EMPLOYMENT TRIBUNALS

Claimant:		**Respondent:**
Mr D Bean	**v**	NSL Limited

Heard at:	Reading	**On:** 12-15, 18 September 2023, 19 September & 11 & 20 October 2023 (in chambers)
Before:	Employment Judge Anstis Ms C Baggs Mr J Appleton	

Appearances
For the Claimant: Dr A Loutfi (counsel)
For the Respondent: Miss I Bayliss (counsel)

RESERVED JUDGMENT

Unanimously:

1. The claimant was unfairly dismissed.

2. The claimant's basic award for unfair dismissal is not subject to reduction for contributory fault.

3. The respondent has subjected the claimant to indirect disability discrimination (to the extent set out in our reasons).

4. The respondent has failed to comply with its obligation to make reasonable adjustments (to the extent set out in our reasons).

5. The respondent has subjected the claimant to unlawful disability-related harassment (to the extent set out in our reasons).

By a majority:

6. The claimant's compensatory award for unfair dismissal must be reduced by 100%.

7. The claimant was not dismissed in breach of contract.

8. The claimant was not subject to discrimination arising from a disability.

REASONS

A. INTRODUCTION AND THE ISSUES

Introduction

1. The claimant was employed by the respondent as a "Civil Enforcement Officer" until his dismissal with immediate effect on 26 June 2019.

2. A "Civil Enforcement Officer" is what would once have been called a parking warden. The claimant was first employed by the Royal Borough of Windsor and Maidenhead on 2 November 2007. His employment transferred to the respondent under TUPE on 1 December 2017 on them taking on the work under contract from the council.

3. The claimant brings claims of unfair dismissal, wrongful dismissal and disability discrimination concerning his dismissal and events surrounding it.

4. This hearing was to determine liability only, but such a determination was to consider issues of contributory fault and/or a *Polkey* reduction from compensation for unfair dismissal.

The issues

5. The parties had agreed a list of issues for the purposes of this hearing, which is attached as Appendix 1 (including the extracts from the particulars of claim referred to).

6. While the precise reasons for his dismissal are in dispute, the claimant accepts (for unfair dismissal purposes) that they were reasons relating to his conduct.

The claimant's disability

7. The claimant has dyslexia, described by him as being severe dyslexia. The respondent accepts that this is a disability, and that it knew of his disability from the start of his employment with them.

8. The claimant's disability makes him a vulnerable party and witness for the purposes of the "Presidential Guidance: Vulnerable parties and witnesses in Employment Tribunal proceedings". We have also had regard to the section of the Equal Treatment Bench Book addressing dyslexia.

9. Adjustments made for the claimant during the hearing were: (i) for there to be a ten minute break every hour (a practice that the tribunal continued throughout the hearing), (ii) in adopting his witness statement, for him to confirm that the statement had been read out to him rather than that he had read it, (iii) for any documents he had to respond to in answering questions to be read out to him, (iv) for questions to be taken strictly one at a time.

10. At the claimant's request this judgment and reasons are prepared with left justification only rather than the usual fully justified format.

Our decision

11. As appears from the judgment set out above, elements of our decision have been made by a majority rather than unanimously. Except where explicitly set out as a majority decision, the reasons that follow should be considered to be unanimous. Where a part of the decision is referred to as being a majority decision, in each case the majority is Ms C Baggs and EJ Anstis and the minority is Mr J Appleton.

B. THE FACTS

Introduction

12. The claimant was employed by the Royal Borough of Windsor and Maidenhead as a Civil Enforcement Officer from 2 November 2007. His employment transferred to the respondent on 1 December 2017.

13. Shortly before his transfer the claimant had a meeting with John Evans of the respondent to discuss the consequences of the transfer for him. His wife and trade union representative also attended that meeting. The notes record "*Dyslexia - may take longer but once I learn then I do*" and the respondent accepts that it knew of his dyslexia from the start of his employment.

14. The claimant had not been subject to any previous disciplinary proceedings and was regarded by the respondent as being good at his job. Mr Evans said that there was no need (at least at that point) for any further enquiries about the claimant's dyslexia since he was good at his job and whatever effect the dyslexia may have had it did not affect his ability to carry out his day-to-day work.

19 April 2019

15. 19 April 2019 was Good Friday. The claimant described it as being a sunny day. A sunny bank holiday meant there were lots of tourists and visitors in Windsor.

16. The claimant was due to work in inner Windsor that day. This meant reporting to the depot in Tinkers Lane in the western suburbs of Windsor, where he and his colleagues would receive the day's briefing (he says they were told to treat the day as if it was a Sunday, meaning less emphasis on residential parking areas and more emphasis on commercial areas). They were then driven to the operational base for inner Windsor, which was a hut at the Coach Park. This contained rest facilities for breaks.

17. The Coach Park comprises an area of parking for coaches to the east, with an ordinary car park to the west (known as the Coach Park Car Park). Access to

these parking areas is via Alma Road, which runs north-south. The rest hut was approximately north of the end of Alma Road, between the coach and car parking areas.

18. Walking south from the Coach Park along Alma Road leads to a crossroads with Arthur Road, a main west-east road in Windsor. Alma Road continues south. To the south-west of this junction is a Co-op. To the south-east is a large housing complex called Ward Royal.

19. The claimant and his colleagues had designated routes they were to patrol, although this did not require them to trace their patrol area in any particular order or to be in any particular place at any particular time. They were also responsible for assisting members of the public who had any difficulties with the car parks. We were told that the parking machines at the Coach Park Car Park had recently been renewed, so that people needed more help than normal, particularly on a busy bank holiday. It was up to the claimant when he took his breaks, except that his lunch break had to end 90 minutes or more before the end of his shift.

20. The Civil Enforcement Officers were provided with handheld devices (a “HH”), manufactured or supplied by Chipside.

21. A Civil Enforcement Officer was required to record on the HH when they entered and exited any particular street or other enforcement area. They also recorded any observations on the HH and the HH was used to record and print out the Penalty Charge Notices (parking tickets) (“PCN”) they issued. They would record breaks on the HH.

22. An “observation” would be recorded for any irregularly parked vehicle. This meant a vehicle without the correct parking permit or visitor’s ticket. It is not typically the case that a PCN would be immediately issued, since various grace periods were allowed, or it may be that a vehicle was allowed to park without restriction in a particular area for a particular period of time. An “observation” may later result in the issuing of a PCN, but this would not necessarily follow. The vehicle may move on during any permitted or grace period.

23. We heard that the HH relayed live data back to the respondent’s supervisors, and that information from the HH would be downloaded at the end of the day (including details of any PCN that had been issued).

24. The claimant understood these rules about the use of the HH and had been using a HH in this manner for a number of years.

25. The record of streets or other areas entered and left during the day, along with observations made and PCNs issued formed the “log” for the day.

26. It has never been in dispute that the claimant's log for that day shows his HH as having crashed and rebooted four times in the morning.

27. It is also not in dispute that the claimant's log shows him as:

    - being on a lunch break from 13:35-14:05,
    - being on Alma Road from 14:09-14:11,
    - being at Ward Royal from 14:11-14:21,
    - being back on Alma Road from 14:21-14:28, and
    - arriving back at the coach park at 14:28, remaining there until he was driven back to Tinkers Lane to finish his shift at 15:00.

The maps and HH data

28. The question at the core of this case is where the claimant actually was in the period between 14:08 (or 14:09) and 14:28. The records he made on the HH show that in this time he was walking south from the Coach Park along Alma Road, beyond the junction with Arthur Road, to Ward Royal, and then walking back to the Coach Park. It is the respondent's case that in fact he never left the Coach Park rest area in this time.

29. As well as recording the manual entries made by the claimant, the HH contained a GPS facility allowing it to locate where it (and therefore the claimant) was at any particular time.

30. The presentation of this data and how it actually operated was the cause of some confusion during the hearing, and possibly (a point we will consider later) during the claimant's disciplinary proceedings. The respondent's position was that (if operating correctly) the HH would report its location to the Chipside online system which would record it in the following way:

    - Irrespective of any action by the CEO, the device would report its position at intervals and this would be noted as purple dots on a map.
    - This was not continuous tracking. It was samples taken at particular points in time. We have seen that these intervals varied between 1-5 minutes. What caused or contributed to this variation was not clear, and it was not clear what the intended rate of sampling was.
    - There would be no "purple dot" report if the device has not moved since its previous report.

- The online system would draw blue lines and a direction of travel between purple dots. This was simply a crude joining of the dots by straight lines that would give some idea of the route taken by the CEO but could not be relied upon to place the CEO at any particular point on that blue line at any particular time.

- Green pins would record the location of the device at the time when manual entries were made recording entry or exit of locations. Different coloured pins would also mark the location of observations and where PCNs were issued.

31. For the respondent, the key point is that (if operating correctly) the system would put markers at the location the HH thought it was at the time of any manual entries being made on the HH by the CEO – including entries and exits, observations and PCNs.

32. There were thus, in principle, three ways of locating where a HH (and therefore a CEO) was at any particular time. Purple dots were an automatic record of where the individual was, sampled on a regular basis. Pins showed where the individual was when manual entries were made to the HH. Finally, a blue line would give an approximate idea of where the individual was at times there was no purple dot or pin.

33. It is the respondent's case that the green pins showing the entries and exits from Alma Road and Ward Royal between 14:08 and 14:28 are located in the Coach Park rest area rather than, as they should have been, in Alma Road and Ward Royal. The respondent takes from this that the claimant was falsely recording where he was (a practice known as "ghost logging") and that this constitutes both falsification of records and bringing the respondent into disrepute with its client (the Royal Borough of Windsor and Maidenhead) who ultimately pays for the patrols to be carried out.

34. While there has been considerable dispute about the process and substance of the respondent's actions in response to this, the claimant accepts that if he had carried out such "ghost logging" this would amount to falsification of records and potentially bringing the respondent into disrepute, and that this is something he could have been dismissed for. It is his position that he did carry out his patrol down Alma Road to Ward Royal and that the HH GPS data for this period is not reliable.

23 April 2019

35. The claimant describes having a conversation on 23 April 2019 with the operation support manager of the respondent's contract with the Royal Borough of Windsor and Maidenhead where she asked about the time he had taken his lunch break on 19 April 2019. There is no dispute that the claimant's lunch break ended around 14:05 and therefore offended against the respondent's rule that lunch breaks should be taken to end at least 90 minutes

before the end of the shift – in his case 15:00. The outcome of this was a file note being made recording "*Spoke to Dean about taking his lunch break to late in the day. He needs to plan his day and breaks out better.*"

26 April 2019

36. The claimant might have thought that that was the end of the matter, but it was not. On 26 April 2019 a supervisor seems to have attempted to recreate his afternoon patrol from 19 April 2019. We have screenshots from the Chipside system showing that this was done, but have been given no explanation why this was done.

30 April 2019 - The first investigation meeting

37. The claimant says:

> *"On 30 April 2019 I was on a routine stop to the council depot on Tinkers Lane when my supervisor … asked me to come into a room for a chat. I wasn't told that it was an investigation meeting but … when he said he was going to ask me some questions, I asked to be accompanied as a result of my condition … He told me this would not be necessary …*
>
> *During the meeting I was asked why I had taken my lunch break between 13:35 and 14:05 given that my shift ended at 3pm. I explained that because of how busy we were, this was the first chance I had had to take lunch. I was confused because I had already had this conversation with* [the other supervisor] *the previous week. I was then questioned in relation to what I did 14 minutes before my lunch break and 3 minutes after … I understood this meeting to be about my lunch break only. I had not been given any indication about any allegations of 'idling' or of deliberate falsification of records on my tour log.*
>
> *At the end of the meeting I was made to sign documents that I could not read or challenge which were relied upon during the disciplinary process.* [The supervisor] *told me to read the notes and sign them. I really struggle to read anything handwritten at the best of time and the marks on the page just looked like squiggles and lines and white space. My stress levels were high, and his insistence that I read them was making me anxious, so I said "if that's what I said, fine" and signed the notes so I could leave the room."*

38. He continues:

> *"After the meeting I was asked to wait in the general area and then called into* [the manager's] *office. To my utter shock and dismay I was suspended with immediate effect. I could not believe that I was being*

sent home for taking a late lunch, and I struggled to take in what [the manager] *was telling me."*

39. As mentioned by the claimant, the supervisor took notes of the meeting. These recorded that the meeting lasted from 11:37-12:25, but there are only two pages of substantive notes. They record that the claimant was asked to confirm he was working on 19 April 2019 (which he did). They record that he was referred to "the GPS handout" (what that is is not clear) and that he confirmed that that was the route he had taken, but with the claimant also saying that the HH had shut down three times. Discussion follows about the claimant's lunch break, and the claimant is asked how long it takes to walk to Alma Road and from there to Ward Royal. The supervisor asks "*Did you walk around Ward Royal and put in your HH any observation*" and the claimant replies, "*Yes I did it was a taxi*". When asked "*Did you patrol the whole Ward Royal area*" the claimant says "*I was observing the vehicle for 5 minutes.*"

40. While the introduction to these notes says that there is an issue of (amongst other things) idling, in the absence of any witness evidence from the supervisor in question we accept the claimant's account of this meeting. He thought it was about his lunch break, which was the only issue that had been previously raised with him. Similarly, in the absence of any evidence from the manager or notes of that meeting we accept the claimant's account of the suspension meeting.

41. The following day the claimant is given a suspension letter, which says:

> *"Further to our meeting on 30th April 2019 which took place at Tinkers lane at 12.15. I am writing to confirm your suspension from your position as CEO on full pay whilst a full investigation is undertaken into allegations of:*
>
> - *Deliberate falsification of records/activities on your Tour Log dated 19th April 2019.*
> - *Bringing the company into serious disrepute.*
> - *Failure to carry out simple working instructions."*

42. We record at this point our view that the respondent has not told us the full truth about the prompt for and circumstances of this initial investigation into the events of 19 April 2019. This is not intended as criticism of those witnesses who did attend for the respondent, but we did not hear any evidence from anyone directly involved in the operation of the contract with the Royal Borough of Windsor and Maidenhead, and those witnesses we did hear from had simply been delegated or instructed to carry out particular functions in respect of the claimant's disciplinary or grievance processes. For instance, Mrs Mallen could not tell us what had prompted the investigation or

suspicions about the claimant's actions. All she knew was that she had been assigned to conduct the disciplinary hearing.

43. There are three reasons for thinking there is more to this.

44. First, it only emerged during the hearing that one other individual had been dismissed for the same offence in the same place on the same day and another had been warned for a similar offence. While Mrs Mallen (who was the disciplining manager in all of the cases) was keen to emphasise that she had treated these separately, it seems highly unlikely to us that they would have been seen as separate matters by management on the contract at the Royal Borough of Windsor and Maidenhead. It was not entirely clear, but it appeared to us that of 3-4 people who were at the rest hut with the claimant at lunchtime, at least two and possibly more had been disciplined for related offences at the same day, yet there has been no explanation of what it was that prompted the respondent to investigate this.

45. Second, it is clear that a supervisor was attempting to recreate the claimant's route as early as 26 April 2019 (i.e. before the first investigation meeting), which suggests that by that point there was considered to be more to it than simply a lunch break at the wrong time – yet it has never been explained why this was done or why the respondent adopted this apparently informal first investigation meeting rather than moving to a formal investigation with the precautions that may have gone with that.

46. Third, as referred to below, there is reference in the claimant's second investigation meeting to matters that have not previously arisen in his case.

47. Finally, we note that this suspension letter is not at all clear about what the actual misconduct alleged was. It says that the claimant's tour log was falsified for a particular date, but does not say what particular entries were the problem or why the respondent believed them to have been falsified. The other two allegations are entirely generic with no indication what they may relate to.

8 May 2019 - The second investigation meeting

48. The suspension letter set a further investigation meeting for 8 May 2019.

49. The claimant describes the start of the meeting as follows and, in the absence of any witness evidence contradicting it, we accept his account:

> *"I was then invited to a further investigatory meeting on 8 May 2019 with* [my manager]*. I asked if I could be accompanied and* [she] *initially refused. I reminded her of my dyslexia and she came back and agreed I could be accompanied by a trade union representative, or a colleague. I asked to have the meeting postponed so my trade union representative could attend, but this was refused and I was told to "just*

> *bring someone else" so I brought my disability advocate, my wife. When* [the manager] *realised who she was, she asked my wife to leave even though I pleaded with her I needed someone with me to help with my dyslexia. The last-minute substitution of a colleague on shift …, who had had no details of my disability-related needs or the allegations made against me, to be my companion put me at a disadvantage."*

50. The notes of the meeting record that it lasted from 11:23 – 12:45. The claimant is questioned about, and accepts his understanding of, the requirement to log entry and exit of every road. He is shown his log for the day. He is questioned about the distances to Alma Road and Ward Royal, and his record of an observation at Ward Royal. When asked why it took him much longer to walk back to the coach park than it did to walk out to Ward Royal he says that he stopped at the Co-op on the way back, accepting that he did not record this break, nor any later break on his return to the coach park. He accepted that he had been told that any breaks needed to be recorded. The manager asks the claimant who was with him at the coach park and when he cannot say who was with him she gives him the names of five colleagues. He says two of them may have been on "outers" then (less built-up areas where patrols are carried out with the aid of a car) and therefore not at the Coach Park. He is then shown "*the printout of the tracking on that day*" and that "*that is regarded* [recording?] *every entry you put in*". The claimant says that the HH rebooted three times in the morning. The manager points out that this may mean data loss, but would not mean incorrect data being recorded. The manager points out that "*as you can see you logged into coach park … so here matches your log in you entered coach park when you turn over your entry is in Alma Road location symbol is still in coach park*", and "*next location you entered showing Ward Royal but as you can see it shows that you are in coach park*". The claimant says that he went to Ward Royal to log the vehicle there, before returning to the coach park to use the toilet. The manager says that the observation of the taxi in Ward Royal has triggered a GPS pin at the coach park, not at Ward Royal. The claimant says that when he observed the taxi he observed it (the taxi) in Ward Royal but he (the claimant) was observing it from Alma Road.

51. Whatever criticism may be made of this meeting, the quality of the maps and of the question of a companion at this meeting it does appear that the manager is making efforts to put the essence of the respondent's case to the claimant – the HH GPS has put him at a different location to the one he has logged himself as being at.

52. The manager goes on to show the claimant the results of the attempt by the supervisor to recreate his route, and later to record the entries as if they were in the coach park rather than Alma Road and Ward Royal. The manager accepts that this was using a different HH to that the claimant used. The claimant says does not accept the manager saying that they all (i.e. each HH) work the same.

53. The following page records the core dispute:

> "[manager] *what I am trying to show you that your GPS showing that you were in coach park whilst you were sat in coach park; is that happened or not.*
>
> [claimant] *I can only show you what I done I can't explain what is says there. I can confirm that walked to Ward Royal put in the observation and walked back to coach park."*

54. That has been the dispute from the start and remains the dispute today: the GPS shows the claimant in the coach park when the claimant says he walked out to Ward Royal and back.

55. The meeting goes on to find that the claimant did not log his toilet break on his return to the coach park and did not remember which colleagues were at the coach park on his return. There is talk of the claimant sitting next to a colleague at lunch and checking messages on his phone, but there is no suggestion of where this point has come from or what its significance is. This is another point at which it appears that by having no witness evidence from local contract staff we do not have any explanation of how this disciplinary matter came to their attention in the first place.

56. Again, the central dispute is put to the claimant:

> "[manager] *Dean did you sit in coach park while you logged in Alma Road, Ward Royal and coach park?*
>
> [claimant] *I walked to Ward Royal and Alma Road.*"

57. As regards the end of the interview, the claimant says (and we accept) "*Again, I was made to sign the meeting notes before I could leave the meeting.*"

58. The claimant was subsequently invited to a disciplinary hearing on 15 May 2019, but this was postponed to 21 May 2019 at his request so that his trade union representative could attend.

The disciplinary invitation and problems with the Chipside materials

59. This is the disciplinary invitation letter that was sent to the claimant:

> *"Further to your email dated and received Sunday 12th May 2019, requesting for a rearranged meeting to enable your Trade Union Representative … to attend. I would like to inform you that you are required to attend a rearranged disciplinary meeting on Monday 20th May 2019 at 11am at Tinkers Lane Depot Windsor, SL4 4RL. The disciplinary meeting will be conducted by Rosin Mallen OSM, also present at the hearing will be Mark Little as note taker and company representative.*

I must also inform you that as this is the second time this meeting is being arranged, should you fail to attend this rescheduled disciplinary meeting I will have no alternative to consider the information available to us at the time and a decision will be made in your absence.

The reason for the disciplinary meeting is in relation to an allegation that you:

- *Deliberate Falsification of records/activities on your Tour report Log dated 19th April 2019*
- *Bringing the company into serious disrepute*
- *Failure to carry out simple working instructions*

Under the Company's disciplinary procedure, as laid down in the Handbook of Employment, I must inform you that such actions constitute Gross misconduct, and should the case be proven, could result in your employment being terminated without notice or payment in lieu of notice.

All documentation that we will be relying on at the hearing was enclosed in the previous correspondence dated 10th May 2019. You may review the Company's Disciplinary, Appeals and Grievance Policy within your handbook of employment.

- *A copy of your patrol log for 19th April 2019*
- *A copy of your Investigation dated 8th May 2019*
- *A copy of the Investigation questions dated for 30th April 2019*
- *A copy of your GPS entries and HHCT entries*
- *A copy of supervisors GPS entries*
- *Disciplinary, Appeals & Grievance Policy*

You are entitled, if you wish, to be accompanied by a work colleague or trade union official at the disciplinary meeting where you will be given every opportunity to state your case. It is your responsibility to arrange any representation that you wish to have.

60. The "*copy of your GPS entries and HHCT entries*" (HHCT being another way of referring to what we are calling the HH) is p363-371 in the tribunal bundle. The "*supervisors GPS entries*" are at p355-362.

61. Both these sets of documents are screenshots taken from the respondent's Chipside system. There are considerable difficulties with both, some of which are of the respondent's making and some seem inherent in the system.

62. It appears (although we were never told as much) that the Chipside system is an online interactive system. The screenshots show in a left side-bar various entries marked by the HH – either the automatic purple dots or the various coloured pins. The main body of the screenshot is what appears to be Google Maps overlayed by different pins, dots and lines. Clicking on a pin appears to bring up the individual entry, which can be cross-referred to those on the side-bar.

63. This leads to there being no coherent way of forming a single screenshot that encompasses all that we or anyone else needed to know about what was happening at any particular time. The side-bar and the map do not necessarily relate to each other, although it does seem possible in some instances to link the two together. It took considerable explanation, often from counsel rather than witnesses, to form any idea of what all of this was supposed to show.

64. That may be inherent in it being impossible to reproduce in a screenshot the interactive nature of the Chipside system, but the problems were compounded by the screenshots being of poor quality when reproduced. The critical printout at p365 purports to show a cluster of green pins in the rest area at the time the claimant said he was out in Alma Road or Ward Royal. While the claimant did not seem to dispute that this was what it showed, the quality of the accompanying map was so poor that it was impossible to say anything much more than that the pins were considerably to the north of where the words "Alma Road" appeared. Since each pin overlays the other and the pins generally are overlayed by a label it is not possible to be confident how many pins there are there.

65. While the electronic copies of these documents provided to the tribunal were in colour, the printed copies were in black and white, making any attempt to decode the pins or other material by colour impossible. We accept Ms Scott's evidence that the copies that had been delivered to the claimant were in black and white. We also accept Ms Scott's evidence that they were delivered without any key or other explanation of what they were meant to show. Without explanation these materials are incomprehensible.

66. The respondent's explanation of what these showed and how they were to be interpreted was lacking even in the tribunal hearing, with counsel expanding on the significance of the entries across the first two days of the hearing, and both sides coming close to attempts to give expert evidence with each counsel speculating on why the materials may or may not be reliable, and what they do or don't signify. Counsel for the claimant expanded her challenges to this material during the course of questioning the respondent's witnesses – in particular critiquing what the maps did or did not show.

67. Mrs Mallen was also provided with this material. She was not familiar with the Chipside system as a different system is used at the contract she was responsible for. She explained that she had subsequently spent "hours" exploring the relevant materials on the Chipside system in order to properly understand it. While a tribute to her diligence, this gives an indication that the materials are far from intuitive, and this opportunity to explore the system was not available to the claimant or his representative.

68. It may be expecting too much of the respondent to provide expert evidence on the system and what it did or did not show, but both this hearing and the disciplinary process have lacked a simple and coherent explanation of the system, screenshots and, for example, any explanation of tolerances or accuracy expected in the system, such as may appear in publicity material, manuals or specifications provided by Chipside.

21 May 2019 – the disciplinary hearing

69. The disciplinary hearing took place on 21 May 2019. It was chaired by Roisin Mallen, who gave evidence at this hearing. She was the manager of the respondent's contract with Reading Borough Council, so came from outside the Windsor and Maidenhead contract.

70. The notes record the meeting as having started around 11:00. The claimant was accompanied by his trade union representative.

71. Mrs Mallen asks the claimant about his experience and working arrangements. He agrees that his lunch break is to not be taken within 90 minutes of the end of his shift.

72. She reads out to him the allegedly wrong entries in his log. He says they are correct. She works through his understanding of the process for logging streets and he confirms that he carried that out properly. She talks though his after lunch work with him. She asks "*can you tell me how up to 1408 your HH was recording the correct location and after that does not?*" The claimant says he can't explain that. There is further discussion about his activities that afternoon. He goes on to say that his HH crashed four times that day. He says that there were three or five others with him in the coach park. Mrs Mallen says that there were three – one on lunch and two on other duties and that "*other people's routes and locations have been looked into*". His union rep says there is no proof of "deliberate falsification". Mrs Mallen says she will go and check the locations, apparently in accordance with a sketch map prepared by the claimant and his trade union representative. At the end of the meeting his representative asks for a copy of the notes to be sent to the claimant. Mrs Mallen says she will give them a copy to take away with them, but we understand this was not done. She says they can be read through now but the union rep says they preferred to take them away. Mrs Mallen says she would normally go through the notes but if there was anything to be changed they should contact her as soon as possible.

21 May 2019 - the first grievance

73. The claimant raised his first grievance by email on the same day as his disciplinary hearing. He said (or it was said on his behalf by Ms Scott):

> *"I wish to make a formal grievance about the handling of my on-going disciplinary matter, namely direct discrimination in respect to my dyslexia, a recognised disability under the Equality Act 201 0, and the failure to makes reasonable adjustments which has left me at a significant disadvantage in this process.*
>
> *Namely:*
>
> 1. *It is a matter of record with NSL Ltd that I have dyslexia (minutes of one to one meeting 18.10.17).*
>
> 2. *Refusal to allow to have my chosen representative attend the investigatory meetings to accommodate my weak literacy skills, ability to process, store and recall information, problems with verbal communication and awareness of the concept of time which are made worse under stress.*
>
> 3. *Requirement for me sign documents that I could not read or have the capacity to understand and challenge without support.*
>
> 4. *First meeting 30 April 2019 - During the meeting … when it became apparent this was more than a "chat" I asked … if I could have someone into help me and* [this was] *refused*
>
> 5. *Second meeting 8 Meeting 2019 - I made a reasonable request for the meeting to be postponed to allow the … GMB (my chosen representative) to be present as he is aware of my needs. This was refused. I was told verbally and in writing that I must not make contact with any of my colleagues while on suspension so when told to bring someone else I brought my wife who does my reading and writing on my behalf, and and fully understands the support I need. She was asked to leave. … a colleague was called in at the last minute and he played a completely passive role. He had no prior knowledge of the allegations, no experience in supporting my specific needs, he did not explain questions or challenge what was written in the record. He also struggled to read the handwritten notes at times."*

74. The first grievance thus mirrors the current claims of indirect disability discrimination and in respect of reasonable adjustments.

6 June 2019 – the second grievance

75. The claimant wrote again with a document headed "Formal Grievance: Failure to make reasonable adjustments". This made more general points concerning the respondent's response to the claimant's disability.

The grievance hearing and outcome

76. Both grievances were heard together by John Evans, Client Account Manager, on 14 June 2019. The claimant was accompanied by his trade union representative. Mr Evans sent a lengthy outcome letter on 21 June 2019. The claimant's grievances were dismissed.

The disciplinary outcome

77. Mrs Malley's conclusion on the disciplinary hearing had awaited the outcome of the claimant's grievance. Apparently having been told that the grievance had not been upheld, Mrs Malley proceeded to issue an outcome letter on 26 June 2019. She recites the allegations against the claimant as being:

> *"• Deliberate falsification of records/ activities on your Tour Log dated 19th April 2019.*
>
> *• Bringing the company into serious disrepute.*
>
> *• Failure to carry out simple working instructions."*

78. She conducts an analysis of matters across several pages, concluding:

> *"Your entries and patrols on the 19th April do not match between the period 14:09 to 14:28, you have logged in locations that you have not visited and have also allegedly observed a vehicle in contravention in a location that you clearly were not in, this leads to a complete breakdown in confidence and trust in your work.*
>
> *In reaching a final outcome to your disciplinary, I have reviewed the Company Disciplinary Policy and it clearly outlines that the above-mentioned allegations notably deliberate falsification of company records and bringing the company into serious disrepute are acts amounting to Gross Misconduct.*
>
> *Therefore, I do find that your actions do amount to Gross Misconduct and due to the lack of mitigation, and a complete breakdown in the trust and confidence of the Company due to your actions, I do not believe that a formal warning in line with the Company Disciplinary Policy is appropriate in these circumstances.*
>
> *As a result, I have made the decision to terminate your employment with immediate effect from the 26th June 2019 and due to your actions, which amount to Gross Misconduct, you will be dismissed without*

notice and I hereby confirm that your contract of employment is now terminated."

79. The claimant immediately appealed the decision, initially in brief terms but later on 4 July 2019 with a detailed critique of the decision.

Grievance appeal

80. The appealed against the decision on his grievance. His appeal was heard on 2 July 2019 by Richard O'Malley, Account Director. Again the claimant was accompanied by his trade union representative. Mr O'Malley provided the outcome on 29 July 2019. The claimant's appeal was dismissed.

Disciplinary appeal

81. The claimant's disciplinary appeal was heard on 31 July 2019 by Brian Knowles, Client Account Manager. The claimant was accompanied by his trade union representative. Mr Knowles carried out further investigations and conducted a second meeting with the claimant on 5 November 2019. Nothing in this case seems to depend on the disciplinary appeal, and the claimant was notified by way of a letter dated 28 November 2019 that his appeal had been unsuccessful.

THE LAW

Wrongful dismissal

82. The limited necessary law on wrongful dismissal is addressed in our discussion and conclusions.

Disability discrimination – discrimination arising from disability

83. Section 15(1) of the Equality Act 2010 provides:

"A person (A) discriminates against a disabled person (B) if:

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

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

84. The exception in section 15(2) for lack of knowledge of the disability does not apply in this case.

Disability discrimination – indirect discrimination

85. Section 19 of the Equality Act 2010 reads as follows:

"(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

(2) For the purposes of subsection (1), a provision criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if:

(a) A applies, or would apply, it to person with whom B does not share the characteristic,

(b) It puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

(c) it puts, or would put, B at that disadvantage, and

(d) A cannot show it to be a proportionate means of achieving a legitimate aim."

Disability discrimination – reasonable adjustments

86. Section 20(2) & (3):

> *"The duty* [to make reasonable adjustments includes] *a requirement where a provision criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with people who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage."*

87. This is subject to a proviso regarding knowledge of disability in Schedule 8, which will be discussed below.

Disability discrimination - harassment

88. Section 26:

"(1) A person (A) harasses another (B) if:

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

(b) The conduct has the purpose or effect of:

(i) Violating B's dignity, or

(ii) Creating an intimidating, hostile, degrading, humiliating or offensive environment for B …

> *(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account:*
>
> *(a) The perception of B,*
>
> *(b) The other circumstances of the case,*
>
> *(c) Whether it is reasonable for the conduct to have that effect."*

89. The respondent relied upon Betsi Cadwaladr University Health Board v Hughes EAT 0179/13 to suggest that words such as "violating" or "intimidating" were strong words that implied more than mere offence or objectionable behaviour was required to find harassment.

Unfair dismissal

90. Unfair dismissal is dealt with at s98 of the Employment Rights Act 1996:

> *"(1) In determining … whether the dismissal of an employee is fair or unfair, it is for the employer to show:*
>
> *(a) The reason … for the dismissal, and*
>
> *(b) That it is either a reason falling within subsection (2)* [which includes a reason relating to the conduct of the employee] *or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.*
>
> *…*
>
> *(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer):*
>
> *(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and*
>
> *(b) shall be determined in accordance with equity and the substantial merits of the case."*

91. In cases of conduct dismissals, the tribunal will have regard to the case of BHS v Burchell [1980] ICR 303 (the so-called "Burchell test"):

> *"First of all there must be established … the fact of* [the employer's belief in the guilt of the employee]*; that the employer did believe it. Secondly, that the employer had in* [its] *mind reasonable grounds on which to sustain that belief. And thirdly … the employer, at the stage at which* [it] *formed that belief on those grounds … had carried out as much investigation into the matter as was reasonable in all the circumstances of the case."*

92. There is a "range of reasonable responses" for an employer's actions, and it is only if the respondent's actions fall outside that "range of reasonable responses" that the tribunal can find the dismissal unfair.

93. So far as unfair dismissal compensation is concerned, a reduction to the basic award for unfair dismissal can be made under section 122(2) of the Employment Rights Act 1996:

> *"Where the tribunal considers that any conduct of the complainant before the dismissal … was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly."*

94. And in respect of a compensatory award, s123(6) provides:

> *"Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding."*

C. DISCUSSION AND CONCLUSIONS

Wrongful dismissal

95. The question on wrongful dismissal is put in this way in the list of issues:

> *"Did the claimant commit a repudiatory breach of the employment contract, entitling the Respondent to dismiss without notice? The Respondent will say that if the allegations are made out, they were clearly a repudiatory breach of the contract."*

96. Although the list of issues refers only to the respondent's view on whether the allegations amount to a repudiatory breach of contract, it is accepted by the claimant that if he had done what the respondent thought he had done this would amount to a repudiatory breach of contract and the respondent would be entitled to dismiss him without notice.

97. The question then is whether the respondent has shown, on the balance of probabilities, that the claimant was in the Coach Park at the relevant time on the afternoon of 19 April 2019 or whether he was in Alma Road and the other areas of Windsor that he had recorded on his hand-held device.

98. There are essentially only two pieces of evidence on that point: for the respondent, the HH GPS records showing the claimant as being in the car park, and for the claimant, his word that he was in Alma Road and other areas of Windsor.

99. The tribunal is divided on the question of wrongful dismissal, and what follows sets out a majority decision and the views of the minority.

The majority

100. The view of the majority is that the claimant was in the Coach Park at the relevant time, rather than in Alma Road and other areas of Windsor. By recording false information about his location he was in repudiatory breach of contract and his dismissal without notice was not a breach of contract.

101. The majority acknowledge that the HH had rebooted three times in the morning, and that it was later sent for repair on account of PCNs not downloading properly. However, the majority do not think that this casts doubt on the GPS measurements from the HH. Whatever the problems with rebooting and downloading, except for that 20-minute period in the afternoon it is not in dispute that the HH had accurately recorded the claimant's location for the rest of the day. There is no basis on which to think that there would be a glitch with the HH that meant that for 20 minutes it was recording an inaccurate location.

102. The claimant has at some points suggested that if the HH was not able to get an accurate GPS position it would simply record its last known position, but that cannot be right as the positioning for that period shows a range of locations in a small area of the Coach Park (it seems in the rest area). This is not a case of identical locations having been recorded over a period.

103. On that basis the majority think it more likely than not that the location information recorded by the hand-held device was correct, and should be preferred to the claimant's oral evidence on where he was.

The minority

104. The minority consider that the claimant was not in fundamental breach of contract and that his dismissal was wrongful.

105. The view of the minority is that the GPS data for the relevant period of time should not be preferred to the claimant's word on the matter. The claimant was a long-standing employee with a clean disciplinary record. The HH device had exhibited problems earlier on in the day and was later found to be defective. Attempts to recreate the events of the day using other hand-held devices did not assist when the claimant's case was that particular device may be unreliable. It is for the respondent to establish (on the balance of probabilities) that the GPS location data is accurate, and should be preferred

to the claimant's word. Given the acknowledged problems with the device, the respondent had not done this and the claimant's version of events was to be preferred on the balance of probabilities.

106. While there is clearly a division in the tribunal panel on the question of wrongful dismissal (and on other matters dealt with later), both the majority and minority acknowledge and understand the decision of the other member or members of the panel, and both the majority and minority accept that the evidence is capable of the interpretation given to it by the other member or members. Indeed, we consider that the majority decision on these point is an accurate reflection of the difficulties that each member of the tribunal panel has had in forming a conclusion on these points.

Disability discrimination - discrimination arising from a disability

107. The first question we have to answer is "*Did the Claimant have an "inability to easily adapt to changes to working practices and his difficulties with time management" at the material time and did it arise from the Claimant's disability?*"

108. The respondent does not dispute this in its closing submissions, but does go on to say that the claimant was not treated unfavourably as a result of that "matter arising", since it was nothing to do with the unfavourable treatment - named in the list of issues (and ET1) being his dismissal.

109. In his closing submissions the claimant says "*the Tribunal must identify whether R's decision to investigate and suspend C on 30 April (summarily dismissing C on 26 June) was unfavourable treatment*". We do not accept that, given that the unfavourable treatment described in the list of issues is dismissal, not investigation and suspension.

110. It has never been suggested that honest recording of his location is a "change in working practices" or relates to "time management". The only thing that could fall within that category is the claimant taking his lunch break too late in the day.

111. That was originally dealt with by way of an informal warning, and no complaint arises from that. However, the point reappears at the time of the claimant's suspension because the third point of "*failure to carry out simple working instructions*" can only relate to the timing of his lunch break, so the matter arising from his disability was a factor in the decision to suspend and investigate him.

The majority

112. The majority find that the difficulty for the claimant is that it does then not play a part in the decision to dismiss him. By the time of his dismissal any question of time management or the timing of his lunch break had been entirely

overshadowed by the questions in relation to honest recording of his work location. While it may have been part of the reason for the claimant's suspension and the investigation into his actions it was ultimately not part of the decision to dismiss him, so the majority finds that his dismissal was not unfavourable treatment in relation to matters arising from his disability. The majority conclude that the claimant was not subject to discrimination arising from disability.

The minority

113. The minority consider that the question of "*failure to carry out simple working instructions*" remained a material element of the respondent's decision to dismiss the claimant. The minority note that the decision letter refers to the claimant's "actions" amounting to gross misconduct, without distinguishing between the different actions, and the minority concludes that the "*failure to carry out a simple working instruction*" remained a material part of the decision to dismiss the claimant.

114. As regards the question of justification, the minority find that the aim of "*the protection of their relationship and reputation with their client and the need to trust civil engagement officers to only log time as paid work when they are working*" can only apply to the element of the decision to dismiss that involved the claimant's logging of his work location, and has no relevance to the question of when his lunch breaks are taken. Accordingly it cannot justify the "*failure to carry out a simple working instruction*" as a material part of the decision to dismiss, and the claimant was subject to discrimination arising from disability.

Disability discrimination - reasonable adjustments and indirect discrimination

PCPs

115. Questions of reasonable adjustments and indirect discrimination are closely linked, and we will look at them together, looking first at the alleged PCPs, which are the same for both claims:

    (a) not allowing employees to be accompanied at investigation meetings by a companion of their choosing, and

    (b) the respondent's requirement for investigation meeting notes to be signed at the end of the meeting.

116. There is a third alleged PCP, which is "*the respondent's disciplinary policy*". What this was supposed to mean was something of a mystery during the hearing. By the time of the claimant's closing submissions it seemed framed as the disciplinary policy not containing any express exemptions for or recognition of disabilities. The policy is said to be "*not equipped to address disability-related causes of alleged misconduct*". Despite Dr Loutfi's efforts we

remained unable to understand how the disciplinary procedure as a whole could be said to be a PCP that disadvantaged the claimant, and we will not take this point any further.

117. The first PCP is accepted by the respondent. The second is not, although the respondent accepts an alternative PCP for notes to be signed by or on his behalf at some point.

118. The respondent's acceptance of a PCP of having meeting notes signed by or on behalf of the employee is inevitable given that that is how the form used for the notes is set up. The "record of investigatory interview" from contains this on its front page: "*I have read over what has been written and I have been allowed to correct or add anything I wish. This is a true and correct record and I have signed at the foot of each page to signify this.*" Towards the middle of the front page the following appears: "*If you agree it is a correct and true record you will be asked to sign your name at the foot of each page.*" The only issue is whether it is required for the signature to be at the end of the meeting or whether it can be later.

119. It is clear to us that it was the respondent's expectation that meeting notes would be signed by the employee at the end of the investigation meeting. That is what the claimant was asked to do at the end of every meeting except when his union representative specifically requested that the meeting notes were provided for signature after the meeting. It is telling that although this was apparently agreed, the notes in question were not provided.

120. Framing this PCP as a "requirement" is rather difficult as it suggests that the respondent is in a position to enforce signature at the end of the meeting which, of course, it is not. It is, however, clear that there was an expectation that the notes would be signed at the end of the meeting. That is what was asked of the claimant and the supposed deviation from that requirement was never completed by the respondent. An "expectation" is sufficient to establish a PCP, and we find that there was a PCP that employees should sign meeting notes at the end of the meeting.

121. In both cases we find that the PCPs put the claimant at a substantial disadvantage. Most obviously, his dyslexia meant that he was not able to read the notes to the extent that someone without dyslexia could. That was particularly so with handwritten notes such as were used in the investigation meetings. We accept that he could not read the notes that he was expected to sign at the end of the investigation meetings. Expecting him to sign them at the end of the meetings put him at a substantial disadvantage. Beyond that, his dyslexia meant that he needed someone to accompany him to formal meetings such as these who understood the limitations his disability placed on him, and who could not only read documents for him but also interpret and explain questions and other matters he may not immediately understand. Examples of such people are his wife and his trade union representative, but

this disadvantage was not alleviated simply by the provision of a work colleague who could accompany him and act as a reader (such as happened in his final investigation meeting).

122. The PCPs both amounted to potential indirect disability discrimination (subject to questions of justification) and gave rise to an obligation to make reasonable adjustments. The respondent has always known of his disability and its effects so we do not see that any question of a lack of knowledge of the disability arises.

123. The question on indirect discrimination then becomes whether the respondent has justified its PCPs by reference to its legitimate aim, said to be "*a fair, consistent and effective approach in dealing with misconduct issues*".

124. The analysis of this is essentially the same for both PCPs.

125. As regards the first PCP – being accompanied by a companion of the individual's choosing, we do not see how allowing a companion of someone's choosing compromises a fair or effective approach in dealing with misconduct issues. It may, of course, compromise a consistent approach if allowance is made for disabled employees that is not made for others, but a "consistent approach" that does not allow for disability is anathema to the regime of disability discrimination, and cannot be said to be a legitimate aim. The nature of disability discrimination law is that in some cases disabled people will be treated differently to those who are not disabled, so having a "consistent approach" cannot be said to justify indirect discrimination in this case.

126. Similarly, allowing an individual to take the investigation meeting notes away for review before signature can hardly be said to compromise fairness or effectiveness an effective approach to dealing with misconduct. We heard no evidence at all from the respondent's witnesses about how delayed signature of the investigation notes may be unfair or give rise to a less effective approach to dealing with misconduct. As with the first PCP, "consistency" cannot properly be argued as a legitimate aim where the disability discrimination regime specifically envisages different treatment being required for people who have disabilities.

127. The two PCPs we have found both amount to indirect disability discrimination.

128. The respondent did not make any adjustments to these PCPs. In the list of issues the respondent relies on Schedule 8 para 20(1) of the Equality Act 2010:

> *"A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know … that an interested disabled person has a disability and is likely to be placed at a disadvantage …"*

129. We have already established that the respondent knew of the claimant's disability so the only possible argument is that it did not know and could not reasonably be expected to know that his disability would place him at a disadvantage. This cannot possibly arise on the question of signature of the notes, since difficulties in reading (and possibly writing) are the best known symptoms of dyslexia. It may be less obvious that there are also difficulties of understanding that may require assistance from a person familiar with the claimant's difficulties, but we note that the claimant was accompanied in his original transfer meeting by his wife, which would have been unusual, and we consider that the respondent could reasonably have been expected to know that he needed assistance from someone who knew of his difficulties during these meetings.

130. The respondent failed to comply with its duty to make reasonable adjustments in respect of the two PCPs we have identified.

Disability discrimination - harassment

131. There are three matters that are said to be harassment.

The respondent's insistence that he sign the investigation notes at the end of the investigation meetings on 30 April 2019 and 8 May 2019.

132. It does not seem to be disputed by the respondent that this occurred – or to the extent that it is disputed it involves a conflict of evidence between the claimant (who attended the hearing and was cross-examined) and others who did not attend the hearing. In those circumstances we prefer the claimant's evidence and find that it did occur.

133. The respondent says that the individuals who required this "*were following what they thought to be the respondent's practice in relation to notes*", but following practice does not mean that it does not amount to harassment. In the list of issues the respondent says that this was not unwanted conduct and that it did not relate to the protected characteristic of disability. The respondent's submissions conclude that "*this does not meet the standard of harassment*".

134. It is clear from the claimant's evidence that this was unwanted conduct, and matters in relation to reading and understanding notes clearly "related to" the claimant's disability. The respondent's defence to this is not made out and we find that this did amount to disability-related harassment.

John Evans' comment in the grievance outcome letter that it was 'very short just over a couple of pages' that the claimant had to sign.

135. The respondent accepts, as it has to, that this was said in the letter. The respondent also accepts that it was unwanted conduct. In the list of issues the

respondent's only further observation on this is to say that "*this was a factual comment*".

136. Being "*a factual comment*" does not mean that it was not also harassment. There is no requirement that in order to be harassment a comment has to be untrue, or a matter of opinion. Many true or factual comments might also amount to harassment. It depends on whether it relates to the claimant's disability (which does not seem to be in dispute, and which it clearly is given that it relates to his ability to read) and, beyond that, whether it has the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading humiliating or offensive environment for the claimant.

137. The respondent accepts in its closing submissions that this comment did "*have the unintended consequence of making the claimant feel bad about his disability*". The respondent appears to accept in principle that the comment would meet the definition of harassment but for the degree of its impact. The respondent says that "*it is not accepted that this comment meets the high bar of having the purpose or effect of violating the claimant's dignity*".

138. This derives from the respondent's position that Hughes emphasises the strength of words such as "violating" or "intimidating".

139. We have considered the Hughes case and note the reliance there on Elias LJ's decision in Grant v HM Land Registry [2011] EWCA Civ 769 that "*tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment.*" We also note the reliance on Underhill P's decision in Richmond Pharmacology v Dhaliwal [2009] IRLR 336 that:

> *"Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase."*

140. A key element of the decision in Hughes is that "*context* [is] *very important in determining the question of environment and effect*".

141. We will apply the words of the statute to the comment in question, bearing in mind that what is required is more than a "*trivial act causing minor upset*".

142. The context is that this was said in the outcome of a grievance where the claimant had complained about a failure to accommodate or make adjustments for his disability, including a "*requirement for me sign documents*

that I could not read or have the capacity to understand and challenge without support".

143. In that context, we find that a comment in the outcome letter that the document the claimant had to sign was "very short" does amount to unlawful harassment. It did relate to the claimant's disability, since it concerned his ability to read the document. It may not have been intended to violate the claimant's dignity or create a hostile environment for him but, taking into account s26(4), that was its effect, and we find that it went beyond being "trivial" or simply an "unfortunate phrase".

Richard O Malley's comment in the grievance appeal letter that 'you did not make a request to be accompanied…you said 'do I need to bring someone in' as opposed to 'I require someone with me'.

144. The respondent accepts that this occurred and that it was unwanted conduct, "*however, the respondent submits that it was a relevant comment to discuss and address*".

145. Perhaps the more pressing point is the respondent's suggestion that this was not "*related to*" the claimant's disability. The claimant's position is that it did relate to his disability, in that the claimant's dyslexia gave rise to struggles with verbal communication, meaning that a focus on the particular words used (rather than that intention behind them) was unfair to the claimant, and indeed amounted to a violation of his dignity or created a hostile or degrading (etc.) environment for him.

146. We take the view that it this did not amount to unlawful harassment. The grievance appeal manager was entitled to take the claimant's statement at face value. To the extent the claimant was offended by this we take the view that under s26(4) that despite the claimant's perception it was not reasonable for the statement to have that effect and in all the circumstances of the case it did not amount to harassment.

Unfair dismissal

Introduction

147. We recognise that a distinction between substantive and procedural unfairness is not always helpful. The question for the tribunal is whether the dismissal was unfair, not whether it was substantively unfair or procedurally unfair. Nevertheless, it is a distinction adopted by the parties in the list of issues, and we will consider unfairness by reference to that list of issues.

148. As previously stated, the claimant accepts that he was dismissed for a reason related to his conduct, so the respondent has satisfied section 94(1). What remains is consideration of fairness generally under section 94(4).

Substantive unfairness

149. These are the matters that are said to make the claimant's dismissal substantively unfair:

    a. *The Respondent failed to carry out a reasonable investigation in that it, inter alia, failed to interview any of the potential witnesses identified by the Claimant and relied solely upon the faulty HCC readings;*

    b. *The Respondent acted unreasonably in failing to properly consider and investigate the possibility that the faulty HHC was responsible for the inaccurate readings. Following the appeal meeting Roisin Mallen apparently followed the same route using an HCC terminal which she states accurately recorded her location. However, evidence of the results were not shared with the Claimant and she did not specify whether she had used the same faulty terminal;*

    c. *The Respondent failed to take account of the fact that the Claimant had previously raised and requested assistance with his time management difficulties regarding the timing of his lunch breaks ...*

    d. *The Respondent failed to take into consideration the Claimant's length of service and the Respondent's size and the administrative resources available to it in deciding to dismiss the Claimant.*

    e. *Summary dismissal was disproportionate in the circumstances;*

    f. *The Claimant is aware of another employee of the Respondent who had not transferred from RBWM who was given only a warning for the same offence.*

150. As with other aspects of the case, the tribunal is divided on the question of whether the dismissal was substantively unfair.

Substantive unfairness – the majority

151. For the majority, the claimant's criticisms require too much of the respondent by way of investigation. Sufficient investigation was carried out. The claimant himself had not volunteered who was present at the rest area, nor suggested any further investigatory steps that the respondent had not taken. Two witnesses were interviewed and provided no useful information. The respondent's efforts to recreate the HH route had to be done using other devices as the original device was no longer available to it. Questions of time management were not ultimately relevant to the claimant's dismissal. (d) is

simply a repeat of the general test we are applying. As per our findings on wrongful dismissal, dismissal was appropriate in this case. The question of consistency with the other employee was ultimately not made out by the claimant on the facts of the case.

Substantive unfairness – the minority

152. For the minority, the claimant's criticisms of the respondent's actions at (a)-(c) are made out, and that is sufficient to render the dismissal unfair.

153. The heart of the criticism at points (a)-(c) is that the respondent relied entirely on the faulty HH readings. While not doubting the genuineness of the belief of the dismissing officer that the claimant had committed misconduct, the dismissal was unfair as the respondent had not carried out as much investigation as was reasonable in the circumstances. In particular, it had not explored the question of whether there was any evidence as to the claimant's whereabouts other than that from the HH and the claimant himself. The respondent had identified early on that there were others present at the Coach Park Car Park rest area around that time, but it was not until much later (too late to be of any use, and not covering all potential witnesses) that there was any investigation into whether they remembered the claimant being present. Although not a specific criticism made by the claimant the respondent seemed not to have explored whether, for instance, there was any CCTV in or around the Coach Park Car Park that may have helped locate the claimant. Attempts to recreate the route with other HHs did not help with the investigation as the claimant's position was that his HH was uniquely faulty, not that the HHs generally were faulty.

154. As described above, (c) was, in the view of the minority, a part of the decision to dismiss the claimant, and that was unfair.

155. The points at (d)-(f) were less persuasive, but ultimately the claimant's dismissal was unfair (and substantively unfair) because the respondent did not carry out as much investigation as was reasonable in the circumstances of the case.

Procedural fairness

156. These are the matters said to amount to procedural unfairness:

> *"a. The Respondent failed to set out the detail of the allegations against him prior to the disciplinary hearing;*
>
> *b. Although the Respondent provided GPS print outs prior to the dismissal hearing, they did not make sense without the key which was only provided by the Respondent in the dismissal letter;*

c. The Respondent failed to share new evidence they had apparently obtained with the Claimant whilst relying upon the same in dismissing him;

d. The Respondent failed to reasonably make further enquiries regarding the Claimant's health, including seeking an up-to-date medical report regarding such;

e. The Respondent failed to explore alternative options to dismissal."

157. The tribunal is unanimous that the claimant's dismissal was unfair for the reasons set out below.

158. Points (a) and (b) are the key points here. There are clear deficiencies in the way the respondent set out the allegations and the evidence ahead of the disciplinary hearing. The disciplinary invitation letter set out the allegations as being:

"• *Deliberate Falsification of records/activities on your Tour report Log dated 19th April 2019*

• *Bringing the company into serious disrepute*

• *Failure to carry out simple working instructions"*

159. The first allegation does contain some specifics, but it is not clear from this that the only period in issue is the twenty minute period in the afternoon.

160. The disciplinary invitation letter was accompanied by the black and white print outs from the Chipside system that we have previously referred to.

161. No key or description of what these were supposed to show was provided to the claimant in writing until after his dismissal. We have explained the difficulty that the tribunal had in understanding these. As described, this is partly inherent with trying to capture an online system in paper form, but partly because the respondent made no real effort prior to his dismissal to present this to the claimant in any sort of comprehensible written form.

162. This is, in our unanimous view, sufficient to render the claimant's dismissal unfair. The lack of clarity in disciplinary allegations and the evidence may not be so significant in other cases, but it was of clear significance in this case where the investigation steps appear to have been dealt with on a relatively informal basis without (as described above) any necessary support or accommodations made for the claimant.

163. Points (c)-(d) are less obviously matters of unfairness. The "new evidence" appears to be a reference to the re-run of the claimant's route carried out by Mrs Mallen, but in circumstances were someone conducts follow-up work after

a disciplinary hearing it is not always necessary to give the employee an opportunity to comment on that work. For the majority (although not for the minority) a medical report was not required, as the claimant's disability did not play a part in his dismissal.

164. On point (e), although the majority have found that the claimant's actions did amount to gross misconduct and justified dismissal that is not to say that the respondent had no alternative to dismissal in this case. Mrs Mallen was questioned about what (if any) mitigation she had considered, but she could not identify any mitigation. Plainly the claimant's long history of good service ought to have been taken into account, and it seems to us that the respondent did not explore alternative options to dismissal. This contributes to the unfairness of the dismissal, but only to a limited extent as the majority consider that dismissal was, in any event, within the range of reasonable responses.

Contributory conduct and reductions in compensation

165. Given our findings it is to be expected that the tribunal is not unanimous on the question of any reductions from an unfair dismissal award for contributory fault (or *Polkey*).

166. For the minority, the claimant had not committed any misconduct and there were serious issues of both substantive and procedural fairness in the claimant's dismissal. The minority conclude that there should be no reduction in unfair dismissal compensation either on the basis of contributory fault or *Polkey*.

167. The majority will first address the question of a *Polkey* reduction.

168. The majority consider that the unfairness identified is serious and sufficient to render the claimant's dismissal unfair. However, during the course of the disciplinary hearing Mrs Mallen was at pains to work through her understanding of the Chipside materials with the claimant. Despite the respondent's failure to properly present its evidence and allegations ahead of the disciplinary hearing, by the time of his dismissal the claimant was aware of the evidence against him. That does not make the dismissal fair but is liable to be taken into account on the question of any reduction in compensation. The fundamental dispute between the claimant's word as to where he was and the GPS records was clear during the disciplinary hearing, even if not before.

169. On the question of whether there should have been an alternative sanction, the majority consider that while this should have been considered by the respondent it was inevitable that the claimant would have been dismissed for the misconduct. That is particularly so given the respondent's need to protect its reputation and integrity as regards its client, the Royal Borough of Windsor and Maidenhead.

170. The majority therefore conclude that even if the elements of procedural unfairness had been dealt with properly by the respondent, the claimant would still have been dismissed. Accordingly it is appropriate to reduce the claimant's compensatory award by 100% under the principle in *Polkey*.

171. Given a 100% *Polkey* reduction in the compensatory award it is not necessary to consider a reduction in the compensatory award for contributory fault.

172. The *Polkey* rule would not apply to the claimant's basic award. For that, we have to consider whether "*any conduct of the complainant before the dismissal … was such that it would be just and equitable to reduce … the amount of the basic award to any extent …*".

173. The majority have made clear that they consider that the claimant had committed gross misconduct, but are wary that in the light of the 100% reduction in the compensatory award any reduction in the basic award would run the risk that the unfairness of the dismissal was not reflected in an appropriate award of compensation. Accordingly, while acknowledging the claimant's misconduct, the majority consider that it would not be just and equitable to make any reduction to the basic award. The minority concurs in this view, although as set out above that is for different reasons, on the basis that the claimant has not committed any misconduct.

D. NEXT STEPS

174. The provisional remedy hearing listed for 18 January 2024 will now take place, unless the parties can agree an appropriate remedy before then.

175. Any further steps to be taken before then will be a matter for agreement between the parties or, failing that, early application to the tribunal. It seems likely that the first step will need to be service of a revised schedule of loss prepared by the claimant in the light of this decision, which should be done as soon as possible.

Employment Judge Anstis
Date: 23 October 2023

Sent to the parties on: 6 November 2023..

.....
For the Tribunals Office

APPENDIX 1 - AGREED LIST OF ISSUES

Unfair dismissal

1. What was the reason for the Claimant's dismissal? The Claimant accepts it was the potentially fair reason of conduct.

   The Respondent will say it was gross misconduct namely 1) deliberate falsification of records causing a breakdown in trust and confidence and 2) bringing the company into serious disrepute. The Claimant further alleges he was dismissed for failure to carry out simple working instructions. R admits this was investigated but avers C was not dismissed for this allegation.
2. Did the Respondent in the circumstances act reasonably or unreasonably in treating it the reason as sufficient reason for dismissal?
   - 2.1 Did the Respondent genuinely believe that the employee was guilty of gross misconduct? The Claimant does not accept this but does not advance an ulterior motive.
   - 2.2 Did it have reasonable grounds on which to base that belief?
   - 2.3 Had it carried out as much investigation as was reasonable in the circumstances of the particular case?
3. The Claimant particularises his issues in relation to the substantive unfairness of the dismissal in paragraph 16 of the particulars of claim a) b) f d) e) f) and the first sentence of c). The rest of c) is withdrawn.
   - *[a. The Respondent failed to carry out a reasonable investigation in that it, inter alia, failed to interview any of the potential witnesses identified by the Claimant and relied solely upon the faulty HCC readings;*
   - *b. The Respondent acted unreasonably in failing to properly consider and investigate the possibility that the faulty HHC was responsible for the inaccurate readings. Following the appeal meeting Roisin Mallen apparently followed the same route using an HCC terminal which she*

states accurately recorded her location. However, evidence of the results were not shared with the Claimant and she did not specify whether she had used the same faulty terminal;

c. The Respondent failed to take account of the fact that the Claimant had previously raised and requested assistance with his time management difficulties regarding the timing of his lunch breaks ...

d. The Respondent failed to take into consideration the Claimant's length of service and the Respondent's size and the administrative resources available to it in deciding to dismiss the Claimant.

e. Summary dismissal was disproportionate in the circumstances;

f. The Claimant is aware of another employee of the Respondent who had not transferred from RBWM who was given only a warning for the same offence.]

4. Did the Respondent carry out a fair procedure? The Claimant relies on 17 a) to e) at his particulars of claim.

[a. The Respondent failed to set out the detail of the allegations against him prior to the disciplinary hearing;

b. Although the Respondent provided GPS print outs prior to the dismissal hearing, they did not make sense without the key which was only provided by the Respondent in the dismissal letter;

c. The Respondent failed to share new evidence they had apparently obtained with the Claimant whilst relying upon the same in dismissing him;

d. The Respondent failed to reasonably make further enquiries regarding the Claimant's health, including seeking an up-to-date medical report regarding such;

e. The Respondent failed to explore alternative options to dismissal.]

5. Was dismissal in the range of reasonable responses? The Claimant accepts that if the dismissal is found to be procedurally and substantively fair then it would have been in the range of reasonable responses.

Wrongful dismissal

6. Did the claimant commit a repudiatory breach of the employment contract, entitling the Respondent to dismiss without notice? The Respondent will say that if the allegations are made out, they were clearly a repudiatory breach of the contract.

Disability discrimination

7. The Respondent accepts the Claimant had a disability under s6 Equality Act 2010. The Respondent accepts it had knowledge of his disability at the relevant time.

Jurisdiction

8. The parties are agreed that the last act that is prima facie in time would be the 19th April 2019. The parties agree that all issues commenced after this point and so are in time.

Discrimination arising

9. What was the unfavourable treatment? The claimant will say it was dismissal
10. Did the Claimant have an "inability to easily adapt to changes to working practices and his difficulties with time management" at the material time and did it arise from the Claimant's disability?
11. Did the Respondent treat the Claimant unfavourably because of the above? The Respondent will say that the Claimant was demonstrably able to adapt to working practices and time management at work as he did so the majority of the time and had never been sanctioned in relation to this. Further, he was dismissed for dishonesty related gross misconduct not time management/maladaptation to working practices. The reasons are factually disputed by C.
12. Was the Respondent's treatment the proportionate means of a legitimate aim? The Respondent will say in any event, the dismissal in the circumstances was a proportionate means of a legitimate aim. The legitimate

aims relied upon by the Respondent are the protection of their relationship and reputation with their client and the need to trust civil engagement officers to only log time as paid work when they are working.

Harassment

13. Did the Respondent or an employee of the Respondent engage in unwanted conduct? The claimant alleges the unwanted conduct was
    13.1 The Respondent's insistence that he sign the investigation notes at the end of the investigation meetings on 30 April 2019 and 8 may 2019. The Respondent does not accept it insisted the Claimant sign any meeting notes. It asked the Claimant if he was happy to sign such notes and he agreed. As such, the Respondent does not accept this was unwanted conduct at the time.
    13.2 John Evans' comment in the grievance outcome letter that it was 'very short just over a couple of pages' that the claimant had to sign. The Respondent accepts this was said. The Respondent accepts this was unwanted conduct. The Respondent will say this was a factual comment. JE was attempting to address the Claimant's concerns and ascertain the effect they had had on the fairness of the overall process.
    13.3 Richard O Malley's comment in the grievance appeal letter that 'you did not make a request to be accompanied…you said 'do I need to bring someone in' as opposed to 'I require someone with me'. The Respondent accepts this statement was written. The Respondent accepts that it was unwanted conduct. However, the Respondent submits that it was a relevant comment to discuss and address.
14. Did this conduct relate to the protected characteristic of disability? The Respondent does not accept that any of the conduct related to disability.
15. Did it have the purpose or effect of violating the claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant, considering
    15.1 the claimant's perception
    15.2 the circumstances of the case

15.3 whether it was reasonable for the conduct to have that effect

Reasonable adjustments

16. Did the Respondent apply a provision, criterion or practice which placed the Claimant at a substantial disadvantage in comparison with persons who are not disabled? The Claimant relies on the following PCPs
    16.1 The Respondent's policy of not allowing employees to be accompanied at investigation meetings by a companion of their choosing. The Respondent accepts this is a PCP.
    16.2 The Respondent's requirement for investigation meeting notes to be signed at the end of the meeting. The Respondent's position is that there has never been any requirement for employees to sign meeting notes at the end of an investigation meeting. There is a policy that they should be signed but it does not state at the end of the meeting. In relation to the Claimant's notes throughout the disciplinary, it appears to have been the practice that he was asked to sign meeting notes at the end. If he requested not to, he was allowed to take them away and if he requested someone else did it (such as his union officer) then they would sign them.
    16.3 The Respondent's disciplinary policy
17. Was the Claimant put at a substantial disadvantage that was more than minor or trivial by the PCPs? The Claimant will rely on the following substantial disadvantages. The Respondent does not accept these.
    17.1 Increased stress and confusion meaning that he could not raise any issues other through the grievance process
    17.2. Policy of signing the meeting notes, which commits the claimant to a level of agreement. He didn't feel able in real time to know what committed to
    17.3. Client was not able to put best case forwards
18. Could the Respondent have been reasonably expected to know of such disadvantages? The Respondent does not accept it knew of disadvantages at the relevant times.

19. If so, did the Respondent take such steps as were reasonable to avoid the disadvantage to the Claimant. The Respondent will say that these would not be proportionate or effective. The Claimant relies on the following reasonable adjustments
    19.1 The Claimant should have been allowed to have a companion of his choice to accompany him to his investigation meetings to support his disability related needs –
    19.2 The Claimant should have been allowed to take the investigation notes away with him to sign once he had had the time and opportunity to review them properly
    19.3 The Respondent should have made adjustments to the disciplinary process to take account of the fact that the Claimant had difficulty adapting to new working practices and the instruction not to take lunch within 1 hour 30 mins of the end of the shift.

Indirect discrimination

20. Did R apply the PCPS listed above to C. The Respondent's position as above.
21. Did these PCPs put people with dyslexia at a general disadvantage? The Respondent's position is as above.
22. Did it put the claimant to that disadvantage? What disadvantages does the Claimant rely on? As above, the Respondent does not accept this.
23. Was it a proportionate means of a legitimate aim? The Respondent relies on a fair, consistent and effective approach in dealing with misconduct issues.

Holiday Pay

24. Withdrawn