



EMPLOYMENT TRIBUNALS

Claimant: Miss G Allen

Respondent: Euro Car Parts Limited

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

Heard at: Southampton **On:** 11, 12, 13 and 14 September 2023

Before: Employment Judge Gray
AND Members Mr Bompas and Mr Knight

Appearances

For the Claimant: Ms D Norman (Executive)

For the Respondent: Ms M Tutin (Counsel)

RESERVED JUDGMENT

It is the unanimous judgment of the Tribunal that the Claimant's complaints of unfair dismissal, discrimination arising from disability, indirect discrimination (disability), breach of the duty to make reasonable adjustments, harassment related to disability, and victimisation (save for allegation 7.2.1 which was dismissed on withdrawal), all fail and are dismissed.

REASONS

1. The Claimant makes complaints of unfair dismissal, discrimination arising from disability, indirect discrimination (disability), breach of the duty to make reasonable adjustments, harassment related to disability, and victimisation.
2. The Respondent resists all complaints.
3. This claim has benefitted from previous case management hearings (13 February 2023 before Employment Judge Cadney and 21 July 2023 before Employment Judge Cuthbert) at which the issues were agreed, and a timetable agreed for this final hearing. This final hearing was listed to determine matters of liability only.
4. The Claimant has Attention Deficit Hyperactivity Disorder (ADHD). Provision was made for her during this hearing to have regular and longer breaks to assist her with her condition and her medication as requested by her representative.
5. The Claimant's oral evidence did not conclude until the end of day two. Respondent's evidence did not conclude until the morning of day four. Time was then given to the parties to finalise their submissions. It was then agreed that these would be delivered in the afternoon of day four. This was done in agreement with the parties by the Respondent submitting written submissions with oral additions, and the Claimant's representative presenting hers orally. As that process did not conclude until late afternoon on day four, Judgment was reserved.
6. For reference at this hearing, we were presented with:
 - a. A hearing documents bundle consisting of 574 pages (to this was added three further pages which were copies of the Claimant's Return from Furlough and Return to Work interview notes). The Claimant's representative did not have a hard copy of the hearing bundle; however, it was possible to let her have the press copy as there were no requirements for that during this hearing.
 - b. An agreed chronology (this was agreed by the Claimant's representative after she had opportunity to consider it while the Tribunal read in the morning of day one, save for the addition of reference to August 2021 and the Claimant being informally warned about PPE (concerning the wearing of masks)).

- c. Reading list and cast list from the Respondent.
- d. Witness statements:
 - i. Claimant (the hearing bundle page references in the Claimant's statement (which refers to exhibits) were confirmed before the Claimant gave her oral evidence).
 - ii. For the Respondent
 - 1. Daniel Crease (DC) – Branch Manager (at the time of Christchurch)
 - 2. Peter Grech (PG) – Operations Manager
 - 3. Graham Howard (GH) – Assistant Manager
 - 4. Kirk Dunford (KD) – Regional Account Manager – who dismissed the Claimant.
 - 5. Paul Joseph (PJ) – Regional Manager – who heard the appeal.
- 7. The issues had been previously agreed and were confirmed with the parties at the start of the hearing. It was confirmed by the Claimant's representative that no reasonable adjustment complaint is made for an auxiliary aid in connection with the company van (in particular the Claimant's suggested adjustment at paragraph 5.5.3 of the agreed list of issues). As to the PCPs the Respondent's Counsel confirmed that it is accepted it had and applied the first PCP, however, the second and third it views as too vague to concede.
- 8. It was noted that the only complaint that appeared to be in time related to the dismissal, as any act or omission which took place before the 26 January 2022 is potentially out of time. The Claimant's representative confirmed that the Claimant's principal argument in respect of time limit issues is that it is asserted as being conduct extending over a period.
- 9. The issues to be determined are set out below along with the further information provided by the parties following the case management hearing before Employment Judge Cuthbert:

1. Unfair dismissal

1.1 What was the reason for dismissal? The Respondent asserts that it was a reason related to conduct, which is a potentially fair reason for dismissal under s.98(2) of the Employment Rights Act 1996.

1.2 Did the Respondent act fairly and reasonably in the circumstances within the meaning of s98(4) ERA in treating the reason as a sufficient reason for dismissing the Claimant. In particular:

1.2.1 Did the Respondent have a genuine belief that the Claimant was guilty of the misconduct alleged?

1.2.2 If so, did the Respondent have reasonable grounds for this belief?

1.2.3 Had the Respondent followed a fair procedure, including a reasonable investigation? The Claimant says the investigation was unfair in particular because:

1.2.3.1 The Respondent failed to take sufficient account of the Claimant's asserted disability and its effects upon her.

1.2.3.2 The Respondent failed to take into account that it not acted upon previous requests by the Claimant for adjustments to her working hours.

1.3 Was the decision to dismiss a fair sanction, that is, was it within the range of reasonable responses open to a reasonable employer when faced with these facts?

1.4 If there were any procedural failings which rendered the Claimant's dismissal unfair, would the Claimant still have been dismissed had a fair procedure been followed and, if so, when?

1.5 If the dismissal was unfair, did the Claimant contribute to the dismissal by culpable conduct and if so, to what extent? This requires the Respondent to prove, on the balance of probabilities, that the Claimant actually committed the misconduct alleged.

2. Disability

2.1 Did the Claimant have a disability as defined in section 6 of the Equality Act 2010 at the time of the events the claim is about, namely between around May 2020 and 10 February 2022? The Tribunal will decide:

2.1.1 Whether the Claimant had a physical or mental impairment. She relies on a diagnosis of ADHD.

2.1.2 Did it have a substantial adverse effect on the Claimant's ability to carry out day-to-day activities?

2.1.3 If not, did the Claimant have medical treatment, including medication, or take other measures to treat or correct the impairment?

2.1.4 Would the impairment have had a substantial adverse effect on her ability to carry out day-to-day activities without the treatment or other measures?

2.1.5 Were the effects of the impairment long-term? The Tribunal will decide:

2.1.5.1 did they last at least 12 months, or were they likely to last at least 12 months?

2.1.5.2 if not, were they likely to recur?

3. Discrimination arising from disability (Equality Act 2010 section 15)

3.1 Did the Respondent treat the Claimant unfavourably by:

3.1.1 Refusing changes which the Claimant requested to her working hours (including changes to her start times). The Claimant says that she requested such changes in weekly meetings with various managers: Peter Grech, Daniel Crease, Graham Howard and Peter Jackson. The requests were made from around May 2020 onwards.

3.1.2 Refusing changes requested by the Claimant to her van which she says was defective and so impacted adversely on her performance. She says that these changes were requested in the same weekly meetings as the previous paragraph, from around May 2020. [The Claimant is to clarify dates on which she was provided with a new/replacement van within 7 days of the date of the present hearing]. It was understood and clarified that the previous references by the Claimant in her pleadings to seeking "modifications to her working environment" related in specific terms to her working hours and to the provision of a van.

3.1.3 Threatening the Claimant with dismissal. The Claimant says that these threats were made at weekly meetings, due to alleged performance issues, by Peter Grech, Daniel Crease, Graham Howard and Peter Jackson. She says that they occurred from around the Summer of 2020 until the end of her employment.

3.1.4 Considering and/or taking disciplinary action against the claimant on the following bases, each of which the Claimant says arose from the effects of her disability and/or changes to her ADHD medication:

3.1.4.1 Her inability to meet a driving score target of 85%.

3.1.4.2 That she shouted at and swore at colleagues on occasions.

3.1.4.3 That she refused a management request to drive a van.

3.1.4.4 That she failed to follow process, in respect of use of PPE and in carrying more than one disc brake at a time.

3.1.4.5 That she was verbally abusive to a member of the public.

3.1.4.6 That she was late for work on a number of occasions.

3.1.5 Terminating the Claimant's employment.

3.2 Did the following things arise in consequence of the Claimant's disability? The Claimant's case is that the following things arise from her disability, and/or from changes in her ADHD medication:

3.2.1 She struggled at times to carry out her duties at work: she struggled to focus, was easily distracted, had issues with timekeeping, could be hyper-focused, had an inability to see things laterally, had difficulties with organisation and time management, she could be forgetful, she experienced impulsivity and emotional disturbance. See the Claimant's disability impact statement.

3.2.2 She experienced behavioural changes and difficulties at work, in terms of her interactions with others, and mood swings and panic attacks.

3.3 Was the unfavourable treatment because of any of those things?

3.4 Was the treatment a proportionate means of achieving a legitimate aim? The Respondent says that its aims were:

3.4.1 [to be clarified within 7 days].

3.5 The Tribunal will decide in particular:

3.5.1 Was the treatment an appropriate and reasonably necessary way to achieve those aims?

3.5.2 Could something less discriminatory have been done instead?

3.5.3 How should the needs of the Claimant and the Respondent be balanced?

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

4. Indirect discrimination (Equality Act 2010 s. 19)

4.1 A "PCP" is a provision, criterion or practice. Did the Respondent have apply the following PCPs to the Claimant:

4.1.1 Working hours arrangements of starting at 8am and finishing at 5.30pm

4.1.2 A process for dealing with alleged misconduct.

4.1.3 A process for dealing with alleged poor performance.

4.2 Did the Respondent apply the PCPs to persons with whom the Claimant did not share the same protected characteristic (namely disability - ADHD), or would it have done so?

4.3 Did the PCPs put persons with whom the Claimant shared the characteristic (ADHD), at a particular disadvantage when compared with persons with whom she did not share the characteristic, due to the effects of her disability upon her (see para 3.2 above for details)?

4.4 Were the PCPs a proportionate means of achieving a legitimate aim? The Respondent says that its aims were:

4.4.1 [to be clarified within 7 days]

4.5 The Tribunal will decide in particular:

4.5.1 Were the PCPs an appropriate and reasonably necessary way to achieve those aims?

4.5.2 Could something less discriminatory have been done instead?

4.5.3 How should the needs of the Claimant and the Respondent be balanced?

5. Reasonable Adjustments (Equality Act 2010 ss. 20 & 21)

5.1 Did the Respondent have the requisite knowledge of the Claimant's alleged disability and its effects upon her? The Respondent accepts that it knew the Claimant had the condition of ADHD during her employment but denies it had

awareness that this amounted to a disability or of the alleged effects of the same upon the Claimant.

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

5.2.1 Working hours arrangements of starting at 8am and finishing at 5.30pm?

5.2.2 A process for dealing with alleged misconduct?

5.2.3 A process for dealing with alleged poor performance?

5.3 Did the PCPs put the Claimant at a substantial disadvantage compared to someone without the Claimant's disability, in that she faced a heightened risk of disciplinary action and dismissal due to the effects of her disability and/or changes to her ADHD medication upon her (see para 3.2), including:

5.3.1 Her inability to meet a driving score target of 85%.

5.3.2 That she shouted at and swore at colleagues on occasions.

5.3.3 That she refused a management request to drive a van.

5.3.4 That she failed to follow process, in respect of use of PPE and in carrying more than one disc brake at a time.

5.3.5 That she was verbally abusive to a member of the public.

5.3.6 That she was late for work on a number of occasions.

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

5.5 What steps (the 'adjustments') could have been taken to avoid the disadvantage? The Claimant suggests:

5.5.1 She should have been given flexible working hours (particularly around start times).

5.5.2 She should have been allowed to swap shifts with colleagues when she requested to do so.

5.5.3 She should have been provided with a newer/better van to assist her to meet her driving performance targets.

5.5.4 The Respondent should have adopted a more flexible approach to how it dealt with conduct issues and more allowances should have been made for the Claimant's disability.

5.5.5 The Respondent should have adopted a more flexible approach to how it dealt with performance issues and more allowances should have been made for the Claimant's disability.

5.6 Was it reasonable for the Respondent to have to take those steps and by when?

5.7 Did the Respondent fail to take those steps?

6. Harassment related to disability (Equality Act 2010 s. 26)

6.1 Did the Respondent do the following things:

6.1.1 [The Claimant relies upon the matters set out above at paras 3.1.1 to 3.1.5 as being acts of alleged harassment].

6.2 If so, was that unwanted conduct?

6.3 Did it relate to the Claimant's protected characteristic, namely disability?

6.4 Did the conduct have the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

6.5 If not, did it have that effect? The Tribunal will take into account the Claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

7. Victimisation (Equality Act 2010 s. 27)

7.1 Did the Claimant do a protected act as follows, namely raising a grievance on 20 September 2021 about matters which could amount to a breach of the Equality Act 2010? The Respondent disputes that the content of the grievance of that date amounts to a protected act.

7.2 Did the Respondent do the following things:

7.2.1 [Claimant to clarify within 7 days if and how the provision of a van is said to amount to victimisation] – [***This was withdrawn by the Claimant during the final hearing***]

7.2.2 [Claimant to clarify within 7 days the factual basis of any claim that she experienced an escalation in hostility at weekly meetings with Peter Grech and Daniel Crease after she raised her grievance].

7.2.3 Terminate the Claimant's employment (this is accepted).

7.3 By doing so, did the Respondent subject the Claimant to detriment?

7.4 If so, was it because the Claimant had done the protected act?

8. Time limits - discrimination

8.1 The claim form was presented on 16 June 2022. The Claimant commenced the Early Conciliation process with ACAS on 25 April 2022 (Day A). The Early Conciliation Certificate was issued on 6 June 2022 (Day B). Accordingly, any act or omission which took place before 26 January 2022 (which allows for any extension under the Early Conciliation provisions) is potentially out of time so that the Tribunal may not have jurisdiction to hear that complaint.

8.2 Were the discrimination and victimisation complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:

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

8.2.2 If not, was there conduct extending over a period?

8.2.3 If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?

8.2.4 If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:

8.2.4.1 Why were the complaints not made to the Tribunal in time?

8.2.4.2 In any event, is it just and equitable in all the circumstances to extend time?

Further information from the Respondent

Discrimination arising from a Disability (3)

In respect of each of the alleged acts of unfavourable treatment relied upon by the Claimant (paraphrased below), the Respondent responds as follows:

1. Refusing changes to working hours (3.1.1). The Respondent contends that any such treatment would be a proportionate means of achieving a legitimate aim, namely the effective allocation of human resources and business efficacy.

2. Refusing changes to the Claimants van (3.1.2). The Respondent contends that any such treatment would be a proportionate means of achieving a legitimate aim, namely the effective allocation of company resources and equipment.

3. Threatening the Claimant with dismissal (3.1.3). The Respondent contends that any such treatment would be a proportionate means of achieving a legitimate aim, namely the effective management of staff conduct and/or performance.

4. Considering/taking disciplinary action against the Claimant (3.1.4). The Respondent contends that any such treatment would be a proportionate means of achieving a legitimate aim, namely the effective management of staff conduct and/or performance.

5. Terminating the Claimant's employment (3.1.5). The Respondent contends that any such treatment would be a proportionate means of achieving a legitimate aim, namely the effective management of staff conduct and/or performance.

Indirect Discrimination (4)

In respect of each of the PCPs relied upon by the Claimant, the Respondent responds as follows:

1. Working hours arrangements of starting at 8am and finishing at 5:30pm (4.1.1). The Respondent contends that any such treatment would be a proportionate means of achieving a legitimate aim, namely the effective allocation of human resources and business efficacy.

2. A process for dealing with alleged misconduct (4.1.2). The Respondent contends that any such treatment would be a proportionate means of achieving a legitimate aim, namely the effective management of staff conduct.

3. A process for dealing with alleged poor performance (4.1.3). The Respondent contends that any such treatment would be a proportionate means of achieving a legitimate aim, namely the effective management of staff performance.

Further information from the Claimant

Reply to points 4.1.1 - 4.1.3

4.1.1 The date(s) or approximate on which she was provided with a new / alternative work van (see Issue 3.1.2).

Reply.

After making informal complaints to her managers about the vehicle which she was assigned, the Claimant received her new van in or around June 2020, however she was later forced to change into a older unsuitable van , (which was not fit for purpose), on Saturday 11th September 2021, by her Manager Peter Grech, following a series of incidents of bullying, which made the Claimant feel victimised, as set out in detail within her grievance filed on the 23rd September 2021.

4.1.2 Clarification as to whether, and if so on what factual basis, the Claimant asserts that she was not provided with a new or replacement van as a result of her grievance (see Issue 7.2.1).

Reply.

The Claimant was initially provided with a new van after making a series of informal complaints about the defects on her original van Around June 2020. It is alleged that after the Claimant made a number of informal requests to change her working patterns, (which were, it is alleged unreasonably refused); The Respondents began to victimise and target her with spurious disciplinary's, without any justifiable reason , she also received less favourable treatment from the Respondent which included on the 11th September 2021, returning the Claimant to the unsuitable van with the defects, which the Respondent had previously swapped due to its defectiveness and unsuitability. A formal grievance was then filed on the 23rd September 2021, accordingly.

[This allegation was withdrawn by the Claimant during the final hearing]

4.1.3 Clarification as to how (factual details of what was said or done on each occasion), when and by whom, the Claimant asserts that she was treated in a more hostile manner in weekly meetings following the raising of her grievance (see Issue 7.2.2).

Reply

The Claimant's relationship with the Respondent slowly began to break down over a period of time following her various complaints and or requests for modifications to her working patterns, due to the adverse effects of her disability and or for changes to her working equipment in

the form of vehicle exchanges. The Claimant rely's upon the detailed facts as set out in her Grievance - dated 23rd September 2021 - detailing the ensuing and continuing unfair use of the disciplinary process enacted against her by the Respondent, (in particular Peter Grech); This conduct ultimately resulted in the Claimant's unfair dismissal from the company in February 2022.

THE FACTS

10. We found the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after considering the factual and legal submissions made by and on behalf of the respective parties.
11. We had the benefit of an agreed factual chronology, save for one amendment by the Claimant referring to, in August 2021 being informally warned about PPE (concerning the wearing of masks).
12. The Claimant confirmed during cross examination that everything she wanted the Tribunal to consider about her claim was in her witness statement and the documents she wanted to refer the Tribunal to had been referred to by her once the three additional pages were added to the hearing bundle (pages 575 to 577).
13. The issues of whether the Claimant is a disabled person or not, and knowledge about it by the Respondent remain in dispute between the parties.
14. We therefore need to determine whether the Claimant has a disability as defined in section 6 of the Equality Act 2010 at the time of the events the claim is about, namely between around May 2020 and 10 February 2022.
15. As to the physical or mental impairment the Claimant relies upon a diagnosis of Attention Deficit Hyperactivity Disorder (ADHD).
16. The Claimant's date of birth is 11 May 1999.
17. The material dates of alleged disability discrimination in this claim are May 2020 to February 2022.
18. The Claimant would have been around 21 to 22 years old in this period.
19. The ADHD diagnosis is not in dispute. In her disability impact statement (page 156) the Claimant says she was first diagnosed with ADHD as a teenager, the condition has persisted into adulthood.
20. We therefore need to consider the other matters:

- a. Did ADHD have a substantial adverse effect on the Claimant's ability to carry out day-to-day activities?
 - b. If not, did the Claimant have medical treatment, including medication, or take other measures to treat or correct ADHD?
 - c. Would ADHD have had a substantial adverse effect on her ability to carry out day-to-day activities without the treatment or other measures?
 - d. Were the effects of ADHD long-term? The Tribunal will decide:
 - i. did they last at least 12 months, or were they likely to last at least 12 months?
 - ii. if not, were they likely to recur?
21. The Claimant sets out in paragraph 2 of her witness statement how ADHD impacts on her with symptoms including, being easily distracted finding it hard to listen to others in conversation, overlooking details, not completing tasks or projects, being hyper focused, poor time management, disorganisation, forgetfulness, impulsiveness, anxiety and fatigue. She says she has been battling with her ADHD since adolescence but controlled with the help of prescription medications.
22. In her oral evidence the Claimant also confirmed that she does suffer from all the examples set out in her disability impact statement, albeit that the statement refers to them as generally being things people with ADHD may suffer from.
23. The Claimant confirmed orally that her ADHD affects everyday life, being helped by her medication. To cope with a lack of focus she will listen to music, take herself out of a situation and have a cigarette. She doesn't consider she has a good coping strategy for managing hyperfocus. As to disorganisation she explained that she would try to get things organised the night before. As to forgetfulness she would rely upon her Nan as being like her diary. To cope with excess energy, she will tap her finger, tap or rub things together. To manage relationships and talking with people she will try to wait until they finish and try to give social cues to let people know she wants to talk.
24. A letter from her GP dated 1 February 2022 supports what the Claimant says (page 161). It records that the Claimant ... "... has a diagnosis of ADHD for which she is on regular medication and under review by the Community Mental Health Team. Symptoms of her ADHD can include difficulty concentrating and organising herself as well as struggling to maintain the direction of a conversation. These difficulties sometimes lead to agitation. She is currently

experiencing an exacerbation of her symptoms for which I have asked the Community Mental Health Team to review her earlier than planned.”.

25. We were also presented with a copy of an incomplete medical letter dated stamped the 12 July 2021 (page 164) within which it states ... “In our meeting today Georgia was very clear that the reduction in dose of Elvanse has led to significantly poorer control of ADHD symptoms which affect her daily living and performance at work.”. About this letter the Claimant says she gave a copy of it to DC around that time. DC was asked about this in his oral evidence, and he confirmed he could not recall seeing the letter before these proceedings nor being given a copy by the Claimant. The Claimant does not say in her witness statement that she gave a copy of this specific letter to DC at that specific time. There is also no contemporaneous documentation presented to us that support that it was. We therefore accept what DC says on this matter.
26. We also note the Claimant’s Employment Medical Questionnaire (page 174 to 175) dated 10 January 2019 (although it is apparent this is a typo and should be dated 10 January 2020, as the Claimant did not start until January 2020 and the form refers to the Claimant having a medical in November 2019). This document refers to ADHD, and the medication and a doctor review in November 2019. It also though does confirm that the Claimant does not think she has a recognised disability or impairment at that time, nor that she needs any special arrangements. In oral evidence the Claimant explained that she did not want to view herself as disabled at that time and it was a recent diagnosis.
27. The other health related documents we were presented that are contemporaneous to the Claimant’s period of employment with the Respondent are a note of a wellbeing discussion dated 19 March 2021 (pages 210 to 211). In that the Claimant is recorded as saying that she is feeling good that day, that she has been on a set medication for ADHD for a year, but recently had to adjust the dose due to heart. Also, that she gets agitated over things and its hard to move past. It records that she finds cigarettes, music, coffee and analysing the situation helpful. It records that she is with the GP at the moment due to medication adjustments and heart racing. In response to the enquiry ... “Is there anything that you think we could do to help to support you with your current issues/concerns?” the form records the Claimant saying ... “no just talking is helpful”.
28. There are notes from a Return from Furlough meeting on the 8 March 2021 between the Claimant and DC (pages 575 to 576). The form records the Claimant explaining that she has had her ADHD medication adjusted and she is just wondering how it will be during work. There is more handwritten details about the change in the Claimant’s ADHD medication on the second page of the note (page 576). It records the Claimant ... “... has spoken to me regarding concerns adjusting on a lower dosage but doctors have said she can return to work and is aware to speak to BM [Branch Manager] if needs to regarding this.”.

29. We also have notes from a Return to Work Interview on the 3 July 2021 which records the Claimant is not in the correct mind frame / head space. The employee conflict issue that is being investigated is stressing, but she chilled yesterday having talked to her nan about everything and she is fine to come back to work today.”.
30. The Respondent says that it disputes disability because it does not have evidence of substantial adverse effects particular to the Claimant, nor whether the condition is long term.
31. As a matter of fact, we find that the Claimant had ADHD at the material times, it is long term, being since adolescence and is ongoing, and the Claimant is adversely impacted when her medication is not effective.
32. The question of what the Respondent knew about this disability and when we consider as part of our fact find as set out below. Noting here that the Claimant’s Employment Medical Questionnaire (pages 174 to 175) at the start of her employment does confirm that the Claimant does not think she has a recognised disability or impairment at that time, nor that she needs any special arrangements.
33. It is on the 20 January 2020 that the Claimant commenced employment with the Respondent at its Christchurch, Dorset branch (pages 172 to 188). The employment contract confirms she is employed as a Delivery Driver (page 178).
34. DC addresses what he knew about the Claimant’s ADHD in paragraphs 9 and 10 of his witness statement. We note from paragraph 9 ... “When I joined the Christchurch branch, I was completely unaware that the Claimant has ADHD. New Branch Managers are not informed by HR of any medical conditions of the staff at the branch, so it was not until I had a conversation with the Claimant at some point in the months that followed me joining that she informed me of this.”.
35. In cross examination DC confirmed that the conversation with the Claimant he refers to in paragraph 9 of his witness statement was some 2 to 3 months after he joined the Christchurch branch in March 2020 (so around May/June 2020, although DC later suggested in his oral evidence that it may be June/July 2020).
36. DC was asked to confirm what he recalled the Claimant telling him and he stated that he was aware of an incident over additional duties and a door slamming, which led to him discussing with the Claimant if she needs to take herself away from a situation, calm down and have a break. DC confirmed in his oral evidence that he understood from his conversation with the Claimant that she had to step away to calm down due to behavioural issues and that is from ADHD. It would appear this is the acknowledgement of the Claimant being able to take smoking breaks to help her calm down.

37. This is consistent with what the Claimant says in her grievance document and in paragraphs 13, 14 and 15 of her witness statement in relation to the need for smoking breaks ... (paragraph 13) ... "...one of the coping mechanisms to deal with the stresses that occurs whilst working was to go outside take 10 minutes to reset and smoke a cigarette ready for the next run ...".
38. Chronologically, to then consider the first allegation of discrimination arising from disability. The Claimant asserts in the agreed list of issues that the Respondent treated her unfavourably by (3.1.1) refusing changes which the Claimant requested to her working hours (including changes to her start times). The Claimant says that she requested such changes in weekly meetings with various managers: Peter Grech, Daniel Crease, Graham Howard and Peter Jackson. The requests were made from around May 2020 onwards.
39. We have considered what the Claimant says about this matter in her witness statement in paragraph 4 ... "... I requested help from the company from my manager's Daniel Crease, and also Peter Grech in order to change my working pattern. However I was advised by Daniel Crease to check with Peter Grech about changing my unsuitable shifts, which I was struggling with. However the requests were always refused."
40. As to requests for changes to working hours, in cross examination the Claimant confirmed that she hadn't asked PG for changes before May 2020 (the date as per the list of issues) because he did not start until June 2021. The Claimant also confirmed that the request to change working patterns was after March 2021 after the change in her medications.
41. Also, from paragraph 5 of the Claimant's witness statement ... "Despite repeatedly requesting the above changes at weekly meetings, and other work colleagues offering to change work shifts with mine to assist me. My managers continued to refuse my reasonable request for adjustments to my working environment. These adjustments were needed in order for me to cope with the impact on my health and my ability to work normally, following the changes which were made to my medication, as confirmed by doctors letters; as shown in Exhibit ET2, This evidence was also disclosed to my managers at the respondent firm, at the material time. However despite this my manager Daniel Crease, and his senior manager Peter Grech, continued to refuse my reasonable requests, and even told me that they did not believe I was even disabled. It was clear to me that they did not understand my ADHD disability, despite taking me on knowing that I had the condition."
42. The Claimant confirmed in her oral evidence that the allegation she raises against PG and DC in paragraph 5, was only against PG and that he had said to her on the 3 August 2021 that he did not believe she had ADHD. No reference

to this particular assertion is made in the Claimant's grievance documents though.

43. Also, from paragraph 7 of the Claimant's witness statement ... "... as I was still suffering from the affects of the changes to my ADHD medications, I continued to make requests for changes to my working patterns, on a weekly basis, in the one to one meetings with my managers, Daniel Crease and Peter Grech, however these requests were always refused."

44. The Claimant provides no specific details of when and what was asked for and it is disputed by DC (see paragraphs 11 and 12) and GH (paragraphs 14 and 16). Also, PG does not start at the branch until 19 June 2021 (paragraph 10).

45. DC acknowledges being asked about hour changes by the Claimant on two occasions as set out in paragraphs 52 and 66 of his witness statement:

"52. During one of my meetings with the Claimant regarding her timekeeping, the date of which I cannot recall, she had suggested that she move from the early shift (8am-5pm) to the later shift (9am-6pm) to see whether that would make a difference to her timekeeping. This would have to be subject to a Driver on the late shift agreeing to move to the early shift, but when I asked, no one was willing to swap shifts with the Claimant. One Driver explained to me that he and other Drivers had been approached by the Claimant regarding swapping shifts but they did not want to do this."

"66. During the meeting on 6 October 2021 regarding the Claimant's lateness, she suggested moving her shift pattern from 8am to 8:15am. I considered this but it was not possible as there is a rota in place in order to meet customer needs where vans leave the branch at 7:30am, 8:00am, 8:30am and 9:00am. This allows a good delivery flow to customers. 8:15am was not a required shift and would mean that there was not as consistent of a flow out of the branch."

46. As noted in paragraph 5 of the Claimant's witness statement the medical evidence from the Claimant does show changes to the Claimant's medication impacting on her condition (page 164). There is also a record of the Respondent being aware of the change of medication (pages 210 to 211). What the documents and evidence of the Claimant do not show though is what the working ability issues were or what was needed to assist with that, save for the Claimant saying just talking is helpful (page 211). The GP letter dated 1 February 2022 also does not make that clear (page 161).

47. We also note of the 27 periods of lateness referred to by DC in his witness statement, 20 record the Claimant giving the reason as traffic, then four as she missed her alarm and two as waking up late and one as taking too long to get ready.

48. From the evidence presented to us we find that the Respondent at the relevant time of the requests did not know of what substantial disadvantage impacted on the Claimant. We accept the reasons given by DC as to why the Claimant's requests were not agreed to at that time, being they could not be accommodated.
49. On the 11 June 2020 the Respondent received a complaint that the Claimant had shouted at and sworn at a colleague on 9 June 2020. No formal action is taken (pages 229 to 230).
50. On the 30 June 2020 the Claimant's probation period was extended due to her driving score (pages 204 to 205).
51. On the 30 September 2020 the Claimant's probation period was passed, although she was placed on a performance improvement plan in relation to her driving score (pages 206 to 207).
52. In the agreed chronology the Respondent says it was on the 23 October 2020 that the Claimant was provided a new company van. We note the Claimant's evidence is the "defective" van issue was resolved for her in June 2020.
53. This relates to the second allegation (3.1.2) refusing changes requested by the Claimant to her van which she says was defective and so impacted adversely on her performance. She says that these changes were requested in the same weekly meetings as the previous allegation, from around May 2020. The Claimant clarifies in the further information she provides for the agreed issues that ... "After making informal complaints to her managers about the vehicle which she was assigned, the Claimant received her new van in or around June 2020, however she was later forced to change into an older unsuitable van, (which was not fit for purpose), on Saturday 11th September 2021, by her Manager Peter Grech, following a series of incidents of bullying, which made the Claimant feel victimised, as set out in detail within her grievance filed on the 23rd September 2021."
54. The Claimant refers to the van being an issue up to June 2020 and why, in paragraphs 6 and 7 of her witness statement. We note in paragraph 6 the Claimant says ... "I also had problems with the first motor vehicle which I had been driving, from January 2020 to June 2020, the vehicle was dangerous and not fit to be driven, with fumes coming back inside the vehicle triggering my asthma symptoms. These problems with the vehicle, together with my ADHD, caused me extreme panic and anxiety which was pointed out and explained to my manager Daniel Crease, as my driving scores and performance was being affected detrimentally."
55. DC addresses the van issue on paragraphs 28 and 29 of his witness statement:

“28. The branch received a delivery of some new vans on 23 October 2020. The Claimant had been driving a blue van, but in an attempt to improve her driving score she was provided with one of the newer white vans. I am not entirely sure how a new van would assist, but it was worth trying.

29. This was not my decision as the Driving Controller and Operations Manager would determine who received the new vans, but I had believed that new vans went to those who were currently driving the oldest vans or those who had the best driving scores by way of recognition of this. As such, the Claimant receiving a new van was out of the ordinary and clearly showed that the branch was trying to help her to improve her score.”

56. The Claimant in her witness statement does not say that she asked for the van to be changed and it was refused. She records it being changed in June 2020. This resolves that issue so far as the Claimant is concerned at that point. We also note from the grievance the Claimant raises dated 20 September 2021, (pages 308 to 309) the Claimant expressly complains of matters since 3 August 2021, and not before.

57. We have not been presented evidence to support that the Respondent refused to change the Claimant’s van prior to June 2020. What the Respondent has asserted, and we accept, is that the Claimant was treated positively from October 2020 by being given a new van in circumstances when she would not normally have qualified for one.

58. PG in paragraphs 37 to 45 of his witness statement sets out his recollection of the van incident on the 11 September 2021. PG explains why there was a shortage of vans that day, due to break downs affecting two vans and one of the other vans not being on site. The van resource is then allocated based on start times. This leaves a blue van for the Claimant, as it was understood the Claimant would not want to drive the large transporter.

59. (Paragraph 40 of PG’s statement) ... “When the Claimant arrived to start her shift, she asked where her van was and I explained that she would have to use an alternative van that day, to which she responded ‘no fucking way I’ m driving a fucking blue van’. I explained about the broken-down vans and how I had ensured she did not have to drive the large panel van but she kept responding ‘no. no. I don’t drive blue vans’.”.

60. PG describes the maintained refusal to drive the blue van by the Claimant and then it being resolved when he says he asked another employee to swap vans with the Claimant. PG notes that contrary to the Claimant’s assertions, her driving scores had not been improved by not using a blue van.

61. PG says that he raises the Claimant’s conduct with DC so that DC could then investigate.

62. Although a disciplinary process was then recommended by DC following his investigation, it did not happen because it timed out after the grievance against PG had concluded.
63. DC refers to his involvement in this matter in paragraphs 48 and 49 of his statement ... "48. I held an investigation meeting with the Claimant on 14 September 2021 as she had refused to follow a reasonable management instruction (pages 291-304 of the Bundle). The allegation was that the Claimant had refused to drive a specific van as the van she usually drove was being used by another Driver, stating 'no fucking way' to Peter Grech. Whilst the Claimant accepted that she had refused to drive the blue van, she denied swearing. I felt that this matter should proceed to a formal disciplinary meeting." ... "49. The Claimant did not tell me that her refusal to drive a different van was as a result of her ADHD or a change to her medication."
64. What the Claimant tells DC is recorded in the investigation notes (page 293):
... I said why are you putting me in the a blue van when few days b4 in a meeting about D/School I stated the only thing helped me was being in white van. In blue van it was zero. In same meeting he asked if anything Co could do to help and I said no. I need to keep it as is so I said no I am not driving a blue van as white van helps me. I don't want to go in blue van as worrying more about my job for the future & so I refused."
65. And page 296: The Claimant is asked by DC ... "are there any other reasons other than already discussed why you didn't want to drive a blue van?". The Claimant replies ... "because I didn't feel safe in a blue van."
66. The Claimant has explained in her witness evidence (paragraph 6) why she did not feel safe in a blue van ... "... the vehicle was dangerous and not fit to be driven, with fumes coming back inside the vehicle triggering my asthma symptoms. These problems with the vehicle, together with my ADHD, caused me extreme panic and anxiety ...", which the Claimant then says that her ... "driving scores and performance was being affected detrimentally". The Claimant does not communicate this to the Respondent at the time.
67. The intention was to invite the Claimant to a disciplinary, but that never happened. The outcome of it is therefore unknown.
68. The refusal by the Claimant is not in dispute, the reasonableness of the request and the reasonableness of the refusal is. The swearing is in dispute. The Claimant has not expressed in response at the investigation that her ADHD was a factor or refer expressly to a connection as a result of things arising because of her ADHD. The Claimant denies swearing and refers to not feeling safe in the blue van.

69. The Claimant also does not identify her ADHD nor refer expressly to a connection as a result of things arising because of her ADHD in her grievance against PG when referring to matters relating to this van incident. We note from page 338 of the bundle ... "I politely told Peter that I wouldn't be driving the blue van because I do not feel safe in a blue van after being in one when I first started, there was a problem with the DPF where it constantly smoked and the smoke would come into the drivers cabin of the van for months which resulted in me having a cough. Also for the reason of wanting to keep my job, as I have just received a final warning for my drivers score and didn't want to ruin the efforts I had been making to achieve a good drivers score."
70. What is suggested by the Claimant here is smoke making her cough.
71. We therefore have the Claimant's refusal, a request for the matter to be investigated, it being investigated with the recommendation it proceed to a disciplinary, which did not happen.
72. The Claimant's refusal is the cause for what happens. The Claimant says she refuses because she did not feel safe in the blue van and she says she did not feel safe because problems with the vehicle, together with her ADHD, caused her extreme panic and anxiety, detrimentally affecting her driving scores and performance. This is not something she communicates to the Respondent at that time.
73. The circumstances of the 11 September 2021 are not as the Claimant asserts in her further information. Considering paragraph 17 of the Claimant's witness statement and paragraph 43 of PG's witness statement, a request is made for the Claimant to use an older van as the Claimant's usual van is not available that day. The Claimant refuses to use the older van and an alternative is then accommodated for her on that day.
74. Referring to the agreed chronology it is acknowledged that on the 18 May 2021 the Claimant received an informal warning regarding her driving score (page 218).
75. On the 28 May 2021 the Respondent received a complaint that the Claimant had shouted at and sworn at a colleague (page 229).
76. On the 17 June 2021 the Claimant received an informal warning regarding her actions towards her colleague (page 231).
77. On the 1 July 2021 the Claimant attended an investigation meeting relating to her poor driving score. The outcome was that she should be invited to a formal disciplinary (pages 232 to 239).

78. On the 6 July 2021 and the 8 July 2021, the Claimant was late for work (pages 255 to 256 and pages 257 to 258).
79. On the 13 July 2021 Claimant attended a disciplinary meeting with Glen Cable relating to her behaviour/bad language and her poor driving score. The outcome was that she would receive a final written warning for conduct (pages 259 to 278).
80. On the following dates the Claimant was late for work
- a. 16 July 2021 (pages 279 to 280)
 - b. 12 August 2021 (pages 281 to 282)
 - c. 2 September 2021 (pages 283 to 284)
 - d. 9 September 2021 (pages 287 to 288)
 - e. 14 September 2021 (pages 289 to 290)
81. On the 14 September 2021 the Claimant attended an investigation meeting relating to her refusal to follow reasonable management instructions. The outcome was that she should be invited to a formal disciplinary (pages 291 to 304).
82. On the 14 September 2021 the Claimant also attended an informal discussion with DC regarding persistent lateness (page 305).
83. On the 20 September 2021 the Claimant raised a grievance (pages 306 to 309).
84. The Claimant's written grievance (pages 308 to 309) refers to Bullying, Victimization and Harassment. It does not refer to the Equality Act, disability, or ADHD. Reference is made to ADHD in the expanded grievance statement the Claimant submits at the grievance hearing (pages 336 and 337).
85. Although the issue as to the asserted protected act focuses on the specific letter dated 20 September 2021, it is clear (as the Claimant confirmed in her oral evidence) that her expanded statement at pages 335 to 339 that she presents at the grievance hearing would form part of it.
86. Within the statement document the Claimant writes ... "I had to explain to Peter in depth the struggles of dealing with stress, anxiety and day to day emotions whilst having ADHD. In response to telling Peter this he brought up medication that I take and 'problems' that I am dealing with. This made me feel very victimised, upset and bullied." (page 337).
87. On the 23 September 2021 the Claimant was invited to a grievance meeting (page 310).
88. On the following dates the Claimant was late for work:

- a. 24 September 2021 (pages 317 to 318)
 - b. 29 September 2021 (pages 319 to 320)
 - c. 30 September 2021 (pages 321 to 322)
89. On the 30 September 2021 the Claimant attended a grievance meeting with Steve Radford (pages 323 to 329).
90. On the 1 October 2021 Claimant was late for work (pages 349 to 341)
91. On the 5 October 2021 Steve Radford met with multiple individuals regarding the Claimant's grievance (pages 342 to 375).
92. On the following dates the Claimant was late for work:
- a. 6 October 2021 (pages 376 to 377)
 - b. 9 October 2021 (pages 380 to 381)
 - c. 11 October 2021 (pages 382 to 383)
 - d. 14 October 2021 (pages 384 to 385)
93. On the 14 October 2021 the Claimant was sent the outcome of her grievance. The outcome was that none of the Claimant's grievances were upheld (pages 386 to 389).
94. On the 15 October 2021 the Claimant was late for work (pages 390 to 391).
95. Also, on the 15 October 2021 the Claimant appealed the outcome of her grievance (page 393).
96. On the following dates the Claimant was late for work:
- a. 19 October 2021 (pages 398 to 399)
 - b. 20 October 2021 (pages 400 to 401)
 - c. 21 October 2021 (pages 402 to 403)
97. On the 22 October 2021 the Claimant was invited to a grievance appeal meeting (pages 404 to 405).
98. On the 27 October 2021 the Claimant was late for work (pages 406 to 407).
99. On the 2 November 2021 the Claimant was invited to a re-arranged grievance appeal meeting at her request (pages 408 to 409).
100. On the following dates the Claimant was late for work:
- a. 8 November 2021 (pages 415 to 416)

- b. 9 November 2021 (pages 417 to 418)
- 101. On the 12 November 2021 the Claimant attended a grievance appeal meeting (pages 419 to 425).
- 102. On the following dates the Claimant was late for work:
 - a. 3 December 2021 (pages 435 to 436)
 - b. 6 December 2021 (pages 437 to 438)
- 103. On the 9 December 2021 Claimant was sent the outcome of her grievance appeal. The outcome was that none of the Claimant's points of appeal were upheld (pages 439 to 441).
- 104. On the 10 January 2022 the Claimant received an informal warning regarding her failure to wear correct PPE and breaching the Health and Safety Policy (pages 442).
- 105. On the 11 January 2022 the Claimant was invited to a mediation meeting following her grievance and appeal outcomes (page 443).
- 106. On the 13 January 2022 the Claimant received an informal warning regarding her timekeeping (page 449)
- 107. On the following dates the Claimant was late for work:
 - a. 17 January 2022 (pages 450 to 451)
 - b. 18 January 2022 (pages 452 to 453)
 - c. 24 January 2022 (pages 454 to 455)
- 108. On the 27 January 2022 the Claimant attended a mediation meeting with DC and PG, chaired by Christopher Macey (pages 456 to 462).
- 109. On the 28 January 2022 the Claimant attended an investigation meeting regarding her verbally abusing a member of the public and bringing the Respondent into disrepute (pages 463 to 477).
- 110. It is appropriate at this point, before matters escalate to the actual dismissal, to consider the next allegation (3.1.3) being threatening the Claimant with dismissal. The Claimant says that these threats were made at weekly meetings, due to alleged performance issues, by Peter Grech, Daniel Crease, Graham Howard and Peter Jackson. She says that they occurred from around the Summer of 2020 until the end of her employment.
- 111. This in our view should also be considered with the fourth allegation (3.1.4), considering and/or taking disciplinary action against the Claimant on

the following bases, each of which the Claimant says arose from the effects of her disability and/or changes to her ADHD medication:

- a. (3.1.4.1) Her inability to meet a driving score target of 85%.
- b. (3.1.4.2) That she shouted at and swore at colleagues on occasions.
- c. (3.1.4.3) That she refused a management request to drive a van.
- d. (3.1.4.4) That she failed to follow process, in respect of use of PPE and in carrying more than one disc brake at a time.
- e. (3.1.4.5) That she was verbally abusive to a member of the public.
- f. (3.1.4.6) That she was late for work on a number of occasions.

112. The Claimant addresses these allegations in paragraphs 8 and 9 of her witness statement:

"8. I was pulled up on various spurious disciplinary's or alternatively disciplinary's for actions triggered or caused due to the impact of the changes to my medication, which meant that my ADHD was not fully under control, and despite the situation being explained to them and confirmed within my doctors letter, no allowances or adjustments were made in respect of the same, and my employers basically ignored these facts when considering and implementing the standard disciplinary and performance policy."

"9. I was reprimanded for things like lateness, poor driving scores, and disorganisation, the need to take additional work breaks, and instead of attempting to assist me with my difficulties, my line manager Peter Grech continued to harass and victimise me, pursuant to my previous complaints for changes to my working pattern and a change of vehicle, and even maliciously returned me to the previous old defective vehicle, which I had previously complained about, and the company had removed me from because they agreed it had been unsuitable. This action naturally made my driving / performance scores go down, due to both the vehicle defects, the natural anxiety and stress of the situation, my ADHD, and the medical side effects which I had been experiencing. Following my manager Peter Grech's actions I refused to drive this van and filed a formal written complaint, the contents of which are shown below. The facts within the same are relied upon in these proceedings."

113. We note that paragraphs 10 to 18 of the Claimant's 20 numbered paragraph statement then quote from her grievance document at pages 335 to 339 of the bundle.

114. Within that document and as then repeated in her statement there is reference made to incidents on the 3 and 20 August 2021 (in relation to smoking breaks). The instruction to use the older van on the 11 September 2021. And issues to do with being challenged over mask wearing (7 and 16 September 2021).
115. Reference is made to the Claimant's ADHD in paragraphs 13, 14 and 15 of her witness statement in relation to the need for smoking breaks ... (paragraph 13) ... "... Our line manager Dan has had multiple meetings with me in regards to having ADHD, one of the coping mechanisms to deal with the stresses that occurs whilst working was to go outside take 10 minutes to reset and smoke a cigarette ready for the next run ...".
116. The Claimant has provided no specific example of being "threatened" with dismissal.
117. In cross examination the Claimant confirmed that she did not know what "spurious" meant, despite using it in paragraph 8 of her witness statement.
118. The Claimant has also not set out which of the many disciplinary issues were spurious or caused by ADHD or changes to her medication.
119. Consequently, in cross examination the Claimant was taken through the various disciplinary matters:
120. About the incident on the 11 June 2020 where the Respondent received a complaint that the Claimant had shouted at and sworn at a colleague on 9 June 2020. In cross examination the Claimant agreed the language was used by her and that she did apologise. She also confirmed that she doesn't swear because she has ADHD, that is what comes from the situation when she doesn't feel in control. The Claimant accepted that there was no medical evidence presented to this Tribunal that links a loss of control to ADHD. The Claimant confirmed that she doesn't go around using ADHD to blame every situation of life and agreed that if there is no reference to ADHD in response it is because she doesn't think ADHD accounts for the outburst. This is consistent with what she says in paragraph 15 of her witness statement ... "... that in no way shape or form do I use the disability I have, to gain me anything in my life.".
121. Then on the 18 May 2021 the Claimant received an informal warning regarding her driving score (page 218). In cross examination the Claimant accepted that this warning was fair for her driving.
122. On the 28 May 2021 the Respondent received a complaint that the Claimant had shouted at and sworn at a colleague (page 229). On the 17 June 2021 the Claimant received an informal warning regarding her actions towards

her colleague (page 231). In cross examination the Claimant accepted the warning was fair.

123. On the 1 July 2021 the Claimant attended an investigation meeting relating to her poor driving score. The outcome was that she should be invited to a formal disciplinary (pages 232 to 239). On the 13 July 2021 Claimant attended a disciplinary meeting with Glen Cable relating to her behaviour/bad language and her poor driving score. The outcome was that she would receive a final written warning for conduct (pages 259 to 278). In cross examination the Claimant accepted it is a fair warning in respect of her actions.

124. Within the outcome letter dated 19 July 2021 reference is made to the Claimant's ADHD (page 280A) ... "I take on board your comments around your ADHD and with reference to the points in your statement, however, that said, the company has to be extremely strict with regards to telematics for the safety of the employee in question and others around them, which I explained in the meeting and which you acknowledged."

125. The metrics that are considered in the telematics as well as the overall score, are speed, braking, acceleration, night-time, and urban score.

126. DC was asked in cross examination about the scores given at the telematics meeting on the 12 March 2021 (page 208). That records a score of 0 for acceleration. DC confirmed in his oral evidence that would be because of the Claimant pulling away too harshly, effectively "gunning it" out.

127. We have considered that telematics form and it notes that acceleration is put down to concentration and focus being on where driving to, rather than pulling away. It records that the Claimant is going to switch focus to pulling away from drops and locations softer. As to the braking score of 45, the form records they discussed traffic lights, road works and roundabouts and slowly approaching them.

128. We also note that by March 2021 there is no ongoing issue with driving a "defective" van, the Claimant having resolved that issue from June 2020.

129. We have considered carefully how the Claimant's ADHD is discussed at the disciplinary meeting on the 13 July 2021 (pages 264 to 267).

130. At page 264 the Claimant is asked why she thinks she hasn't improved her driving score to 85%. She explains that she thinks the problems is the van is manual whereas her car is automatic, and she just needs time to adjust. She also refers to when someone takes the van home, they change the seat and she doesn't feel focused because she needs to get comfortable, to be aware she has ADHD.

131. At page 265, the Claimant is asked if she is on the right medication. She says not yet but soon. It notes the Claimant having said to DC that she could get to 80% but not stay there and being asked if that was correct. The Claimant confirmed she did say it, but on that day, she was not in the right headspace, and she thinks now she has a clearer head and thinks she can keep it there.
132. At page 266, it is then explained to the Claimant why the Respondent is strict with telematics. She is asked when she starts her new medications, and she says in the next week or so.
133. At page 267, it notes the Claimant mentioning that she has a lot of stuff outside of work and it being confirmed that is the ADHD. She is then asked if she understands why she has been given a disciplinary for driving scores and she confirms that she totally understands.
134. The Claimant does not seek to assert at the disciplinary hearing that her ADHD or something arising from it were a factor in the other conduct matter being her behaviour/bad language. We remind ourselves of what the Claimant has told this Tribunal, that she doesn't go around using ADHD to blame every situation of life and agreed that if there is no reference to ADHD in response it is because she doesn't think ADHD accounts for the outburst.
135. The Claimant did not appeal the warning and when asked why in oral evidence she confirmed that she did not know why.
136. The next telematics meeting is on the 2 September 2021 with PG (pages 285 and 286). It records two overall scores above 85% and two below. The form is signed by the Claimant and PG. It records the Claimant confirming she did not need more training and just needed to concentrate more.
137. It is reasonable to conclude from this that the Claimant is okay and does not need anything from the Respondent to perform her role.
138. About the incident to do with the smoking break on the 3 August 2021, PG confirmed in supplemental oral evidence that the smoking policy in place when he started was when a driver was loading, they could have a smoke, as most drivers smoked. He saw that this turned into "smoking parties" and he agreed with DC that in recognition of ensuring the drivers have a 40 minute break/lunch break, it be agreed that they not allow smoking at the branch, and the drivers smoke away from branch, not being visible to others. PG says he discussed this with the drivers and agreements were reached in some cases as to length of lunch breaks/breaks. On the 3 August 2021, PG says he saw the Claimant smoking and talking and challenged this. It was then the Claimant told him that she had an agreement with DC that she would be allowed to take 5 minutes out if having an issue generated by ADHD and she could have a smoke if she needed to. PG confirmed he therefore asked the Claimant if she

could make him aware if she needed to take time away and when she did take the break to do so out of view of the other drivers. As the Claimant's allegation that he said to her he didn't believe she had ADHD and/or she was using it to gain preferential treatment, he denied this. In cross examination PG confirmed that he did make an allowance for the Claimant in respect of smoking breaks, and this was more favourable than to others as it gave her more time to smoke not less, when the Company policy was, they don't have smoking breaks.

139. We accept the account of PG on this matter. It is consistent with the way the Claimant describes what she did on the 20 August 2021 in respect of smoking at the branch (paragraph 13). The Claimant describes how she chose to smoke and work, rather than smoke and not work for 10 minutes, however the Claimant still considers it okay for her to smoke at the branch.

140. On the 14 September 2021 the Claimant attended an investigation meeting relating to her refusal to follow reasonable management instructions. The outcome was that she should be invited to a formal disciplinary (pages 291 to 304). No further action was taken about that for the reasons we refer to above.

141. On the 10 January 2022 the Claimant received an informal warning regarding her failure to wear correct PPE and breaching the Health and Safety Policy (pages 442). The Claimant explained in her oral evidence that she challenges this at the time as she has not been given gloves that fit her due to an amputated finger. DC acknowledged in oral evidence that this was raised by the Claimant after the warning. There is no evidence to suggest this has any connection to ADHD or to something arising from her ADHD.

142. On the 13 January 2022 the Claimant received an informal warning regarding her timekeeping (page 449). The Claimant agreed in cross examination that it was not a surprise when formal action was taken in relation to further lateness. She did not accept that the Respondent was being generous with her though and maintained that this was a spurious warning or caused by ADHD or the medication. She confirmed she did not submit a complaint about it at the time though, and the Claimant has not evidenced in what way she asserts this.

143. On the 28 January 2022 Claimant attended an investigation meeting regarding her verbally abusing a member of the public and bringing the Respondent into disrepute (pages 463 to 477). The Claimant did not accept the account against her. As the Claimant does not accept what she is accused of happened there is no apparent ADHD link based on her defence, i.e., she is not saying it happened because of her ADHD, she is saying it did not happen. No further action was taken about this potential disciplinary issue.

144. On the following dates the Claimant was then late for work:

- a. 31 January 2022 (page 478)
 - b. 1 February 2022 (page 481).
145. On the 1 February 2022 the Claimant was invited to a disciplinary meeting, the date of which was re-arranged due to her union representative's unavailability (pages 482 to 483 and pages 489 to 490).
146. On the 3 February 2022 the Claimant was late for work (page 491).
147. We note that the three most recent incidents of lateness all record the Claimant's reason as relating to traffic.
148. On the 8 February 2022 the Claimant attended a disciplinary meeting with KD regarding her timekeeping (pages 492 to 501).
149. On the 10 February 2022 the Claimant attended a reconvened disciplinary meeting and was informed of the outcome (page 509).
150. The Claimant's termination date is the 10 February 2022.
151. On the 16 February 2022 the Claimant was sent the outcome of the disciplinary, which she appealed the same day (pages 510 to 512 and pages 513 to 514).
152. On the 21 February 2022 the Claimant submitted further information relating to the grounds of her appeal (pages 515 to 517).
153. On the 23 February 2022 the Claimant was invited to a disciplinary appeal meeting (pages 522 to 523).
154. On the 28 February 2022 Claimant was invited to a re-arranged disciplinary appeal meeting at her request (pages 522 to 524).
155. On the 17 March 2022 the Claimant attended a disciplinary appeal meeting with PJ (pages 530 to 542).
156. On the 8 April 2022 the Claimant was invited to reconvened disciplinary appeal meeting (pages 554 to 555).
157. On the 14 April 2022 the Claimant was invited to a re-arranged reconvened disciplinary appeal meeting at her request, which was further re-arranged at her request (pages 560 to 564).

158. On the 21 April 2022 the Claimant attended a reconvened disciplinary appeal meeting and was informed that her appeal was not upheld (pages 565 to 571).
159. On the 28 April 2022 the Claimant was sent the outcome of the disciplinary appeal meeting (pages 572 to 574).
160. The Claimant complains that her dismissal was unfair and also unfavourable treatment due to something arising from her ADHD disability and unwanted conduct related to disability and also victimisation.
161. It is not in dispute that the Claimant was dismissed with an effective date of termination of the 10 February 2022 (see pages 511 and 512).
162. The Respondent relies upon a conduct reason.
163. The Claimant is dismissed for unacceptable levels of lateness on the back of a live final warning that has not been appealed.
164. The Claimant does not dispute the conduct issues (she confirmed this in her oral evidence). She asserts that there is explanation and mitigation (i.e., her ADHD) that without further investigation it makes the dismissal unfair.
165. The Claimant asserts (1.2.3.1) that the Respondent failed to take sufficient account of her asserted disability and its effects upon her. Also, (1.2.3.2) that the Respondent failed to take into account that it had not acted upon previous requests by the Claimant for adjustments to her working hours.
166. We have considered carefully what the Claimant does assert about her ADHD at the dismissal hearing.
167. Firstly, considering the statement the Claimant produced for the dismissal hearing at page 494. It states that she communicated struggling with ADHD to DC and ... "... One of these aspects is time keeping/getting to work on time...". It goes on to say that she requested DC give her a later shift.
168. In the last paragraph the Claimant writes ... "The most important point that I would like you to take away from my statement today is that I don't want to be late to work, every morning is the same fight with myself to get there on time. But that's one of the key points to having ADHD, it's like you're in a constant battle with yourself, you know what needs to be done and what is asked of you and you want to do it you really do, but then there is the same you inside of your head saying no, no, no, not today and it's a constant battle that is a constant cycle. It just doesn't stop and it doesn't matter how much you try, all these little hiccups and bumps will never go away until you find the root of the problem. At this moment in time the root of the problem is my ADHD, which

brings me to my next point. I have been noticing a decline in some areas of my disability for the past 6 months and have been in contact with my GP to get a referral back to the Mental Health Team that I am under for the review of my ADHD medication. I would like to submit a letter of evidence that my GP has written for the purpose of this meeting.”.

169. The Claimant was asked in cross examination to accept that the GP letter she produced for the hearing dated 1 February 2021 (at page 161 and also repeated at page 495 of the bundle within the dismissal hearing workbook) does not provide a link between her lateness and ADHD, that it didn't comment about lateness. In response the Claimant confirmed that it was not necessary as the letter was produced to show that she was looking for help and struggling.
170. Within the minutes of the dismissal meeting the Claimant is recorded as saying when asked how the disability affects the time keeping ... “... with my ADHD timekeeping is one small thing, with ADHD I am not on the right medication at the moment, my brain works differently, I don't know, I don't understand it myself.” (page 497).
171. In response to the main reason of the Claimant's lateness being recorded as traffic the Claimant says ... “... the reason I say is because I don't want everybody knowing about my disability or constantly saying its about my disability...” (page 498).
172. We have then considered carefully the evidence provided by KD as to why he decided what he did (paragraph 23 of his statement). He says that he ... “... did not find the Claimant's reasoning as to why she had not stated ADHD as the reason for her lateness to be a plausible response because the lateness forms are confidential, which the Claimant would be aware of, so the only people that would see them would be the person/people who were already aware of her ADHD, such as her Branch Manager who held the meetings..”. Further, ... “... There was no medical evidence to suggest that the Claimant's lateness was as a result of ADHD. This was not something that she had raised previously and it felt to me that this was being raised at this point in a 'last ditch' attempt to remain in employment. I was concerned that there was no attempt on any of the lateness forms to mention at the time her ADHD if that had been the cause of her lateness on those occasions.”. Also, ... “... In relation to the Claimant's start time, it would not be possible for the Claimant, or any other employee, to have no fixed start time. The Respondent has service level agreements with its customers and most local customers are to receive their parts within an hour, so the branches have to plan the rotas for their staff in order to ensure that the service level agreements are met. Without knowing start times, there cannot be adequate preparation and then the customer will receive poor service and won't order from the Respondent again.”.

173. KD also notes that the Claimant was subject to a final written warning which was live.
174. KD also confirms that he considered alternatives to dismissal ... "... whether the Claimant's final warning could be extended, but the Claimant had already received an informal warning on 13 January 2022 relating to timekeeping and was then late on three occasions within 10 days of that informal warning so I felt that she had already had received an extra chance at that point and there had been no change.". Further ... "... whether there were any alternative roles that the Claimant could be placed in to avoid dismissal, but there were no other roles within the branch that would have been appropriate. All roles have fixed start times and some roles in the branch start earlier than 8am so I could not see that a change in role would have any effect on the Claimant's timekeeping.".
175. At paragraph 24 of his statement KD confirms ... "I absolutely did not make the decision to dismiss the Claimant because she has ADHD or because she had raised a grievance against Peter Grech in September 2021. I would never dismiss someone because they have a medical condition or because they have raised a grievance; that would be discriminatory and/or retaliation and is not at all in my character. I go into all meetings that I chair with a completely open mind and no bias. If I ever felt that I was not independent in a situation, then I would refuse to be the chair of that meeting.".
176. Considering the Claimant's appeal against her dismissal (pages 516 to 517), she does not assert that she was dismissed because she had raised a grievance.
177. PJ considers the Claimant's appeal and in paragraphs 26 of his witness statement he addresses what he determined about each of the issues the Claimant had raised. He rejects the Claimant's appeal.
178. The claim form was presented on 16 June 2022. The Claimant commenced the Early Conciliation process with ACAS on 25 April 2022 (Day A). The Early Conciliation Certificate was issued on 6 June 2022 (Day B). Accordingly, any act or omission which took place before 26 January 2022 (which allows for any extension under the Early Conciliation provisions) is potentially out of time so that the Tribunal may not have jurisdiction to hear that complaint. The Claimant did not present any evidence in her witness statement as to why she did not submit her claim before she did and relies upon an argument that the allegations she makes are conduct extending over a period as referred to by her in paragraph 20 of her witness statement.

THE LAW

179. We were provided with a summary of relevant law within the written closing submissions of Respondent's Counsel. This is summarised below for reference as to what we considered:

Disability discrimination

180. Burden of proof

181. In the first place, the Claimant must prove facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the Respondent committed an unlawful act of discrimination: s.136(2) EqA 2010.

182. In **Royal Mail Group Ltd v Efofi [2021] UKSC 33, [2021] IRLR 811**, the Supreme Court confirmed that a two-stage approach is usually helpful to apply: (i) can a claimant show a prima facie case? If no, the claim fails. If yes, the burden shifts to the respondent; (ii) is the respondent's explanation sufficient to show that it did not discriminate? However, this approach should not be applied in an overly mechanistic or schematic way: **Khan v Home Office [2008] EWCA Civ 578**.

183. Disability

184. An individual has a disability if they have a physical or mental impairment, and the impairment has a substantial and long-term adverse effect on her ability to carry out normal day-to-day activities: s.6(1) EqA.

185. The burden of proving disability lies squarely on the Claimant: **Kapadia v London Borough of Lambeth [2000] IRLR 699**. It is not our job to take an inquisitorial approach, particularly in respect of the bundle of documents, in considering the issue: **Joseph v Brighton and Sussex University Hospitals NHS Trust UKEAT/0001/15**.

186. The above definition poses four essential questions: (1) Does the person have a physical or mental impairment? (2) Does that impairment have an adverse effect on their ability to carry out normal day-to-day activities? (3) Is that effect substantial? (4) Is that effect long-term? These questions may overlap to a certain degree; however, the Tribunal should ensure that each step is considered separately and sequentially: **Goodwin v Patent Office [1999] IRLR 4**.

187. The activities affected must be "normal". The EqA Guidance states (paragraph D3): "In general, day-to-day activities are things people do on a regular or daily basis, and examples include shopping, reading and writing, having a conversation or using the telephone, watching television, getting

washed and dressed, preparing and eating food, carrying out household tasks, walking and travelling by various forms of transport, and taking part in social activities.”

188. The test of whether an impairment has an adverse effect is an objective one of causation: the impairment must be found by the Tribunal to have the adverse effect; it is not enough that the Claimant subjectively believes this to be the case: **Primaz v Carl Room Restaurants Ltd (t/a McDonald's Restaurants Ltd) [2022] IRLR 194 at [62].**
189. Whether an effect is substantial requires a consideration of whether it is more than minor or trivial: s.212 EqA. In considering the nature of any adverse effect, the Tribunal should focus on what the employee cannot do because of their impairment, rather than what they can still do: **Aderemi v London and South Eastern Railway Ltd UKEAT/0316/12.**
190. The EqA Guidance (paragraph B7) suggests that if a person can reasonably be expected to modify their behaviour to reduce the effects of an impairment on their normal day-to-day activities, they might not be considered disabled. In some cases, a coping or avoidance strategy might alter the effects of an impairment to the extent that they are no longer substantial.
191. Para. 5(1), Sch. 1, EqA states that an impairment will be treated as having a substantial adverse effect if measures are being taken to treat it or correct it and, but for those measures, the impairment would be likely to have that effect. The Tribunal should assess how an impairment would affect the Claimant's day-to-day activities if the treatment were stopped: **Woodrup v London Borough of Southwark [2003] IRLR 111.**
192. Para. 2(1), Sch. 1, EqA states that an impairment will have a long-term effect if: (1) it has lasted at least 12 months; (2) the period for which it lasts is likely to be 12 months; or (3) it is likely to last for the rest of the life of the person affected. In respect of the meaning of the word 'likely' as used in the above context, this means whether something "could well happen": **SCA Packaging Ltd v Boyle [2009] UKHL 37.**
193. Knowledge of disability
194. The Court of Appeal held in **Gallop v Newport City Council [2013] EWCA Civ 1358, [2014] IRLR 211** that ... "For that purpose the required knowledge, whether actual or constructive, is of the facts constituting the employee's disability as identified in section 1(1) of the DDA. Those facts can be regarded as having three elements to them, namely (a) a physical or mental impairment, which has (b) a substantial and long-term adverse effect on (c) his ability to carry out normal day-to-day duties; and whether those elements are

satisfied in any case depends also on the clarification as to their sense provided by Schedule 1.”.

195. Harassment

196. Harassment occurs where a person engages in unwanted conduct related to a protected characteristic, which has the purpose or effect of either violating an individual’s dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for them: s.26(1) EqA. In deciding whether conduct shall be regarded as having the proscribed effect, the following must be taken into account under s.26(4) EqA: the perception of individual; the other circumstances of the case; and whether it is reasonable for the conduct to have that effect.

197. The question of reasonableness in this context is a matter of fact for the Tribunal to determine, having regard to all the relevant circumstances, including the context of the conduct: **Richmond Pharmacology v Dhaliwal [2009] IRLR 336, EAT**. In that case, Underhill J noted at [22] that an individual’s dignity would not necessarily be violated “by things said or done which are trivial or transitory, particularly where it should have been clear that any offence was unintended”.

198. Whilst a single act or passage of actions may be so significant that its effect is to create the proscribed environment, it does not follow that in every case a single act is in itself necessary sufficient to create that environment: **Weeks v Newham College of Further Education UKEAT/0630/11, [2012] EqLR 788, EAT**.

199. A ‘detriment’ does not include conduct which amounts to harassment: s.212(1) EqA. Accordingly, if the Tribunal upholds any allegations of harassment, the same underlying factual allegation cannot also be upheld as a detriment for the purposes of any other claims presented under EqA.

200. Discrimination arising from disability

201. Discrimination arising from disability occurs where an employer treats a disabled person unfavourably because of something arising in consequence of their disability and they cannot show that the treatment was a proportionate means of achieving a legitimate aim: s.15(1) EqA.

202. In **Pnaiser v NHS England and another [2016] IRLR 170**, the EAT summarised the proper approach to claims for discrimination arising from disability as follows:

(1) The Tribunal must identify whether the Claimant was treated unfavourably and by whom;

(2) It then has to determine what caused that treatment, focusing on the reason in the mind of the alleged discriminator;

(3) The Tribunal must then determine whether the reason was something arising in consequence of the Claimant's disability, which could describe a range of causal links;

(4) Knowledge is required of the disability, rather than knowledge that the "thing" leading to the unfavourable treatment was a consequence of the disability.

203. To be proportionate, the unfavourable treatment has to be both an appropriate means of achieving a legitimate aim and a reasonably necessary means of doing so: **Homer v Chief Constable of West Yorkshire [2012] UKSC 5, [2012] IRLR 601**. When assessing proportionality, the Tribunal should reach its own judgement, but that must be based on a fair and detailed analysis of the working practices and business considerations involved, having particular regard to the business needs of the employer: **Hensman v Ministry of Defence UKEAT/0067/14/DM, [2014] EqLR 670**, applied in **Monmouthshire County Council v Harris UKEAT/001/15**.

204. Indirect discrimination

205. Indirect discrimination occurs where an employer applies a provision, criterion or practice ("PCP") to those without the employee's protected characteristic; it puts those with the employee's protected characteristic at a particular disadvantage when compared to those without the characteristic; it puts the employee at that same disadvantage; and the employer cannot show the PCP to be a proportionate means of achieving a legitimate aim: s.19(2) EqA.

206. It is possible that a one-off act by an employer in the course of dealings with employee can amount to a PCP but they will not always do so. There must be some indication that the same course of action would be done again in the future, if a hypothetically similar case arose, suggesting some level of repetition: **Ishola v Transport for London [2020] EWCA Civ 112, [2020] ICR 1204**.

207. In relation to the protected characteristic of disability, a reference to persons who share a protected characteristic is a reference to persons with the same disability: s.6(3) EqA.

208. The justification defence allowed by virtue of s.19(2)(d) EqA places the burden on the employer but gives rise to an objective test, requiring the Tribunal to carry out its own assessment as to whether the means adopted were proportionate, weighing the real needs of the employer against any

discriminatory effects of the requirement: *Hardy & Hansons plc v Lax* [2005] ICR 1565, CA. To show that its actions were proportionate, an employer does not need to show that it had no alternative course of action; rather, it must demonstrate that the measures taken were “reasonably necessary” in order to achieve the legitimate aim(s): ***Barry v Midland Bank Plc* [1999] IRLR 581 (HL)**.

209. Failure to make reasonable adjustments

210. An employer’s duty to make reasonable adjustments can arise where a PCP applied by the employer puts a disabled person at a substantial disadvantage in comparison to those who are not disabled. The employer must take such steps as it is reasonable to take to avoid that disadvantage: s.20(3) EqA. However, an employer’s duty to make reasonable adjustments does not arise unless an employer knows, or ought reasonably to know of, the disabled person’s disability and that the disabled person is likely to be placed at a substantial disadvantage: Sch.8, para. 20(1)(b) EqA.

211. In considering this claim, the Tribunal must identify: (1) the PCP applied by or on behalf of the employer; (2) the identity of the non-disabled comparators; and (3) the nature and extent of the alleged substantial disadvantage suffered by the Claimant: ***Environment Agency v Rowan* [2008] ICR 218**.

212. Whether an employee is placed at a substantial disadvantage depends on the actual facts, regardless of what the parties believe the facts to be: ***Copal Castings Ltd v Hinton* UKEAT/0903/04**. It is necessary for the employee’s disability to be the cause of the substantial disadvantage experienced by them: ***Hilaire v Luton Borough Council* [2023] IRLR 122 at [31]**.

213. Further, an objective assessment of the reasonableness of proposed adjustments cannot be made unless the nature and extent of the substantial disadvantage imposed upon the employee by the PCP is appreciated: ***Newham Sixth Form College v Sanders* [2014] EWCA Civ 734**.

214. The test of reasonableness of adjustments is objective and to be determined by the Tribunal: ***Smith v Churchill’s Stairlifts plc* [2006] IRLR 41**. The EHRC Code lists factors which may be taken into account in considering the reasonableness of an adjustment, which includes: whether taking any steps would be effective in preventing the substantial disadvantage; the practicability of the step; the financial and other costs of making the adjustment and the extent of any disruption caused; the extent of the employer’s financial and other resources; the availability of external financial or other assistance; and the type and size of the employer.

215. The question of whether the adjustment would work is important. In **Romec Ltd v Rudham UKEAT/0069/07**, the EAT held that a tribunal erred when, having identified the extension of a rehabilitation programme as a potential reasonable adjustment, it decided that it would have been reasonable for the employer to make that adjustment to give the employee the opportunity to prove himself. The EAT held that this was the wrong approach and instead, the tribunal should have asked itself to what extent the extended rehabilitation programme would have allowed the claimant to return to full time work.
216. Tribunals should not only consider factors relating to the disabled person, but should take account of wider implications, such as the effect of the proposed adjustment on the organisation or workforce as a whole: **Chief Constable of Lincolnshire Police v Weaver UKEAT/0622/07**.
217. Victimisation
218. Victimisation occurs where one person subjects another to a detriment because that person has done a protected act or the former believes that that person has done, or may do, a protected act: s.27(1) EqA.
219. The following are protected acts under EqA: (1) bringing proceedings under EqA; (2) giving evidence or information in connection with proceedings under EqA, regardless of who brought these proceedings; (3) doing any other thing for the purposes of or in connection with EqA; and (4) alleging, whether expressly or otherwise, that the respondent or another person has contravened EqA: s.27(2) EqA.
220. If a worker alleges that the respondent or another person has contravened EqA, the asserted facts must be capable of amounting to a breach of EqA and sufficiently clear. For example, where a worker complains of bullying, harassment, discrimination or victimisation in the sense of being unfairly treated generally, rather than specifically because of a protected characteristic, that is unlikely to amount to a protected act: see e.g. *Beneviste v Kingston University UKEAT/0393/05*, **Durrani v London Borough of Ealing UKEAT/0454/12** and **Fullah v Medical Research Council UKEAT/0586/12**.
221. The protected act must be more than simply causation of the treatment in the 'but for' sense: **Ahmed v Amnesty International [2009] IRLR 884**. It must be a real reason. In **Greater Manchester Police v Bailey [2017] EWCA Civ 425**, Underhill LJ held at para. 12 that "it remains common to refer to the underlying issue [of causation] as the "reason why" issue." The treatment need not be consciously motivated: **Nagarajan v London Regional Transport [1999] IRLR 572 (HL)**.
222. Limitation

223. Under s.123(1)(a) EqA, a claim brought in the Tribunal for discrimination “may not be brought after the end of the period of 3 months starting with the date of the act to which the complaint relates”. Section 123(3)(a) provides that “conduct extending over a period is to be treated as done at the end of the period”.
224. Where the act of discrimination consists of a failure to do something (i.e., to make reasonable adjustments), the failure is treated as occurring when “the person in question decided on it”: s.123(3)(b) EqA. The date of such a decision is, in the absence of evidence to the contrary, treated as either the date when the respondent does not act inconsistent with doing the omitted act, or, if there is no such inconsistent act, the expiry of the period in which they might reasonably have been expected to do it: s.123(4) EqA.

Unfair dismissal

225. An employer must hold a genuine belief in an employee’s misconduct, for which there must be reasonable grounds to sustain that belief, having carried out as much investigation into the matter as was reasonable in all the circumstances: **British Home Stores Ltd v Burchell [1978] IRLR 379, at 380.**
226. We must consider the investigation as a whole when assessing the question of reasonableness. As part of the process of investigation, the employer must consider any defences advanced by the employee, but whether and to what extent it is necessary to carry out a specific inquiry into them in order to meet the Burchell test will depend on the circumstances as a whole: **Shrestha v Genesis Housing Association Ltd [2015] IRLR 399, at [23].** There may be circumstances in which an employer will not need to conduct an investigation if i.e. the employee admits the misconduct: **RSPB v Croucher [1984] IRLR 425.** However, the test remains whether the employer acted reasonably in all the circumstances: **Secretary of State for Scotland v Campbell [1992] IRLR 263.**
227. An employer considering dismissal is not required to re-open the circumstances in which a live final written warning was given. Where there has been no appeal against a final warning, there would need to be exceptional circumstances for going behind an earlier disciplinary process given the need for finality: **Davies v Sandwell Metropolitan Borough Council [2013] EWCA Civ 135 at [38].**
228. An employer’s decision to dismiss an employee must fall within a range of reasonable responses that a reasonable employer in those circumstances and in that business might have adopted: **Iceland Frozen Foods Ltd v Jones [1982] IRLR 439, at 442.** The range of reasonable responses test applies both to the decision to dismiss and to the consideration of whether the investigation

into the suspected misconduct was reasonable in all the circumstances: **Sainsburys Supermarkets Ltd v Hitt [2003] IRLR 23, at 27.**

229. Overall, we must guard against substituting our view for that of the employer: **Foley v Post Office; Midland Bank Plc v Madden [2000] IRLR 827, at 831.**

230. Polkey reduction

231. Where a claim of unfair dismissal is upheld, the Tribunal we may make a compensatory award under s.123 ERA, which relevantly provides:

“(1) Subject to the provisions of this section...the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.”

232. The compensatory award may be reduced to reflect the chance that the Claimant would have been dismissed in any event and that the employer’s procedural errors made no difference to the outcome: **Polkey v AE Dayton Services Ltd [1987] IRLR 503.**

233. The Polkey reduction is a broad general principle of just and equitable compensation under s.123 ERA and is not confined to its most obvious application: **Gover v Propertycare Ltd [2006] ICR 1073, at [19].** Applying s.123 ERA may lead the Tribunal to conclude that compensation should be limited to a particular period, or reduced by a particular percentage, to allow for the possibility that the employment might have ended at some future point, absent any unfair dismissal. For these purposes there is no sensible distinction between dismissals that are procedurally or substantially unfair: **Lancaster & Duke Ltd v Wileman [2019] IRLR 112, at [26].**

234. Contributory conduct

235. If we find that the Claimant has, by any action, caused or contributed to her dismissal, it must reduce the compensatory award as it considers just and equitable: s.123(6) ERA.

236. We must address the following four points (**Steen v ASP Packaging Ltd [2014] ICR 56, at [11]-[14]**):

(1) It must identify the conduct which is said to give rise to possible contributory fault;

(2) Having identified that it must ask whether that conduct is blameworthy. The answer depends on what the Claimant actually did or failed to do, which is a matter of fact for the Tribunal to establish and which, once established, it is for the Tribunal to evaluate;

(3) The Tribunal must ask for the purposes of s.123(6) ERA if the conduct which it has identified and which it considers blameworthy caused or contributed to the dismissal to any extent; and

(4) The Tribunal should consider if the award should be reduced and to what extent it is just and equitable to reduce it.

THE DECISION

237. Disability

238. In respect of the complaints of disability discrimination we need to determine whether the Claimant had a disability as defined in section 6 of the Equality Act 2010 at the time of the events the claim is about, namely between around May 2020 and 10 February 2022.

239. We find as matters of fact that:

- a. The Claimant has the impairment as diagnosed of ADHD (this is not in dispute).
- b. This impairment did have a substantial adverse effect on the Claimant's ability to carry out day-to-day activities, when considering how she would be without medical treatment, including medication, as we accept the evidence the Claimant has provided in her witness statement, disability impact statement, the hearing bundle, and as clarified by her during her being cross examined.
- c. The effects of the impairment were long-term. At the material times in this case (May 2020 to 10 February 2022) they had lasted at least 12 months, being present from adolescence.

240. We find the Claimant is a disabled person at the material times by reason of ADHD. The Claimant is adversely impacted when her medication is not effective and this is a long-term condition, being since the adolescence of the Claimant. The Claimant is a disabled person at the times material to this claim.

241. Knowledge of disability

242. Knowledge of disability is in dispute so we need to consider did the Respondent know or could it reasonably have been expected to know that the

Claimant had the disability and if so from what date. Did the Respondent have the requisite knowledge of the Claimant's alleged disability and its effects upon her. Further, did the Respondent know, or could it reasonably have been expected to know that the Claimant was likely to be placed at the alleged disadvantage.

243. The Respondent accepts that it knew the Claimant had the condition of ADHD during her employment but denies it had awareness that this amounted to a disability or of the alleged effects of the same upon the Claimant.

244. We note from **Gallop v Newport City Council [2013] EWCA Civ 1358, [2014] IRLR 211** that: "For that purpose the required knowledge, whether actual or constructive, is of the facts constituting the employee's disability as identified in section 1(1) of the DDA. Those facts can be regarded as having three elements to them, namely (a) a physical or mental impairment, which has (b) a substantial and long-term adverse effect on (c) his ability to carry out normal day-to-day duties; and whether those elements are satisfied in any case depends also on the clarification as to their sense provided by Schedule 1."

245. When the Claimant commences her employment, she declares she has ADHD, is on medication for it, but does not assert it is a disability that requires adjustment. The Respondent is on notice though of the impairment.

246. It is then in May/June/July 2020 that DC understands from a conversation from the Claimant that she had to step away to calm down due to behavioural issues and that is from ADHD. It would appear this is the acknowledgement of the Claimant being able to take smoking breaks to help her calm down. An agreement is reached with regard to smoking breaks. Adjustments to the updated smoking break policy are then confirmed on the 3 August 2021 for the benefit of the Claimant.

247. This is consistent with what the Claimant says in her grievance document and in paragraphs 13, 14 and 15 of her witness statement in relation to the need for smoking breaks ... (paragraph 13) ... "... one of the coping mechanisms to deal with the stresses that occurs whilst working was to go outside take 10 minutes to reset and smoke a cigarette ready for the next run ...".

248. The Respondent is aware of changes to the Claimant's ADHD medication on the 8 March 2021 and the Claimant is made aware to speak to the Branch Manager if she needs to regarding this.

249. The next recorded issue related to ADHD is the references the Claimant makes in the disciplinary hearing on the 13 July 2021 in connection with her driving scores.

250. Within the meeting notes (page 264) the Claimant is asked why she thinks she hasn't improved her driving score to 85%. She explains that she thinks the problems is the van is manual whereas her car is automatic, and she just needs time to adjust. She also refers to when someone takes the van home, they change the seat and she doesn't feel focused because she needs to get comfortable, to be aware she has ADHD.
251. Questions are asked about the Claimant's medication, and it is confirmed she will start new medications in the next week or so. The Claimant when asked if she understands why she has been given a disciplinary for driving scores, confirms that she totally understands.
252. The Claimant does not seek to assert at that disciplinary hearing that her ADHD or something arising from it were a factor in the other conduct matter being her behaviour/bad language. We remind ourselves of what the Claimant has told this Tribunal, that she doesn't go around using ADHD to blame every situation of life and agreed that if there is no reference to ADHD in response it is because she doesn't think ADHD accounts for the outburst.
253. The Claimant did not appeal the warning and when asked why in oral evidence she confirmed that she did not know why.
254. The next telematics meeting is on the 2 September 2021 with PG (pages 285 and 286). It records two overall scores above 85% and two below. The form is signed by the Claimant and PG. it records the Claimant confirming she did not need more training and just needed to concentrate more.
255. It is reasonable to conclude from this that the Claimant is okay and does not need anything from the Respondent to perform her role in relation to her ADHD and her diving scores.
256. We do not find that the Respondent has knowledge of a substantial disadvantage on the Claimant's day to day activities at this point.
257. It is then at the dismissal hearing that the Claimant is again documented referring to her ADHD supported by a letter from her GP.
258. We have considered carefully what the Claimant does assert about her ADHD at the dismissal hearing.
259. Firstly, considering the statement the Claimant produced for the dismissal hearing at page 494. It states that she communicated struggling with ADHD to DC and ... "... One of these aspects is time keeping/getting to work on time...". It goes on to say that she requested DC give her a later shift. She concludes in that statement ... "... I don't want to be late to work, every morning is the same fight with myself to get there on time. But that's one of the key points

to having ADHD, it's like you're in a constant battle with yourself, you know what needs to be done and what is asked of you and you want to do it you really do, but then there is the same you inside of your head saying no, no, no, not today and it's a constant battle that is a constant cycle. It just doesn't stop and it doesn't matter how much you try, all these little hiccups and bumps will never go away until you find the root of the problem. At this moment in time the root of the problem is my ADHD, which brings me to my next point. I have been noticing a decline in some areas of my disability for the past 6 months and have been in contact with my GP to get a referral back to the Mental Health Team that I am under for the review of my ADHD medication. I would like to submit a letter of evidence that my GP has written for the purpose of this meeting.”.

260. The Claimant was asked in cross examination to accept that the GP letter she produced for the hearing dated 1 February 2021 (at page 161 and also repeated at page 495 of the bundle within the dismissal hearing workbook) does not provide a link between her lateness and ADHD, that it didn't comment about lateness. In response the Claimant confirmed that it was not necessary as the letter was produced to show that she was looking for help and struggling.

261. Within the minutes of the dismissal meeting the Claimant is recorded as saying when asked how the disability affects the time keeping ... “... with my ADHD timekeeping is one small thing, with ADHD I am not on the right medication at the moment, my brain works differently, I don't know, I don't understand it myself.” (page 497).

262. In response to the main reason of the Claimant's lateness being recorded as traffic the Claimant says ... “... the reason I say is because I don't want everybody knowing about my disability or constantly saying its about my disability...” (page 498).

263. We have considered carefully how KD considers the matters raised by the Claimant. We have also considered what has been evidenced as to the Claimant's communicated reasons for her lateness. We find that it has not been proven that the Respondent had knowledge that the Claimant's incidents of recorded lateness arose from her ADHD, the majority of the recorded reasons are because of traffic. The GP letter dated 1 February 2021 does not make that linkage either.

264. As to knowledge of the Respondent, we find it had knowledge of the impairment from the start of the employment relationship, there is also in our view sufficient continuity of communication of the impairment through the course of the employment relationship to support a long-term condition. However, knowledge by the Respondent of a substantial disadvantage on day-to-day activities and/or arising from any particular PCP is not made out in our view. The Respondent understands the Claimant needs to take breaks, that is accommodated for. Other than that, the Claimant has presented as fit for work

and not communicated she needs a particular adjustment to her work to assist her, nor in our view communicated sufficient information to give the Respondent constructive knowledge of such an issue or need.

265. Harassment related to disability and discrimination arising from disability.

266. We find the Claimant is a disabled person and accept that her disability affects her in that she is easily distracted finding it hard to listen to others in conversation, overlooking details, not completing tasks or projects, being hyper focused, poor time management, disorganisation, forgetfulness, impulsiveness, anxiety and fatigue. That symptoms of her ADHD can include difficulty concentrating and organising herself as well as struggling to maintain the direction of a conversation. Further, she gets agitated over things and it is hard to move past. The Claimant finds cigarettes, music, coffee and analysing the situation helpful. The Claimant also had problems with the first motor vehicle which she drove from January 2020 to June 2020, in that she believed the vehicle was dangerous and not fit to be driven, with fumes coming back inside the vehicle triggering her asthma symptoms. These problems with the vehicle, together with her ADHD, caused her extreme panic and anxiety.

267. For each of the allegations in paragraphs 3.1.1 to 3.1.5 of the list of issues we need to determine if the Respondent did do what the Claimant alleges, then if that was unwanted conduct, and if so, did it relate to the protected characteristic of disability, and did it have the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant, or if not, did it have that effect. We need to take into account the Claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

268. Then if not, but the alleged conduct did happen, we need to determine:

- a. whether the Claimant was treated unfavourably and by whom;
- b. what caused that treatment, focusing on the reason in the mind of the alleged discriminator;
- c. whether the reason was something arising in consequence of the Claimant's disability, which could describe a range of causal links;
- d. Noting that knowledge is required of the disability, rather than knowledge that the "thing" leading to the unfavourable treatment was a consequence of the disability.

269. Then, to consider if such treatment was a proportionate means of achieving a legitimate aim. We note that the Respondent's asserted legitimate aims are not disputed by the Claimant.
270. So, to consider the first allegation (3.1.1) refusing changes which the Claimant requested to her working hours (including changes to her start times). The Claimant says that she requested such changes in weekly meetings with various managers: Peter Grech, Daniel Crease, Graham Howard and Peter Jackson. The requests were made from around May 2020 onwards.
271. the Claimant provides no specific details of when and what was asked for and it is disputed by DC (see paragraphs 11 and 12) and GH (paragraphs 14 and 16). Also, PG does not start at the branch until 19 June 2021 (paragraph 10).
272. As noted in paragraph 5 of the Claimant's witness statement the medical evidence from the Claimant does show changes to the Claimant's medication (that was recorded while the Claimant was working for the Respondent (page 164)). What it does not show though is what the working ability issues were or what was needed to assist with that. The GP letter also does not show this (page 161).
273. We also note of the 27 periods of lateness referred to by DC in his witness statement, 20 record the Claimant giving the reason as traffic, then four as she missed her alarm and two as waking up late and one as taking too long to get ready.
274. Accepting the evidence of DC and his explanations for his response on the two occasions he recalls being asked by the Claimant to change her working hours (paragraphs 52 and 66 of his witness statement) and then refusing that request (which we accept would be unwanted and unfavourable as the Claimant would like it), we find that the reason for refusal is it couldn't be accommodated.
275. The evidenced refusals do not relate to disability, nor are they because of something arising from the Claimant's disability. The Claimant has not proven allegation 3.1.1 on the balance of probability.
276. The next allegation (3.1.2) refusing changes requested by the Claimant to her van which she says was defective and so impacted adversely on her performance. She says that these changes were requested in the same weekly meetings as the previous paragraph, from around May 2020. The Claimant asserts (as set out in her further information) that after making informal complaints to her managers about the vehicle which she was assigned, the Claimant received her new van in or around June 2020, however she was later forced to change into an older unsuitable van, (which was not fit for purpose),

on Saturday 11th September 2021, by her Manager Peter Grech, following a series of incidents of bullying, which made the Claimant feel victimised, as set out in detail within her grievance filed on the 23rd September 2021.

277. The Claimant in her witness statement does not say that she asked for the van to be changed and it was refused. She records it being changed in June 2020. This resolves that issue so far as the Claimant is concerned at that point.

278. We have not been presented evidence to support that the Respondent refused to change the Claimant's van prior to June 2020. What the Respondent has asserted, and we accept, is that the Claimant was treated positively from October 2020 by being given a new van in circumstances when she would not normally have qualified for one.

279. The circumstances of the 11 September 2021 are not as the Claimant asserts in her further information. Considering paragraph 17 of the Claimant's witness statement and paragraph 43 of PG's witness statement, a request is made for the Claimant to use an older van as the Claimant's usual van is not available that day. The Claimant refuses to use the older van and an alternative is then accommodated for her on that day.

280. The Claimant has not proven on the balance of probability that the Respondent refused to change the van either before June 2020 or on the 11 September 2021. The Claimant has not proven on the balance of probability what she alleges as set out in allegation 3.1.2.

281. The next allegation (3.1.3) is threatening the Claimant with dismissal. The Claimant asserts that these threats were made at weekly meetings, due to alleged performance issues, by Peter Grech, Daniel Crease, Graham Howard and Peter Jackson. She says that they occurred from around the Summer of 2020 until the end of her employment. This in our view should also be considered with the fourth allegation (3.1.4), considering and/or taking disciplinary action against the Claimant on the following bases, each of which the Claimant says arose from the effects of her disability and/or changes to her ADHD medication:

- a. (3.1.4.1) Her inability to meet a driving score target of 85%.
- b. (3.1.4.2) That she shouted at and swore at colleagues on occasions.
- c. (3.1.4.3) That she refused a management request to drive a van.
- d. (3.1.4.4) That she failed to follow process, in respect of use of PPE and in carrying more than one disc brake at a time.
- e. (3.1.4.5) That she was verbally abusive to a member of the public.

f. (3.1.4.6) That she was late for work on a number of occasions.

282. We have considered carefully the evidence presented to us, and the facts we have found. The Claimant has not proven on the balance of probability a particular “threat of dismissal”, by a particular person and when. What we have been presented is an account by the Respondent’s witnesses, supported by contemporaneous documentation, of the Claimant, in our view, being managed fairly and proportionately for the issues that arise with her performance. Allegation 3.1.3 has not been proven on the balance of probability.

283. Considering then each of the specific allegations of disciplinary action. It is not in dispute that disciplinary action was considered or taken for the matters alleged and that could therefore be unwanted conduct or unfavourable.

284. Firstly 3.1.4.1, her inability to meet a driving score target of 85%.

285. There is a discussion at the disciplinary hearing in respect of the final warning about driving scores that relates to the Claimant’s ADHD. What the Claimant describes at that meeting is she takes time to settle in, as she is used to driving an automatic versus a manual and the change in seat position. Such issues being ADHD linked are not communicated by the Claimant prior to this. We also note there are no ongoing issue with driving an older van by the time of the disciplinary, the Claimant having resolved that issue from June 2020.

286. Having considered the telematic scores and what the Claimant communicates, we do not find it proven on the balance of probability that the Respondent understands or should reasonably do so, that the telematics scores are because of something arising from her ADHD. That understanding is confirmed in the communicated outcome of the final written warning. The Claimant does not appeal it to suggest otherwise. No issues are then raised by the Claimant at the subsequent telematics meeting.

287. We do not find that the Claimant has proven on the balance of probability that the reason this disciplinary action was considered and taken relates to her disability or something arising from her disability. For the avoidance of doubt even if we were wrong in that we also find the Respondent lacked knowledge of all the ingredients of disability at this point. Even, if there was relevant knowledge of disability and such a link were evidenced, we note the Respondent’s uncontested legitimate aim being the effective management of staff conduct and/or performance. It is not in dispute that there is a formal process in place that the parties adhere to. The matters being considered for disciplinary and being disciplined for is in our view a proportionate means of achieving the undisputed legitimate aim.

288. The next (3.1.4.2) is that she shouted at and swore at colleagues on occasions.
289. The Claimant has not evidenced any communication by her to the Respondent that link such things which were raised in a disciplinary sense to her ADHD. We also find the Respondent lacked knowledge of all the ingredients of disability at this point. Even, if there was relevant knowledge of disability, the Claimant accepted in oral evidence that the actions taken by the Respondent in these matters were fair, save for the issue with the complaining by the member of the public, which she denies she did as alleged. The Claimant also denies swearing towards PG. The Claimant does not link those issue to her ADHD. Even if such a link were evidenced, we note the Respondent's uncontested legitimate aim being the effective management of staff conduct and/or performance. As the Claimant accepted when a disciplinary sanction for these sorts of matters was issued it was fair, and this was after a disciplinary process, the actions of the Respondent are in our view proportionate in achieving that aim.
290. (3.1.4.3) That she refused a management request to drive a van.
291. PG in paragraphs 37 to 45 of his witness statement sets out his recollection of this issue. He explains why there was a shortage of vans that day, due to break downs affecting two vans and one of the other vans not being on site. The van resource is then allocated based on start times. This leaves a blue van for the Claimant, as it was understood the Claimant would not want to drive the large transporter. He relays the Claimant refusing with swear words.
292. PG describes the maintained refusal to drive the blue van by the Claimant and then it being resolved when he says he asked another employee to swap vans with the Claimant. PG notes that contrary to the Claimant's assertions, her driving scores had not been improved by not using a blue van.
293. PG says that he raises the Claimant's conduct with DC so that DC could then investigate.
294. Although a disciplinary process was then recommended by DC it did not happen because it timed out after the grievance against PG had concluded.
295. What the Claimant then tells DC is recorded in the investigation notes (page 293): ... I said why are you putting me in the a blue van when few days b4 in a meeting about D/School I stated the only thing helped me was being in white van. In blue van it was zero. IN same meeting he asked if anything Co could do t help and I said no. I need to keep it is so so I said no I am not driving a blue van as white van helps me. I don't want to go in blue van as worrying more about my job for the future & so I refused.". Also, page 296: The Claimant is asked by DC ... "are there any other reasons other than already discussed

why you didn't want to drive a blue van?". The Claimant replies ... "because I didn't feel safe in a blue van."

296. The intention was to invite the Claimant to a disciplinary, but that never happened. The outcome of it is therefore unknown.

297. The refusal by the Claimant is not in dispute, the reasonableness of the request and the reasonableness of the refusal is. The swearing is in dispute. The Claimant has not expressed in response at the investigation that her ADHD was a factor or refer expressly to a connection as a result of things arising because of her ADHD. The Claimant denies swearing and refers to not feeling safe in the blue van.

298. The Claimant also does not identify her ADHD nor refer expressly to a connection as a result of things arising because of her ADHD in her grievance against PG. What is suggested by the Claimant is smoke making her cough.

299. We therefore have the Claimant's refusal, a request for the matter to be investigated, it being investigated with the recommendation it proceed to a disciplinary, which did not happen.

300. The Claimant's refusal is the cause for what happens. The Claimant says she refuses because she did not feel safe in the blue van and she says she did not feel safe because problems with the vehicle, together with her ADHD, caused her extreme panic and anxiety, detrimentally affecting her driving scores and performance. This though is not something communicated to the Respondent at that time.

301. We have found that the Respondent lacked knowledge of all the ingredients of disability at this point. If there was relevant knowledge of disability, and accepting what the Claimant says, she refuses because of something arising from her disability, the escalation to investigation could be said to arise from that also, but for the refusal, there would be nothing to investigate. The Respondent's undisputed legitimate aim is the effective management of staff conduct and/or performance. It is not in dispute that there is a formal process in place that the parties adhere to. There are disputed facts between the Claimant and PG as to the swearing. There is no express communication of the linkage between disability and her refusal by the Claimant, so matters being considered for disciplinary is in our view a proportionate means of achieving the undisputed legitimate aim.

302. (3.1.4.4) That she failed to follow process, in respect of use of PPE and in carrying more than one disc brake at a time.

303. No evidence has been presented about these issues to show on the balance of probability that what is raised with the Claimant about these matters

is because of something arising from her ADHD or related to her ADHD. The Claimant confirmed that issues over gloves is to do with her finger.

304. (3.1.4.5) That she was verbally abusive to a member of the public.
305. We have already considered this allegation of being verbally abusive to a member of the public, as part of allegation 3.1.4.2 above. The Claimant denies she was, so this is not because of something arising from her ADHD. The Claimant does not relate it to her ADHD either.
306. (3.1.4.6) That she was late for work on a number of occasions.
307. The majority of the Claimant's lateness is explained as being because of traffic. It is that explanation given by the Claimant for the majority of the lates, as to why the Respondent takes the action it does. Not because of something arising from the Claimant's ADHD or in relation to her ADHD.
308. We have found that the Respondent lacked knowledge of all the ingredients of disability at this point. Even, if there was relevant knowledge of disability, the Respondent's undisputed legitimate aim is the effective management of staff conduct and/or performance. It is not in dispute that there is a formal process in place that the parties adhere to. There is no communication at the time of the linkage between disability and her disciplinarys for lateness, so matters being considered for disciplinary and being disciplined for is in our view a proportionate means of achieving the undisputed legitimate aim.
309. Further, the Claimant does not link in her evidence that any of the allegations in 3.1.4.1 to 3.1.4.6 directly relate to her disability,
310. For all these reasons allegations 3.1.1 to 3.1.4, whether as acts of harassment or as something arising from disability fail and are dismissed.
311. As to allegation 3.1.5 terminating the Claimant's employment It is not in dispute that the Claimant's employment was terminated, nor that this can be unwanted conduct or unfavourable treatment. The Respondent relies upon the potentially fair reason of conduct. The Claimant does not dispute the conduct issues (she confirmed this in her oral evidence). She asserts that there is explanation and mitigation (i.e., her ADHD) that without further investigation it makes the dismissal unfair. We have considered this allegation when considering the fairness of the dismissal as set out below. For completeness we note the Respondent's undisputed legitimate aim here, being the effective management of staff conduct and/or performance.

312. Indirect disability discrimination

313. The Respondent accepts that it applies the PCP of working hours arrangements of starting at 8am and finishing at 5.30pm. It says it does so for the undisputed legitimate aim of the effective allocation of human resources and business efficacy.

314. We have found that the Claimant's disability affects her in that she is easily distracted finding it hard to listen to others in conversation, overlooking details, not completing tasks or projects, being hyper focused, poor time management, disorganisation, forgetfulness, impulsiveness, anxiety and fatigue. That symptoms of her ADHD can include difficulty concentrating and organising herself as well as struggling to maintain the direction of a conversation. Further, she gets agitated over things and it is hard to move past. The Claimant finds cigarettes, music, coffee and analysing the situation helpful. The Claimant also had problems with the first motor vehicle which she drove from January 2020 to June 2020, in that she believed the vehicle was dangerous and not fit to be driven, with fumes coming back inside the vehicle triggering her asthma symptoms. These problems with the vehicle, together with her ADHD, caused her extreme panic and anxiety.

315. A PCP of fixed working hours would be difficult to meet for someone who has poor time management. However, the Claimant explains her lateness in the majority of occasions as being because of traffic. The Claimant has not presented any supporting medical evidence that her being late is because of her ADHD. Neither, that those with ADHD cannot time manage and are late, to evidence a relevant group disadvantage.

316. We do not find that the Claimant has therefore proven on the balance of probability that this particular PCP caused the Claimant a particular disadvantage when compared with persons with whom she did not share the characteristic, due to the effects of her disability upon her. We have been presented no evidence as to what the group disadvantage is particular to this PCP. Even if we were wrong in that, both DC (in paragraphs 52 and 66 of his witness statement) and KD (in paragraph 23 of his witness statement) present evidence to us as to why fixed working times are important for the Respondent's business and we accept what they say in the way they managed the Claimant against this as being a proportionate means of achieving the undisputed legitimate aim, particularly as a disciplinary/performance process was followed with her, during which the Claimant could put her case and alternatives were considered, including a change of role.

317. As to the second and third PCPs being processes for dealing with alleged misconduct and poor performance, the Respondent says they are too vague to concede.

318. As we understand the evidence presented in this case it is not in dispute that the Claimant has been put through disciplinary and performance processes. The Claimant has not presented evidence to show what particular disadvantage these caused her when compared with persons with whom she did not share the characteristic, due to the effects of her disability upon her. We have been presented no evidence as to what the group disadvantage is particular to these PCPs. The Claimant has not proven matters on the balance of probability to require a need to consider the Respondent's undisputed legitimate aim being the effective management of staff conduct/performance.

319. Reasonable adjustments

320. In relation to the complaint of a breach of the duty to make reasonable adjustments, the same PCPs are pleaded as in the complaints of indirect discrimination.

321. It is then asserted by the Claimant in respect of those PCPs that she was put to a substantial disadvantage compared to someone without her disability, in that she faced a heightened risk of disciplinary action and dismissal due to the effects of her disability and/or changes to her ADHD medication upon her, including:

- a. Her inability to meet a driving score target of 85%.
- b. That she shouted at and swore at colleagues on occasions.
- c. That she refused a management request to drive a van.
- d. That she failed to follow process, in respect of use of PPE and in carrying more than one disc brake at a time.
- e. That she was verbally abusive to a member of the public.
- f. That she was late for work on a number of occasions.

322. For those we need to determine whether the Respondent knew, or could it reasonably have been expected to know, that the Claimant was likely to be placed at the disadvantage.

323. We have already considered the knowledge question and what we find is that the Respondent did not have the relevant knowledge to engage the duty.

324. As to driving scores it is reasonable to conclude from the final warning process and the follow up telematics meeting that the Claimant is okay and does not need anything from the Respondent to perform her role in relation to her ADHD and her diving scores.

325. As to shouting and swearing at colleagues, refusing to drive a van, use of PPE and verbal abuse to a member of the public, the Claimant does not communicate at the time (or indeed at this hearing, save for her refusal to drive a van) an association to what happened with any substantial disadvantage because of her ADHD, to show the Respondent knew this, and based on the evidence presented we do not find that the Respondent could reasonably have been expected to know it.

326. In respect of lateness this is an issue explored at the dismissal stage.

327. We have considered this aspect in respect of the knowledge question and the complaint of indirect discrimination.

328. We find that it has not been proven that the Respondent had knowledge that the Claimant's incidents of recorded lateness arose from her ADHD. The majority of the recorded reasons are because of traffic. The GP letter dated 1 February 2021 does not make that linkage either. Even if we were wrong in that, both DC (in paragraphs 52 and 66 of his witness statement) and KD (in paragraph 23 of his witness statement) present evidence to us as to why fixed working times are important for the Respondent's business. We accept what they say in the way they managed the Claimant against this which we find is a proportionate means of achieving the undisputed legitimate aim, particularly as a disciplinary/performance process was followed with her, during which the Claimant could put her case and alternatives were considered, including a change of role. This in our view would mean that if relevant knowledge had been proven of the disability and substantial disadvantage the suggested adjustments relevant to lateness being (5.5.1) she should have been given flexible working hours (particularly around start times); and (5.5.2) she should have been allowed to swap shifts with colleagues when she requested to do so; would not be reasonable.

329. Victimisation

330. We need to determine (based on the agreed list of issues) whether the Claimant did a protected act by raising a grievance on 20 September 2021 about matters which could amount to a breach of the Equality Act 2010. The Respondent disputes that the content of the grievance of that date amounts to a protected act.

331. The Claimant's written grievance (pages 308 to 309) refers to Bullying, Victimisation and Harassment. It does not refer to the Equality Act, disability, or ADHD. Reference is made to ADHD in the expanded grievance statement the Claimant submits (pages 336 and 337).

332. Although the issue as to the asserted protected act focuses on the specific letter dated 20 September 2021, it is clear (as the Claimant confirmed in her oral evidence) that her expanded statement at pages 335 to 339 that she presents at the grievance hearing would form part of it.
333. Within the statement document the Claimant writes ... “I had to explain to Peter in depth the struggles of dealing with stress, anxiety and day to day emotions whilst having ADHD. In response to telling Peter this he brought up medication that I take and 'problems' that I am dealing with. This made me feel very victimised, upset and bullied.” (page 337).
334. This is sufficient in our view to amount to a protected act.
335. We therefore need to determine whether the Respondent did the following things (noting allegation 7.2.1 has been dismissed on withdrawal), (7.2.2) escalate hostility towards her at weekly meetings with PG and DC. The Claimant sets out in her further information that her relationship with the Respondent slowly began to break down over a period of time following her various complaints and or requests for modifications to her working patterns, due to the adverse effects of her disability and or for changes to her working equipment in the form of vehicle exchanges. The Claimant relies upon the detailed facts as set out in her Grievance – dated 23rd September 2021 – detailing the ensuing and continuing unfair use of the disciplinary process enacted against her by the Respondent, (in particular Peter Grech); This conduct ultimately resulted in the Claimant’s unfair dismissal from the company in February 2022.
336. The Claimant has not then identified what happened after her grievance that she asserts is victimisation in the way she alleges. It was not put to DC or PG that any particular thing they did or didn’t do was because she had raised her grievance. As we have set out above what we have been presented is an account by the Respondent’s witnesses, supported by contemporaneous documentation, of the Claimant, in our view, being managed fairly and proportionately for the issues that arise with her performance. Allegation 7.2.2 has not been proven on the balance of probability.
337. As to 7.2.3 terminate the Claimant’s employment. It is not in dispute that the Claimant’s employment was terminated. The Respondent relies upon the potentially fair reason of conduct. The Claimant does not dispute the conduct issues (she confirmed this in her oral evidence). She asserts that there is explanation and mitigation (i.e., her ADHD) that without further investigation it makes the dismissal unfair. We have considered this allegation when considering the fairness of the dismissal as set out below.

338. Time limits

339. With the findings we have made about the disability discrimination complaints it is not necessary for us to determine the time limit jurisdictional matters.

340. Unfair dismissal

341. The Respondent relies upon a conduct reason.

342. The Claimant is dismissed for unacceptable levels of lateness on the back of a live final warning that has not been appealed. We note that where there has been no appeal against a final warning, there would need to be exceptional circumstances for going behind an earlier disciplinary process given the need for finality: **Davies v Sandwell Metropolitan Borough Council [2013] EWCA Civ 135 at [38]**. However, the final written warning has been considered as part of the disability complaints and we have not found that the final written warning was given in relation to the Claimant's disability or something arising from disability.

343. The Claimant does not dispute the conduct issues (she confirmed this in her oral evidence). She asserts that there is explanation and mitigation (i.e., her ADHD) that without further investigation it makes the dismissal unfair.

344. We accept that the reason for dismissal is the Claimant's conduct. This is a potentially fair reason for dismissal under s.98(2) of the Employment Rights Act 1996.

345. Considering then whether the Respondent acted fairly and reasonably in the circumstances within the meaning of s98(4) ERA in treating the conduct reason as a sufficient reason for dismissing the Claimant.

346. The Claimant does not dispute her conduct. We find that the Respondent has a genuine belief that the Claimant was guilty of the misconduct alleged and had reasonable grounds for that belief.

347. As to the procedure, we recognise we must consider the investigation as a whole when assessing the question of reasonableness. Also, that the range of reasonable responses test applies both to the decision to dismiss and to the consideration of whether the investigation into the suspected misconduct was reasonable in all the circumstances. The Respondent has in our view followed a fair procedure, including a reasonable investigation. The Claimant is given an opportunity to put her case and a right of appeal. The matters the Claimant raises are considered by KD and PJ, and we accept their evidence about this. We find that the Respondent did as much investigation as was reasonable at

the time. What the Respondent did is not outside the range of reasonable responses.

348. Based on what has been proven on the balance of probability we do not find that the Respondent failed to take sufficient account of the Claimant's asserted disability and its effects upon her. It has not been proven that the Respondent had knowledge that the Claimant's lateness arose from her ADHD, the majority of the recorded reasons is because of traffic. The GP letter does not make that linkage. We therefore accept the evidence of KD as to why he decided what he did and that is not related to the Claimant's ADHD, it is not because of something arising from the Claimant's ADHD nor is it because the Claimant raised a grievance. As also noted, we do not find that the final written warning, which results in the Claimant's further lateness being escalated to a dismissal, was given in relation to the Claimant's disability or something arising from disability.
349. As to the assertion that the Respondent failed to take into account that it had not acted upon previous requests by the Claimant for adjustments to her working hours, based on our fact find as set out above, we find that for the requests that have been evidenced, these were considered and refused because they could not be accommodated, and not related to the Claimant's disability or because of something arising from her disability.
350. For all these reasons we find that the decision to dismiss for the reason of the Claimant's conduct was a fair sanction, that is, it was within the range of reasonable responses open to a reasonable employer when faced with these facts. Alternatives were considered and were not deemed reasonable.
351. We do not find any procedural failings which would render the Claimant's dismissal unfair.
352. For all these reasons it is the unanimous judgment of the Tribunal that the Claimant's complaints of unfair dismissal, discrimination arising from disability, indirect discrimination (disability), breach of the duty to make reasonable adjustments, harassment related to disability, and victimisation (save for allegation 7.2.1 which was dismissed on withdrawal), all fail and are dismissed.

Employment Judge Gray
Dated 6 October 2023

Judgment sent to Parties on
25 October 2023 By Mr J McCormick