EMPLOYMENT TRIBUNALS

Claimant: A

Respondent: The Forward Trust

Heard at: London South (by video)

On: 6, 9, 10, 11, 12, 16, 17, 19, 20, 23, 24, 26, 27, 30 and 31 October 2023, 5 December 2023 (submissions), 6, 7 and 8 December 2023 (deliberations) and 5,6 and 7 February 2024 (deliberations)

Before: Employment Judge Evans
Ms C Edwards
Ms J Forecast

Representation
Claimant: in person
Respondent: Mr Crow of counsel

JUDGMENT

1) The complaint of unfair dismissal is not well-founded and is dismissed.

2) The complaint of breach of contract in relation to notice pay is not well-founded and is dismissed.

3) The complaint of being subjected to detriment for making protected disclosures is not well-founded and is dismissed.

4) The complaint of direct disability discrimination is not well-founded and is dismissed.

5) The complaint of unfavourable treatment because of something arising in consequence of disability is not well-founded and is dismissed.

6) The complaint of failure to make reasonable adjustments for disability is not well-founded and is dismissed.

7) The complaint of harassment related to disability is not well-founded and is dismissed.

8) The complaint of victimisation is not well-founded and is dismissed.

9) The complaint that the respondent refused to permit the claimant to exercise his rights to daily and weekly rest under the Working Time Regulations 1998 is not well-founded and is dismissed.

10) The complaint of being subjected to detriment for alleging that the respondent had infringed rights under the Working Time Regulations 1998 is not well-founded and is dismissed.

11) The complaint of unauthorised deductions from wages is well-founded.

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Preamble

1. The claimant was dismissed without notice by the respondent on 11 June 2020. He presented claims to the Tribunal on 5 May 2020 (2301822/2020 – "claim 1"),

10 September 2020 (2305071/2020 – “claim 2”), and 21 May 2021 (2301847/2021 – “claim 3”).

2. The three claims came before the Tribunal at the final hearing which began on 6 October 2023. These are the Tribunal’s reasons for the unanimous judgment set out above. The Tribunal asked the claimant by its orders of 8 December 2023 to inform it by 7 February 2024 if he preferred this judgment to be sent to a member of his family or a friend rather than to himself. The claimant responded on 22 December 2023 saying that he would and identifying the relevant person. This judgment has therefore been sent to that person and not to the claimant.

Documents and witness statements

Bundles and documents

3. The Tribunal had the following agreed bundles before it:

    3.1. **Pleadings bundle:** a pleadings bundle (“PB”) containing 709 pages;

    3.2. **Documents bundle:** a documents bundle (“DB”) containing 5762 pages. This bundle is a combination of two bundles prepared by the respondent and claimant respectively and it contained 5312 pages at the beginning of the hearing. Pages 5313 to 5326 were added by consent on 17 October 2023. The following pages were also added by consent on the following dates: page 5327 to 5329 (23 October 2023), pages 5330 to 5332 (24 October 2023), pages 5333 to 5349 (27 October 2023), pages 5350 to 5760 (30 October 2023), pages 5761 to 5762 (31 October 2023);

    3.3. **Audio and video files:** the following audio and video files were also admitted by consent. Two audio clips of a hearing on 29 April 2020, a video clip of Mr Biggin visiting the claimant at home on 19 July 2018 (uploaded by the respondent on 10 and 19 October 2023) and two video clips of the same part of the hearing on 29 April 2020 provided by the claimant on 28 November 2023;

    3.4. **Medical documents bundle**: a medical documents bundle (“MDB”) containing 314 pages;

    3.5. **Remedy bundle**: a remedy bundle (“RB”) containing 54 pages.

4. References in these reasons to pages in these bundles take the form PB “x”, DB “x” etc., where “x” is the page number.

5. The parties also prepared the following documents before or during the course of the hearing:

    5.1. An essential reading list and opening (prepared by the respondent);

    5.2. An issues chronology (prepared by the respondent);

    5.3. Two chronologies (one prepared by the respondent, the other by the claimant);

5.4. A cast list (prepared by the respondent with additions by the claimant);

5.5. Closing written submissions. The parties adopted the form which the Tribunal strongly recommended that they adopt by its orders of 31 October 2023.

5.6. Further closing written submissions in relation to the unauthorised deductions claim made by the parties at the invitation of the Tribunal after it had realised that neither party had made submissions in relation to the claimant's unauthorised deductions claim.

Witnesses and witness statements

6. The following witnesses gave evidence by reference to witness statements prepared and exchanged before the final hearing in the following order:

6.1. The claimant;

6.2. Mr Panditharatna (the Executive Director of Employment Services of the respondent);

6.3. Ms Thatcher (the Head of HR of the respondent during the claimant's employment). A very short supplementary witness statement was also produced on behalf of Ms Thatcher on 20 October 2023 and the claimant made no objection to this;

6.4. Mr Biggin (the Chief Operating Officer of the respondent);

6.5. Mr Trace (the CEO of the respondent);

6.6. "AJ", as he is known to all involved (Senior IT Support Engineer at the respondent until November 2019);

6.7. Mr Bernstein (the Chair of Trustees of the respondent); and

6.8. Ms Ball (an HR Business Partner at the respondent until June 2022).

Procedural and other related matters

7. The following is a brief summary of the procedural and other matters dealt with at the beginning of, and during, the final hearing.

Final preparations for the hearing and the delay in oral evidence beginning

8. There had been a case management hearing on 15 September 2023. The judge noted in their case management orders (PB 685) ("the CMOs of 15 September") that the parties had "experienced real difficulties reaching agreement on many things" and made orders to keep the proceedings on track for the final hearing. As of 15 September 2023 the contents of the bundle had not been agreed and witness statements had not been exchanged. The CMOs of 15 September required witness statements to be exchanged by 4pm on Thursday 5 October 2023.

9. Witness statements were not exchanged on that date. The claimant blamed what he said was a failure by the respondent to serve a hard copy bundle at the same time as the soft copy bundle. The respondent did not accept that it was at fault. Witness statements were finally exchanged on Monday 9 October 2023. The Tribunal is satisfied that any disadvantage suffered by the claimant as a result of any delay by the respondent serving a hard copy of the bundle was eliminated by the subsequent delay in witness statements being exchanged (taking into account that throughout the hearing the claimant generally used the electronic copies of the bundles rather than the hard copy, and it seemed to the Tribunal that he found those easier to navigate) and by the beginning of oral evidence being put back (details below).

10. The delay in the exchange of witness statement resulted in the Tribunal deciding, with the agreement of the parties, that the timetable set out at [3] of the CMOs of 15 September 2023 should be amended so that the claimant's evidence would not begin until Thursday 12 October 2023.

Adjustments

11. The respondent accepted that at all relevant times the claimant had various disabilities (but not that it had knowledge of them). There was a discussion of the adjustments which should be made as a result of those disabilities at the case management hearing on 15 September 2023 (PB 679). These were discussed at the beginning of the hearing and we do not set out all of their detail here but observe that the adjustments listed in the CMOs of 15 September were made. However, it is worth noting in particular that:

    11.1. The Tribunal did not sit on Wednesdays or on Fridays after 1.30pm to enable the claimant to attend therapeutic appointments. (Indeed, from what the claimant said to the Tribunal, we understood that he was throughout the hearing receiving some assistance from his therapist);

    11.2. The claimant was permitted to have a friend or family member (referred to at PB 679 as a "McKenzie friend") sitting next to him to assist him in the ways set out at [8] to [9] at PB 679-680. In fact, the claimant did not generally choose to have someone sitting next to him. Rather, various different family members and friends attended by video. The Tribunal understood that sometimes the family member/friend was in the claimant's home with him and sometimes they were elsewhere;

    11.3. The claimant was given regular breaks as set out at [11] at PB 680. Hand signals were agreed for the claimant to indicate that he needed an immediate break or a break soon. He was also told he could type 1 (break now) or 2 (break soon) in the chat box. In fact the claimant did not do this. However, breaks were regularly discussed and granted whenever requested by the claimant. Initially, this resulted in there usually being a 10 minute break after every 40 minutes. However, as the hearing progressed, and doubtless the claimant became more tired, there was generally a break of 10 minutes after every 20 minutes. Further, when the claimant indicated a need for a longer break than the "regular" break, the length of the "regular" break was extended;

11.4. The Tribunal was conscious throughout the hearing of the claimant having the health conditions identified at [5] of the CMOs of 15 September. There were times when the claimant was, quite possibly as a result of those health conditions, finding the hearing difficult. When this happened, the Tribunal did discuss with the claimant how he was feeling and, where appropriate, offered further breaks (whether for recuperation or in order to find documents or otherwise to prepare for the next part of the hearing). At no point did the Tribunal decline to make any adjustment requested by the claimant to the timetable or otherwise.

<u>Specific matters arising during the hearing</u>

<u>The possibility of further adjournments</u>

12. As the Tribunal notes below, various matters arose which inevitably raised in its mind whether there needed to be a deviation from the timetable agreed between the parties. In summary, there were times when the claimant was clearly struggling to deal with the pressures which all Tribunal hearings impose on the participants.

13. At no point, however, did the claimant make an application for there to be an adjournment and, overall, his position was that he wanted the hearing to be completed within the timetable agreed so that his claims could finally be determined. Taking account of this, our awareness during the hearing that the claimant was receiving support from friends, family and his therapist, the need for all claims to finally reach a conclusion, the extensive previous case management of this claim, the very significant amount of hearing time given to the claim, and the over-riding objective, at no point did the Tribunal conclude that it should in the interests of justice suggest to the claimant that he might wish to consider applying for an adjournment.

<u>The claimant's cross-examination</u>

14. The Tribunal tried to respond immediately to any concerns raised by the claimant during the course of the hearing. For example, at one point during his cross-examination (at 11.17am on Tuesday 17 October 2023, just after a break), the claimant indicated that he was upset because he felt that he had been discouraged from making notes in relation to a particular question referring to various documents. The Tribunal explained that it had felt this was unnecessary given the generalised nature of the question but decided that the documents should be gone through again so the claimant had a further opportunity to deal with them individually if he wished to do so. This was then done.

15. Overall, however, the claimant coped well with being cross-examined in terms of his performance as a witness. That is to say he knew the documents well and did not appear to have any significant difficulties understanding the questions put to him or responding in some detail to them. Whilst the claimant on occasion expressed frustration at not being able to find exactly the document he wished to find whilst being cross-examined, this reflects the difficulties inherent in bundles running in total to just under 7000 pages. Further, the claimant had a significant amount of time during the hearing and before presenting his closing written submissions to find any documents that he had been unable to identify during cross-examination. We make separate findings on his credibility below.

The claimant's cross examination of the respondent's witnesses

16. It appeared to the Tribunal that the claimant found cross-examining the respondent's witnesses to be more emotionally taxing than being cross-examined himself. At the claimant's request, the order of the respondent's witnesses was adjusted so that the first witness would not be one of the witnesses who he said he found it most difficult to deal with. This resulted in Mr Panditharatna being the first witness called by the respondent. However, on Monday 23 October 2023, the day Mr Panditharatna was being cross-examined, the claimant did not reappear after the break from 11.32 to 11.45am. A friend of the claimant appeared and explained that the claimant was unwell. The friend said that he would ask questions on behalf of the claimant. The Tribunal had some concerns about whether the claimant wished to proceed in this manner because it was not clear to what extent the friend had been able to discuss matters with him. There was therefore a series of breaks until around 2.30pm, by which time the claimant had provided an email saying that the friend would "continue cross-examination in my place since I am unable to". The friend then completed the cross-examination of Mr Panditharatna.

17. The claimant chose to cross-examine the remainder of the respondent's witnesses rather than to rely on a friend or family member. He clearly found this task difficult but we sought to assist him by helping him when appropriate to rephrase questions so as to focus on the issues in hand. To the extent necessary, after he had completed his cross-examination of each witness, the Tribunal sought to ensure that all of the allegations specific to the witness were put to them either by the Tribunal or by Mr Crow.

Closing submissions

18. As noted at [5] above, the claimant provided closing submissions in the form which the Tribunal had recommended. The parties had had four weeks to do this. The claimant clearly found martialling his arguments and the relevant evidence difficult. He did not provide written submissions in relation to all the issues arising in his claim. At the beginning of 5 December 2023, when oral submissions were heard, during a discussion about the order of submissions (the respondent seeking a variation to the Tribunal's orders of 31 October 2023 in this respect), the claimant said that he had not read the respondent's written submissions which had been sent to him on 29 November 2023. This had been on the advice of his family, who had read them. They had recommended him not to read them because of their possible impact on his mental health, but had summarised parts of them for him. When the claimant was asked whether he would rather go first or second in oral submissions, he said he would go first.

19. The claimant made oral submissions from 10.50 am to 11.45 am with two 10 minute breaks. He explained that, in order to protect his mental health, he was not going to listen to Mr Crow's oral submissions, but that a member of his family, Mr Martinelli, would. At the end of Mr Crow's oral submissions, the claimant made further brief submissions in response by reference to a description of Mr Crow's oral submissions given to him by Mr Martinelli.

20. The Tribunal considered whether there was any further adjustment that it should make in light of what the claimant said to it on 5 December 2023 about his state of

health. It concluded that there was not: the claimant did not make an application for the submissions' day to be adjourned or for further time to be allowed for him to do additional work on his written submissions. Further, the Tribunal concluded that such an adjournment would not be of any benefit to him. The Tribunal so concluded because it is very clear that the claimant has struggled to focus on what is relevant, rather than on extraneous matters, throughout the whole of these proceedings and has often had difficulty completing required tasks before deadlines, despite the extensive case management conducted prior to the final hearing. In summary, the Tribunal did not believe that further delay would result in the claimant producing further written or oral submissions which would focus clearly on the issues that it had to decide – and in principle any further delay would clearly not have been welcomed by him.

Rule 50 orders

21. An order had been made under rule 50 on 2 July 2021 in respect of a hearing on 6 September 2021 (PB 267). It did not apply to the proceedings generally. The claimant made an application under rule 50 for anonymity on Monday 9 October 2023. After discussion, it was treated as an application for (1) an anonymity order (2) a restricted reporting order. The respondent opposed the application. The Tribunal made both orders for reasons given orally at the hearing.

22. It should be noted, however, that there was considerable discussion of the scope of the anonymity order sought. The Tribunal pointed out to the claimant that if the anonymity order only required his name to be omitted or deleted from any document entered on the Register, or which otherwise formed part of the public record, this might well not prevent him being identified by "jigsaw" identification. The claimant nevertheless chose to limit his application so that only his name would be omitted. His reason for this appeared to the Tribunal to be that he did not wish the respondent or its witnesses to have what he regarded as being the benefit of anonymity.

The list of issues

23. The claimant's particulars of claim were lengthy (claim 1 - 10 pages, claim 2 – 86 pages, claim 3 - 29 pages). They largely took the form of a narrative which did not clearly set out what the alleged unlawful acts were. As a result of this, there had prior to the final hearing been extensive case management at a number of preliminary hearings and a lot of time and resource had been spent producing a list of issues.

24. This process began at a preliminary hearing before EJ Mason on 30 April 2021 (PB 208). In light of the length of the pleadings, EJ Mason prepared a draft list of issues and ordered the claimant to address any gaps in it (PB 211) in the hope that a concise list of issues might be agreed. Following that hearing, claim 3 was presented and a further preliminary hearing took place on 14 June 2021 before EJ Wright. At that hearing the claimant was ordered to produce a Scott Schedule in relation to all three claims. The respondent was ordered to prepare a list of issues for agreement with the claimant once the Scott Schedule had been produced. There was then to be a further preliminary hearing on 7 April 2022 to "conclude the process of clarifying the issues in the case, and for the production of a finalised 'List of Liability Issues'" (PB 323).

25. The Scott Schedule (PB361 to 416) was again a document containing a large amount of narrative, rather than clearly defined, concise, factual allegations. The parties were not able to agree the list of issues that the respondent prepared in relation to it. Consequently, the whole of the day long preliminary hearing on 7 April 2022 (PB 422) before EJ Wright was spent "going through the outstanding matters one-by-one". The respondent was following that hearing to tidy up and finalise the list of issues, with the claimant being given an opportunity to correct any allegation which was factually incorrect.

26. What in fact then happened was that the claimant sent a letter with 52 pages of enclosures to the Tribunal on 22 April 2022 (PB 427). This contained an application for the reconsideration of the outcome of the preliminary hearing on 7 April 2022.

27. At the next preliminary hearing on 15 July 2022 EJ Wright dismissed the application for a reconsideration (PB 624). In relation to the list of issues EJ Wright noted that the list of issues had first been considered at the preliminary hearing before EJ Mason on 7 April 2021 and that "Despite his difficulties and disabilities, the claimant has had every opportunity to point out any error or to correct it. The claimant has seen this process as an opportunity to expand the List of Issues". The orders observed that the claimant had asserted that items were missing from the list drafted by EJ Mason but that having checked that list EJ Wright could not see what was missing. EJ Wright noted "Again, it is a simple matter for the claimant to say what is missing rather than to keep making the assertion, without substantiating it". The order concluded by stating that:

    In accordance with the overriding objective, it is proportionate to now move on and to confirm the List is finalised and to then consider the next steps in this litigation.

28. At the same preliminary hearing, EJ Wright struck out a substantial part of the claimant's claim (PB 627). She prepared a revised version of the list of Issues reflecting this (PB 633 to 633).

29. The CMOs of 15 September touched briefly on the list of issues at PB 633 at [24] to [25] (PB 685), noting amongst other things that the claimant wished to correct a date relevant to his claim under section 15 of the Equality Act 2010, and that the claimant wished to withdraw certain complaints as set out in that list of issues. The claimant was to provide details by 20 September 2023.

30. There was then a discussion at the beginning of the final hearing on 9 October 2023 in relation to which issues the claimant wished to withdraw. This resulted in the respondent circulating a "condensed" list of issues on 10 October 2023. This was the list of issues at PB 633 amended in light of the withdrawals by the claimant and with all struck through text removed to make the document easier to use. The claimant then suggested on 10 October 2023 that he might wish to make an amendment to put forward a different "something arising" from the various ones set out in the list of issues. The Tribunal made an order that any such application needed to be made in writing by no later than the end of 11 October 2023. This order was recorded in writing in case management orders dated 10 October 2023. The claimant did not in fact make any such application.

31. This condensed list of issues was then discussed again at the beginning of the day on 16 October 2023 in light of an email sent by the claimant on 15 October 2023 at 18.05. This resulted in the dates for issues 15.1(3) and 16.1 (1b) being amended from June 2019 to July 2019, to all the 2018 dates in issue 19.1 i being deleted, to issues 19.1 lix, lx and lxi being withdrawn, and to issues 22.2 iv and v (which the claimant accepted he had incorrectly numbered as i and ii in his email) also being withdrawn.

32. At the conclusion of the claimant's cross-examination the Tribunal asked the claimant a number of questions in relation to the list of issues. The purpose of these questions was to clarify the detail of a number of the allegations. For example, allegation 19.1 was that the respondent had "Ignored C's complaint email of 6.5.20". The Tribunal asked the claimant who he said had ignored the email and where it was in DB (it was not easy to find documents in DB because it ran to nearly 6000 pages but was not in chronological order). The claimant's answers to the Tribunal questions on 20 October 2023 as supplemented by a small amount of additional information given by the claimant on 23 October 2023 were then incorporated into a revised condensed list of issues sent to the parties on the same date under cover of an order ("the final list of issues").

33. However, even the final list of issues is subject to the following caveat. Its origins lie in the Scott Schedule prepared by the claimant. The respondent did not (and does not) accept that all the allegations contained in the Scott Schedule (and so all the allegations contained in the final list of issues) were contained in claim 1, claim 2 or claim 3. Consequently, and unusually, the question of whether the claimant needs leave to amend in relation to some of the issues contained in the final list of issues was not determined prior to the final hearing. As a result, the Tribunal will need to consider whether the claimant needs and should be given leave to amend in relation to any allegation which would otherwise be successful. The respondent's position in relation to this was set out in its written closing submissions.

34. It appears that the reason that the question of whether the claimant needed and, if so, should be given leave to amend was not dealt with at an earlier stage was that it was felt this would be such a time consuming process that it was more time efficient to deal with it as set out in the previous paragraph. This speaks to the enormous difficulties experienced in a list of issues being finalised.

35. The final list of issues is contained in Appendix 1 to these reasons. The issues contained in that list are therefore the issues which as of 23 October 2023 the parties <u>agreed</u> were those before the Tribunal. The issues as set out below in the body of these reason reflect the final list of issues completely: in its orders of 31 October 2023 the Tribunal noted that the issues as set out below (and as set out in the written submissions document that the parties were invited to complete) was "not intended to vary or add to the issues contained in the agreed list of issues **in any way** (but it does set them out in full sentences)", although the questions of time limits and amendments were also dealt with, because both were in play.

36. The Tribunal has set out the process leading to the final list of issues in some detail because:

36.1. It demonstrates the very considerable resources expended by the Tribunal in attempts to understand and to assist the claimant in setting out clearly in the final list of issues the allegations that the claimant makes.

36.2. It demonstrates how very difficult the claimant has found it to express his case clearly and succinctly and to settle on the exact allegations which he wishes to pursue.

36.3. It is relevant to the approach that the Tribunal has taken during the course of the hearing to the claimant's attempts to argue, even after the process described at [30] to [32] above had concluded, that the final list of issues did not accurately reflect his case and that consequently the Tribunal should depart from it.

37. At no point did the claimant either make an application to amend the list of issues or draw the Tribunal's attention to the original particulars of claim in claim 1, 2 or 3 when arguing that the Tribunal should depart from it. Rather he said, on a number of occasions, that the list of issues did not reflect his Scott Schedule. In the Tribunal's view, what the claimant was, with a limited exception, seeking to do was to adjust his arguments as the case progressed to meet difficulties he could see arising in his arguments as a result of his cross-examination or of the evidence of other witnesses. It has therefore decided his claim by reference to the final list of issues as agreed on 23 October 2023.

38. The limited exception was when the claimant was in the view of the Tribunal in effect explaining what an allegation actually meant, when that meaning was unclear. In the case of that limited exception, the Tribunal has considered the allegation both as literally pleaded and in light of the claimant's explanation of it.

<u>Amendments to timetable during hearing</u>

39. As noted above, the claimant's oral evidence began a day late, on Thursday 12 October 2023.

40. On 17 October 2023, with the agreement of the parties, a further amendment was made to the timetable set out in the case management orders of 10 October 2023. This was that the claimant's evidence would continue until 1.30pm on Friday 20 October and so the respondent's evidence would be reduced by 3 hours. This suited both the respondent (who otherwise would have had insufficient time to complete its cross-examination of the claimant) and the claimant (because it gave him the weekend of 21 to 22 October 2023 to finalise his cross-examination preparation).

The issues for the Tribunal to decide

41. The issues that the Tribunal needed to decide are set out in Appendix 1.

The law

<u>Unfair dismissal (including automatic unfair dismissal</u>

42. Section 94 of the Employment Rights Act 1996 ("the 1996 Act") gives an employee the right not to be unfairly dismissed.

43. Section 98(1) of the 1996 Act provides that, when a Tribunal has to determine whether a dismissal is fair or unfair, it is for the employer to show the reason for the dismissal and that such reason is a potentially fair reason because it falls within section 98(1)(b) or section 98(2). The burden of proof to show the reason and that it was a potentially fair reason is on the employer. A reason for dismissal is a set of facts known to or beliefs held by the employer which cause it to dismiss the employee. Conduct (and so misconduct) is a potentially fair reason.

44. Section 101A of the 1996 Act provides that an employee who is dismissed shall be regarded as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee refused or proposed to refuse to comply with a requirement which the employer imposed in contravention of the Working Time Regulations 1998 or refused (or proposed to refuse) to forego a right conferred on them by the Working Time Regulations 1998.

45. Section 103A of the 1996 Act provides that an employee who is dismissed shall be regarded 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. The meaning of "a protected disclosure" is considered further below.

46. Section 104 of the 1996 Act provides that an employee who is dismissed shall be regarded as unfairly dismissed if the reason (or if more than one, the principal reason) for the dismissal is that the employee brought proceedings against the employer to enforce a relevant statutory right or alleged that the employer had infringed a right of his which is a relevant statutory right. "Relevant statutory rights" include the rights conferred by the Working Time Regulations 1998.

47. The burden of proof to prove the reason for dismissal remains on the employer even when the claimant asserts that the dismissal is unfair because the reason (or principal reason) for it was that they had made a protected disclosure or asserted a relevant statutory right. The Court of Appeal in Kuzel v Roche Products Ltd [2008] EWCA Civ 380 approved at [66] the analysis of the burden of proof in this type of case provided by the Employment Appeal Tribunal:

    (1) Has the claimant shown that there is a real issue as to whether the reason put forward by the respondent, some other substantial reason, was not the true reason?

    (2) If so, has the employer proved his reason for dismissal?

    (3) If not, has the employer disproved the s.103A reason advanced by the claimant?

    (4) If not, dismissal is for the s.103A reason.

    In answering those questions it follows:

    (a) that failure by the respondent to prove the potentially fair reason relied on does not automatically result in a finding of unfair dismissal under s.103A;

(b) however, rejection of the employer's reason coupled with the claimant having raised a prima facie case that the reason is a s.103A reason entitles the tribunal to infer that the s.103A reason is the true reason for the dismissal, but

(c) it remains open to the respondent to satisfy the tribunal that the making of the protected disclosures was not the reason or principal reason for dismissal, even if the real reason as found by the tribunal is not that advanced by the respondent;

(d) it is not at any stage for the employee (with qualifying service) to prove the s.103A reason.

48. If the employer persuades the Tribunal that the reason for dismissal was a potentially fair reason, the Tribunal must go on to consider whether the dismissal is fair or unfair within the meaning of section 98(4) of the 1996 Act. This requires the Tribunal to consider whether the decision to dismiss was within the band of reasonable responses. Section 98(4) applies not only to the actual decision to dismiss but also to the procedure by which the decision is reached. The burden of proof is neutral under section 98(4).

49. In considering this question the Tribunal must not put itself in the position of the employer and consider what it would have done in the circumstances. That is to say it must not substitute its own judgment for that of the employer. Rather it must decide whether the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted.

50. When the reason for the dismissal is misconduct, the Tribunal should have regard to the three-part test set out in British Home Stores Limited v Burchell [1980] ICR 303. First, the employer must show that it believed the employee was guilty of misconduct. This is relevant to the employer establishing a potentially fair reason for the dismissal under section 98(1) and, as noted above, the burden of proof is on the employer.

51. Secondly, the Tribunal must consider whether the employer had reasonable grounds upon which to sustain its belief in the employee's guilt.

52. Thirdly, the Tribunal must consider whether at the stage at which that belief was formed on those grounds the employer had carried out as much investigation into the matter as was reasonable in the circumstances. The second and third parts of the test are relevant to the question of reasonableness under section 98(4) and the burden of proof in relation to them is neutral.

53. Turning to matters relevant to remedy, section 123(6) of the 1996 Act requires the Tribunal to reduce the amount of the compensatory award by such amount as it considers just and equitable if it concludes that the claimant caused or contributed to their dismissal. In addition, section122(2) of the 1996 Act requires the Tribunal to reduce the basic award if it considers that it would be just and equitable to do so in light of the conduct of the claimant prior to dismissal.

54. In Nelson v BBC (no.2) [1980] ICR 110, the Court of Appeal found that three factors must be satisfied before the Tribunal can reduce the compensatory award because of contributory conduct. These are that:

54.1. The conduct must be culpable or blameworthy;

54.2. The conduct must have actually caused or contributed to the dismissal;

54.3. It must be just and equitable to reduce the award by the proportion specified.

Wrongful dismissal

55. An employee is entitled to be given notice as set out in their contract of employment if the employer decides to terminate it. Section 86 of the 1996 Act sets out the minimum period of notice that must be given. Alternatively, an employee may be entitled to longer notice under their contract of employment.

56. If an employer fails to give the period of notice required, it will act in breach of contract unless the employee has committed a repudiatory breach of contract and so the employer is entitled to accept that repudiatory breach and terminate the contract without notice.

57. The key issue, therefore, in any claim of wrongful dismissal will often be whether the employee's breach of contract was repudiatory: whether it was sufficiently serious to justify dismissal. That depends on the circumstances. If not justified, the dismissal is wrongful, and the employer is liable in damages.

Protected disclosure detriment

58. Section 47B(1) of the 1996 Act provides that a worker (and so an employee) has the right not to be subjected to a 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".

59. A "protected disclosure" is defined by section 43A of the 1996 Act as a "qualifying disclosure" made in accordance with any of sections 43C to H. Section 43C states that a qualifying disclosure is made in accordance with it if the worker makes the disclosure to their employer.

60. A "qualifying disclosure" is defined in section 43B of the 1996 Act as follows:

…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) 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,

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

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

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

61. The question of whether a disclosure is made "in the public interest" was considered in the leading case of Chesterton Global v Nurmohamed [2017] EWCA Civ 979. Underhill LJ adopted the following approach at [36] and [37]:

The statutory criterion of what is "in the public interest" does not lend itself to absolute rules, still less when the decisive question is not what is in fact in the public interest but what could reasonably be believed to be. I am not prepared to rule out the possibility that the disclosure of a breach of a worker's contract of the Parkins v Sodexho kind may nevertheless be in the public interest, or reasonably be so regarded, if a sufficiently large number of other employees share the same interest. I would certainly expect employment tribunals to be cautious about reaching such a conclusion, because the broad intent behind the amendment of section 43B(1) is that workers making disclosures in the context of private workplace disputes should not attract the enhanced statutory protection accorded to whistleblowers – even, as I have held, where more than one worker is involved. But I am not prepared to say never. In practice, however, the question may not often arise in that stark form. The larger the number of persons whose interests are engaged by a breach of the contract of employment, the more likely it is that there will be other features of the situation which will engage the public interest.

Against that background, in my view the correct approach is as follows. In a whistleblower case where the disclosure relates to a breach of the worker's own contract of employment (or some other matter under section 43B(1) where the interest in question is personal in character), there may nevertheless be features of the case that make it reasonable to regard disclosure as being in the public interest as well as in the personal interest of the worker…. The question is one to be answered by the Tribunal on a consideration of all the circumstances of the particular case, but [counsel for the employee's] fourfold classification of relevant factors which I have reproduced … above may be a useful tool. As he says, the number of employees whose interests the matter disclosed affects may be relevant, but that is subject to the strong note of caution which I have sounded in the previous paragraph.

62. The four factors identified were:

(a) the numbers in the group whose interests the disclosure served;

(b) the nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed – a disclosure of wrongdoing directly affecting a very important interest is more likely to be in the public interest than a disclosure of trivial wrongdoing affecting the same number of people, and all the more so if the effect is marginal or indirect;

(c) the nature of the wrongdoing disclosed – disclosure of deliberate wrongdoing is more likely to be in the public interest than the disclosure of inadvertent wrongdoing affecting the same number of people;

(d) the identity of the alleged wrongdoer – as [counsel for the employee] put it in his skeleton argument, "the larger or more prominent the wrongdoer (in terms of the size of its relevant community, i.e. staff, suppliers and clients), the more obviously should a disclosure about its activities engage the public interest" – though he goes on to say that this should not be taken too far.

63. An employee wanting to rely on the protected disclosure protections bears the burden of proof of establishing the relevant failure. In Boulding v Land Securities Trillium (Media Services) Ltd UKEAT/0023/06 Judge McMullen said:

As to any of the alleged failures, the burden of the proof is upon the Claimant to establish upon the balance of probabilities any of the following:

(a) there was in fact and as a matter of law, a legal obligation (or other relevant obligation) on the employer (or other relevant person) in each of the circumstances relied on;

(b) the information disclosed tends to show that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject.

Direct disability discrimination

64. One of the forms of discrimination prohibited by the Equality Act 2010 ("the 2010 Act") is direct discrimination. This occurs where "because of a protected characteristic, A treats B less favourably than A treats or would treat others" (section 13(1) of the 2010 Act).

65. The question, therefore, is whether A treated B less favourably than A treated or would treat an actual or hypothetical comparator and whether the less favourable treatment is because of a protected characteristic – in this case disability. On such a comparison, there must be no material difference between the circumstances relating to each case (section 23 of the 2010 Act). In a claim of direct disability discrimination the circumstances relating to a case include a person's abilities (section 23(2)(a) of the 2010 Act).

66. Section 212 of the 2010 Act provides that a detriment does not include conduct which amounts to harassment. Consequently, although direct discrimination and harassment claims may be pursued in the alternative, conduct will either amount to a detriment (for the purposes of a direct discrimination claim) or harassment but not both.

Knowledge of disability

67. Section 15(2) of the 2010 Act provides that an employer has a defence to a claim under section 15 (discrimination arising from disability) if it shows that it "did not know, and could not reasonably have been expected to know," of the employee's disability.

68. Paragraph 20(1) of Schedule 8 to the 2010 Act provides that a person is not subject to a duty to make reasonable adjustments if they do not know and "could not reasonably be expected to know" that the employee has a disability and is likely to be placed at a substantial disadvantage by the provision, criterion or practice.

69. The words "could not reasonably be expected to know" leave scope for a finding that an employer had imputed or constructive knowledge of disability. Whether an employer had such knowledge is a question of fact for the Tribunal to decide. It does not matter if there is no formal diagnosis if there are other circumstances from which a long term and substantial adverse effect can be deduced.

70. An employer may be under a duty to make enquiries to establish whether a person has a disability for the purposes of the 2010 Act. However, the extent of any such duty is limited: it does not require every possibly enquiry, particularly where there is little or no basis for doing so (see Ridout v TC Group [1998] IRLR 628 and Secretary of State for Work and Pensions v Alam [2010] ICR 665).

Discrimination arising from disability

71. Under section 15(1) of the 2010 Act, a person (A) discriminates against a disabled person (B) if "A treats B unfavourably because of something arising in consequence of B's disability and A cannot show that the treatment is a proportionate means of achieving a legitimate aim".

Duty to make reasonable adjustments

72. The 2010 Act imposes a duty on an employer (A) to make reasonable adjustments to premises or working practices to help disabled job applicants and employees (section 20 of the 2010 Act). A failure to comply with this duty to make reasonable adjustments is a form of discrimination (section 21 of the 2010 Act).

73. The duty arises for the purpose of this claim "… 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". (Section 20(3)).

Harassment

74. Harassment is defined in section 26(1) of the 2010 Act:

(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.

75. Section 26(4) of the 2010 Act deals with matters to be taken into account when deciding whether unwanted conduct had the relevant effect. The Tribunal must take into account the perception of the claimant, the other circumstances of the case and whether it was reasonable for the conduct to have had that effect.

76. In deciding whether conduct is "unwanted", this is a question of fact which requires the Tribunal to decide whether the conduct was unwanted by the employee (Thomas Sanderson Blinds Ltd v Mr S English UKEAT/0316).

77. Turning to the necessary causal connection, "related to" is a broad test requiring an evaluation of the evidence in the round. It is broader than the "because of" formulation in a direct discrimination claim. In deciding whether conduct "related to" a protected characteristic, the Tribunal must apply an objective test and have regard to the context in which the conduct took place (Warby v Winda Group Plc EAT 0434/11). It is not, however, to be reduced to a "but for" test. It is not enough to show the individual has the protected characteristic or that the background related to the protected characteristic.

78. HHJ Auerbach gave useful guidance in relation to the necessary causal connection in Tees Esk and Wear Valleys NHS Foundation Trust v Aslam [2020] IRLR 495:

> *20. Some basic points about the architecture of the variation of the definition of harassment found in sub-sections 26(1) and 26(4) are worth restating at the outset. Firstly, as Ms Millns correctly submitted, there are three components, all of which must be satisfied, albeit that the third has within it two alternatives. The conduct must be found to be unwanted; it must be found to relate to the relevant characteristic; and it must have either the proscribed purpose or the proscribed effect, or both. Secondly, the test of whether conduct is related to a protected characteristic is a different test from that of whether conduct is "because of" a protected characteristic, which is the connector used in the definition of direct discrimination found in section 13(1) of the 2010 Act . Put shortly, it is a broader, and, therefore, more easily satisfied test. However, of course, it does have its own limits.*
>
> *21. Thirdly, although in many cases, the characteristic relied upon will be possessed by the complainant, this is not a necessary ingredient. The conduct must merely be found (properly) to relate to the characteristic itself. The most obvious example would be a case in which explicit language is used, which is intrinsically and overtly related to the characteristic relied upon. Fourthly, whether or not the conduct is related to the characteristic in question, is a matter for the appreciation of the Tribunal, making a finding of fact drawing on all the evidence before it and its other findings of fact. The fact, if fact it be, in the given case that the complainant considers that the conduct related to that characteristic is not determinative. These propositions, we think, drive from a pure consideration of the language of the statute, and have been articulated in previous authorities including Hartley, O'Brien, and Nailard.*
>
> *…*
>
> *23. It is important to note that much of the discussion in Nailard concerned whether there was harassment related to sex, by virtue of what is called the motivation of the particular individuals concerned, because that was the focus*

of the particular issue in that case. The Tribunal in that case, it was said, needed to focus on the motivation for the conduct of the employed officials, as opposed to that of the lay officials, about whose alleged conduct complaint had been made to the employed officials.

24. However, as the passages in Nailard that we have cited make clear, the broad nature of the 'related to' concept means that a finding about what is called the motivation of the individual concerned is not the necessary or only possible route to the conclusion that an individual's conduct was related to the characteristic in question. Ms Millns confirmed in the course of oral argument that that proposition of law was not in dispute.

25. Nevertheless, there must be still, in any given case, be some feature or features of the factual matrix identified by the Tribunal, which properly leads it to the conclusion that the conduct in question is related to the particular characteristic in question, and in the manner alleged by the claim. In every case where it finds that this component of the definition is satisfied, the Tribunal therefore needs to articulate, distinctly and with sufficient clarity, what feature or features of the evidence or facts found, have led it to the conclusion that the conduct is related to the characteristic, as alleged. Section 26 does not bite on conduct which, though it may be unwanted and have the proscribed purpose or effect, is not properly found for some identifiable reason also to have been related to the characteristic relied upon, as alleged, no matter how offensive or otherwise inappropriate the Tribunal may consider it to be.

79. Unite the Union v Nailard [2019] ICR 28 was a decision of the Court of Appeal dealing with the meaning of "related to".

80. Whether the impugned conduct is sufficiently serious to "violate" a claimant's dignity is essentially a matter of fact for the Tribunal. However, in Richmond Pharmacology v Dhaliwal [2009] ICR 724 Underhill P said:

Not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended.

81. In Betsi Cadwaladr University Health Board v Hughes and others [2013] EAT 0179 Langstaff P affirmed this view, commenting:

…the word "violating" is a strong word. Offending against dignity, hurting it, is insufficient. "Violating" may be a word the strength of which is sometimes overlooked. The same might be said of the words "intimidating" etc. All look for effects which are serious and marked, and not those which are, though real, truly of lesser consequence.

82. Langstaff J said this at [21] of Weeks v Newham College of Further Education UKEAT/0630/11/ZT in relation to "environment":

An environment is a state of affairs. It may be created by an incident, but the effects are of longer duration. Words spoken must be seen in context; that

context includes other words spoken and the general run of affairs within the office or staff-room concerned. We cannot say that the frequency of use of such words is irrelevant.

83. Consequently, whilst a one-off act may violate an employee's dignity, it would not be sufficient to create a degrading environment.

Victimisation

84. Victimisation is defined in section 27 of the 2010 Act:

(1) A person (A) victimises another person (B) if A subjects B to a detriment because—

(a) B does a protected act, or

(b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act—

(a) bringing proceedings under this Act;

(b) giving evidence or information in connection with proceedings under this Act;

(c) doing any other thing for the purposes of or in connection with this Act;

(d) making an allegation (whether or not express) that A or another person has contravened this Act. …

85. The causal connection required is the same as in a direct discrimination claim. It is not a "but for" test but an examination of the real reason of for the treatment. As such, it is necessary to consider the employer's motivation (conscious or unconscious).

86. Section 212 of the 2010 Act provides that a detriment does not include conduct which amounts to harassment. Consequently, although victimisation and harassment claims may be pursued in the alternative, conduct will either amount to victimisation or harassment but not both.

Burden of proof

87. Section 136 of the 2010 Act provides for a shifting burden of proof:

(1) This section applies to any proceedings relating to a contravention of this Act.

(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.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

88. The correct approach to the shifting burden of proof remains that set out in the guidance contained in Barton v Investec Securities ltd [2003] IRLR 332 approved by the Court of Appeal in Igen Ltd v Wong [2005] IR 931 and further approved recently in Efobi v Royal Mail Group Ltd [201] ICR 1263.The Barton guidance is as follows:

(1) Pursuant to s 63A of the SDA 1975, it is for the claimant who complains of sex discrimination to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the claimant which is unlawful by virtue of Part II or which by virtue of s 41 or s 42 of the SDA 1975 is to be treated as having been committed against the claimant. These are referred to below as "such facts".

(2) If the claimant does not prove such facts he or she will fail.

(3) It is important to bear in mind in deciding whether the claim-ant has proved such facts that it is unusual to find direct evidence of sex discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the dis-crimination will not be an intention but merely based on the assumption that "he or she would not have fitted in".

(4) In deciding whether the claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.

(5) It is important to note the word "could" in SDA 1975 s 63A(2). At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.

(6) In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts.

(7) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw in accordance with s 74(2)(b) of the SDA 1975 from an evasive or equivocal reply to a questionnaire or any other questions that fall within s 74(2) of the SDA 1975.

(8) Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant and if so, take it into account in determining, such facts pursuant to s 56A(10) of the SDA. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.

(9) Where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of sex, then the burden of proof moves to the respondent.

(10) It is then for the respondent to prove that he did not commit, or as the case may be, is not to be treated as having commit-ted, that act.

(11) To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since "no discrimination whatsoever" is compatible with the Burden of Proof Directive.

(12) That requires a tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not a ground for the treatment in question.

(13) Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice."

89. There is therefore a two-stage process to the drawing of inferences of direct discrimination. In the first place, the claimant must prove facts from which the tribunal could conclude in the absence of any other explanation that the respondent had committed an act of discrimination against the complainant. If the burden does shift, then the employer is required to show a non-discriminatory reason for the treatment in question.

90. In Efobi the Supreme Court confirmed the point that a Tribunal cannot conclude that "there are facts from which the court could decide" unless on the balance of probability from the evidence it is more likely than not that those facts are true. All the evidence as to the facts before the Tribunal should be considered, not just that of the claimant.

91. In Madarassy v Nomura International plc [2007] ICR 867 the Court of Appeal stated that "could conclude" must mean "a reasonable Tribunal could properly conclude" from all the evidence before it. The Court of Appeal also pointed out that the burden of proof does not shift simply on proof of a difference in treatment and the difference in status. This was because it was not sufficient to prove facts from which a Tribunal could conclude that a respondent could have committed an act of discrimination.

92. The position in relation to the burden of proof was helpfully summarised by Underhill LJ in Base Childrenswear Ltd v Otshudi [2019] EWCA Civ 1648 at [18]:

It is unnecessary that I reproduce here the entirety of the guidance given by Mummery LJ in Madarassy. He explained the two stages of the process required by the statute as follows:

(1) At the first stage the Claimant must prove "a prima facie case". That does not, as he says at para. 56 of his judgment (p. 878H), mean simply proving "facts from which the Tribunal could conclude that the Respondent 'could have' committed an unlawful act of discrimination". As he continued (pp. 878-9):

"56. … 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) [of the Sex Discrimination Act 1975] must mean that 'a reasonable Tribunal could properly conclude' from all the evidence before it. …"

(2) If the Claimant proves a prima facie case the burden shifts to the Respondent to prove that he has not committed an act of unlawful discrimination – para. 58 (p. 879D). As Mummery LJ continues: "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." He goes on to explain that it is legitimate to take into account at the first stage all evidence which is potentially relevant to the complaint of discrimination, save only the absence of an adequate explanation.'

93. In deciding whether there is enough to shift the burden of proof to the respondent, it will always be necessary to have regard to the choice of comparator, actual or hypothetical, and to ensure that they have relevant circumstances which are the same or not materially different as those of the claimant having regard to section 23 of the Equality Act 2010.

94. When the claim is not one of direct discrimination, the way in which the shifting burden of proof provision will apply depends upon the provision concerned:

94.1. In a complaint of discrimination arising from disability, the claimant will need to establish that they have been treated unfavourably and will have to prove that the something upon which they rely arises in consequence of their disability. They will also need to adduce some evidence to suggest that the unfavourable treatment could be because of the something arising.

94.2. In a complaint for reasonable adjustments, the burden of proof shifts when the claimant has proved that there is a PCP which puts them at a substantial disadvantage compared to a non-disabled person and, also, that there are facts from which it could reasonably be inferred in the absence of an explanation that it has been breached. As such there must be some evidence of an apparently reasonable adjustment that could have been made.

94.3. In a complaint of harassment, the claimant will need to establish on the balance of probabilities that they have been subjected to unwanted conduct which had the purpose or effect of violating their dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment. They will also need to adduce some evidence to suggest that the conduct could be related to a protected characteristic.

94.4. In a complaint of victimisation, if the claimant proves that they have done a protected act and that they have then suffered a detriment at the hands of the employer, a prima facie case of discrimination which shifts the burden of proof to the employer will be established if there is evidence from which the Tribunal could infer a causal link.

<u>The Working Time Regulations 1998 (“the 1998 Regulations”)</u>

95. Regulation 30 of the 1998 Regulations allows a worker (and so an employee) to present a complaint to a Tribunal that his employer has “refused to permit him to exercise any right he has under” specified regulations.

96. The relevant regulations include regulation 10(1) (the right to a “rest period of not less than eleven consecutive hours in each 24-hour period during which he works for his employer”) and regulation 11(1) (the right, subject to the respondent choosing a reference period of 14 days, “to an uninterrupted rest period of not less than 24 hours in each seven-day period during which he works for his employer”).

<u>Detriment – section 45A Employment Rights Act 1996 (working time cases)</u>

97. Section 45A of the 1996 Act provides that a worker (and so an employee) has the right not to be subjected to a detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker:

(a) refused (or proposed to refuse) to comply with a requirement which the employer imposed (or proposed to impose) in contravention of the Working Time Regulations 1998,

(b) refused (or proposed to refuse) to forgo a right conferred on him by those Regulations,…

…(f) alleged that the employer had infringed such a right.

<u>Unauthorised deductions from wages</u>

98. Section 13 of the 1196 Act provides that an employer may not make a deduction from the “wages” of a worker unless the deduction is required or authorised by virtue of a statutory provision or a relevant provision of the worker’s contract or the worker has previously signified in writing their agreement or consent to the making of the deduction.

<u>Time limits</u>

<u>*Claims under the 2010 Act*</u>

99. Section 123 of the 2010 Act provides where relevant as follows.

(1) Subject to sections 140B, proceedings on a complaint within section 120 may not be brought after the end of –

(a) the period of 3 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…

…

(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.

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—

(a) when P does an act inconsistent with doing it, or

(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

Detriment claims under the 1996 Act

100. Section 48 of the 1996 Act provides that a worker (and so an employee) may present a complaint to the Tribunal that he has been subjected to a detriment in breach of section 45A or section 47B. Section 48(3) of the 1996 Act deals with time limits:

(3) An [employment tribunal] shall not consider a complaint under this section unless it is presented—

(a) before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them, or

(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.

(4) For the purposes of subsection (3)—

(a) where an act extends over a period, the "date of the act" means the last day of that period, and
(b) a deliberate failure to act shall be treated as done when it was decided on;…

Claims under the 1998 Regulations

101. Regulation 30(2) of the 1998 Regulations provides that, subject to any extension of the time limit to facilitate Acas conciliation:

(2) … an employment tribunal shall not consider a complaint under this regulation unless it is presented—

(a) before the end of the period of three months (or, in a case to which regulation 38(2) applies, six months) beginning with the date on which it is alleged that the exercise of the right should have been permitted (or in the case of a rest period or leave extending over more than one day, the date on which it should have been permitted to begin) or, as the case may be, the payment should have been made;

(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three or, as the case may be, six months.

102. The 1998 Regulations do not contain any provision equivalent to that contained in section 48(3)(a) of the 1996 Act, which provides that when the complaint relates to an act which is part of a series of similar acts, the time limit runs from the last act in the series.

Closing submissions

103. As noted, above the parties provided lengthy written closing submissions and we do not produce or summarise them here.

104. In addition, Mr Crow for the respondent made extensive oral submissions in relation to the claimant's written closing submissions. In the interests of relative brevity, again we do not set them out here.

105. By contrast, the claimant's oral submissions were limited and we do summarise them here, because they perhaps provide a reasonable overview of his case. The claimant's oral submissions may be reasonably summarised as follows:

105.1. The claimant had believed throughout – and continued to believe – that the treatment he had received was discrimination related to his disability and victimisation after he had raised an issue in relation to the way right to work checks were carried out in relation to a new employee. He believed that he had been discriminated against in 2019 and 2020.

105.2. The claimant had had little idea about what was going on in early 2020 when he was suspended. The respondent contended that his grievance letter of early February 2020 was all about disability discrimination and yet the respondent had never explained why this issue had not been dealt with in the outcome letters following the disciplinary process and grievances. The respondent had not produced documentary or witness evidence that explained credibly why he had been treated differently and why the difference in treatment was not caused by discrimination.

105.3. The respondent had admitted in oral evidence that his complaint about the right to work issue had never been looked at properly. However, something had gone wrong on the day the right to work check had been carried out. The respondent said his dismissal resulted from the email he had sent to another employee, PR, at 12.33 on 16 December 2019 ("the PR email of 16 December") (DB 4244) but there was no credible explanation as to why he had

been treated more severely than other employees guilty of more serious breaches of confidentiality.

105.4. Further, having regard to the terms of his contract and the respondent's procedures, nothing in the PR email of 16 December could be regarded as a severe breach of confidentiality or of one of the respondent's procedures. The breach had not resulted in financial or reputational damage and had not even been logged on the respondent's own systems. It was not reasonable to classify it as the reason for the claimant's suspension and subsequent dismissal.

105.5. When the claimant had asked the Information Commissioner's Officer ("ICO") about the 16 December email, it had said that, since the information had never left the respondent's organization, it was a matter for the respondent's procedures. The claimant accepted that he could have said what he said in the PR email of 16 December in a more measured manner, and would have done so if able to do so, but nobody had even now explained the gravity of what he had done clearly. It had not been reasonable of the respondent to use that single email to either suspend or dismiss him.

105.6. If Mr Biggin and the respondent had wished to dismiss him and it was not about the 16 December email, then what was it about him that they did not like? The respondent's subsequent actions in running a six month long internal process and then defending the claims brought by the claimant as they had done did not make financial sense. What in the PR email of 16 December could possibly have justified such expense and, also, the effect of suspension and dismissal on the claimant's life?

105.7. The processes had been run in a punitive manner and nobody could seriously believe that the PR email of 16 December justified what had then happened. It was clear that something else was behind what had occurred and in the absence of a credible answer or explanation it was either because of the claimant's disabilities, or because he had spoken out, or because of some other hidden reason. There was no evidence showing that the single email justified what had then occurred.

105.8. The claimant submitted that there was still a lack of transparency concerning AJ's complaint about him. For example, it was not clear when the complaint had been made. The claimant had been given inconsistent information about such matters. Further, the matters pursued against him had occurred some time before he had actually been suspended. This begged the question of just how seriously the respondent really viewed the PR email of 16 December.

105.9. The claimant submitted that policies had been followed inconsistently. Other staff members had been given the opportunity to learn from their mistakes, but he had not.

105.10. Finally, the claimant turned to the respondent's knowledge of his disabilities. The respondent had had actual and constructive knowledge of his disabilities in 2019 and 2020 and it had been clear that he required reasonable

adjustments, but none had been made. Mr Biggin had not wanted someone working for him he would only work the basic hours or who would need adjustments, because that would make him look bad in front of other executive team members.

105.11. Further, there was little doubt that disability had a bearing on what happened in December 2019, i.e. when he sent the PR email of 16 December. Having worked long hours for many months, and having increased the amount of modafinil that he was taking, there had been a decline in him being able to conduct himself appropriately. However, the respondent had never been prepared to investigate this by asking for a medical expert about it. If the respondent had done so that would have prevented everything that had followed. The claimant had not understood how everything had been affecting him by December 2019 because nobody had told him.

Findings of fact

106. Under this heading we first set out general findings of fact in relation to the terms under which the claimant was employed, events between 2016 and the end of 2019, the disciplinary and grievance processes followed in 2020, and the claimant's credibility. Further specific findings of fact are included in the conclusions section of the judgment in relation to the specific issues to which they relate.

107. A feature of this claim is that the claimant has set out exhaustively what he regards as the background to his dismissal from 2016. We have found much of this background to be of very limited relevance, and have limited our findings of fact in relation to it accordingly.

The terms on which the claimant was employed

108. The claimant's employment with the respondent began on 7 March 2016. He was initially employed as "Head of IT". He subsequently became "Head of ICT".

109. The respondent is a charity, previously known as the Rehabilitation for Addicted Prisoners Trust. It provides rehabilitation services for people suffering from alcohol and drug addictions within the prison service and runs community-based projects. As such it works with vulnerable people in circumstances where confidentiality is self-evidently important.

The claimant's contract of employment

110. The claimant was employed under the terms of a contract dated 24 February 2016 (DB 279). Clause 4.2.3 required the claimant to comply with "all regulations and reasonable and lawful directions and instructions given to him by the Organisation or anyone authorised by it". Clause 4.4 of his contract required him to comply with "any rules, policies and procedures" of the respondent. Clause 14.1 gave the respondent the power to dismiss the claimant without notice if he was "guilty of any gross misconduct affecting the business of the Organisation".

111. The respondent had a number of policies relevant to this claim. We now turn briefly to these. We find that the claimant was aware of them and of their contents.

The respondent's disciplinary policy and procedure

112. The respondent had a disciplinary policy and procedure ("the disciplinary procedure") which applied to the claimant. The examples it gives of general misconduct (DB 45) include "inappropriate behaviour that is not serious enough to warrant gross misconduct" and "Company policy breaches that are not serious enough to warrant gross misconduct". The examples it gives of gross misconduct (DB 46) include "serious company policy breaches" and "disclosure of confidential information to unauthorised persons".

The respondent's code of conduct

113. The respondent had a code of conduct ("the code of conduct"). This included provisions requiring employees to behave in a "professional, respectful and courteous manner at all times" (DB 57). It included a detailed section on "Confidentiality of Information" at its section 4.4:

> *Employees must always be aware of the confidentiality of information gained during the course of their duties whilst working for The Forward Trust, which in many cases includes access to personal information relating to clients* ***and other employees****. Information given to an employee by clients should be shared as appropriate with their team and manager. Under no circumstances should employees keep this information to themselves. It is expected that employees understand the importance of treating information, including electronically stored data, client files, reports and work property (including security passes and work keys), securely, and in a discreet and confidential manner.* ***Any breach of confidentiality may be regarded as gross misconduct and be the subject of disciplinary action which could result in dismissal.*** [Emphasis added.]
>
> *Protected information which may be detrimental to The Forward Trust, employees or service users must be treated as confidential to the organisation except where there is an over-riding duty to report it and deal with it under the organisation's Whistleblowing Policy and Procedure.*

The respondent's confidentiality & information sharing policy

114. The respondent had a confidentiality & information sharing policy ("the confidentiality policy") (DB 139). The provisions it contained included the following:

114.1. Confidential information is defined so as to include "personal details of any… employee" and "information contained within the personnel records of any employee" (DB 142);

114.2. Confidential information must only be shared with the express consent of the data subject, or where there is significant legal or ethical justification to do so (DB 139);

114.3. Confidential information should be used when absolutely necessary, access should be on a need-to-know basis and the minimum that is required should be used (the Caldicott Principles at DB 140);

114.4. "A breach of confidentiality without legitimate need, directly or indirectly, is a disciplinary offence, which could result in dismissal and/or prosecution" (DB 148);

114.5. "It is also important to note that a legal "Duty of Confidentiality" continues even after individuals or staff members have left the organisation, and after death" (DB 148).

The respondent's sickness absence policy & procedure

115. The respondent had a sickness absence policy & procedure (DB 161) ("the sickness absence procedure"). The first three bullet points at its paragraph 3 stated:

Employees have a responsibility to:

- *Follow the sickness notification procedures, including informing their manager and submitting any required certification(s) of sickness; and adhere to timescales contained within the procedures.*

- *Call their line manager and speak to them personally to notify them of their sickness absence, unless there are exceptional circumstances. This must be done on the first day of absence and before their usual start time. Employees should give an indication of the duration of their absence and, if known, when they expect to return to work. Failure to notify your line manager without good reason will amount to unauthorised absence. Unauthorised absence is unpaid and may form the basis for disciplinary action for anything up to and including gross misconduct, which could lead to termination of employment. Entitlement to sick pay may also be affected by late notification.*

- *Ensure that their manager is kept informed of their absence and expected duration, at mutually agreed intervals throughout the period of sickness absence.*

The claimant's credibility

116. We deal with the credibility of various of the witnesses where that issue arises below. However, the credibility of the claimant is of more significance than that of any other single witness and so we deal with it here.

117. We did not find the claimant to be a credible witness for the following reasons:

117.1. **Amending allegations to fit the evidence:** the claimant has, we find, on a number of occasions sought to amend the allegations to fit the evidence. An example of this is the allegations of direct disability discrimination considered at issues [22.1] to [22.3] below which, in their final form, are allegations against Mr Biggin in respect of the period July 2019 to January

2020. The start date had originally been June 2019. During the hearing the claimant accepted that Mr Biggin did not know about the relevant disability in June 2019 and therefore wished to amend the start date for the allegation to July 2019. However, we find that he did this not because he accepted that he had made a mistake in relation to the start date for the treatment complained of but because he recognised the impossibility of the cause of an event post-dating it. As such his revised position appeared to us to be that the cause of the treatment complained of had been one thing in June and another from July, which is inherently improbable.

117.2. **Making allegations without evidence:** some of the allegations have been made without there being any evidence to support them. An example of this is the allegation of discrimination arising from disability against HG considered at issue [26.3]. HG is said to have failed to consider the claimant's grievances and health despite the facts that: (1) she was not involved in the grievance process in any way; and (2) there is no evidence that at the time of her very limited involvement in the matters giving rise to this claim she had knowledge either of the claimant's disabilities or of the claimed "things arising from".

117.3. Inconsistency/wanting to have it both ways: the claimant's evidence and the documents often show the claimant to be inconsistent in that he has wanted to "have things both ways". For example, he criticises the respondent for not being able to produce the 2016 OH report repeatedly but then also criticises them for seeking to obtain it "without my consent" (his witness statement paragraph 377). Equally, in the context of his GDPR arguments he contended that his disabilities were not relevant to his grievance (see our findings at [33.22.1] below in this respect) but has pursued complaints in these proceedings that his disability status was insufficiently addressed in the grievance outcome (see issue [33.22] below).

117.4. Maintaining allegations in the face of all the evidence/making mountains out of molehills: the claimant has shown a tendency to maintain allegations in the face of all the evidence when cross-examined and, also, to exaggerate the significance of minor events. For example, one of the issues addressed below is that on two occasions the claimant received his payslips later than he should have done because his access to Cascade was removed when he was suspended. This matter is considered at issue [39.11] below (Allegation 20.2 (lvii)). In summary, there were brief delays because of the removal of Cascade access and, on each occasion, Mr Blackburn posted hardcopy pay slips within a short period of time. The evidence simply does not suggest either that Mr Blackburn deliberately deprived the claimant of his payslips or that what he did (or did not) do was in any way related to a protected act of which we have found Mr Blackburn was unaware. However, at the end of cross-examination on this point, the claimant maintained his allegation that this was an act of victimisation and declined to accept that Mr Blackburn had posted the payslip when he had said he had because, the claimant said, there was no evidence that it had been posted – for example the respondent's post book. This was a wholly unrealistic position.

117.5. **Mischaracterising evidence:** the claimant has shown a tendency to mischaracterise evidence to fit his theory of how he has been unfairly treated. For example, the letter of 13 March 2020 headed "Rescheduled Formal Meetings" (DB 1660) states:

> *Taking into account the allegations of gross misconduct and misconduct against you and the issues you have raised as part of your formal grievance, coupled with the negative impact you say this continuing situation is having on your health, we believe it is in your best interests to conclude the grievance and disciplinary procedures as soon as possible.*

117.6. When asked about this in cross-examination he said that this section of the letter "makes it obvious that the decision had already been made", when in fact it clearly does no such thing.

2016 to 2018

118. The claimant raises no significant issues in relation to his employment in 2016 and 2017. However, during the course of 2018, he experienced difficulties in his relationship with ST, an employee in the HR department who had begun work in 2017. He was also disappointed when in 2018 he received a bonus of £1000 when he had been hoping to receive one of £2000. This resulted in the claimant telling Mr Biggin on 19 June 2018 (DB 3861):

> *I'm also no longer happy to do the Out of Hours work for time in lieu as I have been the only person doing it since I started – I want to be paid standard x 1.5 rate for overtime – this was done in retrospect for the East Kent Project in 2017 by Merlin & Caroline Gilmartin so this is not unheard of at Forward Trust.*

119. Mr Biggin responded to this and other communications on 26 June 2018 (DB 4685). He said that ahead of a planned meeting the claimant should consider:

- *The effect that taking the actions you say you intend to take will have on my attitude to flexibility in other areas and the fact that I will have to have a clear demaraction between the 35 hrs required in the office and the additional hours.*

- *Whether or not your stated way of working delivers the flexibility I require in a Senior Management role.*

120. The claimant did in fact then apologise saying that he had been "out of order in relation to the tone of emails recently" (DB 4658). We note that the claimant's contract of employment did not entitle him to overtime (or, indeed, time off in lieu) if he worked more than a certain number of hours per week. Its clause 6.1 (DB 285) stated (where relevant):

> *The Employee's normal working hours shall be 35 hours per week between Monday and Friday with a one hour lunch break… There may be additional hours as are necessary for the proper performance of his/her duties. The Employee acknowledges that due to the nature of the business, flexibility of*

hours is paramount and that s/he shall not receive further remuneration in respect of such additional hours.

121. Further, clause 6.1 included an opt out from the maximum working week of 48 hours established by regulation 4(1) of the 1998 Regulations. It stated (where relevant):

In accordance with Regulation 5 of the WTR you agree that Regulation 4(1) of the WTR will not apply to the Employee's employment with the Organisation. You may at any time give three months' written notice to withdraw your agreement to this.

122. The Tribunal finds that these are unsurprising and unexceptional provisions for a contract of employment for someone holding the position the claimant held.

123. A further difficulty arose between Mr Biggin and the claimant in July 2018. An issue arose in respect of the period 16 to 19 July 2018. Mr Biggin took the view that the claimant was absent from work without authorisation and had failed to deliver work required for the Quarterly Strategy Review ("QSR").

124. On 16 July 2018 the claimant had copied Mr Biggin in on an email to the IT department (DB 473) saying he was working from home because it was "too hot". The claimant was also not in the office on 17 or 18 July and Mr Biggin's evidence is that, when he checked the claimant's diary, there was nothing to indicate where he was. Mr Biggin emailed the claimant on 17 July 2018 (DB 480) asking the claimant where he was. He received no reply and then emailed the claimant again on 18 July (DB 479) saying that he considered the absence of 17 July to be unauthorised and that "I will continue to regard your absence as unauthorised until such time as you convince me otherwise". The claimant again did not reply or attend work on 19 July and again Mr Biggin says there was nothing in his diary indicating where he was. Mr Biggin, having also failed to contact the claimant by telephone, then attended the claimant's house at around 13.00 because he was "concerned for his welfare" (JB 47).

125. The exchange between Mr Biggin and the claimant when he attended the claimant's house (which was close to their workplace) on 19 July 2018 was captured by the claimant's CCTV system and a fragment of it was retained by the claimant. Without setting out the recording in full, the claimant on answering the door says "Oh, John, hello". Mr Biggin is heard to say "what's wrong?". The claimant says "I'm waiting for my plumber". Mr Biggin goes on to say "no [name] come on, it's Thursday, I've been trying to contact you all week. The reason I am here is that I am worried about you". The claimant says "ok" and Mr Biggin continues "clearly you are not worried about work". The claimant replies "I am worried about work" to which Mr Biggin says "it doesn't seem it" and continues "you need to get yourself back next week because you need to talk to me about what is going on here". The claimant says "ok" again and then Mr Biggin continues "I've been trying to get hold of you all week, I've emailed you, I've rung you on both phones, I've left messages so I've decided today to come round and see you, you obviously weren't expecting me clearly…".

126. Mr Biggin says he then made a detailed note of what had happened on 23 July 2018 (DB 491-496). He says that by the time he did so the claimant's diary for the previous week showed entries that had not been there when he had looked the previous week. Amongst other things the entries showed the claimant as having been "unwell" on Wednesday and Friday. Mr Biggin says that when he spoke to the claimant following his return to work he "reminded him of the proper process and the need to seek prior authorisation and keep me informed" (JB 54). He also say that he told him that a recurrence "would result in us having to follow a formal procedure" (JB 55).

127. By contrast the claimant's account of these few days is very different. During those days he had been on an authorised work trip, had booked a half-day off to book with the plumber on Thursday and had called in sick on the Wednesday. He says that he had left a message for Mr Biggin saying that he was sick. Further, Mr Biggin had approved the half day off (DB 3873). In summary, Mr Biggin had known where he was throughout and there had been no good reason to visit him at home.

128. We find that although it may be that Mr Biggin missed a phone message and perhaps even approved half a day's absence, he was on the days in question unaware of the claimant's whereabouts. This was why he sent the emails that he sent and, also, in the end visited the claimant at home. It is reflected in what he said when he visited the claimant at home. We find that the claimant did not take quite simple steps that he could have taken to inform Mr Biggin of his whereabouts – in particular, responding to the emails. We also find that the claimant was aware that Mr Biggin did not know his whereabouts and that this was reflected in his reaction to Mr Biggin's visit. At no point during their interaction did he say anything which suggested that Mr Biggin should have known where he was. We further find that the claimant wrote up diary entries after the event in an attempt to suggest that Mr Biggin should have known his whereabouts. We so find because we accept Mr Biggin's evidence that he had checked the claimant's diary in an attempt to locate him and his diary showed nothing.

129. To the extent that this requires us to prefer the evidence of Mr Biggin to that of the claimant we do so because it is inherently improbable that Mr Biggin would have sent the emails he did and paid the claimant a visit at home if the claimant's diary had shown where he was.

2019

Pressure of work

130. Throughout much of 2019 the claimant was under considerable pressure of work as a result of both planned and unplanned work required of the ICT department. The planned and unplanned work undertaken by the claimant's department in 2019 included having to obtain a particular cyber security accreditation after gaining a DWP contract, the head office move in the summer of 2019, the need to move the respondent's systems in Hull to supported windows versions, a significant computer virus problem in September and the implementation of SharePoint.

131. AS, a member of the claimant's team had significant periods off work sick (DB 3857) and the suspension of AJ in September 2019 – to which we return below - also resulted in the claimant losing another regular and senior member of staff.

132. It is clear that the claimant found it difficult to cope with pressure of work during 2019 and this resulted in outbursts to Mr Biggin and threats of resignation. One example of this is his email to Mr Biggin of 16 April 2019 (DB 826) where he also set out a significant number of days off that he would take as "TOIL". Another example of an expressed intention to leave was his email to Mr Biggin of 8 May 2019 (DB 845). Throughout 2019, the claimant often expressed himself to Mr Biggin in an intemperate manner. We find that this had a negative effect on Mr Biggin's view of how satisfactory an employee the claimant was.

Incidents affecting how Mr Biggin saw the claimant

133. There were also a variety of incidents involving the claimant in 2019 which we also find affected in a negative way how Mr Biggin saw the claimant as a senior employee. These included the following:

133.1. **The EH incident and subsequent complaint:** In June 2019 there was an incident between the claimant and the then Finance Director, EH. The claimant emailed Mr Biggin about this on 10 June 2019 (DB 918) stating that he wished to raise a formal grievance. He said he could no longer work with EH. He said "We will start this tomorrow when I'm in and I'm not backing down". Mr Biggin replied on 11 June 2019 (DB 921) saying that if the claimant wished to make a formal complaint he would need to do that in writing. Mr Biggin also commented that he did not like the "tone of your email to me about [EH]".

133.2. Mr Biggin investigated the incident between the claimant and EH and concluded both were to blame. Mr Biggin drafted a reply to the claimant in relation to his written complaint and was ready to send this on 30 October 2019 (DB 5088). We accept his evidence that he forgot to email the letter on that date and it remained in his draft items until 9.53 am on 19 December 2019 when he found and sent it (DB 5087) with an apology ("Sorry, I have forgotten to send this as it was in my drafts box").

133.3. **The Hull getting in touch incident:** In August 2019 there was an occasion when Mr Biggin again found it difficult to get in touch with the claimant who was on a work trip to Hull. The claimant apologised explaining that his phone had died (DB 1094).

133.4. **The right to work incident:** On 21 October 2019 TO, a volunteer who was becoming an employee, had had to submit documents showing her right to work in the UK. The member of the HR department dealing with this, EO, was unfamiliar with the particular documents that TO had provided. EO obtained legal advice and the matter was resolved satisfactorily by 5pm on the day. The claimant complained about this to Ms Thatcher on 23 October 2019 (DB 3459) and also emailed Mr Biggin on the same day (DB 4125) alleging that there had been "discrimination". The claimant chased a reply in relation to his concerns on 10 December 2023 (DB 3499) and on the same dated Ms Thatcher replied (DB 3498) saying that EO was within her rights to seek legal

advice because “it was a document she had not seen before and it was dealt with on the same day”.

133.5. Mr Biggin eventually wrote to the claimant about this issue on 19 December 2019 at 9.53 am (DB 4246). He said it was clear that EO had not discriminated against TO and that the reason she had taken additional advice was that:

> *… she had not come across this form of ID previously and given the hefty fines attached to getting the RTW process wrong, she felt she needed more clarity.*

133.6. We find that TO herself had no significant concern in relation to this matter on the day: her documents were returned to her at the end of normal working hours. We find the claimant’s pursuit of the issue wholly disproportionate and conclude that it can only reasonably be explained by a desire to find fault in the work of the HR department. On any realistic assessment, the action of EO in seeking external advice was wholly unremarkable and understandable.

134. However, it is important not to exaggerate the significance of such issues on the relationship between Mr Biggin and the claimant. We find that throughout 2019 Mr Biggin engaged with the question of the claimant’s wellbeing at the Quarterly Line Management Review meetings (PB 3398-3400). It was a topic for discussion at each such meeting. The minutes of 23 May 2019 record a commitment “to work on ways to manage the repayment of our of hours time more effectively”. The minutes of 23 October 2019 record Biggin saying “I have now agreed a temp and hopefully [the claimant] will be able to manager his work life better in coming weeks”. Mr Biggin was as such concerned to make the claimant’s working life easier when possible. Equally, Mr Biggin obtained an increase to the claimant’s salary from 1 October 2019 after putting forward an “extra-ordinary business case” (DB 3464). Such a case was necessary because in principle staff members at or above the grade of Head were not receiving pay increases in 2019.

<u>The dismissal of AJ and the PR email of 16 December</u>

135. On 27 September 2023 AJ, a member of the claimant’s team, was suspended and an investigation into suspected misconduct was begun. On 12 November, Mr Blackburn informed the claimant that there would be a formal disciplinary hearing (DB 4161). On 22 November, Mr Blackburn sent an email to the claimant informing him that AJ had been told of the decision to dismiss him summarily for gross misconduct (DB 4167). The initial appeal deadline was 6 December 2019. Mr Blackburn said:

> *In terms of updating your team, my advice is to say that AJ has been dismissed following a lengthy disciplinary procedure, because of negligence and a serious breach of the ICT policy. We need to balance the need to update the team with AJ’s right to confidentiality and right of appeal, so I don’t think it is appropriate to say anything further, and if any questions are asked, do let me know and we can agree what else should be disclosed to the team on a need-to-know basis.*

Given that AJ might appeal and that process would then need to be followed, you may choose to inform the team on a need-to-know basis.

136. On 4 December 2019 the claimant sent Mr Blackburn an email with the subject line "Communication internally – advice pls", copying in Ms Thatcher and Mr Biggin (DB 4175). He asked:

James and Gee obviously know everything, however what can I and what can't I say about AJ leaving right now so that I can communicate our plans to the staff involved?

137. Ms Thatcher responded on the same day (DB 4175) saying:

I would simply say that AJ is no longer with the team.

138. We find in light of these emails that it is clear that the claimant understood that the fact of AJ's dismissal for gross misconduct was confidential. We reject his apparent assertion that such understanding related only to the period when AJ might appeal.

139. During the course of the disciplinary process against him, AJ made certain allegations against the claimant. AJ's oral evidence, which we accept, was that he was told by Mr Blackburn that the disciplinary process against him would be followed but that if he wished to give a witness statement about such matters when that had concluded then he would be free to do so. We accept his evidence that this resulted in him writing out the witness statement which was at DB 3511 which is dated 13 December 2019 and which was subsequently typed out by Mr Blackburn. We also accept AJ's evidence that he sent the messenger messages at DB 3077 to a former colleague complaining about the claimant.

140. On 13 December 2019 an employee, PR, emailed the IT helpdesk saying he could not check email or other apps on his phone. The claimant picked up the query later that day and replied (DB 3514) explaining that PR needed to update his security settings and giving him instructions on how to do this. He finished his email "Any problems please come into Edinburgh House so we can assist". PR replied on 16 December and expressed surprise that his phone was not compliant, noting that AJ had updated it in September. He went on "Anyway, are you free either today or tomorrow to updated [sic] what it needs to be updated?". The claimant replied to that email a few hours later saying (DB 3513):

Pedro,

Either make your phone comply by doing the security changes necessary or don't use it. In case you don't know AJ was suspended and then fired for Gross Misconduct. We are constantly fine tuning security settings, if you want your phone to work with our systems you will (like all of us and EVERY other staff member) need to conform to the security policies We employ Zero Trust principles here as approved by ET where possible now.

141. This is "the PR email of 16 December". Two further emails were exchanged. The claimant's final email (DB 3512) was sarcastic and rude.

142. The Tribunal finds that by sending the PR email of 16 December the claimant was quite clearly in breach of various provisions contained in the policies and procedures referred to above. In particular:

142.1. The fact that an employee has been dismissed for gross misconduct is self-evidently confidential. There was no need to tell PR about the reasons for AJ's dismissal. The claimant had as such not treated the information in a "discreet and confidential manner". The PR email of 16 December was therefore a breach of the code of conduct.

142.2. Further, the reason for AJ's dismissal quite clearly fell within the definition of confidential information contained in the confidentiality policy. AJ's consent had not been obtained and there was no "significant legal or ethical justification" for its disclosure to PR. Further, its disclosure to PR was not in accordance with the Caldicott principles because it was not "absolutely necessary". The PR email of 16 December was as such a breach of the confidentiality policy.

143. The Tribunal also finds that the reason the claimant referred to AJ's dismissal in the PR email of 16 December was not that he believed it to be relevant to the matter in hand – the security settings on PR's phone. Rather it was because he was irritated by PR wanting him to update his phone instead of PR sorting it out himself. His irritation is perhaps even more apparent in his final email at DB 3512 sent later on the same day.

144. On 17 December 2019 HG emailed Mr Biggin, complaining about the claimant (DB 5338). She said:

I wish to formally complain about the attitude and behaviour of [the claimant] to my staff in the data and performance team. I find his emails to the team (please see attached) unprofessional and rude with his lack of co-operation affecting the ability of my team to be able to perform their duties.

145. The attachments included the email string between 13 and 16 December 2023 between the claimant and PR in relation to PR's phone and so the PR email of 16 December.

<u>The claimant's absence from work in December 2019</u>

146. On 17 December 2019 the claimant emailed the IT team at 10.30am, cc'ing Mr Biggin (DB 3520) saying:

I'm feeling run into the ground, and not feeling great, dosing myself up with lemsip now and then will be in.

147. At 1.32pm on the same day the claimant emailed CF, apparently having just arrived in the office.

148. At 2.04pm on the same day the claimant emailed MM, a member of the ICT department saying (DB 3521):

I briefly came in, but 2 emails were enough to push me over the edge grab my laptop and go home to do the blue Sky work…

…I'm pretty sick, suppose for example I'm sick now the next few weeks I want to know what you think are next steps to achieve blue Sky and hull…

149. At 9.47am on 18 December 2019 the claimant emailed CG, cc'g Mr Biggin, in response to a request for comments on a draft email to employees about the launch of SharePoint (DB 3524). The email begins in an intemperate manner before going on to say:

For clarity there is limited IT support in Head Office tomorrow with only Jorge & Temi there as Michael and I are in Denham, assuming I'm well enough as I am sick and only working due to the limited time frames involved in keeping both Denham & Bridges with any IT going forward.

Whether I am able to get to Denham and work the rest of the week depends on how I feel, I can't attend the xmas party today unfortunately as I'm too sick.

150. At 9.49 am on 18 December 2019 the claimant emailed LH in relation to the Christmas party, cc'ing Mr Biggin. He said:

I'm too sick to come today, of course I'll pay my £10 as I had committed to it.

151. At 1.41pm on 18 December 2019 Mr Biggin replied to the claimant (DB 3524):

Sorry you are unwell, but if it continues and puts the Denham work at risk could you please let me know formally early on so I can manage expectations.

152. At 9.12am on 19 December 2019 the claimant emailed "ITTeam" saying he remained sick. The email was not cc'd to Mr Biggin.

153. At 9.55 am on 19 December 2019 Mr Biggin emailed the claimant (DB 3528). He noted that the claimant has not replied to his email of the previous day and had not left a voicemail message for him. He goes on to say:

I assume, given that Michael tells me you are not going to Denham today, and that your Out of Office says you are sick, that you are still ill.

It is our sickness policy, and common professional courtesy that you formally inform your line manager when reporting sick and this is particularly important as we are coming into the Christmas period and you hold a critical role. This is not the first time I have had to speak to you regarding the adherence to our sickness policy.

I need you by return, or by telephone, formally inform me that you are unfit for work and give me an indication of the potential length of your absence. Failure to do so will result in my booking your absent without leave.

154. The claimant did not reply to Mr Biggin's email to him of 19 December 2019 but cc'd him into an email to "ITTeam" at 7.06am on 20 December 2019 (DB 4252) which said:

I'm still sick and won't be in work today

155. Mr Biggin emailed the claimant at 8.26 am complaining that the claimant had still not reported sick and that the claimant had not replied to his email of the previous day. He noted that the claimant was "clearly able to access [his] emails" and said:

I also need to know whether your illness is likely to be for a short or extended period as you allude in your e-mail to Michael on Tuesday that you could be off for weeks and clearly that needs some decision making on my part about continuity.

156. The email ended:

Non compliance with this request will be dealt with equally formally.

157. On Monday 23 December 2019, at the beginning of the following week, the claimant emailed Mr Biggin at 12.36pm (DB 4255). The claimant apologised for not speaking to Mr Biggin during his absence the previous week. He explains his failure to contact Mr Biggin by email by saying that "email in general was not something I was accessing". He said that "between" the previous Tuesday (17 December) lunchtime and an unidentified point in time his only email access was "to email the sickness [sic] so the team and yourself were updated with expectation for that day".

158. Mr Biggin replied on the same day (DB 4258) saying that he would discuss the matter with the claimant on his return to the office in the week commencing 6 January 2020. Mr Biggin had a period of annual leave from 23 December 2019 to 4 January 2020.

159. The claimant has placed much emphasis in his evidence on the fact that he was not using email to any significant extent between 17 and 20 December 2020. He has exhaustively analysed emails relating to this period in correspondence to suggest that on any proper understanding of the facts he was not really at fault. However, the Tribunal finds that the facts are really quite straight forward: the claimant did not comply with the sickness absence procedure as set out at [115] above because (1) he did not call Mr Biggin and (2) he did not give him any indication in relation to the duration (whether actual or expected) of the absence. Mr Biggin had made clear his expectations in relation to absence reporting following the incident in July 2018. The fact that he copied Mr Biggin in on some emails is of limited relevance as is the fact that Mr Biggin had previously accepted notification of sickness by email. This is because the claimant was conducting time critical work and Mr Biggin was naturally concerned about the possible effect on this work of the claimant's absence. Notwithstanding this, the claimant provided him with no real information about the likely duration of his absence as the sickness absence procedure required.

Mr Biggin's decision to suspend the claimant

160. On reviewing the complaint from HG in relation to the email string between the claimant and PR, Mr Biggin was concerned that the claimant had breached confidentiality. He did his own analysis of this issue (DB 4661) against the respondent's procedures.

161. The question of when Mr Biggin decided to suspend the claimant is a relevant one. Mr Panditharatna's conclusion in relation to this issue (DB 2375) in the grievance outcome letter was not entirely clear. The same can be said of the conclusion of Mr Trace and Mr Bernstein (DB 2873) in the grievance appeal outcome.

162. The oral evidence of Mr Biggin was that he knew he would have to suspend the claimant before Christmas. When asked by the Tribunal what had prompted this decision, Mr Biggin said that it was his interpretation of the PR email of 16 December after he had analysed this (DB 4661) against the respondent's policies. He did not provide a precise date for when he had conducted this analysis.

163. We find that by around 23 December 2019 Mr Biggin was aware of the allegations made against the claimant by AJ, was aware of the complaint by HG, had concluded as a result of his analysis that the claimant might have breached the respondent's policies by the PR email of 16 December, and had concerns about the claimant's absence from work in the week commencing 16 December 2023. We find that it was because of these matters that Mr Biggin took the decision to suspend the claimant whilst an investigation took place and that he took this decision sometime between 23 December 2019 and 4 January 2020. However, as we find at [174] below, the concerns about the claimant's absence from work were not material to suspend and he would not have been suspended for those alone.

164. We find that there was a delay in the suspension being effected until 14 January 2020 because Mr Biggin was on annual leave from 23 December 2019 to 4 January 2020, because he wanted the time critical work in Hull to be concluded, and because he wished to arrange for cover for the claimant's role to be in place before he suspended him.

2020

The emails of 6 and 7 January 2020

165. On 6 January 2020 the claimant sent an email to AG and GD with the heading EU WTD, Staff Wellbeig [sic] and H&S. This read where relevant as follows (DB 1371):

> *Hope you had a great break*
>
> *Following the continued extended working hours the IT Team have had to endure since September 2019 I was looking for some guidance and wasn't sure if it was HR or H&S*
>
> *I couldn't find anything in the staff handbook or the Health & Safety staff checklist around working hours*

When reviewing 2019 as a whole it has come to my attention the work the team put in as a whole during these months should not have been encouraged and that we need additional training to ensure we are informed what is considered safe working practice

From review of the EU WTD at the end of the year there are specific laws around uninterrupted breaks of time away from work, something I was unaware of until late December

When mentioning it to Janet she obviously was aware of it and was surprised neither myself nor the team were

In the interest of staff wellbeing and safeguarding staff health can I ask for additional training on this subject as well as review of the lone working policy as a team.

I believe from reading up on this its both our own responsibility and the company's to ensure we are able to work in a safe environment?

Obviously now that we are aware something is wrong I am keen to ensure we fill this gap

Thanks in advance
Regards

166. AG replied the following day (DB 1370) with some information and expressing the view that as things stood neither the claimant nor any member of his team were averaging over 48 hours per week. She noted:

Fortunately, as a Head of department, you are able to control of the overtime you do – control in the sense that you can decide whether to do it or not and it's not forced upon you but not in the sense of the overtime isn't there or isn't needed as that is a separate issue.

167. She went on to refer to the possibility of him raising a business case to expand his team to "lighten the load for all of you".

168. On 7 January 2020 the claimant sent an email to Mr Biggin under the heading "QSR Report Q3 2019/20" (DB 1359). He raised a variety of what he clearly regarded as potential problem/risk areas. Of specific relevance to this claim he wrote:

HR has been so preoccupied with protecting absent staff and forming a barrier to any staff backfill that focus on existing staff has been lost. Running IT is like running electricity — when staff are off in the team the requirement is still the same and there is no plan or facility in place to backfill through temporary or agency staff in times of need — in fact when this is questioned it is categorically been [sic] blocked by HR when suggested. This has led to existing staff putting in prolonged periods of unnecessary overtime mostly because of staff numbers.

With such a stretch on existing staff there has been overwork, and risks to staff wellbeing and health.

<u>*The claimant's suspension*</u>

169. On 14 January 2020 the claimant attended what he had expected to be a return-to-work meeting with Mr Biggin. The claimant was in fact suspended at that meeting and handed a letter (DB 1378) ("the suspension letter"). The suspension letter referred to allegations of misconduct against him by AJ and HG which were set out. There is one particular matter raised in the letter following the words "In the case of the complaint from HG that" which requires further comment, because it appears to have caused confusion. The second bullet point following those words stated:

> *As part of these communications, in a specific e-mail exchange, you committed a significant breach of both our Code of Conduct as well as our policy on Confidentiality.*

170. This did not reflect an allegation of misconduct *by HG*. Her concern as set out in her email of 17 December (which is set out at [144] above) was about the manner and attitude of the claimant as (in her view) exemplified by the email string in which the PR email of 16 December was included. Rather the second bullet point reflected the concern *of Mr Biggin* in relation to confidentiality on reading the PR email of 16 December.

171. The allegations of misconduct included that the claimant had improperly monitored "the mailboxes of other staff" and had manipulated the respondent's "systems to falsely implicate other staff in wrongdoing". Given that the claimant was the Head of ICT, and had the technical knowledge which inevitably went with this role, it is wholly unsurprising that the respondent decided to suspend him whilst the allegations were investigated.

<u>*The investigation and disciplinary charges*</u>

172. The respondent instructed the Burdett Consultancy to carry out an investigation into the allegations on 21 January 2020 (DB 5350). The scope of the investigation set out under the heading "Direction" reflected the terms of the suspension letter except that a further allegation for investigation had been added:

> *In respect of the episode of sickness absence, that:*
>
> *CT failed to fully comply with the organisation's Sickness and Absence Policy and Procedure.*

173. The Tribunal finds that Mr Biggin had clearly decided to *address* what he regarded as the claimant's failure to communicate with him appropriately during his December absence from work before the suspension letter was sent (reflected, for example, in his email of 23 December 2019 at DB 3532). The question therefore arises as to why it was not mentioned in the suspension letter.

174. Mr Biggin's evidence (JB 97) was that, although he would not have suspended the claimant for this alone, he felt that it was something that needed to be

addressed and, since a formal process had been initiated, it should be addressed within that process. The delay in adding it was also caused in part by the need to take legal advice. The Tribunal accepts this explanation and finds that it was omitted because it was not material to the decision to suspend but, once that decision had been taken, it was logical to include it within the investigation as it was a matter that was outstanding.

175. Mr Blackburn invited the claimant to an interview with the Burdett consultancy by an email of 28 January 2020 (DB 1436). On 31 January 2020, the claimant emailed Mr Blackburn in relation to his health conditions and requested that a fellow employee, VF, be permitted to accompany him to the interview (DB 1450). We return to this email below in the context of the respondent's knowledge of the claimant's health conditions.

176. The claimant was interviewed by Bernie Burdett of the Burdett Consultancy on 4 February 2020 (DB 1478).

177. On 23 February 2020 the Burdett Consultancy delivered its report (DB 5353) with 57 appendices ("the investigation report"). Appendices 1 to 7 were notes of interviews with the claimant and six other employees. Its recommendations were at its page 17 (DB 1592):

> *A formal disciplinary hearing is recommended in respect of the following allegation [sic]:*
>
> - *Failure to follow the Sickness and Absence Policy and Procedure from sickness starting 17th December 2019.*
> - *Breach of both the Code of Conduct and Privacy Policy in respect of his disclosure regarding ex-employee AJ on 16th December 2019.*
> - *Breach of the Information Security and Communications Technology Policy and the Confidentiality and Information Sharing Policy by emailing the Cyber Essential Plus accreditation and accompanying report to three external parties on 8th May 2019.*
> - *Breach of the Code of Conduct Policy in regard to communications with the business in general, external parties and the IT Team.*

178. As such the investigation report concluded that there was no case to answer in respect of the allegations made by AJ. However, it also recommended disciplinary action in respect of the emailing of the Cyber Essentials Plus accreditation. This was a matter uncovered by the Burdett Consultancy during the course of its investigation. It was as such a new allegation.

179. Mr Blackburn wrote to the claimant on 9 March 2020 (DB 1637) enclosing a copy of the investigation report and inviting him to a disciplinary meeting on 20 March 2020. The disciplinary allegations were set out in the letter as follows:

> <u>*Allegation 1 – Misconduct; a breach of The Forward Trust Sickness and Absence Policy and Procedure:*</u>

The basis of this allegation is that you failed to follow the correct notification procedures for your bout of sickness absence commencing on 17 December 2019.

Allegation 2 – Gross Misconduct; A serious breach of Company Policy and the disclosure of confidential information to unauthorised persons:

The basis of this allegation is that on 16 December 2019 you breached The Forward Trust Code of Conduct and Confidentiality and Information Sharing policies during an email exchange with [PR], and informed unauthorised persons that ex-employee [AJ] had been suspended and fired from the organisation for Gross Misconduct.

Allegation 3 - Gross Misconduct; A serious breach of Company Policy and the disclosure of confidential information to unauthorised persons:

The basis of this allegation is that you breached The Forward Trust Information Security & Communications Technology Policy (Section 4.1) and the Confidentiality and Information Sharing Policy (Section 6.1) by sending by email the Cyber Essentials Plus Accreditation and accompanying report to three external parties. It is alleged this occurred on 8 May 2019 and that your actions exposed the organisation to an unnecessary security risk.

Allegation 4 – Misconduct; A breach of Company Policy and inappropriate conduct:

The basis of this allegation is that you have breached of The Forward Trust Code of Conduct Policy through various inappropriate communications with internal staff, external parties and including the Information and Communications Technology (ICT) team.

180. The disciplinary charges brought against the claimant therefore reflected the recommendations of the investigation report. Two of the disciplinary charges were categorised as being potential gross misconduct, and two as being potential misconduct.

The claimant's grievance of 6 February 2020

181. The claimant had instructed solicitors and they raised a "Formal Grievance" on his behalf on 6 February 2020 (DB 1526) ("the first grievance"). Its numbered paragraph 1 begins:

As the Company is aware, our client is disabled under the Equality Act 2010 in respect of a number of conditions…

182. Its numbered paragraph 2 continues:

Our client has informed us of a range of incidents at work which have occurred over the last couple of years of his employment, which give rise to a number of potential employment claims against the Company.

183. The effect of its first two paragraphs is to put the claimant's disabilities "centre stage". The letter goes on to describe a number of incidents, beginning with Mr Biggin's visit to the claimant's house in July 2018.

184. Mr Blackburn sent emails to the claimant about the first grievance on 13 and 20 February 2020 (DB 1568). In the latter he said that he had decided to "pause arranging a formal grievance meeting until we receive the outcome of the misconduct allegations investigation" because there were "interlinking and correlated issues".

185. Mr Blackburn subsequently told the claimant in his letter of 9 March 2020 (DB 1637) which, as noted above, set out disciplinary charges against the claimant, that the grievance would be considered concurrently with the disciplinary proceedings because the matters were "intrinsically linked". He was consequently invited to a grievance meeting to take place on 20 March 2020 immediately before the disciplinary hearing. The letter informed the claimant that Mr Panditharatna would conduct both the grievance and the disciplinary hearing.

The grievance and disciplinary hearings on 28 and 29 April 2020

186. The grievance and disciplinary hearings were postponed on a number of occasions at the claimant's request and, also, at the claimant's request, it was agreed that they would take place on different days rather than the same day as originally envisaged.

187. The grievance hearing took place by telephone conference during the first "lockdown" of the pandemic on 28 April 2020. The claimant was accompanied by his colleague, VF. Ms Ball attended as HR representative. RW attended as a note taker. The most accurate written record of the grievance hearing is at DB 1981. This is a transcript made by the claimant of a recording he made using his home's CCTV system. The hearing began at 1pm and ended at 5.03pm. There was insufficient time to deal with the whole of the claimant's grievance so the hearing continued on 6 May 2020. The transcript of the claimant's recording is at DB 2169. The hearing began at 12.49pm and concluded at 5.02pm.

188. The disciplinary hearing also took place by telephone conference on 29 April 2020 with the same attendees as at the grievance hearing on the previous day. Again, the most accurate written record of it is a transcript the claimant made of a recording he had made. The transcript begins at DB 2065 and shows that the hearing began at just after 1pm and concluded sometime after 5.30pm.

The second grievance

189. On 27 April 2020, the day before the hearing in relation to the first grievance, the claimant raised by email what he described as "Additional Grievances ahead of planned meetings" (DB 1925) ("the second grievance"). The email ran to six pages. The additional grievances were directed at Mr Blackburn (DB 1927), Ms Thatcher (DB 1928) and, also, generally at the process followed since the claimant's suspension in January. It is a confused and confusing document.

190. Because the claimant had directed various complaints in the second grievance at Mr Blackburn, the respondent replaced Mr Blackburn as the member of HR dealing with the disciplinary and grievance processes with Ms Ball. She wrote to the claimant about this at 18.48 on 27 April 2020 (DB 1944). She explained how the second grievance would be dealt with as follows:

The formal complaint in your email against the suspension and disciplinary investigation process from January to April 2020 is relevant to the current live grievance and disciplinary procedures that are taking place tomorrow and Wednesday. As a result your complaints that relate to these processes will be dealt with through whichever one of these procedures is the most appropriate.

Your formal complaints raised in relation to Graeme Blackburn and Caroline Thatcher will be investigated as separate grievances to the existing grievance and disciplinary procedure. I will let you know as soon as possible regarding new grievance meetings.

191. As such the respondent distinguished between those parts of the second grievance which related to the process followed to date in respect of the disciplinary process and first grievance and those parts of the second grievance relating to Mr Blackburn and Ms Thatcher. The former would be considered during the disciplinary and grievance meetings which were about to take place and the latter would be dealt with separately. We find that the distinction was to some extent artificial because the latter related to a significant extent to the process followed to date.

Mr Panditharatna's decisions in relation to the disciplinary charges and the first grievance

192. The claimant had requested that various additional witnesses give evidence. He was asked to prepare questions for them. These were sent to the witnesses. Their answers were then sent to the claimant on 13 May 2020 by Ms Ball (DB 2238).

193. Mr Panditharatna intended to deliver the outcomes of both the disciplinary and grievance meetings to the claimant in person on 11 June 2020. However, the claimant was ill and could not attend and so the outcomes were sent to him by post in letters dated 11 June 2020.

194. The grievance outcome letter of 11 June 2020 (DB 2370) ("the first grievance outcome") did not uphold any of the allegations contained in the first grievance. It numbered these allegations 1 to 10. It also did not uphold any of the allegations contained in the second grievance which related to the process followed in respect of the disciplinary process and first grievance (numbered allegations 11 to 16).

195. The disciplinary outcome letter of 11 June 2020 (DB 2380) ("the letter of dismissal") found, following the numbering of the allegations set out at [179] above, that:

195.1. **Allegation 1 (breach of sickness & absence policy):** The claimant was guilty of misconduct;

195.2. **Allegation 2 (the PR email of 16 December):** the claimant was guilty of gross misconduct;

195.3. **Allegation 3 (the cyber essentials accreditation):** the claimant was guilty of gross misconduct but the sanction was downgraded because the claimant had admitted the allegation and provided an explanation for his actions;

195.4. **Allegation 4 (inappropriate communications):** the claimant was guilty of misconduct.

196. The letter of dismissal explained that the sanction imposed was summary dismissal in light of the finding of gross misconduct.

The claimant's appeals

197. The claimant appealed against his dismissal by an email of 18 June 2020 (DB 4759). The thrust of his appeal was that dismissal had been too harsh a sanction taking into account "other cases similar to this historically". He did not contend that the conduct which the respondent had concluded amounted to gross misconduct had been caused by his disabilities. Rather, he contended (DB 4762) that he was not aware that the information contained in the PR email of 16 December was confidential. He also relied on what he regarded as his own expressions of remorse (DB 4765) in relation to the sending of that email. He referred to his health as a mitigatory factor.

198. The claimant also appealed against the grievance outcome by an email of 18 June 2020 (DB 4775).

The hearing of the claimant's appeals against dismissal and the grievance outcome

199. The grievance appeal was heard by Mr Trace and Mr Bernstein on 27 July 2020. The claimant did not attend but his partner sent through just under 200 pages of additional documentation on his behalf on the day of the appeal (DB 2453). Notes were taken of the hearing (DB 2609). The grievance appeal outcome letter was sent to the claimant on 24 August 2020 (DS 2868) ("the first grievance appeal outcome letter"). This rejected his appeal in its entirety.

200. The appeal against dismissal was also heard by Mr Trace and Mr Bernstein. It took place on 31 July 2020 and again the claimant did not attend. The claimant's partner again sent through additional documentation on the day of the hearing (234 pages at DB 2624). Notes were taken of the appeal hearing (DB 2619). The dismissal appeal outcome was sent to the claimant on 24 August 2020 (DB 2879) ("the dismissal appeal outcome letter").

The second grievance – in so far as it was not dealt with at the same time as the first grievance

201. Ms Sherlock, an HR consultant was appointed to investigate those parts of the second grievance that were not dealt with at the same time as the first grievance. She wrote to the claimant about this on 27 July 2020 (DB 2608) inviting him to meet with her. He did not meet with her.

202. Ms Sherlock conducted a number of interviews, including with Mr Blackburn (DB 2398), Ms Thatcher (DB 2422) and Mr Panditharatna (DB 2891). She concluded her investigation and Mr Panditharatna wrote to the claimant with the outcome of the second grievance on 19 October 2020 (DB 2898) ("the second grievance outcome"). In her report, Ms Sherlock rejected all the points raised by the claimant except for Allegation 6 (DB 2904). What Ms Sherlock labelled as Allegation 6 was simply a bullet point from the second grievance (DB 1928):

> *Graeme Blackburn wrote to me inviting me to a disciplinary and grievance meeting following the investigation meeting, while fully knowing the full extent of my illness' and disabilities and planned them without care and attention to any adjustments that might be needed as well as removing all of my comments about my health within the meeting notes and not allowing me to discuss my health conditions.*

203. Perhaps unfortunately, Ms Sherlock did not clearly analyse what this complaint was about. Realistically, it had two parts to it:

203.1. That Mr Blackburn, although knowing the full extent of the claimant's disabilities, planned the grievance and disciplinary meetings without considering what adjustments might be needed.

203.2. That Mr Blackburn removed the claimant's comments about his health from the meeting notes and did not permit the claimant to discuss his health conditions.

204. Ms Sherlock did not consider the second part of this complaint at all. In relation to the first part, she criticised the fact that the respondent had not referred the claimant to occupational health prior to the making their decisions (although this is not part of Allegation 6, as she has set it out). She explains this as follows (DB 2904):

> *Without professional medical input, there is no way Forward Trust could fully understand [the claimant]'s diagnosis or what he could and couldn't deal with mentally – a referral would have given an audit trail and clear guidance on appropriate reasonable adjustments.*

205. She also picks up on a comment Ms Thatcher had made when interviewed about a "massive meltdown" that the claimant had had in 2019 in her conclusion:

> *I am upholding this allegation as Forward Trust did not know the full extent of [the claimant]'s illness before making their decisions. A decision was made by HR and Rradar not to refer [the claimant] to Occupational Health but as Forward Trust, but this has left the Organisation open for challenge and also not taking into account some of [the claimant]'s behaviour already changing as early as 2019.* [Drafting errors and resulting lack of clarity reproduced from the original.]

206. Ms Sherlock's conclusion is, therefore, that the claimant's complaint that the respondent planned the relevant meetings "without care and attention to any adjustments that might be needed" is upheld on the basis that there was no referral to occupational health. We note that she does not identify any other adjustments which should have been made but were not. Further the only adjustment that the

claimant requested at the time which was not permitted was the recording of meetings.

207. The claimant appealed the second grievance outcome by an email dated 27 October 2020 (DB 2916). AG acknowledged his appeal on 30 October 2020 (DB 2923). Mr Trace considered the appeal and rejected it by a letter dated 16 December 2020 (DB 2012). That was the end of the respondent's internal processes.

<u>The claimant's health and the respondent's actual and constructive knowledge of it</u>

<u>The claimant's HIV+ status</u>

208. The claimant's case is that the respondent had actual and constructive knowledge of his HIV+ status from 1 April 2016 (claimant's submissions, paragraph 32). He contends that the respondent had such knowledge because of an occupational health report dated 1 April 2016 (DB 3786) ("the 2016 OH report"). He has not provided other evidence to which it is appropriate to attribute significant weight in relation to the issue of actual or constructive knowledge of his HIV+ status.

209. The claimant was diagnosed as being HIV+ in 2007. He included information about this in a health declaration form (DB 3784) dated 18 February 2016 and this resulted in the 2016 OH report. This recorded "Currently well, states single related period of sickness absence 7 yrs ago. Nio impact upon ADL home/work…Fit to undertake role without restriction".

210. The 2016 OH report was emailed to JT on 1 April 2016 (DB 3789). She left the respondent with immediate effect around a week later as evidenced by the email at DB 3790. The respondent contends that it was unable to locate the 2016 OH report when the claimant asked for it in 2020 and that Medigold, its OH provider, was also unable to locate it. It was finally obtained via a data subject access request (DB 3028). The claimant contends, in effect, that the respondent had the report but chose not to provide it to him when asked in order to cover up its knowledge of his HIV+ status.

211. The Tribunal finds that the 2016 OH report was never downloaded by the respondent from the link contained in the email of 1 April 2016 to JT and that consequently the respondent held no copy of it on the claimant's HR file. The Tribunal finds that Medigold was unable to locate the 2016 OH report when the respondent asked for it in 2020 and that this was probably due to a combination of the following factors: the age of the 2016 OH report; the fact that the respondent had changed its name; the fact that Medigold was not the organisation that had obtained the 2016 OH report on behalf of the respondent – rather it was a separate organisation, DHS, that had done this. DHS had subsequently been acquired by Medigold (DB 3029). The Tribunal rejects the claimant's contention that the respondent had the report all along – and indeed cannot see why as a matter of logic the respondent would have lied about this, given that there is nothing in the 2016 OH report which suggests that the claimant needed reasonable adjustments as a result of his HIV+ status.

212. The Tribunal consequently finds that, although the respondent had constructive knowledge of the claimant's HIV+ status from 1 April 2016, it did not have actual knowledge of it until the claimant disclosed it in his email to Mr Blackburn of 31 January 2020 (DB 1450). It should be noted that that email does not address the HIV+ status in a way which suggests that the claimant thinks Mr Blackburn already knows about it.

The claimant's mental ill-health

213. Although the respondent has conceded that the claimant suffered from depression at all relevant times, the claimant's pleaded cases in this respect is relevant to the question of the respondent's knowledge of this.

214. In the grounds of claim attached to claim 1 which was presented on 5 May 2020, he stated (PB 20):

> *In April 2018 I was able to successfully discontinue taking antidepressants and leave the depression and mental health issues behind.*
>
> *On 14th January 2020, the Claimant was suspended from his current role unexpectedly and began suffering from an anxiety state bought on by the stress involved by the manner in which this was enacted by the Respondent.*

215. This pleaded case was consistent with what he wrote to the respondent on 29 April 2020 (DB 2039):

> *Additionally, I had come through the depression and stopped taking antidepressants in April 2018 and not needed medical support until this process in January 2020*

216. It is therefore clear that as of spring 2020 the claimant's position was that he had not suffered from any significant mental ill-health between April 2018 and January 2020.

217. The claimant's final position may in fact be that the respondent only had actual or constructive knowledge of his depression from 31 January 2020 (see paragraph 32 of his closing submissions). However, elsewhere he has suggested that the respondent had constructive knowledge of it at an earlier date as a result of his workplace behaviour (paragraph 31.14 of his closing submissions refers to an "emotional breakdown 17-07-19") or as a result of how he behaved later in 2019.

218. We accept that the claimant became very emotional in a conversation with Ms Thatcher in July 2019 (this is referred to at [205] above). She referred to it as a "meltdown" when interviewed by Ms Sherlock and accepted in her oral evidence that he had been on the "verge of tears" with a "shaky" voice. However, the claimant was under significant pressure of work in July 2019, which continued for the rest of 2019. We find that his behaviour was not such as to give the respondent actual or constructive knowledge that he had depression. Further, we do not find that his behaviour was such that the respondent ought reasonably to have made enquiries that it did not make which might have resulted in such knowledge.

219. In reaching this finding we have taken into account his response to Ms Thatcher's email of 21 October 2019 (DB 3458) in which she said (in response to concerns he had raised about confidentiality) "If you wish to declare any health issues you can do so by emailing me directly". His reply was "There isn't anything to declare because as OH reported back the medication I take doesn't impact my day to day life nor does the condition and I prefer not to be defined by something like that".

220. We have also taken into account the nature of the claimant's argument in relation to this and the related issue of why he behaved as he did in December 2019. By the time of the hearing, his position was that even though he was not aware that his behaviour had deteriorated his managers should have been. We found this to be an unrealistic proposition, given that the claimant has a partner and did not at the relevant time live alone. In other words, if his behaviour had changed to such an extent that his managers should have noticed this <u>and</u> put it down to his health, then one would have expected his partner and/or other family members or friends equally to have noticed the change and to have told the claimant about it.

221. We therefore find that the respondent did not have actual or constructive knowledge of the claimant's depression prior to receiving the email on 31 January 2020.

<u>The claimant's narcolepsy</u>

222. The claimant contends that the respondent had actual and constructive knowledge of his narcolepsy from 11 June 2019 when he says he informed Mr Trace of this. He relies in this respect on an email of that date to Mr Trace (DB 3980). So far as relevant, in that email he wrote:

> *I do not have health issues that are impacting my work, John and I haven't even discussed why I am in hospital, I booked it all out of time owed. I am booked into Guys & St Thomas for a sleep study over the next few days and have been on a monitoring band for the past week and a half ahead of that. Nothing serious, nothing consequential. I anticipated that I would find the days this past week tiring so booked my TOIL appropriately to accommodate this.*

223. This email does not therefore (1) say that the claimant has narcolepsy; or (2) say that he is having tests which may result in a diagnosis of narcolepsy; or (3) suggest that the tests may result in the diagnosis of any significant medical condition ("Nothing serious, nothing consequential").

224. Further, the Tribunal does not accept that the claimant told either Mr Trace or Mr Biggin that he had narcolepsy prior to January 2020. The Tribunal prefers the evidence of Mr Trace and Mr Biggin in this respect in light of (1) the fact that the claimant's recollections were not precise; (2) the email quoted above, which suggests that the claimant actually went out of his way to avoid a reference to the possibility of him having narcolepsy; and (3) the absence of any significant contemporary documentation that he did tell either of them prior to January 2020, despite the voluminous nature of the documentary evidence in this case.

225. The claimant also contends that his behaviour may have been affected by coming off (his closing submissions 31.12) or resuming (CT 75) his use of modafinil, a drug which helps people with narcolepsy stay awake during the day. However, he has not produced significant medical evidence in support of this contention, and it is not something about which the respondent was or should reasonably have been aware.

226. Taking the evidence in the round, we find that the respondent did not have either actual or constructive knowledge that the claimant had narcolepsy prior to receiving the email on 31 January 2020.

Conclusions

227. The Tribunal has reached the following conclusions as set out in the final list of issues. It explained to the parties at the hearing that it would not consider issues relevant to remedy at this stage except for Polkey and contribution and so has not done so.

228. In reaching specific conclusions we have tried where relevant to cross-refer to specific findings and other relevant conclusions to assist the reader in understanding a lengthy judgment. However, such cross-references are not intended to be exhaustive. That is to say, the fact that we specifically cross-refer to some factual findings in relation to a particular conclusion does not mean that others are not relevant to that conclusion.

The automatic unfair dismissal claim (section 103A of the 1996 Act) (protected disclosure)

1. Did the claimant make a protected disclosure in the email that he sent to Mr Biggin on 7 January 2020 (DB 1360)? The claimant contends that the alleged protected disclosure falls within section 43B(1)(b) of the Employment Rights Act 1996.

1.1. **Did the claimant disclose information in that email:**

1.1.1. The wording relied upon is set out at [168] above.

1.1.2. The respondent accepts that the claimant disclosed information in the email of 7 January 2020 at 10.05pm.

1.2. **Did the claimant believe the disclosure of information was made in the public interest?**

1.2.1. We conclude that the claimant did believe that the disclosure of information was made in the public interest, taking into account the following factors:

1.2.1.1. The disclosure was not focused specifically on the claimant's own position. It was written in the context of an email setting out various matters which the claimant said affected the interests of the business and the disclosure was focused on the interests of all the members of

the IT department. This was not a large group – no more than five people at the point the disclosure was made – but it was a group.

1.2.1.2. The interest affected was the right of employees not to be required to work excessive hours which may negatively affect their health. This is a significant interest recognised in legislation such as the 1998 Regulations.

1.2.1.3. The fact that the alleged wrongdoing was said to be deliberate. The HR department were said to be "blocking" the use of temporary staff.

1.2.1.4. The fact that the alleged wrongdoer was the HR department of the respondent (an organisation of significant size), bearing in mind that this was the department which would reasonably have been expected to have a particular concern that the relevant legislation was complied with.

1.2.1.5. The fact that the claimant had been intermittently raising in broad terms questions relating to his workload for some time and had clearly been working very hard – this factor being relevant to whether the claimant held the belief in question.

1.3. **Was that belief reasonable?**

1.3.1. We conclude that belief was reasonable given the nature and focus of his disclosure. His disclosure was not just about a dissatisfaction with his own working hours but about those of the whole department and the possible consequences of such working hours for their health.

1.4. **Did the claimant believe it tended to show that a person had failed, was failing or was likely to comply with any legal obligation?**

1.4.1. The claimant contends ([1.2.2] of his closing submissions) that the disclosure tended to show that the respondent had failed or was likely to fail to comply with its legal obligations under the Working Time Directive and/or to provide a safe working environment – because they were working excessive hours. The Working Time Directive does of course contain provisions relating to daily rest (Article 3), weekly rest (Article 5) and maximum weekly working time (Article 6). This was a matter about which the claimant had been exchanging emails with AG shortly before sending the email including the alleged protected disclosure.

1.4.2. In light of the way the claimant expressed himself in the email of 7 January 2020, the contents of the email string between himself and AG earlier on the same day (considered further below), and the background of him raising concerns about how hard he was having to work, we find that the claimant did have such a belief: his belief that staff were working "prolonged periods of unnecessary overtime" with consequent risks to "staff wellbeing and health" reflected a belief that the respondent was not

complying or had failed to comply with the provisions of the Working Time Directive identified in the previous paragraph.

1.5. **Was that belief reasonable?**

1.5.1. The Tribunal concludes that such belief was reasonable. The focus of the disclosure is the number of working hours that the IT department were working. This has two obvious implications in terms of the Working Time Directive (or the 1998 Regulations).

1.5.2. The first is that maximum weekly working hours may have been exceeded. The second is that the required daily or weekly rest breaks may not have been permitted.

1.5.3. By the time the claimant sent the email at 10.05pm on 7 January 2020 he had received AG's email of 7 January 2020 at 4.50pm (DB 1370). So far as working hours was concerned, this stated with reference to weekly working hours:

> *We work [average weekly hours] out by calculating the overtime you've done over the last 17 weeks and ensuring that the average of this does not exceed 48 hours per week. Yours doesn't just yet, but it's important to keep an eye on it. Your team are considerably further away from the WTD limit, so at present I don't think there is a concern in that respect.*

1.5.4. The claimant had then done his own calculations and prepared a further email to Ms Gray at 5.49pm on 7 January 2020 (DB 1368). On the basis of his calculations, he believed he had on occasion exceeded the 48 hour week maximum. However, this could not have led him to have reasonably believed that the respondent had failed to comply with the identified legal obligations given the opt out from the 1998 Regulations included in his contract of employment of which he would have been aware (see [121] above). But in the same email he also considers the position of daily and weekly rest breaks. And says:

> *… so you can see in the below list and my calendar and the overtime approved there are many periods of week in a row where no period of 24 hours rest from work has occurred….*
>
> *This affects both myself and also the work I allow the team to do as Michael at least several times a month is working until late/early hours of the morning on server updated for East Kent and the is in work at 9am – which as I understand it now wouldn't be allowed.*

1.5.5. In light of this analysis of the claimant it was reasonable for him to believe that the respondent was not complying or had not complied with its obligations under the Working Time Directive in relation to daily rest breaks in relation to, at the very least, "Michael". The fact that his belief was reasonable is not of course to say it was correct (and we have concluded, elsewhere, that it was not).

1.6. **Did the claimant make the disclosure to their employer?**

1.7. There is no dispute that he did.

2. **The Tribunal therefore concludes that the claimant did make a protected disclosure as alleged.**

3. **Was the reason or principal reason for dismissal that the claimant made a protected disclosure?**

3.1. The Tribunal concludes that it was not. Its reasons for this conclusion are set out below.

<u>The automatic unfair dismissal claim: asserting a statutory right under section 104 or Working time cases under section 101A of the Employment Rights Act 1996)</u>

4. **Assertion of a statutory right (section 104 of the 1996 Act): did the claimant allege that the respondent had infringed a right of his under the Working Time Regulations 1998 on 6 January 2020. The claimant relies in this respect on his email of 6 January 2020 at 17.15 (DB 1371)**.

4.1. The email sent on 6 January 2020 at 17.15 does not contain any such assertion. It is a request for information and advice.

4.2. In his closing submissions, the claimant seeks to argue that in fact he relies on the emails sent at DB 1368-1369. These do include assertions that his rights under the 1998 Regulations have been infringed (see [1.5.4] above).

4.3. The Tribunal notes that the condensed list of issues did refer to him having raised "issues on 6 January 2020 regarding his rights under the WTR". The reason the issue is now as set out above was the during the course of the hearing the claimant agreed in relation to issue [22.1] of the condensed list of issues that the email relied on was that at DB 1371.

4.4. In the absence of an application by the claimant to amend the list of issues again, the Tribunal concludes that it is not open to it to consider the claimant's argument that the reason for his dismissal was asserting that the respondent had asserted a right of his under the 1998 Regulations on 6 January 2020.

4.5. However, in case the Tribunal is wrong about this, it has set out below what its conclusions would have been if such an application had been successfully made.

5. **Working time case (section 101A of the 1996 Act): did the claimant refuse (or propose to refuse) to comply with a requirement which the respondent imposed in contravention of the Working Time Regulations 1998 or refuse (or propose to refuse) to forgo a right conferred on him by the Working Time Regulations 1998? The claimant relies in this respect on his email of 6 January 2020 at 17.15 (DB 1371)**.

5.1. The claimant did not so refuse or so propose to refuse in that email of 6 January 2020. Further, in his written submissions, he did not contend that he had done so, stating that the email "highlighted that I now was aware of the breaches that [sic] did not intend for either myself or the team to continue to work in the manner we had been".

6. Was the reason or principal reason for dismissal one that came within section 104 (assertion of statutory right) or 101A (working time case) of Employment Rights Act 1996?

6.1. The Tribunal concludes that it was not. Our reasons for this conclusion are set out in detail below when we set out conclusions in relation to the reason for dismissal in the context of the "ordinary" unfair dismissal complaint.

6.2. Further and separately, in relation to the section 101A claim, this conclusion follows inexorably from the conclusion that there was no refusal or proposed refusal.

"Ordinary" unfair dismissal

7. If the claimant was not automatically unfairly dismissed, what was the reason or principal reason for dismissal? The respondent asserts it was a reason relating to the claimant's conduct. The Tribunal needs to decide whether the respondent genuinely believed the claimant had committed misconduct. In the alternative, the respondent asserts that it was a complete breakdown in trust and confidence in the claimant's ability to communicate positively and constructively with managers and resolve differences in the workplace.

7.1. The respondent only made submissions in relation to the potentially fair reason of misconduct and so we do not consider its alternative case.

7.2. By the time of his closing written submissions the claimant's case was that the protected disclosure and the assertion of a statutory right were each "one of several reasons behind the dismissal" (claimant's closing submissions paragraph [3.1] and [6.1]).

7.3. We conclude that in fact the principal reason for dismissal both when Mr Panditharatna made the initial decision to dismiss and, subsequently, when that decision was confirmed on appeal by Mr Trace and Mr Bernstein, was that they each honestly believed that the claimant had committed misconduct as set out in the dismissal letter and the dismissal appeal outcome letter.

7.4. We conclude that the protected disclosure made on 7 January 2020 and any assertion of a statutory right in the email referred to at issue [4.2] above were not in any way relevant to the respondent's decision to dismiss. A feature of the claimant's approach to both the internal disciplinary proceedings and the litigation which has followed his dismissal has been his tendency to send multiple, lengthy and confusing emails raising numerous issues. This is one of the causes of the final bundles running to nearly 7000 pages. The emails containing the protected disclosure and any assertion of a statutory right may or may not have been reviewed by Mr Panditharatna and/or Mr Bernstein and

Mr Trace but, given the mass of documentation and arguments that they were presented with, we find that it is highly unlikely that they had the contents of those emails in mind at all when approaching their decision-making tasks. Further, there is no evidence of significance that they had concerns about the making of the protected disclosure/assertion of a statutory right which might have led them to dismiss the claimant because of them.

7.5. We have concluded that in fact the reason for dismissal was a genuine belief in the misconduct of the claimant for the following reasons:

7.5.1. This is what the chronology suggests. We have found at [163] that a decision was taken by Mr Biggin that it was necessary to suspend the claimant between 23 December and 4 January 2020. The reason for that decision was allegations made against the claimant which subsequently formed much of the subsequent disciplinary case against him. The first decision in the process which ultimately led to the dismissal of the claimant was therefore made *before* the claimant had sent the emails on 6 and 7 January 2020 in which he made a protected disclosure and asserted any statutory right.

7.5.2. Further and separately, the claimant has argued at times that Mr Biggin fabricated the grounds for his suspension (and so the subsequent disciplinary proceedings). However, the reality is that much of the factual background giving rise to the disciplinary proceedings was simply not in dispute: for example, the claimant had sent the PR email of 16 December 2019; the claimant had not replied promptly to emails from Mr Biggin between 18 and 20 December 2020.

7.5.3. In light of our findings above, we find that Mr Biggin did not falsely manufacture concern about the claimant's communications and absence between 17 and 20 December 2019 – his concerns about the claimant's absence and communications during this period actually had their origins in the claimant's July 2018 absence considered between [123] and [129] above and the incident in August 2019 considered at [133.3]. Mr Biggin reasonably believed that the claimant did not always communicate with him appropriately when he was absent from work.

7.5.4. In light of our findings above at [139] we also reject any suggestion that the complaint by AJ, which was one of the matters leading to the claimant's suspension, was fabricated or contrived.

7.5.5. We therefore reject any suggestion that Mr Biggin fabricated or contrived any of the grounds for suspension and that Mr Panditharatna, Mr Trace or Mr Bernstein were either subsequently deceived by this or went along with it. Rather we conclude that Mr Biggin honestly believed that the matters giving rise to the suspension of the claimant required that and should be investigated. That is not to say, of course, that there were not difficulties in the relationship between Mr Biggin and the claimant by December 2019. We find that there were, and some of the causes are these are identified in our findings of fact at [133] above.

7.5.6. Further and separately, we find that the Burdett Consultancy was an independent external investigator. We conclude in light of our findings between [172] and [180] that the scope of the investigation reflected the matters in respect of which Mr Biggin held the belief set out in the previous paragraph. To the extent that the recommendations as to disciplinary action in the investigation report were wider, we conclude that this reflected matters which had come to the investigators' attention as a result of the investigation they were tasked with carrying out. It should be noted in this respect that the allegations made by AJ (set out in the suspension letter at DB 1378) were broad in their scope so it was unremarkable that other matters came to the attention of the investigators during the course of their investigation.

7.5.7. The disciplinary allegations considered by Mr Panditharatna, Mr Trace and Mr Bernstein and for which the claimant was ultimately dismissed were therefore the result of an independent external investigation. This again points towards a belief in the claimant having committed misconduct being the reason for dismissal.

7.5.8. Further and separately, we found Mr Panditharatna to be a credible witness. This was because his oral evidence was essentially consistent with his written witness evidence, he considered his answers carefully, and he was prepared to make concessions where appropriate (for example, that it might have been better to tell the claimant the reason for the length of the final postponement of the disciplinary and grievance hearings). His account of why the breach of confidentiality caused by the PR email of 16 December was in his view gross misconduct was credible. He was clear in his account that the reason for dismissal was the misconduct identified in the dismissal letter and we find that there is no significant evidence which calls that account into question.

7.5.9. Further and separately, we concluded that Mr Trace and Mr Bernstein were credible witnesses and honest in their evidence when explaining why they had upheld Mr Panditharatna's decision to dismiss. We so found because in both cases their oral evidence was essentially consistent with their written witness evidence and because their accounts were consistent with the documentary evidence.

7.5.10. Before reaching the conclusions that we have reached in the previous paragraph we considered carefully the draft dismissal appeal outcome letter dated 18 August 2020 (DB 4930). This was not sent to the claimant at the time (being only a draft) but was disclosed/provided following a DSAR during the subsequent litigation. It has a section headed "other concerns" towards its end which suggested that matters beyond the four allegations considered in earlier section of the letter in relation to the formal disciplinary allegations might have been taken into account when deciding to uphold Mr Panditharatna's decision to dismiss:

Upon examination of the investigation and the multitude of supporting documentation, we were concerned that there were potentially more serious allegations that were not followed up, for various reasons.

There was a concern that you were using your position to access material from across the organisation, with several references that you were accessing email databases and this was something that had been raised by several people and not just one person. The reason this was not pursued by Bernie Burdett was because an investigator would have found this difficult to verify. I (Mike Trace) was aware of ongoing vendettas with people in the organisation, and I find it plausible that you could have been doing this. You held onto death in custody documents and downloaded "take ownership" software. You were found to have a document containing birth dates of employees and used your admin status to access our systems inappropriately. An organisation must have implicit faith in their Head of IT and be able to completely trust that they will not misuse their authority but there was a concerning amount of information to suggest that you were in the habit of accessing material that you should not have been accessing.

In light of this, we feel that you could not be trusted. Especially as IT literate as you are, with a deep and invested interest in hacking and IT technology.

7.5.11. This section did not appear in the final version of the dismissal appeal outcome letter. In his oral evidence Mr Trace did not remember this version of the dismissal appeal outcome letter or remember who had prepared it. Mr Bernstein in his oral evidence noted that the concerns appeared to be expressed more as those of Mr Trace. He could not remember the draft letter but believed that the relevant paragraphs were likely to have been deleted because they were not relevant to the allegations considered by Mr Panditharatna and for which the claimant had been dismissed. They were not therefore relevant to the appeal decision either.

7.5.12. We note that the excluded section of the letter does not provide any evidence to support the claimant's contentions that he was dismissed for making a protected disclosure/asserting a statutory right/because he was disabled/as an act of victimisation. We further note that anyone who has taken part in a disciplinary decision-making process will know that there is a danger that irrelevant matters will be taken into consideration and that avoiding this is part of careful disciplinary decision making. We conclude that the section of the letter quoted above was discarded precisely because it was irrelevant and that the fact that the matters in it were considered at one point to be relevant, most likely by Mr Trace or by the drafter of the letter, is not significant evidence pointing to the decision to dismiss not being that put forward by the respondent. In this respect we note that even in the discarded draft the relevant matters appeared under the heading "other matters" and were not as such regarded as central to the issues under consideration.

7.5.13. Further and separately, for the reasons set out below we have concluded that the decision to dismiss was not because of disability,

unfavourable treatment because of something arising in consequence of disability, an act of victimisation or otherwise unlawful.

7.6. Overall, therefore, applying the burden of proof as required by Kuzel, we conclude that the claimant has not shown that there is a real issue as to whether the reason put forward by the respondent was not the true reason. Rather we conclude that the respondent has proved that the reason for the claimant's dismissal was conduct. That is to say that it held an honest belief that the claimant had committed misconduct.

8. Was it a potentially fair reason?

8.1. Conduct is a potentially fair reason.

9. If the reason was misconduct, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? The Tribunal will decide, in particular, whether:

9.1.1. there were reasonable grounds for that belief;

9.1.1.1. We have concluded that there were reasonable grounds for the respondent's belief that the claimant was guilty of misconduct. We set out below our reasons for this in relation to each of the disciplinary allegations which were included in the charge letter (detailed at [179] above).

9.1.1.2. Allegation 1: breach of sickness absence procedure: there was no dispute that the claimant had failed to notify in accordance with the policy as set out at [115] above because he did not telephone Mr Biggin between 17 and 20 December 2019. Further, in light of the emails considered between [146] and [159] above which were before the decision makers, it was clearly reasonable for the decision makers to believe that the claimant had only emailed Mr Biggin by copying or blind-copying him in on emails which was not what Mr Biggin or the sickness absence procedure had required. There were therefore reasonable grounds for the decision makers' belief that the claimant had breached the sickness absence procedure.

9.1.1.3. Allegation 2: the PR email of 16 December: there was no dispute that the claimant had sent the email. The fact that AJ had been dismissed for gross misconduct was self-evidently confidential information both as a matter of common sense and when regard is had to the respondent's policies and procedures referred to between [110] and [114] above. The claimant was therefore clearly in breach of section 4.4 of the code of conduct as noted in the dismissal letter. There were consequently reasonable grounds for the decision makers believing this.

9.1.1.4. The following matters in particular did not result in reasonable grounds for the belief no longer existing. First, the suggestion that the

disclosure of the information was justified or necessary in the context of the email exchange. It was clearly open to the decision makers acting reasonably to take the view that it was not. Secondly, the suggestion that the claimant did not understand it was confidential information, perhaps particularly in light of the email messages considered at [135] to [137] above which were said to relate to confidentiality during a particular period only. It was clearly open to the decision makers acting reasonably to take the view that that was not at all what those emails suggested. Thirdly, the fact that the PR email of 16 December had not been recorded as an actual or potential breach of data protection obligations under the respondent's relevant systems. Those were separate systems. It was clearly open to the decision makers acting reasonably to take the view that this did not result in what the claimant had done not being misconduct.

9.1.1.5. Allegation 3: the cyber essentials report: the claimant admitted this allegation so there were clearly reasonable grounds for the decision makers' belief in relation to it.

9.1.1.6. Allegation 4: breach of company policy and inappropriate conduct: the email singled out by Mr Panditharatna in relation to this allegation was the PR email of 16 December. We have considered this at [140] to [145] above. The contents of that email clearly constituted reasonable grounds for a belief that the claimant was guilty of "inappropriate conduct" given its requirements for the employees to behave in a "professional, respectful and courteous manner at all times".

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

9.1.2.1. It is important not to lose sight of the fact that what a reasonable investigation requires will inevitably depend to a significant degree on the extent to which the key factual allegations are in dispute. As highlighted above in our analysis of whether there were reasonable grounds for the respondent's belief that the claimant had committed misconduct, much was in fact not in dispute.

9.1.2.2. The respondent has set out at paragraph [9.1.2.6] of its closing submissions the investigatory steps taken by the respondent. We find that that is a fair summary of the steps taken.

9.1.2.3. The claimant's criticisms of the investigative process as outlined in his closing submissions are confused. They reflect his apparent inability to focus on what is genuinely relevant and the difficulty he displayed throughout the hearing in seeing "the wood for the trees", despite the Tribunal trying to help the claimant focus on the issues. For example, at 9.1.2.2 of his closing written submissions the claimant refers to concerns raised in an email he sent on 29 April 2020 (DB 2033 to DB 2036). At DB 2035 he had raised issues in relation to what he regards as the insufficiency of the investigation in relation to the

Cyber Essentials Plus accreditation. However, the factual allegation in relation to this accreditation, of which the claimant had been notified on 20 March 2020 (see [179] above) was simply about to whom he had sent the report. The claimant did not dispute that it had been sent to people to whom it should not have been sent.

9.1.2.4. By way of further example, he refers at paragraph [9.1.2.12] of his closing submissions to the disciplinary hearing notes at DB 2702 to 2717 stating "remarks highlighted in yellow demonstrated the problems with the investigation". At page 2702 the claimant picks up in one of these highlighted remarks on a reference by Mr Panditharatna to "work you were doing for East Kent" and comments on it. However, the reference to "East Kent" is of very peripheral relevance at best.

9.1.2.5. The claimant's criticisms of the investigative process understandably overlap with his criticisms of the procedure followed generally. We return to these below. However, we find that in light of the extent to which the factual allegations were actually in dispute, the investigative process carried out by the respondent was within the band of reasonable responses.

9.1.3. the respondent otherwise acted in a procedurally fair manner;

9.1.3.1. Again, the claimant's arguments in relation to why the procedure was not within range of reasonableness have been confused. We address what we regard as the more significant points that have arisen during these proceedings here. When referring to the question of whether an aspect of the procedure followed resulted in the procedure being outside the range of reasonableness, we refer to whether the aspect was "unreasonable".

9.1.3.2. <u>The claimant's suspension (and the delay in suspending him)</u>: the claimant complained both that he was suspended and that there was a delay in suspending him (thus casting doubt on the need to suspend). We have made findings about the reason for both suspension and the delay in suspension at [160] to [164] and [169] to [173] above. We also reached conclusions about the suspension at [7.5.2] to [7.5.5]. In light of those findings and conclusions, we conclude that neither the fact that the claimant was suspended nor the delay in implementing the decision to suspend resulted in the procedure being unreasonable. Both were reasonable actions taken to defend the respondent's reasonable interests.

9.1.3.3. <u>Refusal to discuss the allegations at the suspension meeting</u>: the respondent was under no obligation to discuss the reasons for the claimant's suspension at the meeting on 14 January 2020. Further, given that a decision had been taken to undertake an investigation, any discussion might have resulted in confusion. We therefore conclude that the refusal of the respondent to discuss the allegations

at the suspension meeting did not result in the procedure followed being unreasonable.

9.1.3.4. The use of an external investigator: there is no evidence of any significance which suggests that the Burdett consultancy had any pre-conceived bias against the claimant. It was not unreasonable for the respondent to use an external investigator. Indeed, it increased the independence of the investigation.

9.1.3.5. The addition of the allegation of a breach of the sickness absence policy (Allegation 1): we have made findings of fact about why this happened when it did at [173] to [174] above. In light of those findings, it was clearly not unreasonable for the allegation to be added when it was.

9.1.3.6. The addition of the cyber essentials allegation (Allegation 3): we have made findings at [178] above which explain why this allegation was added when it was. It was clearly reasonable for the respondent to add this allegation to those previously levelled at the claimant in these circumstances. The respondent was not obliged to disregard possible wrongdoing of this kind uncovered by the Burdett consultancy's investigation. The respondent's procedure in this respect was not unreasonable.

9.1.3.7. The agreement of minutes: the claimant contends that amendments he made to draft notes of his meeting with the Burdett consultancy were not considered by her. We find that the evidence in this respect is unclear. However, it is clear that the amendments he proposed were provided to Mr Panditharatna, the decision maker. The respondent's procedure in this respect was not unreasonable.

9.1.3.8. The extent of IT access: the claimant was given supervised IT access on a number of occasions: 31 March 2020, 1 April 2020, 8 April 2020 and 21 April 2020. Given the nature of the allegations against him, this was reasonable access. The respondent's procedure in this respect was not unreasonable.

9.1.3.9. Running the disciplinary and grievance procedures in parallel (or not): as the findings of fact above make clear, disciplinary and grievance procedures were run in parallel except that some of the allegations contained in the second grievance were "carved out" and dealt with separately. We find that the decision to carve out some aspects of the second grievance as set out at [191] above was entirely reasonable: we find that the reason that it was done was to avoid further delay to the disciplinary procedure and the first grievance. We also find that the claimant was not disadvantaged in this respect in relation to the disciplinary proceedings: he was in practice able to raise whatever points he wished during the disciplinary hearing.

9.1.3.10. The underlying reality was this: the claimant complained relentlessly about more or less every aspect of the disciplinary and grievance processes. In these circumstances, it was clearly reasonable for the respondent to get on with the disciplinary and grievance hearings at the end of April. In light of the way the claimant conducted himself, it was unlikely that the respondent would have ever got to a point at which all outstanding allegations had been fully investigated before a particular scheduled hearing.

9.1.3.11. Delay in hearings: the claimant was dissatisfied with the respondent when it initially declined to postpone the disciplinary and grievance hearings on 6 April 2020 (DB 1787). The claimant subsequently criticised the respondent when it did postpone the hearings scheduled for those days until 28 and 29 April 2020 (the rescheduling letter is at DB 1816). We find that the length of the postponement was in part due to the availability of Mr Panditharatna at the height of the pandemic. We conclude that in these circumstances the respondent acted reasonably by postponing the hearings for just over 3 weeks, particularly given that it was the claimant who had requested the postponement.

9.1.3.12. The non-recording of disciplinary and grievance hearings: the claimant recorded the hearings himself via his domestic CCTV system. He accepted that he had done this at the hearing and, indeed, transcripts which he had prepared were included in the bundles. As such, the claimant was not in fact put to the disadvantage which he claims arose by the absence of a recording.

9.1.3.13. However, in so far as the question is whether the respondent's refusal to permit a recording in principle put the claimant at a disadvantage and rendered the procedure unreasonable, we have reached the following conclusions. The respondent provided a note taker and also permitted the claimant to be accompanied. We find that the note taker was competent. In these circumstances, it was not unreasonable for the respondent to refuse to permit the hearings to be recorded.

9.1.3.14. We have taken into account in reaching this conclusion the point made by the claimant about the respondent's notes of the grievance hearings being much shorter than his (DB 2918). However, the notes of a meeting will invariably not be a verbatim record of it and there was no procedural requirement for such a record in relation to the hearings that the claimant attended. The notes of a meeting will invariably be very much shorter than a transcript but this does not mean that they have not captured what is important. Rather, their relative brevity may well be explained by the fact that they have captured what is important and excluded what is not. It is indeed for this very reason that after the event the notes of a meeting are often more useful than a transcript of a recording of it.

9.1.3.15. Occupational health advice: the claimant argues that the failure to instruct an occupational health adviser to prepare a report rendered the procedure followed unreasonable. With hindsight, he makes this point with two separate arguments in mind: (1) that occupational health advice was necessary for the respondent to understand what adjustments should be made to the procedure; (2) that occupational health advice was necessary in order to judge whether the claimant was guilty of misconduct and/or the seriousness of any such misconduct.

9.1.3.16. The mass of correspondence generated by the claimant throughout the internal process inevitably meant that it was often difficult for the respondent to understand exactly what points he was making. However, at CT 359 he refers to the documents at DB 4585 and 4592, which are emails he sent on 4 and 6 May 2020. The focus of this and other contemporary correspondence is very much on occupational health advice being necessary for the respondent to understand what reasonable adjustments should be made. At DB 4585 the claimant writes:

> *When I was faced with again at the end of the disciplinary with this complete inability to anticipate and ensure that the company had considered any reasonable adjustments that the anxiety state I am experiencing (along with the decline of my mental health) brings me back to another point in my email.*
>
> *I'm requesting that the company treats me like a normal employee and stop singling me out and that the company refers me immediately to occupational health for assistance completing these processes.*

9.1.3.17. Ms Ball's evidence (FB 26) was that an occupational health referral would simply have caused further delay and so further stress. In answer to questions asked in cross-examination, she explained that taking occupational health advice would have taken a significant amount of time. An initial referral would have simply been to a nurse who was not a specialist. She said, in effect, that she did not believe that detailed occupational health advice could be obtained quickly.

9.1.3.18. The respondent was faced with a dilemma. On the one hand it was in everyone's interests to conclude the disciplinary and grievance processes as soon as possible and it had made all the adjustments requested by the claimant apart from permitting the recording of hearings. The respondent's closing submissions list at [9.1.2.7] a variety of things that we find it did during the process, many at the claimant's request. On the other, the claimant was asking it to refer him to occupational health so that he might receive "assistance for completing these processes" without any real indication of what such assistance might be, and such a referral would have resulted in delay and the prolonging of the period of uncertainty for the claimant.

9.1.3.19. The Tribunal concludes that in resolving this dilemma as it did the respondent did not act unreasonably: that is to say it was not unreasonable for the respondent to take the view that it was not necessary to instruct an occupational health expert to advise on what further assistance (if any) the claimant should receive in order to complete the disciplinary and grievance processes. In this respect we note that the claimant did engage with both the disciplinary and grievance procedures throughout, albeit at times with family members and friends doing at least some of the work on his behalf.

9.1.3.20. So far as the claimant's second argument in relation to the possibility of a referral to occupational health is concerned – that is to say that advice was necessary in order to judge whether the claimant was guilty of misconduct and/or the seriousness of any such misconduct – as we have noted above, this was not the focus of his requests for an occupational health referral at the time. Nor was it something which featured significantly at the disciplinary hearing. It can however, just about be discerned between the lines in emails such as that at DB 4593 which refers to others having concerns about his "instability" and "behaviour". His contemporaneous medical records do not suggest significant mental health issues in 2019.

9.1.3.21. However, taking the evidence in the round, the claimant did not at the time say to any significant extent that he believed he had committed misconduct as he had because of illness or disability (or as a result of things flowing from them). Rather, he argued at length and in enormous detail about the basic facts relevant to the alleged acts of misconduct. In these circumstances, the respondent did not act unreasonably by failing to instruct occupational health with a view to establishing whether his misconduct was explained by his medical conditions.

9.1.3.22. The Tribunal has taken into account Ms Sherlock's analysis of this issue as set out at [203] to [206] above in reaching these conclusions. We find her conclusions (which are not supported by detailed analysis) to be counsel of perfection rather than the identification of what was reasonably required.

9.1.3.23. Excessive HR involvement: the claimant contended that HR were excessively involved in the disciplinary and grievance processes (his closing written submissions at [9.1.3.16]). We conclude that they were not. The extent of their involvement was entirely normal and reasonable. When reaching this conclusion, we have taken into account in particular the fact that there is no evidence which suggests that they were involved in the actual decision making in a way that was inappropriate. The decisions were ultimately taken by Mr Panditharatna, Mr Trace and Mr Bernstein.

9.1.3.24. Stress management and other policies: the claimant contends that the respondent failed to follow the stress management, sickness absence and other policies in relation to him. The allegation is

confused and often vague, but at [9.1.3.7] he contends that the stress management policy should have been "invoked" after his "emotional breakdown" on 17 July 2019. He contends that this would have resulted in a change of workload and that "most of the conduct within the allegations would never have happened". As noted at [9.1.3.21] above, this was not a point that the claimant made to any significant extent at the time. Equally, as noted at [216] above, even when the claimant presented claim 1 on 5 May 2020, his position was that he had not suffered from any significant mental ill-health between April 2018 and January 2020.

9.1.3.25. Further, the claimant has not adduced any significant medical or other evidence which supports his contention that his misconduct could be explained by illness or disability (or as a result of things flowing from them). Consequently, any failure to follow the stress management and other policies as alleged did not result in the procedure followed being unreasonable.

9.1.3.26. Overall, therefore, we conclude that the procedure followed by the respondent was within the band of reasonable responses.

9.1.4. dismissal was within the range of reasonable responses

9.1.4.1. The dismissal letter found the claimant guilty of gross misconduct in relation to Allegation 2 (the breach of the code of conduct and the confidentiality policy represented by the PR email of 16 December) and misconduct in relation to Allegation 1 (breach of sickness absence procedure) and Allegation 4 (breach of company policy and inappropriate conduct). So far as Allegation 3 (the cyber essentials policy) was concerned, the letter of dismissal notes that it was seen as gross misconduct but "you admitted the allegation but provided an explanation for your actions and I have admitted this. I have decided to downgrade the sanction as a result" (DB 2385).

9.1.4.2. Mr Panditharatna's oral evidence was that he took all of the misconduct into account when deciding on the appropriate sanction. He was entitled to do this. We have concluded above that he had an honest belief in the claimant's misconduct, that there were reasonable grounds for this belief, that a reasonable investigation had been carried out and that the procedure followed by the respondent generally was reasonable. The remaining question, therefore, is whether dismissal was within the range of reasonable responses.

9.1.4.3. We have concluded that it was:

9.1.4.3.1. As we have found at [142] the sending of the PR email of 16 December was quite clearly a breach of the respondent's policies and procedures. Those policies and procedures made clear that a breach of confidentiality could be regarded as gross misconduct (for example, section 4.4 of the code of conduct set out at [113]) and/ or could lead to dismissal (for example, the

section of the confidentiality policy referred to at [114.4] above). We find that it was reasonable for the respondent to take the view that the claimant knew this (and, indeed, find that he did).

9.1.4.3.2. Further, the claimant's contract of employment when read with the disciplinary procedure made it clear that the disclosure of confidential information might amount to gross misconduct. We find that it was reasonable for the respondent to take the view that the claimant knew this (and, indeed, find that he did).

9.1.4.3.3. As found above, the fact that another employee had been dismissed for gross misconduct was self-evidently confidential. Further it came within the definition of confidential information contained in the confidentiality policy.

9.1.4.3.4. Further, the email correspondence considered between [135] and [138] demonstrates both that the claimant knew this himself and that it was in effect confirmed to him on two separate occasions by email before he sent the PR email of 16 December.

9.1.4.3.5. The claimant had, therefore, knowingly committed an act that he knew the respondent might treat as an act of gross misconduct (and which was, as our conclusions below make clear, an act of gross misconduct).

9.1.4.3.6. In terms of the overall reasonableness of the decision to dismiss, we conclude that the misconduct identified in relation to Allegations 1 and 4 add relatively little to the respondent's case. They were insufficiently serious in Mr Panditharatna's opinion to merit more than a first written warning. Equally, the respondent concluded that allegation 3 should result only in a first written warning.

9.1.4.3.7. However, we have concluded that dismissal primarily for sending the PR email of 16 December was within the band of reasonable responses because by sending the email the claimant committed an act that he knew the respondent might treat as an act of gross misconduct. The respondent was as we have concluded at issue [9.1.1.4] above entitled to take the view that the disclosure of the information was not justified or necessary in the context of the email exchange.

9.1.4.3.8. We turn now to a number of matters which the claimant relies on in support of his argument that his dismissal was unfair. The claimant contends that the respondent was wrong to draw a distinction between his attitude towards on the one hand the sending of the cyber essentials report (for which the respondent said he showed remorse) and on the other the sending of the PR email of 16 December (for which the respondent said he showed no remorse or understanding).

9.1.4.3.9. The claimant so contends because he says he did show remorse and he cites in this respect his email of 14 February 2020 at DB 1546, referring particularly at paragraph [7.13] of his closing submissions to DB 1549. However, the thrust of what the claimant is actually saying at DB 1549 is that he does not understand why sending the PR email of 16 December was incorrect and that he needed training. He then goes on to criticise PR at considerable length at DB 1550. This reflects the claimant's general attitude towards the sending of the PR email of 16 December throughout the internal proceedings (and, indeed, subsequently). It was reasonable of Mr Panditharatna and then Mr Trace and Mr Bernstein to take the view that the claimant had constantly sought to justify and explain the sending of the PR email of 16 December and that he had not shown any significant remorse for having done so.

9.1.4.3.10. This was something which weighed against the claimant. Mr Panditharatna said in the dismissal letter:

> *In relation to allegation two and having taken your explanations, defence and mitigations into account, I believe you exercised a serious lapse in judgement and what concerns me most is your apparent failure to accept the gravity of your actions which were wholly unacceptable. I was not satisfied that a similar situation would not happen again and this is particularly relevant as a senior member of staff and as Head of ICT.*

9.1.4.3.11. We conclude that it was reasonable for Mr Panditharatna to take this view of the claimant's attitude towards his own misconduct in sending the PR email of 16 December.

9.1.4.3.12. The claimant also contends that his dismissal was unfair because he was treated differently to, and inconsistently with, other employees who had breached confidentiality. We conclude that the claimant was not treated differently to anyone else in a truly similar situation. In light of the email at page DG 5761, we find that the respondent had dismissed other employees as a result of allegations that included confidentiality or data breaches. We reject the suggestion that sending the PR email of 16 December was comparable in any sensible way to the first grievance (which contained a reference to the claimant's HIV+ status) being forwarded to the person who was to consider the claimant's grievance. It was self-evidently necessary for the grievance to be forwarded in this way and there was nothing in it which would have suggested to its recipient that the claimant did not agree to that. Equally, HB forwarding the PR email of 16 December to HG, her manager, is self-evidently not comparable to the claimant writing and sending it in the first place.

9.1.4.3.13. The claimant also contends, in effect, that his dismissal was unfair because what the sending of the PR email of 16 December actually demonstrated was a training need. We conclude that the respondent acted within the band of reasonable responses by rejecting this argument in light of our conclusions between [9.1.4.3.1] and [9.1.4.3.5] above. The claimant did not need further training to know that he should not have disclosed the fact that a fellow employee had been dismissed for gross misconduct in the circumstances in which he did this.

9.1.4.3.14. The claimant also contends, in effect, that his dismissal was unfair because the respondent did not in reality take breaches of confidential information seriously, citing in particular as evidence the fact that the PR email of 16 December had not been recorded as an actual or potential breach of data protection obligations under the respondent's relevant systems. However, those were separate systems of an essentially regulatory nature operated by other employees. Any disconnect should reasonably be seen in that context. We do not accept that the respondent did not take breaches of confidentiality seriously. That it did is reflected in the dismissals referred to above.

9.1.4.4. Overall, therefore, whilst we conclude that the decision taken by the respondent to dismiss the claimant was not a decision every employer would have taken, it was nevertheless quite clearly within the band of reasonable responses.

9.1.4.5. Finally, we have considered the various authorities to which the claimant has referred in reaching this conclusion. We do not consider any of them to be of any real assistance to him. The claimant has sought to use Jagex Limited v Mr John McCambridge UKEAT/0041/19/LA as a factual precedent, but the reality is that the facts are not at all similar. For example, at paragraph [9.1.4.5] of his closing submissions the claimant suggests that the fact that others knew AJ had been dismissed meant that the fact that he had been dismissed for gross misconduct was no longer confidential, but this is self-evidently not the case. Burdett v Aviva Employment Services Ltd UKEAT/0439/13/JOJ does not assist the claimant because he has not demonstrated that his misconduct was caused by a disability. Salford Royal NHS Foundation Trust v Roldan [2010] IDR 1457 is not of any great relevant because this is not a career ending dismissal and, in any event, this was not a case in which there were acute conflicts of fact.

10. The Tribunal therefore concludes that the claimant was not unfairly dismissed.

11. Because the Tribunal has found that the claimant was not unfairly dismissed, it is not necessary for it reach any conclusions in relation to the question of Polkey or contribution. However, these are the conclusions that the Tribunal

would have reached in relation to contribution if it had been necessary to consider it.

11.1. **If the claimant was unfairly dismissed, did they cause or contribute to dismissal by blameworthy conduct?**

11.1.1. If we had concluded that dismissal was not within the band of reasonable responses, we would nevertheless have concluded that the claimant had contributed very substantially indeed to his dismissal, in particular by sending the PR email of 16 December.

11.2. **If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?**

11.2.1. We would have concluded that that was culpable conduct because sending the PR email of 16 December was an obvious breach of the respondent's procedures and policies as referred to above and the claimant was aware that he should not have sent it. We would have concluded that it was just and equitable to reduce his compensation by 75%.

11.3. **Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal? If so, to what extent?**

11.3.1. We would have concluded that for the same reasons it was just and equitable to reduce the basic award and would have reduced it by 75%.

Wrongful dismissal

12. How much notice was the Claimant entitled to? The Claimant says he was entitled to three months' notice.

13. The respondent accepts that the claimant's notice period was three months.

14. Did the Claimant fundamentally breach the contract of employment by an act of so-called gross misconduct?

14.1. The effect of clause 4 of his contract of employment as considered at [110] above was to require the claimant not to disclose confidential information when regard is had to the policies and procedures, in particular as considered at [113] and [114] above. The respondent had by such policies and procedures also provided that the unauthorised disclosure of confidential information could be regarded as a repudiatory breach of contract.

14.2. Viewed objectively, and taking account of our findings at [143] about *why* the claimant included the information about AJ's dismissal for gross misconduct in the PR email of 16 December, we conclude that, by sending the email when he knew it would result in the unauthorised disclosure of obviously

confidential information, the claimant was guilty of gross misconduct and a repudiatory breach of contract. What he did was such as to undermine the trust and confidence existing between him and the respondent.

14.3. Further and separately, and in case our conclusion in the previous paragraph is incorrect, a series of breaches may together amount to a fundamental breach of contract and we find that there was such a fundamental breach of the implied term of trust and confidence when the following are taken together: the sending of the PR email of 16 December; the sending of the cyber essentials report; the claimant's attitude towards the sending of the PR email of 16 December throughout the disciplinary process; the claimant effectively ignoring the advice given to him in relation to the confidentiality of the dismissal of AJ in the two emails considered at [135] to [137] above; the claimant's covert recording of the hearings when he knew that the respondent has refused to agree to this. (We reject any suggestion by the claimant that he was unaware that the recordings were being made at the time. He is a skilled IT professional who we find was aware of how his own CCTV system functioned. Further, by his own evidence any recordings would have been deleted within a relatively short period of time if not saved. They were therefore saved which again points to a contemporary awareness of them being made.)

15. If so, did the Respondent affirm the contract of employment prior to dismissal?

15.1. We conclude that the respondent did not. The claimant was suspended shortly after the respondent became aware of the sending of the PR email of 16 December. After that, the respondent followed a disciplinary process resulting in the claimant's dismissal without any undue delay on its part.

15.2. The claimant was not, therefore, wrongfully dismissed.

<u>Protected disclosure detriment (sections 47B and 48 of the Employment Rights Act 1996)</u>

16. **Did the claimant make a protected disclosure**?

17. The Tribunal refers to its conclusions at issue [2] above in this respect. The claimant therefore did make a protected disclosure.

18. Did the respondent do the following things:

18.1. **[11.1a] Suspend the claimant on 14 January 2020?**

18.1.1. The respondent did suspend the claimant on 14 January 2020.

18.2. **[11.1b] Fail to address the protected disclosure during the grievance and appeal hearings?**

18.2.1. We find that this factual allegation is not made out. In the protected disclosure which is set out at [168] above the claimant raised issues about what he regarded as inadequate staffing and the effect of this

on existing staff. This issue was addressed because it was considered at both the grievance and the grievance appeal hearing.

18.2.2. So far as the grievance hearing before Mr Panditharatna is concerned, this is clear from the notes/transcript prepared of the hearing on 6 May 2020 (see, for example, DB 2177).

18.2.3. So far as the grievance appeal hearing is concerned, this is clear from the notes of that hearing which begin at DB 2609. The discussion is apparent at DB 2611 and 2612.

18.3. **[5] Did Mr Panditharatna on 11 June 2020 remove or re-state claimant's references (in Mr Panditharatna's outcome letters) to allegations of discrimination, harassment and bullying?**

18.3.1. We find that this factual allegation is not made out. Although exactly what is meant by references being removed or restated is unclear, the outcome letters referred to the allegations and responded to them.

18.4. **[7] did Mr Panditharatna on 11 June 2020 fail to address the claimant's protected disclosure?**

18.4.1. We find that this factual allegation is not made out. The first grievance outcome of 11 June clearly addresses the factual matters which were the subject of the claimant's protected disclosure (Grievance allegation 4, DB 2371-2).

18.5. **[6] did Mr Trace on 24 August 2020 fail to address the suggestion that the claimant's protected disclosures were being covered up by staff in his outcome letters?**

18.5.1. We find that this factual allegation is not made out for the following reasons. First, the claimant has not identified where such a suggestion was made. Further and separately, in any event Mr Trace did in effect address such a suggestion if it were made in the first grievance appeal outcome letter at DB 2874-5 when considering Grievance allegation 11 by finding that the whistleblowing process "was not ignored".

18.6. **[8] did Mike Trace on 24 August 2020 fail to address and remove reference to claimant's protected disclosure in the outcome letters?**

18.6.1. We find that this factual allegation is not made out. The first grievance appeal outcome letter clearly addresses the factual matters which were the subject of the claimant's protected disclosure (Grievance allegation 4, DB 2869-2870).

19. By doing so, did the respondent subject the claimant to detriment?

19.1.1. The only factual allegation which has been made out is that the claimant was suspended. The respondent accepted that the suspension was a detriment.

20. If so, was it done on the ground that the claimant had made a protected disclosure?

20.1. We conclude that the decision to suspend the claimant which was taken by Mr Biggin was wholly unrelated to the protected disclosure that the claimant had made. This is above all because we have found at [163] above that the decision to suspend Mr Biggin was taken before the protected disclosure was made because Mr Biggin believed this was necessary whilst an investigation took place.

20.2. Further and separately, by the time the claimant was suspended he had raised a considerable variety of issues in the same email as that in which the protected disclosure was made. We do not find that the protected disclosure was something which would have stood out in the lengthy email to Mr Biggin in a way which would have made it likely that he would have reacted to it rather than to the email's other contents.

20.3. More generally, we conclude that there is no evidence of significance that the respondent treated the claimant unfavourably in any way because of the protected disclosure. If our findings of fact had resulted in one of the other factual allegations being made out – for example, because we construed a document differently – we would not have concluded that the reason for the treatment in question was the making of the protected disclosure.

20.4. In light of these conclusions, the claimant's complaint that he was subjected to detriments for making a protected disclosure fails and is dismissed.

Direct disability discrimination

21. The respondent has conceded that the claimant had disabilities for the purpose of section 6 of the Equality Act 2010 at all relevant times by virtue of being HIV positive, having narcolepsy and/or depression. Where relevant, the state of and timing of the respondent's knowledge remains in issue.

22. Did the respondent do the following things:

22.1. **[Allegation 15.1 (3)]: From July 2019 to January 2020 refuse the claimant the opportunity to recruit more staff (Mr Biggin is named as the perpetrator)?**

22.1.1. We find that this factual allegation is not made out. We find that Mr Biggin did not during the period in question *refuse* to recruit more staff. Rather, following a period in which the IT team had been expanded, Mr Biggin sought to maintain staffing levels. For example, after the departure of AS, JG was recruited (there is an email dated 9 July 2019 confirming this at DB 996). Equally, although there were issues with the timing of the replacement of AJ, we find that at no point did Mr Biggin *refuse* to replace him and it is of note that at the time the claimant blamed the HR department and not Mr Biggin for the delay. Further, it is clear that in December 2019

Mr Biggin authorised the recruitment of another first line support engineer (DB 3501-2), having previously agreed to a temp.

22.1.2. Overall, we find that Mr Trace and Mr Bernstein reflected the position accurately in the first grievance appeal outcome letter of 24 August 2020 when they stated (DB 2870):

We are aware from experience that John Biggin spent a lot of time through 2019 trying to be supportive of you and ensure that the IT function worked well. It is a fact that a higher staff complement was agreed for the IT department at your request and that this is the highest staff complement the department has ever had.

However, this must of course be seen in the context of the particular pressures on the ICT Department in 2019.

22.2. **[Allegation 15.1 (3)]: From July 2019 to January 2020 increase workload pressure (amount and deadlines) on the claimant (Mr Biggins is named as the perpetrator)?**

22.2.1. We have made findings at [130] above about the pressure of work on the claimant during this period. It is clear that pressure of work did increase in 2019.

22.2.2. However, the allegation is not that workload pressure increased, but that Mr Biggin increased it because of the claimant's disabilities. There is as such an implicit suggestion that Mr Biggin engineered matters so as to increase workload pressure. We find that he did not: rather increasing workload pressure simply reflected the work required to be completed by the IT department during the period in question, some of which was planned and some of which was unplanned.

22.2.3. We therefore find that this factual allegation is not made out.

22.3. **[Allegation 15.1 (3)]: From July 2019 to January 2020 blame the claimant for IT problems (Mr Biggin is named as the perpetrator)?**

22.3.1. We find that this factual allegation is not made out. Whilst Mr Biggin did hold the claimant responsible for the performance of the IT department during the period in question (which is unsurprising given that the claimant was the Head of ICT and reported to Mr Biggin), Mr Biggin did not "blame" him for them. In this context "blame" clearly has the meaning of inappropriately attributing responsibility to the claimant.

22.4. **[Allegation 15.1 (11)]: On 18 December 2019, and between 10 March 2020 and 11 June 2020, fail to record the claimant as sick on the HR system (Mr Biggin, Ms Ball, Mr Blackburn and Mr Panditharatna are named as the perpetrators)?**

22.4.1. **18 December 2019**: Mr Biggin did not sign off on the claimant's sickness absence on this date (and so he was not recorded as being off

sick). We are able to make a positive finding about why he did not do this. It was because he did not believe that the claimant had complied with the sickness notification procedure and because the claimant had not responded to emails he had sent. We have made further findings in relation to these matters at [146] to [159] above. Ms Ball, Mr Blackburn and Mr Panditharatna were in no way involved in the claimant not being recorded as sick on 18 December 2019. The failure to record the sickness absence was in no sense whatsoever because of disability.

22.4.2. **10 March to 11 June 2020**: the claimant was not recorded as sick during this period. We are able to make a positive finding about why this was the case. We find that the reason for this was that he had been suspended since 14 January 2020 and that nobody considered whether his status as recorded on the HR system should be changed once he began to submit sick notes in March. The failure to record the sickness absence as such was in no sense whatsoever because of disability.

22.4.3. We further conclude that in reality this was to the claimant's advantage as he continued to receive normal pay rather than sick pay which would if he had been absent for a sufficiently long period have reduced.

22.5. **[Allegation 15.1 (1)]: On 14 January 2020 and 9 March 2020 decide to suspend the claimant (Mr Biggin and Mr Blackburn are named as the perpetrators)?**

22.5.1. We find that Mr Biggin suspended the claimant on 14 January 2020. We find that neither he nor Mr Blackburn suspended him on 9 March 2020.

22.5.2. We are able to make a positive finding about why Mr Biggin suspended the claimant on 14 January 2020. As we have found at [163] above the decision to suspend the claimant was made because Mr Biggin believed this was necessary whilst an investigation took place. The decision to suspend was in no sense whatsoever because of disability.

22.6. **[Allegation 15.1 (1)]: On 14 January 2020 and 9 March 2020 conduct an insufficient investigation (Mr Biggin and Mr Blackburn are named as the perpetrators)?**

22.6.1. We find that this factual allegation is not made out. We refer to our conclusions in relation to the unfair dismissal claim above. Neither Mr Biggin nor Mr Blackburn conducted the investigation. However, we have concluded above that the investigation was reasonable and for the same reasons conclude it was not insufficient.

22.7. **[Allegation 15.1 (1)]: On 14 January 2020 and 9 March 2020 decide to dismiss the claimant (Mr Biggin and Mr Blackburn are named as the perpetrators)?**

22.7.1. We find that this factual allegation is not made out. We refer to our conclusions in relation to the unfair dismissal claim above. Neither Mr Biggin nor Mr Blackburn took the decision to dismiss the claimant. That decision was taken initially by Mr Panditharatna and was confirmed on appeal by Mr Trace and Mr Bernstein.

22.8. **[Allegation 15.1 (6)]: On 14 January 2020, 31 March 2020, 1 April 2020 and 20 April 2020 restrict the claimant's access to his mailbox and/or personnel record (Mr Biggin and Mr Blackburn are named as the perpetrators)?**

22.8.1. The claimant's access to his email inbox and "Cascade" the electronic HR system was restricted from 14 January 2020 and the access he was given to his mailbox on 31 March 2020, 1 April 2020 and 20 April 2020 was supervised. The claimant was provided with a copy of his personnel file on 6 March 2020 (DB 1633). He had not previously had access to this which was "restricted" from 14 January 2020.

22.8.2. We therefore find that the claimant's access to his mailbox and electronic personnel record as held on Cascade were restricted as claimed.

22.8.3. We are able to make a positive finding about why the claimant's access was so restricted. The claimant's access was so restricted because of his technical expertise and the nature of the allegations against him. We refer to our findings at [171] above in this respect. The restriction of access was in no sense whatsoever because of disability.

22.9. **[Allegation 15.1 (7)]: On 10 February 2020, 19 February 2020 and 9 March 2020 remove all information on the claimant's health from investigation meeting notes (Mr Blackburn is named as the perpetrator)?**

22.9.1. We find that this factual allegation is not made out. The claimant does not claim to have seen a draft of the investigation meeting notes containing information relating to the claimant's health which was missing from the final version. There is no evidence of any significance that such information was removed from a draft of the investigation meeting notes.

22.10. **[Allegation 15.1 (8)]: On 9 March 2020 include no mention of the claimant's health/disability in their investigation notes and not investigate these as mitigatory factors (Ms Burdett is named as the perpetrator)?**

22.10.1. The claimant did not contend that his HIV+ status was relevant to the alleged misconduct and his position as of Spring 2020 as found at [216] above was that he had had not suffered from mental ill-health between April 2018 and January 2020. He did not obviously rely on his narcolepsy as an explanation for his misconduct.

22.10.2. However, the allegation is that there was no mention of his health/disability and that these were not investigated as mitigatory factors. In fact, there is a heading "[claimant's] workload, sickness and stress levels" at section 5 of the investigation report (DB 1587). As such his health was mentioned and its significance investigated at least to some extent.

22.10.3. We therefore find that this factual allegation is not made out.

22.10.4. It is not necessary for us to consider the reason for the claimant's health/disability being mentioned to the limited extent that it was or investigated to the limited extent that it was. However, if it had been necessary, we would have found that the reason was that it reflected the extent to which the claimant relied on such matters during the investigation. We would have concluded that it was in no sense whatsoever because of disability.

22.11. **Allegation 15.1 (10)]: On 23 March 2020 fail to provide the occupational health report when requested (Ms Thatcher, Mr Blackburn and Ms Cox are named as the perpetrators)?**

22.11.1. The respondent accepts that the 2016 OH report was not provided on 23 March 2020 when requested.

22.11.2. We have set out detailed findings in relation to the 2016 OH report at [208] to [211] above. In light of those findings, we are able to make a positive finding about why it was not provided on 23 March 2020: it was because it had not been downloaded in 2016. The failure to provide it was therefore in no sense whatsoever because of disability.

22.12. **[Allegation 15.1 (10)]: On 23 March 2020 amend HR records so they no longer matched payslips to cover up (Ms Thatcher, Mr Blackburn and Ms Cox are named as the perpetrators)?**

22.12.1. We find that this factual allegation is not made out. This is because it is unclear, the claimant did not comment on it in his closing written submissions, and we have found no evidence sufficient to prove on the balance of probabilities that HR records were amended so that they no longer matched payslips to "cover up".

22.13. **[Allegation 15.1 (10)]: On 23 March 2020 delete entries from outlook calendar and emails which mentioned health and/or overtime (Ms Thatcher, Mr Blackburn and Ms Cox are named as the perpetrators)?**

22.13.1. We find that this factual allegation is not made out. The claimant did not comment on it in his closing written submissions and we have found no evidence sufficient to prove on the balance of probabilities that deletions took place as alleged.

22.14. **[Allegation 15.1 (12)]: On 30 March 2020 provide the claimant's HIV and disability information to staff without the claimant's prior consent**

and inform the claimant that he had done so (Mr Blackburn is named as the perpetrator)?

22.14.1. As explained by the claimant during the course of the hearing, the allegation is that (1) Mr Blackburn provided the claimant's HIV and disability information to Mr Panditharatna without the claimant's prior consent when he forwarded the first grievance to him; (2) Mr Blackburn told the claimant that he had done this on 30 March 2020.

22.14.2. The respondent accepts that Mr Blackburn forwarded the first grievance to Mr Panditharatna in unredacted form so providing to him the claimant's HIV and disability information contained in it and, also, that he told the claimant that he had done so.

22.14.3. So far as the question of consent is concerned, we conclude that on any sensible reading of the first grievance the claimant wished the disabilities set out in it to be considered as a potential cause of what he regarded as unlawful treatment. If this were not the case, there is no logical reason for the information to have been included in the first grievance which was drafted by lawyers. In light of this, by including such information in the first grievance, the claimant could reasonably be taken to have consented to it being forwarded in unredacted form to the decision maker. This is all the more the case given that the first grievance does not expressly say that the claimant requires redactions to be made to it before it is sent to anyone other than the addressee. As such the claimant did impliedly provide consent. The fact that the Information Commissioner's Office found that there had been a breach of the GDPR (DB 3201) because "explicit" consent had not been obtained does not cause us to change this conclusion in light of the wording of the allegation.

22.14.4. The allegation is as such only partially made out.

22.14.5. We are, however, able to make a positive finding both about why Mr Blackburn forwarded the first grievance as he did and why he told the claimant he had done this in his email of 30 March 2020 (DB 4432). In both cases it was in order to progress the claimant's grievance appropriately. In neither case was his action in any sense whatsoever because of disability.

22.15. **[Allegation 15.1 (13): Between 29 April 2020 and 6 May 2020 refuse to hold a grievance hearing at the start of May 2020, instead delaying it; and speak to the claimant in an angry and sarcastic manner (Ms Ball is named as the perpetrator)?**

22.15.1. Refuse to hold grievance hearing and delay it: the grievance hearing in relation to the first grievance did take place at the start of May. To the extent that this allegation should be understood to relate to that part of the second grievance which was not dealt with at the same time as the first grievance, we refer to our factual findings at [189] to [191] above. We find that in some sense it could be said that the respondent refused to hold a hearing in relation to the whole of the second grievance at the beginning

of May and therefore delayed it. The factual allegation is therefore made out in part.

22.15.2. However, we are able to make a positive finding about why the respondent acted as it did. Notwithstanding our finding at [191] above that the distinction made between the different parts of the second grievance was to some extent artificial, we find that it is clear that this distinction was made in order to avoid further delay in relation to the first grievance and for no other reason. The reason the respondent acted as it did was in no sense whatsoever because of disability.

22.15.3. **Ms Ball speaking to the claimant in an angry and sarcastic manner:** the claimant relied in this respect during the hearing on the part of the transcript prepared by the claimant at DB 2113. In particular, he noted in the transcript that Ms Ball had in his view spoken "sharply". The recording of the relevant part of the hearing was played to the Tribunal. Having heard the recording, we find that Ms Ball did not speak to the claimant in either an angry or a sarcastic manner. We therefore find that this factual allegation is not made out.

22.15.4. We have not considered the wider recasting of this issue by the claimant in his closing submissions because it does not reflect the list of issues and, in any event, the issue as recast is unclear.

22.16. **[Allegation 15.1 (2)]: On 11 June 2020 conduct an insufficient investigation (Mr Panditharatna is named as the perpetrator)?**

22.16.1. The claimant has not commented on this allegation in his closing written submissions. We have considered it as relating to the way Mr Panditharatna chaired the hearings, considered the documentation and information provided, and obtained and considered further evidence from witnesses after the claimant had provided questions to them.

22.16.2. We refer to our conclusions in relation to the reasonableness of the investigation as set out in relation to issue [9.1.2] above. We conclude that this factual allegation is not made out: it is clear that the investigation was sufficient.

22.17. **[Allegation 15.1 (2)] On 11 June 2020 decide to dismiss the claimant (Mr Panditharatna is named as the perpetrator)?**

22.17.1. There is no dispute that Mr Panditharatna decided to dismiss the claimant.

22.17.2. We are able to make a positive finding about why Mr Panditharatna decided to dismiss the claimant. It was because he had an honest belief that the claimant was guilty of gross misconduct as alleged. We refer to our findings and conclusions in relation to this issue above. The decision was in no sense whatsoever because of disability.

22.18. **[Allegation 15.1 (14)]: On 27 July, 31 July and 24 August 2020 conduct an insufficient investigation and then provide an outcome which blamed the claimant (Mr Trace is named as the perpetrator)?**

22.18.1. The claimant has not commented on this allegation in his closing submissions. We have, however, taken it to refer to the appeal hearing in relation to both the first grievance outcome and the decision to dismiss.

22.18.2. Mr Trace and Mr Bernstein (against whom no allegation is made in this respect) convened a hearing to discuss the claimant's appeals. The claimant did not attend but minutes are included in the bundle.

22.18.3. We refer to our conclusions in relation to the reasonableness of the investigation as set out in relation to issue [9.1.2] above. We conclude that this factual allegation is not made out in so far as it relates to the investigation: it is clear that the investigation was sufficient. In particular, we conclude that Mr Trace and Mr Bernstein adequately considered the additional materials provided by or on behalf of the claimant following the first grievance outcome and the dismissal letter.

22.18.4. In so far as "blaming" the claimant is concerned, we conclude in light in particular of the dismissal appeal outcome letter and the first grievance appeal outcome letter that the only way in which Mr Trace (and so Mr Bernstein) can be reasonably said to have "blamed" the claimant was by concluding he was guilty of gross misconduct.

22.18.5. We are able to make a positive finding about why Mr Trace and Mr Bernstein "blamed" the claimant in this way. It was because they had an honest belief that the claimant was guilty of gross misconduct as alleged. We refer to our findings and conclusions in relation to this issue above. Such "blame" was in no sense whatsoever because of disability.

22.19. **[Allegation 15.1(15)]: From 27 July to 24 August 2020 trivialise the claimant's disabilities by analogising with a dentist visit (Mr Trace is named as the perpetrator)? This is a reference to what Mr Trace said at the disciplinary appeal meeting on 31 July 2020 as set out at DB 2620.**

22.19.1. We find that this factual allegation is not made out. Mr Trace's comments seek to explore at a general level the relevance of health problems to disciplinary allegations. Mr Trace is not "analogising" the claimant's disabilities to a dental visit but rather considering whether and to what extent health problems are mitigating factors, as the subsequent discussion as recorded between him and Mr Bernstein makes clear. He does not say anything which could reasonably be understood as him suggesting that the claimant's disabilities were no more serious that something requiring a visit to the dentist.

22.20. **[Allegation 15.1 (9)]: On 24 August 2020 remove references to Mr Biggin's 'discriminatory acts' at appeal hearings (Mr Trace is named as the perpetrator)?**

22.20.1. The claimant noted in his written closing submissions that the allegation related to the “outcome letters” – it is therefore that Mr Trace removed references to “discriminatory acts” of Mr Biggin’ from the first grievance appeal outcome letter and from the dismissal appeal outcome letter.

22.20.2. The factual allegation is not made out. There is no evidence of significance that references to “discriminatory acts” were removed from the outcome letters before they were sent to the claimant. Indeed, although the draft of the dismissal appeal outcome letter was contained in the bundle at DB 4930 (and we have made findings in relation to this at issue [7.5.10] above), it was not suggested to Mr Trace in cross-examination that he had removed references to discriminatory acts from it and nor were any such references identified in the draft.

23. Was that less favourable treatment?

The Tribunal will decide whether the claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the claimant’s.

If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether they were treated worse than someone else would have been treated.

The claimant says they were treated worse than EH (finance director) and Ms Thatcher. The claimant also relies on a hypothetical comparator.

24. If so, was it because of disability?

24.1. We have considered this issue and that of less favourable treatment as set out in issue [23] above together.

24.2. We conclude that neither EH nor Ms Thatcher are appropriate comparators in relation to any of the allegations. Their circumstances were materially different. The question, therefore, is in effect whether a non-disabled Head of ICT would have been treated differently in the same circumstances.

24.3. Turning to the factual allegations that we have found to be proved in whole or in part, of course, the claimant must establish something more than unfavourable treatment and the existence of disability to establish a *prima facie* case and transfer the burden of proof. We conclude that the claimant has failed to prove facts from which we could decide in the absence of any other explanation that the respondent had discriminated against the claimant because of disability. This is for reasons including the following:

24.3.1. Generally, so far as any of the proved factual allegations relates to matters which took place before 31 January 2020, the respondent’s employees had no actual knowledge of disability (we have made findings in this respect between [208] and [226] above). This very substantially reduces the likelihood of the “reason why” being disability.

24.3.2. Further and separately, in relation to the individual factual allegations proved in whole or in part:

24.3.2.1. [Allegation 15.1 (11)]: On 18 December 2019, and between 10 March 2020 and 11 June 2020, fail to record the claimant as sick on the HR system (Mr Biggin, Ms Ball, Mr Blackburn and Mr Panditharatna are named as the perpetrators)? There is no evidential basis for rejecting Mr Biggin's explanation that he did not accept the absence of 18 December on Cascade because of the claimant's failure to follow procedure. Equally there is no evidence of significance pointing to the non-recording of his absence from 10 March being because of disability. The burden of proof does not shift.

24.3.2.2. [Allegation 15.1 (1)]: On 14 January 2020 and 9 March 2020 decide to suspend the claimant (Mr Biggin and Mr Blackburn are named as the perpetrators)? There is no evidential basis to infer a link between the claimant's disabilities and the decision to suspend. The burden of proof does not shift.

24.3.2.3. [Allegation 15.1 (6)]: On 14 January 2020, 31 March 2020, 1 April 2020 and 20 April 2020 restrict the claimant's access to his mailbox and/or personnel record (Mr Biggin and Mr Blackburn are named as the perpetrators)? There is no evidential basis for finding that a non-disabled Head of ICT would have been treated differently in the same circumstances. The burden of proof does not shift.

24.3.2.4. [Allegation 15.1 (10)]: On 23 March 2020 fail to provide the occupational health report when requested (Ms Thatcher, Mr Blackburn and Ms Cox are named as the perpetrators)? The evidence in relation to this issue as considered at [208] to [211] above is clear. There is no evidential basis to infer a link between the claimant's disabilities and the failure to provide the 2016 OH report. The burden of proof does not shift.

24.3.2.5. [Allegation 15.1 (12)]: On 30 March 2020 provide the claimant's HIV and disability information to staff without the claimant's prior consent and inform the claimant that he had done so (Mr Blackburn is named as the perpetrator)? There is no evidential basis to infer a link between the claimant's disabilities and either the first grievance being forwarded to Mr Panditharatna without Mr Blackburn asking the claimant if he could do this or Mr Blackburn telling the claimant he had done this. The burden of proof does not shift.

24.3.2.6. [Allegation 15.1 (2)] On 11 June 2020 decide to dismiss the claimant (Mr Panditharatna is named as the perpetrator)? There is no evidential basis to infer a link between the claimant's disabilities and the decision to dismiss. The burden of proof does not shift.

24.3.2.7. [Allegation 15.1 (14)]: On 27 July, 31 July and 24 August 2020 conduct an insufficient investigation and then provide an outcome which blamed the claimant (Mr Trace is named as the perpetrator)? There is no evidential basis to infer a link between the claimant's disabilities and Mr Trace "blaming" the claimant by finding that he had committed gross misconduct. The burden of proof does not shift.

24.3.3. Further and separately, in case the Tribunal is wrong in these conclusions and the burden of proof has shifted in relation to one or more of the allegations which were factually proved, the Tribunal has made findings above about why in each case the respondent acted as it did. The factual findings in this respect have been set out above in relation to the relevant allegations and not at this point in order to make our reasons easier to follow. However, the issue was in each case considered after the question of whether the burden of proof had shifted. The Tribunal has concluded in relation to each allegation that the treatment was in no sense whatsoever because of disability.

24.3.4. The claimant's complaints of direct disability discrimination therefore fail and are dismissed.

25. If so, did the respondent's treatment amount to a detriment?

25.1. Because the Tribunal has concluded that the claimant was not treated less favourably because of disability, there is no need for it to reach conclusions in relation to whether the treatment complained of, when proved, amounted to a detriment, and so we do not do so.

Discrimination arising from disability

26. Did the respondent treat the claimant unfavourably by:

26.1. **[Allegation 16.2 (1b)]: From July 2019 onwards refusing to backfill missing staff ((Mr Biggin is named as the perpetrator)?**

26.1.1. We find that this factual allegation is not made out. We refer in this respect to our conclusions in relation to issue [22.1] and conclude in light of the evidence that they are the same whether the question is whether Mr Biggin refused the opportunity to recruit more staff or to backfill missing staff. Employees were in principle replaced when they left and the claimant was able to use volunteers/temps.

26.1.2. It should also be noted in this respect that during his oral evidence the claimant contended that the alleged refusal to backfill was not because of disability or because of something arising in consequence of a disability but rather because he had raised a grievance about EH.

26.2. **[Allegation 16.2 (8)]: In December 2019 delaying the claimant's suspension for 4 weeks until 1 day before the claimant's annual leave (Mr Biggin is named as the perpetrator)?**

26.2.1. In light of our findings of fact above, we conclude that there was a delay to the claimant's suspension until a day before his annual leave. This is because we have found above that Mr Biggin did not suspend the claimant as soon as he decided that this was necessary. We conclude that, objectively, this was unfavourable because we find that being suspended so shortly before a period of holiday will have reduced the claimant's enjoyment of the holiday more than if he had been suspended further from its commencement.

26.3. **[Allegation 16.2 (2a)]: Between 17 December 2019 and 24 August 2020 failing to consider the claimant's grievances and health (Mr Biggin, Mr Blackburn, HG, Ms Burdett, Ms Ball, Mr Panditharatna and Mr Trace are named as the perpetrators)?**

26.3.1. The allegation is not entirely clear but we take it to be that between those dates the named individuals did not consider the claimant's grievances and, in that context, his health.

26.3.2. We find that this factual allegation is not made out. Ms Burdett and HG had no responsibility for considering the claimant's grievances and health. Further, at the time of her very limited involvement, HG had no knowledge either of the claimant's disability or of the claimed "things arising from" Equally, Mr Biggin was not involved once the claimant had raised a grievance.

26.3.3. Mr Blackburn and Ms Ball were members of the respondent's HR department. They were not responsible for considering the claimant's grievances and health but rather were responsible for managing and advising on the relevant procedures. This they clearly did and, in the course of so doing, quite clearly took considerable account of the claimant's health, in light of the various adjustments to the hearings which were made, some of which are enumerated at [26.3.3] of the respondent's written submissions.

26.3.4. Mr Panditharatna and Mr Trace did consider the claimant's grievances and his health. This is clear from the notes of the hearings and from the first grievance outcome, the dismissal letter and the appeal outcome letters.

26.4. **[Allegation 16.2 (2a)]: Between 17 December 2019 and 24 August 2020 proceeding with the disciplinary process, sanction and dismissal without sufficient investigation (Mr Biggin, Mr Blackburn, HG, Ms Burdett, Ms Ball, Mr Panditharatna and Mr Trace are named as the perpetrators)?**

26.4.1. We find that this factual allegation is not made out. The allegation is that various things were proceeded with "without sufficient investigation". However, we have concluded at [22.6.1] that the investigation was not insufficient. It was sufficient.

26.5. **[Allegation 16.2 (3)]: On 19 and 20 December 2019 sending a threatening and accusatory email (Mr Biggin is named as the perpetrator)?**

26.5.1. The email of 19 December 2019 is at DB 3528 and that of 20 December 2019 is at DB 3530. We have considered these in our findings of fact between [153] and [156] above.

26.5.2. The Concise Oxford Dictionary defines threat most relevantly for these purposes as "a statement of an intention to inflict injury, damage, or other hostile action as retribution" and "to threaten" accordingly. On any reasonable reading, the emails do not threaten, rather they warn. They are, however, "accusatory" in that they accuse the claimant of not having done things that he should have done.

26.5.3. In light of our findings of fact about these emails at [159] above we conclude, however, that Mr Biggin did not treat the claimant unfavourably by sending them. This is because in these circumstances Mr Biggin was not in any objective sense treating the claimant adversely. Rather he was telling him in straight-forward terms what he had failed to do and what he needed to do. This factual allegation is not therefore made out.

26.6. **[Allegation 16.2 (3)]: On 19 and 20 December 2019 failing to hold a return to work meeting (Mr Biggin is named as the perpetrator)?**

26.6.1. This factual allegation is not made out: on these dates the claimant was by his own account absent from work due to sickness. He did not return to work until 23 December 2019.

26.6.2. If this allegation should correctly be construed as an allegation that the respondent failed to hold a return to work meeting on account of his absence on 19 and 20 December 2019, our conclusion at [26.8.1] below applies. The factual allegation is again therefore not made out.

26.7. **[Allegation 16.2 (3)]: On 19 and 20 December 2019 rejecting the claimant's stated reason for absence (Mr Biggin is named as the perpetrator)?**

26.7.1. This factual allegation is not made out. As is clear from our findings of fact, on these dates Mr Biggin was taking issue with the claimant's failure to follow the sickness notification procedure. He warned the claimant that a failure to provide the information he required "will result in my booking your absent without leave" (DB 3528). This and the other emails were not a rejection of the stated reason for absence.

26.8. **[Allegation 16.2 (25)]: Between 23 December 2019 and 14 January 2020 refusing a return to work interview (Mr Biggin is named as the perpetrator)?**

26.8.1. This factual allegation is not made out. Mr Biggin did not refuse a return to work interview. Indeed, at paragraph 253 of his witness statement the claimant accepts that one was arranged. What then happened was that it was superseded by the arranged meeting being used to suspend the claimant. Once the claimant was suspended, there was no purpose in holding a return to work meeting unless and until the claimant returned to work.

26.9. **[Allegation 16.2 (6)]: From January to August 2020 subjecting the claimant to disciplinary proceedings (Mr Biggin, Mr Blackburn, Ms Ball, Mr Panditharatna, Mr Trace and Ms Burdett are named as perpetrators)?**

26.9.1. This factual allegation is not made out in relation to Mr Blackburn, Ms Ball or Ms Burdett. They were each involved in the disciplinary process but as HR advisers/an investigator. In those roles they cannot be said to have "subjected" the claimant to disciplinary proceedings.

26.9.2. However, given their respective roles, Mr Biggin (who made the decision to investigate), Mr Panditharatna (who made the decision to dismiss) and Mr Trace (who dealt with the appeal) can be said to have subjected the claimant to disciplinary proceedings and that was unfavourable treatment.

26.10. **[Allegation 16.2 (10)]: From January to August 2020 continuing disciplinary proceedings without adjustments and measures needed to safeguard health (Mr Blackburn, Ms Burdett, Mr Panditharatna, Ms Ball and Mr Trace are named as perpetrators)?**

26.10.1. This allegation is not factually made out. In so far as it is to the effect that no adjustments or measures were made or taken, clearly a substantial number were made (some of which are included in the list of procedural adjustments at paragraph [9.1.2.7] of the respondent's closing submissions).

26.10.2. In so far as it relates to an alleged failure to conduct a risk assessment as is suggested by the claimant's closing submissions, we find that in light of the adjustments that were made, that the claimant has failed to prove that there was a failure to carry out a risk assessment that was necessary to safeguard the claimant's health.

26.11. **[Allegation 16.2 (9)]: In February 2020 removing mentions of the claimant's health from the investigation (Ms Burdett is named as the perpetrator)?**

26.11.1. This allegation is not factually made out for essentially the reasons set out in our conclusions in relation to issues [22.9] and [22.10] above. The investigation report did in fact refer to the claimant's health and there is no evidence of any significance that further mentions of it were removed from a draft and so not included in the final report.

26.12. **[Allegation 16.2 (26)]: On or around 20 March 2020 losing or destroying the occupational health report and denying having any record of it?**

26.12.1. We have set out detailed findings in relation to the 2016 OH report at [208] to [211] above. In light of those findings of fact we conclude that the 2016 OH report was not lost or destroyed on or around 20 March 2020.

26.12.2. The respondent did, however, in effect deny having any record of it by the email of Mr Blackburn dated 30 March 2020 which is at DB 1850.

27. Did the following things arise in consequences of the claimant's disability/disabilities:

27.1. **Having a 'breakdown' in Head Office on 17 July 2019?**

27.1.1. There is no dispute that the claimant became visibly emotional and upset on this occasion. Ms Thatcher when interviewed by Ms Sherlock described it as a "massive meltdown" and the claimant says in paragraph 69 of his witness statement that he had an "emotional breakdown at home". However, the claimant's pleaded case is that this was during a period when his symptoms of mental ill health were fewer than they had been previously. Further, at times of tension at work people can become emotional, upset and have what might be described in a general way as a "meltdown" without the cause of that being a disability.

27.1.2. The claimant has not produced significant medical evidence supporting a contention that his reaction on 17 July 2019 resulted from his accepted mental health disability of depression. Nor has he suggested to any significant extent or produced any significant evidence that it resulted from his disabilities of being HIV+ or having narcolepsy.

27.1.3. The Tribunal concludes that, taking the evidence in the round, the claimant has not proved on the balance of probabilities that what he characterises as a breakdown on 17 July 2019 arose in consequence of one or more of his disabilities rather than simply reflecting the fact that he had become upset and emotional at work as a result of a difficult interaction with a colleague during a very busy time at work.

27.2. **An inability to telephone his line manager when off sick in December 2019?**

27.2.1. The claimant has not provided significant medical or other significant documentary evidence supporting his contention that he was unable to telephone his line manager when off sick in December 2019. Further, he does not set out such an inability clearly in his witness statement.

27.2.2. Taking the evidence in the round we find that the claimant has failed to prove that he was unable to telephone his line manager when off

sick in December 2019. Consequently, he has failed to prove that any such inability arose in consequence of a disability.

27.3. **Being in an emotional and panicked state prior to the grievance hearing on 28 April 2020?**

27.3.1. The respondent accepts that the claimant was in such a state prior to the grievance hearing on 28 April 2020. The claimant's medical records and fit notes show that by 28 April 2020 the claimant had an "Anxiety state" and his GP's records refer to panic attacks (for example, the entries of 2 and 21 April 2020 at MDB 118). There is a clear diagnosis of "Mixed Anxiety and depressive disorder" following a telephone review on 13 July 2020 (MDB 225), which records that the claimant was taking diazepam for panic. Overall, whilst it is not significantly out of the ordinary for an employee to be in an emotional or panicked state prior to a grievance hearing, we nevertheless conclude that the claimant has proved on the balance of probabilities that his emotional and panicked state prior to the grievance hearing on 28 April 2020 was something arising in consequence of his disabilities in that it was materially affected by his depression.

27.4. **Needing companions to speak for him at the start of the grievance hearing?**

27.4.1. The reference to a companion must be a reference to VF. The transcript of the hearing at DB 1981 does not support the contention that the claimant needed VF to speak for him at the start of the grievance hearing. Its opening three pages show him making a number of points in relation to his need to confer with VF because (he said) he had not managed to do so earlier that morning because of emails he had been receiving.

27.4.2. There is no significant medical evidence supporting the claimant's contention that he was unable to speak for himself at the start of the grievance.

27.4.3. Taking the evidence in the round, we find that the claimant was able to speak for himself and did not need his companion to speak for him at the start of the grievance hearing and that, consequently, this was not something arising in consequence of any of his disabilities.

28. Was any unfavourable treatment because of any of those things?

28.1. The Tribunal has concluded that the claimant has proved that "being in an emotional and panicked state prior to the grievance hearing of 28 April 2020" was something arising "in consequence of" one of his disabilities but that the other things said to arise in consequence were not. Consequently, it is only unfavourable treatment occurring on or after that date which could be because of something arising.

28.2. This claim fails in relation to all of the allegations of unfavourable treatment set out at issues [26.1] to [26.12] above except allegations [26.2],

[26.9] (in part) and [26.12] because the factual allegations are not made out. It also fails in respect of [26.2] and [26.12] because the something arising post-dated the factual matters giving rise to those allegations.

28.3. Further and separately, in relation to the three factual allegations of unfavourable treatment which were made out (delaying the suspension, subjecting the claimant to disciplinary proceedings, and denying having any record of the 2016 OH report), even if we had concluded that all of the things said to arise in consequence of one or more of his disabilities did so arise, we would have concluded that the unfavourable treatment was not in any sense "because of" any of those things. No link can coherently be argued to exist between any of the things arising in consequence of the disabilities and the unfavourable treatment that has been proved. The claimant has not shifted the burden of proof to the respondent.

28.4. However, in case we are wrong about that, we make the following positive findings about the reasons for the unfavourable treatment that has been proved. So far as the delay in suspending is concerned, it was for the reason set out at [164]. So far as subjecting the claimant to disciplinary proceedings are concerned, it was because the respondent reasonably believed that the claimant might have committed acts of misconduct. So far as the denial of having any record of the OH report is concerned, it was quite simply because the respondent did not have a copy of it for the reason set out at [211] above. In each case it was not because of anything arising in consequence of any of the claimant's disabilities.

28.5. Further and separately, if we had concluded that any of the other factual allegations of unfavourable treatment had been made out, we would have reached the same conclusion about the absence of any link between them and any of the things said to arise in consequence of the disabilities. There is simply insufficient evidence to shift the burden of proof and, in each case, other reasons for the alleged treatment in question can readily be identified.

29. Was the treatment a proportionate means of achieving a legitimate aim? The respondent says that its aims were: [LISTED AT DB 674-676]

29.1. It is not necessary for us to reach any conclusion in relation to this issue in light of our conclusions above.

30. The Tribunal will decide in particular:

30.1. **was the treatment an appropriate and reasonably necessary way to achieve those aims;**

30.2. **could something less discriminatory have been done instead;**

30.3. **how should the needs of the claimant and the respondent be balanced?**

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

31.1. It is not necessary for us to reach any conclusion in relation to this issue in light of our conclusions above. However, if it had been, we would in light of our findings of fact about knowledge as set out above have concluded that all the complaints in respect of unfavourable treatment which is said to have taken place before 31 January 2020 failed. We would have so concluded because it was not argued by the claimant that any of the "things arising" arose in consequences of his HIV+ status and we have found above that the respondent did not have actual or constructive knowledge of his other disabilities before 31 January 2020.

Reasonable adjustment claim

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

In light of our findings of fact from [208] above, the respondent had constructive knowledge of the claimant's HIV+ status from 1 April 2016. It had actual knowledge of the claimant's HIV+ status from 31 January 2020. However, the claimant does not rely upon any substantial disadvantage said to arise from his HIV+ status. So far as the claimant's depression and narcolepsy are concerned, the respondent did not have constructive or actual knowledge prior to 31 January 2020.

The consequence of this is that the reasonable adjustment claim in relation to the PCP at 32.1.1 and 32.1.3 fails because the pleaded disadvantage relates to his period of absence in December 2019, when the respondent did not have actual or constructive knowledge of the relevant disabilities.

However, in case we are wrong about this, we set out below what our conclusions would have been in respect of all the pleaded PCPs if the respondent had had the necessary knowledge of disability.

32.1. **A "PCP" is a provision, criterion or practice. Did the respondent have the following PCPs:**

32.1.1. A sickness absence policy?

32.1.1.1. The respondent accepts that it had such a policy and that was a PCP.

32.1.2. The non-recording of hearings?

32.1.2.1. There was not a PCP of never recording hearings. There was a PCP of not recording meetings other than as an exception in unusual circumstances. This is therefore the PCP considered further below.

32.1.3. Permitting emailed notification of sickness absence?

32.1.3.1. The respondent accepts that because the claimant had been allowed to do this on a number of occasions such a PCP existed in relation to the claimant (respondent's written submissions [32.1.3.3]).

32.2. **Did the PCPs put the claimant at a substantial disadvantage compared to someone without the claimant's disability, in that:**

32.2.1. In relation to the PCP at 32.1.1 and 32.1.3 it was impossible from the claimant to comply with the notification requirements due to sleepiness or the effects of medication?

32.2.1.1. So far as the sickness absence policy is concerned, the claimant is referring to the requirement to notify his manager. This PCP should therefore be considered together with the PCP of email notification of sickness absence.

32.2.1.2. We find that these PCPs did not put the claimant at a substantial disadvantage and that it was not "impossible" for him to comply with them due to sleepiness or the effects of medication. We so conclude for the following reasons:

32.2.1.2.1. First, there is evidence that on days when the claimant says he was absent due to sickness in December 2019 he was nevertheless able to email at the beginning of the working day (see from example the email referred to at [152] above to the IT team).

32.2.1.2.2. Secondly, there is no significant medical evidence demonstrating the claimed impossibility.

32.2.1.2.3. Thirdly, to the extent that the claimant's case in this respect relies upon his oral evidence, we attach very limited weight to it because for the reasons set out at [117] we have not found him to be a credible witness.

32.2.1.3. Even if the "notification requirement" is argued to be to make a phone call, we do not accept that this put the claimant at a substantial disadvantage because it was impossible for him to comply with it. We refer in this respect to our conclusions in relation to issue [27.2] above.

32.2.2. In relation to the PCP at 32.1.2 the claimant had greater difficulty in note-taking, greater difficulty in concentrating and reduced memory?

32.2.2.1. We find that the claimant has proved that he had greater difficulty in note-taking, greater difficulty in concentrating and reduced memory compared to someone without his disabilities. We have so concluded because there is no dispute that at the time he had narcolepsy and the letter from Narcolepsy UK (PB 617) supports his case in this

respect in that it refers to the possibility of “micro sleeps”, which would be likely to affect the ability to take notes, concentration and memory.

32.2.2.2. However we have also concluded that the PCP did not place the claimant at a substantial disadvantage when compared to someone who was not disabled because there was an official note taker present (who the claimant accepted during cross-examination was “very good at note taking”) and, also, his companion, VF, who was able to take notes. Indeed, we note that the letter from Narcolepsy UK proposes the provision of a note taker as an alternative to the making of a recording as an adjustment.

32.2.2.3. We further find in any event that a recording would not have been/was not (given the claimant made his own recordings in any event) more helpful to him than minutes/notes taken by VF and the official note taker. This is because a recording will result in a very lengthy transcript which must be prepared and which will include a large amount of irrelevant material. This results in it being more difficult for any reader to focus on matters of significance than if they are reading minutes/notes, which will invariably be focused on the more significant details.

32.2.2.4. In light of these conclusions, the claimant’s claim of reasonable adjustments fails and is dismissed.

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

32.3.1. Given that we have concluded that there was no disadvantage, it is not necessary for us to consider this issue.

32.4. **What steps could have been taken to avoid the disadvantage? The claimant suggests:**

It is not necessary for us to consider this issue in light of our conclusions above. However, these are what our conclusions would have been if the claimant had proved that one or more of the PCP placed him at a substantial disadvantage of which the respondent was or should have been aware.

32.4.1. [Allegation 18.5 (i)]: The holding of a full return to work meeting following December 2019 absence;

32.4.1.1. The proposed adjustment does not relate to any of the PCPs or the substantial disadvantages relied upon by the claimant and consequently would not avoid any disadvantage.

32.4.1.2. The proposed adjustment in fact seems to imply that the sickness absence policy required a return to work meeting which was not held. As such, what is in effect asserted is that there was a failure to follow a PCP.

32.4.2. [Allegation 18.5 (ii)]: Not disciplining the claimant for disability related absence/lateness;

32.4.2.1. The claimant was not disciplined for disability related absence or lateness. The proposed reasonable adjustment would not therefore have avoided the pleaded disadvantage.

32.4.3. [Allegation 18.5 (iii)]: Ensuring the claimant was not disciplined for disability related conduct;

32.4.3.1. The reference to "disability related conduct" must, given the pleaded PCPs, be a reference to disciplinary allegation 1 (see [179] above).

32.4.3.2. However, in light of our conclusions above about the claimant's failure to contact Mr Biggin when absent due to sickness, we concluded that this was not "disability related conduct". The proposed reasonable adjustment is not, as such, relevant.

32.4.4. [Allegation 18.5 (iv)]: Referring the claimant to occupational health after 17 July 2019, 28 January 2020, 11 March 2020, and 27 April 2020;

32.4.4.1. A referral to occupational health would not have been an adjustment to any of the PCPs. Such a referral is also not a step that would without more have avoided any of the pleaded disadvantages.

32.4.5. [Allegation 18.5 (v)]: Allowing requests by the claimant to be referred to occupational health;

32.4.5.1. A referral to occupational health would not have been an adjustment to any of the PCPs. Such a referral is also not a step that would without more have avoided any of the pleaded disadvantages.

32.4.6. [Allegation 18.5 (xv)]: Allowing the recording of meetings;

32.4.6.1. The respondent concedes that this would have been a reasonable adjustment if the claimant had proved substantial disadvantage. However, we have concluded above that he has not.

32.4.7. [Allegation 18.5 (xvi)]: Allowing more breaks in meetings to agree notes as the meetings progressed.

32.4.7.1. We find that the claimant was told that he could have breaks whenever he required them. We also find that he was proactively offered breaks during the meetings. We find that there were a considerable number of breaks during meetings – for example, seven during the meeting on 28 April 2020.

32.4.7.2. We find that at the time of the meetings the claimant was not of the view that further breaks were necessary. In these circumstances,

we find that further breaks would not have avoided the substantial disadvantages claimed.

32.5. **Was it reasonable for the respondent to have to take those steps and when?**

32.5.1. It is not necessary for us to consider this issue in light of our conclusions above.

32.6. **Did the respondent fail to take those steps?**

32.6.1. It is not necessary for us to consider this issue in light of our conclusions above.

<u>Harassment related to disability</u>

33. Did the respondent do the following things?

33.1. **[Allegation 19.1 (ii)]: On 10 June 2019 did EH "scream" at the claimant?**

33.1.1. We find that EH did shout at the claimant on this date during the course of a heated altercation and that therefore she "screamed" at him. We further find that this conduct was unwanted.

33.1.2. Turning to whether this conduct related to one of the claimant's disabilities, it was on its face unrelated to them. It is therefore necessary to consider whether there is an evidential basis for drawing an inference that it related to one of the claimant's disabilities. We conclude that there is not. In particular, the evidence does not suggest that EH was even aware of any of the claimant's disabilities and we refer to our findings of fact in relation to the question of knowledge above in that respect.

33.1.3. Even if there had been such an evidential basis, taking the evidence in the round, we would have concluded that in fact EH shouted at the claimant as she did because she had had a disagreement with him and that her conduct was not in any way related to any of his disabilities.

33.2. **[Allegation 19.1 (lxii)]: Did Mr Biggin refuse to 'backfill' staff and commence an investigation in July 2019?**

33.2.1. In light of our findings and conclusions in respect of issue [22.1] and issue [26.1] above, we conclude that the factual allegation that Mr Biggin refused to backfill staff is not made out.

33.2.2. So far as the investigation is concerned, this is a reference to the investigation which was begun in relation to the claimant's treatment of AS. The claimant refers to it at paragraphs 81 and 82 of his witness statement. Mr Blackburn emailed the claimant about this on 16 July 2019 (DB 4004) saying that Ms Thatcher had asked him to carry out an internal investigation. The documentation referred to by the claimant does not

suggest that Mr Biggin commenced the investigation. In light of our findings above about the claimant's credibility, we do not accept his account that Mr Biggin denied but then admitted instructing Ms Thatcher to investigate.

33.2.3. However, in case we are wrong about that, we turn to whether instructing Ms Thatcher to commence an investigation in July 2019 would have been unwanted conduct related to one of the claimant's disabilities. It is clear that such conduct would have been unwanted. However, the conduct was on its face unrelated to his disabilities. It is therefore necessary to consider whether there is an evidential basis for drawing an inference that it related to one of the claimant's disabilities. We conclude that there is not. In particular, the evidence does not suggest that Mr Biggin was aware of any of the claimant's disabilities in July 2019 and we refer to our findings of fact in relation to the question of knowledge above in that respect.

33.2.4. Even if there had been such an evidential basis, taking the evidence in the round, we would have concluded that if Mr Biggin had commenced an investigation this was because AS had raised concerns about the support the claimant had provided to him and that Mr Biggin's conduct was not in any way related to any of the claimant's disabilities.

33.3. **[Allegation 19.1 (viii)]: On 11 September 2019 did Mr Blackburn and Ms Thatcher select ST as the claimant's liaison despite broken relationship?**

33.3.1. This is an issue falling within the limited exception identified at [38] above.

33.3.2. As literally pleaded, it is not made out as ST was not "selected" as the claimant's liaison on 11 September 2019. She had held that role for some time and indeed was the HR business partner for all head office staff.

33.3.3. However, this issue clearly makes reference to difficulties which had arisen in the claimant's relationship with ST and his communicated desire around September 2019 to no longer work with her.

33.3.4. Turning to whether leaving ST as the claimant's HR business partner on or around 11 September 2019 was unwanted conduct related to one of the claimant's disabilities, we find that it was unwanted. However, it was on its face unrelated to his disabilities. It is therefore necessary to consider whether there is an evidential basis for drawing an inference that it related to one of the claimant's disabilities. We conclude that there is not. In particular, the evidence does not suggest that Mr Blackburn or Ms Thatcher was even aware of any of the claimant's disabilities at this time and we refer to our findings of fact in relation to the question of knowledge above in that respect.

33.3.5. Even if there had been such an evidential basis, taking the evidence in the round, we would have concluded that in fact Ms

Thatcher/Mr Blackburn left ST as the claimant's HR business partner despite difficulties in their relationship because ST dealt with all head office staff and it would have been administratively inconvenient for another HR business partner to deal with just him. As such their conduct was not in any way related to any of his disabilities.

33.4. **[Allegation 19.1 (i)]: By emails of 29 August 2019, 19 and 20 December 2019 did Mr Biggin accuse the claimant of unauthorised absence and threaten disciplinary action?**

33.4.1. So far as the email of 29 August 2019 is concerned (DB 1094), we conclude that it neither accuses the claimant of unauthorised absence nor threatens disciplinary action. It just asks him where he is and what he is doing.

33.4.2. So far as the emails of 19 and 20 December 2019 are concerned, we refer to our conclusions at [26.5] above. The emails did not threaten but did accuse.

33.4.3. The factual allegations are as such partially made out. Turning to whether this conduct was unwanted conduct related to one of the claimant's disabilities, it was clearly unwanted. However, it was on its face unrelated to his disabilities – the mere background of possible sickness absence is insufficient for us to find otherwise. It is therefore necessary to consider whether there is an evidential basis for drawing an inference that it related to one of the claimant's disabilities. We conclude that there is not. In particular, the evidence does not suggest that at the relevant time Mr Biggin was even aware of any of the claimant's disabilities and we refer to our findings of fact above in relation to the question of knowledge in that respect.

33.4.4. Even if there had been such an evidential basis, taking the evidence in the round, we would have concluded that in fact the conduct took place because Mr Biggin had genuine and legitimate concerns about the claimant's failure to keep in touch with him/notify him appropriately of absences and that it was not in any way related to any of his disabilities. We refer to our findings of fact and conclusions at issue [7.5.3] above in this respect.

33.5. **[Allegation 19.1 (ix)]: On 19 December 2019 did Mr Biggin time the sending of emails to coincide with the claimant's absence?**

33.5.1. The factual allegation is made out: the emails were about the claimant's failure to notify Mr Biggin appropriately of an ongoing absence and so they necessarily were sent during it.

33.5.2. Turning to whether this conduct was unwanted conduct related to one of the claimant's disabilities, it was clearly unwanted. However, it was on its face unrelated to his disabilities – the mere background of possible sickness absence is insufficient for us to find otherwise. It is therefore

necessary to consider whether there is an evidential basis for drawing an inference that it related to one of the claimant's disabilities. We conclude that there is not. In particular, the evidence does not suggest that Mr Biggin was even aware of any of the claimant's disabilities at the relevant time and we refer to our findings of fact above in relation to the question of knowledge in that respect.

33.5.3. Even if there had been such an evidential basis, taking the evidence in the round, we would have concluded that in fact the conduct took place because Mr Biggin had genuine and legitimate concerns about the claimant's failure to notify him appropriately of his absence and that it was not in any way related to any of his disabilities. We refer in particular to our findings of fact at [159] above in this respect.

33.6. **[Allegation 19.1 (xi)]: On 14 January 2020 did Mr Biggin refuse to discuss matters at the suspension meeting?**

33.6.1. The respondent concedes that the factual allegation is made out.

33.6.2. Turning to whether this conduct was unwanted conduct related to one of the claimant's disabilities, it was clearly unwanted. However, it was on its face unrelated to his disabilities. It is therefore necessary to consider whether there is an evidential basis for drawing an inference that it related to one of the claimant's disabilities. We conclude that there is not. In particular, the evidence does not suggest that Mr Biggin was even aware of any of the claimant's disabilities at the time, and we refer to our findings of fact above in relation to the question of knowledge in that respect.

33.6.3. Even if there had been such an evidential basis, taking the evidence in the round, we would have concluded that in fact the conduct took place because Mr Biggin reasonably took the view that it was not appropriate to discuss matters further at the suspension meeting given that a formal investigation was due to take place which he, Mr Biggin, was not going to conduct. The conduct was not as such in any way related to any of the claimant's disabilities.

33.7. **[Allegation 19.1 (xiii)]: On 26 February 2020 did the respondent ask the claimant if he still required annual leave and also ask him to accept the investigation report whilst he was on annual leave?**

33.7.1. The first part of the factual allegation is not made out: the email relied upon is at DB 1625 but Mr Blackburn did not ask the claimant "if he still required leave" but rather asked him to "confirm" dates, in light of an inconsistency between the claimant's calendar and the Cascade records.

33.7.2. The second part of the factual allegation is also not made out: the email relied on is at DB 1630 and ends as follows:

> *I wanted to ask you now if you would prefer me to contact you with the outcome on Friday by email, or if you would prefer to be updated upon your return from annual leave on Monday 9 March 2020?*

33.7.3. Mr Blackburn did not therefore ask the claimant to accept the investigation report whilst on annual leave but rather gave him a choice in relation to this issue.

33.7.4. However, in case we are wrong about the proper meaning of the emails, we turn to whether the conduct alleged would have been unwanted conduct related to one of the claimant's disabilities. It is clear that such conduct would have been unwanted. However, the conduct would on its face have been unrelated to his disabilities. It is therefore necessary to consider whether there would have been an evidential basis for drawing an inference that it related to one of them. We conclude that there would not have been

33.7.5. Even if there had been such an evidential basis, taking the evidence in the round, we would have concluded that if the unwanted conduct had taken place this was in fact because Mr Blackburn was reasonably and appropriately carrying out his role as a member of the HR team involved with the claimant's grievance and disciplinary proceedings and was not in any way related to any of the claimant's disabilities.

33.8. **[Allegation 19.1 (xv)]: Between February and March 2020 did Mr Blackburn and Ms Burdett fraudulently create multiple documents as follows:**

33.9. 05-02-2020 GB supplied "Lorna Cox - Communication.docx"

33.9.1. 09-03-2020 GB supplied electronic investigation inc. appendix and later C received a printed version of these by post 12-03-2020:
A8 Signed Statement from [AJ] (AJ).pdf
A52 AJ Facebook Messenger Screenshots 3.1.2020.pdf
A19 CT & PR email exchange from 13 December.mht
A53 Email HG formal complaint re CT.pdf
A30.2 Copy of [CT] SignIns_2019-12-16_2019-12-23
A32 RE Whereabouts 28 August 2019.mht
A13 Additional information MM 13 Feb 2020.pdf
A47 Reported IG breach but document remains in CTs email.pdf
A49 Email to External Parties containing attachments.pdf
A50 Emails from CT demonstrating unprofessional communications.pdf
A54 Scan of Text messages between CT and [AJ] (AJ)

33.9.2. 30-04-2020 GB supplied electronic version of A53, "Complaint.msg"

33.9.3. 30-04-2020 GB supplied spreadsheet titled, "Cascade Overtime Submissions & Approvals.xlsx"

33.9.4. 23.04.2020 GB supplied a different A53, "FW Complaint.msg"

33.9.5. 13-05-2020 FBall supplied answers to witness questions:
General Questions for the Data Team - JG answers.docx
Questions for all IT TEAM - Temi answers.docx

Questions for Hayley - Answers.docx
Questions for Janet - Answers.docx
Responses - Caroline Scott.pdf

33.9.6. The claimant did not make any submissions in relation to this issue in his closing written submissions and the exact basis for these allegations remains unclear. So far as we have been able to understand them, it seems that the claimant contends that the fact that an individual provided a document, or copied and pasted text from one document to another, is evidence that the individual has fraudulently created it.

33.9.7. The Tribunal concludes that the claimant has not identified any evidence of significance which supports his contention that Mr Blackburn, Ms Burdett or Ms Ball "fraudulently created documents". At most, the evidence shows that Mr Blackburn and Ms Ball were involved in drawing together evidence and in the case of Mr Blackburn appendices to the investigation report. But the evidence does not support a contention that they acted fraudulently and we find that they did not.

33.10. **[Allegation 19.1 (xxx)]: Between 11 March 2020 and 11 June 2020, did the respondent fail to seek medical input?**

33.10.1. The factual allegation is made out. The respondent did not seek an occupational health report and receiving information from the claimant about medical conditions does not amount to "seeking" medical input.

33.10.2. Turning to whether this conduct was unwanted conduct related to one of the claimant's disabilities, it was unwanted. However, it was on its face unrelated to his disabilities – the background of the claimant's disabilities and his view that further medical input should be sought is insufficient. It is therefore necessary to consider whether there is an evidential basis for drawing an inference that it related to one of the claimant's disabilities. We conclude that there is not.

33.10.3. Even if there had been such an evidential basis, taking the evidence in the round, we would have concluded that in fact the conduct took place because the respondent believed it had sufficient information concerning the claimant's health for the processes to be conducted fairly and that the conduct was not in any way related to any of his disabilities.

33.11. **[Allegation 19.1 (xvii)]: On 30 March 2020 did Mr Blackburn lie to the claimant saying that he had contacted the OH provider who had no record of/report in relation to the claimant?**

33.11.1. We refer to our findings and conclusions in relation to issue [26.12] and to our findings of fact at [208] to [211]. We find that Mr Blackburn did not lie to the claimant in his email of 30 March 2020. Rather he honestly set out the position in relation to the 2016 OH report as he understood it to be at that time. The factual allegation is therefore not made out.

33.12. **[Allegation 19.1 (xviii)]: On 30 March 2020 did Mr Blackburn inform the claimant that he had disclosed the claimant's HIV and disabilities to Mr Panditharatna without the claimant's consent?**

33.12.1. We refer to our findings and conclusions in relation to issue [22.14] above. These are equally relevant here: the factual allegation is partially made out only – Mr Blackburn did inform the claimant that he had disclosed his HIV status and disabilities to Mr Panditharatna.

33.12.2. Turning to whether this conduct was unwanted conduct related to one of the claimant's disabilities, we do not accept that it was unwanted. Rather we find that it is exactly what the claimant would have anticipated. If he had not wanted the grievance decision maker to know about his HIV+ status and disabilities he would not have allowed his solicitors to mention them in the first grievance or, at the very least, would have required them to include something in the first grievance saying that such information should be redacted before the first grievance was passed on to the decision maker. Consequently, Mr Blackburn telling him that the (unredacted) first grievance had been passed to the decision maker would not have been unwanted conduct.

33.12.3. In case we are wrong about that, we consider whether there is an evidential basis for drawing an inference that the conduct related to one of the claimant's disabilities. We conclude that there is not – the fact that the information disclosed related to the disabilities is insufficient.

33.12.4. Even if there had been such an evidential basis, taking the evidence in the round, we would have concluded that in fact the conduct took place because Mr Blackburn was keeping the claimant appropriately informed about the progress of the first grievance and that the conduct was not in any way related to any of the claimant's disabilities.

33.13. **[Allegation 19.1 (xix)]: On 27 April 2020 did Mr Blackburn deliberately time the email to arrive at 21.53 to maximise adverse impact on the claimant?**

33.13.1. The factual allegation that such an email was sent is not made out: the claimant does not identify the offending email in his witness statement or closing written submissions and, so far as we can see, it has not been included in the bundle. In particular, therefore, we do not accept what the claimant said in closing written submissions (again without identifying the email in the bundle): that the email had been sent with a delayed send time.

33.13.2. However, if an email had been sent at 21.53, we would not have concluded that it had been sent to "maximise adverse impact" on the claimant. The claimant was a prolific user of email throughout the internal proceedings. This resulted in a very considerable volume of email traffic. Indeed, the claimant sent emails to Ms Ball at 20.40 (DB 1959) and Ms Cox at 20.09 (DB 1942) on 27 April 2020. It was as such not unusual for the claimant to email relatively late in the day and a further example of this

is his email to Mr Blackburn at 20.25 on 24 April 2020 (DB 1938). If Mr Blackburn did send an email at 21.53, we find that this was simply part of such voluminous email traffic and not sent to "maximise adverse effect". For this reason also, therefore, the factual allegation is not made out.

33.14. **[Allegation 19.1 (xx)]: On 28 April 2020 did Ms Ball send too many emails immediately prior to the first grievance hearing?**

33.14.1. The factual allegation is not made out. Ms Ball did not send "too many" emails on 28 April 2020 immediately prior to the first grievance hearing.

33.14.2. We so conclude because the emails she sent were reasonably necessary for the purpose of the hearing. For example, her email at DB 1964 was a necessary substantive reply to the claimant's email of 20.40 at DB 1959 (and indeed during cross-examination the claimant accepted that the email at DB 1964 was not harassment "because I asked for the response"). Similarly, the email at 10.32 (DB 1961) was necessary in light of the problems that Ms Ball was encountering in setting up skype.

33.15. **[Allegation 19.1 (xxii)]: On 6 May 2020 did Ms Ball behave inappropriately at the grievance hearings, namely by refusing to discuss adjustments further and confirming that advice had been taken from a solicitor?**

33.15.1. The factual allegation is not made out. Whilst Ms Ball did make reference to advice having been received from the respondent's solicitors, there was in the circumstances nothing inappropriate about this. Further, there was no refusal to *discuss* adjustments further – see DB 2172 to 2174. Taking the evidence in the round, Ms Ball did not behave inappropriately as alleged.

33.16. **[Allegation 19.1 (xxiii)]: Did Ms Ball and/or Mr Panditharatna ignore the claimant's emails of 6 May 2020 at DB 5059-5060?**

33.16.1. The email at DB 5059-5060 was sent by the claimant at 08.28 on the morning of the adjourned hearing. It is in effect a response to the respondent's email of 5 May at DB 4589 in which the respondent stated that it would make no reference to occupational health. In his email the claimant sets out again why such a reference should be made.

33.16.2. We find that Ms Ball and Mr Panditharatna did not "ignore" the email at DB 5059-5060: the claimant referred to the matters dealt with by it at the meeting held later on the same day and the respondent's employees responded at the meeting. In other words, the fact that no email response was sent to the email before the meeting did not mean that the respondent had ignored it. The factual allegation is not made out.

33.17. **[Allegation 19.1 (xxxi)]: Did Mr Panditharatna decide to dismiss without opening/reading the claimant's email of 27 May 2020 until 20.15 on 24 July 2020?**

33.17.1. The email in question is at DB 2209-2306 and had many attachments. At paragraph 74 of his witness statement Mr Panditharatna explains that it was opened the IT department because of concerns about possible “malicious content” and that he did read it before reaching his decision. The claimant’s case in this respect depends, essentially, on the read receipts at DB 4726 and DB 4727.

33.17.2. We accept Mr Panditharatna’s explanation because we found him to be a credible witness for the reasons set out in relation to issue 7 at [7.5.8] above. Consequently, the factual allegation is not made out. The email was opened on Mr Panditharatna’s behalf and he read it before deciding to dismiss the claimant.

33.18. **[Allegation 19.1 (xxiv)]: On 15 May 2020 did Ms Ball allow the claimant only 24 hours to feedback on note from hearing (email at DB 5327-5329)?**

33.18.1. The thrust of the allegation can only sensibly be taken to be that the claimant was only given 24 hours to provide feedback on the notes of the various hearings. This is quite clearly not correct and so the factual allegation sensibly construed is not made out. The claimant was ultimately given until 27 May 2020 to provide any comments which was 15 days after he was sent the latest set of minutes (those of the second day of the grievance hearing) and 23 days after he was sent the first set of minutes (those of the disciplinary hearing). This is clear from DB 4594 and DB 2151 respectively.

33.18.2. However, it is correct that within this timescale on 15 May 2020 Ms Ball sent the email at DB 5329 which said:

> *My intention was to confirm that we would be finalising the minutes today and if you had any points to make in relation to the recorded minutes, please send them through to me by 5pm today.*

33.18.3. If the allegation is simply that this email was sent then it is made out.

33.18.4. Turning to whether the sending of the email at DB 5329 was unwanted conduct related to one of the claimant’s disabilities, we find that it was unwanted. However, it was on its face unrelated to his disabilities. It is therefore necessary to consider whether there is an evidential basis for drawing an inference that it related to one of the claimant’s disabilities. We conclude that there is not.

33.18.5. Even if there had been such an evidential basis, taking the evidence in the round, we would have concluded that in fact the conduct took place because Ms Ball was trying to finalise the notes of the various hearings and for no other reason. We would have concluded that the conduct was not in any way related to any of the claimant’s disabilities.

33.19. **[Allegation 19.1 (xxviii)]: On 9 June 2020 did Mr Panditharatna's response to the claimant's email of 6 June 2020 deny inappropriate behaviour and OH?**

33.19.1. The factual allegation is made out: Mr Panditharatna did deny inappropriate behaviour by Ms Ball and did decline to vary the previous decision in relation to an occupational health referral in his email at DB 2355.

33.19.2. Turning to whether this conduct was unwanted conduct related to one of the claimant's disabilities, it was clearly unwanted. However, it was on its face unrelated to his disabilities. The background of his disabilities is not sufficient. It is therefore necessary to consider whether there is an evidential basis for drawing an inference that it related to one of the claimant's disabilities. We conclude that there is not.

33.19.3. Even if there had been such an evidential basis, taking the evidence in the round, we would have concluded that in fact the conduct took place because Mr Panditharatna, who the Tribunal found to be a credible witness, believed that Ms Ball had not acted inappropriately and that the decision in relation to the occupational health referral was the correct decision. We would have concluded that his conduct was not in any way related to any of the claimant's disabilities.

33.20. **[Allegation 19.1 (xxix)]: Did Ms Ball continue to communicate with the claimant by email after 9 June 2020 despite being told that such communication would be considered by the claimant to be harassment?**

33.20.1. On 9 June 2020 (DB 4700) Mr Panditharatna told Ms Ball the claimant had the following auto-reply response, a copy of which is also at DB 4701:

Dear Sir/Madame

Following direct medical advice received Monday 8th June 2020 17:30 emails from the Forward Trust are no longer being accepted at this address and being automatically redirected to an external email address [the claimant] is certified unfit for work until 7th July 2020 - this certificate was supplied by email to Asi.Panditharatna@forwardtrust.org.uk on the 8th June 2020.

Dr Abdul Mukadam of Ackerman Medical Practice primary concern is to safeguard my current health and allow time for me to begin recovery. He has advised The Forward Trust need to engage Occupational Health prior to any further communications.

Please ensure any urgent communications are sent by recorded post.

Failure to follow this advice will be construed as further harassment and could result in action being taken.

Kind regards

[the claimant]

33.20.2. The factual allegation is made out because Ms Ball accepted in her witness statement at paragraphs 54 to 56 that she continued to send him "important documents" by email: we find that these were payslips, P45s and outcome letters. However, we also find that following receipt of the above auto-reply response correspondence sent by email was limited to those documents. The claimant did not dispute that this was the case either in his cross-examination of Ms Ball or otherwise.

33.20.3. In her witness statement Ms Ball said that she continued to email the claimant in this way to avoid delay. In her oral evidence she added that she was aware of his previous complaints (in relation to not receiving payslips). Having heard Ms Ball's evidence we find that she continued to email key documents to the claimant because she was concerned that if she did not this would result in the processes being delayed and, possibly, disputes about whether particular documents had been received. She adopted a belt and braces approach.

33.20.4. Turning to whether this conduct was unwanted conduct related to one of the claimant's disabilities, it was clearly unwanted. In light of our findings in the previous paragraph, we conclude that Ms Ball's motivation for continuing to email certain documents to the claimant did not relate to any of the claimant's disabilities. However, features of the factual matrix nevertheless lead us to the conclusion that the conduct in question related to the particular characteristic, i.e. to the claimant's mental health disability. This is because the auto-reply as set out above so clearly identifies the reason for the request to avoid further email communications as being the claimant's mental health disability (of which the respondent was at the time aware) and medical advice received in relation to it.

33.21. **[Allegation 19.1 (xxxii)]: Did Mr Trace demean the claimant's disabilities by describing them as being similar to have an anaesthetic at the dentist's (this is a reference to what Mr Trace said at the disciplinary appeal meeting on 31 July 2020 as set out at DB 2620)?**

33.21.1. This factual allegation is not made out. At issue [22.19] above we set out our reasons for concluding that the comments did not "trivialise" the claimant's disabilities by "analogising them". Equally, and for very similar reasons, we conclude that the comments did not describe the claimant's disability as being "similar to" having an anaesthetic at the dentist's.

33.21.2. If it were necessary for us to consider whether the comment related to the claimant's disabilities, we would have considered that it did not. We would have concluded that it related to Mr Trace's desire to understand the relevance of the claimant's evidence in relation to his health and disabilities.

33.22. **[Allegation 19.1 (xxxiii)]: Did the respondent fail to address disability status in the disciplinary and grievance appeal outcomes?**

33.22.1. When the claimant emailed LC on 17 April 2020 in relation to whether his HIV+ status should have been passed on (by the first grievance being forwarded) he argued that his disability status was not relevant, saying (DB 1868):

Purpose – I am not contesting that Asi should be made aware of the grievance points, however is there a legitimate reason or lawful purpose within the employment contract, under employment law, within ACAS guidance on Grievance and Disciplinary processes or even internal company policies that allow the sharing of this special category data held within this paragraph without explicit consent? No - while there are infringements and complaints in other grievance points in regard to health and safety, working time directive breaches and the failure of the company holding a return to work meeting following the sickness absence policy, all of the points raised in the grievance apply to any employee with or without a disability and further the detail of the information within this paragraph.

33.22.2. It is not therefore entirely clear to us why he now contends that an alleged failure “to address disability status” was an act of harassment in relation to the first grievance appeal outcome letter.

33.22.3. Be that as it may, we conclude that in order to fairly deal with the two appeals the respondent did not need to expressly consider whether the claimant did or did not have a disability. This is because: (1) in his grievance he did not argue that the respondent had wrongly refused to accept that he was disabled; (2) the respondent did not dispute the claimant’s contentions about his “disability status”.

33.22.4. Taking into account the contents of both outcome letters, we consider that the respondent “addressed” the claimant’s disability status because it considered his disabilities to the extent that this was necessary. The allegation is therefore not made out factually.

33.22.5. If we had concluded that the drafting of the two outcome letters meant that they had not “addressed” his disability status, and so it had been necessary for us to consider whether such omission related to the claimant’s disabilities, we would have considered that it did not. This is because we would have concluded that such omission simply reflected the view of Mr Trace and Mr Bernstein of what was and was not relevant, in light of the contents of the two appeals.

33.23. **[Allegation 19.1 (xxxiv)]: On 24 August 2020 did Mr Trace say that IT had been “much better” under the management of the Interim Head of IT?**

33.23.1. This allegation concerns the first grievance appeal outcome letter at DB 2870 when it states that the IT department:

…has been operating with fewer resources since February 2020 and is managing the current workload without crises. The department has

been more productive, and this would indicate that the workload is not due to staffing levels but more about styles of working and the organisation of the work.

33.23.2. The allegation is not made out because the outcome letter does not say that IT had been "much better" under the management of the Interim Head of IT.

33.23.3. However, in case we are wrong about that, and properly construed the offending wording did mean what the claimant contends, we turn to whether the conduct alleged would have been unwanted conduct related to one of the claimant's disabilities. It is clear that such conduct would have been unwanted. However, the conduct would on its face have been unrelated to his disabilities. It is therefore necessary to consider whether there would have been an evidential basis for drawing an inference that it related to one of them. We conclude that there would not have been.

33.23.4. Further, even if there had been such an evidential basis, taking the evidence in the round, we would have concluded that if the unwanted conduct had taken place this was because it addressed the question of sufficiency of resources in the IT department – which was relevant to the grievance appeal - and was not in any way related to any of the claimant's disabilities.

33.24. **[Allegation 19.1 (xxxv)]: On 24 August 2020 did Mr Trace confirm that he had instructed Mr Biggin to delay suspension pending finding a replacement member of staff?**

33.24.1. The date of the allegation makes plain that this is a reference to something that was said in one or both of the two outcome letters.

33.24.2. Neither letter says anything which could reasonably be construed as Mr Trace confirming that he had instructed Mr Biggin to delay suspension pending finding a replacement member of staff. The fact that at DB 2873 the first grievance appeal outcome letter states that "[Mr Biggin] discussed his concerns with me (Mike Trace) before Christmas" certainly does not amount to confirmation of an instruction as the claimant contended in his closing written submissions. The allegation is not therefore made out. We further find that Mr Trace and Mr Biggin having a conversation of this nature – effectively about how to manage a risk to the business of the respondent – was entirely reasonable and not in any way related to the claimant's disabilities.

33.25. **[Allegation 19.1 (xxxvi)]: on 24 August 2020 did Mr Trace blame the claimant's professional judgment as a reason that adjustments would not help?**

33.25.1. In light of the claimant's closing written submissions it appears that this allegation refers to the following section of the dismissal appeal outcome letter at DB 2883:

We had already agreed that the tone of the selected example emails were unacceptable and agreed that the finding that you were guilty of misconduct is correct. We found that a first written warning is entirely appropriate and sufficient and certainly not too severe.

You felt that it would have been helpful for you to have support and training with this problem, but we did not feel that this was the case. Your conduct and attitude in these emails are not a training nor a competence issue, they are a matter of simple professional judgment.

33.25.2. We find that the factual allegation is not made out: what the section of the letter set out above addresses is an argument that the claimant needed training in order to avoid sending inappropriately worded emails to colleagues. Mr Trace and Mr Bernstein concluded that training would not have assisted and that sending inappropriately worded emails to colleagues was simply a matter of professional judgment.

33.25.3. However, in case we are wrong about that, we turn to whether the conduct alleged would have been unwanted conduct related to one of the claimant's disabilities. It is clear that such conduct would have been unwanted. However, the conduct would on its face have been unrelated to his disabilities. It is therefore necessary to consider whether there would have been an evidential basis for drawing an inference that it related to one of them. We conclude that there would not have been.

33.25.4. Even if there had been such an evidential basis, taking the evidence in the round, we would have concluded that if the unwanted conduct had taken place as alleged it simply reflected the analysis of Mr Trace and Mr Bernstein of why the claimant had acted as he had and was not in any way related to any of the claimant's disabilities.

33.26. **[Allegation 19.1 (xxxvii)]: on 24 August 2020 was Mr Trace dismissive of the claimant's disabilities?**

33.26.1. The claimant's written submissions make plain that this is a reference to the two outcome letters.

33.26.2. The Concise Oxford Dictionary defines "dismissive" as "feeling or showing that something is unworthy of serious consideration". The Tribunal concludes that neither outcome letter is dismissive of the claimant's disabilities. Neither letter suggests that either author took the view that the claimant's disabilities were unworthy of serious consideration. The factual allegation is not therefore made out.

34. If so, was that unwanted conduct?

34.1. In the hope of making our reasons easier to read and understand, we have where necessary dealt with this issue above.

35. If so, did it relate to disability?

35.1. In the hope of making our reasons easier to read and understand, we have where necessary dealt with this issue above. We have also in relation to some but not all of the allegations dealt with it on an alternative basis, i.e. even when the factual allegation was not made out. More generally, with the exception of issue [33.20], we have concluded that there was insufficient evidence that any of the conduct complained of was related to disability to shift the burden of proof to the respondent.

36. If so, 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?

36.1. This issue arises only in relation to issue [33.20] – Ms Ball continuing to send some communications by email after the claimant had set up the out of office reply considered above.

36.2. In light of our findings of fact about why Ms Ball did this as set out at [33.20], we conclude that the conduct did not have the <u>purpose</u> of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant.

37. 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.

37.1. Again, this issue only arises in relation to issue [33.20]. There is both a subjective and an objective aspect to this issue. In considering it, the motive or intention of Ms Ball is irrelevant.

37.2. Turning to the perception of the claimant, we find that he will have perceived the respondent sending the documents identified at [33.20.3] above by email as well as by post as violating his dignity and creating an intimidating, hostile degrading or humiliating environment, given what he had written in the auto-reply. We find that this reflects the fact that by June 2020 he was exceptionally sensitive to any action or inaction by the respondent.

37.3. However, taking into account the other circumstances of the case, we conclude that it was not reasonable for the sending the documents identified at [33.20.2] to have had that effect. We so conclude because (1) only a limited number of documents was sent; (2) they were documents which were either self-evidently important (for example, the outcome letters) or to which the claimant had previously attached very considerable significance (for example, the payslips); (3) the claimant had previously said that he had not received documents by post (see, for example, the email exchange between him and Mr Blackburn of 26 February 2020 at DB 1620-1621); (4) the auto-reply arrangements which the claimant had put in place (see [33.20]) avoided him seeing any correspondence that was sent to that email address because it was re-directed.

37.4. In light of this conclusion, the whole of the claimant's complaint that he was subjected to harassment related to disability fails.

Victimisation (Equality Act 2010 section 27)

38. Did the claimant do a protected act as follows:

38.1. **On 21st October 2019, an employee ("TO") presented 3 documents to the Respondent to establish her right to work in the UK and HR sought advice from solicitors. On 23rd October 2019, raised with JB his concerns about external solicitors reviewing these documents which he says caused unnecessary stress and amounted to discrimination on grounds of race (DB 4124-4125). He was unhappy with the response and "escalated" this complaint in November 2019 and again on 31 December 2019, when he says he made a "formal complaint".**

The respondent by its representative Mr Crow accepted during the course of the hearing on 27 October 2023 that the allegation of discrimination contained at DB 4125 was a protected act for the purposes of section 27(2)(d) of the Equality Act 2010. This is referred to as "protected act 1" below.

38.2. **In emails of 1 May 2020, 4 May 2020 and 6 May 2020, did the claimant claim protection and the right to adjustments per the Equality Act.**

The respondent in effect conceded in its closing written submissions that such an allegation was made and we indeed conclude that it was. This is referred to as "protected act 2" below.

38.3. **In an email of 27 April 2020 and verbally on 28 April 2020 and 6 May 2020, restated on various occasions thereafter, did the claimant allege unlawful discrimination?**

The respondent in effect conceded in its closing written submissions that such an allegation was made and we indeed conclude that it was. This is referred to as "protected act 3" below.

39. Did the respondent do the following things:

39.1. **[Allegation 20.2 (xlii)]: Did the respondent delay the response to the June 2019 grievance and offer no right of appeal in a letter dated 31 October 2019 sent to the claimant on 19 December 2019?**

39.1.1. We have made some findings of fact in relation to this issue at [133] above and set out the outcome of the grievance there. The claimant's grievance about the conduct of EH was sent to Mr Biggin on 11 June 2019 (DB 932). The claimant then involved Mr Trace later on the same day (DB 3980). The claimant's grievance and other complaints against EH were investigated until her resignation in August. We find a response should therefore have been sent to the claimant in August or perhaps September.

39.1.2. We find that in fact what happened was that Mr Biggin told the claimant of the outcome of the grievance orally on 30 October 2019. This is what he said at paragraph 61 of his witness statement and we preferred his evidence to that of the claimant in this respect because we found him to be a more credible witness. We have found at [133.2] above that the actual decision letter then remained in Mr Biggin's draft items inbox until 19 December 2019, when it was sent with an apology. The factual allegation is therefore made out in that there were delays in responding to the claimant's grievance generally before 30 October 2019 and in writing after that date until 19 December 2019. Further, the written outcome did not offer a right of appeal.

39.1.3. The reason that we found Mr Biggin to be a more credible witness than the claimant is as follows. Whilst we did at times find the way he answered questions in cross-examination to be overly defensive, and also considered that at times he demonstrated a lack of willingness to make concessions which should perhaps have been made, his approach to the evidence overall was far more realistic than that of the claimant. We refer to our findings above in relation to the claimant's credibility in this respect.

39.1.4. Turning to the question of detriment, we conclude that a reasonable worker would take the view that the delay in providing the oral and then written outcomes amounted to a detriment.

39.1.5. Turning to the question of whether the detriment was because the claimant did a protected act, the only relevant protected act is protected act 1 which took place on 23 October 2019. As such the protected act took place part way through the delay identified above. It is inherently unlikely that there was one reason for the delay before 23 October 2019 and another reason for the delay after 23 October 2019. Taking the evidence in the round, there is an insufficient evidential basis to infer a link between protected act 1 and the delay.

39.1.6. However, in case we are wrong about that, and the burden of proof shifts, we find in any event that the reason for the delay prior to 30 October 2019 was simply that Mr Biggin was very busy and that the reason after 30 October 2019 was simply that he forgot to email the letter. Equally, we find that the omission of the reference to a right of appeal was simply an oversight by Mr Biggin. We find that neither matter was in any sense whatsoever because of protected act 1.

39.2. **[Allegation 20.2 (ii)]: On 17 December 2019 did Mr Biggin construct grounds for suspension?**

39.2.1. The 17 December 2019 was the date that HG sent her complaint about the claimant's emails to Mr Biggin (DB 1737). Mr Biggin gave evidence which we accept that on reviewing the emails and having considered the matter he considered that the emails showed potential misconduct which should be investigated.

39.2.2. We conclude that Mr Biggin did not on this (or any other) date "construct" grounds of suspension. He genuinely believed that there were allegations of misconduct and that the claimant should be suspended whilst they were investigated. The allegation is, therefore, not factually made out. We refer to our conclusions at [7.5.1] to [7.5.5] in this respect.

39.2.3. We have so concluded on the basis that "construct" implies "make up" or "artificially manufacture". However, if we had given the word a wider and neutral meaning, we would have gone on to conclude that the grounds were not constructed because of any of the protected acts. Rather we would have concluded that they were constructed because Mr Biggin genuinely believed that there were allegations of misconduct which should be investigated, and that the claimant should be suspended whilst this took place.

39.3. **[Allegation 20.2 (xliii)]: Did the respondent refuse a return to work interview on 23 December 2019, 7 January 2020 and 14 January 2020?**

39.3.1. This factual allegation is not made out for the reasons set out at issue [26.8.1] above.

39.4. **[Allegation 20.2 (i)]: On 14 January 2020 did Mr Biggin add a second complaint from HG?**

39.4.1. We have made findings of fact relevant to this issue at [169] to [170] above. The factual allegation is not made out for the following reasons:

39.4.1.1. The relevant allegation was not "added" on 14 January 2020 – rather that is the date on which the claimant was informed of it.

39.4.1.2. The relevant allegation was not an allegation by HG – see our findings of fact at [170] above.

39.4.2. Further, if we had interpreted the allegation as being that the allegation set out at [169] above had been added on or before 14 January 2020, which *might* have been factually made out, we would have concluded that the reason for this was that Mr Biggin honestly believed that that was potential misconduct which should be investigated and that his decision to include that allegation was in no sense whatsoever because of any of the protected acts.

39.5. **[Allegation 20.2 (xliv)]: Did the respondent arrange the meeting of 14 January 2020 under false pretences/suspend without warning?**

39.5.1. We find that the meeting of 14 January 2020 was initially arranged as a return to work meeting but was then used as a meeting to suspend the claimant. We find that it was not arranged under "false pretences" because the original intention of Mr Biggin had been to use the meeting as a return to work meeting to discuss the reason for the claimant's December absence.

39.5.2. The claimant was suspended without warning. The respondent's policy did not require advance warning of suspension and, in these circumstances, we conclude that a reasonable employee would not take the view that suspension without notice in and of itself amounted to a detriment.

39.5.3. In case we are wrong about that, we turn to the question of whether any detriment was because the claimant did a protected act. The only relevant protected act is protected act 1 which took place on 23 October 2019. Taking the evidence in the round, there is an insufficient evidential basis to infer a link between protected act 1 and the suspension without warning.

39.5.4. However, in case we are wrong about that, and the burden of proof shifts, we find in any event that Mr Biggin's reason for suspending without notice was to protect the respondent's IT systems. We refer to our findings at [171] above in this respect. We find that it was in no sense whatsoever because of protected act 1.

39.6. **[Allegation 20.2 (lii)]: Did the respondent fail to provide clarity on the disciplinary allegations from 14 January 2020 onward (to dismissal)?**

39.6.1. We have considered the investigation and the disciplinary allegations arising from it between [172] and [180] above and they were all discussed in detail at the subsequent disciplinary hearing. We find that the respondent did provide clarity on the disciplinary allegations and so the allegation is not factually made out.

39.6.2. However, in case we are wrong about that, and in fact the respondent subjected the claimant to a detriment by not providing such clarity, we have considered the question of whether such an absence of clarity was because the claimant did one or more of the protected acts.

39.6.3. The allegation is not directed at a particular individual but probably encompasses at least Mr Biggin, Mr Blackburn and Mr Panditharatna. We conclude that it is inherently unlikely that each of these would be influenced in any way by the protected acts, given their relative lack of importance in the vast volume of correspondence and issues in dispute between the claimant and respondent. Taking the evidence in the round, there is an insufficient evidential basis to infer a link between any lack of clarity and the protected acts, two of which post-date the alleged beginning of the lack of clarity.

39.6.4. However, in case we are wrong about that, and the burden of proof shifts, we find in any event that the reason for any lack of clarity was simply a lack of attention to detail by one or other of the individuals involved in what was undoubtedly a complex disciplinary process. We find that it was in no sense whatsoever because of any of the protected acts.

39.7. **[Allegation 20.2 (iv)]: On 28 January 2020 did Mr Biggin add an allegation, to be investigated, of failure to adhere to sickness absence procedure?**

39.7.1. The respondent admits that this allegation was added on 28 January 2020 after legal advice had been taken. However, it seems to us that it was probably added by 21 January 2020 because it features in the instructions to the Burdett Consultancy of that date (see [172] above) albeit it was not notified to the claimant until 28 January 2020. In any event, the allegation was added to those contained in the suspension letter and so we treat the factual allegation as made out. Turning to the question of detriment, the respondent concedes this.

39.7.2. Turning to the question of whether the detriment was because the claimant did a protected act, the only relevant protected act is protected act 1 which took place on 23 October 2019. Taking the evidence in the round, there is an insufficient evidential basis to infer a link between the protected act and the addition of the allegation.

39.7.3. However, in case we are wrong about that, and the burden of proof shifts, we find in any event that the reason for the addition of the allegation was as set out at [172] to [174] above. We find that it was in no sense whatsoever because of any of the protected acts.

39.8. **[Allegation 20.2 (liv)]; Did the respondent inappropriately appoint Ms Burdett as investigator and did she remove references to the claimant's health in her report?**

39.8.1. We have concluded at [22.10] above that the allegation that there was no mention of his health in Ms Burdett's report is not made out. We further find that there is simply no evidence of significance to support a contention that other references to his health were removed. The allegation is not factually made out.

39.8.2. So far as whether it was inappropriate to appoint Ms Burdett as an investigator, we conclude that it was not inappropriate for the reasons set out at [9.1.3.4] above. The allegation is therefore not factually made out.

39.8.3. However, if either part of the allegation had been made out, we would have concluded that any detriment thereby ensuing was not because of the protected act. Our primary reason for this would have been Ms Burdett was not aware of protected act 1 (chronologically, the only one that might be relevant) and so it could not have been why she acted as she did.

39.9. **[Allegation 20.2 (lv)]: Did the respondent accuse the claimant of gross misconduct at the investigation meeting?**

39.9.1. During the course of the investigation meeting Ms Burdett put the breach of confidentiality to the claimant as being a potential act of gross

misconduct and the way in which she did so may reasonably have caused the claimant to feel that he was being "accused" of gross misconduct ("she asked was CT aware of the FT Code of Conduct Policy and was he aware that his actions were a gross breach of this policy" (DB 1499)). We find that the factual allegation is therefore made out.

39.9.2. Turning to the question of detriment, we conclude that a reasonable worker would not have taken the view that this amounted to a detriment. Rather they would have taken the view that they were being subjected to robust but reasonable questioning to enable them to fully explain their position.

39.9.3. In case we are wrong about that, we turn to the question of whether any detriment was because the claimant did a protected act (the only relevant protected act is protected act 1 which took place on 23 October 2019). Taking the evidence in the round, there is an insufficient evidential basis to infer a link between the protected act and the questioning. In particular, in reaching this conclusion we have taken account of the fact Ms Burdett was not aware of protected act 1.

39.9.4. However, in case we are wrong about that, and the burden of proof shifts, we find in any event that the reason for Ms Burdett questioning the claimant robustly as set out above was simply that she wanted to fully explore the reasons that he had acted as he had. We find that it was in no sense whatsoever because of any of the protected acts.

39.10. **[Allegation 20.2 (Iiii)]: Did the respondent add an allegation to be investigated on 28 January 2020 and 9 March 2020?**

39.10.1. The adding of an allegation on 28 January 2020 has been dealt with at issue [39.7] above. The respondent admits the second part of the allegation relating to 9 March 2020 – when the claimant was invited to the disciplinary hearing the Cyber Essentials report allegation was added. We have made findings of fact in relation to the addition of the Cyber Essentials allegation at [178] to [180] above.

39.10.2. The respondent accepts that adding the 9 March 2020 allegation was a detriment.

39.10.3. Turning to the question of whether the detriment was because the claimant did a protected act, the only relevant protected act is protected act 1 which took place on 23 October 2019. Taking the evidence in the round, there is an insufficient evidential basis to infer a link between the protected act and the addition of the allegation.

39.10.4. However, in case we are wrong about that, and the burden of proof shifts, we find in any event that the reason for adding the 9 March 2020 was as in effect set out in our findings of fact referred to above: the Cyber Essentials allegation had emerged from the investigation report (prepared by Ms Burdett who was unaware of any protected act). We find that it was in no sense whatsoever because of any of the protected acts.

39.11. **[Allegation 20.2 (lvii)]: Did the respondent fail to provide a payslip for January and February 2020 on time?**

39.11.1. The respondent concedes that they were not provided on time: that for January was 8 days late and that for February 5 days late. We find that normally an employee would have accessed payslips via Cascade but the claimant could not do this once suspended. We find that when the claimant pointed out his non-receipt of the payslips they were posted to him by Mr Blackburn. The respondent concedes detriment.

39.11.2. Turning to the question of whether the detriment was because the claimant did a protected act, the only relevant protected act is protected act 1 which took place on 23 October 2019. Taking the evidence in the round, there is an insufficient evidential basis to infer a link between the protected act and the delay. In particular, it appears that Mr Blackburn was primarily responsible for the payslips being received late and we find that he was not at the time aware of protected act 1 (the only potentially relevant protected act).

39.11.3. However, in case we are wrong about that, and the burden of proof shifts, we find in any event that the reason for the detriment was simply that the claimant was in the unusual position of not having access to Cascade (and so his payslips). Mr Blackburn acted promptly when the claimant raised the issue with him. We find that it was in no sense whatsoever because of any of the protected acts.

39.12. **[Allegation 20.2 (lvi)]: Did the respondent deliberately rely upon incorrect sickness absence dates? The perpetrator is said to be Mr Blackburn prior to receipt of the investigation report and others afterwards. The reference to incorrect sickness absence dates is to 17 to 20 December 2019.**

39.12.1. The allegation is unclear and the claimant has not commented on it in his closing written submissions. We believe that properly understood it is that the respondent dealt with Allegation 1 on the basis that the claimant said he was absent from work due to sickness between 17 and 20 December 2019 when his position is that he was in fact only absent due to sickness from 18 to 20 December 2019.

39.12.2. We find that the factual allegation is not made out: the claimant cannot sensibly contend that the sickness absence dates were "incorrect" when on 17 December he himself sent email saying he was ill on that date and going home as a result of that (see our findings of fact at [146] to [148] above) and, also, subsequently completed a Cascade entry on that basis (DB 1351).

39.12.3. However, in case we are wrong about that and the respondent did subject the claimant to a detriment as alleged, we turn to the question of whether the detriment was because the claimant did a protected act.

Taking the evidence in the round, there is an insufficient evidential basis to infer a link between any of the protected acts and the detriment.

39.12.4. However, in case we are wrong about that, and the burden of proof shifts, we find in any event that the reason for the detriment was quite simply that the respondent reasonably understood that the claimant had originally said – when he submitted the Cascade entry – that he was absent from work due to sickness for part of 17 December and then also 18 to 20 December. We find that it was in no sense whatsoever because of any of the protected acts.

39.13. **[Allegation 20.2 (v)]: Did Mr Blackburn manipulate investigation notes by removing mentions of the claimant's illness and entering disputed notes?**

39.13.1. So far as the allegation related to the manipulation of investigation notes, it is not factually made out for the reasons set out at issue [22.9.1] above.

39.13.2. So far as it relates to "entering disputed notes", we find that Mr Blackburn did not do this: he agreed some changes which the claimant proposed and made clear where a dispute remained (see in particular DB 1565 and 1567). The allegation is not factually made out because "entering disputed notes" carries with it an implication that the notes were presented to a third party as agreed when they were not.

39.13.3. However, if we are wrong about this implication, and the allegation in respect of "entering disputed notes" is made out, because the respondent did not accept all the amendments proposed by the claimant, we conclude that a reasonable worker would not have taken the view that that amounted to a detriment given that the notes when passed on identified areas of disagreement. It is entirely usual for different attendees to have differing recollections of exactly what was said at a meeting. There was therefore no detriment.

39.13.4. In case we are wrong about that, we turn to the question of whether the detriment was because the claimant did a protected act. The chronology suggests that the only relevant protected act was protected act 1. We have found above that Mr Blackburn was not aware of this. Taking the evidence in the round, there is an insufficient evidential basis to infer a link between any protected act and the detriment.

39.13.5. However, in case we are wrong about that, and the burden of proof shifts, we find in any event that the reason for the detriment was quite simply that it was not possible to agree the contents of the notes. We find that it was in no sense whatsoever because of any of the protected acts.

39.14. **[Allegation 20.2 (lix)]: Did the respondent fail to carry out a risk assessment regarding the claimant's health when planning adjustments from the meeting of 4 February 2020 and refuse to seek medical input?**

The perpetrator is said to be Mr Blackburn initially and then Ms Ball and Mr Panditharatna.

39.14.1. In so far as the failure to carry out a risk assessment is concerned, we have concluded that the factual allegation was not made out at issue [26.10] above.

39.14.2. In so far as the failure to seek medical input is concern, the factual allegation is made out for the reasons given at issue [33.10] above.

39.14.3. Turning to the question of detriment, we conclude that a reasonable worker would have taken the view that this did not amount to a detriment because the respondent did not dispute what they had said about their health and made all but one of the adjustments requested.

39.14.4. In case we are wrong about that, we turn to the question of whether any detriment was because the claimant did a protected act. Taking the evidence in the round, there is an insufficient evidential basis to infer a link between the protected act and the detriment claimed.

39.14.5. However, in case we are wrong about that, and the burden of proof shifts, we find in any event that the reason for the detriment was that identified at issue [33.10.3] above. We find that it was in no sense whatsoever because of any of the protected acts.

39.15. **[Allegation 20.2 (lxvi)]: Did the respondent delay the provision of documentation requested on 6 February 2020?**

39.15.1. The claimant explained this allegation in his closing written submissions. In essence, he argues that the respondent did not send him all of the documents that it should have sent to him following his Data Subject Access Request (“DSAR”) of 6 February 2020 within the required time and that it avoided doing so by classifying his DSAR as “complex”, something which was ultimately held to be incorrect by the ICO. The point is evidenced by the emailed letter from the ICO at DB 3197 (relevant section at end of DB 3200).

39.15.2. We find that the respondent did by the actions of LC therefore delay the provision of some of the documentation requested on 6 February 2020. We conclude that this was a detriment because a reasonable employee would have taken that view.

39.15.3. We turn to the question of whether the detriment was because the claimant did a protected act. The most obviously relevant protected act is protected act 1 because the other two had not taken place when the conduct complained of began. Taking the evidence in the round, there is an insufficient evidential basis to infer a link between any of the protected acts and the detriment. In particular, we find that LC was not involved in any significant way in the disciplinary and grievance proceedings and would be most unlikely to have been motivated to act by any of the protected acts.

39.15.4. However, in case we are wrong about that, and the burden of proof shifts, we find in any event that the reason for the detriment was quite simply the volume of documentation involved. LC felt she needed more time to deal with the DSAR and believed (wrongly, as it transpired) that she was entitled to obtain more time by categorising it as “complex”. We find that it was in no sense whatsoever because of any of the protected acts.

39.16. **[Allegation 20.2 (Ix)]: Did the respondent proceed with two allegations of gross misconduct on 9 March 2020?**

39.16.1. The respondent admits, and it is clearly the case, that it proceeded with two allegations of gross misconduct. It also admits that this was a detriment.

39.16.2. Turning to the question of whether the detriment was because the claimant did a protected act, the only relevant protected act is protected act 1 which took place on 23 October 2019. Taking the evidence in the round, there is an insufficient evidential basis to infer a link between the protected act (more than four months before) and the detriment.

39.16.3. However, in case we are wrong about that, and the burden of proof shifts, we find in any event that the reason for detriment was that having conducted a reasonable investigation (we refer to our conclusions at issue [9.1.2] in this regard), the respondent believed that the claimant had a case to answer in respect of the allegations in question. We find that it was in no sense whatsoever because of any of the protected acts.

39.17. **[Allegation 20.2 (vii)]: On 9 and/or 30 March 2020, did Mr Blackburn disclose the claimant’s HIV and disability without consent/tell the claimant that he (Mr Blackburn) had done this?**

39.17.1. This is to all intents and purposes the same factual allegation considered at issues [22.14] and [33.12]. The allegation is only partially made out for the reasons we have given when deciding those two issues – Mr Blackburn did inform the claimant that he had disclosed his HIV status and disabilities to Mr Panditharatna.

39.17.2. We conclude that this was not a detriment for essentially the same reasons that we concluded at [33.12.2] that it was not unwanted conduct. A reasonable worker would not have taken the view that it amounted to a detriment.

39.17.3. In case we are wrong about that, we turn to the question of whether any detriment was because the claimant did a protected act. The only relevant protected act is protected act 1 which took place on 23 October 2019. Taking the evidence in the round, there is an insufficient evidential basis to infer a link between the protected act and the detriment. In particular, we have found above that Mr Blackburn was unaware of

protected act 1 and the detriment took place some considerable time after it.

39.17.4. However, in case we are wrong about that, and the burden of proof shifts, we find in any event that the reason for the detriment was that set out at issue [33.12.4] above. We find that it was in no sense whatsoever because of any of the protected acts.

39.18. **[Allegation 20.2 (lviii)]: Did the respondent fail to mark absence from 10 March 2020 as sickness and obscure the true reason for the claimant's first request (dated 10 March 2020) for rescheduling of meeting? The perpetrator is said to be Mr Blackburn from 10 March 2020 to 28 April 2020 and after that Ms Ball and Mr Panditharatna. The claimants says the true reason was "obscured" in respect of his 1st request to reschedule because it was due to medical appointments and not because he wanted the date of the meeting changed.**

39.18.1. The respondent recorded the claimant's absence during this period as being "suspension". This was accurate because, whether or not he was well enough to attend work in the period referred to, he would have been suspended.

39.18.2. Turning to the question of detriment, we conclude that a reasonable worker would not have taken the view that being recorded as "suspended" amounted to a detriment when this was true. Indeed, for the reasons given at issue [22.4.3], a reasonable worker would have regarded this as being to their advantage in circumstances when it was true, even if they were also off work sick.

39.18.3. In case we are wrong about that, we turn to the question of whether the detriment was because the claimant did a protected act. Taking the evidence in the round, there is an insufficient evidential basis to infer a link between any protected act and the detriment.

39.18.4. However, in case we are wrong about that, and the burden of proof shifts, we find in any event that the reason for the detriment was that set out at issue [22.4.2] above. We find that it was in no sense whatsoever because of any of the protected acts.

39.18.5. Turning to the allegation that various employees of the respondent obscured the true reason for the claimant's first request (dated 10 March 2020) for rescheduling of meeting the claimant relies (see his closing written submissions) on the letter at DB 4375. Fairly construed, this letter suggests that the meeting on 20 March should be rescheduled for two reasons: (1) because the claimant has a medical appointment on that date; (2) because the claimant believes there is insufficient time before 20 March "for you to return all the evidence that I have asked for so far". In light of this, it was entirely reasonable and accurate for Mr Blackburn to write that the claimant wanted the date of the meeting changed. This covered both the reasons put forward by the claimant for it being changed. The factual allegation is therefore not made out.

39.18.6. In case we are wrong about that and the respondent did "obscure" the reason for the first request by describing it as alleged, we conclude that a reasonable worker would not take the view that this amounted to a detriment.

39.18.7. In case we are wrong about that, we turn to the question of whether the detriment was because the claimant did a protected act. Taking the evidence in the round, there is an insufficient evidential basis to infer a link between any of the protected acts and the detriment.

39.18.8. However, in case we are wrong about that, and the burden of proof shifts, we find in any event that the reason for any detriment was that Mr Blackburn and others saying that the claimant "wanted the date of the meeting changed" was simply a convenient shorthand which encompassed both the reasons (i.e. the medical appointment and his concern about the availability of documentation). We find that it was in no sense whatsoever because of any of the protected acts.

39.19. **[Allegation 20.2 (vi)]: Did Mr Blackburn, Ms Ball and Mr Panditharatna fail to correctly record the reason for the claimant's absence of 10 March 2020 to 11 June 2020?**

39.19.1. This is to all intents and purposes the same as the first allegation considered at [39.18] and so repeat our conclusions as set out at [39.18.1] to [39.18.4]. In summary, the claimant was not subjected to a detriment because of a protected act.

39.20. **[Allegation 20.2 (xii)]: Did Mr Blackburn, Ms Burdett, Mr Panditharatna and Mr Trace remove references to the claimant's health/conditions in the investigation and decision letters?**

39.20.1. The factual allegation is an amalgam of the factual allegations considered and found not to be made out at issue [22.9.1], [22.20], [26.11], [39.8] and [39.13]. For the reasons previously given, it is not made out.

39.21. **[Allegation 20.2 (lxv)]: Did the respondent lose or destroy the OH (2016) report and deny (on 30 March 2020) having any record of it?**

39.21.1. This is similar to the factual allegation considered at issue [26.12] above. In light of our conclusions there, we find that the respondent lost (but did not destroy) the 2016 OH report in 2016 when it failed to download it and did, in effect, deny having any record of it on 30 March 2020.

39.21.2. Turning to the question of detriment, we conclude that a reasonable worker would take the view that this amounted to a detriment.

39.21.3. Turning to the question of whether the detriment was because the claimant did a protected act, the only relevant protected act is protected act 1 which took place on 23 October 2019. This cannot have been a reason for the 2016 OH report being lost more than 3 years previously. So

far as the allegation concerning 30 March 2020 is concerned, it was Mr Blackburn who wrote the email in question and we have found above that he was unaware of protected act 1. Taking the evidence in the round, there is an insufficient evidential basis to infer a link between the protected act and the detriment.

39.21.4. However, in case we are wrong about that, and the burden of proof shifts, we find in any event that the reason for the detriment was the chain of events in relation to which we have made findings of fact at [208] to [211] above. We find that it was in no sense whatsoever because of any of the protected acts.

39.22. **[Allegation 20.2 (xiii)]: On 26 May 2020 did Mr Biggin make contact with the claimant via Mary Woodman (a former HR employee)?**

39.22.1. Ms Woodman was asked by the respondent to contact the claimant to investigate the second grievance. Her email to him of 26 May 2020 is at DB 2282. The claimant in effect declined to meet Ms Woodman until "the company clearly communicates with me about this" (DB 22284).

39.22.2. The email does not amount to Mr Biggin making contact with the claimant via Ms Woodman and so the factual allegation was not made out.

39.22.3. The claimant, having agreed during a discussion during the hearing that the allegation was at set out above, then sought to recast it as not involving a reference to Mr Biggin. We pointed out that that was not what we had said during the hearing and the matter was not pursued further. However, if the allegation had been that Ms Woodman contacting the claimant was a detriment because of a protected act ,we would have concluded that it was not. This is because a reasonable worker would have no objection to being contacted by someone who was tasked with investigating a grievance they had raised.

39.22.4. In case we are wrong about that, we turn to the question of whether the detriment was because the claimant did a protected act. Taking the evidence in the round, there is an insufficient evidential basis to infer a link between any of the protected acts and Ms Woodman contacting the claimant.

39.22.5. However, in case we are wrong about that, and the burden of proof shifts, we find in any event that the reason for Ms Woodman contacting the claimant was that the respondent wished to arrange for the second grievance to be investigated. We find that it was in no sense whatsoever because of any of the protected acts.

39.23. **[Allegation 20.2 (lxi)]: Did the respondent initially (on 3 and 6 April 2020) refuse requests to reschedule meetings (disciplinary 6th and grievance 7th meetings) and fail to test video conferencing?**

39.23.1. The respondent accepts that it initially refused to re-schedule on 3 and 6 April 2020. It also accepts that Ms Ball did not test the video

conferencing facility before 28 April 2020. The respondent does not know whether Mr Blackburn had conducted testing at an earlier date. We find that he had not as there is nothing in the documentation which suggests that he had.

39.23.2. Turning to the question of detriment, we conclude that a reasonable worker would not conclude that the initial refusal to reschedule was a detriment in light of the reasons given for this. This was not, therefore, a detriment. Turning to the testing of the video conferencing facility, the respondent concedes the issue in relation to Mr Blackburn but not Ms Ball. We find that a reasonable worker would take the view that Ms Ball failing to test the video conferencing facility before 28 April 2020 did not amount to a detriment, given that she only became involved in the disciplinary and grievance processes on 27 April 2020.

39.23.3. In case we are wrong in our conclusion that the initial refusal to reschedule by Mr Blackburn was not a detriment, we turn to the question of whether any detriment was because the claimant did a protected act. Given any such refusal must have been before 3 and 6 April 2020, the only relevant protected act is protected act 1. We have found above that Mr Blackburn did not know about this. Taking the evidence in the round, there is an insufficient evidential basis to infer a link between the protected act and the refusal to re-schedule. Further, if we are wrong about that, and the burden of proof shifts, we find in any event that the reason for the detriment was simply that Mr Blackburn wanted to bring the processes to a conclusion as soon as possible because he considered that was in the best interests of all involved. It was in no sense whatsoever because of the first protected act.

39.23.4. Turning to the question of whether the detriment caused by Mr Blackburn failing to test the video conferencing facility was because the claimant did a protected act, we note that so far as the first protected act is concerned we have found that Mr Blackburn was not aware of it. So far as the other protected acts are concerned, the first date relied upon is 27 April 2020: the allegation, therefore, is that because of protected act 3 Mr Blackburn immediately decided not to test the video conferencing facility. Taking the evidence in the round, we conclude that there is an insufficient evidential basis to infer a link between any of the protected acts and the failure to test the video conferencing. In particular, given the respondent's desire to get on with the hearings, it is very difficult to see why it would deliberately not test the equipment because of protected acts when this might result in the hearings not going ahead.

39.23.5. However, in case we are wrong about that, and the burden of proof shifts, we find in any event that the reason for the failure to test the video conferencing was because Mr Blackburn was busy with other preparatory work for the hearings (including dealing with the voluminous email correspondence generated by the claimant) and because he assumed that, given the claimant's undoubted technical expertise, there was unlikely to be any difficulty in using Skype. We find that it was in no sense whatsoever because of any of the protected acts. We would if

necessary have reached the same conclusion in relation to the reason for the failure of Ms Ball to test the video conferencing.

39.24. **[Allegation 20.2 (lxii)]: Did the respondent refuse to record meetings despite health issues and impose unreasonable deadlines for agreements of minutes?**

39.24.1. The respondent accepts that it did not record the meetings which was something the claimant had requested in his email to Ms Ball of 27 April 2020 at 20.40 (DB 1960). The refusal was in Ms Ball's email of 28 April 2020 (DB 1964). We have considered the issue of the agreement of minutes at issue [0] above. In light of our conclusions in relation to that issue, we find that the factual allegation that unreasonable deadlines were imposed is not made out.

39.24.2. Turning to the question of detriment in relation to the respondent refusing to record meetings, we conclude in light of our findings at issue [9.1.3.14] and issue [32.2.2.2] that a reasonable worker would not have taken the view that refusing to record the meetings amounted to a detriment. A reasonable worker would have appreciated all the difficulties that a recording can bring and understood why the provision of a note taker was satisfactory. Indeed, as noted at [32.2.2.2] above, Narcolepsy UK regards the provision of a note taker as an adequate adjustment. There was, therefore, no detriment.

39.24.3. In case we are wrong about that, we turn to the question of whether the detriment was because the claimant did a protected act. Taking the evidence in the round, there is an insufficient evidential basis to infer a link between any of the protected acts and the refusal to record.

39.24.4. However, in case we are wrong about that, and the burden of proof shifts, we find in any event that the reason for Ms Ball refusing to permit the claimant to record the meetings was that this reflected the respondent's policy and that a note taker would be provided. We find that it was in no sense whatsoever because of any of the protected acts.

39.25. **[Allegation 20.2 (lxiii)]: Did the respondent dismiss the claimant without sufficient investigation or cause?**

39.25.1. The whole of this factual allegation has previously been considered in relation to issue [22.6], issue [22.16], issue [22.18] and issue [26.4]. We have also considered it in the context of the unfair dismissal claim. The allegation is not factually made out for the reasons given in relation to those issues and in our conclusions in relation to the unfair dismissal claim.

39.25.2. Further, and separately, taking the evidence in the round, there is an insufficient evidential basis to infer a link between the protected acts and the decision to dismiss.

39.25.3. However, in case we are wrong about that, and the burden of proof shifts, we find in any event that the reason for dismissal was as found in relation to the unfair dismissal claim. We find that it was in no sense whatsoever because of any of the protected acts.

39.26. **[Allegation 20.2 (lxvii)]: Did the Mr Blackburn respondent disclose the claimant's HIV status without consent and then did the respondent criticise the claimant about sensitivity to this issue in the grievance appeal outcome letter?**

39.26.1. The first part of this issue has been dealt with at issue [39.17] above. So far as the allegation that the respondent criticised the claimant about sensitivity to this issue in the grievance appeal outcome letter is concerned, the claimant's closing submissions make plain that this is a reference to the following paragraph at DB 2881:

Your attitude towards the need for Information Governance protection appears selective, as you are highly sensitive to confidentiality when it relates to yourself but when handling other people's information you claim ignorance of our policies and general practice with regards to the disclosure you made.

39.26.2. We find that the factual allegation is not made out: the paragraph in question does not "criticise the claimant about sensitivity" to the issue of the disclosure of his HIV status. Rather it highlights what the writers of the letter regard as a significant contrast between the way he believes sensitive information relating to himself should be dealt with and how he deals with sensitive information relating to others.

39.26.3. In case we are wrong about that, and the relevant paragraph should be construed as a criticism of his sensitivity to the issue of the disclosure of his HIV+ status, we turn to the question of detriment. We conclude that a reasonable worker would take the view that being criticised for being sensitive about the disclosure of their HIV+ status amounted to a detriment.

39.26.4. We therefore turn to the question of whether the detriment was because the claimant did a protected act. Taking the evidence in the round, there is an insufficient evidential basis to infer a link between the protected acts and the criticism.

39.26.5. However, in case we are wrong about that, and the burden of proof shifts, we find in any event that the reason for the writers of the outcome letter expressing matters as they did was that they believed what they saw to be the claimant's contrasting attitudes towards his own and others' confidential information to be relevant to the matters they had to decide. We find that it was in no sense whatsoever because of any of the protected acts.

39.27. **[Allegation 20.2 (lxviii)]: Did the respondent cover up health issues/disabilities and protected acts by failing to mention them in the**

disciplinary and grievance outcome letters and the disciplinary and grievance appeal outcome letters?

39.27.1. There is very considerable overlap between this issue and issue [33.22] (which we concluded was not made out factually) and issue [26.3] (which we concluded was not made out factually). We find that the respondent did not "cover up" health issues/disabilities or the protected acts by failing to mention them in the various letters. They were mentioned to the extent that the authors of the letters reasonably thought they were relevant. The factual allegation is not made out.

39.27.2. Further and separately, it is of course always possible to make criticisms of what is or is not included in outcome letters. However, we conclude that the contents of the various letters referred to above were not in any way because of the protected acts.

40. If so, by doing so, did it subject the claimant to detriment?

40.1. In the hope of making our reasons easier to read and understand, we have where necessary dealt with this issue above.

41. If so, was it because the claimant did a protected act?

41.1. In the hope of making our reasons easier to read and understand, we have where necessary dealt with this issue above.

42. Alternatively, if so, was it because the respondent believed the claimant had done, or might do, a protected act?

42.1. We have not expressly considered this issue above and so do so here. We conclude that, to the extent that the respondent did subject the claimant to detriments as found above, it was not because it believed the claimant had done or might do a protected act. We so conclude for the same reasons we have given above for concluding that the detriments found were not because the claimant had done a protected act.

42.2. Further, our conclusions in the alternative – that is to say in complaints where detriment was not found – would have been the same if we had considered whether any detriment was because the respondent believed the claimant had done or might do a protected act.

42.3. In light of these conclusions the claimant's claim of victimisation fails and is dismissed.

<u>Breach of Working Time Regulations 1998 regulation 30(1)(a)</u>

43. Did the Respondent deny the claimant the following rights:

43.1. **[Allegation 21.1 (i)] To a daily rest break of not less than 11 consecutive hours (regulation 10)? The claimant says that during the 20 day period 9 – 28 September 2019 there were 12 occasions when he was not given 11 consecutive hours daily rest.**

43.1.1. An employer refuses to permit a worker to exercise a right under regulation 10 or 11 of Working Time Regulations 1998 if they expressly refuse the exercise of the right or put in place working arrangements that do not allow employees to take the breaks in question. An employer does not refuse to permit a worker to exercise their right under either regulation simply because the worker does not on a particular occasion take the rest break in question.

43.1.2. There is no doubt that the claimant worked very hard in the period 9 to 28 September 2019. This was a period when his workload was affected by a virus outbreak. However, the Tribunal does not accept that during that period the respondent refused to permit him to exercise his right under regulation 10 for the following reasons:

43.1.2.1. He did not identify in his witness statement or oral evidence any express refusal by Mr Biggin or another manager of any specifically requested daily rest break. Nor did he identify in his witness statement or oral evidence specific working arrangements which were put in place by the respondent that did not allow him to take the rest breaks. Indeed, we find that in fact that there was no such express refusal or any such specific working arrangements.

43.1.2.2. Rather his contention was, in effect, that the volume of work was such that he was unable to take (and so was not permitted to exercise his right to) the relevant rest breaks. We conclude that the volume of work did not in fact result in him not being unable to exercise his right to the relevant rest breaks. Rather, we find that as the Head of ICT he made choices about how the workload of his department should be managed/allocated and that, if there were occasions during the 20 day period identified when he received a daily rest break of fewer than 11 consecutive hours, this was simply a consequence of those choices.

43.1.2.3. For example:

43.1.2.3.1. The claimant would seek to manage increases in workload by seeking permission to work overtime. However, this was not required by the respondent. The minutes of the quarterly review meeting on 23 October 2019 (DB 1307) record (the author being Mr Biggin):

[the claimant] is ok but has over the last few months been working a lot of additional hours. Firstly in respect of the office move and latterly in dealing with a significant virus infection.

I have allowed OT for this period but this means continued additional hours.

I have now agreed a temp and hopefully [the claimant] will be able to manager his work life better in coming weeks.

[the claimant] has largely managed to maintain focus and delivery, however, recent events have meant that deadlines have had to be moved.

Two points arise from this. First, it was essentially a matter for the claimant whether additional workload was managed by overtime or by other means – the recruitment of a temp. There is no suggestion that Mr Biggin insisted on a particular course of action. Secondly, the workload could be managed by the claimant agreeing different deadlines.

43.1.2.3.2. The claimant was in fact able and did on occasion say to the respondent, in effect, that it needed to make decisions about what work it wished him to carry out because he could not do everything which was on his plate at a particular time. An example of this is the email at DB 3772 dated 6 November 2019 in which the claimant indicates that he will not work his normal hours and then overtime on top of that. The respondent did not reply by saying, for example, that he had to work whatever hours were required in order to complete the work.

43.1.3. We therefore conclude that the respondent did not refuse to permit the claimant to exercise his rights under regulation 10 as alleged.

43.1.4. Further and separately, in case we are wrong about that, we find that the complaint was brought out of time. It should have been brought within three months of each day on which it is said that a rest break was denied. The claim was in fact brought at best on 5 May 2020 when claim 1 was submitted. Early conciliation took place between 11 March and 7 April 2020. The latest time began to run in relation to any of the alleged refusals was 28 September 2019. As such it was presented several months out of time.

43.1.5. The claimant has not made clear submissions about why it was not reasonably practicable to present the claim within the three month time limit. If it had been necessary for us to consider this issue, we would have concluded that it was reasonably practicable for him to present the claim. As such, we would have concluded that the Tribunal had no jurisdiction to hear it.

43.1.6. Finally, in his closing written submissions the claimant contended that at the bottom of page 5 and the top of page 6 that I did not "withdraw the claims in relation to the continued breaches from September 2019 to December 2019". However, in light of our conclusion at [35] above that the final agreed list of issues was that contained in Appendix A, and given that

it cannot sensibly be argued that the claimant's argument comes within the exception we identified at [38], we do not consider that it is open to us to consider alleged breaches as set out at 43.1 of the claimant's submissions in respect of the period October to December 2019.

43.1.7. Nevertheless, if we had considered such alleged further breaches, we would have concluded that the claimant's claim failed for the substantive reasons set out above. Further, we would have also concluded that any claim in respect of an alleged refusal prior to 12 December 2019 was out of time.

43.2. **[Allegation 21.1 (ii)] To an uninterrupted weekly rest period of not less than 24 hours (regulation 11)? The claimant says he had only one period of 24 hours uninterrupted rest during the 20 days period 9 – 28 September 2019.**

43.2.1. We conclude that the claimant's complaints in relation to weekly rest fail for the same reasons as his complaints in relation to daily rest.

Detriment – section 45A Employment Rights Act 1996 (working time cases)

43.3. **Did the claimant allege that the respondent had infringed his rights pursuant to the Working Time Regulations 1998 in his email of 6 January 2020 to Ms Gray (DB 1371)?**

43.3.1. We repeat our conclusions as set out at issue [4] in relation to this issue. We have therefore set out below what our conclusions would have been if the claimant had successfully applied to amend the list of issues in the way described in our analysis of that issue (which of course he did not).

43.4. **If so, did the respondent subject the claimant to any of the following detriments because of this allegation:**

43.4.1. [Allegation 22.2 (i)] Mr Biggin suspending the claimant and subjecting him to disciplinary proceedings?

43.4.1.1. We have found at [163] above that the decision to suspend was taken between 23 December 2019 and 4 January 2020. If the claimant made an allegation that his rights under the 1998 Regulations had been infringed, it was not made before 6 January 2020. Consequently, the reason for the suspension cannot have been any allegation that his rights under the 1998 Regulations had been infringed.

43.4.1.2. Further and separately, we find that the actual reason for the suspension was as found at [163] above and was in no way related to any allegation that his rights under the 1998 Regulations had been infringed. Similarly, we find that subjecting the claimant to disciplinary proceedings was in no way related to any such allegation. It was because Mr Biggin reasonably believed that the claimant might have been guilty of misconduct.

43.4.2. [Allegation 22.2 (ii)] The respondent ignoring the claimant's complaints about breach of the Working Time Regulations 1998 in his email of 6 January 2020 to Ms Gray (DB 1371) and in his grievance letters of 6 February 2020 (DB 1526) in respect of daily and weekly rest in the letters setting out the outcome of the grievance and the grievance appeal? The perpetrators are said to be Mr Panditharatna and Mr Trace.

43.4.2.1. Turning first to the allegation against Mr Panditharatna, he quite clearly did not "ignore" such complaints. He dealt with them in the first grievance outcome at DB 2372-2373.

43.4.2.2. Turning secondly to the allegation against Mr Trace, again he quite clearly did not "ignore" such complaints. He dealt with them quite clearly in the first grievance appeal outcome letter at DB 2870-2871.

43.4.2.3. The factual allegation is not therefore made out.

43.4.3. **[Allegation 22.2 (iii)] The respondent blaming the claimant for breaching the Working Time Regulations 1998 in the letters setting out the outcome of the grievance and the grievance appeal? The perpetrators are said to be Mr Panditharatna and Mr Trace.**

43.4.3.1. Turning first to the allegation against Mr Panditharatna, he quite clearly did not "blame" the claimant "for breaching the Working Time Regulations 1998" in the first grievance outcome. Rather he made the entirely sensible (and, in light of our findings above, correct) point that the claimant "managed [his] own working time as well as having access to additional staffing resources and personnel to assist [him]" (DB 2373) as part of his analysis of why in his view there had been no breach of the 1998 Regulations.

43.4.3.2. Turning secondly to the allegation against Mr Trace, he quite clearly did not "blame" the claimant "for breaching the Working Time Regulations 1998" in the first grievance appeal outcome letter. Rather at DB 2870 Mr Trace made the points that it was a matter for the claimant how the workload within his team was organised and that the claimant had allocated overtime to himself as part of his analysis of why there had been no breach of the "Working Time Directive".

43.4.3.3. The factual allegation is not therefore made out. However, if either letter could have been construed as "blaming" the claimant for breaching the 1998 Regulations, we would have concluded that the letters were written as they were because Mr Panditharatna and Mr Trace honestly believed that that was the correct analysis of the complaints made by the claimant in relation to the 1998 Regulations and not because he had alleged that his rights under the 1998 Regulations had been infringed.

43.4.4. [Allegation 22.2 (vi)] By Mr Biggin, Mr Panditharatna and Mr Trace portraying the claimant as if he had no line manager and holding the claimant accountable for overtime and TOIL usage in the grievance and grievance appeal outcomes?

43.4.4.1. This allegation is not factually made out. Read fairly and as a whole, the letters do not portray the claimant as having "no line manager" although they do consider the nature of the line management relationship between the claimant and Mr Biggin in light of the senior role held by the claimant. Equally, they do not hold the claimant "accountable" for overtime and TOIL usage but rather simply identify that the use of overtime and TOIL were largely determined by the claimant's own decisions.

43.4.4.2. In case we are wrong about this second point, and properly construed the letters do hold the claimant accountable for overtime and TOIL usage, we concluded that there was no detriment. This is because a reasonable worker would not have taken the view that the ways the letters considered overtime and TOIL usage was a detriment.

43.4.4.3. Finally, in case we are wrong about both those things, and on a proper construction of the letters the claimant was subjected to a detriment, we conclude that the letters were written as they were because Mr Panditharatna and Mr Trace honestly believed that that was the correct analysis of the claimant's line management position and the position in relation to overtime and TOIL, and not because he had alleged that his rights under the 1998 Regulations had been infringed.

43.4.5. [Allegation 22.2 (vii)] By Mr Biggin and Mr Blackburn destroying and/or deleting data to cover up breaches of the Working Time Regulations 1998?

43.4.5.1. We find that the factual allegation is not made out because there is no evidence of any significance which suggests that Mr Biggin or Mr Blackburn destroyed and/or deleted data to cover up breaches of the 1998 Regulations.

43.4.5.2. In making this finding we have taken account in particular of what the claimant says about this issue in his closing written submissions but this really amounts to no more than him being aware of Mr Blackburn having accessed his mailbox on one occasion to forward emails to him. If it is the case that parts of the claimant's calendar were no longer available when he logged on in March 2020, there is no evidence of significance to tie this to either Mr Biggin or Mr Blackburn or, indeed, which suggests that data was deliberately destroyed or deleted for any purpose.

43.4.6. [Allegation 22.2 (viii)] By preventing the claimant from accessing HR records (payroll overtime) by removing his access to cascade?

43.4.7. This factual allegation is not made out: the claimant was not prevented from accessing things as he suggests but rather was given supervised access on a number of occasions and we have made findings about the extent of this access at [9.1.3.8] above.

43.4.8. Finally, in case we are wrong about both those things, and the limitations on access should be properly understood to be "preventing" access, access was limited (or "prevented") as it was for the reasons we have found at issue [22.9] above, and not because the claimant had alleged that his rights under the 1998 Regulations had been infringed.

43.5. **[Allegation 22.2 (ix)] By failing to acknowledge the claimant's statutory rights to breaks and days off?**

43.5.1. This factual allegation is not made out. Following the claimant sending the email of 6 January 2020 to Ms Gray, she responded promptly in a way that acknowledged that he and the members of his team had rights under the 1998 Regulations (see her email of 7 January 2020 at page DB 1370 to 1371). She specifically seeks clarification in relation to the advice he requires in relation to "uninterrupted breaks". The email cannot be construed as failing to acknowledge the claimant's statutory rights to breaks and days off.

43.5.2. Equally, the subsequent grievance procedure and the resulting first grievance outcome and first grievance appeal outcome letters did not fail to acknowledge that the claimant had statutory rights. Indeed, they specifically acknowledged that the claimant did have such rights in their consideration of whether there had been breaches of the 1998 Regulations or the Working Time Directive.

43.6. The claimant's claim that he was subjected to a detriment in breach of section 45A of the Employment Rights Act 1996 therefore fails in relation to each of the allegations for the reasons set out in relation to each of them above as well as for the reason set out at issue [43.3] above.

<u>Unauthorised deductions from wages</u>

43.7. **[Issue 23]: Did the respondent make unauthorised deductions from the claimant's wages and if so, how much was deducted and is to be paid to the claimant?**

43.8. **[Issue 24]: Was the claimant paid less in wages than he was entitled to be paid and, if so, how much? The claimant says he is entitled to have been paid salary during the period 12 to 15 June 2020 as he did not receive the dismissal letter until 15 June.**

43.8.1. These two issues both relate to the same factual allegation: this is that, although the respondent emailed a letter of dismissal to the claimant on 11 June 2020, he did not read it until 15 June 2020 when it was delivered by post. The claim is not out of time as it was included in the second claim presented on 10 September 2020 (PB 57).

43.8.2. We find that the claimant did not see or read the dismissal letter until 15 June 2020. The question, therefore, is whether this resulted in the respondent having made unauthorised deductions from his pay in respect of his wages from 13 to 15 June 2020.

43.8.3. A contract does not terminate for the purposes of a claim brought under the 1996 Act on notice of dismissal being given until the employee either reads the letter or has a reasonable opportunity of knowing about it (Brown v Southall and Knight [1980] ICR 617, EAT). Indeed, there is no place for the doctrine of "constructive notice" unless an employee deliberately fails or refuses to read a letter (McMaster v Manchester Airport plc [1998] IRLR 112, EAT). Further, in Gisda Cyf v Barratt [2010] ICR 1475, the Supreme Court held that in assessing whether an employee had had a reasonable opportunity to read a dismissal letter a subjective approach should be taken being "mindful of the human dimension in considering what is or is not reasonable to expect of someone facing the prospect of dismissal from employment. To concentrate on what is practically feasible may compromise the concept of what can realistically be expected".

43.8.4. We consider that, given that the claimant had because of his health decided not to engage with email traffic from the respondent but rather had caused it be redirected (the auto-reply in issue is set out in full at [33.20] above), he did not either read the dismissal letter or have a reasonable opportunity to do so before it was delivered to his home by post on 15 June 2020. We note in this respect that the respondent would have received the auto-reply in response to the email attaching the letter of dismissal and it would have been open to it to effect delivery by hand on 10 June 2020, but it chose not to do so. We also note in this respect that in any event service of a notice of dismissal by email was not permitted by the contract (see its clause 25.4 at DB 297).

43.8.5. We conclude on this basis that consequently the respondent did make an unauthorised deduction from the claimant's wages because it paid him only until 11 June 2020 when in fact his employment did not terminate until 15 June 2020. The claimant says that he is owed £447.50 (gross) in this respect. We do not know if the respondent disputes this quantification of the claim. If it does not, it will doubtless pay the net amount due. If it does, then the parties should apply for a 3 hour remedy hearing.

Time limits

44. Other than in relation to the claims under regulation 30(1) of the 1998 Regulations, we have not considered the question of time limits because it is unnecessary to do so in light of our conclusions above.

Amendment

45. We have not considered the question of amendment because in because it is unnecessary to do so in light of our conclusions above.

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Employment Judge Evans

Date reasons signed: 7 February 2024

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