

- c. Failure to make reasonable adjustments (s20 & 21 Equality Act 2010) in relation to the decision to dismiss the Claimant for gross misconduct
 - d. Wrongful dismissal/breach of contract – failure to pay notice pay
3. The issues were identified at the preliminary hearing on 24 February 2022 and confirmed at the start of the hearing as follows:

Wrongful dismissal / Notice pay

- 3.1 What was the Claimant's notice period?
- 3.2 Was the Claimant paid for that notice period?
- 3.3 If not, was the Claimant guilty of gross misconduct? ie did the Claimant do something so serious that the Respondent was entitled to dismiss without notice?

Direct disability discrimination (Equality Act 2010 section 13)

- 4.1 Did the Respondent do the following things:

4.1.1 Dismiss the Claimant on grounds of gross misconduct

4.2 Was that less favourable treatment? The Tribunal will decide whether the Claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the Claimant's. If there was nobody in the same circumstances as the Claimant, the Tribunal will decide whether he was treated worse than someone else (ie someone that did not share his disability) would have been treated. The Claimant has not named anyone in particular who he says was treated better than he was.

- 4.3 If so, was this less favourable treatment because of disability?

Discrimination arising from disability (Equality Act 2010 section 15)

- 5.1 Did the Respondent treat the Claimant unfavourably by:

5.1.1 investigating an allegation that the Claimant had committed an act of Gross Misconduct;

5.1.2 making a finding that the Claimant had committed an act of gross misconduct;

5.1.3 dismissing the Claimant for gross misconduct; and/or

5.1.4 making a referral to the local authority's safeguarding team confirming the Claimant had been dismissed for gross misconduct?

- 5.2 Did the following things arise in consequence of the Claimant's disability:

5.2.1 The Claimant struggles to understand complex situations.

5.2.2 He may not have understood that it was inappropriate to use language like fuck off in banter with a person we support ("PWS").

5.2.3 He did not understand that the disciplinary meeting could lead to his dismissal.

5.2.4 He found the disciplinary meeting difficult to engage in and was not able to fully explain his version of events and/or his defence in this meeting. The Claimant asserts that his conversation with a PWS was deliberately taken out of context by the complainant Gillian Vine and her account was factually incorrect. He also asserts that there had been a history between Gillian Vine and the Claimant and this was not considered by the Respondent. He asserts that if the

Respondent had made further enquiries the PWS would have supported the Claimant's account.

5.3 Was the unfavourable treatment because of any of those things that arose in consequence of the Claimant's disability? e.g did the Respondent make a finding that the Claimant had committed an act of gross misconduct as the Claimant had not fully explained his version of events?

5.4 Was the treatment a proportionate means of achieving a legitimate aim?

5.5 The Tribunal will decide in particular:

5.5.1 was the treatment an appropriate and reasonably necessary way to achieve those aims;

5.5.2 could something less discriminatory have been done instead;

5.5.3 how should the needs of the Claimant and the Respondent be balanced?

5.6 Did the Respondent know or could it reasonably have been expected to know that the Claimant had the disability? From what date?

Reasonable Adjustments (Equality Act 2010 sections 20 & 21)

6.1 Did the Respondent know or could it reasonably have been expected to know that the Claimant had the disability? From what date?

6.2 A "PCP" is a provision, criterion or practice. Did the Respondent have the following PCPs:

6.2.1 A PCP of conducting disciplinary meetings which could lead to dismissal;

6.2.2 A PCP of taking disciplinary action including dismissal when an employee has sworn in the presence of a person they support;

6.2.3 A PCP of jumping to the decision to dismiss for gross misconduct (which had to be reported to Neath and Port Talbot's safeguarding team) before completing a thorough and reasonable investigation – here the Claimant asserts there had been a history between Gillian Vine and the Claimant and this was not considered by the Respondent, nor was the PWS interviewed to understand the context of the conversation.

6.3 Did the PCPs put the Claimant at a substantial disadvantage compared to someone without the Claimant's disability, in that as a result of his disability,

6.3.1 he didn't fully comprehend that this was a disciplinary meeting and that he could be dismissed? The Claimant asserts that if he had comprehended this, he would have invited someone to attend to support him and the outcome from the meeting may have been different.

6.3.2 found the situation (ie the disciplinary meeting) to be distressing and found it difficult to put forward his version of events and/or his defence?

6.3.3 The Claimant was more likely to have used swear words and/or misunderstood the appropriateness of using swear words with a "person we support".

6.4 Did the Respondent know or could it reasonably have been expected to know that the Claimant was likely to be placed at the disadvantage?

6.5 What steps could have been taken to avoid the disadvantage? The Claimant suggests:

6.5.1 his employer should have verbally explained to him and checked he understood that this was a disciplinary hearing and he was facing dismissal

6.5.2 the outcome of the meeting should have been that the Claimant was given counselling and a warning rather than dismissal

6.6 Was it reasonable for the Respondent to have to take those steps?

6.7 Did the Respondent fail to take those steps?

Remedy for discrimination (only if the Claimant succeeds with this claim)

7.1 Should the Tribunal make a recommendation that the Respondent take steps to reduce any adverse effect on the Claimant? What should it recommend?

7.2 What financial losses has the discrimination caused the Claimant?

7.3 Has the Claimant taken reasonable steps to replace lost earnings, for example by looking for another job?

7.4 If not, for what period of loss should the Claimant be compensated?

7.5 What injury to feelings has the discrimination caused the Claimant and how much compensation should be awarded for that?

7.6 Has the discrimination caused the Claimant personal injury and how much compensation should be awarded for that?

7.7 Is there a chance that the Claimant's employment would have ended in any event? Should their compensation be reduced as a result?

7.8 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

7.9 Did the Respondent or the Claimant unreasonably fail to comply with it?

7.10 If so is it just and equitable to increase or decrease any award payable to the Claimant?

7.11 By what proportion, up to 25%?

7.12 Should interest be awarded? How much?

Procedure, documents and evidence heard

1. At a case management hearing on 24 February 2022 as recorded in a case management order dated 29 April 2022, the appointment of an intermediary was recommended and an assessment and report requested in relation to supporting Leon to participate in these proceedings. At a preliminary hearing on 11 November 2022 Judge Brace adopted the recommendations in the Report for communicating with and cross examining Leon at the final hearing and other directions were made for reasonable adjustments to support Leon to participate fully in the final hearing including referring to him as 'Leon' during the hearing and avoiding undue formality, which is also adopted now in the written reasons to make them accessible to Leon. We discussed these recommendations and adjustments at the outset of the final hearing with the parties and representatives and throughout the hearing we had more frequent short breaks to enable Leon to focus, summed up and checked with Leon that he understood and was following the process, and were mindful of ensuring the recommendations for communicating and cross-examining Leon were followed.
2. There was a Bundle of documents of 245 pages and an additional document was produced by Mr Thomas during the hearing and was added to the end of the

Bundle. We heard evidence from Leon as the claimant and from Mr Mark Thomas and Ms Cerys Jones on behalf of Accomplish. Leon was represented by his mother, Ms Schliker and both representatives made oral submissions at the end of the hearing.

Findings of Fact

3. This is the unanimous decision of the Tribunal. We set out the following findings of fact which we determined as relevant to the issues. We are not making findings of fact on all the points in dispute between the parties, only those that are relevant to the issues in the case as now identified.
4. Leon was employed by the Respondent as a support worker, from 11th November 2020 until his dismissal on 27th January 2021. Accomplish is a company that provides support for people living with mental health needs, learning disabilities, autism and acquired brain injuries.

The Application

5. Leon applied for the role of support worker by application form in July 2020. He completed the form with the assistance of a worker from Rathbone – an educational and training charity working with anyone whose needs have not been met by education or who needs support to overcome barriers to learning, training or employment. Leon gave information to the person completing the form to include in his application. There was no indication on the form that Rathbone assisted Leon in writing and submitting his application. Mr Thomas gave evidence that he had never heard of the charity, Rathbone.
6. The application included a summary of Leon’s qualifications including 5 GCSEs, a BTEC and Welsh Baccalaureate gained in 2015 at his comprehensive school and qualifications in H&S (entry level 3), Communication (entry level 3) and Level 1 Awards and extended level 1 Award in Health and Social Care (Early Years and Childcare) gained in 2016 and 2017 through Rathbone Wales.
7. Under the general information section there was a statement that ‘Applications are welcomed from disabled persons and that ‘a disability will not prejudice this application’ with the opportunity to state if a person has a disability that they would like the company to know about at this time and if so, to provide further details and information. The response written on the form was “N/A” which in the hearing Leon agreed means ‘not applicable’ and agreed that in looking at his application Accomplish would not know that he had a disability, acknowledging “it looks that way”, which we find to be the case.

Interview

8. The interview was conducted by telephone on 10 July 2020 and a record of the interview notes are in the Bundle. The interview was conducted by the previous manager at the time, who was Mr Thomas’s predecessor. Leon’s answers to the interview questions recorded in the form included questions about dealing with ‘challenging behaviour’, which he understood and was able to answer. In the overall summary by the interviewer the comments on ‘communication’ record that: *“Leon understood all questions asked, he made himself adequately understood in his responses. Good clear communication.”* It records that the interviewer recommended him for employment and an offer was made by letter on 24 July 2020 enclosing his contract of employment and conditional on receipt of satisfactory references, acceptance of the contract terms and ability to work in the UK. A positive reference was provided by his former employer, a care home for elderly people and people with dementia and his former Head of Vocational

Education and Careers at his comprehensive school. The offer letter referred to a 2 day induction, after which further courses and shadow shifts were required for a period of two weeks.

Contract

9. Leon was employed under a contract of employment dated 24 July 2020. The first six months were a probationary period. At clause 13.4 of his contract it states: *“The Company has the right to dismiss you without notice in the case of gross misconduct.”* Clause 14.1 states: *“You must comply with the Company’s rules, policies and procedures as detailed in the Company Policy Manual.”*

Induction Training

10. At the time the Induction Training was held by Teams because of the pandemic. Leon attended the training online, although he did not remember the term ‘induction’, he confirmed that he did his online training and on his notes from his phone, which he had copied off the rota, it records ‘induction training 10-2pm then 2-8.30pm 11/11/20’. The induction training includes a section on ‘relationships and professional boundaries’ and was included in the bundle. Mr Brockley asked Leon about that specific slide in the bundle and Leon understood the slide and examples being shown to him and agreed that the examples of behaviour were unprofessional. Overall Leon completed 15 out of 18 modules of online training during his period of employment.
11. Mr Brockley referred Leon to a policy at page 103 of the bundle titled ‘Safeguarding and Protection - Relationship boundaries’ referring him to the section heading ‘What you Need to Know and Do’. The first paragraph states that “staff should never swear at, or in the vicinity of persons we support and should be aware that swearingconstitutes potential emotional/verbal abuse”. Leon said that he could not recall seeing it before. He confirmed in evidence that he understood and agreed the policy statement was appropriate and agreed that you should not swear at a PWS, though said ‘plenty of other people swear it happens all time’. Leon accepted in his evidence that anyone who swore at a PWS, even if not disabled, could be dismissed for swearing and that it could apply to anyone.
12. During the probation period Leon was supervised and Mr Will Elliot completed the supervision form. This was the first of 6 intended supervisions during the six month probation period. Leon did not recall when it was completed though thought it may be monthly and we found it likely on balance that this was completed after his first month in the role. There was positive feedback on the form from Leon about the home and colleagues and he confirmed he had received the induction training and that the service provision he had seen since joining was in line with the induction training. Regarding the values of the company, he stated ‘everything is good’. There was positive feedback about his performance generally under the section ‘monitoring at work – performance management’ from Mr Elliot, and it was noted that he should continue with his eLearning and there was staff feedback that he should be more proactive at the home in learning what tasks need doing. It was noted that he was half way through his online training (at that point) and recorded Leon’s comments that he had some frustration with the content, saying it should be general knowledge questions and Mr Elliot’s response was noted on the form that the training was geared to the job role.
13. There were nine points noted in the section for requiring improvement and detailing plans to improve, with comments including that the training was to benefit him and to take a lead from more senior staff on shift to learn; to the need to administer medication on time and put it back in place, noting that everyone can make mistakes and should take ownership of it; and that when filling out reports he

should fill in information and it is vital to record accurate information. There was no record on the supervision report that Leon disclosed that he was struggling in the role in any areas discussed or that he needed additional support.

14. Leon was asked in the hearing about the supervision report and confirmed his understanding of supervision, meaning you are being watched all the time. He did not challenge or disagree with the contents of the report, except commenting about the positive feedback he gave, stating that you have to say that if you want to work for the company and that he did not remember saying that he 'loved working at the home'.

Disability

15. In evidence at the hearing, having accepted that Accomplish would not know from his application that he had a disability, Leon said that 'in the job' they could see that he needs assistance with everything, that people have to explain to him 'over and over again before he gets it' and so it could be seen something was not right with him. When asked for details of who he meant, he said 'everyone' and that he needed to have help with every report, as he did not know how to word it. Asked if he suggested Mr Thomas was aware, he said that 'he must have been, as a manager you have got to take everyone in'. He mentioned 'Will' and the 'team leader in charge of next door, in charge of me anyway'.
16. Mr Thomas was appointed to the role of manager of the Park Avenue service (the home at which Leon worked) in mid-January 2021, approximately two months after Leon had joined and relatively shortly before his dismissal. In his witness evidence he stated that he did not know that Leon had a disability and had no reason to do so. He said that there was no record of it and that Leon did not give any indication he had a disability. He stated that these proceedings were the first time anything like this had been disclosed to him. In evidence at the hearing Mr Thomas stated that he had no reason to know at the time as Leon got on well with the clients, he did his training and got on well with it and that he does not expect anyone to come into the job and pick up everything 'off the bat'.
17. He was asked in cross examination about the supervision form and whether given the areas for improvement this raised any questions, specifically regarding medication and regarding completing reports. Mr Thomas was not the manager at the time of this supervision, as he recalled, but said that it was normal to get distracted sometimes (as per a comment on the report) and that he would not expect someone to be perfect from the off and that he would not just assume anyone had a disability. He noted that everyone gets improvements on supervision and if Leon had said he needed help, he would have offered help.
18. On it being put to him that an employer should do what is reasonably expected to find out if an employee has a disability and to investigate where obvious concerns are noted, Mr Thomas questioned what obvious concerns there were that Leon would need help. He noted that this supervision was a first supervision and that everyone will have areas of concern; if Leon had said he was struggling but he did not do so; and that his start could be a normal start for anyone who has not got experience in care. On it being put to him that Leon had 3 years' experience in care, he stated that it was a different service and different provider, with different paperwork and layouts and that if he went to a new company, he too would have to get to know it.
19. Ms Jones said in evidence that she did not know that Leon was disabled and that it was not apparent during her meeting with him that there was any disability, which we accept for reasons set out further below.

Incident 12/02/21

20. On 12 January 2021, an incident occurred when Leon swore when sitting with a person we support (PWS) in the home. It is not in dispute that Leon swore, a colleague who witnessed and reported it (GV) said he swore, Leon said he swore and the PWS said he swore. Leon accepted that he used the words 'fuck off' in conversation with the PWS. GV's statement when reporting the incident and the allegation subsequently under investigation by Accomplish is that Leon swore at the PWS. Leon disputed this and said he swore in general conversation with the PWS about something on the television.
21. Based on the statements taken and that Leon consistently gave at the time of the disciplinary investigation to Mr Thomas and at the disciplinary hearing to Ms Jones and his evidence at the hearing, we find on balance that Leon swore during a conversation with the PWS, using the words 'fuck off' when watching television. Although Leon had suggested that there was 'history' between himself and GV, whom he knew before working at Accomplish, he confirmed in evidence at the hearing that any history related to when they were at school and that he had had no problems with GV since working with Accomplish.
22. The incident was reported by GV to Mr Elliot and a second colleague, as recorded in a statement typed by them on 18 January 2021. Mr Thomas said he discussed the issue with HR and started his investigation on 18th January 2021 and asked GV for her written statement. He said in evidence this was on 16 January 2021 but that she signed it on 18 January 2021. Taking account of documentary evidence produced at the time and uncertainty from Mr Thomas in his recollection of the dates in his evidence at the hearing, we find it likely that GV reported the incident on 18 January rather than 16 January 2021. Mr Elliot and a colleague recorded their statement of GV's report on 18 January 2021. They also took a statement from the PWS on 18 January 2021 in which he confirmed that Leon did say 'fuck off' and said that was how he speaks to him but it did not bother him as 'he was a big boy and could look after himself'. Mr Thomas made a safeguarding referral by submission of a referral form to Neath and Port Talbot Council ("NPTC") that same day (the document produced by Mr Thomas during the hearing and added to the end of bundle).
23. After the incident was reported, Leon was moved from the Park Avenue home to Ty Branwen (the home next door), and he confirmed that he was interviewed a couple of days after that, which is consistent with the incident being reported on 18 January 2021. On 20 January 2021 Mr Thomas interviewed Leon and took a short statement. In his evidence Mr Thomas went through the questions he had asked and Leon's response, as recorded in the statement, including that Leon said that he does speak to the PWS and swear as 'banter' and acknowledged that it was unacceptable.
24. Mr Thomas completed his Investigation report dated 21 January 2021, making a recommendation to go to a disciplinary hearing on the basis that Leon had admitted swearing, the PWS confirmed this and that it was a regular thing and that this was not a professional relationship where the people they support are receiving appropriate care. The Disciplinary Policy includes as an example of gross misconduct, "swearing at or in the vicinity of people we support (potential verbal/emotional abuse)". Mr Thomas passed the report on to the disciplinary hearing manager (Ms Jones), and took no further part in the disciplinary hearing. Ms Jones confirmed in her evidence that she did not speak to Mr Thomas prior to the disciplinary hearing and had only ever seen him once on a group Teams meeting before this.

25. Leon was invited to a disciplinary hearing by letter dated 21 January 2021. The letter set out the allegation of 'swearing at a person we support' and that this was a potential act of gross misconduct and therefore could lead to summary dismissal, it informed him of the right to be accompanied, and enclosed the investigation report and disciplinary policy. Leon accepted in evidence that those matters were all covered in the letter. When asked by Mr Brockley if he understood that he could be accompanied, he said that he 'felt [he] could do it on [his] own but that it did not work out'. We find that Leon was made aware of and understood he had a right to bring someone with him to the hearing. When asked about his understanding of the warning that he could be dismissed, he responded that he 'did not think it would end up like this' and he 'did not think that he would be dismissed'. We find that Leon was made aware of and understood the possibility of dismissal.
26. The meeting took place by Teams on 25 January 2021. Ms Jones chaired the meeting. Leon had difficulty connecting via Teams at first and Ms Jones spoke to him by telephone to talk him through connecting to the Teams meeting. She asked if he wanted to postpone the meeting because of this but he said he wanted to go ahead and 'get it done'.
27. The minutes of the meeting record that Ms Jones read out an introduction including the reason for the meeting. The minutes record that Leon put forward his account of the incident and his explanation that he swore using the words alleged but that it was said in general conversation and was not 'at' the PWS and he repeated this. When asked if he understood it is inappropriate and crossing professional boundaries, he confirmed he understood and agreed it was not professional and was 'out of order'. He suggested that if they asked the PWS he would say it was a misunderstanding, that it was made to seem like it was 'at him' but it was not meant like that. He made a point of adding that he had had no previous warnings and no problems since starting. In his evidence at the tribunal hearing Leon accepted that the written minutes of the disciplinary hearing were correct, he said he could not recall the questions asked, due to it being so long ago, but agreed it was written at the time and was likely correct. We accept the minutes are an accurate record of the meeting and find that Leon understood the nature of and reason for the meeting and that he engaged in the meeting to answer questions and give his own account and explanation in response, including adding that he had had no previous warnings or problems.
28. On 27 January 2021, Ms Jones sent the minutes to Mr Thomas who met with Leon and gave a copy to him to sign. Leon was sent home immediately after that meeting. Leon had arranged to see the PWS that day and sent him a message by text from his personal mobile that day to tell him that he had been sacked. A letter dated 1 February 2021 confirming his dismissal and the reasons for this was sent to Leon by Ms Jones.
29. The letter confirms his dismissal with effect from 27 January 2021 and the reasons. It was noted in the letter that at the disciplinary meeting he had said he was still learning and understands that professional boundaries have been crossed; that having given careful consideration to the investigation statements and discussions during the disciplinary meeting, it was concluded that he did swear at the person he was supporting and that this was a clear breach of the professional boundaries between him and that person; that it was their reasonable belief that an act of gross misconduct had taken place; and that due to the seriousness of the allegation and their duty of care to the vulnerable client group, there was no alternative but to summarily dismiss him. The letter also set out the right of appeal and noted that where appropriate a referral will be made for any concerns of a safeguarding nature.

30. In evidence at the hearing, Ms Jones explained the reasons for her decision. She stated that she felt this was serious and a safeguarding issue, as it evidenced Leon crossing professional boundaries and treating the PWS like a friend and not acting as a support worker to the PWS. Regarding Leon's explanation that the swearing was not 'at' the PWS but in conversation with him, she stated that whether 'at' or 'in the vicinity of', it was gross misconduct and so that was not a mitigating factor and makes no difference because it is not appropriate and crossed a line. She felt that dismissal was the only option open to her as the professional boundaries had broken down and she felt that it was not ok for him to go back and work with the PWS; and that she did not feel that he could learn from it because of the relationship and because the boundaries had broken down. In her witness statement she said that breaking down the boundaries meant they could not trust him not to do it again, he was crossing and breaking professional boundaries, and that swearing is an emotional boundary.
31. When asked in cross examination if there should have been further investigation, she said that Leon had admitted it and the PWS had confirmed it, so she felt there was nothing more to investigate. With regard to speaking again to the PWS, as suggested by Leon and as put to her in cross examination in relation to the PWS's comment in his statement 'I'm a big boy' and that he could look after himself, she said that it was not up to the PWS to protect himself and that "it is up to us to protect him".
32. She confirmed in evidence that she had dealt with other disciplinary cases for swearing over the years and also confirmed that every time there is an allegation of swearing, there will always be a referral on the basis that it is a safeguarding concern. It is not in dispute that a referral was made and we find that this was based on the conduct under investigation.

Referral

33. On 15 February 2021 there was a multi-disciplinary strategy meeting at Neath and Port Talbot council (NPTC). This was as a result of the safeguarding referral by Mr Thomas on 18 January 2021.
34. The bundle included a document prepared by NPTC with a summary of the referral and notes of contact and communications with Accomplish after the referral and before the meeting on 15 February 2021. In evidence Mr Thomas confirmed that he would usually be contacted after making a referral and that he did not receive an email reply following submission of the referral on 19 January 2021 and conceded that he would assume that he received a phone call. The entries on the NPTC summary are in date order and include an entry on 19 January 2021. It records notes of a communication with Mr Thomas, the date and shorthand for the type of communication, which is partially obscured "[blank]/C" and includes the following notes: "pushing for dismissal...." "not happy with his conduct...." "disciplinary interview to take place tomorrow...".
35. On balance we find this was a record of a phone call with Mr Thomas, based on the partial entry type ('[blank]/C' for telephone call), and Mr Thomas's evidence that he did not receive a reply by email and concession that he would assume he received a phone call after making the referral, and that the entry also includes reference to the disciplinary interview that was subsequently conducted by Mr Thomas the following day, as recorded in the NPTC note. Initially in cross examination, Mr Thomas said that he could not comment on the contents of the note as he did not write the summary report. It was put to him that this was evidence that Leon's dismissal was predetermined before Mr Thomas had interviewed Leon and so his dismissal must be because he was disabled. Mr

Thomas denied saying that he was 'pushing for dismissal' and that someone was putting words in his mouth. He also stated that it was not his decision.

36. The strategy meeting took place on 15 February 2021. Mr Thomas was invited to attend the meeting by NPTC and certain actions were agreed by the multi-disciplinary team at the meeting. This was after Leon's dismissal and we make no further findings of fact about this meeting or its outcome as this is not an issue before the Tribunal.
37. In his witness statement Leon states that he was not paid a bonus that was paid to other staff, it was confirmed in submissions at the hearing that this was not a claim brought before the Tribunal and was included as part of the background. This was not a claim or issue before the Tribunal and we make no further finding in this respect.

Wrongful Dismissal

38. For the purposes of the wrongful dismissal claim, the Tribunal has considered its own view. The tribunal finds that as a matter of fact, Leon admitted to swearing and using the words 'fuck off' in conversation with the PWS. This is set out in Accomplish's policies as an example of conduct that is inappropriate and is a breach of professional boundaries, including emotional boundaries and we find it was so on this occasion, with professional boundaries being crossed by Leon. It is also conduct potentially giving rise to safeguarding concerns in relation to the vulnerable adult group that Accomplish supports and did so on this occasion for reasons as we heard in her evidence from Ms Jones, set out in our findings above. Under Accomplish's disciplinary policy this conduct is cited as potential gross misconduct and potential grounds for summary dismissal.

Law

39. Equality Act 2010 s.13 Direct discrimination

(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

40. Equality Act 2010 s.15 Discrimination arising from disability

(1) A person (A) discriminates against a disabled person (B) if—

(a) A treats B unfavourably because of something arising in consequence of B's disability, and

(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

41. Equality Act 2010 s.20 Duty to make adjustments

(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply;

and for those purposes, a person on whom the duty is imposed is referred to as A.

(2) The duty comprises the following three requirements.

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

(4).....

42. Equality Act 2010 s.21 Failure to comply with duty

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

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

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

43. Equality Act 2010 Schedule 8 - Part 3 Limitations on the Duty

Lack of knowledge of disability, etc

s.20

(1) A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know—

(a)

(b) [in any case referred to in Part 2 of this Schedule], that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement.

(2)

44. EHRC Code of practice on employment

Chapter 5 s.15 claim

What if the employer does not know that the person is disabled? (EQA sch 8 para 20)

5.13 If the employer can show that they:

- did not know that the disabled person had the disability in question;
and
- could not reasonably have been expected to know that the disabled person had the disability,

then the unfavourable treatment does not amount to discrimination arising from disability.

5.14 It is not enough for the employer to show that they did not know that the disabled person had the disability. They must also show that they could not reasonably have been expected to know about it. Employers should consider whether a worker has a disability even where one has not been formally disclosed, as, for example, not all workers who meet the definition of disability may think of themselves as a 'disabled person'.

5.15 An employer must do all they can reasonably be expected to do to find out if a worker has a disability. What is reasonable will depend on the circumstances. This is an objective assessment. When making enquiries about disability, employers should consider issues of dignity and privacy and ensure that personal information is dealt with confidentially.

Wrongful Dismissal

45. An employer faced with a repudiatory or fundamental breach by an employee can either affirm the contract and treat it as continuing or accept the repudiation and terminate the contract, which results in immediate or summary dismissal. Summary dismissal, as dismissal without notice or with inadequate notice, is wrongful (meaning that it is a breach by the employer) unless the employer can show that summary dismissal was justified because of the employee's repudiatory breach of contract.
46. In [Briscoe v Lubrizol Ltd 2002 IRLR 607, CA](#), the Court of Appeal approved the test set out in [Neary and anor v Dean of Westminster 1999 IRLR 288](#), Special Commissioner (Westminster Abbey), where Lord Jauncey asserted 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 his employment'. The Court of Appeal in *Briscoe* stressed that the employee's conduct should be viewed objectively, and so an employee can repudiate the contract even without an intention to do so.
47. A court or tribunal must be satisfied, on the balance of probabilities, that there was an actual repudiation of the contract by the employee.

Conclusion

48. In reaching our decision we have taken account of the relevant legislation set out in the Equality Act 2010 at s.13 direct discrimination s.15 discrimination because of something arising as a consequence of disability s.20 the duty to make reasonable adjustments and s. 21 failure to make reasonable adjustments and the relevant Schedules of the Act. Also, we have taken account of the Equality and

Knowledge of disability

49. We felt it logical to first address the claims of disability discrimination.
50. For the claim of direct discrimination, there is a two stage test and we must first consider the issue of whether Leon has proved facts from which if unexplained, the tribunal can consider that discrimination took place or is possible and that his dismissal was because of his disability. To say he was disabled and was treated less favourably is not enough, something more is required and at this stage of the test, Accomplish's explanation for the dismissal is disregarded.

51. For the claims of discrimination because of something arising as a consequence of his disability (s.15) and a failure in the duty to make reasonable adjustments (s.20 and s.21), the issue we must address is whether Accomplish knew or could reasonably be expected to know that Leon was disabled and, if so, in the case of the reasonable adjustments claim, we must also go on to ask if Accomplish knew he was at the specific disadvantages set out in the list of issues above, because of his disability.
52. We looked at all of the evidence before us and based on our findings of fact summarised above, set out our conclusions on these issues below.
53. It was not suggested by Leon and there was no evidence before us that he had disclosed his disability to Accomplish. On his application form in relation to a question on disability, it noted 'N/A' meaning not applicable and Leon accepted that Accomplish would not know that he had a disability from that. We accepted Mr Thomas and Ms Jones' evidence that they did not know at the time that Leon was disabled, that it was not disclosed to them by Leon that he was disabled and that there was no record of his disability held by Accomplish.
54. We considered whether Accomplish could reasonably be expected to know that Leon had a disability based on his performance 'on the job' whereby he said that 'everyone' should know as he always needed help.
55. In considering this, we reviewed his supervision form and there was no record that he raised his disability in supervision. We noted that there was positive feedback about Leon and from Leon on the form and when looking at the notes in relation to areas for improvement, that he did not ask for additional help or support.

56. We carefully considered whether the number of areas for improvement on the form did or ought to have reasonably put Accomplish on notice to consider whether he may have a disability or to make any enquiries about disability and concluded that it did not. In considering this question, we took into account the positive feedback on the form about Leon and also the evidence we heard that Leon started off well in his role, he got on well with the clients, he did his training and that as a first supervision, having areas for improvement was normal for a starter.
57. We also considered whether Leon's engagement in the disciplinary process and disciplinary hearing did or ought to have reasonably put Accomplish on notice to consider or make any enquiries about disability and concluded that it did not. We took account of Leon's evidence that he did not understand the disciplinary meeting and was unable to give his version of events and concluded based on the written documents at the time and his evidence about this at the hearing (as set out in our findings above) that he did understand and engage with the disciplinary investigation and meeting for the reasons that follow.

58. We accepted Ms Jones' evidence that she saw no indication during the meeting that he did not understand or was not able to engage in the meeting and after some difficulties in connecting to the Teams meeting, he was given an opportunity to postpone but wanted to go ahead.
59. We found that the documents record that he gave his account of the incident consistently from his first response to Mr Thomas in the investigation meeting and in the disciplinary meeting, when he explained his version of events several times. At the disciplinary meeting, he also put forward the fact that he had no previous warnings and had no problems since starting, as something to be taken into account when speaking up for himself. He did not raise or disclose during the disciplinary process that he felt in need of more support or help in dealing with the meetings or any reason why this would be the case. He acknowledged that he had a right to be accompanied and that at the time he felt he could do it by himself. We also found that he understood dismissal was a possibility but that he did not think he would be dismissed or that it would 'end up like this'.
60. We considered overall that at the time of the incident Leon had been employed for approximately two months, he had had his first monthly supervision session and was doing well in some areas and needed to improve in others, he had completed the majority of his online training and was considered to have had a normal start. He had not asked for additional support or help. After the incident, he had engaged in the disciplinary process and spoken up for himself in the disciplinary hearing and there was no other evidence before us to suggest that Accomplish ought reasonably to have considered or made further enquiries about disability.

61. In respect of the claim of direct discrimination, on balance we conclude that there were no facts proved from which, if left unexplained, we could conclude that disability discrimination took place or was possible and that disability was the reason for the dismissal. Therefore, the burden of proof does not shift to Accomplish and we do not move to the second stage of the test.
62. Even if that were not the case, and the burden of proof did pass to Accomplish and we were to consider the second stage of the test, we have made positive findings of fact on Accomplish's reason for dismissal and found that it was not because of disability. We accept Ms Jones' evidence and find that it is credible that she made the decision to dismiss Leon for gross misconduct for the reasons set out in the letter of dismissal and given in evidence at the hearing, as set out in our findings above. In summary this was because the conduct was serious and raised a safeguarding issue, it evidenced a crossing and breaking of professional boundaries in treating the PWS as a friend rather than acting as a support worker and the relationship and boundaries having broken down that they could not trust that he would not to do so again.
63. In respect of the claims of discrimination because of something arising as a consequence of his disability (s.15) and a failure in the duty to make reasonable adjustments (s.20 and s.21), on balance we conclude that at the material time Accomplish did not know and could not reasonably be expected to know that Leon had a disability for the reasons outlined above.
64. In light of our conclusions above, the claims of disability discrimination do not succeed and the claims are dismissed.
65. Although the claims go no further, even if we had found to the contrary that Accomplish knew or could reasonably be expected to know that Leon was disabled at the relevant time, on the facts that we have found above, the s.15 'something arising as a consequence of disability' and s.20/21 'reasonable adjustments' claims of disability discrimination would not have succeeded. As the claims fail on

the primary issue of knowledge, we are not following in detail the list of issues but have set out a brief summary of our reasons below.

s.15 Discrimination arising as a consequence of disability

66. In considering whether Leon was subjected to unfavourable treatment, he relies on four points: i) investigating him for gross misconduct; ii) making a finding that he was guilty of gross misconduct; iii) dismissing him for gross misconduct; and iv) making a safeguarding referral to NPTC. It is not in dispute that Leon was investigated and there was a finding of and dismissal for gross misconduct and a referral made to safeguarding by Accomplish. Whether such treatment is unfavourable, in the sense of being a detriment for Leon, it is accepted that dismissal is detrimental and would amount to unfavourable treatment.
67. However, the next issue to address is whether he was treated in that way because of something that arose as a consequence of his disability. In respect of this issue, Leon relies on and states that as a consequence of his disability: i) he struggles to understand complex situations; ii) he may not have understood that using such language was inappropriate; iii) he did not understand that the disciplinary meeting could lead to his dismissal and; iv) he found the disciplinary meeting difficult and was not able to explain his version of events and that his swearing had been taken out of context by GV and there was history between them.
68. On the facts we have outlined we have found that: i) Leon understood and engaged in the disciplinary meeting, which can be described as a complex situation; ii) that he undertook training and was able to understand and identify examples of appropriate and inappropriate behaviours from that training at the hearing and accepted that swearing at a PWS was inappropriate; iii) we found that whilst he did not believe he would be dismissed for swearing, he was informed and understood that that dismissal was a possibility; iv) he was able to participate in the disciplinary meeting and did put across his version of events and his explanation consistently. As such those things he relies on as something that arose as a consequence of his disability are not made out or established on the facts as found.
69. Therefore on the consideration of whether any unfavourable treatment established, was because of something arising as a consequence of his disability, we find it was not. The unfavourable treatment up to and including his dismissal was based on his conduct that crossed professional boundaries and gave rise to safeguarding concerns as set out in the findings of fact and outlined briefly above in paragraph 67 and was not because of something arising as a consequence of his disability on the facts as found.

Failure to make reasonable adjustments

70. In considering the reasonable adjustments claim, even if Accomplish had knowledge of his disability, Leon would have difficulty in establishing there was a failure to make reasonable adjustments given our findings as outlined. The PCPs and disadvantages relied on by Leon in each respect, raise similar factual considerations to those set out above. Even if the PCPs set out in the list of issues and relied on by Leon were established, the next consideration is whether such PCPs put him at a substantial disadvantage, compared to someone who was not disabled, because of his disability.
71. In addressing this issue, the three substantial disadvantages relied on at paragraph 6.3 of the list of issues above, are not made out on the facts found. As already outlined above, we found that he understood the disciplinary meeting and the possibility of dismissal although he did not believe he would be dismissed, that he was able to engage in the process and put forward his defence at the

disciplinary hearing and that he understood the inappropriateness of using swear words with PWS. Therefore the claim fails at that stage.

Wrongful Dismissal

72. In considering the wrongful dismissal claim, this is a matter of fact for the tribunal. It is not in dispute that Leon was dismissed summarily and was not paid for a period of notice.

73. We must consider if there was a breach of contract and if so, whether it was serious enough to justify dismissal.
74. As a matter of fact, set out in our findings above, we have found that Leon admitted to swearing when talking to a person we support, that Accomplish's policies include such conduct as an example of conduct that breaches professional boundaries and in Accomplish's disciplinary policy it is included as an example of potential gross misconduct, also giving rise to safeguarding concerns and did so on this occasion.
75. In the context of Accomplish's service provision and vulnerable client group and its policies, we conclude that by using swear words in conversation with a PWS, as a support worker whose role it is to maintain those boundaries (rather than for the PWS to do so), Leon's conduct in crossing and breaking that boundary is in breach of contract and serious enough to justify dismissal and that Accomplish were entitled to summarily dismiss Leon without notice.

Employment Judge K Hunt

Date 24 October 2023

REASONS SENT TO THE PARTIES ON 25 October 2023

FOR THE TRIBUNAL OFFICE Mr N Roche