EMPLOYMENT TRIBUNALS

Claimant: Mr J Whiteside

Respondents: 1. Unilever UK Limited
2. Anne Donaghey
3. Nicholas Maher

Heard at: Liverpool **On:** 13-17 March 2023
20-24 March 2023

Before: Employment Judge Benson
Ms F Crane
Mr J Murdie

REPRESENTATION:

Claimant: In person
Respondents: Miss V Brown - Counsel

JUDGMENT having been sent to the parties on 6 April 2023 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Claims and Issues

1. The claimant worked for the first respondent (whom we have referred to as the "respondent" in these reasons) from 23 November 2015 to 12 October 2020 when he was dismissed. He was employed as a First Line Leader (FLL). The respondent says his dismissal was for an act of gross misconduct. The claimant says that he was set up for dismissal having been a whistle-blower, that both the dismissing officer and the appeal officer knew of his whistleblowing, and that the way in which the respondent carried out its disciplinary process amounted to both public interest disclosure detriment and disability discrimination. The claimant says that his dismissal was automatically unfair and a detriment at the hands of the second and third respondents. He further alleges a failure to make reasonable adjustments, and indirect discrimination.

2. The respondent said that the claimant was dismissed for failing to follow reasonable management instructions which were critical to health and safety issues when, on 23 April 2020, he failed to carry our demarcation of packaging lines for social distancing, and to put in place appropriate contact diary systems and zoning requirements. It denies that the claimant was dismissed for any reasons relating to whistleblowing or that it discriminated against the claimant or failed to make any adjustments. The second and third respondents deny the public interest disclosure allegations made against them.

3. The respondent admits that the claimant's impairment of anxiety and depression amounted to a disability at the relevant time for the purposes of section 6 of the Equality Act 2010. The respondent denied that it had knowledge of the claimant's disabilities.

4. Following a case management hearing on 29 June 2021, the parties were asked to agree a List of Issues which was available for the Tribunal at this hearing and is set out below. At the outset of the hearing, I asked the respondents to confirm whether all issues in the draft List of Issues remained matters to be decided by the Tribunal or whether any issues were conceded. Ms Brown, who represented the respondents, provided that information and it is reflected in our decision below. The claims which were brought were claims of:

(1) Unfair dismissal (contrary to section 94 of the Employment Rights Act 1996 – "ordinary" unfair dismissal);

(2) Discrimination arising from disability (section 15 Equality Act 2010);

(3) A failure in the duty to make reasonable adjustments (contrary to sections 20 and 21 of the Equality Act 2010);

(4) Indirect discrimination (contrary to section 19 of the Equality Act 2010);

(5) A detriment for making a protected disclosure (contrary to section 47B of the Employment Rights Act 1996);

(6) A claim of automatic unfair dismissal (contrary to section 103A of the Employment Rights Act 1996);

(7) Breach of contract in respect of notice pay.

5. The issues to be determined by the Tribunal were as follows:

<u>Preliminary Issue – Time Limit</u>

1. Are any of the Claimant's complaints presented out of time?

2. If so:

(a) do the complaints represent:

i. in relation to his claims under the Equality Act 2010 ("**EQA**"), conduct extending over a period of time?

ii. in relation to his claims under the Employment Rights Act 1996 ("**ERA**"), a series of similar acts?

(b) Would it be just and equitable to extend time in respect of his claims under the EA?

(c) Was it reasonably practicable for the Claimant to have lodged his claims under the ERA within time and if not, did he lodge them within a further reasonable period such that time should be extended?

Unfair Dismissal

3. What was the reason for dismissal? The First Respondent asserts that it was a reason related to gross misconduct, which is a potentially fair reason for dismissal under s.98(2) ERA.

4. Did the First Respondent hold a genuine belief in the Claimant's misconduct on reasonable grounds and following as reasonable an investigation as was warranted in the circumstances?

5. Was the decision to dismissal a fair sanction, that is, was it within the range of reasonable responses open to a reasonable employer when faced with those facts?

6. Did the First Respondent adopt a fair procedure?

7. If it did not adopt a fair procedure, would the Claimant have been fairly dismissed in any event and/or to what extent and when?

8. If the dismissal was unfair did the Claimant contribute to the dismissal by culpable conduct?

Disability

9. The First Respondent accepts now that the Claimant is a disabled person within the meaning of s.6 EQA by reason of anxiety/depression.

Knowledge of Disability (as applicable)

10. Can the First Respondent show that at the material time it did not know, and could not reasonably have been expected to know, that the Claimant had a disability?

Discrimination Arising from Disability

11. The allegation of unfavourable treatment as "something arising in consequence of the Claimant's disability" is:

(a) dismissal due to the failure to follow alleged verbal / WhatsApp Health and Safety instructions;

(b) dismissal due to the failure to follow complex zoning instructions.

12. Can the Claimant prove that the First Respondent treated him as set out in paragraphs a - b above because of the "something arising" in consequence of disability? The Claimant will say that the following arose in consequence of his disability:

    (a) the Claimant's difficulty in processing and recalling last minute verbal / WhatsApp information/Instructions;

    (b) the Claimant's difficulty in processing and understanding last minute complicated instructions.

13. The First Respondent denies that the alleged unfavourable treatment arose from the Claimant's disability.

14. In the alternative, can the First Respondent show that the treatment was a proportionate means of achieving a legitimate aim? The First Respondent relies upon the following (without limitation):

    (a) operational need and operational efficacy, particularly during the Covid-19 pandemic given the unprecedented circumstances;

    (b) the need to communicate and enforce safe working practices and matters pertaining to health and safety, particularly relating to Covid safety compliance;

    (c) the need to communicate and enforce working practices/give instructions in a timely manner, reflective of the serious and unprecedented risk posed by Coronavirus;

    (d) the paramount importance of health and safety more generally, particularly in a factory environment;

    (e) the need to investigate and address alleged misconduct;

    (f) the need to enforce the standards of behaviour required of employees under First Respondent's Code of Business Principles;

    (g) the upholding of standards of behaviour/conduct in accordance with the First Respondent's expectations and as set out in the Disciplinary Policy – in particular the aim of health and safety compliance; and

    (h) the need to have trust and confidence in employees.

<u>Failure to make reasonable adjustments</u>

<u>Knowledge of Disability – section 20(1) Schedule 8 EQA 2010</u>

15. Did the First Respondent know or could it not reasonably have been expected to know, that the Claimant had the disability and was likely to

be placed at the alleged disadvantages set out in relation to Reasonable Adjustments (1)-(4) below.

Reasonable Adjustment (1)

16. Did the First Respondent apply the following provision, criteria and/or practice ('the PCP') generally, namely:

    - The requirement for employees to follow last minute verbal / WhatsApp Health and Safety Instructions.

17. If yes, did the application of such PCP put the Claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled in that:

    - The inability to follow complex verbal instructions under time pressure rendered the Claimant unable to properly comply with those instructions.

18. If yes, did the First Respondent take such steps as were reasonable to avoid the disadvantage? The Claimant asserts that the following adjustments were reasonably required:

    - Providing clear and written instructions well in advance of the deadline for compliance.

Reasonable Adjustment (2)

19. Did the First Respondent apply the following provision, criteria and/or practice ('the PCP') generally, namely:

    - The requirement to attend 3 disciplinary investigation meetings and a disciplinary hearing over the course of 8 weeks.

20. If yes, did the application of such PCP put the Claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled in that:

    - the inability to cope with stressful situations made it very difficult for the Claimant to concentrate on the allegations against him and properly defend himself;

    - the stressful situation exacerbated his ill health.

21. If yes, did the First Respondent take such steps as were reasonable to avoid the disadvantage? The Claimant asserts that the following adjustment was reasonably required:

    - Reducing the number of disciplinary meetings and the delay between the same.

Reasonable Adjustment (3)

22. Did the First Respondent apply the following provision, criteria and/or practice ('the PCP') generally, namely:

    - A provision or practice of delaying the commencing disciplinary proceedings of 8 weeks following the alleged misconduct.

23. If yes, did the application of such PCP put the Claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled in that:

    - The inability to cope with stressful situations, leading to the Claimant collapsing with anxiety and shock.

24. If yes, did the First Respondent take such steps as were reasonable to avoid the disadvantage? The Claimant asserts that the following adjustments were reasonably required:

    - Informing the Claimant immediately after his alleged misconduct and commence the investigation within a reasonable period of time.

Reasonable Adjustment (4)

25. Did the First Respondent apply the following provision, criteria and/or practice ('the PCP') generally, namely:

    - Requiring for Nick Maher to conduct the disciplinary investigation meetings.

26. If yes did the application of such PCP put the Claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled in that:

    - The inability to cope with stressful situations making it very difficult for the Claimant to concentrate on the allegations against him and properly defend himself;

    - The stressful situations also exacerbated his ill health.

27. If yes, did the First Respondent take such steps as were reasonable to avoid the disadvantage? The Claimant asserts that the following adjustments were reasonably required:

    - Providing an independent investigator.

    - The Third Respondent refraining from openly losing his temper in front of the Claimant.

28. The First Respondent denies that the Claimant has identified any provision, criterion or practice which applies, or would apply to the Claimant and to persons who do not have the same disability as the Claimant. Further, the First Respondent denies that it applied the provision, criterion or practice(s) as expressed by the Claimant.

29. The First Respondent further contends that, to the extent it was required to make reasonable adjustments for the claimant under s.20 EA, it complied in all respects with its obligation including (without limitation) implementing the adjustments and support measures set out in its Grounds of Resistance.

Indirect Discrimination

30. Did the First Respondent apply he following provision, criteria and/or practices ('the PCPs"') generally, namely:

    - The requirement to follow last minute verbal/WhatsApp health and safety instructions;

    - The requirement to attend 3 disciplinary investigation meetings and a disciplinary hearing over the course of 8 weeks;

    - Delaying commencing disciplinary proceedings over 6 weeks following the alleged misconduct.

31. If yes, did the application of the PCPs identified put others with the Claimant's disability at a particular disadvantage when compared with persons who do not have this protected characteristic?

32. If yes did the application of the PCPs put the Claimant at that disadvantage, namely:

    - The inability to follow complex verbal instructions under time pressure rendered the Claimant unable to properly comply with those instruction.

    - The inability to cope with stressful situations, making it very difficult for the Claimant to concentrate on the allegations against him and properly defend himself;

    - The stressful situation exacerbated his ill health.

33. In the alternative can the First Respondent show that the treatment was a proportionate means of achieving a legitimate aim? They rely upon the following (without limitation):

    (a) operational efficacy, particularly during the Covid-19 pandemic given the unprecedented circumstances;

    (b) the need to communicate and enforce safe working practices and matters pertaining to health and safety, particularly relating to Covid safety compliance;

    (c) the need to communicate and enforce working practices/give instructions in a timely manner, reflective of the serious and unprecedented risk posed by Coronavirus;

(d) ensuring that a thorough and comprehensive investigation took place to establish the facts pertaining to the disciplinary issue and to ensure that the disciplinary process was followed and a fair procedure was adopted, particularly in circumstances where there were genuine concerns about the claimant's conduct in the context of health and safety actions in response to the global pandemic;

(e) the First Respondent was operating at a time of unprecedented operational challenge and accordingly, whilst it was imperative to address concerns relating to misconduct/health and safety compliance the timing of such was balanced with the prioritisation of operational needs.

Detriment for making protected disclosures

34. What alleged disclosures does the Claimant rely upon? The Claimant relies on the table of Protected Disclosures with the Claimant's Further Particulars.

35. In relation to each alleged disclosure – does such disclosure amount to a qualifying disclosure in that was it:

(a) A disclosure of information?

(b) If so, did the Claimant believe the disclosure of information was made in the public interest?

(c) If so, was that belief reasonable?

(d) If so, did he believe it tended to show one of the prescribed grounds?

(e) If so, was it made to a prescribed person?

36. What is the detriment relied upon by the Claimant? The Claimant relies on the following detriments:

(a) the Second and Third Respondent 'setting a trap' for the Claimant to fail in the Health & Safety task for which he was later dismissed;

(b) singling the Claimant out for disciplinary investigation regarding the events of 23 April 2020 and COVID breaches generally;

(c) the First and Third Respondent failing to carry out a fair and impartial investigation into the events of 23 April 2020 in order to secure the Claimant's dismissal;

(d) the Second Respondent lying about the events of 23rd April 2020 and the instructions provided to the Claimant in order to secure his dismissal;

(e) the Claimant being dismissed by reason of the abovementioned involvement of the Second and Third Respondents;

(f) the removal of the Claimant's contractual right to BUPA health insurance.

37. To which alleged disclosure does the Claimant link the alleged detriment and can he show that such alleged detriment was done because of that disclosure?

Automatic Unfair Dismissal - PIDA

38. Was the reason or principal reason for dismissing the Claimant that the Claimant had made a protected disclosure contrary to s 103A ERA. What disclosure(s) does the Claimant rely on in this regard? Was such disclosure(s) a qualifying disclosure?

39. The First Respondent relies on conduct as the reason for dismissal.

Wrongful Dismissal/Breach of Contract

40. Was the First Respondent entitled to dismiss the Claimant without notice because the Claimant had committed gross misconduct? Alternatively has the Claimant been wrongfully dismissed or dismissed in breach of contract in relation to notice pay?

Remedy

41. To what remedy is the Claimant entitled, if any?

42. Has the Claimant taken reasonable steps to replace lost earnings?

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

44. What injury to feelings has the discrimination and/or detriment caused the Claimant and how much compensation should be awarded for that?

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

46. If so, is it just and equitable to increase or decrease any award payable to the Claimant? By what proportion, up to 25%?

Preliminary Issues

Reasonable Adjustments

6. The claimant suffers with anxiety and depression. As such during the course of the hearing adjustments were made to ensure that he could fully participate in these proceedings including such breaks as he required.

7. During the claimant's evidence, he was concerned that the second respondent was intimidating him by way of her staring at him. Arrangements were

made, with the agreement of the second respondent, for her to sit at a different place within the Tribunal such that she was not in the claimant's eyeline.

8. On the fifth day of the hearing, the claimant was taken ill on the way to the Tribunal. The hearing that day was adjourned, and arrangements made to reconvene on 20 March 2023 assuming the claimant was able to continue. The Tribunal was concerned that the claimant's ill health may have resulted from anxiety at the prospect of his cross examination of the second respondent, and as such wrote to the parties on 17 March to propose a "ground rules" discussion on 20 March before the evidence continued. The claimant indicated on the resumed hearing that no adjustments were required other that regular breaks, which continued. When judgment was delivered orally on 24 March, the claimant requested that he be screened off from Mr Maher. It was agreed by the parties that Mr Maher and Ms Donaghey could attend by CVP and as such would not be in the Tribunal room at all.

Application for witness orders

9. The claimant made application at the outset of the hearing for a witness order in respect of Mr Fabio Pastani, the Site Director of the first respondent, who had given evidence in a previous Tribunal hearing. The claimant sought to introduce evidence which he said had been provided at that hearing upon which he wished to rely. Although the claimant himself could give evidence as to what he heard, for that evidence (which was not accepted as accurate by the respondent) to be given weight by this Tribunal, Mr Pastani himself would need to attend. As such the Tribunal heard representations from the claimant and asked for comments from the respondents, and having adjourned the Tribunal refused the application for a witness order. It gave reasons at the time, but in brief it did not consider that the evidence provided by Mr Pastani, as stated by the claimant to be that the night leader had ensured that the tape had been down by the deadline, was necessary.

10. There was no suggestion that Mr Pastani had been present at the midnight deadline, and the question of whether the tape was down by that time, or what the dismissing officer had been told was in dispute. Mr Pastani could only have been advised of that by somebody else and the people who he was likely to have been advised by were the second or third respondents. As such they were available to give evidence themselves. The Tribunal considered that it was neither proportionate to call Mr Pastani, who had left the company and was living in Italy, nor necessary in view of the relevance of his evidence. The evidence would not take the matter much further.

11. Ms Brown had spoken with the barrister at the previous Tribunal where Mr Pastani was alleged to have provided the evidence referred to, and he had confirmed that the evidence was not as stated by the claimant. The claimant raised with the Tribunal that he wished to have advice as to what action could be taken against that barrister (in his colleague's hearing) who he considered had either perjured himself or misled the Tribunal. The Tribunal advised of the definition of perjury, and also confirmed that it was not advice which it was able to provide to the claimant.

12. There were further applications made during the course of the hearing for additional witness orders for Mr Richardson, Mr Partridge and Ms Cochlan. The

Tribunal explained to the claimant that the starting point was for him to contact those individuals and confirm with them what evidence they could give to assist the Tribunal and whether they were willing to attend voluntarily. The claimant did not update the Tribunal as to his enquiries.

Evidence and Submissions

13. The claimant gave evidence on his own behalf and the second respondent (Anne Donaghey, Operations Manager of PS1 and the claimant's line manager) and third respondent (Mr Nick Maher, Occupational Health and Safety and Environmental Manager) gave evidence on their own behalf. Two further witnesses were called by the first respondent, being Mr Martin Collins (Operations Manager who conducted the disciplinary hearing and dismissed the claimant), and Ms Lucia McCann (a Global Engineering Director who conducted the appeal).

14. The parties had agreed a bundle of documents for use by the Tribunal which consisted of some 1219 pages.

15. Additional documents were produced and admitted from both parties during the hearing.

16. The parties had also agreed a draft chronology and agreed list of facts.

17. Ms Brown on behalf of the respondents also provided to the Tribunal at their request a document confirming their position on the alleged protected disclosures. In total the claimant sought to rely upon some 27 disclosures.

18. Both parties provided the Tribunal with submissions at the conclusion of the evidence for which the Tribunal was grateful.

Findings of Fact

19. In coming to our findings of fact, we make the following preliminary points and findings on the disputed events relevant to our decision.

Notes of meetings

20. We have been provided with notes of most relevant meetings. The claimant was given the opportunity to comment upon them and he had a Trade Union representative at the meetings who could have challenged them. The notes were taken by different members of the HR team. We find that the notes of these meetings reflect what was discussed. We have considered those notes carefully in coming to our views as the credibility of the claimant and Ms Donaghey.

The disputed events

21. The factual issues at the centre of these claims are the events of 23 April 2020 between approximately 5pm and midnight. Those events are disputed. The version given by the claimant and that of Ms Donaghey are very different. Those conducting the investigation, disciplinary hearing and the appeal hearing accepted (or partially accepted) Ms Donaghey’s version, and it resulted in a finding that the claimant’s actions amounted to gross misconduct, and he was dismissed.

22. When considering whose evidence we preferred in relation to any disputed issues, we have done so on the balance of probabilities; that is, what is more likely to have happened.

23. We consider that throughout the investigation and disciplinary process, and indeed this hearing, the claimant attempted to give honest and truthful evidence. His version of the key issues of whether Ms Donaghey had given him verbal instructions that evening in two meetings and a telephone call and whether she had provided him with a marked up plan of PS1 not vary. However, during the investigation and disciplinary process following his notification that he was to be investigated under that process, the claimant's responses given to the respondent were impacted by his feelings that there was a “set-up” by the respondents to dismiss him. This impacted upon his perceptions as to the respondents’ motives, which in turn adversely impacted upon how Mr Collins and Mrs McCann viewed his evidence. His past mental health history contributed to this feeling. The claimant's comments about Ms Donaghey added to Mr Collins’ view as to the claimant's motive – that the claimant had in part acted deliberately.

24. We found Ms Donaghey evidence in relation to the events of 23 April unreliable. Although she had the opportunity shortly after that date (we believe it was on 29 April) to provide a report, we consider that her version was influenced by a need to protect her own reputation and ensure that she was not held responsible for the factory’s failure to meet the Tier 4 requirements she as tasked with implementing by midnight that day.

25. The claimant stated throughout that he had no meetings with Ms Donaghey on 23 April 2020. Ms Donaghey stated that she had had two separate meetings and one telephone call with the claimant on that evening during which she gave detailed instructions to the claimant as to what he was to do that evening before midnight to implement the Tier 4 requirements within the factory PS1.

26. On the balance of the evidence, we find that she did not have these meetings or discuss her instructions in a telephone call. At best she might have passed through the office where the claimant and Mr Wyles were holding their handover meeting, but we find that she did not give the detailed verbal instructions she alleges. The claimant produced evidence in the disciplinary process in the form of Whatsapp messages that he was engaged on the production line during the times that Ms Donaghey says she was meeting him.

27. Ms Donaghey’s evidence in relation to the timing of events varied, though not significantly, however the length of the meetings which she says took place and what was discussed was inconsistent at various stages of the investigation and disciplinary process, and in the respondent’s internal reports. Ms Donaghey provided her version in a report she prepared, we believe on 29 April 2023; in a statement provided to Ms Maher as part of the investigation dated 20 July 2020 and a further statement on 22 September again to Mr Maher. Although the impression she gave in statement of 20 July was that there were two detailed discussions lasting at least 20 minutes, that changed such that in the final statement in September she used terminology which is vague and imprecise and indicates a casual discussion. She uses terms such as “popping in and out of the office”, and further in her witness statement Ms Donaghey refers to meetings which lasted 20 minutes “including other

matters", which was not the impression which was provided to Mr Maher in the investigation or to Mr Collins in the disciplinary hearing.

28. Further, Ms Donaghey's evidence contained other contradictions. She says that in relation to the claimant, she "made sure he understood" but then that "he wasn't listening at either of the discussions". Her references to the claimant being annoyed about overtime in one of the meetings is a reference in our view to a conversation when the claimant was on days and not that evening. The claimant was clear about when that conversation took place and gave that response immediately when asked about it.

29. The claimant stated throughout that he was not given or shown a plan of PS1 marked up with zones. We find that there was a draft plan of PS1 completed in handwritten form but that it was not drawn to the claimant's attention. It may have been on Mr Hardy's desk but Ms Donaghey did not show it to the claimant and explain the detail as she alleges. In her first statement she does not refer to it. In her second statement she says it was picked up and shown to the claimant, and in the third statement she said that there was a plan on Mr Hardy's desk and there was an expectation that the claimant amend it. In the Tribunal she stated that there was also a pile of printed copies for him to give out. Her evidence was not consistent.

30. The other issue which had a significant impact upon the evidence and witness' recollections is the delay in the respondent first raising the events of 23 April with the claimant and witnesses other than Ms Donaghey. The claimant was first asked about the incident on 3 June 2020. Prior to that date he had no indication that there was any issue arising from that evening's events. It is clear to us that the considerable delay in asking the claimant and other witnesses about these events resulted in confusion and inability to recall exactly what had happened and when. This delay impacted the evidence of Mr Wyles' as to what conversations he had with the claimant; the claimant's recollection of some issues including which lines (if any) were put down on 23 April (which also caused confusion in the evidence of Mr Richardson, and Mr Wyles); what plans or maps were made available and/or given out to the claimant and to operatives, when and by whom (Mr Wyles, the claimant and Ms Donaghey).

31. We turn now to the remainder of our findings.

<u>Claimant's early employment</u>

32. The claimant commenced employment with the first respondent on 23 November 2015. At the time of his dismissal, he was a First Line Leader ("FLL") in one of the respondent's factories (PS1) at the Port Sunlight site. From 4 February 2019 the claimant commenced a period of long-term sickness absence relating to back issues. He returned on 6 January 2020.

33. The claimant submitted a complaint about his line manager, Lisa Foley, whom he alleged bullied him. That allegation was investigated during the claimant's absence and an outcome provided on 10 December 2018. A facilitated meeting took place between the claimant and Ms Foley on 7 January 2019.

34. The claimant's interactions with Ms Foley had a significant impact upon him throughout his employment and since.

35. The parties agreed facts which related to this period and appear in a separate document. They are not necessary to repeat here.

The claimant's medical position

36. The claimant suffered a back injury at work as described above which resulted in him having a significant period of absence and having ongoing restrictions of movement.

37. It has been accepted that the claimant also suffered with depression and anxiety and at various times during his employment he took medication in the form of Sertraline for his depression. His mental health issues deteriorated from when he was notified of the investigation meeting in June 2020, and the respondent in any event concedes that the claimant was a disabled person at the relevant time. There were a number of referrals to Occupational Health in respect of his back, but reference was also made to mental health issues. Various Occupational Health assessments took place (7 November 2018, 12 December 2018, 23 July 2019, 12 February 2020 and 14 April 2020) and in some of the later reports reference is made to the claimant's disability, but in any event the claimant completed health assessments in the form of questionnaires, including references on 4 February 2020 to him being on Sertraline, and at page 195 of the medical bundle reference to mental health, stress and depression. In an earlier questionnaire in 2018 the claimant confirmed that he had anxiety and was on Sertraline.

38. We therefore find that the Occupational Health team, and we also by that find that it was the HR team, had knowledge of the claimant's disability prior to any of the acts of discrimination that he is alleging occurred.

Risk Assessment

39. Following his return to work in February 2020, the claimant was due to have a risk assessment. There were delays in it happening, and we accept that there was some confusion initially whether it had been done, but that it was due to take place and did take place but not until 1 May, which was after the events which resulted in the claimant's dismissal.

40. We find that while the claimant had been waiting for the assessment had he had any clear concerns that his mental health was impacting on his job, then it would have been incumbent upon him to raise those concerns at an earlier stage. He did not do that. Although he told Occupational Health that he was struggling, the focus in the report was about putting matters in the past and focussing on new roles and beginnings. If he was seriously concerned that it was impacting upon his ability to do his job, he would have flagged that as being urgent or would have flagged that there were some serious issues immediately. Whilst waiting for the risk assessment, the claimant did not raise any concerns about being on shift.

41. We also note that at 1 May 2020 (either in that meeting nor in the follow-up email) the claimant had not said that he had any problems understanding

instructions or processing information. He refers to communication between him and Ms Donaghey being good, and the focus in follow up emails was about being him targeted. In his appeal hearing the claimant made one comment that he had told Ms Donaghey that he needed clear instructions but that was not put to her in this hearing nor mentioned in the investigation or disciplinary stages of the process. There was no medical evidence produced that the claimant's anxiety and depression caused him any difficulties with processing information or understanding instructions.

Allegations of whistleblowing

42. As part of his role the claimant as part of his role was required to challenge policies and practices within the respondent factory. He also raised complaints during his employment about matters which were specific to him and his treatment, and these were set out in the claim form at paragraph 59(a)-(w) (later amended to add other complaints). These covered the period from January 2018 to 9 October 2020. The respondent was not cross examined about any of these in any detail and it was clear that the complaints between January 2018 and April 2020 primarily related to his interactions with Lisa Foley and her behaviour, which he continued to raise after she was no longer his line manager and the respondent considered the matter had been dealt with. Many of the complaints were routine matters relating to day to day reports of health and safety issues which he raised as part of his role as a FLL. From June 2020 the issues he raised were personal concerns about the procedures being invoked against him.

Respondent's business

43. The respondent is a multinational business. The claimant was employed at its Port Sunlight site. It operates with the highest level of health and safety regulation because of the quantity of hazardous materials on site. There are four factories on that site PC, PS1, PS2 and PS3. Mr Maher was the site manager with overall responsibility for Health and Safety for each of the factories. There was a local lead at each of the factories for Health and Safety and they reported to Mr Maher.

44. The claimant was employed at the PS1 factory. Ann Donaghey was the Operations Manager for that factory and the claimant's manager. That factory produced bleach. Mr Richardson was the local Health and Safety Lead at PS1. During the Covid pandemic, bleach was a key product for the NHS and it was essential that production was maintained.

Respondent's disciplinary policies and procedures

45. We were referred to the respondent's policies and procedures and examples were given as to what might amount to gross misconduct, and they included the issues for which the claimant was dismissed.

Covid – March 2020

46. The first lock down started on 23 March 2020. The events of 23 April 2020 which are central to the claimant's claim took place in the very early stages of the Covid pandemic. At that time the terminology which rapidly became part of our

everyday language was new to all. This included the principals of social distancing and contact tracing.

47. The claimant had returned from 14 months of absence on 6 January. He was on a phased return for 12 weeks. That was extended such that he returned to full time hours on 6 April 2020. He was absent with Covid symptoms from 15 March to 6 April and also used some of his accrued holiday entitlement which had built up during his absence.

48. On balance we find that the claimant has not shown that Ms Donaghey accused him of him being a whistleblower following the issues relating to the publication of a photograph in which she was not wearing a mask. In the risk assessment meeting on 1 May he refers to his good relationship with Ms Donaghey and this does not accord with someone who accused him as he alleges.

Information provided to the claimant regarding social distancing before 23 April 2020.

49. The respondent, as with many employers at the time, was assessing and implementing Covid protections on a day-by-day basis. It was communicating updates to staff by cascading information through its managers and meetings would be held at 9.00am each day where managers would provide updates. Information was also sent by email to all staff, but such emails weren't sent to those who were absent from work. The claimant therefore missed many of these briefings and updates. He was however aware of posters had been put in place with social distancing measures and in preparation for a visit to the site from a senior director on 16 April, taping was carried out to one of the lines in PS1. These were very early days of the pandemic, and the situation was changing rapidly as updated government guidance was issued. The respondent introduced its own safety arrangements which were formalised by way of Tiers which were sets of requirements to implement Covid measures and reduce the risk of infection across the various sites.

50. On 16 April 2020 the respondent's Chief Supply Chain Officer instructed that Tier 4 was to be in place by no later than 24 April. This was by way of a document titled Global Sourcing Unit Standard Tier 4 Version 8. This included additional social distancing and contact tracing arrangements which were to be introduced. He directed that any factory which did not have this in place by that date would have its operations stopped. By the date 24 April, the respondent meant completion by midnight on 23 April 2020.

51. The Tier 4 additional measures included:

52. Social Distancing and Zoning Standards

a. Site split into zones to define the number of FTE's within each zone

b. Ensure social distancing (2m)

c. Reduce movement where possible between zones

d. Implement contract tracing

53. There were also directions about face masks, gloves and eye protection.

54. Unfortunately, this document was not shared with the claimant at the time nor was the claimant present at the meetings at 9am and 1.30pm on 23 April when Ms Donaghey talked it through as he was not due to attend work until 6pm when his shift started. Although parts of it were available in the factory, we find that the only documents which the claimant had to refer to on the night of 23 April, were those which we have detailed below.

55. There was a delay in these measures being put in place in PS1 and they were not completed until 2pm on 24 April 2020. The factory was not shut down at any stage.

Events of 23 April 2020

56. At the morning meeting Ms Donaghey advised the managers and FLLs present that the requirements to comply with Tier 4 were to be completed that day. The claimant was not present as he was working on the night shift. The deadline was midnight. That required lines to be marked in tape between each packaging line and around desks and that the factory was to be 'zoned' and contact diaries issued to all staff to ensure they recorded if they spent more than 15 minutes in any particular zone. At 13.30 a further discussion took place. There were 9 packaging lines in PS1. 8 were operational. Line 9 had been completed previously, but the tape didn't stick well to the floor and with passing traffic it had come up and may have been replaced to some extent.

57. During the day shift one of the FLLs Mr N Partridge refused to put down the tape on his line, line 2, until he had some form of policy or plan to follow. This caused Ms Donaghey and Mr Maher significant frustration and during Mr Partridge's challenge, he became obstructive and aggressive. Line 2 was not therefore completed, and Ms Donaghey was upset. It is unclear why the other lines were not completed during the day shift, but that day was particularly busy.

58. There was dispute as to when the tape was put down on these other lines, but it was clear that some tape was put down on 23 April, but the majority of lines were completed on 24 April. The FLL on the day shift, Mr Wyles, and Mr Richardson, the H&S lead, were not asked about this until some 8 or so weeks afterwards and could not recall the exact date the tape was put down with any clarity. There was no suggestion by the claimant that the taping had been completed on 23 April until he saw the (inaccurate) statements of Mr Wyles and Mr Richardson later in his disciplinary process and by that time the delay and his mental health was affecting his view of events.

59. At 14.42 Mr Maher sent email an email to Ms Donaghey with a plan of one of the other factories (the PC factory) marked into zones. That was sent with an instruction to replicate the PC factory approach for contact tracing cards. A copy of that PC plan was provided to Mr Wyles during his shift together with a copy of a One Point Learning sheet ("OPL") in respect of the PC factory and a generic document entitled 'contact diary'. He was asked to produce a plan for PS1 with zoning and amend the OPL for PS1. Unfortunately, he was not provided with a floorplan of PS1

to adapt, though Mr Richardson did find one and hand marked it with zones later that afternoon.

60. The claimant was due to start his shift at 6pm. He had a brief conversation with Mr Partridge on his way into the factory which was observed by Ms Donaghey. She considered that the conversation was about the disagreements with Mr Partridge that afternoon, but she did not know for sure. She believed however that the claimant and Mr Partridge were friends but without any facts upon which to base that view. Her version of the events of later than evening was influenced by her incorrect view of the claimant's and Mr Partridge's relationship.

61. Ms Wyles spoke to the claimant as part of the handover from one shift to the other. He apologised to the claimant that they had been unable to hand out the diaries for the contact tracing that day. He provided the claimant with a number of printed out copies of the contact diary with the PC plan on the back (even though that was the wrong factory) and the OPL still relating to the PC factory. There was no discussion about taping lines.

62. Mr Wyles was focussed on the diary and had handed out some of the diaries he had printed out before he left for the evening. These still had the incorrect PC plan on it. The claimant was aware that he needed to continue with handing out the diaries and to adapt it for PS1 that evening.

63. At 17.32 Ms Donaghey sent a further email to the claimant, Mr Wyles and others. This included a replicated OPL and contact diary for another factory being PS3. That email also stated "…below the zoning and one way system for everyone's reference" and attached a plan of PS3 entitled PS3: Zoning and 1 way movement (Phase 1 - effective immediately). The key on the plan referred to six zones and then a number of comments about the one-way system and walkways throughout the factory. The claimant did not see this email until late that evening.

64. Ms Donaghey's evidence both to this Tribunal and in the course of the claimant's disciplinary process was that she had two meeting with the claimant that evening, one prior to the handover with Mr Wyles and the other at 6.30pm before she left for the evening in which she explained to the claimant what he needed to do by 12 midnight in relation to taping, zoning and diaries. She said that she provided the claimant with a plan of PS1 which had the zones he was to use clearly marked on them but her evidence upon this was not consistent. She contended that the claimant knew what he was to do. The claimant denied that there had been any meetings with Ms Donaghey or that he had been told what to do.

65. For the reasons set out above, we preferred the evidence of the claimant to that of Ms Donaghey in relation to these issues. We accept the claimant's evidence which was that he had been on the production line at during the time Ms Donaghey said her meetings had happened. The only meeting he had that evening was with Mr Wyles on the handover and that there had been no discussion or instruction concerning putting tape between the production lines. He was not given the marked plan of PS1 by Ms Donaghey nor that his attention was drawn to it. As such we conclude that no meetings took place with Ms Donaghey that evening. Further, we find that Ms Donaghey did not gave instructions to the claimant concerning his tasks during their phone call just after 7.00pm that evening.

66. As such the only instructions which the claimant received that evening were those received from Mr Wyles during their handover and from the email and WhatsApp messages he received.

67. The claimant commenced shift and had a number of pressing issues to deal with. These included trying to locate a missing colleague who was a potential suicide risk, attempting to find a replacement for a colleague who had not attended for work and issues with the line. The chronology of the Whatsapp messages, emails and a phone call that evening was as follows;

a. 18.54 Whatsapp claimant to Ms Donaghey: concerning arranging cover for the missing operative.

b. 19.06 Phone call Ms Donaghey to the claimant about the missing operative.

c. 19.10 Whatsapp from Ms Donaghey to the claimant asking him to put the issues about the missing operative in an email and ensure that the claimant has spoken to Manpower about it.

d. 19.33-19.34 – Whatsapps from Mr Maher to Ms Donaghey: “Do we have the PC zoning example in No.1 now? Or are we at risk because of Neil [Partridge]? If so I will escalate directly to MP and Weibke (SHE Director) as consequence is factory closure”.

e. 19.39 to 19.44: Whatsapps Ms Donaghey to Mr Maher: “But I’m working on it still. I do not want that will ensure its done, we can’t have that for PS1. I’m pretty stressed. Let’s discuss with Fabio in the morning. Let’s speak tomorrow, Neil even said today, I won’t come in anymore if we have to wear masks all day with Mike at the time”.

f. 20.07 – 20.09 WhatsApp Ms Donaghey to the claimant: discussing the missing operative and 20.09 she asks: “where is the extra person from line 4. Can they help with zone markings and cleaning please sending map shortly”. At 20.09 the claimant replies “extra guy can help line 2”. Ms Donaghey responds at 20.10 “What with?” The claimant messages at same time “very sad to hear about [XX]”.

g. 20.15 Whatsapp Ms Donaghey to claimant: “please utilise extra guy to mark a yellow and black tape dividing line across every line in our factory down the middle. Further instructions to follow to teams”.

h. No further email with instructions or map was sent at that stage.

i. 20.44 Email Ms Donaghey to the claimant and others forwarding the emails she had received earlier that day at 14.35 and 14.42 (with PC plan/OPL for PC and generic diary). Her email stated: p511 “As discussed and explained today before 13.30, this is a mandatory requirement as are glasses and mask wearing; directly from Marc Engel. This morning I was assured it was in hand by [Mr Richardson][Mr Partridge] and [Mr Hardy] had this in hand and were

leading on lines 9 and 2 and the other lines were to follow suit and to be implemented by the FLLs. @John Whiteside as discussed, please utilise the extra person to implement this on nights and we will review in the morning"

j. 20.44 Whatsapp Ms Donaghey to the claimant: "Instructions sent for zoning". "Mist be completed tonight utilising extra person as instructed please. Thank you"

k. 20.45 Whatsapp claimant to Ms Donaghey "I was hoping to utilise hom on line 2 to run though breaks if possible".

l. 20.46 Whatsapp Ms Donaghey: "safety first" "always" "might be able to do both".

m. 20.46 Whatsapp claimant to Ms Donaghey: "OK I will stop line 9 and 2 for breaks thanks".

n. 20.51 Email Ms Donaghey to claimant and six others saying: Team as discussed: we need this implementing ASAP. PC's example was sent on to replicated @Richardson, Michael and I will do a walk thourgh first thing tomorrow to review progress. It attached electronic master plans of PS1.

o. 20.57 AD received a text from Teresa Carson – the senior Trade Union representative to say she was coming over to PS1 to speak to the team members.

p. 20.58 to 21.02: Whatsapp Ms Donaghey to claimant: "We only stop for breaks if we need to eg line 2 for safety or if team members untrained. Let's catch up about what you've been taken through by other flls. I'm sure you will have a good shift."

q. 21.02 to 21.03: WhatsApp Claimant to Ms Donaghey: "Line 9 only 1 trained op. Line 2 Confidential [xx] seems stressed a bit hot and bothered so would like to keep Jay supporting him please. I do understand about breaks and training etc no worries. Just want to keep lines running and be safe as well thanks."

r. 22.06 Whatsapp: Ms Donaghey to claimant: If we need to stop for breaks and get floor dobe it. I believe Sam is in now."

s. 22.07 Whatsapp claimant to Ms Donaghey: "Haven't seen him yet as full strength now so no need to stop again."

68. At approximately 10.30pm the various urgent issues which the claimant had been dealt with and he had the opportunity to review the steps Ms Donaghey had instructed him to carry out. He was confused by his instructions. The Whatsapp messages from Ms Donaghey referred to taping whereas the emails sent which Ms Donaghey said in her messages were the "further instructions" and which she then said were "the instructions for zoning" referred to zones, one-way systems, and contact diaries. There was no mention of lines. The claimant believed that what he

was being asked to do was to mark out on the factory floor, with the tape, the various zones throughout the PS1 factory and one-way systems for PS1 in the same way as was demonstrated in the example for PS3.

69. He became anxious and confused. He panicked that the job was much more onerous that he had understood and that there was neither sufficient time, nor enough tape to complete the tasks he had been instructed to do. Although Ms Donaghey had not anticipated that he would have to do all of the work himself, he considered he would have to take operatives from the lines. Whilst he was trying to map out a one-way system for PS1. Teresa Carson (TU) called to see him having spoken to her members in the factory. She was concerned that the contact tracing was not in place and that the wrong plans (those for PC) had been issued by Mr Wyles previously. She explained the principle of zoning and contact diaries to the claimant. He was very relieved and believed he now understood that it was not a question of marking lines with tape throughout the factory floor but rather, zoning areas on a plan and issuing contact diaries.

70. At 11.03 he emailed Ms Donaghey to sayj “Hi really sorry but I literally had no clue what you wanted me to do from the emails”. Luckily Teresa Carson has talked me through it. It’s not about taping out areas or markings, it’s about each person having a contact diary apparently, so no need for any labour. I will print off the OPL, zones and a diary for each person. I will discuss with each operative and go through the OPL. Hope this is right.”

71. He decided to print off the generic diary without the PC map on it and he went around the factory handing out the diaries and OPLs and explaining the principles of zoning to the operatives. He also ensured that masks and glasses were available as set out in the email of 20.44. He confirmed in his email to Ms Donaghey that he would discuss the contact diaries with each operative and go through the OPL with them. This he did.

72. The claimant did not contact Ms Donaghey following his conversation with Teresa Carson as he believed he understood what was required. In fact, he had misunderstood what was needed as Tier 4 also required the packing machines to be segregated from each other with tape as part of the social distancing requirements. This was what Ms Donaghey was referring to when she referred to taping.

<u>The next day 24 April 2020</u>

73. The PS1 factory was not shut down at any stage.

74. When Ms Donaghey attended at work the following morning, she noted that the taping was not down. Most of the taping was completed by 11.30pm that day by Mr Wyles, Mr Richardson and the claimant. Ms Donaghey gave Mr Partridge the opportunity to change his stance on putting down the tape on line 2. He continued to refuse to do so. By 14.00 on 24 April, this was completed by one of the other managers. The OPL and plan for PS1 was updated over the next 24 hours or so and distributed to operatives. Tier 4 requirements were completed.

75. The fact that the deadline was not met was reported to Mr Maher at 9.00am. Ms Donaghey was asked to produce a report on the events of that day and evening.

This she did on 29 April 2020. That report appears at p986 and throughout refers to responsibility for the failure being that of the claimant and Mr Partridge. She states that she considered the claimant's actions to be deliberate and that he ignored her request. She suggests that he was perhaps influenced by Mr Partridge. She states that Mr Maher told her on 24 April that he would call Maria Pia and explain that Mr Partridge and the claimant's actions would directly lead to shutting down the factory. She refers to her extreme embarrassment in her insubordinate team members working together to create barriers to the safety needs and that she felt her reputation was damaged by their actions.

76. The claimant was unaware that there was any ongoing issue with his response that evening.

1st May 2020

77. During a meeting with Ms Donaghey, and a member of HR to complete a Stress Risk Assessment, the claimant was positive in his comments about Ms Donaghey.

Claimant's suspension/delay in investigation

78. On 3rd June 2020 (six weeks after the incident) the claimant was invited by letter to disciplinary investigation meeting with Maher to be held on 10 June 2020. [pg 389] It confirmed that the events which were to be investigated were failure by the claimant to put down the demarcation lines with hazard tape on 23 April 2020 and failing to follow a reasonable management instruction to implement the demarcation procedures and not engaging with Ms Donaghey when she contacted him on multiple occasions for updates.

79. This was the first time that the claimant was aware that the events of 23 April 2020 were being investigated.

80. The reason for that delay was the pressures of operating within the Covid pandemic and Mr Maher's absences.

81. The claimant suffered a deterioration in his mental health issues and was signed off from work with anxiety and depression from 8 June 2020. He did not return to work.

82. The claimant then proceeded to raise grievances as follows:

a. 4th June 2020: staff being targeting for investigation and dismissal [pg 997] (1)

b. 7th June 2020: Ms Donaghey's poor leadership and not following Covid measures [pg 393] (2)

c. 7th June 2020: safety issues [pg 391 and 395] (3)

d. 10th June 2020: the disciplinary investigation. (4)

e. 23rd June 2020 C complaint about Targeting [p411] (5)

83. It is clear from his exchange of emails with Mr Smit of the respondent containing these grievances that the claimant's mental health was being impacted by the allegations against him. The email of 10 June contained the claimant's first version of the events of that evening. [p995]. It stated:

> "I believe the investigation into both Neil and I are vexatious and malicious. I came onto nights not being given any concrete information on what was required, my handover colleague had no clue either. I had no help or plan from my manager or OSHE advisor. I had no tape to carry out my task. I had only a bit of information from other factories. No1 lackadaisical attitude meant they had all day to plan and inform. No plan just follow no3! No verbal help from anyone. I haven't even seen the supply chain officers requirements! Confusing timelines! Confusing who was doing what! I emailed back to say I had no clue what I was expected to do! I asked the senior union stewards advice and followed that. I even emailed to tell my manager and stated hope this is ok."

84. Mr Smit reassured the claimant that his grievances would be investigated and recommended that he focus on his wellbeing. In correspondence about the claimant's grievances on 3 July 2020, the claimant again gave his version of the events that evening stating:

> "I did my best that evening with no handover, no plan and confusing information. As my colleague stated that night "Good luck I don't know what's going on". I did not have a discussion with the ops manager, it was not mentioned in a phone call only about a person / op going missing and worry for his welfare. The next day still nobody knew what to do! When they did put tape down they were instructed to do it wrong! It had to be done again! Why had all the other factories formed plans but not no1? I was generally confused and thought I was being asked to do large zones! A senior steward stated it was about people having contact diaries which I implemented. I still haven't seen the chief supply chain officer's requirements! As my colleague said we had a go with what info we had. I tried my best."

85. The investigatory meeting did not take place on 10 June and the claimant's fitness to attend an investigatory meeting was assessed by OH. Having seen the OHP, the claimant was asked to attend an investigation meeting as part of the disciplinary process with Mr Maher to take place on 20 July.

Investigation meetings

20th July

86. Prior to this meeting the claimant was provided with the likely questions he would be asked as recommended by the OHP and given copies of some of the emails and WhatsApp messages.

87. The meeting was conducted by Mr Maher, who had HR support and the claimant was accompanied by his trade union representative. The notes of that meeting are an accurate reflection of the discussion.

88. In the meeting the claimant denied that Ms Donaghey had spoken to him that evening about zoning and that his only conversation with her was over the phone when they had discussed the missing operative. He referred to his handover from Mr Wyles being unclear, in that he was handed the PC factory OPL, the contact diary with a map of PS3 on the back and that Mr Wyles wasn't sure what to do with them but told the claimant to do his best and wished him luck.

89. It is clear from the notes of the investigation meeting that the claimant was still unclear what it was that he should have done. He said he was never told it was a mandatory requirement and that he wasn't clear what social distancing was until that day. In terms of tape – he thought it was to put a C section around a desk. From the minutes, he was still confused as to how that ensured people were two metres apart. Upon reading the email sent by Ms Donaghey later that evening, he thought that he was being asked to physically mark all out of the areas in the factory floor in tape as a one-way system with lines and arrows. He was trying to work out how to do this with the walkway, access to trucks etc and he became very confused. He said that nowhere in the emails did it say he should put lines down. He explained that he then had conversations with Teresa Carson (TU) who explained that the zones were hypothetical and didn't need to mark out the various areas with tape. He then spoke with the operatives about the OPLs and the contact diaries and that made sense to him, though it is clear he was still confused about close contact tracing and Mr Maher sought to explain it to him. He said he put out hand drying and soap in the sanitizers. He alleged that it was a set up and questioned why he would do this. He denied having a map marked up of PS1.

90. He referred to the shift being very chaotic and the pressures upon him that evening, including the operative going missing. He was then only able to look at the zoning between 10/11pm. He questioned why he would not have done it if he had understood what to do as it would have only taken 5-10 minutes per line.

<u>27 July</u>

91. A second investigatory meeting was held on 27 July. The claimant questioned the impartiality of Mr Maher and claimed that he had made his mind up the claimant was guilty because he said that the overview questions which were sent to him in advance made reference to having "satisfied the charge". The claimant became agitated. Following a break, the claimant continued to express this view and alleged that he was being set up by Ms Donaghey and Mr Maher was also involved. He continued to question Mr Maher's impartiality. Mr Maher was upset at his integrity being questioned and his demeanour changed, and his voice became more aggressive. This was the view of the claimant's trade union representative. We accept his assessment. He did not, as alleged,by the claimant lose his temper and shout at him. By that stage the claimant was feeling very vulnerable and emotional such that Mr Maher's demeanour had more of an impact upon him. Although he said he wanted to continue with the meeting that day, Mr Maher did to feel he was able to in view of the claimant's concerns. During further exchanges, the claimant and his union questioned the discussions that Mr Maher had had with Ms Donaghey that evening and a separate WhatsApp message which indicated there were discussions about disciplining Mr Partridge. Mr Maher accepted that his investigation to date had already concluded that some discussions did take place between Ms Donaghey and

the claimant that evening, but that he needed to clarify what was said. The meeting was adjourned.

5 August 2020

92. A final investigatory meeting took place on 5 August 2020. Mr Maher put to the claimant again that Ms Donaghey said that two meetings each lasting 20 mins had taken place at which clear instructions were given as to what lines needed to be marked and the zoning of the factory and contact tracing diaries. The claimant again denied that any meetings had taken place. He further denied Ms Donaghey's contention that she had picked up the plan of PS1 with zoning marked on it and showed it to him. The claimant questioned why, if he had been told to do the marking, he would not have done it. Mr Maher put to him that Ms Donaghey had said that the claimant had in one of those meetings raised questions about overtime payments and raised issues about being treated differently and the incompetence of the HR team. The claimant advised Mr Maher that this discussion had happened on a different day, when he was working on days and provided further detail about it. Mr Maher advised that Ms Donaghey had said the two meetings were at 5pm and at 6.00pm. The claimant told Mr Maher that at that time he was physically on line 2 as there were issues with filler. He showed Mr Maher the exchanges he was having with other colleagues about the problem and that the messages were between 17.50 until 18.43. He confirmed that he may have walked onto other lines and went to find filler heads in Mr Partridge's office. The claimant again asked why no one had phoned him that evening to give him instructions if it was so important. As it became clear to the claimant that Ms Donaghey's version of that evening was very different from his, he became agitated and upset.

93. During the course of his investigation Mr Maher interviewed Mr Wyles on 12 June and 23 July 2020, Ms Donaghey on 20 July and he also had her statement stated to be dated 23 April (but likely to have been written on 29 April) about the events of that evening. Ms Carson's on 18 August 2020 and three other witnesses he described as secondary or tertiary witnesses. Each of these statements was redacted to remove the events of earlier on 23 April relating to the claimant's colleague Mr Partridge. This removed a large part of Ms Donaghey's statement of 29 April 2020.

Investigation Report

94. He produced a detailed report which concluded that there was a disciplinary case to answer in respect of each of the allegations: He found that the claimant was instructed to mark out the lines with hazard tape by Ms Donaghey numerous times during the overnight shift on 23/24 April 2020. That the claimant deliberately avoided engaging with Ms Donaghey's direct instructions to mark out zones which she sent via Whatsapp, picking up on less relevant details; and that the claimant failed to implement the contact tracing and diary system in an appropriate format to protect personnel from risk of infection transmission.

95. In doing so he believed Ms Donaghey that she had met with the claimant on 23 April and provided instructions about the marking of lines and contact dairy and that she had spoken to him about this in a phone call at approximately 7pm on 23 April. In his conclusions about whether there was a deliberate refusal to engage with

her, he in part relied upon derogatory comments which the claimant had made about Ms Donaghey during the course of the investigation which he further concluded should also result in disciplinary action against him.

96. The report made only passing reference to Mr Partridge and his conduct during the day of 23 April and which Ms Donaghey had linked with the claimant.

Disciplinary meetings

97. By a letter of 4 September 2020 the claimant was invited to attend a disciplinary hearing to take place with Mr Martin Collins, the No. 4 Operations Manager. The allegations which the claimant faced were:

a. A failure to follow a reasonable management request to mark out the packing lines with hazard tape despite instructions from Ms Donaghey. It was alleged that these instructions were issued by face-to-face discussions/meetings and WhatsApp communication.

b. Failure to directly engage with or follow direct instructions from Ms Donaghey to implement hazard tape markings which were issued via WhatsApp, deliberately picking up on less relevant details.

c. Failure to implement the contract tracing and diary system in an appropriate format in order to protected personnel from risk of infection transmission, displaying a careless approach to management instruction on safety.

d. Disrespectful and derogatory attitude towards his line manager, Ms Donaghey, by repeatedly saying that she had lied, that she does not take the Covid risk seriously, her leadership as “shambolic and lackadaisical”, that under her management there is “load of bullshit going on”. Further saying that “the less I have to do with Anne the better”, suggesting that he avoided or ignored Ms Donaghey if possible.

98. The claimant was provided with the documentation contained within the investigatory report prepared by Mr Maher.

99. The disciplinary meeting took place on 22 September 2020 before Mr Collins. The claimant was accompanied by his representative (Mr Johnson) and Mr Collins had HR support with him. He was warned both in the letter and at the meeting that the outcome of the disciplinary process could be his dismissal for gross misconduct. The claimant questioned why the investigation report and attachments were so heavily redacted as explained above, but no response was provided.

100. The claimant set out his background, and the impact that this process (and his previous experience with Lisa Foley) had had upon him. He raised his suspicions about the redacted information and that that had something to do with Mr Maher’s reaction to the claimant when suggesting he was not impartial. The claimant also raised the issue that someone should have spoken to him about this at the time, and not eight weeks later. The claimant felt that Ms Donaghey was deliberately

gathering evidence against him during that period. The claimant again gave his version of events, as he had at the investigation meeting, including the hectic nature of the evening, his lack of understanding as to what he was required to do, the limited information provided by Mr Wyles on handover and Mr Wyles' confusion, the fact that Ms Donaghey was not telling the truth when she said that she had had meetings with him and had discussed what she required during a telephone conversation. Further, his confusions as to what he was being required to do until it was clarified by Teresa Carson late in the evening. Further, the lack of information in relation to Covid measures so far as he was aware when he commenced the shift on 23 April. The claimant expressed his concerns that Ms Donaghey did not speak to him about what was required, and that she may got mixed up with the days. The claimant further reiterated that Ms Donaghey had contradicted herself in respect of the plan. He provided his explanations on the WhatsApp messages from Ms Donaghey that evening and the confusion and his understanding that by zoning be understood that being marking boxes around desks. The claimant referred to the fact that Ms Donaghey and Mr Maher had been in contact that evening and that he thought that he was doing the right thing when following the clarification from Teresa Carson.

101. The claimant reiterated (in response to a direct question from Mr Collins) that he did not understand what he was supposed to do from the WhatsApp messages. The claimant also said that he felt that it was important that the lines were not in fact put down until the following day, and he was confused about it being a "C" shaped box.

102. In respect of the messages which Ms Donaghey sent about using extra people, and the claimant indicating that he would use them on line 9 to keep it running, he questioned why Ms Donaghey did not ring him to discuss it. The claimant told Mr Collins that there was no malicious intent on his behalf, just the hustle and bustle.

103. Again, the claimant's representative asked why the reports were so heavily redacted, and Mr Collins indicated that he had been told it was not relevant as it was regarding other people and health concerns of individuals. Mr Whitehead reiterated that if it related to the 23 April it must be relevant to him. He read into that that because Mr Maher was unhappy that he had asked about his impartiality he had something to do with it.

104. In respect of the last allegation, the claimant felt that Ms Donaghey was aggressive and that she was unhappy about the incident with the mask. The claimant stood by his comment that matters were a shambles and that it was not him who referred to "bullshit". The claimant reminded Mr Collins about the discrepancies in Ms Donaghey's timings being that she met with him at 5.00pm, 5.30pm and 6.00pm and the story kept changing. He accepted that he had made some mistakes. The claimant said that he did not know how else to say it if someone was lying. The claimant further said that he had never been rude to Ms Donaghey, that he was a polite person but had challenged her. He again alleged that Mr Maher and Ms Donaghey were colluding. The claimant asked Mr Collins to carry out some further investigations in respect of this.

105. On 15 September 2020, the respondent's Global Crisis Committee gave approval to proceed with claimant's disciplinary hearing [pg 1162]

106. A further meeting took place on 12 October in order that Mr Collins could deliver the outcome from the disciplinary hearing.

107. He advised that since the meeting on 22 September he had reviewed the investigation pack, met with Ms Donaghey and reviewed the WhatsApp communications between her and Mr Maher which were referred to. He found that they were not relevant to the allegations.

108. Mr Collins went through the allegations and concluded that they amounted to gross misconduct and that the claimant's employment would be terminated with effect from 12 October. Mr Collins advised that the claimant that he had five days to appeal.

109. A letter confirming the outcome was issued on 12 October 2020. Mr Collins confirmed that he was satisfied that one face-to-face meeting with Ms Donaghey had taken place on 23 April soon after he started his shift. He found that she had told him of the need to tape the floor to separate people working on the lines and that she referred back to that discussion in her later WhatsApp message. He accepted that the claimant had a busy shift, including a missing employee, but by roughly 10.00pm the situation was resolved. By then he had received multiple WhatsApp messages chasing the taping and suggesting that it could be achieved on his shift, however the claimant ignored the instruction. He referred specifically to the message at 20:15 being:

110. "Please utilise extra guy to mark a yellow tape dividing line across every line in the factory down the middle. Further instructions to follow to team."

111. Mr Collins considered that this did not support the claimant's view that this was a huge job to be done and Ms Donaghey reiterated that the job needed to be done that night. Mr Collins did not find it credible that the claimant had (at 23:03 that evening) reverted to Ms Donaghey saying that "it was not about taping areas or marking, it was about each person having a contact diary apparently so no need for any labour."

112. In respect of allegation 2, Mr Collins found that the claimant had deliberately failed to acknowledge the instructions sent by Ms Donaghey picking up on other detail. His reasons for coming to that conclusion were linked to allegation 4 in respect of the claimant's attitude towards Ms Donaghey. Mr Collins considered that there was a deliberate tactic being used.

113. In respect of allegation 3, Mr Collins concluded that the issuing of the incorrect version of the PS1 map and it not being corrected was because the claimant felt put upon by the taping and other safety tasks that he had been instructed to do, he was disrespectful of Ms Donaghey's instructions, and he had had enough for whatever reason. Mr Collins therefore concluded that the claimant had a careless approach to the urgent safety requirements which were required of him.

114. In respect of allegation 4, Mr Collins noted that the language used about Ms Donaghey was disrespectful and derogatory. He took into account that the claimant felt his job was at risk and therefore the language used during the course of the investigation meetings was not the same as was used day-to-day on the shopfloor and therefore this allegation did not amount to gross misconduct. It did however, in his view, shed light on the claimant's attitude to Ms Donaghey and his actions on 23 April. Mr Collins found that these were consistent with him messaging on his phone when Ms Donaghey was trying to speak to him and deliberately ignoring specific taping instructions. Mr Collins saw that the claimant was tactically trying to wind Ms Donaghey up or cause her more stress. Mr Collins therefore found that the actions on 23 April amounted to gross misconduct under the Unilever disciplinary policy, specifically:

a. Refusing to accept a reasonable request made by an authorised person or other serious failure to comply with company rules and procedures;

b. Disregard for safety procedures.

115. Mr Collins concluded that the claimant should be dismissed by reason of gross misconduct.

Grounds of Appeal

116. The claimant appealed against this decision by a letter of 15 October 2020. His grounds were set out in that letter and were as follows:

a. That he believed the decision to terminate his employment was unfair as the sanction imposed was too harsh given a number of factors including that the process was not equitable or fair, but biased;

b. That he had been used as a scapegoat in this instance and targeted;

c. That there had been a predetermined outcome in mind and that was why vital evidence was ignored and other crucial evidence had been withheld;

d. The process had been handled incorrectly;

e. The disciplinary process was not impartial or equitable;

f. He referred to Mr Collins and that he had not been assessed from a mental health capacity as safe or capable of completing the role as per Occupational Health advice;

g. He had been consistent in his statements.

117. A final point was that a statement in a report from Ms Donaghey had been withheld which cleared him of any charges and stated:

118. "All social distancing measures were completed by the deadline on 23 April. Some small taping to be complete for two metre distancing. Unable to complete this due to lack of tape on site."

119. Further that Ms Donaghey went on to state that she gave away number 1 factory tape to PC factory. Therefore, he contended there was "no case and a set-up to fail".

120. The claimant then pointed out the discrepancies in relation to the evidence of Ms Donaghey and that her story had changed at least three times during the investigation in relation to the timing of the meeting she said she had with the claimant, the length of those meetings, the lack of a plan of PS1 being mentioned and further that there had been collusion. Further, the confusion in the emails and WhatsApp messages with regard to zoning and taping of lines; the WhatsApp messages and emails did not give specific instructions and that the timeline tallied with Mr Donaghey and Mr Maher's collusion. The claimant pointed out that five hours before the deadline Ms Donaghey and Mr Maher were organising meetings with the site director to discuss disciplinary action, and the need to call the Head of Safety for Unilever. The claimant could not understand why they did not call him if they had those concerns at that time. The claimant referred to the redacted information, and that Ms Donaghey was panicking in the WhatsApp statements as matters had not been dealt with during the day.

121. In respect of his comments about Ms Donaghey and language he had used, the claimant said that they were taken out of context and deliberately written in a bias fashion. He contended that the comments he had made were accurate and that in part Ms Donaghey had agreed with him. The claimant again questioned why it had taken eight weeks to ask him about the night of 23 April, when Ms Donaghey was gathering information during that period. The claimant questioned generally the approach of the respondent in relation to health and safety at that time. He referred to his mental health and felt that a risk assessment should have been carried out prior to him returning to work.

Appeal

122. The appeal hearing took place on 25 November 2020 before Lucia McCann (Engineering Director). She was supported by HR and a notetaker and Mr Johnson (the claimant's representative) attended with the claimant.

123. The claimant went through the grounds of appeal and answered questions in response to Ms McCann. The claimant again reiterated his version of events which had been provided to Mr Maher at the investigation hearing. Throughout, the claimant alleged that he was targeted and referred to his previous issues with Lisa Foley. He questioned whether there was collusion between the two of them, in that he had a reputation. He felt it might be whistleblowing or his reputation. The claimant accepted that he might be second guessing himself and he had had knocks in his confidence. He referred to the redacted information again and that it was evidence of collusion. The claimant denied that he was annoyed as was alleged, saying that in fact, he was doing other people's work when being asked to do the contact diaries, but he reiterated that he had no idea that there had been a meeting

or that they had been given any tasks during the day – he was just doing his best that evening in trying circumstances.

124. The claimant advised that he was confused with regard to Ms Donaghey's messages, which although he said may be clear in the light of day but were not at the time. The claimant referred to her email saying, "as discussed". The claimant pointed out that the timing of that email tied in with the WhatsApp message from Mr Maher raising the concerns about the lack of progress of getting the lines down, and he felt that that was the "oldest trick in the book" and was "setting him up". He was asked why he did not contact his line manager if he was confused but said that she would switch her phone off after a certain time. The claimant reiterated that no-one spoke to him about the events for the 8-10 weeks, but they just gathered evidence themselves.

125. The claimant's representative, Mr Johnson, confirmed that in respect of the allegation that Mr Maher had shouted in the investigatory meeting, although he was on the telephone during the meeting and not in the room, Mr Maher's tone was raised and he did become a little more aggressive in tone, but that was all he could confirm.

126. Following that meeting Ms McCann gave consideration to the investigation materials, the additional material that was produced in the meeting and the claimant's emails and letters regarding the case.

127. On 8 December 2020 Ms McCann wrote to the claimant with her outcome. She considered that the appeal was on the basis of the following grounds:

a. That the decision to terminate the employment was unfair as the sanction imposed was too harsh given a number of factors that were not acknowledged as well as the process being biased;

b. That the claimant felt targeted and being used as a scapegoat for failures in the implementation of measures by others;

c. That there was collusion against him, specifically between Mr Maher and Ms Donaghey, and a predetermined outcome, evidenced by alleged vital information being withheld or ignored in his case;

d. That Unilever's disciplinary process was not impartial or equitable and fair for all employees related to the above point that there was collusion against him and a predetermined outcome in the case;

e. That he had not been assessed as fit for the role.

128. Ms McCann considered the extract of the report to management about the events of that day provided by the claimant in which Ms Donaghey stated that the reason that the task had not been completed that evening was because there was a shortage of tape. Ms McCann did not comment that this contradicted what Ms Donaghey had said was the reason for the task not being completed, i.e. the claimant's failure to do it.

129. Ms McCann considered that although she acknowledged that the claimant maintained there were no face-to-face conversations with Ms Donaghey on 23 April, she considered that the WhatsApp messages were clear in their instruction and that it was a priority, including suggesting how it could be achieved.

130. Ms McCann considered that the instructions were clear and that the claimant should have been able to implement the necessary measures, and further that if the claimant had required clarification, he had had sufficient opportunities and avenues to do that. The claimant was classed as fit for work and the stress risk assessment was rescheduled at his request.

131. Ms McCann upheld the decision to dismiss the claimant.

Findings of Fact relating to Wrongful Dismissal/Contributory Fault

132. We have found that the claimant was not given any verbal instructions by Ms Donaghey on the evening of 23 April. As such all that he had to rely upon in terms of instructions as to what he was to do was in the handover instructions from Mr Wyles and the emails and WhatsApp messages form Ms Donaghey. Throughout those exchanges, (primarily in the WhatsApp messages, but also within her evidence before the Tribunal) she uses the words “zoning, zone markings and zones” such that we find it was unclear to the claimant whether she was talking about marking the lines or zoning out the factory. It is apparent from the investigation and disciplinary hearings that the claimant on that evening was entirely confused about what he was being asked to do. This was accepted by Mrs McCann in her decision and indeed before the Employment Tribunal.

133. The claimant understood, incorrectly, that he was to mark out zones in PS1 with tape. He could not see how that could possibly be achieved either with the amount of tape he had or in the time available that evening before the deadline. Once he had spoken to Teresa Carson (a senior trade union official) what he was supposed to be doing he said “fell into place” – he therefore proceeded to make what progress he could in handing out diaries, explaining to staff what was required in terms of zoning and social distancing, and also going to the extent of ensuring that there were glasses and masks which were referred to in an earlier email, making sure they were available. He confirmed in his email to Ms Donaghey that evening that he was confused but he identified what he had achieved.

134. The respondent relied on, and indeed we were drawn to it ourselves initially, the text from Ms Donaghey at 20:15, which is the one which refers to marking out the lines, and appears clear, but that is immediately followed by the WhatsApp saying:

135. “Instructions sent for zoning and must be completed tonight. Use extra person as instructed”.

136. What Ms Donaghey then sent through was the email of 20:44 referring to glasses and masks and the zoning of the factory. The claimant understood that the line marking was part of the zoning and indeed Mrs McCann confirmed that she saw them as part of the same process. The claimant felt reassured by the trade union and that he had done what was required.

137. The instructions the claimant was given were confusing and unclear.

138. Even though he thought he understood what he was required to do following his discussion with Ms Carson, he could have clarified those instructions by calling Ms Donaghey. That would have ensured that the task, which he knew was important and had a deadline to meet was carried out to her satisfaction. His failure to do that was blameworthy conduct which contributed to his dismissal.

The Law

Protected Disclosures

139. Protected disclosures are governed by Part IVA of the ERA 1996 of which the relevant sections are as follows:-

> **"s43A: in this Act a "protected disclosure" means a qualifying disclosure (as defined by Section 43B which is made by a worker in accordance with any of Sections 43C to 43H.**
>
> **s43B(1): in this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure is made in the public interest and tends to show one or more of the following:**
>
> **(a) …**
>
> **(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject…**
>
> **(c) ……**
>
> **(d) that the health and safety of any individual has been, is being or is likely to endangered,**
>
> **(e) …**
>
> **(f) …**

140. The Employment Appeal Tribunal ("EAT") (HHJ Eady QC) summarised the case law on section 43B(1) as follows in **Parsons v Airplus International Ltd UKEAT/0111/17,** a decision of 13 October 2017:

> **"23. As to whether or not a disclosure is a protected disclosure, the following points can be made:**
>
> **23.1. This is a matter to be determined objectively; see paragraph 80, Beatt v Croydon Health Services NHS Trust [2017] IRLR 748 CA.**
>
> **23.2. More than one communication might need to be considered together to answer the question whether a protected disclosure has been made; Norbrook Laboratories (GB) Ltd v Shaw [2014] ICR 540 EAT.**
>
> **23.3. The disclosure has to be of information, not simply the making of an accusation or statement of opinion; Cavendish Munro Professional Risks Management Ltd v Geduld [2010] IRLR 38 EAT. That said, an accusation or statement of opinion may include or be made alongside a disclosure of information: the answer will be fact sensitive but the question for the ET is clear: has there been a disclosure of**

> **information?; Kilraine v London Borough of Wandsworth [2016] IRLR 422 EAT."**

141. The worker need only have a reasonable belief that the information tends to show the matter required by Section 43B(1) and that the disclosure is made in the public interest. A subjective belief may be objectively reasonable even if it is wrong, or formed for the wrong reasons. In **Chesterton Global Ltd and anor v Nurmohamed [2017[IRLR 837** the Court of Appeal set out the factors which would normally be relevant to the question of whether there was a reasonable belief that the disclosure was made in the public interest.

142. In this case it was accepted that the alleged disclosures were made to the employer under section 43C.

Detriment in Employment

143. If a protected disclosure has been made, the right not to be subjected to a detriment appears in Section 47B(1) which reads as follows:

> **"A worker has the right not to be subjected to any detriment by any act or any deliberate failure to act by his employer done on the ground that the worker has made a protected disclosure."**

144. The question of what will amount to a detriment was considered in the discrimination context by the House of Lords in **Shamoon v The Royal Ulster Constabulary [2003] ICR 337**: the test is whether a reasonable employee would or might take the view that he had been disadvantaged in circumstances in which he had to work. An unjustified sense of grievance cannot amount to a detriment.

145. The right to go to a Tribunal appears in Section 48 and is subject to Section 48(2), which says this:

> **"On such a complaint it is for the employer to show the ground on which any act or deliberate failure to act was done".**

146. Section 48(2) means that once all the other necessary elements of a claim have been proved on the balance of probabilities by the claimant — i.e. that there was a protected disclosure, there was a detriment, and the respondent subjected the claimant to that detriment — the burden will shift to the respondent to prove that the worker was not subjected to the detriment on the ground that he or she had made the protected disclosure.

147. If an employment tribunal can find no evidence to indicate the ground on which a respondent subjected a claimant to a detriment, it does not follow that the claim succeeds by default — **Ibekwe v Sussex Partnership NHS Foundation Trust EAT 0072/14.** There, the EAT adopted the same approach as that taken by the Court of Appeal in **Kuzel v Roche Products Ltd 2008 ICR 799, CA.** While **Kuzel** was an unfair dismissal claim brought under S.103A ERA, which covers dismissals for making a protected disclosure, a similar burden of proof applies. The Court of Appeal in **Kuzel** held that, having rejected the reason for dismissal advanced by the employer, a tribunal is not then bound to accept the reason advanced by the employee: it can conclude that the true reason for dismissal was one that was not advanced by either party.

148. In **International Petroleum Ltd and ors v Osipov and ors UKEAT /0058/17/DA** the EAT (Simler P) summarised the causation test as follows:

> **"...I agree that the proper approach to inference drawing and the burden of proof in a s.47B ERA 1996 case can be summarised as follows:**
>
> **(a) the burden of proof lies on a claimant to show that a ground or reason (that is more than trivial) for detrimental treatment to which he or she is subjected is a protected disclosure he or she made.**
>
> **(b) By virtue of s.48(2) ERA 1996, the employer (or other respondent) must be prepared to show why the detrimental treatment was done. If they do not do so inferences may be drawn against them: see London Borough of Harrow v. Knight [[2003] IRLR 140]at paragraph 20.**
>
> **(c) However, as with inferences drawn in any discrimination case, inferences drawn by tribunals in protected disclosure cases must be justified by the facts as found."**

149. There was an appeal to the Court of Appeal in the **Osipov** case but the EAT's direction on the drawing of inferences was not challenged.

Unfair Dismissal

Automatic Unfair Dismissal

150. Section 103A of the Act deals with protected disclosures and reads as follows:-

> **"an employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure".**

151. The reason or principal reason is derived from considering the factors that operate on the employer's mind so as to cause him to dismiss the employee. In **Abernethy v Mott, Hay and Anderson [1974] ICR 323**, Cairns LJ said, at p. 330 B-C:

> **"A reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee."**

152. That requires the Tribunal to make a finding about who took the decision to dismiss.

153. An employer with grounds to dismiss for a fair reason, such as misconduct, might still be found to have dismissed for an impermissible reason if the latter is the reason operating on his mind: **ASLEF v Brady [2006] IRLR 576.**

154. Where the reason for dismissal is said by a claimant to be automatically unfair but the respondent advances a potentially fair reason, the approach to be taken is derived from the decision of the Court of Appeal in **Kuzel v Roche Products Ltd [2008] IRLR 530.** The claimant must show that there is a real issue as to whether

the respondent's reason was not the true reason. If that is done, the respondent must prove his reason for dismissal. If he fails to do so, he must disprove the reason advanced by the claimant, otherwise the claim will succeed.

Ordinary Unfair Dismissal

155. If a potentially fair reason within section 98 is shown, the general test of fairness in section 98(4) will apply. Section 98 reads as follows:

> **"(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –**
>
> **(a) the reason (or, if more than one, the principal reason) for the dismissal and**
>
> **(b) that it is either a reason falling within sub-section (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.**
>
> **(2) A reason falls within this sub-section if it … relates to the conduct of the employee …**
>
> **(3) …**
>
> **(4) Where the employer has fulfilled the requirements of sub-section (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".**

156. Conduct dismissals can be analysed using the test which originated in **British Home Stores v Burchell [1980] ICR 303**, a decision of the Employment Appeal Tribunal which was subsequently approved in a number of decisions of the Court of Appeal.

157. The "**Burchell** test" involves a consideration of three aspects of the employer's conduct. Firstly, did the employer carry out an investigation into the matter that was reasonable in the circumstances of the case? Secondly, did the employer believe that the employee was guilty of the misconduct complained of? Thirdly, did the employer have reasonable grounds for that belief?

158. Since **Burchell** was decided the burden on the employer to show fairness has been removed by legislation. There is now no burden on either party to prove fairness or unfairness respectively.

159. The circumstances relevant to assessing whether an employer acted reasonably in its investigations include the gravity of the allegations, and the potential effect on the employee: **A v B [2003] IRLR 405**. At paragraphs 60 and 61 the EAT said**:**

> **"60. Serious allegations of criminal misbehaviour, at least where disputed, must always be the subject of the most careful investigation, always bearing in mind that the investigation is usually being conducted by laymen and not lawyers. Of course, even in the most serious of cases, it is unrealistic and quite inappropriate to require the safeguards of a criminal trial, but a careful and conscientious investigation of the facts is necessary and the investigator charged with carrying out the inquiries should focus no less on any potential evidence that may exculpate or at least point towards the innocence of the employee as he should on the evidence directed towards proving the charges against him.**
>
> **61. This is particularly the case where, as is frequently the situation and was indeed the position here, the employee himself is suspended and has been denied the opportunity of being able to contact potentially relevant witnesses. Employees found to have committed a serious offence of a criminal nature may lose their reputation, their job and even the prospect of securing future employment in their chosen field, as in this case. In such circumstances anything less than an even-handed approach to the process of investigation would not be reasonable in all the circumstances."**

160. A fair investigation requires the employer to follow a reasonably fair procedure. By section 207(2) of the Trade Union and Labour Relations (Consolidation) Act 1992 Tribunals must take into account any relevant parts of the ACAS Code of Practice on Disciplinary and Grievance Procedures 2015.

161. The appeal is to be treated as part and parcel of the dismissal process: **Taylor v OCS Group Ltd [2006] IRLR 613.**

162. If the three parts of the **Burchell** test are met, the Employment Tribunal must then go on to decide whether the decision to dismiss the employee was within the band of reasonable responses, or whether that band fell short of encompassing termination of employment.

163. It is important that in carrying out this exercise the Tribunal must not substitute its own decision for that of the employer. The band of reasonable responses test applies to all aspects of the dismissal process including the procedure adopted and whether the investigation was fair and appropriate: **Sainsburys Supermarkets Ltd v Hitt [2003] IRLR 23.** The focus must be on the fairness of the investigation, dismissal and appeal, and not on whether the employee has suffered an injustice. The Tribunal must not substitute its own decision for that of the employer but instead ask whether the employer's actions and decisions fell within that band.

164. In a case where an employer purports to dismiss for a first offence because it is gross misconduct, the Tribunal must decide whether the employer had reasonable grounds for characterising the misconduct as gross misconduct. The position was explained by HHJ Eady in paragraphs 29 and 30 of **Burdett v Aviva Employment Services Ltd [UKEAT/0439/13.** Generally gross misconduct will require either deliberate wrongdoing or gross negligence. Even then the Tribunal must consider whether the employer acted reasonably in going on to decide that dismissal was the appropriate punishment. An assumption that gross misconduct must always mean dismissal is not appropriate as there may be mitigating factors: **Britobabapulle v Ealing Hospital NHS Trust [2013] IRLR 854** (paragraph 38).

<u>Burden of proof</u>

165. Section 136 of EQA 2010 applies to any proceedings relating to a contravention of EAQ Section 136(2) and (3) provide:

> **(2) If there are facts from which the tribunal could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the tribunal must hold that the contravention occurred, unless A shows that A did not contravene the provision.**
>
> **(3) But subsection (2) does not apply if A shows that A did not contravene the provision.**

166. We are reminded by the Supreme Court in **Hewage v. Grampian Health Board [2012] UKSC 37** not to make too much of the burden of proof provisions. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other.

Discrimination Arising from Disability

167. Section 15 of the EQA provides that:

> **(1) A person (A) discriminates against a disabled person (B) if —**
>
> **(a) A treats B unfavourably because of something arising in consequence of B's disability, and**
>
> **(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.**
>
> **(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.**

168. In **Secretary of State for Justice and anor v Dunn EAT 0234/16** the EAT identified the following four elements that must be made out in order for the claimant to succeed in a S.15 claim:

a. there must be unfavourable treatment,

b. there must be something that arises in consequence of the claimant's disability,

c. the unfavourable treatment must be because of (i.e. caused by) the something that arises in consequence of the disability, and

d. the alleged discriminator cannot show that the unfavourable treatment is a proportionate means of achieving a legitimate aim.

169. If the employer can establish that it was unaware and could not reasonably have been expected to know that the claimant was disabled, the claim cannot succeed.

Duty to make reasonable adjustments

170. By section 20 of EQA 2010 the duty to make adjustments comprises three requirements. The relevant requirement in these proceedings is the first. Section 20(3) states:

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

171. Where a disabled person claims that a 'practice' (as opposed to a provision or criterion) puts him or her at a substantial disadvantage, the EAT has held that the alleged practice must have an element of repetition about it and be applicable to both the disabled person and the non-disabled comparators.

172. A flawed implementation of a workplace procedure was held not to amount to a 'practice' in **London Borough of Haringey v Oksuzoglu EAT 0248/18.**

173. A one-off act can, however, amount to a practice if there is some indication that it would be repeated were similar circumstances to arise in the future. In **Ishola v Transport for London 2020 ICR 1204**, CA, the claimant argued that requiring him to return to work without a proper and fair investigation into his grievances was a PCP which put him at a substantial disadvantage in comparison with persons who are not disabled. Although Simler LJ accepted that the words 'provision, criterion or practice' were not to be narrowly construed or unjustifiably limited in their application, it was significant that Parliament had chosen these words instead of 'act' or 'decision'. As a matter of ordinary language, it was difficult to see what the word 'practice' added if all one-off decisions and acts necessarily qualified as PCPs. However widely and purposively the concept of a PCP is to be interpreted, it does not apply to every act of unfair treatment of a particular employee. The words 'provision, criterion or practice' all carry the connotation of a state of affairs indicating how similar cases are generally treated or how a similar case would be treated if it occurred again. Simler LJ agreed with Kerr J that although a one-off decision or act can be a practice, it is not necessarily one.

174. **A disadvantage is substantial if it is more than minor or trivial:** section 212(1) EQA 2010.

175. Paragraph 6.28 of the EHRC Code lists some of the factors which might be taken into account when deciding what is a reasonable step for an employer to have to take:

(1) Whether taking any particular steps would be effective in preventing the substantial disadvantage;

(2) The practicability of the step;

(3) The financial and other costs of making the adjustment and the extent of any disruption caused;

(4) The extent of the employer's financial and other resources;

(5) The availability to the employer of financial or other assistance to help make an adjustment (such as advice through Access to Work); and

(6) the type and size of employer.

176. Claimants bringing complaints of failure to make adjustments must prove sufficient facts from which the tribunal could infer not just that there was a duty to make adjustments, but also that the duty has been breached. By the time the case is heard before a tribunal, there must be some indication as to what adjustments it is alleged should have been made.

Indirect Discrimination

177. Section 19 of EQA provides, relevantly:

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

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

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

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

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

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

178. In identifying the policy, criteria or practice in an indirect discrimination claim, the authorities referred to above are relevant. Further in **Gan Menachem Hendon Ltd v De Groen 2019 ICR 1023, EAT,** the EAT noted that, for a PCP to emerge from evidence of what happened on a single occasion, 'there must either be direct evidence that what happened was indicative of a practice of more general application, or some evidence from which the existence of such a practice can be inferred'.

179. Saving cost can be legitimate when combined with some other legitimate aim.

180. In order to test proportionality, the tribunal must balance the discriminatory effect of the PCP against the importance of the aim: **Allonby v. Accrington & Rossendale College [2001] ICR 1189.**

Time Limits

181. The time limit for EQA claims appears in section 123 as follows:

"(1) Proceedings on a complaint within section 120 may not be brought after the end of –

(a) the period of three months starting with the date of the act to which the complaint relates, or

(b) such other period as the Employment Tribunal thinks just and equitable…

(2) …

(3) For the purposes of this section –

(a) conduct extending over a period is to be treated as done at the end of the period;

(b) failure to do something is to be treated as occurring when the person in question decided on it".

182. As confirmed by the Court of Appeal in **Adedeji v University Hospitals Birmingham NHS Foundation Trust [2021] EWCA Civ 23**, the best approach is for the tribunal to assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time. This will include the length of and reasons for the delay. If it checks those factors against the list in Keeble, well and good; but he would not recommend taking it as the framework for its thinking. The British Coal Corporation v Keeble [1997] IRLR 36 sets out below, as well as other potentially relevant factors:

a. The extent to which the cogency of the evidence is likely to be affected by the delay.

b. The extent to which the party sued had co-operated with any requests for information.

c. The promptness with which the claimant acted once they knew of the possibility of taking action.

d. The steps taken by the claimant to obtain appropriate professional advice once they knew of the possibility of taking action

Breach of Contract – Notice Pay

183. Subject to certain conditions and exceptions not relevant here, the Tribunal has jurisdiction over a claim for damages or some other sum in respect of a breach of contract which arises or is outstanding on termination of employment if presented within three months of the effective date of termination (allowing for early conciliation): see Articles 3 and 7 of the Employment Tribunals (England and Wales) Extension of Jurisdiction Order 1994.

184. An employee is entitled to notice of termination in accordance with the contract (or the statutory minimum notice period under section 86 ERA 1996 if that is longer) unless the employer establishes that the employee was guilty of gross misconduct. The measure of damages for a failure to give notice of termination is the net value of pay and other benefits during the notice period, giving credit for other sums earned in mitigation.

Contributory Fault

185. The second is a reduction by way of contributory fault. It can apply both to the basic award and to the compensatory award by virtue of differently worded provisions in sections 122 and 123 of the ERA 1996 respectively:

> **"Section 122 (2): Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) 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….**
>
> **Section 123 (6): 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."**

186. As to what conduct may fall within these provisions, assistance may be derived from the decision of the Court of Appeal in **Nelson v BBC (No 2) [1980] ICR 110** to the effect that the statutory wording means that some reduction is only just and equitable if the conduct of the claimant was culpable or blameworthy. The Court went on to say (*per* Brandon LJ at page 121F):

> **"It is necessary, however, to consider what is included in the concept of culpability or blameworthiness in this connection. The concept does not, in my view, necessarily involve any conduct of the complainant amounting to a breach of contract or a tort. It includes, no doubt, conduct of that kind. But it also includes conduct which, while not amounting to a breach of contract or a tort, is nevertheless perverse or foolish, or, if I may use the colloquialism, bloody minded. It may also include action which, though not meriting any of those more pejorative terms, is nevertheless unreasonable in all the circumstances. I should not, however, go as far as to say that all unreasonable conduct is necessarily culpable or blameworthy; it must depend on the degree of unreasonableness involved."**

Reasoning and Conclusions

Unfair Dismissal

Automatic Unfair Dismissal

187. The claimant contends that he was dismissed because he had made protected disclosures. In **Kuzel** the Court of Appeal confirmed that the Tribunal must ask the following questions: Has the claimant shown that there is a real issue whether the reason put forward by the respondent for dismissal was not the true reason? If so, has the employer proved its reason for the dismissal, if not, has the respondent disproved the section 103A reason advanced by the claimant? If not, dismissal is for the section 103A reason.

188. The claimant has not satisfied us that his conduct on 23 April was not the reason that Mr Collins dismissed him or Ms McCann upheld that decision on appeal.

189. Although the claimant contended that their decisions were because he had raised various issues which he contended amounted to public interest disclosures, being his complaints and grievances referred to at paragraphs 32 and 84 above, we find that this view was no more than the claimant's seeking a reason for the respondent's actions which he did not understand. The claimant's increasing anxiety contributed to this view. That is not however enough to satisfy the test. We find that

he has not shown that Mr Collins and Ms McCann's reasoning was for anything other than his conduct on 23 April. Although the claimant has shown that Ms Donaghey provided an inaccurate version of the events of that evening during the investigatory and disciplinary process, we find that the disclosures he relies upon were not part of Ms Donahgey's motivation. The respondent has shown that conduct was the reason for the claimant's dismissal. We are also satisfied that neither Mr Collins nor Mrs McCann knew of the disclosures which the claimant relies upon. Their focus was on the events of 23 April 2020 when coming to their decision.

190. This claim fails.

Ordinary Unfair Dismissal

191. In a claim of unfair dismissal pursuant to section 98 ERA, it is for the respondent to show the reason for dismissal and that it is a potentially fair reason. It contends the reason was the claimant's conduct, and we find that it has shown that to be the case.

192. The relevant case law is that contained in **BHS V Burchell,** which in summary says we must consider whether the first respondent had a genuine belief in the guilt of the claimant. Whether it was based upon reasonable grounds and whether there was a reasonable investigation, including consideration of the procedure followed.

193. We have been very careful when considering this claim to ensure that we do not substitute our own views as to whether we believe the claimant committed gross misconduct, or whether we would have dismissed the claimant. We must (and have) looked at what was known to the respondent at the time Mr Collins and Mrs McCann made their decisions.

194. Firstly, we find that both were entirely independent. They based their decisions upon the investigation reports and in Mrs McCann's outcome also upon the disciplinary letter and minutes, together with additional investigations that they carried out. It should be noted that Mrs McCann for whatever reason did not have the additional statement of Ms Donaghey, which Mr Collins obtained after the disciplinary hearing.

195. We have considered both stages of the process, disciplinary and appeal. The allegations which Mr Collins and Mrs McCann found proved were the same, but reached by way of slightly different reasoning in that Mr Collins found that the claimant's failure to carry out the task was deliberate, he found he refused to do it, whereas Mrs McCann did not. Both however believed that the instructions given to the claimant that evening were clear and reasonable and that was an important factor in their decisions. Both appeared to accept the investigation report which concluded that Ms Donaghey had held at least one meeting with the claimant on 23 April and that he was given clear instructions about taping the floor and issuing the contact diary – those were their conclusions. We find that both had a genuine belief in the guilt of the claimant.

196. We must then consider whether that decision was based upon reasonable grounds and whether the respondent's had carried out a reasonable investigation. These issues are linked, in that we find that the investigation which was carried out

as outside the band of reasonableness and it resulted in Mr Collins and Ms McCann's decision to dismiss not being based upon reasonable grounds. Our reasons are set out as follows:

197. The delay between the incident and notifying the claimant that his conduct was being investigated, and speaking to other witnesses about the events of that evening had a clear impact upon people's memories and that it caused confusion, and it also caused the claimant's arbitrary and confusing behaviour in subsequent meetings which in turn impacted upon the decisions made by Mr Collins and Mrs McCann. A reasonable employer would have factored this into its decisions as to whose versions of events were more likely to be accurate.

198. We find also that the decision to believe Ms Donaghey without any real challenge or question, rather than the claimant in respect of the events of the 23 April was a failure to carry out a reasonable investigation into those issues, which impacted upon the reasonableness of the grounds for their decision. Mr Maher believed Ms Donaghey rather than the claimant, in essence, he told the Tribunal, because she was a manager and that there was a reference in an email that evening which said: "as discussed in the email sent at 20:44". That (he believed) referred to the earlier discussions even though this email was sent by Ms Donaghey immediately after a WhatsApp that had been sent about the same issue. Mr Collins, we find, followed that finding and although he did speak to Ms Donaghey himself, appeared to accept that there was no second meeting even though Ms Donaghey said there was. He therefore appears to have partially believed her and partially not.

199. Neither Mr Collins nor Ms McCann gave weight to the claimant's evidence that he was in the factory, not the office, at the times Ms Donaghey says they met.

200. Despite it being raised by the claimant that he was being used as a scapegoat, Mr Collins did not consider what motives Ms Donaghey might have had for her version of events, rather, finding that the claimant was acting deliberately on 23 April because of comments he made about Ms Donaghey some months later when he believed he was being set up by her and his job was at risk.

201. Mrs McCann does not mention in her outcome why she concluded that it was Ms Donaghey's version of events of that evening which was accurate rather than the claimants, and we have been unable to locate anything in her witness statement which assists us. She appears to have simply accepted that was the position based on what she had read.

202. In the appeal, Mrs McCann did not engage with the claimant's evidence that Ms Donaghey gave a different reason in her report to her managers for the factory not completing the task by midnight on 23 April. This was a clear contradiction in Ms Donaghey's version of events, but Ms McCann didn't question this but rather focussed instead upon the reference to there not being sufficient tape. Although the claimant may have contributed to her focus being on this aspect, the fact that Ms Donaghey appeared to be giving a different explanation for the factory failing to complete the Tier 4 tasks that evening is something which a reasonable employer would have considered and questioned.

203. Neither Mr Collins nor Mrs McCann appeared to give any consideration to the comment in the report of Ms Donaghey on 29 June that she was of the view that the claimant was influenced by Mr Partridge, and they did not question why Ms Donaghey might have held that opinion and how this might have impacted upon her version of events. The parts of the reports and statements relating to Mr Partridge had been redacted in the documents they received, and they did not ask or obtain unredacted copies even though the claimant alerted them to this in his meetings. This would have provided the bigger picture involving Mr Partridge, and Ms Donaghey's reasons for viewing the claimant's conduct as she did.

204. Both Mr Collins and Mrs McCann were of the view that they could only base their decisions upon the documents that they were provided with. When they decided to believe Ms Donaghey, or at least accept that she had spoken with the claimant and had been given verbal instructions, a reasonable employer would have questioned and made more enquiries about what else might have influenced Ms Donaghey when deciding whether she or the claimant's version of events was more likely to be true. This is in our view key as to whether the respondent had reasonable grounds on which to conclude that the allegations against the claimant were proved.

205. Without making those further enquiries and satisfying themselves as to the bigger picture and giving consideration to the other issues with the investigation which we have highlighted, most of which the claimant himself raised as issues within the process, we find that the respondent's investigation was outside the band of reasonableness and the decision to dismiss was not based upon reasonable grounds.

206. The decision to dismiss was based upon two examples of gross misconduct within the respondent's procedures. We further note that in respect of the allegation of a disregard of safety procedures and the respondent's contention that this was such a serious safety issue as to amount to gross misconduct, the respondent did not shut down the factory that night and appears to have allowed the lines to be put down the following day and the contact tracing rectified. The claimant was permitted to continue with his role for some weeks after the event without any concerns as to his attitudes towards health and safety.

207. In the vacuum in which Mrs McCann and Mr Collins considered their decisions and without the further investigation we have highlighted, together with the impact of the delay in raising these issues with the claimant and other witnesses, we conclude that the decision to dismiss the claimant was outside the band of responses which a reasonable employer would have adopted.

208. This claim succeeds.

<u>Public Interest Detriment</u>

209. The claimant relies upon the following as detriments which he says he was subjected to because he had made protected disclosures:

a. the Second and Third Respondent 'setting a trap' for the Claimant to fail in the Health & Safety task for which he was later dismissed;

b. singling the Claimant out for disciplinary investigation regarding the events of 23 April 2020 and COVID breaches generally;

c. the First and Third Respondent failing to carry out a fair and impartial investigation into the events of 23 April 2020 in order to secure the Claimant's dismissal;

d. the Second Respondent lying about the events of 23rd April 2020 and the instructions provided to the Claimant in order to secure his dismissal;

e. the Claimant being dismissed by reason of the abovementioned involvement of the Second and Third Respondents;

f. the removal of the Claimant's contractual right to BUPA health insurance.

210. We find that the claimant has not proved that detriment (a) occurred. In respect of detriment (c) and (d), we do not find that the claimant has shown that the actions of the respondents was to "secure the claimant's dismissal", though we accept that was the outcome. Detriments (e) and (f) are proved, though the removal of the claimant's BUPA insurance was in any event a consequence of his dismissal.

211. We have considered in respect of each of these detriments whether the claimant has shown that the respondents acted as they did because he had made disclosures which the claimant relies upon as public interest disclosures. We have applied the principles in **Kuzel** and **Osipov** (above). We have not made any findings as to whether the disclosures were or were not public interest disclosures as defined in section 43A ERA in view of our findings that there is no causal link between either the dismissal (that was not the reason for dismissal) or the detriments and the disclosures raised by the claimant.

212. Firstly, we find that neither Mr Collins and Ms McCann had knowledge of the disclosures which the claimant relies upon. They deny that they were aware of them, and the claimant has not shown any evidence from which we could conclude that this is inaccurate. Their actions in the decision to dismiss the claimant cannot therefore be because of any disclosures which he made.

213. We also find that the claimant has not shown that Mr Maher had any motive for undertaking the investigation into the events of that night or involvement which resulted in the claimant's dismissal, which was because of any disclosures he had made. It was apparent that the actions of the claimant and Mr Partridge on 23 April and the failure of PS1 to have carried out the mandatory requirement to bring all factories within Tier 4 was escalated to senior management who required a formal investigation into the failures. Mr Maher was required to carry out that investigation and provided his report. Although as we have found there were failings in that investigation, the claimant has not shown that Mr Maher's motives were in any way connected to any disclosures the claimant had made. Again, we consider that the claimant's view that his disclosures were behind Mr Maher's investigation and the flaws he saw in it, was no more than the claimant's seeking a reason for the

respondent's actions which he did not understand. The claimant's anxieties impacted and continue to impact upon his view.

214. Turning to the detriments which involved Ms Donaghey. We find that the claimant has shown that Ms Donaghey evidence in relation to the events of 23 April is unreliable. We do not however find the reasons for her giving her different version of events was because the claimant had made any disclosures.

215. On 29 April, Ms Donaghey was required to provide a report upon the events of that evening. We consider that the version of events she provided was influenced by a need to protect her own reputation and ensure that she was not held responsible for the failure to implement the Tier 4 requirements.

216. We consider that PS1's inability to meet the mandatory deadline imposed by a Board level director had been escalated to an extent not anticipated by Ms Donaghey. We find that she did not think through her actions and the implications that they might have had upon the claimant.

217. At the time Ms Donaghey wrote the report she was influenced by the behaviour of Mr Partridge and she formed the view that the claimant and Mr Partridge were "in this together" without any reasonable evidence to that effect. It was clear that the behaviour of Mr Partridge that afternoon was unreasonable and obstructive. They spoke together that afternoon, but she did not hear what they had discussed. She gave evidence to us that she understood that they played golf together and she thought they were friends, again without any evidence. Mr Whiteside confirmed that they were work colleagues only. We do not however find that her motive was because of any disclosures made or for the claimant to be dismissed or that she anticipated it would result in his dismissal.

218. These claims fail.

<u>Discrimination Issues</u>

219. For the reasons stated above, we have found that the respondent had knowledge of the claimant's disabilities at the relevant time.

Discrimination arising from disability

220. The claimant relies upon his dismissal as the unfavourable treatment. He says that his dismissal arose in part because he failed to follow alleged verbal and/or WhatsApp Health and Safety instructions and complex zoning instructions. In respect of these he says that his disability of anxiety and depressions caused him to have difficulty in processing and recalling last minute verbal / WhatsApp information/Instructions and processing and understanding last minute complicated instructions.

221. It is not disputed that the claimant's dismissal was unfavourable. Further again it is not in dispute that the decision to dismiss the claimant was in part because he failed to follow the instructions to implement health and safety requirements on 23 April 2020. The burden is on the claimant to prove facts form which we could conclude that his failure to follow those instructions was because his anxiety and

depression caused him to have difficulty processing, recalling, and understanding those instructions.

222. The claimant had been unable to do this. He has produced no evidence medical or otherwise, that his anxiety and depression caused him any difficulties with processing and recalling last minute verbal information or processing and understanding last minute complicated instructions., It is perfectly possible that individuals have those difficulties for any number of reasons, and there is no evidence which has been provided which links that specifically to the disability which the claimant has As the claimant is unable to show that those issues arise from his disability, that claim cannot succeed.

223. This claim fails.

Failure to make reasonable adjustments

PCP1 The requirement for employees to follow last minute verbal / WhatsApp Health and Safety Instructions

224. The respondent conceded that this PCP was applied to the claimant and indeed it is unsurprising that it is a PCP in the fast moving environment where the claimant worked.

225. The next question is, however, that the claimant must show us (or show something from which we can conclude this) that he was put at a substantial disadvantage compared with people who were not disabled in that he had an inability to follow complex verbal instructions under time pressures which rendered him unable to properly comply with those instructions. For the reasons set out above, the claimant had produced no evidence, medical or otherwise from which we could conclude that this PCP but him at the substantial disadvantage he alleges. For that reason, no duty to make adjustment arises.

226. This claim fails.

PCP2 The requirement to attend 3 disciplinary investigation meetings and a disciplinary hearing over the course of 8 weeks.

227. We note that the claimant has expressed this PCP in detailed and specific terms, which he is unlikely to be able to show was a practice which was or would be repeated. As he is unrepresented. we accept that the PCP relied upon can be summarised as “disciplinary issues would be properly investigated”. This was a practice applied by the respondent. We accept that the respondent would undertake as many meetings over a reasonable period as was necessary to properly investigate allegations.

228. In this case there were disciplinary and investigation meetings conducted over eight weeks, and we find that with somebody who does suffer from anxiety, a investigation and disciplinary process over that period would put that individual at a substantial (more than minor or trivial) disadvantage compared with a person without a disability in the ways that the claimant has suggested, being the inability to cope with stressful situations making it difficult him to concentrate on the allegations

against him and being able to properly defend himself; and the stressful situation exacerbated his ill health.

229. In the claimant's case there is evidence that it did put him at that substantial disadvantage. He had difficulties in concentrating on allegations; he went off at tangents, he focussed on things which were not key to the issues, he contradicted himself and became side-tracked on new issues which arose. That no doubt exacerbated his anxiety as he alleged. We consider that the respondent would have had knowledge of the substantial disadvantage. The duty to make adjustments therefore arose.

230. We must consider whether the respondent can show that it took such steps as were reasonable to avoid that disadvantage. The claimant says the respondent should have reduced the number of disciplinary meetings and the delay between the same. We are acutely aware, and we were throughout this case, that the Covid pandemic was a period of extreme pressure for everybody but particularly those who had to work during Covid times and also particularly, in the case of the respondent and their staff, having a key role in producing products to assist the NHS and to assist the country as a whole. It is against that background that we must consider whether it would have been reasonable to reduce the number of investigation and disciplinary meetings and the delay between the same.

231. The respondent has an obligation to investigate disciplinary issues and its practice was to do so. It sought to do that within a reasonable period. Any investigation involves speaking to witnesses, seeking out other information, carrying out further investigations as issues arise and producing a report. Delays inevitably occur and in the Covid pandemic this was even more likely than in normal times as staff were busy. Further in the claimant's case, Mr Maher was at times absent himself and the need for three investigation meetings rather than two, was because of issues raised by the claimant when he challenged Mr Maher's character and impartiality resulting in Mr Maher deciding the meeting could not continue that day.

232. When considering these issues, we conclude that although having fewer meetings and conducting them over a shorter period of time may have caused less difficulties to the claimant with his disabilities and had a chance of alleviating the disadvantage it was not a step which was reasonable for the respondent to have taken at that time.

233. This claim fails.

Practice of delaying the commencing of disciplinary proceedings of eight weeks following the alleged misconduct

234. Although we are critical of the delay between the incident on 23 April and notifying the claimant that it was being investigated, we do not find that this can amount to a PCP. It was a one-off regrettable situation and no evidence that this was applied (or would be applied) within the respondent generally. As such that claim cannot succeed. Incoming to this conclusion, we have had regard to the authority of **London Borough of Haringey v Oksuzoglu** and the comments of Simler LJ in **Ishola v Transport for London.**

235. This claim fails.

The requirement for Mr Maher to conduct the disciplinary investigation meetings

236. We accept that this was a PCP applied by the respondent. Mr Maher had conducted investigations previously as part of his role. We must therefore consider whether the application of that PCP put the claimant at a substantial disadvantage compared with people who are not disabled? We find that it did not. The claimant says that having Mr Maher conducting the investigation meetings put him at a substantial disadvantage and he relies upon his inability to cope with stressful situations making it very difficult for him to concentrate on the allegations against him and properly defend himself and that he stressful situations also exacerbated his ill health.

237. We consider that any disciplinary investigation, whoever it was conducted by could cause the claimant these problems. The impact upon the claimant of being subjected to an investigation was apparent in the correspondence with Mr Smit in June 2020, which was prior to the claimant meeting with Mr Maher. It was not therefore the presence of Mr Maher which caused the disadvantage. The duty to make an adjustment does not therefore arise. In any event, it could only be from the time at which the claimant raised his concerns about Mr Maher during the second investigatory meeting, that the respondent could have any knowledge of any substantial disadvantage (had there been one), but the claimant indicated that he wanted the meeting to continue.

238. This claim fails.

Indirect Discrimination

239. The claimant relies upon three PCPs in his claim of indirect disability discrimination.

PCP1 The requirement to follow last minute verbal/WhatsApp health and safety instructions

240. We have accepted in our judgment that this was a PCP which was applied by the respondent, but we have also found that the claimant has not shown us any evidence from which we could conclude that this PCP put others with the claimant's protected characteristic at a particular disadvantage or indeed the claimant himself at such a disadvantage. As such his claim cannot succeed.

241. This claim fails.

PCP2: The requirement to attend 3 disciplinary investigation meetings and a disciplinary hearing over the course of 8 weeks;

242. Again if we accept that the policy, criteria or practice relied upon by the claimant is "disciplinary issues would be properly investigated", we accept that that is a PCP which was applied, but although we accept such a practice did disadvantage the claimant, no evidence was put forward by him as that it puts or would put those people with anxiety and depression at a particular disadvantage compared with those who don't that disability. Although this is something we might infer, we

consider that it is not necessary for us to do that as we find that the respondent has justified the practice it undertook.

243. We accept that the respondent's legitimate aims, particularly (d): ensuring that a thorough and comprehensive investigation took place to establish the facts pertaining to the disciplinary issue and to ensure that the disciplinary process was followed and a fair procedure was adopted, particularly in circumstances where there were genuine concerns about the claimant's conduct in the context of health and safety actions in response to the global pandemic; and (e) the first respondent was operating at a time of unprecedented operational challenge and accordingly, whilst it was imperative to address concerns relating to misconduct/health and safety compliance the timing of such was balanced with the prioritisation of operational needs. In carrying out the balancing exercise we are required to undertake, we consider that the requirement for the claimant to attend the three investigation meetings and a disciplinary hearing over the period of 8 weeks was proportionate.

244. This claim fails.

PCP3: Delaying commencing disciplinary proceedings over 6 weeks following the alleged misconduct.

245. We have found that this was not a policy, criteria or practice applied by the first respondent.

246. This claim fails.

Time Issues

247. As the discrimination claims fail, there are no time issues to decide.

Wrongful Dismissal

248. We have found that no meetings took place with Ms Donaghey on 23 April 2020. Further she did not give him instructions over the telephone. The WhatsApp and email instructions were confusing and not sufficiently clear for the claimant to understand what he was required to do and having spoken to the Trade Union official, he carried out such aspects of the tasks as he was able by the deadline.

249. We find that the claimant did not fail to follow the health and safety requirements and he did not refuse to carry out the instructions that were given to him. There was no act of gross misconduct sufficient for the respondent to dismiss the claimant without notice.

250. This claim succeeds.

Contributory Fault

251. We have found that the claimant failing to clarify his instructions with Ms Donaghey on the evening of 23 April, by telephoning her was blameworthy conduct which contributed to the decision to dismiss him. He was aware of the importance of completing the tasks that night and that they were to protect the health and safety of

his fellow employees. We consider it is just and equitable to reduce the compensatory award by 30% to reflect this.

Delay in producing these reasons

252. We explained at the hearing when the judgment was provided on the final day that we considered it was in the interests of all parties, but particularly the claimant and Ms Donaghey, that a decision with short oral reasons was given that day. All parties agreed. We explained that if written reasons were requested it may therefore take some time to provide them because of the pressures upon the Tribunal. That has proved to be the case. We apologise for that delay.

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Employment Judge Benson

Date: 12 December 2023

REASONS SENT TO THE PARTIES ON

12 December 2023

FOR THE TRIBUNAL OFFICE