to suggest that there was nothing wrong with this and it should be read as "*nobody at the CCC has told me*". We do not accept that. Nobody means nobody – not nobody within a particular category of individuals. We have also sought, without success, to see if the claimant ever raised this point himself as an explanation at the time. It does not seem that he did. The claimant telling the CCC that he had not been told by anyone of the Heyford Park appointment was false. Taken in the context of him asking his colleague not to tell anyone about the earlier call leads to the obvious implication that he was attempting to construct a false position that he was ignorant of the job.

119. There is really nothing to Mr Downey's submission that Ms Barry did not have a genuine belief that the claimant was dishonest. It appears to us that there was

clear material from which she could properly have reached that conclusion but, of course, this is not about what we think but about what she thought. We see no basis to doubt what she has set out in the dismissal letter, which are clear findings that the claimant was dishonest and that that was the reason for his dismissal.

120. All that could remain is the question of whether the allegation had been properly put to the claimant. We repeat that this is a very difficult submission to accept in circumstances where the claimant had not complained of being unaware of the allegation, and where the allegation itself has been clearly set out in the disciplinary invitation letter.

121. We have looked through the notes of the disciplinary hearings. We note:

a. That the allegations against the claimant were read out, in the form they appear in the original disciplinary invitation letter.

b. When the claimant questioned how this could amount to gross misconduct, he was told that "*gross misconduct could potentially relate to dishonesty and that you have potentially asked a colleague to lie for you.*"

c. When asked what happened on 9 August 2019 the claimant said "*I don't have a great deal of recollection of the message with* [my colleague]*, I was all over the place.*"

d. He said he did not remember asking his colleague to not mention their call to management, and said that in any event it was a private conversation.

e. He was specifically asked "*Just going back to your call at 8am. You said you didn't know anything about Heyford Park.*" He replies "*I don't remember that*". Ms Barry points out where the transcript of the call can be found and the claimant says "*I think you've taken it out of context*".

f. There are the following exchanges:

"JB ok, within the call, you said you didn't know about Heyford Park

WH it's quite a long time ago so I can't remember. I think I said I didn't know before the call, why was I not contacted. If it is changed late in the day, it would have been prudent to have had a call as I was on holiday. I accept they didn't know I was not in a good way

JB so, I don't understand. You said you didn't know anything about Heyford Park before the PDA

WH yes, whatever you're saying. I really don't remember the WhatsApp with [the colleague]*. I remember that we probably had something from you sending me the excerpts, but I don't remember the content of it.*

JB this was less than 12 hours from when you received the WhatsApp message from [the colleague] *through to the call to* [the CCC]

WH it's a long time ago. I was getting lots of different messages.

…

JB just to be clear, if you were on the phone to [the colleague] *at 7.30am, how did you know you were expected to go to Heyford Park?*

WH it would have refreshed my PDA

JB when do you refresh that?

WH probably about 7.30am.

…

JB he has said you have said, "please don't mention this to my manager". Would you not think, what is going on?

WH of course I would but you're taking it as I said that

JB if someone has said that, wouldn't you be a little bit worried about it?

WH yes, but I'm saying it's not credible information"

122. We are satisfied that the allegation of dishonesty was adequately put to the claimant. Our study of the notes suggests to us that the claimant was being evasive when the question of his conversation with the CCC was touched on in the meeting. When specifically asked about this, he said he did not remember it, but he had long had the transcript that showed that it did happen. He then said it had been taken out of context, but gives no further explanation as to how that could be. He does not offer the explanation now given by Mr Downey – that "nobody" meant nobody within the CCC. As regards his conversations the evening before, his position was essentially that he could not remember them, in which case it is hardly surprising that Ms Barry chose to believe his colleague's account of those calls when there was no rival account of them from the claimant.

123. If there was any good explanation that the claimant wanted to give as to how this did not amount to dishonesty, we do not see that he has ever given that explanation even to this tribunal. Perhaps it was Mr Downey's intention to do that on his behalf in his explanation of what "nobody" might mean – but as we have previously stated we reject that explanation.

124. The difficulty for the claimant was that he had no good response to the allegation, and in much of the disciplinary hearing preferred to concentrate on casting aspersions on his colleague rather than address the allegations or acknowledge that he may have done anything wrong. The claimant's dismissal was not unfair.

CONCLUSIONS

125. All of the claimant's claims are dismissed – that is either because (for the majority of them) they have been withdrawn or because we have found that the seven that remained were not well founded.

Employment Judge Anstis
Date: 25 November 2022

Sent to the parties on: 30/12/2022

N Gotecha

For the Tribunals Office

APPENDIX – THE "EFFECTIVE CLAIMS"

1. Discrimination arising from disability – Attending a face to face grievance appeal meeting LOI para. 9(f), 11 (d) & (e)

   Note: para 9 addresses the unfavourable treatment and para 11 addresses the "something arising in consequence of his disability.

   9(f) Attending a face to face grievance appeal meeting

   11(d) His reduced cognition due to the effects of his depression and anxiety and the medication prescribed which meant that processing information required extra time.

   11(e) His diminished cognitive function (including being unable to focus) and impaired memory function (this relates to the claimant's disability of depression and anxiety)

2. Reasonable Adjustments – The Respondent applied the PCP of a formal disciplinary process for acts of misconduct LOI para 13(a), 15(a) & (d), 16 (d)-(f)(h):

   Note: para 13 addresses PCPs that the respondent accepts it had. Para 15 gives why that PCP put the claimant at a substantial disadvantage and para 16 identifies the reasonable adjustment(s) the claimant contends for. (We note that there is no burden on a claimant to establish the relevant reasonable adjustment, but in this case the claimant has suggested relevant adjustments to assist the tribunal in its consideration of the points (cf para 6.24 of the EHRC Code of Practice).)

   13(a) The Respondent applied a formal disciplinary process for acts of misconduct.

   15(a) The effect of his depression and anxiety upon his cognitive functions in particular:

      (i) his reaction to stressors,

      (ii) reduced ability to make decisions,

      (iii) fatigue and forgetfulness

   impacted on his ability to manage his responses.

   15(d) The effect of his back condition, and his depression and anxiety upon his cognitive functions in particular his ability to drive, sit for long periods of time, reduced ability to concentrate, fatigue and forgetfulness.

   16(d) i) Implementing the advice given in Occupational Health reports dated 17th January 2019 and 3rd July 2019; and ii) removing the threat of disciplinary action.

16(e) Consultation with Occupational Health prior to commencing any disciplinary action.

16(f) Implementing an informal approach (such as holding an investigation meeting with the Claimant) to avoid the need for a formal disciplinary hearing.

16(h) i) Offering breaks; ii) ensuring key points were highlighted and check for understanding; iii) give prior notice of agenda.

3. Reasonable Adjustments - When allocating work, the Respondent supplied expected arrival times to engineers. LOI para. 13(b), (a), (b) & (d), 16 (a),(b),(g)(i)

13(b) When allocating work, the Respondent supplied expected arrival times to engineers.

15(a) The effect of his depression and anxiety upon his cognitive functions in particular:

(i) his reaction to stressors,

(ii) reduced ability to make decisions,

(iii) fatigue and forgetfulness

impacted on his ability to manage his responses.

15(b) His back condition and its impact on his anxiety resulted in longer journey times.

15(d) The effect of his back condition, and his depression and anxiety upon his cognitive functions in particular his ability to drive, sit for long periods of time, reduced ability to concentrate, fatigue and forgetfulness.

16(a) Reduce triggers for lateness.

16(b) Provide the Claimant longer periods to drive to his appointments.

16(g) Providing greater tolerance into travelling times in consultation with the Claimant.

16(i) Scheduling non-urgent jobs to be attended outside of peak traffic times.

4. Reasonable Adjustments - The Respondent utilised GPS devices (Sat Navs) to check journey data and the location of the engineer. LOI para.13(c), 15(a) – (d), 16(a)-(b), (g),(i),(l)

13(c) The Respondent utilised GPS devices (Sat Navs) to check journey data and the location of the engineer.

15(a) The effect of his depression and anxiety upon his cognitive functions in particular:

(i) his reaction to stressors,

(ii) reduced ability to make decisions,

(iii) fatigue and forgetfulness

impacted on his ability to manage his responses.

15(b) His back condition and its impact on his anxiety resulted in longer journey times.

15(c) Using the GPS device to check journey times pressurised the Claimant to miss breaks if the traffic was heavy (the claimant relies upon both his back condition and depression and anxiety in respect of this allegation).

15(d) The effect of his back condition, and his depression and anxiety upon his cognitive functions in particular his ability to drive, sit for long periods of time, reduced ability to concentrate, fatigue and forgetfulness.

16(a) Reduce triggers for lateness.

16(b) Provide the Claimant longer periods to drive to his appointments.

16(g) Providing greater tolerance into travelling times in consultation with the Claimant.

16(i) Scheduling non-urgent jobs to be attended outside of peak traffic times.

16(l) Removal of Richard Joyce as the Claimant's manager and appointment of a mutually agreed manager.

5. Reasonable Adjustments - Applying a 5-day deadline for the submission of a grievance appeal LOI para. 14(b), 15(a),(d) 16(m)

Note: para 14 is alleged PCPs that the respondent does not accept it had.

14(b) Applying a 5-day deadline for the submission of a grievance appeal.

15(a) The effect of his depression and anxiety upon his cognitive functions in particular:

(i) his reaction to stressors,

(ii) reduced ability to make decisions,

(iii) fatigue and forgetfulness

impacted on his ability to manage his responses.

15(d) The effect of his back condition, and his depression and anxiety upon his cognitive functions in particular his ability to drive, sit for

long periods of time, reduced ability to concentrate, fatigue and forgetfulness.

16(m) Extend time allowed to submit the appeal document to 10 to 15 days or alternatively ask the Claimant how long was needed.

6. Reasonable Adjustments – Requiring Attendance at a grievance appeal meeting LOI para. 14(c), 15(a)-(b), (d), 16(n)

14(c) Requiring attendance at a grievance appeal meeting.

15(a) The effect of his depression and anxiety upon his cognitive functions in particular:

(i) his reaction to stressors,

(ii) reduced ability to make decisions,

(iii) fatigue and forgetfulness

impacted on his ability to manage his responses.

15(b) His back condition and its impact on his anxiety resulted in longer journey times.

15(d) The effect of his back condition, and his depression and anxiety upon his cognitive functions in particular his ability to drive, sit for long periods of time, reduced ability to concentrate, fatigue and forgetfulness.

16(n) i) Allow the meeting to be held in writing; ii) provide assistance with transport; iii) move the meeting closer to the Claimant's home; iv) allow a member of the Claimant's family or friend to attend the meeting as a companion.

7. Ordinary Unfair Dismissal – LOI paras 23-28