EMPLOYMENT TRIBUNALS

Claimant: Mr Z Akbar

Respondent: Bestway Wholesale Limited

Heard at: Manchester Employment Tribunal

On: 02, 03, 06, 07 and 08 March 2023, 18 and 19 July 2023, 12 and 13 October 2023 (tribunal only for deliberations)

Before: Employment Judge M Butler
Mr A Egerton
Ms C Titherington

Representation
Claimant: Self-representing
Respondent: Ms L Halsall (of Counsel)

JUDGMENT

1. The claimant was found not to have made a protected disclosure in or around January/February 2019. His claims for detriment on the grounds of having made a protected disclosure and automatic unfair dismissal therefore fail and are dismissed.

2. The claimant has been found not to have been unfairly dismissed. This claim therefore fails.

3. The claimant has been found not to have had a disability during February 2019-September 2019.

4. The claimant's claims of discrimination arising from disability fail and are dismissed.

5. The claimant's claims of direct discrimination fail and are dismissed.

6. The claimant's claims that the respondent failed in its duty to make reasonable adjustments fail and are dismissed.

7. The claimant's claims of harassment related to disability fail and are dismissed.

8. The claimant's claim of unauthorised deductions from wages fails and is dismissed.

9. The claimant's claim of unpaid holiday pay on termination fails and is dismissed.

10. For the avoidance of doubt, all claims in this case fail and are dismissed.

REASONS

INTRODUCTION

11. The claimant presented a claim on 14 May 2020, following ACAS early conciliation that took place from 19 March 2020 to 03 April 2020.

12. The case went through two case management hearings. The first on 21 October 2020 before Employment Judge Horne. And the second on 07 July 2021 before Employment Judge Humble. Attached to the back of EJ Humble's Case Management Orders was the list of issues to be used at this hearing (starting at p.71 of the bundle). The claimant confirmed that these remained the issues to be determined at this hearing Save for the disability issue had developed, with the respondent having conceded that the claimant had a disability by reason of depression from September 2019. This meant that disability was only an issue for the period preceding September 2019.

13. The tribunal was assisted by a bundle that ran to 515 electronic pages. There were additional relevant documents disclosed during the course of these proceedings, all of which were admitted into evidence.

14. The tribunal heard evidence from the claimant. The claimant also called his brother to give evidence, Mr Shahid Akbar.

15. The tribunal heard evidence from the following individuals, called by the respondent:

    a. Ms Aissah Dowool, who held the position of HR Business Partner at the material times.
    b. Mr Ashar Rehman, who is Operations Director at the respondent.
    c. Mr Eugene Mulroy, who was appointed investigating officer.
    d. Mr Waqar Ahmed, who was the dismissing officer.
    e. Mr Michael Ward, who chaired and decided on the claimant's appeal.

16. The case was initially listed for 5 days. However, the evidence was not completed in this listing. A further two days were listed for 18 and 19 July 2023. These days were used to complete the evidence and to hear closing submissions. Unfortunately, the earliest the tribunal could meet to deliberate and reach a decision in this case was 12 and 13 October 2023. The tribunal can only apologise for the delays in releasing this judgment.

LIST OF ISSUES

17. The list of issues was contained at pages 71-76 of the bundle. This was recorded by Employment Judge Humble, following a Preliminary Hearing on 07 July 2021. It was confirmed by the parties (save for the matter on disability, below) at the outset of this hearing that these remained to be the issues to be determined in this

case.

18. The issues to be determined in this case was therefore as follows:

1 Protected disclosures

1.1 Did the claimant make one or more qualifying disclosures as defined in section 43B of the Employment Rights Act 1996? The Tribunal will decide whether the claimant complained to the Respondent's Head of IT, John Humphreys, and Head of Operations, Asher Raymond, that the respondent's online accounts system was flawed such that credit notes could be issued incorrectly and it was therefore open to fraud. The claimant alleges this disclosure was made in an email to these individuals in or about January or February 2019.

1.2 If the claimant did raise these matters, did he disclose information?

1.3 If so, did he believe the disclosure of information was made in the public interest?

1 .4 If so, was that belief reasonable?

1 .5 If so, did he believe it tended to show that:

1.5.1 A criminal offence had been committed, was being committed or was likely to be committed pursuant to 43B(1)(a); or

1.5.2 a person had failed, was failing or was likely to fail to comply with any legal obligation pursuant to 43B(1)(b).

1 .6 If so, was that belief reasonable?

1.7 If the claimant made a qualifying disclosure, it was a protected disclosure because it was made to the claimant's employer under section 43C.

2 Unfair Dismissal (Section 103A ERA 1996)

2.1 The Tribunal will determine whether the reason or principal reason for dismissal was that the claimant made a protected disclosure. If so, the claimant will be regarded as unfairly dismissed under section 103A ERA 1996.

3 Detriment (section 48 Employment Rights Act 1996)

3.1 The claimant relies upon section 47B and 48 ERA 1996. The Tribunal will determine whether:

3.1.1 The claimant was blamed, or made a scapegoat, for a fatal accident which occurred in February 2019 (paragraph 10 of the particulars of claim).

3.1.2 The respondent increased the number of deliveries from claimant's depot in or about February and March 2019 thereby putting the claimant under increased pressure (paragraph 11).

3.1.3 The respondent made "sham" disciplinary allegations against the claimant (paragraph 16).

3.2 If those detriments are established, the tribunal will determine whether the

claimant reasonably saw those alleged acts as subjecting him to a detriment; and

3.3 If so, whether they were done on the ground that he made a protected disclosure. The claimant relies upon the complaint set out at section 1.1 above.

4 Time limits

4.1 Given the date the claim form was presented and the effect of early conciliation, the detriments complained about by the claimant may not have been brought in time. The Tribunal shall, in respect of the detriment claims and having regard to section 48(3) ERA 1996, determine whether:

4.1.1 the claims were made to the Tribunal within three months of the act complained of; and

4.1.2 If not, whether there was conduct extending over a period which rendered any earlier detriments in time; and

4.1 3 If not, whether it was reasonably practicable for the claims to be made to the Tribunal within the time limit; and

4.1.4 If it was not reasonably practicable for the claim to be made to the Tribunal within the time limit, whether it was made within such further period as the Tribunal considers reasonable.

5 Unfair dismissal (Section 98 ERA 1996)

It is accepted that there was a dismissal. The Tribunal will determine:

5.1 Whether the respondent has shown the reason or principal reason for dismissal was a potentially fair reason under section 98 Employment Rights Act 1996. The reason relied upon in this case is conduct. The respondent alleges that the claimant was dismissed for fraud.

5.2 If the respondent shows a potentially fair reason for dismissal, the Tribunal shall apply the test of fairness under section 98(4), and determine whether the respondent act reasonably.

5.3 If the reason for the dismissal was conduct, it will decide whether the respondent acted reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant. The Tribunal will have particular regard to whether:

5.3.1 the respondent genuinely believed the claimant committed the misconduct;

5.3.2 there were reasonable grounds for that belief;

5.3.3 at the time the belief was formed the respondent had carried out a reasonable investigation;

5.3.4 the respondent followed a reasonably fair procedure; and

5.3.5 the dismissal was within the range of reasonable responses.

6 Disability - section 6 Equality Act 2010

6.1 If disability remains in issue, the Tribunal will determine whether the claimant had a disability as defined in section 6 of the Equality Act 2010 at the material time (for the purposes of this case from February 2019 to 31 January 2020).

The Tribunal will decide:

6.1.1 Whether the claimant had the mental impairment of depression.

6.1.2 If so, whether that impairment have a substantial adverse effect on his ability to carry out day-to-day activities.

6.1.3 If not, whether the claimant had medical treatment, including medication, or had taken other measures to treat or correct the impairment and would the impairment have had a substantial adverse effect on his ability to carry out day-to-day activities without the treatment or other measures.

6.1.4 Whether the effects of the impairment were long-term. The Tribunal will decide:

a) whether they lasted at least 12 months, or were they likely to last at least 12 months; and

b) if not, whether they were likely to recur.

7 Discrimination arising from Disability - s15 Equality Act 2010

The Tribunal will determine:

7.1 Whether the respondent knew or could reasonably have been expected to know that the claimant had the disability at the material time. The claimant contends that the respondent had at least constructive knowledge from June 2019 (paragraph 5).

7.2 If so, whether the respondents treated the claimant unfavourably by reason of the following:

7.2.1 stopped paying him sick pay from October 2019;

7.2.2 subjecting him to an investigation and disciplinary procedure from November 2019; and

7.2.3 his dismissal.

7.3 Whether the following things arose in consequence of the claimant's disability: the claimant's periods of absence from work during the period from about September 2019 to 30 January 2020.

7.4 Whether (under section 136) the claimant has proven facts from which the Tribunal could conclude that the dismissal was because of that thing, in other words that he was dismissed because of his absence.

7.5 If so, whether the respondent can show that there was no unfavourable treatment because of something arising in consequence of disability.

7.6 If not, whether the treatment was a proportionate means of achieving a legitimate aim. The respondent is to specify any such defence in the amended response form and, if relied upon, the Tribunal will decide in particular:

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

7.6.2 whether something less discriminatory have been done instead; and

7.6.3 how the needs of the claimant and the respondent should be balanced.

8 Direct Disability Discrimination - Section 13 Equality Act 2010

The claimant relies upon the same causes of action as with the section 15 claim.

The Tribunal will therefore determine:

8.1 What are the facts in relation to the alleged causes of action at 7.2.1 to 7.2.3 above.

8.2 Where disputed, did the claimant reasonably see the treatment as a detriment?

8.3 If so, has the claimant proven facts from which the Tribunal could conclude that in any of those respects the claimant was treated less favourably than someone in the same material circumstances without a disability would have been treated? The claimant relies upon a hypothetical comparator.

8.4 If so, has the claimant also proven facts from which the Tribunal could conclude that the less favourable treatment was because of his disability?

8.5 If so, has the respondent shown that there was no less favourable treatment because of his disability?

9 Failure to Make Reasonable Adjustments - s20 Equality Act 2010

9.1 Did the respondent know or could it reasonably have been expected to know that the claimant had the disability? From what date?

9.2 A TCP" is a provision, criterion or practice. Are the following PCP's which the respondent had in place:

9.2.1 Requiring the claimant to run a depot with only two manager in from around February/March 2019. (The claimant contends that other depots had three managers.)

9.2.2 Requiring the claimant to cover a wider geographic location than other depots in about the same period.

9.2.3 Subjecting the claimant to disciplinary action from November 2019.

9.3 If so, did the PCPs put the claimant at a substantial disadvantage compared to someone without the claimant's disability. The Claimant contends that he was less able to cope with pressure of running a depot with only two managers and a wide geographical location, and less able to cope with the disciplinary procedure, because of his inability to cope with additional pressure and stress due to his depression.

9.4 Did the respondent know or could it reasonably have been expected to know that the claimant was likely to be placed at the disadvantage?

9.5 Did the respondent fail in its duty to take such steps as it would have been reasonable to have taken to avoid the disadvantage? The claimant says that the following adjustments to the PCP would have been reasonable in respect of 9.2.1 and 9.2.2 (above):

a) reducing the number of deliveries required of his depot;

b) reducing the geographical region for which he was responsible; and

c) providing additional managerial support at the depot.

[It remains unclear what reasonable adjustments the claimant contends should have been made to the disciplinary process. If he proposes to rely upon this he should write to the respondent and briefly outline any adjustments he contends should have been made to the disciplinary procedure - the parties shall then seek to agree upon this point and finalise the list of issues].

10 Harassment related to Disability - section 26 Equality Act 2010

10.1 Did the respondent do the following alleged things:

10.1.1 Show a “disregard for the claimant’s well-being” by not enquiring about his well-being, or offering any support, after he disclosed to the respondent that he had attempted to commit suicide. He says that he informed Carolyn McMenie of this in an email in October 201 9.

10.1.2 In a telephone call of 25 November 2019 an employee of the respondent (who participated in the call along with Chandrika Parekh) allegedly referred to the claimant’s illness in a dismissive way as, “anxiety, depression or whatever".

10.1.3 Sent the letter terminating his employment to his previous address when all other correspondence had been sent to his correct address where he had resided for five years.

10.2 In respect of any of the alleged incidents, was it unwanted conduct?

10.3 Was it related to the claimant’s disability?

10.4 Did the conduct have the purpose of violating the claimant’s dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

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

11 Time limits

11.1 Some or all of the discriminatory acts relied upon which precede the dismissal might not have been brought in time. In respect of those claims, the tribunal will determine whether the discrimination complaints were made within the time limits in section 123 of the Equality Act 2010. Where required, the tribunal will decide:

11.1.1 Was the claim made to the tribunal within three months (allowing for any early conciliation extension) of the act to which the complaint relates?

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

11.1.3 If so, was the claim made to the tribunal within three months (allowing for any early conciliation extension) of the end of that period?

11.1.4 If not, were the claims made within such further period as the tribunal finds is just and equitable? The tribunal will decide:

a) Why were the complaints not made to the tribunal in time?

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

12 Unauthorised Deduction from Wages

Did the respondent make unauthorised deduction from wages in respect of alleged unpaid sick pay?

12 Working Time Regulations

Did the respondent fail to make payment of any accrued holiday pay upon termination of the claimant's employment?

19. In respect of disability, the respondent conceded that the claimant's mental impairment of anxiety was a disability from September 2019 until March 2021. This meant that the tribunal only needed to determine whether the claimant satisfied the definition within s.6 of the Equality Act 2010 between February 2019-September 2019.

LAW

Protected disclosure

20. The relevant statutory provisions of the Employment Rights Act 1996 in relation to this category of claims brought by the claimant are s.43B, s.47B and s.103A of the Employment Rights Act 1996 ('ERA').

21. Section 43B ERA sets out what is meant by a qualifying disclosure:

43B Disclosures qualifying for protection.

(1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, [F2 is made in the public interest and] tends to show one or more of the following—

(a) that a criminal offence has been committed, is being committed or is likely to be committed,

(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) that a miscarriage of justice has occurred, is occurring or is likely to occur,

(a) that the health or safety of any individual has been, is being or is likely to be endangered,

(b) that the environment has been, is being or is likely to be damaged, or

(c) that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed.

22. In essence, what we as a tribunal must determine can be broken down into its constituent parts:

    a. Did the Claimant disclose any information?
    b. If so, did she believe, at the time she made the disclosure, that that the information disclosed was in the public interest and tended to show that the respondent was failing or likely to fail with a legal obligation
    c. If so, was that belief reasonable?

23. The concept of disclosure of information was considered in **Cavendish Munro Professional Risks Management Limited v Geduld 2010 IRLR 37**, Slade J stated:

> "*That the Employment Rights Act 1996 recognises a distinction between "information" and an "allegation" is illustrated by the reference to both of these terms in S43F……It is instructive that those two terms are treated differently and can therefore be regarded as having been intended to have different meanings…….the ordinary meaning of giving "information" is conveying facts. In the course of the hearing before us, a hypothetical was advanced regarding communicating information about the state of a hospital. Communicating "information" would be "The wards have not been cleaned for the past two weeks. Yesterday, sharps were left lying around." Contrasted with that would be a statement that "you are not complying with Health and Safety requirements". In our view this would be an allegation not information. In the employment context, an employee may be dissatisfied, as here, with the way he is being treated. He or his solicitor may complain to the employer that if they are not going to be treated better, they will resign and claim constructive dismissal. Assume that the employer, having received that outline of the employee's position from him or from his solicitor, then dismisses the employee. In our judgment, that dismissal does not follow from any disclosure of information. It follows a statement of the employee's position. In our judgment, that situation would not fall within the scope of the Employment Rights Act section 43 … The natural meaning of the word "disclose" is to reveal something to someone who does not know it already. However s43L(3) provides that "disclosure" for the purpose of s 43 has the effect so that "bringing information to a person's attention" albeit that he is aware of it already is a disclosure of that information. There would be no need for the extended definition of "disclosure" if it were intended by the legislature that "disclosure" should mean no more than "communication*".

24. There has to be something more than simply voicing a concern, raising an issue or setting out an objection. This does not establish the disclosing of information. However, a communication – whether written or oral – which conveys facts and makes an allegation can amount to a qualifying disclosure.

25. In **Kilraine v London Borough of Wandsworth UKEAT/0260/15**, Langstaff J stated:

> *"I would caution some care in the application of the principle arising out of Cavendish Munro. The particular purported disclosure that the Appeal Tribunal had to consider in that case is set out at paragraph 6. It was in a letter from the Claimant's solicitors to her employer. On any fair reading there is nothing in it that could be taken as providing information. The dichotomy between "information" and "allegation" is not one that is made by the statute itself. It would be a pity if Tribunals were too easily seduced into asking whether it was one or the other when reality and experience suggest that very often information and allegation are intertwined. The decision is not decided by whether a given phrase or paragraph is one or rather the other, but is to be determined in the light of the statute itself. The question is simply whether it is a disclosure of information. If it is also an allegation, that is nothing to the point".*

26. Section 47B(1) ERA explains that '[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'.

27. Whilst s.103A ERA provides that '[a]n 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.

Direct disability discrimination

28. Protection against direct disability discrimination is provided for at s.13 of the Equality Act 2010:

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

29. Lord Nicholls in **Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285** gave guidance as to the approach an employment tribunal should consider when determining a direct discrimination complaint:

> "7. …In deciding a discrimination claim one of the matters employment tribunals have to consider is whether the statutory definition of discrimination has been satisfied. When the claim is based on direct discrimination or victimisation, in practice tribunals in their decisions normally consider, first, whether the claimant received less favourable treatment than the appropriate comparator (the 'less favourable treatment' issue) and then, secondly, whether the less favourable treatment was on the relevant proscribed ground (the 'reason why' issue). Tribunals proceed to consider the reason why issue only if the less favourable treatment issue is resolved in favour of the claimant. Thus the less favourable treatment issue is treated as a threshold which the claimant must cross before the tribunal is called upon to decide why the claimant was afforded the treatment of which she is complaining.
>
> 8. No doubt there are cases where it is convenient and helpful to adopt this two-step approach to what is essentially a single question: did the claimant,

on the proscribed ground, receive less favourable treatment than others? But, especially where the identity of the relevant comparator is a matter of dispute, this sequential analysis may give rise to needless problems. Sometimes the less favourable treatment issue cannot be resolved without, at the same time, deciding the reason why issue. The two issues are intertwined.

…

11. …employment tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the claimant was treated as she was. Was it on the proscribed ground which is the foundation of the application? That will call for an examination of all the facts of the case. Or was it for some other reason? If the latter, the application fails. If the former, there will usually be no difficulty in deciding whether the treatment, afforded to the claimant on the proscribed ground, was less favourable than was or would have been afforded to others."

30. This is further explained by Mr Justice Underhill P (as he then was), in **Amnesty International v Ahmed [2009] IRLR 884:**

"32. The basic question in a direct discrimination case is what is or are the "ground" or "grounds" for the treatment complained of.[3] That is the language of the definitions of direct discrimination in the main discrimination statutes and the various more recent employment equality regulations. It is also the terminology used in the underlying Directives: see, e.g., art. 2.2 (a) of Directive EU/2000/43 ("the Race Directive"). There is however no difference between that formulation and asking what was the "reason" that the act complained of was done, which is the language used in the victimisation provisions (e.g. s. 2 (1) of the 1976 Act): see *per* Lord Nicholls in **Nagarajan** at p. 512 D-E (also, to the same effect, Lord Steyn at p. 521 C-D).[4]

33. In some cases the ground, or the reason, for the treatment complained of is inherent in the act itself. If an owner of premises puts up a sign saying "no blacks admitted", race is, necessarily, the ground on which (or the reason why) a black person is excluded. **James v Eastleigh** is a case of this kind. There is a superficial complication, in that the rule which was claimed to be unlawful – namely that pensioners were entitled to free entry to the Council's swimming-pools – was not explicitly discriminatory. But it nevertheless necessarily discriminated against men because men and women had different pensionable ages: the rule could entirely accurately have been stated as "free entry for women at 60 and men at 65". The Council was therefore applying a criterion which was of its nature discriminatory: it was, as Lord Goff put it (at p. 772 C-D), "gender based".[5] In cases of this kind what was going on inside the head of the putative discriminator – whether described as his intention, his motive, his reason or his purpose – will be irrelevant. The "ground" of his action being inherent in the act itself, no further inquiry is needed. It follows that, as the majority in **James v Eastleigh** decided, a respondent who has treated a

claimant less favourably on the grounds of his or her sex or race cannot escape liability because he had a benign motive.

34. But that is not the only kind of case. In other cases – of which **Nagarajan** is an example - the act complained of is not in itself discriminatory but is rendered so by a discriminatory motivation, i.e. by the "mental processes" (whether conscious or unconscious) which led the putative discriminator to do the act. Establishing what those processes were is not always an easy inquiry, but tribunals are trusted to be able to draw appropriate inferences from the conduct of the putative discriminator and the surrounding circumstances (with the assistance where necessary of the burden of proof provisions). Even in such a case, however, it is important to bear in mind that the subject of the inquiry is the ground of, or reason for, the putative discriminator's action, not his motive: just as much as in the kind of case considered in **James v Eastleigh**, a benign motive is irrelevant. This is the point being made in the second paragraph of the passage which we have quoted from the speech of Lord Nicholls in **Nagarajan** (see para. 29 above). The distinctions involved may seem subtle, but they are real, as the example given by Lord Nicholls at the end of that paragraph makes clear.

…

37. …although (as Lord Goff points out) the test may be applied equally to both the "criterion" and the "mental processes" type of case, its real value is in the latter: if the discriminator would not have done the act complained of but for the claimant's sex (or race), it does not matter whether you describe the mental process involved as his intention, his motive, his reason, his purpose or anything else – all that matter is that the proscribed factor operated on his mind. This is therefore a useful gloss on the statutory test; but it was propounded in order to make a particular point, and we do not believe that Lord Goff intended for a moment that it should be used as an all-purpose substitute for the statutory language. Indeed if it were, there would plainly be cases in which it was misleading. The fact that a claimant's sex or race is a part of the circumstances in which the treatment complained of occurred, or of the sequence of events leading up to it, does not necessarily mean that it formed part of the ground, or reason, for that treatment.

Harassment related to disability

31. Protection against harassment is provided for at s.26 of the Equality Act 2010:

(1) A person (A) harasses another (B) if—

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

(b) the conduct has the purpose or effect of—

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading,

humiliating or offensive environment for B.

…

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—

(d) the perception of B;

(e) the other circumstances of the case;

(f) whether it is reasonable for the conduct to have that effect.

Discrimination arising from disability

32. Protection against discrimination arising from disability is contained at section 15 of the Equality Act 2010.

(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.

A failure in the duty to make reasonable adjustments

33. The relevant statutory provisions, in respect of a failure to make reasonable adjustments complaint are as follows:

20. Duty to make adjustments

(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

(2) The duty comprises the following three requirements.

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

21. Failure to comply with duty

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

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

Burden of proof under the Equality Act 2010

34. We reminded ourselves of the burden of proof in discrimination cases, with reference to section 136 of the Equality Act 2010:

> (1) This section applies to any proceedings relating to a contravention of this Act.
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> (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

35. Lord Justice Mummery (with which Laws and Maurice Kay LJJ agreed) in **Madarassy v Nomura International plc [2007] ICR 867**, at paragraphs 56-58, provided a summary of the principles that apply when considering the burden of proof in Equality Act Claims:

> "56. The court in *Igen v Wong…* expressly rejected the argument that it was sufficient for the complainant simply to prove facts from which the tribunal could conclude that the respondent "could have" committed an unlawful act of discrimination**. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination.**
>
> 57. "Could… conclude" in section 63A (2) must mean that **"a reasonable tribunal could properly conclude" from all the evidence before it.** This would include evidence adduced by the complainant in support of the allegations of sex discrimination, such as evidence of a difference in status, a difference in treatment and the reason for the differential treatment. It would also include evidence adduced by the respondent contesting the complaint. Subject only to the statutory "absence of an adequate explanation" at this stage (which I shall discuss later), the tribunal would need to consider all the evidence relevant to the discrimination complaint; **for example, evidence as to whether the act complained of occurred at all; evidence as to the actual comparators relied on by the complainant to prove less favourable treatment; evidence as to whether the comparisons being made by the complainant were of like with like as required by section 5(3) of the 1975 Act; and available evidence of the reasons for the differential treatment**.
>
> 58. The absence of an adequate explanation for differential treatment of the complainant is not, however, relevant to whether there is a prima facie case of discrimination by the respondent. The absence of an adequate explanation only becomes relevant if a prima facie case is proved by the complainant. The consideration of the tribunal then moves to the second stage. The burden is on the respondent to prove that he has not committed an act of unlawful discrimination. He may prove this by an adequate non-discriminatory explanation of the treatment of the complainant. If he does not, the tribunal must uphold the discrimination claim." (emphasis added)

36. Mummery LJ also explained further how evidence adduced by the employer might be relevant, noting that it could even relate to the reason for any less favourable treatment (paras. 71-72):

> "71. Section 63A (2) does not expressly or impliedly prevent the tribunal at the first stage from hearing, accepting or drawing inferences from evidence adduced by the respondent disputing and rebutting the complainant's evidence of discrimination. **The respondent may adduce evidence at the first stage to show that the acts which are alleged to be discriminatory never happened; or that, if they did, they were not less favourable treatment of the complainant; or that the comparators chosen by the complainant or the situations with which comparisons are made are not truly like the complainant or the situation of the complainant; or that, even if there has been less favourable treatment of the complainant, it was not on the ground of her sex or pregnancy.**
>
> 72. Such evidence from the respondent could, if accepted by the tribunal, be relevant as showing that, contrary to the complainant's allegations of discrimination, there is nothing in the evidence from which the tribunal could properly infer a prima facie case of discrimination on the proscribed ground…."

37. Lord Justice Mummery also pointed out that it will often be appropriate for the tribunal to go straight to the second stage. An example is where the employer is asserting that whether the burden at the first stage has been discharged or not, he has a non-discriminatory explanation for the alleged discrimination. A claimant is not prejudiced by that approach since it is effectively assumed in his favour that the burden at the first stage has been discharged.

38. To summarise, the claimant must prove, on the balance of probabilities, facts from which a Tribunal could conclude, in the absence of an adequate explanation that the respondent had discriminated against him. If the claimant succeeds in doing this, then the onus will be on the respondent to prove that it did not commit the act. This is known as the shifting burden of proof. Once the claimant has established a prima facie case (which will require the Tribunal to hear evidence from the claimant and the respondent, to see what proper inferences may be drawn), the burden of proof shifts to the respondent to disprove the allegations. This will require consideration of the subjective reasons that caused the employer to act as he did. The respondent will have to show a non-discriminatory reason for the difference in treatment.

CLOSING SUBMISSIONS

39. Both parties presented a written document that contained the closing submissions that they were seeking to make. And both were provided the opportunity to supplement their submissions orally. These are not repeated here but have been considered in reaching this decision.

FINDINGS OF FACT

We make the following findings of fact based on the balance of probability from the evidence we have read, seen, and heard. Where there is reference to certain aspects of the evidence that have assisted us in making our findings of fact this is not indicative that

no other evidence has been considered. Our findings were based on all of the evidence, and these are merely indicators of some of the evidence considered in order to try to assist the parties understand why we made the findings that we did.

We do not make findings in relation to all matters in dispute but only on matters that we consider relevant to deciding on the issues currently before us.

Did the claimant make a protected disclosure?

40. In or around January and February 2019, the claimant did not send an email to John Humphreys and Ashar Rehman to raise that the respondent's online accounts system was flawed such that credit notes could be issued incorrectly and it was therefore open to fraud. We reach this finding for two reasons. First, the claimant does not give any evidence in his witness statement in respect of having made a protected disclosure. The claimant's witness statement was his opportunity to lay out his evidence in respect of the claims he brings. This failure is somewhat fatal to this part of his claim. Secondly, there is no email contained within the bundle in or around January or February 2019, which was sent by the claimant to both John Humphreys and Ashar Rehman concerning flaws in the online accounts system. The only email that we had sight of form the claimant to John Humphreys and Ashar Rehman is that at p.466, which was on 18 September 2019. And this simply raises that 'some issues' have been found. The claimant's oral evidence centred on him not having access to his email account and therefore was not able to supply such evidence. However, the claimant was given the opportunity to access his email account during the investigation/disciplinary process but chose not to take up that opportunity (see below). Therefore, the claimant was afforded the opportunity to access any emails he considered relevant and has not done so. And further, the tribunal considered Ms Dhowool to be a reliable and credible witness and accepted her evidence on this matter at paragraph 12 of her witness statement to be reliable given it was consistent with the documents that we did have before us.

Conclusion on whether the claimant made a protected disclosure

41. The claimant has not made a protected disclosure in the way he has pleaded in his claim. He restricted his protected disclosure claims (detriment and automatic unfair dismissal) to a single disclosure that he says he made by email to John Humphreys and Ashar Rehman. There is no such email before this tribunal. As this is the only alleged protected disclosure he claims to have made, all claims of detriment on the grounds of having made a protected disclosure and the claim for automatic unfair dismissal must fail and are dismissed. The tribunal does not consider it necessary in these circumstances to make findings in the alternative in respect of the detriments, given that it is a clear positive finding that no such email exists.

Did the claimant have a disability between February 2019 and September 2019?

42. There was a fatal accident at one of the respondent's depots on 18 February 2019. A depot which the claimant had responsibility for.

43. On 25 February 2019, the claimant completed his Performance Management form (pp.407-415). At this time, the claimant does not refer to having any mental impairment, or adverse reaction to events a week later.

44. On 20 March 2019, the claimant sought annual leave for a planned pilgrimage to Sadi Arabia form 05 May 2019. In this request there is no mention of mental health issues and therefore this is found not to be the purpose behind this planned trip.

The claimant in his disability impact statement, at para 4 (see p.175), writes that he requested leave through Asher Rehamn after having attempted suicide on 02 May 2019. And that leave was following his family forcing him to take time off. And that this request was initially denied, before being accepted after the claimant threatened to hand in his notice. This same evidence is not contained within the claimant's witness evidence for this hearing. However, given the email of 20 March 2019, and given that there was no other email or evidence to the contrary, and given that the matter was not put to Mr Rehman by the claimant, we make the finding that the leave taken from 05 May 2019 was for a religious pilgrimage to Saudi Arabia, and was not because of mental health issues nor was it because of an attempted suicide.

45. The claimant sent an email to Carolyn McMenemie on 10 April 2019, with Ashar Rehman copied in. In this email the claimant describes that he and the depot had been going through and were still going through 'a very rough patch', and that related to the fatality referred to above. The claimant does not mention that he is suicidal, nor does he reference any potential disability in this email (p.227). The claimant also indicates in this email that '…he would be grateful if you could give me a little of your time', and that he was '…with L&D from 10am till 4pm'. But that he could stay longer if required. This email was written following having raised the same matter with Nasser Khan and Adina Bejenaru.

46. A meeting took place between the claimant and Ms McMenemie and Mr Rahman in London. During this meeting the claimant raised that he and others in the depot were struggling with the events around the fatality. However, the claimant did not indicate that this was affecting his normal day-to-day activities at this meeting. This meeting then focussed on the support that had been provided to both him and the depot following the incident. This finding is consistent with the email sent on 10 April 2019. That the claimant had some questions for Ms McMenemie, which would be around the incident and what can be done to help him and others through this rough patch. Mr Rahman's oral evidence is also consistent with this when matters were put to him.

47. On the 25 April 2019, the police had been called by the claimant's brother, who was concerned about him (additional evidence disclosed at the hearing). However, this only raised that there were concerns nothing more specific.

48. On balance, we do not find that the claimant attempted suicide on 02 May 2019 (see para 4 of disability impact statement, pp174-176).

49. And although the claimant's evidence on this matter was that he was suicidal and was informing the respondent, and even attempted suicide for which the police intervened, there is simply no evidence to support that that was the case. There was no reference in the email sent on 10 April 2019. There was no reference in the message sent by the police. The claimant referred to text messages that would show this between him and the police but failed to disclose them to the tribunal despite being invited to do so if they existed. Shahid Akbar, the claimant's brother does not give evidence of the clamant being suicidal. His witness statement at no point makes this suggestion. And there is no reference to having suicidal thoughts in any of the medical documents disclosed (see pp157-173) or in the two GP letters that have been disclosed (dated 11 March 2021 and is at p.150) and 21 February 2023, additional document disclosed at the hearing).

50. The claimant was examined by his GP on 11 March 2021. This generated a letter, which expresses that 'Over the last 18 months Mr Akbar has been suffering from anxiety and depression'.

51. The respondent concedes that the claimant had a disability by reason of his mental impairment of a depression from September 2019.

Conclusion on whether claimant had a disability between February 2019 and September 2019

52. The burden of proof rests on the claimant to evidence that he had a mental impairment that was having a long term substantial adverse effect on his normal day-to-day activities during this period. Given our findings above, the claimant has not satisfied this burden.

53. The evidence before the tribunal does not support that the claimant was affected daily to a substantial degree by the mental impairment of depression during the period in question. There is no reference in his medical notes and there is no record in any work documents to such effects on his normal day to day activity, despite the claimant having the opportunity to raise such matters.

54. The tribunal has no doubt that the tragic event that took place in February 2019 will have had an affect on the claimant. However, the evidence does not support that consequent to this, through the period February 2019 to September 2019, the claimant developed the mental impairment of depression which was a disability pursuant to s.6 of the Equality Act 2010.

55. Much of the claimant's case on this matter rested on an attempted suicide. The claimant needs to be aware that the tribunal can only consider the evidence before it. And the evidence before the tribunal (whether this is the reality or not) is that the claimant had not attempted suicide in May 2019, did not take time off because of this, nor made his employer aware of these events in May 2019. The claimant has not produced any evidence to support his version of events, details of which are ominously missing from his witness statement produced for this hearing.

56. This leads the tribunal to the conclusion that the claimant has not satisfied that he had a disability, by way of the mental impairment of depression, during the period February 2019 to September 2019.

Ordinary Unfair dismissal

57. The claimant was employed by the respondent since 2003, latterly in the role of General Manager of the Bestway Manchester Store. In addition to his primary role, the claimant also had responsibility over matters relating to IT.

58. The claimant was a highly successful manager for the respondent. And he had been presented with various awards for the way that he had managed his team.

59. As part of the claimant's IT role, his user profile had enhanced access to the systems. The system also had a group of users that have been described throughout these proceedings as 'God User' or 'Super User' and were within a user group entitled ABGOD. For the avoidance of doubt, we will adopt the term Super User throughout this judgment. The claimant was not within the Super User group initially, however, due to his enhanced access he was able to change his profile such as to give him Super User access (see p.371, where it has been identified that the claimant had done this on 01 January 2018).

60. Following various merges, which included the merging of Bestway Manchester and Batleys, the respondent had decided to try to merge the IT processes, which included those related to credit notes. In short, the stores in Batleys were using a system referred to as Version 4, but the intention was to move all stores to a system

referred to as Version 5. The change to Version 5 was due to be completed in or around April 2017. And as part of this, every depot was sent a 'Check list- Count Down to Go Live' document (this document was disclosed to the tribunal as an additional document during these proceedings).

61. Within Version 4, and incorporated into Version 5, was a function referred to as Option 48. Option 48 was a function that could be used for raising credit notes.

62. The claimant communicated to senior management around 06 June 2018 that Option 48 was being used for matters that it was not intended for and that it should therefore be blocked for use. Consequently, the respondent blocked access to Option 48 from 06 June 2018 to all depots. Access to Option 48 would be through IT changing a user profile to provide appropriate permissions, following a reasoned request. The point of contact for such permissions was listed as the claimant (p.405). For the avoidance of doubt, those staff members who had Super User access would still be able to use Option 48 given the enhanced access they had on the system.

63. Around 15 March 2019, the claimant was placed in the Super User group for the purpose of testing the system (see p.231). The claimant was part of the testing and roll out team for Version 5, and part of this role was to test the system and raise any identified concerns.

64. On 21 July 2019, the claimant raised that others in the depot were using his log in details (p.456). The claimant was informed that this should be avoided as it is a security issue and that he should therefore change his password to prevent this from happening.

65. The claimant was part of the Version 5 Rollout team. As part of this he was given a higher authority profile, namely ABV5ROLLOU from 05 November 2019. This did not give the claimant access to use Option 48 (see p.370). However, the claimant retained the ability to change his user profile due to his enhanced user access (changing his profile would give him the ability to use Option 48) and did so regularly (see pp.372-378). Although the claimant disputed the accuracy of the document, he did not provide an adequate explanation as to why he says the document was not an accurate one, nor did he dispute that he did change his profile from being outside the Super User group to being part of it. On this basis the tribunal was satisfied that the document was accurate and did show dates on which the claimant changed his user profile.

66. Adina Bejenaru headed out the roll out of Version 5 alongside the claimant. She had a Super User access which gave her access to the Option 48 function. Shah Nawaz did not have access to Option 48.

67. By email on 25 October 2019, the Operations Manager at Batleys, Peter Deehan, emailed Mr Mulroy to make him aware that a customer had sought to pay for £4,000 worth of goods with a credit note raised in his own name, with the Credit note itself having been raised at Bestway Manchester.

68. This incident led Mr Mulroy to circulate an email (see p.261), which including the claimant as a recipient, warning of stores/depots to be vigilant as he considered that they had been targeted as part of a 'scam'.

69. Due to this incident, it was reasonable that the respondent would investigate this matter. The claimant accepted this when this proposition was put to him.

70. On 26 October 2019, Mr Mulroy had a phone conversation with Mr Ricky Nestor,

who informed Mr Mulroy that the attempted cashing of the credit note was by a Mr Shah Nawaz. And that having looked further, Mr Nestor could not understand how a number of other credit notes had been created. This led to Mr Mulroy asking Mr Nestor to run a report into those credit notes. Mr Mulroy was informed by Mr Nestor on 27 October 2019, that the credit notes in question were raised by the claimant, and at the point amounted to approximately £32,000.

71. On 28 October 2019, Mr Nestor requested CCTV footage of the Tobacco Sales Room, where the credit notes were raised on 02 October 2019 and 23 October 2019 (p.398). From these, Mr Nawaz was identified as being the person responsible. In that CCTV footage, Mr Nawaz was observed speaking on his mobile phone between 14.50 and 15.04 on 02 October 2019.

72. Mr Nestor also informed Mr Mulroy that the Shah convenience account had been suspended on 02 October 2019, but was reopened by the claimant on 23 October 2019, which was the day Mr Nawaz attempted to cash a credit note.

73. Mr Mulroy was appointed to investigate the potential fraudulent use of credit notes that had been uncovered. The claimant accepted under cross examination that he had a good relationship at this point with Mr Mulroy, and that Mr Mulroy had no reason to get rid of him.

74. As part of Mr Mulroy's investigation, he spoke to the individual who was identified as the person who sought to use the credit note in question. That being Mr Shah Nawaz. Mr Mulroy was accompanied by Kamal and Malik Yasir. This took place on 28 October 2019. Mr Nawaz provided a statement (the typed version is at p.286) where he explained:

> 'I, Shah Nawaz, herby acknowledge that I was involved with Zahid to refund the credit notes. These credit notes were raised by Zahid himself, except the two, which I raised based on his instructions, which he gave me over the phone and snapchat. I did not know how system works. Initially he used to raise credit notes himself and I used to cash them from cash point. I have been doing this since June/2019, on his Instructions. Since that, I remember cashing these kinds of credit notes from two different numbers other than Shah convenience. One of the numbers was Booz Mart. On that occasion, Zahid called the security supervisors (TJ and Saddam) to his office so no one would suspect that I was using a different number. Zahid told me to do shopping on my number (Shah Convenience) and he used to raise the credit note. After shopping I would go to cash point and cash credit note. The change, which was given to me after clearing my invoices, I used to give it to Zahid. I remember giving him cash in his office and leaving for him In the disabled toilets and outside security office. On two occasions I gave it to Omer to give it to Zahid as Zahid told me to give it to him.
>
> The stock, which I would buy on this number (Shah Convenience), I use to take that and sell it to shop keepers and they would pay me in cash., which I used to give to Zahid. Zahid used to give me one hundred pounds for each credit note. Zahid expired my old number and opened a new account. — As I am aware that only Zahid knew about it in the depot, as no one else spoke to me regarding this before.'

75. Mr Nawaz was questioned by Mr Mulroy again on 29 October 2019 (see notes at pp.289-290). He again reiterated that the claimant was involved in the matter, and it was to the claimant that Mr Nawaz handed money following cashing of credit notes. Mr Nawaz explained that the claimant told to him to use BGuard so as to leave no trace behind. And gave an explanation that he attempted to call the

claimant on his mobile number on or around 23 October 2019 as he owed him £1,000. There are two further statements taken from Mr Nawaz on 01 November 20219, but these relate to other matters (p.299 and p.302). There is nothing to support the claimant's allegation that Mr Nawaz was being instructed as to what to say. This was a wholly new allegation by the claimant that was not contained within the claimant's witness statement, and one which did not have any supporting basis.

76. Mr Nawaz during this period of questioning provided Mr Mulroy with screenshots of Snapchat correspondence with the claimant. Particularly, at p.383, this appears to be a set of instructions sent from the claimant as to how to change a user profile. This also informs the tribunal that Zahid, that being the claimant, had replayed the snap for Mr Nawaz, which meant that Mr Nawaz had been given access to these instructions on two occasions.

77. On 31 October 2019, Mr Mulroy contacted Head Office requesting that a letter of suspension be sent to the claimant (para 21 Mr Mulroy witness statement). The claimant received this letter on 01 November 2019, whilst he was absent with sickness. The suspension took effect from 04 November 2019.

78. The claimant was paid company sick pay during October 2019 for his absences. But this was reduced to Statutory Sick Pay during November 2019.

79. Under the claimant's contract, he is entitled to sick pay at the statutory sick pay rate. However, the company retains a discretion as to whether to pay an employee at a company sick pay rate. This is entirely discretionary (as recorded at part 8 of the claimant's statement of particulars, see p.194).

80. Around 01 November 2019, Mr Mulroy asked Adina Bejenaru about whether the claimant had use of her password. On 01 November 2019, Ms Bejenaru confirmed that the claimant had asked for her password on 29 August 2019, 13 July 2019, 13 August 2019 and 16 September 2019. And that she may have also provided him her password on other occasions over the phone (p.308). The claimant was given Ms Bejenaru's password on each of these occasions (see p.308 and accepted by the claimant).

81. On 05 November 2019, Mr Mulroy questioned M Habib (notes on p.307).

82. On 06 November 2019, Omar provides a statement to Mr Mulroy. Omar did not sign this document. It is recorded that Omar states that he was never given any money from Mr Nawaz or the claimant.

83. On 07 November 2019, Tejal Karsan provides a witness statement to Mr Mulroy as part of the investigation (see p.317). Ms Karsan explained in his written statement that the claimant on around 3 or 4 occasions would have credit notes without an invoice and had explained to her that this was or the purpose of testing the Version 5 system. After redeeming the credit note, Ms Karsan says that she was directed to put the money in the safe, and that money would then be removed from the safe. The she records that the claimant told her that this money was being paid back to customers. The claimant when cross examined tried to discredit Ms Karsan's evidence by using personal attacks. He also explained that she was not being truthful as she was not happy with the claimant as he knew she was having an affair. This is an entirely new allegation introduced by the claimant and is not supported in any way. This appeared somewhat a strange attack on Ms Karsan's evidence as he then followed this by accepting that what is in that statement was accurate.

84. On 07 November 2019, Mr Mulroy emails Ms Bejenaru as part of his investigation

to ask her various questions concerning access to her username and password, and her knowledge of a credit note that was raised in her name on 30 June 2018. She explains in her responses that: (i) only the claimant had knowledge of her user name and password (ii) that she was on holiday at the time the credit note in her name was raised and cashed and did not have her laptop with her (iii) that she had never asked anybody to test credit notes using Option 48 (iv) that she has never changed the claimant's profile to give him Super User access and (v) that the dates on which the claimant's profile was changed were not done by her, before confirming that such changes would have given the claimant access to restricted functions (pp.310-311).

85. As part of Mr Mulroy's investigation he identified several credit notes of concern. This included:

    a. 23 October 2019, a credit note raised in the customer name of Shah Convenience, under the claimant's user name. This was for the value of £4,120 (see p.318). This was cashed in the Bestway Manchester Depot (p.319)
    b. 02 October 2019, a credit note raised in the customer name of Shah Convenience, under the claimant's user name. This was for the value of £4,320 (see p.320). The invoice for which is at pp.321-322.
    c. 25 September 2019, a credit note raised in the customer name of Shah Convenience, under the claimant's user name. This was for the value of £3,985.53 (see p.324). The invoice for which is at p.325.
    d. The remaining credit notes and invoices of concerns are contained at pages pp.326-369.

86. Some of the credit notes of concern pre-dated the employment period of Mr Nawaz.

87. Also, as part of Mr Mulroy's investigation he sought and received a report that identified all the occasions that the claimant's user level had been changed and when limits were being cleared (pp.372-378). On which Mr Mulroy cross referenced changes to the claimant's user level, and hence access to Option 48, with the dates on which credit notes had been raised using his profile.

88. On the 07 November 2019, as part of investigating the potential fraud that was taking place at respondent stores, the claimant was invited to an investigatory meeting that was due to take place on 08 November 2019. The letter to the claimant made it clear what allegations where being investigated, and this was that there was 'Fraud, attempted fraud or falsification of any document or Company records' and 'Failing to account correctly for any cash or property received, and/or failure to comply with Bestway accounting, cash or property procedures'. This letter also made it clear that the investigation could lead to a disciplinary hearing which could itself lead to disciplinary action being taken against the claimant (see pp.177-178).

89. On or around 08 November 2019, Mr Nawaz provides the respondent with a copy of his mobile phone record. This records that a phone call was made on 02 October 2019 at 14.56. This lasted 9 seconds. And was made to the mobile number 07707752115, which the claimant accepted was his number.

90. On 08 November 2019, at 10.03, Mr Mulroy receives information from Mr Humphreys to explain that the 999* range is a function used by IT, and effectively enables mobile access to a depot, for which the IP address can not be traced (p.379).

91. On 08 November 2019, the claimant attended the investigation meeting held by Mr Mulroy. As part of this meeting, the claimant was asked to respond to allegations made by Mr Nawaz that the claimant credited him with the credit notes. The allegations were put to the claimant, along with the evidence that had been gathered up to that point and he was given the opportunity to respond to those matters.

92. Based on his investigation, Mr Mulroy concluded that there was a case to answer. And progressed the matter to a disciplinary hearing.

93. Mr Waqar Ahmed was elected to chair the disciplinary hearing and determine the case against the claimant. The claimant was invited to attend a Disciplinary Hearing by letter dated 20 November 2019 (pp.240-241). This lays out 4 matters that were being considered as part of this process, with them being deemed allegations of gross misconduct. The claimant is told that the allegations are serious and if proven could lead to termination of his employment. This letter is accompanied by the documents that related to the investigation, the notes of the investigation meeting and additional documents, including a Lyca Mobile document that illustrates a phone call between the claimant and Mr Nawaz on 02 October 2019.

94. The claimant had no concerns at the time about Mr Ahmed being selected to chair the disciplinary hearing. The claimant described their relationship to be respectful at the time.

95. The claimant then makes contact by phone to members of the respondent's Human Resources team on 25 November 2019. During which Ms Dowool took control of the phone conversation. During this phone call, the claimant requested access to various things: CCTV footage of 23 October 2019, Car tracker data, absence record logs, access to the claimant's laptop and emails, and requested access to any witnesses. The respondent offered the claimant an Occupation Health referral, which he declined.

96. During this phone call, a conversation to the effect of the following took place: Ms Dowool described the claimant's impairment as being anxiety, which upset the claimant and led him to stating that it was not anxiety but depression. Ms Dowool responded to explain that whether it was anxiety or depression, the respondent's intention was to support him. For the avoidance of doubt, Ms Dowool did not say 'anxiety, depression or whatever'. We make this finding based on accepting the evidence of Ms Dowool, whose evidence was consistent with documents she was taken to, was consistent between her written statement and oral evidence, and gave clear answers to the effect that she would never use such a phrase as 'anxiety, depression or whatever'. Whilst the claimant has not been the most reliable of witnesses when recollecting events.

97. Ms Dowool on 28 November 2019 (see p.242) documents the phone call from 25 November 2019. And with respect access to emails and his laptop, the claimant was invited to arrange for that access. It was explained to him that that he could arrange such access, it would have to be in a controlled environment under supervision but could be at a depot of his choosing. The claimant never sought to arrange this access.

98. Following requests by the claimant to reschedule the disciplinary hearing, the hearing is eventually arranged to take place on 16 January 2020 (see p.248). A full day was put aside for this hearing, as the claimant was being afforded supervised access on that day to the IT systems, his laptop and his emails. This was to be supervised by John Humphreys, the IT Controller, who would be

available and present throughout that hearing.

99. The Disciplinary Hearing takes place on 16 January 2020 (the notes of which are at pp.103-128). During this hearing the claimant does not request to make use of the supervised access to his laptop, emails or the IT system that was available to him (see reply by claimant on p.124).

100. The claimant was afforded the opportunity to present his case and respond to the allegations presented against him. The claimant accepted this under cross examination.

101. The claimant presented nothing in terms of documentary evidence, despite having been afforded every opportunity to do so. However, he did refer to an envelope of evidence, which he said would clear his name. However, he refused to give that evidence to Mr Ahmed. Nor has the claimant produced this evidence before this tribunal.

102. The outcome letter was sent to the claimant on 31 January 2020. This was sent to the address that the claimant had resided at previously, in error. This was a simple human error. This was caused by the claimant having two profiles and two employee numbers on the HR system, with one of those profiles having an old address for the claimant recorded. This letter was marked private and confidential.

103. The decision reached was that the 4 allegations were well-founded, and this amounted to gross misconduct. The claimant's employment was terminated with effect on 31 January 2020. This was a decision by Mr Ahmed. In reaching this conclusion, Mr Ahmed provided a reasoned explanation of his findings (see pp.251-253). This balances the allegations with the evidence that had been uncovered, it explained the claimant's response and provided an explanation as to the findings being made and why those were being made. This was a decision that was open to Mr Ahmed on the evidence before him.

104. The claimant appealed the decision by email (see pp.183-186) on 07 February 2020.

105. Mr Ward was appointed to hear the claimant's appeal. The claimant stated that Mr Ward had no reason to get rid of him and raised no other concerns about him as Appeals Manager.

106. The appeal hearing took place on 19 February 2020 (notes of the hearing are at pp.129-141).

107. The claimant's appeal focused on access to documents and to CCTV evidence. As well as that certain investigations were not done, including checking his attendance against the use of his username across the company, consideration of tracker information and investigating whether the witnesses had lied during the process.

108. The claimant is sent a letter containing his Disciplinary Appeal Outcome on 27 February 2020. This rejects the claimant's appeal. This letter explained that:

a. The outcome letter was sent to the wrong address, and that this was a genuine error on the part of human resources.
b. It addressed the appeal point in respect tof Mr Nawaz providing evidence and the impartiality of the process.
c. It addresses the CCTV and tracker data issue.
d. And it addresses the sick pay issue.

109. Again, this letter explains the rational for the decision that is made. And is one that was open to Mr Ward in these circumstances.

Conclusions on Ordinary Unfair dismissal claim

110. There were serious allegations raised in respect of the claimant being involved in defrauding the respondent. The claimant's name was implicated by Mr Nawaz, the person who had been identified as responsible for trying to cash fraudulent credit notes. It does not matter whether the discussion with Mr Nawaz took place on a Friday or a Monday, the important issue was that the claimant had been identified as being involved. The claimant appears to be progressing a case that Mr Nawaz was interviewed on a Monday rather than a Friday, and as the wrong date has been presented in the investigation then the whole approach was unfair. And it is on this basis that the claimant has sought data relating to car trackers (another allegation of unfairness is that the claimant was not sent that data). This simply cannot be the case. The date on which the claimant was identified as having a potential role in this misconduct has no bearing on fairness. And in those circumstances the tracker information is not relevant evidence. Once in receipt of this information it was only right that an investigation took place. And the claimant does not dispute that an investigation would be necessary where there are such allegations of misconduct.

111. The investigation that took place was thorough, and reasonable in the circumstances. It involved investigating individuals that had been named, it involved meetings and taking statements from individuals who potentially could have witnessed something and from individuals who were working in the offices where some of the potential misconduct was said to be taking place. In short, Mr Mulroy spoke to those individuals who could appropriately talk to issues that had been identified. Mr Mulroy was thorough in investigating and interrogating documents and even viewed CCTV of necessary time periods. The claimant has not identified any failing in this investigation that goes close to supporting that the investigation was unfair. Rather, he focused on the source of the information as being unfair, rather than on the investigation that took place once an allegation had been made. This investigation all led to a decision by Mr Mulroy that the claimant had a case to answer. And given that this was following an investigation that identified that the claimant had the skills to manipulate the system in the way it was manipulated, he was a person who had the log on details that enabled him to change his own user settings to enable him to have access to Option 48 (that had been disabled for others), that the documents identified that the claimant's account had bene used to raise the Option 48 Credit notes at the time his user profile had been changed, and on the occasion it was done using Ms Bejenaru's user account (when she was on holiday), the claimant was the only other person that Ms Bejenaru had given her username and password to. This decision was clearly a decision that fell within the Band of Reasonable Responses.

112. When the claimant's case progressed to a disciplinary hearing, the respondent accommodated the claimant as best it could, in light of the claimant's sickness absences. The hearing that took place afforded the claimant every opportunity to respond to the allegations, and afforded the claimant the opportunity to access any evidence that he considered necessary to meet the allegation against him. The claimant chose not to avail himself of this opportunity: that does not taint the decision making with unfairness.

113. Having considered the matter, the investigation had uncovered serious allegations against a manager that was in a position of trust. And the evidence

before Mr Ahmed, pointed towards the claimant. The tribunal was satisfied that Mr Ahmed, honestly believed that the claimant was responsible for the actions that formed the allegations. And he had this belief was based on reasonable grounds (those identified above) that those reasonable grounds were underpinned by a thorough investigation and fair process. Mr Ahmed's decision to dismiss the claimant in circumstances where there was an honest belief that the claimant had breached the confidence of the respondent, which resulted in defrauding of the company, is clearly a decision that falls within the Band of Reasonable Responses.

114. In terms of the appeal, it is unclear what the claimant complains about in this case. However, the tribunal is satisfied that, based on the evidence before us, Mr Ward considered claimant's appeal points, gave the claimant the opportunity to advance those appeal points, gave suitable consideration to them and reached a conclusion that the appeal would not succeed. Again, in this tribunal's judgment this decision to reject the appeal fell within the Band of Reasonable responses.

115. The tribunal, based on the evidence before it considers that the claimant was not unfairly dismissed. And in those circumstances, the claim of unfair dismissal fails and is dismissed.

Conclusions on direct discrimination and discrimination arising from disability complaint

116. The respondent did not stop paying the claimant sick pay from October 2019. Rather, his payment was reduced to statutory sick pay from contractual sick pay (which he had been on for a month). In that sense, the claim as pleaded, insofar as it relates to the respondent having stopped paying him sick pay form October 2019 must fail.

117. However, the case, as it was presented in the tribunal, appeared to centre on whether the claimant was entitled to remain on full pay as he had been suspended, despite being absent on sick leave. He progressed a case based on the disciplinary policy, which was in the bundle starting at p.197. And particularly, he relied on the section relating to suspension (see p.200) that states that 'If an allegation of gross misconduct is made against the employee, then they may be suspended from their duties on full pay until our investigations are completed'.

118. However, the claimant statement of particulars makes it clear that the disciplinary procedures are non-contractual provisions (see p.196). The section relied on indicates that this is not a contractual right by using the word 'may'. And that when on sickness absence 'The company may pay company sick pay in addition to SSP at its entire discretion' (see p.194). The claimant has not produced any evidence to support a finding of facts from which the tribunal could conclude that the respondent reduced his sick pay either because of his disability or due to disability-related absences. So even had that been the case that the claimant was bringing, it would have failed.

119. Given our findings above in respect of the ordinary unfair dismissal claim, the tribunal concludes that the claimant was not subjected to an investigation and disciplinary procedure from November 2019 because of his disability or for reasons connected to disability-related absences. Rather, he was subject to the investigations and disciplinary procedures based on the allegations that were made involving him, and because there was a legitimate finding based on the evidence uncovered through investigation that the claimant had a case to answer.

120. Further, the tribunal concluded that the claimant was not dismissed because of his disability or for reasons connected to disability-related absences. Rather, he was dismissed following the decision-maker having an honest belief

that he was involved in an act of gross misconduct.

121. Based on our conclusions above, the claimant's allegations of direct disability discrimination and for disability related discrimination all fail.

Conclusions on reasonable adjustment complaints

122. The first two allegations rely on matters that took place during February and March 2019. However, this is a period where the tribunal has concluded that the claimant has not established that he had a disability. And therefore, these two must fail on that basis.

123. However, all three of the Provision, Criterion or Practices (PCPs) all fail as they are not PCPs. Rather they are actions aimed at the claimant, rather than being actions that are applied broadly, from which the claimant as a disabled person was put at a substantial disadvantage. The third one particularly, of subjecting the claimant to disciplinary action is not and cannot be a PCP.

124. On this basis, the claim for a failure by the respondent in its duty to make reasonable adjustments fails in its entirety.

Conclusions on harassment related to disability complaint

125. The first part of this type of claim relies on the claimant having sent an email to Ms McMenemie in October 2019, where the claimant informs her that he had attempted to commit suicide. In short, no such email was contained in the bundle and the tribunal concluded that no such email exists. This is further supported by our findings above when considering the issue of disability. This therefore must fail.

126. Given our findings above, this tribunal found that Ms Dowool had not used the words 'anxiety, depression or whatever'. So again, that claim must fail.

127. And given our findings above, the sending of the termination letter to the wrong address, where that is an address that the claimant previously resided, where there was an error on the HR system such that the claimant had two employee profiles, one of which had his old address, where the letter was marked as private and confidential is not found to be harassment. First, the conduct is not related to disability. And second, it would not reasonable to perceive this to have the purpose or effect of harassing the claimant. This part of his claim must also fail.

128. The entirety of the harassment related to disability claim fails and is dismissed for the reasons identified above.

Conclusions on unauthorised deduction from wages

129. The claimant did not have a contractual right to full pay during his suspension, for the reasons outlined above. He was paid Statutory Sick Pay in circumstances where the respondent had a discretionary power to pay him statutory sick pay. In those circumstances there has been no unauthorised deduction from wages, and this claim must fail and is dismissed.

Unpaid holiday pay

130. The claimant has brought no evidence of what holidays he says he is owed, what holidays he says were paid and what is outstanding.

131. The claimant has produced no evidence to support that there would be carry over of leave from any previous leave year.

132. The claimant's particulars of employment give him an entitlement of 22 days (p.194) in any given year. This is exclusive of bank holidays.

133. During May-June, the claimant took a total of 21 days holiday leave, and 2 bank holidays (total of 23 days) (see pages 439-440).

134. The claimant received a payment of £2199 gross for holiday pay on 29 February 2020, which is his final pay slip following dismissal. And given the claimant was on circa £44,000 gross per year, which is equivalent to approximately £170 gross per working day (on a 5-day working week, which was the claimant's work pattern. See p.193)). This is equivalent to some 12.93 days holiday paid in lieu.

135. In the circumstances recorded above, and given the claimant has adduced no evidence on this point, the claimant's claim for unpaid holiday pay fails and is dismissed.

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Employment Judge **Mark Butler**

Date_24 October 2023____

JUDGMENT SENT TO THE PARTIES ON

27 October 2023

FOR THE TRIBUNAL OFFICE

Notes

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.