Case No: 3316532/2021

EMPLOYMENT TRIBUNALS

Claimant: Mr S Jarju

Respondent: John Lewis plc

Heard at: Reading **On:** 16, 17, 18, 19, 20 October and 18 December 2023, and in chambers on 19 December 2023

Before: Employment Judge Shastri-Hurst, Ms H Edwards and Ms J Stewart

Representation
Claimant: Mr H Ogbonmwan (lay representative)
Respondent: Mr D Hobbs (counsel)

RESERVED JUDGMENT

1. The claims of race and religious belief discrimination fail;
2. The claim of victimisation fails;
3. The claim of failure to make reasonable adjustments fails;
4. The claim of unfair dismissal fails;
5. The claim of breach of contract (notice pay) fails.

REASONS

Introduction

1. The respondent has two trading divisions, those being John Lewis and partners department stores and Waitrose and partners supermarkets. The business is run on co-ownership principles and all partners are eligible to participate in a share of the respondent's annual profits.

2. The claimant was employed by the respondent as Warehouse Partner from 16 August 2004 to 20 April 2021. He worked at the Waitrose and partners warehouse in Bracknell. The respondent says that it dismissed the claimant by reason of misconduct.

3. The claimant commenced the ACAS early conciliation process on 29 June 2021. This process completed on 10 August 2021, following which the claimant presented his claim form to the tribunal on 9 September 2021.

4. In the claim form, the claimant sought to present claims of unfair dismissal, disability discrimination, race discrimination, and discrimination on the grounds of religion or belief. He also brought pay claims, ticking all the boxes relating to all types of pay claims. The respondent provided a response to the claim denying all the claims in their entirety.

Preliminary hearings

5. This claim has been subject of three preliminary hearings:

   5.1. On 2 September 2022, before Employment Judge Tynan. At this hearing it became apparent that the claimant had not complied with certain orders of the tribunal. Furthermore no list of issues was capable of agreement, despite the fact that the respondent's solicitors had produced a draft list of issues in advance of the hearing to the claimant's representative. Further Case Management orders were made at this hearing.
   5.2. On 3 April 2023, before Employment Judge Shastri-Hurst. At that hearing the claimant's claim for holiday pay and three allegations of direct race/religion discrimination were struck out on the basis that there had been non-compliance with case management orders. This hearing ended up being part heard.
   5.3. On 15 May 2023, before Employment Judge Shastri-Hurst. At this reconvened hearing, the tribunal considered whether to strike out certain allegations or, in the alternative, whether to make a deposit order in relation to those allegations.

6. Following that hearing on 15 May 2023, the list of issues was finalised to reflect the outcome of the various matters dealt with at that hearing, and now appears at [176-179]. The claims were clarified as being as follows:

   6.1. unfair dismissal under s98 of the Employment Rights Act 1996 ("ERA");

   6.2. breach of contract/notice pay;

   6.3. direct race/religious discrimination under s13 of the Equality Act 2010 ("EqA");

   6.4. failure to make reasonable adjustments under ss20 and 21 EqA;

   6.5. victimisation under s27 EqA.

Final hearing

7. The tribunal had before it the main bundle of 820 pages (references to "[X]"). It was also provided with the claimant's additional bundle of 21 pages (references to "[C/X]"). The respondent did not object to the admissibility of that additional bundle.

8. We also had the benefit of witness statements from the claimant and Michael Ibe ("MI") in support of the claimant, as well as Jimmy Craske ("JC"),

Operational Manager, and Tracy McCreadie ("TM"), a manager in the appeals office within the respondent's People Department. JC was the investigation officer, and TM was the appeal officer regarding the disciplinary process that led to the claimant's dismissal. The dismissing officer was Bill Mansfield ("BM"), who has since retired from the respondent, and did not give evidence in this matter. References to witness statements are "[AB/WS/X]", where AB are the initials of the witness, and X is the paragraph number to which is referred.

9. We were provided with a skeleton argument from the respondent which had been served on the claimant and his representative by email the day before the hearing on Sunday 15 October 2023. From the claimant's representative we had three additional documents:

   9.1. a cast list;
   9.2. a document entitled Brief Claimant Case Summary; and
   9.3. a document entitled Legality and Alternative Sanctions to Strike Out application.

List of Issues

10. The list of issues is found at [176-179], and is annexed to this Judgment. We clarified with Mr Ogbonmwan that the substantial disadvantages alleged in relation to the reasonable adjustments claim were as follows:

    10.1. The claimant was compelled to attend the hearing on 30 April 2021;
    10.2. The claimant was unable to prepare fully for that hearing;
    10.3. Exacerbation of the claimant's mental health.

Timetable

11. Unfortunately, there was a delay in starting the evidence in this case. The claimant's representative raised numerous issues and applications which required our attention and therefore we did not commence the claimant's evidence until 1255hrs on Day Two.

12. In total, the claimant was at the witness table being cross-examined for just short of 9 hours. However, there were, during this period, numerous interjections and interruptions lasting several minutes at a time from Mr Ogbonmwan. The claimant was re-examined by Mr Ogbonmwan for 2 hours.

13. Although the Tribunal agreed with the parties to start at 0930hrs on Day Four and Day Five, unfortunately Mr Ogbonmwan was delayed in his attendance. This meant that we lost the hour. We did on several of the sitting days take shorter lunch breaks in an attempt to catch up some time.

14. We commenced the respondent's evidence on Day Five. We had, on Day Four, warned the parties that the Tribunal would have to rise at 1445hrs on Day Five.

15. On Day Five, we heard evidence from TM. She was cross-examined by Mr Ognbonmwan, with a couple of interjections from Mr Hobbs lasting a few seconds each. At 1230hrs, we informed Mr Ogbonmwan that we wanted TM's evidence to be concluded by 1300hrs. By 1300hrs, the cross-examination was not finished. We took a shorter lunch break, from 1310hrs to 1340hrs, and on

return it was agreed that we would list the case for a further day with the parties on 18 December 2023: all parties confirmed that they were free to attend.

16. We reminded the claimant's representative that we needed to finish TM's evidence "today" and by 1445hrs: there was no need for her to be under oath for the next 8 weeks, when there had been plenty of time for cross-examination on the relevant issues.

17. Mr Ogbonmwan was then given a 10 minute warning, a five minute warning, and a warning that he could have two more questions. He was in fact permitted to ask a third question following that last warning. At that stage, the Tribunal guillotined Mr Ogbonmwan's cross-examination of TM: this meant that TM had been cross-examined for 3 hours and 30 minutes.

18. The hearing was then postponed part-heard, to return on 18 December 2023 for JC's evidence and submissions. Parties were informed that they were welcome to provide written submissions, if that would assist in ensuring that we got through everything on that remaining day.

19. In advance of the 18 December 2023, the Judge sent out a proposed timetable for the final day, to ensure that all matters could be concluded on Day 6. The proposed timetable was as follows:

    Cross-examination of James Craske 1000 – 1300

    Lunch 1300 – 1400

    Cross-examination of James Craske 1400 - 1430

    Tribunal's questions and re-examination 1430 – 1450

    Break 1450 – 1500

    Respondent's submissions 1500 - 1530

    Claimant's submissions 1530 – 1600

20. This allowed 3.5 hours for JC's cross-examination. We were delayed by 15 or so minutes on Day 6, and so took a shorted lunch break to ensure that Mr Ogbonmwan still had 3.5 hours for his cross-examination. Unfortunately, Mr Ogbonmwan was still seeking to ask questions at 1430, despite being reminded of the timetable throughout the day, and being given a 15 minute and 5 minute warning, and in fact being given until 1436hrs in the end.

21. Despite the timetable, Mr Ogbonmwan requested some time to consider his closing submissions. In light of Mr Hobbs' indication that he would not need the allotted 30 minutes in closing, we altered the timetable, so that the parties could have a 20 minute break, followed by 20 minutes each for submissions. For the record, Mr Hobbs' submissions were 22 minutes, Mr Ogbonmwan's were 25 minutes. Mr Hobbs had handed up written closing submissions, which had been given to Mr Ogbonmwan in advance of Mr Ogbonmwan's submissions. Mr Ogbonmwan also handed up submissions, but at a time which meant that Mr Hobbs did not have an opportunity to respond to them; we took this into account when reading them.

Day One Issues

22. At the commencement of the hearing, the Tribunal raised the issue that the Judge had previously made a deposit order in this case and that she was obviously also listed to deal with the final hearing, which was not usual. This was raised by the Tribunal for full transparency, given that the claimant's representative is not legally qualified.

23. The Judge made it clear to the claimant that it was open to him to apply for her to recuse herself and that there was the possibility that a second judge may be available if the application went in his favour. However, she stated that she did not consider there was a difficulty with her hearing the case, given that the deposit order was on a minor part of one of the claimant's several claims: namely, the deposit order was made against one of two of the claimant's alleged protected acts for his victimisation claim (now recorded at issue 17(ii) of the List of Issues at [176]).

24. The claimant's representative made an application to postpone the hearing. The Judge enquired as to whether any application for recusal should be dealt with before the postponement application, however the claimant's representative wished to proceed with the postponement application before the current tribunal. We therefore dealt with that application first.

25. The claimant made an application to postpone the hearing on four grounds:

    25.1. that there was an outstanding application for disclosure that the respondent had not met;
    25.2. that the CCTV footage of the incident leading to the claimant's dismissal had not been disclosed;
    25.3. that the respondent's skeleton argument, served on 15 October 2023, ambushed the claimant and sought to dictate the timetable of the hearing;
    25.4. that the bundle the respondent sent to the claimant's representative was not compliant with Tribunal guidance.

Disclosure issue

26. The Tribunal heard submissions from the claimant's representative on the disclosure issue first. This related to a disclosure request sent to the respondent containing 68 paragraphs. The respondent had responded to this email on 5 October 2023 by commenting on each paragraph where necessary. We used the email of 5 October 2023 as a reference point whilst dealing with the disclosure issue.

27. We went through each of the requests for disclosure to make sure that the tribunal understood what was being asked for, why it was said to be disclosable and what the respondent's response was.

28. Having gone through this exercise with the claimant's representative, we made the decision that there were four categories of disclosure that we considered admissible, should any documents exist that fell within those categories. Those categories were as follows:

28.1. human resources ("HR") telephone logs – if there were any further entries between the claimant and HR regarding the dismissal process, we considered those of relevance and admissible;

28.2. occupational health reports ("OHRs") – if there were any further OHRs relevant to the disciplinary process in 2020, other than the one we have in the bundle dated 11 March 2021, then we considered those relevant and admissible;

28.3. redeployment rejection – it was said by the claimant's representative that JC had sent correspondence to the claimant rejecting him for a redeployment role in 2021. If there were such correspondence, that would be relevant and admissible;

28.4. GP diagnosis – we had been told by the claimant's representative that there was a document from the claimant's GP containing a diagnosis of depression, and that this was not in the final bundle. We considered that if there was a diagnosis from the GP in a document that was currently not in the bundle, that would be admissible and relevant, and should be produced by either side to us.

29. There was also the matter of the disclosure of relevant CCTV. The position was that the respondent's representative had sent a link to the claimant's representative in August 2023. The link should have led through to 2 videos of CCTV evidence. The claimant's representative tells us that he was unable to use the link to see the videos and therefore he and his client had not seen any CCTV evidence, despite it being referenced in the respondent's index to the final hearing bundle. The respondent's representatives managed, during Day 1, to obtain two USB sticks, and copied the CCTV evidence onto those sticks, one for the claimant's representative and one for the Tribunal. We gave the claimant time on the first afternoon to watch the video. In fact we finished the hearing on the first day at 1450, the idea being that we would commence evidence at 1000 on Day Two, having had a chance to read the statements and documents to which they refer.

30. The respondent had the opportunity before we broke on Day One to make enquiries about the four categories of disclosure set out above. It was the respondent's position that there was nothing further to disclose, and that no further documents were in the possession or control of the respondent that fell within those four categories. In terms of the GP evidence, it transpired that in fact we have the relevant document in the claimant's additional bundle of 21 pages.

Remaining postponement points

31. In terms of the other three grounds on which the claimant requested a postponement, we set out each below:

Claimant's bundle

32. Mr Ogbonmwan's position was that the final bundle that was sent to the claimant in line with the case management orders was not compliant with Tribunal guidance. He was unable to point the Tribunal to any specific guidance to which he was referring. The Tribunal inspected Mr Ogbonmwan's bundle on his invitation: the bundle was exactly the same as the bundle provided to the Tribunal, other than it was double-sided. Mr Ogbonmwan stated that the double-sided nature of the bundle made it difficult for him to digest. Mr

Ogbonmwan had mentioned this to the respondent on the first morning, and Mr Hobbs gave Mr Ogbonmwan his (Mr Hobbs') own (clean) hard copy of the bundle: Mr Hobbs was working from an electronic bundle.

33. We found that there was nothing in the way in which the bundle sent to the claimant was formatted that prevented a fair trial, or in any way prejudiced the claimant.

Respondent's skeleton argument

34. We considered that there was nothing unusual about a professional representative providing an opening skeleton argument. These are often exchanged/provided on the first morning of a hearing, if not in advance. To have a skeleton argument provided is in fact helpful not only to the Tribunal but to the receiving party, as it indicates what the sending party's key arguments will be. There was nothing at all unprofessional about Mr Hobbs sending his skeleton to the claimant's side the day before the hearing: it does not amount to an ambush.

35. In terms of the suggested timetable, it was just that: a suggestion. Again, it is not unusual, and is often helpful, for one or both parties to set out how they envisage the hearing panning out in terms of time for cross-examination and so on. Ultimately, the timetable is a matter for the Tribunal to discuss with the parties and finalise. Mr Hobbs did not attempt to, and could not in any event, bind the Tribunal in terms of a timetable for the week ahead.

CCTV

36. Given our discussion regarding disclosure, set out above, by close of Day One the claimant had the CCTV videos in his possession. We gave him permission to provide a supplementary witness statement dealing with just the CCTV.

37. We record that the CCTV was not in fact disclosed late, as was submitted by Mr Ogbonmwan: it was disclosed by the respondent in August 2023. The fact was that the claimant's representative could not access it. However, we have seen no evidence to show that the claimant's representative raised this problem with the respondent's representative.

Decision on postponement

38. When an application is made to postpone a hearing less than 7 days before the commencement of that hearing, rule 30A of Schedule 1 of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 ("the 2013 Rules") applies. R30A provides as follows:

> (1) An application by a party for the postponement of a hearing shall be presented to the Tribunal and communicated to the other parties as soon as possible after the need for a postponement becomes known.
> (2) Where a party makes an application for a postponement of a hearing less than 7 days before the date on which the hearing begins, the Tribunal may only order the postponement where—
> (a)all other parties consent to the postponement and—
> (i)it is practicable and appropriate for the purposes of giving the parties the opportunity to resolve their disputes by agreement; or

(ii)it is otherwise in accordance with the overriding objective;
(b)the application was necessitated by an act or omission of another party or the Tribunal; or
(c)there are exceptional circumstances.

39. In this case, the only one of the above three grounds for postponement that could apply was the "exceptional circumstances" limb. The Tribunal found that none of the grounds set out by the claimant upon which he based his application amounted to exceptional circumstances.

40. Dealing with each of the grounds, briefly, in turn:

    40.1. Disclosure – no further disclosure was produced following the Tribunal's decision on the disclosure application. Therefore, there was no new documentation that required the claimant to have a postponement in order for him to be able to consider it;
    40.2. CCTV – a further copy of the two videos of CCTV that had previously been disclosed by the respondent were provided to the claimant on Day One. He had time on the afternoon of Day One to consider those videos with his representative. He also had permission to provide a supplementary statement dealing with the contents of the CCTV. There was no prejudice to the claimant in those circumstances in continuing with the hearing; we found that a fair hearing could still proceed this week;
    40.3. Claimant's bundle – there was absolutely nothing wrong with the respondent sending to the claimant a double-sided bundle. There was no need for the claimant to have an adjournment in order to familiarise himself with the single-sided version;
    40.4. Respondent's skeleton – we found that the claimant and his representative were not "ambushed" by the skeleton. There was nothing in it that required a postponement in order for the claimant to be able to address it. The suggested timetable was nothing more than a suggestion, and was not seeking to dictate to the Tribunal.

41. There was nothing within the claimant's application that led the Tribunal to find exceptional circumstances existed in this case that meant a postponement was appropriate.

42. The postponement application was therefore rejected.

Application to recuse

43. Following the Tribunal's decision not to postpone the hearing, the Tribunal returned to the issue as to whether the claimant wished to apply for the Judge to recuse herself, or whether he was happy to continue with the current composition of the Tribunal.

44. Mr Ogbonmwan took the opportunity to take instructions, and applied for the Judge to recuse herself, given that she had made a deposit order on 15 May 2023.

45. The respondent's position was that it simply wanted to get on with the hearing. Mr Hobbs submitted that there was nothing that required the Judge to recuse

herself. There was nothing in the deposit order itself that would lead the public to perceive that at fair hearing could not take place.

46. The Tribunal rejected the claimant's application for the following reasons:

    46.1. There has been a change to the law in the 2013 Rules. Under the 2004 Rules, there was an express provision that prohibited a Judge making a deposit order from hearing the final hearing. That rule has been expressly removed from the 2013 Rules, thereby lifting that prohibition;
    46.2. Looking at the deposit order made on 15 May 2023, the reason for it was that the Judge had a concern that the facts relied upon as equating to a protected act would not fulfil the statutory definition of a protected act under s27(2) EqA. The order was not made on the ground that the Judge had found the claimant or part of his case incredible, nor had she made any finding or conclusion on the claimant's credibility (negative or otherwise) or anything of that nature. In other words, the deposit order was a matter of legal interpretation, not credibility;
    46.3. The deposit order was made against one component part of the victimisation claim, which is one of six distinct claims. The deposit order does not threaten the victimisation claim in its entirety, as there is a second protected act upon which the claimant relies.

47. In light of the above points, the Tribunal concluded that there was nothing in this case that could give the public a perception that a fair hearing was not possible.

48. As stated above, the Tribunal released the parties at 1450hrs, in order for the claimant to have time to consider the CCTV with his representative, and prepare a supplementary witness statement. This time also gave the Tribunal time to read the witness statements and the documents to which they referred.

Day Two Issues

49. On the morning of Day 2, the Tribunal received three emails from Mr Ogbonmwan. The contents can be summarised as follows:

    49.1. An application for reconsideration of the Tribunal's decision regarding the CCTV evidence made on Day One;
    49.2. An application for reconsideration of the Tribunal's rejection of the claimant's recusal application on Day One; and,
    49.3. An application to strike out the respondent's Response to the claim.

50. Mr Ogbonmwan also applied in his emails for the Tribunal to take Day Two to deal with these issues, and use the day for case management accordingly. The Tribunal determined that this was not a good use of the Tribunal's time, given the timetable for the hearing and our desire to hear all the evidence and submissions within the allotted five day window.

51. We determined that the two reconsideration applications had no reasonable prospects of succeeding and therefore, under r72 of the 2013 Rules, we did not need to have a "hearing" on the application. Those reconsideration applications were rejected (reasons set out more fully below).

52. We considered it proportionate to allow Mr Ogbonmwan 15 minutes to make submissions on his strike out application, and permit Mr Hobbs 15 minutes to respond. We proceeded to hear from both parties on that basis. Initially, however, Mr Ogbonmwan sought to address us as to the need to take the day to deal with his applications, stating that to refuse to grant that request would be to prejudice the hearing and give a perception of bias. He then continued to make his submissions on his application to strike out the Response, followed by brief submissions from Mr Hobbs. Again, details are set out more fully below.

Reconsideration application re: CCTV

53. Rule 70 of the 2013 Rules provides:

> "A Tribunal may, either on its own initiative (which may reflect a request from the Employment Appeal Tribunal) or on the application of a party, reconsider any judgment where it is necessary in the interests of justice to do so. On reconsideration, the decision ("the original decision") may be confirmed, varied or revoked. If it is revoked it may be taken again."

54. Rule 72 of the 2013 Rules provides:

> "(1) An Employment Judge shall consider any application made under rule 71. If the Judge considers that there is no reasonable prospect of the original decision being varied or revoked (including, unless there are special reasons, where substantially the same application has already been made and refused), the application shall be refused and the Tribunal shall inform the parties of the refusal. Otherwise the Tribunal shall send a notice to the parties setting a time limit for any response to the application by the other parties and seeking the views of the parties on whether the application can be determined without a hearing. The notice may set out the Judge's provisional views on the application."

55. The relevance of the CCTV as we had dealt with it on Day One was that the claimant and Mr Ogbonmwan said that they had not been able to access it via the link the respondent had sent. Therefore, they sought a postponement of the final hearing.

56. As set out above under "Preliminary Issues – Day One", this matter was remedied so that the claimant and his representative had a copy of the CCTV and an opportunity to view and discuss it prior to anyone giving any evidence. The CCTV was clearly relevant and admissible.

57. No points had been advanced in support of the reconsideration application as to why it was necessary in the interests of justice for us to reconsider our decision. We therefore found that our decision not to postpone (as relevant to the CCTV) had no reasonable prospect of being set aside or varied. As such, the application was refused, effectively on the papers.

58. In fact, the framing of this application as a reconsideration application was incorrect, given that the Tribunal's management of issues regarding the CCTV on Day One did not result in a judgment, but a case management order. Technically, the correct procedure would have been for Mr Ogbonmwan to apply to set aside or vary the decision to admit the CCTV and not to postpone the hearing because of the CCTV. If the application had been framed in this way, it would still have been rejected, on the basis that it was not necessary in the interests of justice to so vary/set aside the earlier orders regarding admission of the CCTV, and refusal of the postponement application.

Reconsideration application re: recusal

59. Again, no points had been advanced as to why it was necessary in the interests of justice to reconsider the decision not to recuse Employment Judge Shastri-Hurst.

60. As such, the Tribunal found that there were no reasonable prospects of the decision being set aside or varied. Nothing new was advanced by the claimant, and nothing to suggest that the interests of justice demanded the decision to be reconsidered. Therefore, the reconsideration application was rejected.

61. Again, the correct framing of this application by the claimant should have been an application to set aside or vary a case management order, rather than a judgment. The result would have been the same in any event, given that it was not necessary in the interests of justice to vary or set aside the order refusing the application to recuse.

Claimant's strike out application

62. This application was made under rule 37(1)(b); that the manner in which the respondent had conducted the claim was unreasonable or vexatious. The claimant relied upon three grounds:

    62.1. Ground 1 – late disclosure of significant evidence (namely the CCTV footage);
    62.2. Ground 2 – the low quality and unreliability of the CCTV evidence, which is said to prejudice the claimant; and
    62.3. Ground 3 – the "intimidation" of MI, given the contents of Mr Hobbs' skeleton argument in relation to MI (at paragraph 11).

63. In terms of Ground 1, we had already found that there had been no late disclosure of significant evidence. In particular, the CCTV was disclosed in good time, in August 2023. As set out already above, we had remedied the fact that the claimant and his representative had not seen the video in any event.

64. In terms of Ground 2, we considered that the appropriate way in which to deal with issues as to the quality and reliability of the CCTV footage was for the parties to address us in closing submissions when the time came.

65. In terms of Ground 3, the concern Mr Ogbonmwan had raised was in relation to a section of Mr Hobbs' skeleton regarding MI. Mr Ogbonmwan's submission was that Mr Hobbs had breached his professional duty, had fallen below the standard expected of a barrister in line with the Bar Code of Conduct and had "demoralised and dehumanised" MI deliberately.

66. In summary, paragraph 11 of Mr Hobbs' skeleton submits that MI's evidence to the Tribunal is irrelevant. This is because he had been dismissed some two years prior to the claimant's dismissal, and so MI was not employed by the respondent at the time of the facts that the Tribunal needed to deal with in this claim. Mr Hobbs also set out that MI has his own claim in the Tribunal, listed for 2024, against the respondent, and therefore has an axe to grind. Mr Hobbs included in his skeleton the respondent's reason for dismissing MI: we do not repeat it here as it is not relevant to the issues we need to determine.

67. In the alternative, if strike out was not considered appropriate, Mr Ogbonmwan invited us to place some kind of sanction on the respondent that we deemed appropriate.

68. In determining an application under rule 37(1)(b), there are four steps to consider:

    68.1. Whether there has been scandalous, unreasonable or vexatious conduct of proceedings;
    68.2. Whether a fair trial is no longer possible;
    68.3. Whether strike out is a proportionate response to the conduct in question;
    68.4. If the claim is struck out, what further consequences might follow.

69. We rejected the application to strike out, and the application for a lesser sanction. We found that there had been no vexatious, unreasonable or scandalous conduct for the following reasons:

    69.1. The only evidence that was late to be seen by the claimant was the CCTV, which was disclosed in good time. The only issue was that the claimant's representative could not access it;
    69.2. We heard nothing that suggests that the respondent did anything unreasonable or vexatious in the manner in which they disclosed the CCTV;
    69.3. We have seen no correspondence between the parties' representatives that shows the respondent or its representative acting unreasonably or vexatiously;
    69.4. We had by this time seen the CCTV. The image is clear. As to what it shows, the witnesses and the claimant would be able to give evidence as to what they say it shows;
    69.5. It is ultimately a question for us as to what we make of the CCTV;
    69.6. Paragraph 11 of Mr Hobbs' skeleton is partly fact and partly submission. As to the facts, those had not been challenged by the claimant. As to the submission that MI has his own axe to grind, that is a submission that does not fall below any standards or breach any professional code that Mr Hobbs is bound by;
    69.7. In any event, MI was dismissed some time before the claimant's dismissal, and was not present for any of the allegations that are before us to determine.

70. Furthermore, we considered that a fair trial was still possible. The issue regarding the claimant's inability to view the CCTV had been rectified and he had prepared a supplementary statement to respond to the CCTV. Furthermore, nothing written by Mr Hobbs in relation to MI had in any way fallen below the professional threshold and so the skeleton did not endanger the fairness of the trial.

71. In any event, it would be wholly disproportionate to strike out the Response in reaction to the conduct of which was complained, given that it would mean the respondent would be denied the ability to defend serious claims made against it.

72. We then considered the claimant's representative's alternative application, that some form of sanction be imposed on the respondent in light of its conduct. As set out above, we did not find any conduct by the respondent or its representative to come close to the threshold required by rule 37. Indeed, we found no blameworthy conduct that would necessitate a sanction being put in place.

73. The claimant's applications were therefore rejected.

Day 3 Issues

New CCTV evidence

74. On the third morning of the hearing, Mr Ogbonmwan made an application which effectively asked us to "restrict Mr Hobbs' authority" to produce new evidence. He made allegations against Mr Hobbs, and accused him of acting in a way that was intimidating to him (Mr Ogbonmwan), and in a manner that fell below the standards of the Bar. Mr Ogbonmwan said he would be making a complaint to the Bar Council about Mr Hobbs' conduct.

75. The conduct that was said to be the issue was that Mr Hobbs had asked Mr Ogbonmwan for "a word", and invited him into the respondent's waiting room. Once in the room, Mr Hobbs attempted to show Mr Ogbonmwan a zoomed in clip of the CCTV video we had been shown on Day One of the hearing that lasted 30 seconds. Mr Ogbonmwan stated to Mr Hobbs that he did not wish to see anything without his client, and without being able to talk to his client.

76. We find that nothing in what Mr Ogbonmwan reported to us comes anywhere close to Mr Hobbs acting in a manner that is unprofessional, let alone intimidatory, or against the standards expected of a barrister at the Bar of England and Wales. In fact, we find that Mr Hobbs has been extremely professional throughout this hearing. We have no concerns whatsoever about his professionalism.

77. Mr Hobbs applied for us to admit the 30 second interview. Mr Ogbonmwan's objection to the CCTV was that he believed that it had been manipulated.

78. We found that the new CCTV clip was relevant and admissible, and could potentially help the Tribunal. Any submissions that Mr Ogonmwan had as to the quality or veracity of the CCTV are points that can validly be made in closing submissions.

79. In terms of Mr Ogbonmwan's submission that we should place a blanket restriction on Mr Hobbs' "authority", we concluded that we would not make any such blanket restriction on either side, but would deal with each and every application that we were asked to deal with on its own merit.

Allegations against the respondent's counsel

80. Following a morning break the Tribunal reconvened, at which point Mr Ogbonmwan made some very serious allegations against Mr Hobbs. Mr Ogbonmwan told us that, just before the parties had entered the Tribunal room and in the presence of witnesses, Mr Hobbs had "lashed" at him, saying "do

you know that you should not be talking to the claimant or the witness". We were told that Mr Hobbs was holding his laptop, waving his body and head, and that his whole body was shaking.

81. In his statement to us, Mr Ogbonmwan stated, amongst other things, the following:

    81.1. "I want this to be considered white supremacist tactics";
    81.2. "I need you to rescue me so that I may not be assassinated outside this building, a lot of people have been killed";
    81.3. "I want reassurance and protection against any physical harm – I am afraid and worried";
    81.4. "If he had had a gun he would have used it";
    81.5. "I don't understand his [Mr Hobbs'] mental health situation".

82. When asked what Mr Ogbonmwan was asking the Tribunal to do, he asked that we provide him with security and "rescue him".

83. We asked Mr Hobbs to briefly recount his version of events to us. He told us that he had seen the claimant's representative gesticulating and communicating with his client in the claimant's waiting room. Mr Hobbs said to Mr Ogbonmwan "you do know that you're not supposed to speak to witnesses". We point out that this was at a stage at which the claimant was part way through his cross-examination, and the warning about speaking to others about his evidence had been given to him. Mr Hobbs told us that he was standing still while saying these words. Mr Ogbonmwan had at that point said that this was another example of white supremacy and that he would report Mr Hobbs to the Bar Council.

84. The tribunal took five minutes to consider the submissions we had heard from both representatives. We gave the following decision:

> The claimant's representative's application is for us to rescue him. He has the security guards at the Tribunal at his disposal, as do all members of and visitors to the Tribunal: that is the most protection we can offer him.
>
> In terms of Mr Hobbs' conduct, there is nothing on what we have heard from either representative, or seen from Mr Hobbs, to suggest that he has done anything other than act professionally. He has not even reacted to being accused of assassination or shooting a gun. There is nothing at all that gives us any cause for concern about his conduct and nothing that comes close to intimidation or falling below the standards of the Bar of England and Wales.
>
> In fact there is nothing wrong with professional representatives reminding others of witness warnings given by the Tribunal.
>
> There is nothing that suggests to us any white supremacist behaviour at all. We repeat that Mr Hobbs has been nothing but an example of professionalism.

85. At this point, we took a lunch break. At the point of reconvening after lunch the Tribunal of its own volition made the following statement:

> Following matters before lunch, we wish to raise with the parties the provision in r37(1)(b) of Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, which provides:

"(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—
(a)…
(b)that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;
(c)…
(d)…
(e)…

We have serious concerns about Mr Ogbonmwan's conduct based on the allegations he made against Mr Hobbs before lunch, for example:

- That "he [Mr Hobbs] lashed at me";
- Reference to white supremacy;
- That "if he [Mr Hobbs] had had a gun, he would have used it";
- That Mr Ogbonmwan "needed [us] to rescue [him] so that [he] may be not be assassinated outside this tribunal - a lot of people are being killed";
- "I don't understand his [Mr Hobbs'] mental health situation".

We have found these allegations to be baseless. The allegations amount to a suggestion that Mr Hobbs may seek to physically harm, if not kill, Mr Ogbonmwan.

The ultimate relevant question under r37(1)(b) is whether a fair trial can still be held.

We have concerns that Mr Hobbs is faced with continuing to defend the claim in the face of the most shocking and unmerited allegations that this Tribunal has heard made against a professional representative. This is far beyond the normal crossing of swords that professional representatives can expect during a final hearing.

Parties and representatives who come to this Tribunal should not be expected to withstand such baseless accusations.

We make the point now, so that all present are aware of our current position.

86. No further allegations of this extreme type were made against Mr Hobbs for the remainder of the proceedings.

Distinct Issue – Michael Ibe's Evidence

87. On Day One, Mr Ogbonmwan asked for an indication as to which day MI would be required to attend to give evidence. This led to us having a conversation as to whether Mr Hobbs had any cross-examination questions for MI, given MI's evidence did not go to the facts with which we are concerned: the evidence does not go to anything within the List of Issues. Mr Hobbs clarified that he would probably not have any cross-examination questions for MI. It was envisaged that Mr Hobbs would probably take a day cross-examining the claimant.

88. With those indications in mind, we told MI that he need not attend on Day Two, but could come on Day Three to give his evidence.

89. In the event, MI attended on Day Two. The Tribunal confirmed with Mr Hobbs that he did indeed have no cross-examination for MI. As such, we explained to Mr Ogbonmwan that the right to re-examine would not arise. Furthermore,

given that MI's evidence related to matters that occurred before the facts with which we are concerned, there could be no relevant supplementary questions. We therefore suggested that MI swore to the truth of his statement on Day Two, to avoid the need for him to attend again on Day Three.

90. Mr Ogbonmwan sought an adjournment for a "meeting" with MI. Given that we had already spent the morning of Day Two dealing with the applications set out above, the Tribunal determined it appropriate to move on to taking MI's evidence instead of adjourning. This was due to the fact that MI's evidence would be limited to swearing to the truth of his statement, therefore there could no benefit to or need for a meeting with Mr Ogbonmwan.

91. Mr Ogbonmwan made the point that MI's statement set out that there was further evidence to be adduced. The Tribunal pointed Mr Ogbonmwan to the case management orders made in September 2022 regarding witness statements. The order is at [74] and states:

> "The claimant and the respondent shall prepare full written statements containing all of the evidence they and their witnesses intend to give at the final hearing…No additional witness evidence will be allowed at the final hearing without the Tribunal's permission…"

92. Mr Ogbonmwan then sought to argue that MI should be permitted to respond to paragraph 11 of Mr Hobbs' skeleton argument. He further submitted that MI's Article 6 rights (of the European Convention of Human Rights) would be infringed if he was not permitted to be asked any questions.

93. The Tribunal stated that a response to Mr Hobbs' skeleton would not help us to determine the claimant's claims, and the questions set out in the list of issues. We assured MI that we would not be making any findings about his dismissal or his conduct, in case that was of concern to him. In terms of Article 6, this is the right to a fair hearing: we pointed out that this was the hearing of the claimant's claim, not MI's claim. MI has his own hearing coming up, as we understood it.

94. In the event, the Tribunal called MI to give evidence at 1157hrs on Day Two. MI was initially confused as to why he was not going to be asked any questions. We explained again that it was Mr Hobbs' choice as to whether he asked questions or not. He had chosen not to do so; that meant that there was no right to re-examination by Mr Ognbonmwan. MI swore to the truth of his evidence and was thanked for his time. Although he was told he did not need to attend for the rest of the week, he chose to do so.

95. On Day Three, Mr Ogbonmwan had intimated that he wished to recall MI in order to give him the chance to respond to the perceived aspersions cast on his character by Mr Hobbs' opening skeleton argument. Due to time constraints, the argument had to continue on the morning of Day Four.

96. On Day Four, the Tribunal received from MI an email, also sent to the respondent's representative. To summarise, the email contained his rebuttal to the comments made in Mr Hobbs' skeleton. We thanked MI for taking the time to write the email, and informed him that we had read his email. In light of this, Mr Ogbonmwan did not seek to recall MI again.

Findings of fact

97. The claimant was employed by the respondent from 16 August 2004 to 30 April 2021, when he was dismissed on the grounds of serious misconduct. He worked at the Waitrose & Partners warehouse in Bracknell as a Warehouse Partner. His contract of employment is at [218]. At the time of his dismissal, his line manager was JC.

Use of the respondent's trucks

98. Employees (or "Partners") in the position of Warehouse Assistant use pallet trucks for moving items around the warehouse.

99. The claimant worked the morning ("AM") shift in the Ambient Warehouse. Part of his role involved driving the pallet trucks onto trailers/lorries that are driven to the doors of the warehouse. The trailers are reversed so that their back door is level with a gateway from outside to the warehouse receiving area. These gateways have numbers. To the side of each gateway is a separate, smaller door, which allows the driver of the trailers/lorries to enter into the warehouse to, for example, use the facilities. The drivers are not employees of the respondent.

100. Warehouse Assistants are required to drive a pallet truck from the warehouse, through a gateway and onto a trailer, in order to lift the goods from the trailer and move them into the warehouse on the truck. Each truck is fitted with a pallet guard that stands perpendicular to the ground: its purpose is to protect the driver from items on his truck falling towards him.

101. Each truck has a unique number, and each Partner has a fob that allows him/her access only to machines that they have authority to use. The technology associated with the fob means that, on looking at the data relating to each fob, one can see which Partners have had access to and used which vehicles, at what times.

102. At the beginning of a Warehouse Assistant's shift, they are expected to complete a pre-use check book for their allocated truck – for example, [292/293].

2020

103. At some point in 2020, the claimant attended a Black Lives Matter ("BLM") event remotely. This event was organised internally by the respondent; the claimant attended remotely online, during work hours. Given that this event was organised by the respondent, it was clearly permitted that its employees attend.

104. At another point in 2020, during Ramadan, JC asked the claimant if he was a Muslim. The claimant alleges that JC laughed at this point. This conversation was not put to JC during his cross-examination.

105. This incident is noted by the claimant in his appeal meeting notes at [426], however in this note there is no reference to JC having laughed:

> "Before Ramadan he asked me whether [I] am a Muslim. I replied to him I said I yes [sic] am a Muslim and he walked off".

106. Given that this conversation happened in the course of Ramadan, we do not consider that this was anything other than an innocuous question. We find

that JC did not laugh: we find that this would have been mentioned by the claimant in the appeal had JC laughed.

Discrimination Allegation 4 – giving the claimant a pay rise equivalent to 3p per hour (2020) – perpetrator JC

107. The claimant's pay increases are recorded at [641], which shows as follows:

Date	Hourly pay (£)	Pay increase (£)
1 April 2012	10.01	--
1 April 2013	10.17	0.16
1 April 2014	10.37	0.20
1 April 2015	10.53	0.16
1 April 2018	10.53	0.00
1 April 2020	10.55	0.02

108. Partnership pay was performance related, meaning that the pay rise that could be achieved depended directly on the performance grading a partner obtained each year. The salary structure for partners is set out within set pay bands. It is possible for partners to move up a pay band, or increase their salary within a pay band, based on their performance grading.

109. In terms of JC's involvement, we accept his evidence that he sat down with the rest of the management team to consider whether each partner merited the pay rise that they were eligible to receive, and to confirm whether that pay rise was recommended for each partner. Ultimately, the decision on any one partner's pay rise rested with their shift manager. For the claimant, the shift manager was EB or BM, not JC.

110. For the year 2020, the claimant's performance was graded as "very good" – [246/237]. We can see he was awarded a pay rise of 2p. We find that this is in keeping with the pay increases received in previous years.

111. The claimant was not entitled to a pay rise in the 2021 pay review, due to him being subject to a final written warning (see below). The claimant accepted that this was the respondent's policy, as set out at [334].

July 2020

112. On Thursday 9 July 2020, the claimant had an issue with his car and had needed to take it to the garage. In order to accommodate this, JC agreed to a rest day swap, so that the claimant would be off work on Thursday 9 July, and working Saturday 11 July 2020 instead.

113. On Friday 10 July 2020, the claimant telephoned into work and spoke to JC. JC reported the conversation in notes included within the log on the claimant, kept by the managers ("Managers' Record") – [273]:

> Took a phone call at 10:00 saying that [the claimant] may not be able to come to work tomorrow and Sunday because he was still having car trouble and he needed to go to the garage. He would need it unpaid if he couldn't get to work. I informed him that anytime [sic] away from work would be discussed when he returned and that he must inform me if he couldn't come to work on Saturday or Sunday.

114. We accept this log entry as being accurate: it is contemporaneous evidence of the discussion between the two men, at a time when there was no reason at all for JC to record anything other than the truth.

115. On 20 July 2020, the claimant had a rest-day change granted in order to allow the claimant to partake in a religious festival - [273]

116. On 22 July 2020, the claimant received a final written warning that was to be kept on his personnel record for 12 months– [251]:

> Serious misconduct, namely your unauthorised absence and failure to follow correct absence reporting procedures

117. A note on the Managers' Record. We find that this is a record pursuant to a system that had been in place for over 20 years. Each partner has a log, in which factual matters are recorded by that partner's managers. It does not include opinions/commentary on a partner, it is not an appraisal document. It appears to us logical for managers to keep such a log, to ensure consistency and good communication should a manager be away from work for any period and the line management of a partner need to be covered by another. The record is neutral in tone. The claimant complains to us that the managers who made entries in this Record did so in bad faith. We find that there is no evidence before us of bad faith, or collusion or conspiracy between the four managers for whom we have entries in this record.

Discrimination Allegation 3 – failure to redeploy the claimant following raising a grievance against JC for issuing a final written warning (2020)

118. On examining the chronology of this case, it is clear that this Allegation 3 is confused. It was not JC who imposed a final written warning on the claimant (this happened in 2020, as set out above). Furthermore, the claimant explained that when this allegation refers to raising a grievance, he meant an oral complaint he raised with Elliott Blair ("EB"), a shift manager. The only oral complaints to EB that we have heard any evidence about were made in 2019.

119. It is common ground that, in 2019, the claimant spoke to EB requesting a change in line manager from JC. The best evidence we have as to dates of these conversations is from the claimant's disciplinary appeal interview on 28 May 2021 – [425]. In that interview, the claimant said that:

> "I asked [EB] twice for a new line manager – 2019 in Dec was the second time. It was not listened to. First time was Oct 2019".

120. It is the claimant's case that it was in these conversations that he made a complaint of discrimination about JC.

121. EB's evidence in the appeal interview was that the claimant told EB that – [435]:

> "JC wasn't giving him what he needed, no indication about an issue. [The claimant] was one of the nicest people, very friendly, I would have remembered if it was [negative] about JC…He didn't say anything [negative] around [JC]…No cause for concern about his relationship with [JC]…Discrimination: no."

122. We find that, as at June 2021, EB would have no reason at all to withhold any information, or lie about what the claimant had said to him. We accept EB's recollection of the conversation with the claimant as accurate, for the following reasons:

122.1. This recollection is nearer in time to the 2019 conversation than the claimant's witness statement, or the claimant's oral evidence to us;

122.2. During cross-examination, the claimant was asked to give examples that he gave to EB in 2019 of JC's discriminatory behaviour: he was unable to give us any such examples;

122.3. The claimant was unable to give us any clear evidence as to what he told to EB about JC discriminating against him;

122.4. The claimant's own recollection recorded in the appeal notes on 28 May 2021 made no mention of complaining to EB about discriminatory behaviour. He simply stated that he asked EB for a new line manager – [425];

122.5. There is no contemporaneous documentary evidence to support the claimant's assertion that he complained to EB about discriminatory behaviour in 2019.

123. We find that the claimant did not make a complaint of discrimination by JC to EB in October or December 2019 (or at any other time).

124. Factually, it is correct to say that the claimant was not redeployed to a different manager: EB refused the claimant's request. EB's evidence to the appeal panel (TM) was that it was common for Partners to ask to change line managers, and that he would always ask the reason for the request. He also explained that he often moved Partners around in terms of their management anyway, and that he would have told the claimant that he tends to move people in January and February. At that time, in the beginning of 2020, no Partners ended up moving to a different line manager due to COVID-19. The claimant had given EB no good reason why he should be moved, and so he was treated the same as everyone else and not moved.

March 2021 – issue regarding storage of a pallet

125. Prior to the incident with which we are primarily concerned (8 April 2021), the claimant was being investigated for another matter ("the prior incident") regarding a pallet that had not been stored in the pallet racking safely.

126. Although this matter was originally dealt with by JC (as the claimant's manager), it was then passed onto Christina Northellini ("CN").

127. We note that there is reference to this investigation at [454], in which PPA (the respondent's HR function) recorded that "Partner is already being investigated for an accident to another truck which he also didn't report". JC was very clear that this prior incident was not of the same nature as the 8 April incident: we accept that this is a reporting error by HR, as JC is likely to have better knowledge of matters involving the claimant than HR.

128. Furthermore, on [455], there is an entry from HR recording "a breach of procedure and negligence with potential serious health and safety consequences" on 29 March 2021. This matter, which was not reported by the perpetrator, related to improper storage of a pallet, leading to damage to that pallet, and stock falling out from height. This entry was confirmed by JC in his evidence to be the prior incident. In this HR entry, it is recorded that JC's view was that he wanted to "move to a case to answer".

March 2021 – occupational health involvement

129. On 4 March 2021, the claimant told JC about the pain he was experiencing in both shoulders – [277]. As a result of this conversation, the claimant was referred to Occupational Health ("OH").

130. On 11 March 2021, an OH referral was undertaken. The claimant spoke to JC following that referral, on 15 March 2021: JC recorded in the claimant's employee notes that – [277]:

> 15/03/21 [The claimant] has decided to go against the referral dated 11/03/21. He has a physio appointment booked for Tues 23 March. I will be meeting with him weekly to discuss redeployment as stated on the referral. [The claimant] also requested information regarding GIP insurance and long term sickness. This was printed and given to him.
>
> 16/03/21 [The claimant] has spoken to me this morning and informed me that he doesn't want to look at redeployment and is happy to carry on working as he is on normal duties.

131. The claimant complains to us now that he was refused the option of redeployment – see [C/WS/107] and Issue 16(ii) (part of the reasonable adjustments claim). We accept the contemporaneous note made by JC as an accurate reflection of the conversation between the two men. This is not only contemporaneous, but is supported by JC's written and oral evidence to us. We also note that Mr Ogbonmwan made the suggestion to JC in cross-examination that "because the claimant refused redeployment, you sacked him". This suggests that in fact the claimant was the one who refused redeployment.

April 2021

132. On 8 April 2021, the claimant was working his usual AM shift. Part way through his shift, he decided to use truck number 202 ("the Truck") to perform his duties in the receiving area. We have the front cover of the pre-use checklist for this vehicle at [292]. [293] is the page that is said by the respondent to have been completed on the morning of 8 April 2021. Unfortunately, the contents is illegible. However, the claimant told us that he had filled in the pre-use checklist for the Truck and that there was no damage to the Truck on his inspection of it in the morning of 8 April 2021. We can see on [293] that there is a specific check required for the pallet guard.

133. Emil Grabowski ("EG"), a Warehouse Partner, reported to JC, the First Line Manager, that the guard on the Truck had been bent, saying words to the effect of "I am not taking the blame for what that idiot has done".

134. [JC/WS/27] records that EG approached him at 1115hrs. At the beginning of his evidence, JC corrected this time to 1315hrs: Mr Hobbs had made us

aware towards the beginning of the case that this error was to be corrected in JC's evidence. We accept that this was a genuine typographical error.

135. The claimant seeks to say that JC is lying to us now in saying that the conversation happened at 1315hrs, as JC has realised that the accident had not happened by 1115hrs. It is alleged that JC realised his mistake and so changed the time in his statement to support the respondent's case.

136. This does not make sense to us. Had JC been attempting to deliberately mislead us as to the timing (or even the existence) of this conversation, he would more likely than not have done so in his original statement. He would be highly unlikely to make a mistake of this nature if he had set out deliberately to mislead.

137. JC went to inspect the Truck which was still in the receiving area, by which time the driver of the trailer that the claimant had been attempting to unload had left the site.

138. JC then went to the "goods in" department and told the claimant and EG to stand down from using any equipment. He then started the procedure of investigating, in order to get to the bottom of the damaged Truck. This included:

138.1. Asking the claimant and EG to write a statement regarding their use of the Truck that day;
138.2. Checking the pre-use check book;
138.3. Placing a "VOR" (vehicle off road) sign on the damaged Truck;
138.4. Requesting the relevant CCTV footage;
138.5. Requesting the key fob log on data for the claimant and others' key fobs, to see who had accessed the Truck.

139. The claimant has attempted to cast some doubt on whether the Truck was in fact the one that was damaged. It is the respondent's case that the Truck was truck number 202. We find that this is the case for the following reasons:

139.1. We have a photo of the Truck, taken by JC, on 8 April 2021 shortly after the accident was reported to him – [297]. Although there is no date on this photograph, and although the claimant challenges its authenticity, we have no good reason to doubt JC's evidence that he took this photo on 8 April 2021 after EG told him of the damage;

139.2. There are two trucks in this photo. The one nearest the camera is said by the respondent to be the Truck (202) with a VOR ("Vehicle Off Road") sign attached. This is denied by the claimant. By zooming in on the electronic copy of the bundle, we can see the "VOR" sign attached to the truck nearest to the camera has the number 202 on it. We can also see from that photograph that the pallet guard is not vertical, but is at (very approximately) a 75-80 degree angle from the floor, as opposed to the truck immediately behind it in the photograph, whose pallet guard appears to be perpendicular to the floor.

140. We therefore conclude that the truck that the claimant used that morning, truck 202, was one and the same as the Truck that suffered damage on that day.

141. It was JC's responsibility to investigate the damage to the Truck, as the matter had been reported to him as manager. It is part of a manager's remit, when informed of an accident/damage, to then undertake an investigation to understand what occurred. JC told us that this is not something that he, as a manager, would pass on to someone else to deal with: to do so would mean he was not doing his job properly.

142. Both the claimant and EG provided a written statement regarding their knowledge of any damage to the Truck – [307/300]. The claimant complains that these statements were not done on the correct prescribed form/in the correct format. We find that this made no difference to the information contained within the statements: it is purely a cosmetic matter that has no bearing on the fairness of the investigation process.

143. The salient parts of the claimant's statement are as follows:

143.1. He did the pre-use checklist for the Truck at around 0605hrs;
143.2. The Truck was fine, and the claimant did not notice any damage;
143.3. He drove the Truck between lanes 54 and 56, then back to the goods in area;
143.4. EG then turned to him and said that the Truck was bent.

144. The salient parts of EG's statement are as follows:

144.1. EG did a pre-use checklist at 1038hrs and the Truck was fully operational;
144.2. He used the Truck for around 30 minutes, at which point it was still functional;
144.3. When the claimant came back from a break, EG noticed that there was damage to the Truck, specifically the pallet guard was bent;
144.4. The claimant told EG that it had been bent since the morning, but EG was 100% sure that this was not the case.

Discrimination allegation 11 – line manager (JC) and disciplinary hearing manager (BM) colluded to persuade EG to provide false evidence (April 2021) – alleged perpetrators JC and BM

145. We find that there was no collusion as alleged, nor was there any inappropriate interference in the preparation of EG's statement by JC. We find this for the following reasons:

145.1. We have seen and heard no good evidence to suggest that BM spoke to EG at any stage of the internal process. In any event, at this stage, BM had not been identified as the disciplinary manager, so he would have no incentive to collude as suggested by the claimant;

145.2. The evidence of JC at [JC/WS/27-31] was not challenged in cross-examination. Specifically, in [JC/WS/31], JC denies colluding as alleged;

145.3. During the appeal, TM interviewed EG, who confirmed that no-one had helped him with the contents of his statement written on 8 April 2021 – [441].

146. On 9 April 2021, JC was sent the relevant CCTV footage. At [406], we have an email from Om Gurung at 1057 hours, sending a video file to JC: the title of that file is "360 Bay 211-210_uuid-5ee0a7b0-a174-4de9-840-ffffcd8d2731_2021-04-08_11-58-52(1).mp4".

147. The claimant and Mr Ogbonmwan both argued that it was not clear what video clip this email was sending, and that this was all part of a conspiracy to manufacture evidence to push the claimant out.

148. We are satisfied that the video attached to that email from Mr Gurung is CCTV footage of 8 April 2021 at around 1158hrs, as demonstrated by the title of the video, which includes "2021-04-08" and "11-58-52" both of which we find are references to the time and date of the attached footage. We find that the video footage shows what is described in the body of Mr Gurung's email: there is no good evidence to suggest that he has fabricated any of the contents within his email, nor has any good reason been proffered as to why he may invent evidence. The body of his email states:

> "The CCTV footage was reviewed and camera 809 captures the Material Handling Unit [Truck] at 11:35, the machinery appearance [sic] to be functioning as normal. However, when the time approaches 11:55 to 12:00 [the claimant] has gone into the lorry to unload his goods and he comes out at 11:58 with a dented grill on his Material Handling Unit. The Material Handling Unit is then parked at 12:00 and the damage is clearly visible on camera 806".

149. JC watched the CCTV footage and concluded that it had been the claimant driving the Truck when it became damaged. On that basis, EG was cleared from the investigation and returned to work in the department.

What does the CCTV footage show us?

150. We have seen this CCTV footage, and it shows the following:

Time on video (min:sec)	Action
00:20	Pallet driver ("PD") enters shot on foot
01:32	PD gets onto a truck
01:33	The pallet guard on the truck is straight
01:44	PD drives truck towards a gateway
01:47	PD and truck disappear from view (onto a trailer parked at the gateway) At the same time, the lorry driver appears through the side door at the gateway and walks away from the gateway and out of shot
02:37	PD and truck exit the trailer, returning into view. The truck is empty

02:40	The pallet guard of the truck is now clearly bent, now at an angle of (very roughly) 75-80 degrees
02:55	PD drives the truck clear of the trailer, then dismounts and shakes the pallet guard. He tries to use another truck but returns to the original truck
03:47	PD on the truck moves out of view
03:50	PD momentarily comes back into view, but then disappears out of shot again
04:15	The lorry driver comes into view and returns to the trailer
04:30	Another PD drives onto the trailer with a different truck and unloads the goods on the trailer
05:00	Video ends

151. Watching this CCTV footage in the Tribunal room, the claimant denied that the PD in the video was him. We find that the PD was indeed the claimant for the following reasons:

151.1. On observing the claimant in the Tribunal and the build and gait of the PD on the CCTV, we find that they are one in the same;

151.2. Mr Hobbs managed to enlarge the CCTV footage. Mr Ogbonmwan objected to the inclusion of the enlarged footage, but we admitted it on the basis that it was of assistance to the Tribunal. Although not crystal clear, this footage gives a closer picture of the PD's face shape and body shape. From this, we are satisfied further that the claimant is the PD in the video;

151.3. On first being asked about the CCTV in the investigation meeting that followed on 12 April 2021, the claimant did not deny that the PD was him. He answered questions on the assumption that the PD was him. In fact, throughout the internal process, the claimant did not once deny that the PD in the CCTV was him.

151.4. The claimant informed us that there was only one other black employee on his AM shift in the Ambient Warehouse, and that, on 8 April 2021, that other employee was not working at the time of the CCTV footage.

152. From viewing the CCTV footage ourselves, the Tribunal makes the following findings:

152.1. At the time of the claimant driving the Truck onto the lorry trailer at, the pallet guard was perpendicular to the floor and undamaged;

152.2. Around 50 seconds later, the claimant drove the Truck off the trailer: it was still empty. We find that something happened on the trailer prior to the claimant loading the Truck, that made the claimant disembark from the trailer;

152.3. Whilst the Truck was on the trailer, the trailer driver exited the trailer and was not present whilst the claimant was on the trailer;

152.4. Upon the claimant driving off the trailer, the pallet guard was no longer perpendicular to the ground, but was bent at an angle away from the driver;

152.5. The claimant dismounted from the Truck, inspected and pushed on the vertical guard. We find that the only rational explanation for such action was that the claimant was aware he had hit something, and was checking whether the guard had been damaged.

153. The CCTV footage referred to above was labelled "CCTV (2)" before the Tribunal. We also had sight of another CCTV video, 6 minutes in duration, labelled "CCTV (1)". This showed us the following:

Time on video (min:sec)	Action
00:45	PD enters shot on truck
00:51	It is clear from this angle that the pallet guard of the truck has been damaged
01:00	Again, it is clear from this angle that the pallet guard of the truck has been damaged
01:40	PD dismounts and inspects the pallet guard
02:07	PD stops his inspection and leaves the truck
06:00	Video ends

154. We make the following findings, having seen CCTV (1):

154.1. Again, from the gait and appearance of the PD, we are satisfied that this is the same PD as in CCTV (2), namely the claimant;
154.2. The truck on which the claimant appears in CCTV (1) is the same damaged truck (which is the Truck) as that viewed in CCTV (2). This is clear from the angle at which the pallet guard is leaning in CCTV (1); that being the same, approximately 75-80 degrees, away from the driver;
154.3. The claimant inspected the truck in order to assess the damage to the pallet guard. There is no other good explanation as to why the claimant would act in this manner;
154.4. The claimant abandoned the truck.

Aftermath of incident

155. When JC received the key fob data, it showed that it had been the claimant who had accessed the Truck at the relevant time. This evidence from JC was not challenged, and we accept it.

156. On 9 April 2021, JC telephoned the HR department and spoke to Jane Bell ("JB"). He reported to JB that CCTV showed a driver driving onto a trailer with a straight guard, then coming off the trailer with a bent guard, and failing to report any damage or accident – [454].

157. It is recorded that "[JC] has said that he feels that the first incident is NCA [no case to answer]". This refers to the prior incident referenced above in March 2021.

Discrimination allegation 9 – failure to provide the claimant with details of the other vehicle (the trailer) involved in the accident (April 2021) – alleged perpetrator JC and BM

Discrimination allegation 10 – failing to take a statement from the driver of the trailer (in which the accident occurred) – alleged perpetrators JC and BM

158. The claimant complained later in the process that no evidence was obtained from the lorry driver at the gateway onto whose trailer the claimant had driven the Truck. We find that this was because, by the time of JC's attendance on the site, the lorry and lorry driver had departed from the respondent's grounds.

159. The claimant says that steps should have been taken to obtain information about the driver, in order to get his evidence. We accept that the driver was not an employee of the respondent, and that it would have been difficult to trace the identity of the driver.

160. In any event, we are satisfied that the driver would not have added anything to the investigation. First, he was not present throughout the time that the claimant and the Truck were on the lorry trailer. Second, the CCTV clearly shows that, when the claimant entered the trailer, the pallet guard was undamaged, then on his leaving the trailer it was damaged.

Investigation meeting on 12 April 2021

161. On 12 April 2021, JC held an investigation meeting with the claimant. This meeting was to investigate the damage to the Truck that had been reported to JC on 8 April 2021. JC told us, and we accept his unchallenged evidence, that if an accident is reported to a manager, it is that manager's responsibility to investigate. Technically, this was a health and safety investigation into an accident, and was not a disciplinary investigation meeting; this makes no material difference.

Discrimination Allegation 8 – line manager asked the claimant to attend an investigation meeting without a representative present (12 April 2021) – perpetrator JC

162. The claimant complains that he was not allowed to be accompanied to this meeting. JC told us that this was an informal meeting, and so the claimant was not offered the right to a companion: his evidence was that this only occurs at formal meetings. JC's evidence on this was unchallenged: we accept this as the reason why the claimant was not offered a companion.

163. There is no statutory right to be accompanied to any meeting other than a disciplinary or grievance meeting: the meeting on 12 April 2021 was neither of these. Although the claimant was not offered the chance to be accompanied, neither did he request a companion. We accept that it was an informal meeting, and we find that the lack of offer of a companion was not a disadvantage to the claimant.

164. The notes of the investigation meeting are at [311-319]; they were signed by the claimant and JC on 12 April 2021. The important parts of those notes are as follows:

164.1. The claimant was given the opportunity to add to his statement written on 8 April 2021;

164.2. The claimant was shown the CCTV from 8 April 2021 from 1130-1135hrs;

164.3. After seeing the CCTV footage, the claimant accepted that the pallet guard had been straight before he entered the trailer, and then was bent on the claimant coming out of the trailer;

164.4. The claimant accepted that it was him driving the Truck onto the trailer, with a straight pallet guard;

164.5. The claimant stated that he "didn't think it was a heavy touch". He accepted touching something but did not at the time think that the Truck was damaged;

164.6. He believed that he had had an accident in the trailer, but that it was not a "heavy touch" and he did not notice the damage;

164.7. He apologised;

164.8. The claimant had checked to see if the pallet guard was damaged by trying to shake it;

164.9. The claimant accepted that it was a mistake not to report the accident at the time.

Discrimination Allegation 5 – permitting JC to become involved in the disciplinary process leading up to the claimant's dismissal (given that the claimant had raised a grievance against him in 2020) (April 2021) – perpetrator EB

165. The claimant avers further to this allegation that JC should not have dealt with this investigation, as JC did not like the claimant, and JC was already the investigating officer on the prior investigation.

166. On this discrete point, we find as follows. In relation to the prior incident investigation, JC in fact transferred the responsibility of that investigation to "Christine" (another manager). In any event, he had indicated that he considered that there should be no case to answer on that matter: far from demonstrating a dislike of the claimant, we find that this shows JC considered each matter that came before him fairly and on its merits.

167. Regarding Allegation 5, t is not correct that EB permitted JC to be involved in the claimant's disciplinary process. As above, JC undertook the investigation into the damage as he was the manager to whom the damage was reported. To leave it to another manager would have been to shirk his managerial responsibilities.

168. As mentioned above, technically, the investigation done by JC was not a disciplinary investigation in any event. It was an investigation into damage caused to one of the respondent's trucks. The matter became a disciplinary matter at the point that JC sought HR advice and it was agreed that the matter should be referred for a disciplinary process. For completeness, we find that the investigation conducted by JC at this point was sufficient to mean that no separate formal disciplinary investigation needed to be done. All relevant and reasonable enquiries were covered by JC in his investigation.

169. In any event, no grievance had been raised against JC by April 2021, whether in 2020 or at all. Furthermore, the claimant accepted in cross-examination that he had never objected to JC undertaking the investigation.

170. Factually therefore, this allegation did not occur as pleaded. JC, of his own volition, undertook an investigation into damage, and then passed it on to others to pursue a disciplinary process. We find that JC's involvement at this stage was of no detriment to the claimant; we have no good evidence to the contrary.

171. We find that JC was an appropriate person to deal with this investigation.

Discrimination Allegation 6 – line manager put pressure on the claimant to admit causing vehicle damage and/or not reporting it on the basis that it would not then be pursued as potentially dismissible misconduct (8-12 April 2021) – perpetrator JC

172. The claimant's case to us was that the only reason he accepted fault in the investigation meeting was that there had been a "gentlemen's agreement" in place between himself and JC. That agreement set out that, if he accepted fault, he would not be dismissed.

173. We reject the allegation that there was such a gentlemen's agreement, or that any pressure was applied by JC, for the following reasons:

173.1. The claimant's evidence on this altered during the course of his evidence to us. He started by alleging that JC placed him under pressure; however by the end of his evidence the claimant told us that this was nothing more than a "gentlemen's agreement" and that in fact he could not really remember it;

173.2. Whether JC suggested or told the claimant to say that the accident was his fault, and he would not be fired, was not a point that was put to JC in cross-examination;

173.3. We have a note of the investigation hearing; the time at which this gentlemen's agreement was said to have occurred by the claimant was prior to the investigation meeting. At the beginning of the meeting, the claimant denied an accident. According to the notes it was following sight of the CCTV that the claimant changed his account, accepting that there had been an accident. The timing of the change in the claimant's account makes no sense if the reason for the claimant's admission was a conversation that happened before the meeting. On the face of it, if there had been a gentlemen's agreement, the claimant had not initially upheld his end of that agreement. We note again that the claimant signed the investigation notes as accurate;

173.4. The logical reason for the claimant's change of account, his admission and apology, is that he saw the CCTV, recognised himself, saw there was damage to the Truck and realised there was no point in denying an accident had occurred. This explanation is consistent with the timing of his change in account, which is straight after his viewing of the CCTV during the investigation meeting.

174. The claimant now alleges that he did not see the CCTV in this meeting (or at all during the course of the internal process). We do not accept this. We find that he was shown the CCTV at this investigation meeting for the following reasons:

174.1. The notes of the meeting record not only the showing of the CCTV, but a discussion around the CCTV. These notes were signed by the claimant at the time of the meeting;

174.2. The claimant's evidence to us was that he could not remember the investigation meeting at all. JC's evidence was clear, that the CCTV had been viewed during that meeting;

174.3. The claimant never raised an issue about not having seen the CCTV in writing to the respondent, or in any meeting (the appeal meeting, for example).

175. Following this meeting with the claimant, JC reported back to HR; see entry in the HR log of 12 April 2021 at [454]. That note by HR recorded that:

> "[JC] has held the inv mtg. James shared the CCTV with P. P was dishonest about his involvement in the accident.
>
> [JC went over training records relating to reporting accidents. P said he didn't remember and didn't know but did then present full awareness of what he needed to do if he had an accident.
>
> When they discussed the accident and watched the footage, P was visibly involved and gave multiple versions of what happened but could not explain the reason why he did not report it.
>
> No mitigation.
>
> [JC] is looking to pass on to disciplinary.
>
> Adv: this is fine – cannot see any risk at this stage by doing so."

176. At 13.31hrs on 12 April, JC sent Bill Mansfield ("BM") (Shift Manager) the CCTV footage he had received from Mr Gurung – [408].

April 2021 – claimant commences sick leave

177. The day following the investigation meeting, 13 April 2021, the claimant went home from work due to sickness. He reported to JC that he was "going home sick due to stress and he could not concentrate": this again appears in the employee notes – [278]. This was the first time that the claimant had reported to the respondent that he was suffering from stress.

178. On 14 April 2021, BM contacted HR to seek advice as to what to do in light of the claimant going on sick leave for stress. The advice received was that the claimant could be asked if he was fit to have a meeting, or that a referral to Occupational Health be made to ask the same question – [453].

179. On 20 April 2021, JC sent a management referral to Occupational Health in order to establish whether the claimant was fit to attend a disciplinary hearing – [320]. The OH physician recommended that - [321]:

> "Concentration and focus appears [sic] to be affected due to the current situation and related stress. Management to contact the partner to arrange a telephone meeting"

180. In the clinical assessment of the OH physician - [744];

> "it would be better for [the claimant's] mental and physical health to take part in the meeting, at least by telephone. [The claimant] has agreed to a telephone meeting to try and resolve the issue and improve his health".

181. Also on 20 April 2021, the claimant called the HR department at 1646hrs. The conversation is recorded as follows:

> "[the claimant] already has a final warning is worried about closure as he is being investigated due to damage to a pallet truck. Is wondering if both fall under misconduct.
>
> Advice: Potentially yes both fall under misconduct need to follow process and after outcome delivered have the opportunity to appeal the decision".

182. The claimant was reviewed by his GP on 21 April 2021 and was signed off as unfit to work due to stress and shoulder pain until 20 May 2021 – [340]

Discrimination allegation 13 – disciplinary hearing manager convened a disciplinary hearing despite the claimant being signed off work by his GP with stress and a shoulder injury (30 April 2021) – alleged perpetrator BM

183. Factually, this allegation is correct: BM did go ahead with the disciplinary hearing on 30 April 2021, despite the claimant having a live fit note stating that he was not fit for work.

184. We find that the reason BM went ahead with the meeting was that he had taken advice from the OH physician, which is set out above. Further, the OH Physician reported not only that their view was that going ahead with the meeting was in the best interest of the claimant, but also that the claimant had agreed to attend by telephone.

185. On 21 April 2021, the claimant was sent an invitation letter to a disciplinary meeting to be held on 30 April 2021 - [327]. The claimant was also emailed witness statements, investigation notes and CCTV.

Discrimination allegation 12 – disciplinary hearing manager denied the claimant access to the relevant CCTV footage prior to the disciplinary hearing (April 2021) – alleged perpetrator BM

186. The clamant denies that he was able to access the CCTV in the format it was sent to him, and told us that he called BM about this numerous times to no avail.

187. We do not accept this. We find it unlikely that, if the claimant was having difficulty in viewing the CCTV, and was getting nowhere with his calls to BM, he would not have put something in writing, and would not have raised it at his disciplinary meeting. Furthermore, the claimant did not mention in his appeal meeting that he had not been able to access the CCTV. We find that he had access to the CCTV in advance of the disciplinary hearing.

188. On 30 April 2021, the claimant attended a disciplinary meeting chaired by BM. That meeting took place by video.

Discrimination allegation 17 – conducting the disciplinary meeting by zoom so that the claimant had difficulty participating (30 April 2021) – alleged perpetrator BM

189. The disciplinary meeting took place by video.

190. We find that this did not place the claimant in any difficulty in terms of his participation for the following reasons:

190.1. The claimant did not raise the format of the hearing as being a problem for him, whether before, during or after the meeting;
190.2. When asked in cross-examination what the disadvantage to the claimant was, he said that he was unable to see the note taker. We do not find that this impeded the claimant's participation in the meeting;
190.3. From the minutes of the meeting, we find that the claimant was able to fully engage in the meeting.

191. Furthermore, we find that the reason for the format of the meeting being by video was that, in April 2021, we were in the midst of the COVID0-19 pandemic; the respondent had determined that it would have a policy during the pandemic, whereby it would continue to hear disciplinary matters, but that they would be by video.

Discrimination allegation 18 – proceeding with a disciplinary hearing in a pandemic (30 April 2021) – alleged perpetrator BM

192. Evidently, the hearing did go ahead during the pandemic.

193. The claimant told us in cross-examination that:

> "I wasn't fit to attend. I had a sick note. The pandemic lasted a long time. I don't say they had to wait to the end of the pandemic but they didn't need to rush. Instead of zoom, they should have waited until meetings were allowed face to face"

194. This suggests that in fact the claimant's complaint here refers back to Allegation 17, in that he says he should have had a face to face meeting, presumably because he maintains it was disadvantageous for him to have a video hearing.

195. We therefore refer back to our findings above regarding Allegation 17: that the video format of the hearing was in no way disadvantageous to the claimant, and did not impact his ability to participate in that hearing.

Disciplinary hearing 30 April 2021

196. The meeting notes are at [344-354]. These notes are not signed by the claimant. The important points from this hearing are as follows:

196.1. The claimant was able to explain the reason why accidents need to be reported, in order that a damaged truck be taken out of action, as it may cause an accident;
196.2. The claimant had pushed against the pallet guard to see if it was safe to use, but did not notice it was damaged;

196.3. He thought there had only been a "soft touch" and that the Truck was still safe to use;

196.4. The claimant, once in the trailer, realised it was too low to get the pallets out of the trailer. He thought that the Truck may have hit the top bar in the trailer;

196.5. The claimant said sorry, and that he needed this job.

197. There was a break in the meeting from 1035hrs to 1115hrs. During that break, BM spoke to the respondent's HR department. The entry at [304] records that BM said the following at 1055hrs:

> "Disciplinary manager calling - [the claimant] now acknowledges it was him due to the CCTV footage. [The claimant] said didn't really feel the cash or hear it and did no [sic] think to report it due to him not thinking there was a need to. Manager spoke through potential consequences of not reporting the accident, and [the claimant] understood that it could be a serious risk if [the claimant] chose not to report the accident as others may use machinery which could potentiall [sic] cause a serious accident".

198. The meeting was then reconvened at 1115hrs, at which point the claimant said he was "so sorry" and that "it won't happen again" but had nothing else to add.

199. At this juncture, we note that the claimant complained to us that there was no break during the disciplinary hearing. This is clearly not the case. Not only is a break recorded in the minutes of the meeting [352/353], but we have the HR record, detailed above, that shows BM talking to HR part way through the disciplinary hearing. These pieces of evidence all corroborate each other, and we find that there was a break between 1035hrs and 1115hrs.

200. BM then delivered his decision, that the claimant's contract would be closed for serious misconduct. This decision was confirmed in writing by letter of 30 April 2021 - [355].

Discrimination allegation 19 – dismissal (30 April 2021) – alleged perpetrator BM

201. We find that BM held a genuine belief that the claimant was guilty of both causing damage to the Truck and failing to report the accident. Although the claimant had initially alleged that the reason for his dismissal was his race/religion, he confirmed in evidence that he did not believe BM had discriminated against him. Therefore, there was no sustained challenge to BM's belief.

202. We accept that BM's reason for dismissing the claimant was his belief that the claimant was guilty of the misconduct of which he was accused.

203. On the evidence we have seen and heard, including the claimant's inconsistencies throughout the internal process and before us, we find that the reason for dismissal was his misconduct as alleged by the respondent.

204. The key evidence before BM was:

204.1. The CCTV that showed the claimant on the Truck, going onto the trailer undamaged, and coming off the trailer damaged;

204.2. The fact that the Truck was damaged and that the key fob data demonstrated that it was the claimant's fob that had been used at the relevant time;

204.3. The claimant's failure to report the accident, leaving it to be reported by EG;

204.4. The claimant's repeated reference to having a light touch in the trailer with the Truck, and his admissions and apologies within the internal meetings.

205. On that evidence, BM had reasonable grounds for holding the belief that the claimant was guilty of the misconduct alleged against him.

Discrimination allegation 16 – disciplinary officer did not have material available to him to conduct the disciplinary hearing appropriately (30 April 2021) – alleged perpetrator BM

206. We find that BM had all the material at the time of making his decision that was required in order to deal with the disciplinary hearing fairly. The specific criticism made of BM is that he did not have information from the lorry driver who was driving the trailer onto which the claimant drove the Truck on 8 April 2021, and that he did not have the CCTV.

207. We have found the lorry driver's evidence would not have added anything to the investigation/disciplinary process, given:

207.1. He was not present throughout the time that the claimant and the pallet truck were on the lorry trailer; and,

207.2. The CCTV clearly shows that, when the claimant entered the trailer, the pallet guard was undamaged, then on his leaving the trailer it was damaged.

208. We have also found that BM did have the CCTV at the time of making his decision (as did the claimant).

209. Therefore, we find that BM did have all material available to him in order to deal with the hearing appropriately.

Appeal

210. On 4 May 2021, the claimant sent an email to Reuben Kogo ("RK"), who became his companion through the appeal process – [819]. That email was a draft letter of appeal. Within that draft, the claimant set out that he denied that there had been an accident, but that there was just a touch to the pallet. The draft also dealt with the disciplinary matter of the claimant taking unauthorised leave to get his car from the garage that led to his final written warning. He set out that he considered that the matter regarding damage to the Truck had been made a big issue because he is a "black man".

211. On 6 May 2021, the claimant sent an email (different to the draft) appealing his dismissal, and stating that he was disabled - [370].

212. In that appeal, he stated:

> "I want to state categorically that I did not cause nor was I involved in an accident while riding a ride-on truck".
>
> "I also wish to state that my line manager Jimmy [JC] told me to accept that i caused an accident"

213. The claimant was invited to attend a telephone appeal with Tracy McCreadie ("TM") on 17 May 2021, by email of 10 May 2021 - [385]. This hearing was rescheduled to 24 May 2021 due to the claimant's companion not being able to attend – [409/413].

214. On 12 May 2021, BM forwarded Mr Gurung's email attaching the CCTV footage to the appeals office email address - [408].

215. On 19 May 2021, the claimant applied to have a face-to-face meeting and to reschedule the appeal once more, as his companion was still not available to attend - [389]. TM converted the appeal hearing to a video hearing - [397]. The claimant complains about the lack of face-to-face hearing, however he gave no reason (such as a need for reasonable adjustments) as to why face-to-face was necessary. The respondent asked him to set out the reason why he would prefer a face-to-face meeting; the claimant's only reason was that "I will feel more comfortable than the telephone meeting" – [398]. TM gave evidence that the appeal told place during the COVID-19 pandemic, at a stage when the government advice was to work from home if at all possible. She deemed that it was not necessary, particularly in light of no good reason from the claimant, to have the hearing in person, particularly when video facilities were available. We accept this evidence as to the rationale behind TM's decision-making. The claimant has not told us that there was any disadvantage to him in holding the hearing by video rather than in person: we find that there was no such disadvantage.

216. On 20 May 2021, the claimant emailed the appeal office to ask for "the internal and external picture and video dimension of the lorry trailer" that was said to have been involved in the accident leading to damage to the Truck. June Pritchard in the Appeals Office responded, stating that the claimant had already been sent copies of the CCTV footage, statements and investigation notes – [420].

217. The appeal ended up taking place on 28 May 2021, as the claimant's companion, RK, was again not available on 24 May 2021. The notes of the appeal meeting are at [420]. The salient points are as follows:

217.1. The claimant raised complaints that JC "doesn't like black people", giving examples of when he (the claimant) felt overly scrutinised by JC - [425];
217.2. The claimant gave TM several names of people to interview who would support his case – [425/429];
217.3. The claimant told TM that JC has, before Ramadan, asked whether the claimant was a Muslim and, when the claimant replied in the affirmative, walked off - [426];
217.4. The claimant gave the specific example of JC's alleged conduct, that JC said "I will give you a pay rise – he gave [the claimant] 3p – he laughed when he told [the claimant]" - [426];

217.5. The claimant suggested that JC had told him to take the blame for the damage to the Truck, which is why the claimant said there had been an accident in the investigation meeting, and apologised. If he accepted fault JC told the claimant it would not be a "sackable offence" – [426];

217.6. The claimant made the point that he was not provided with the details of the trailer that he entered on the Truck, the trailer driver was not interviewed, and there was no damage to that trailer - [425];

217.7. His companion stated that "the accident didn't happen" - [425];

217.8. The claimant pointed out that no-one heard the Truck hit the trailer – [426];

217.9. JC had mentioned to the claimant that he (the claimant) should leave the respondent. The claimant told TM that JC had printed out some forms that would lead to the claimant's contract being closed, and had showed them to the claimant. The claimant stated to TM that these forms were in his locker - [428];

217.10. Following the claimant attending a BLM event organised by the respondent, "managers who used to joke and talk to [him] just said "hello". They didn't talk about football, ... they changed" - [428];

217.11. The claimant stated that the reason he had been sacked was that JC does not like black people or Muslims – [429].

218. On 28 May 2021, TM sent the claimant the notes of the appeal meeting and permitted him to edit them – [403]. The changes that the claimant (or his companion) made were adopted by TM – [431]. TM also gave the claimant the opportunity to set out what resolution he sought from his appeal: he replied that he wanted to return to work (the AM ambient shift) with a different manager – [431].

219. Following her interview with the claimant, TM interviewed various witnesses:

219.1. BM – [434];
219.2. Elliott Blair – [435];
219.3. JC – [436]
219.4. Fred Gasasira – [437]
219.5. Satish Sookha – [438];
219.6. Nathan Robinson – [438];
219.7. Reda Bouaou – [440];
219.8. John Ababio – [441];
219.9. Emile Grabowski – [441].

220. The claimant relies on the evidence of some of the above named people in support of his race claim, to demonstrate that JC acted against him due to his race.

221. We find that the evidence gleaned during the appeal investigation does not support the claimant's contention that JC discriminated against him on the grounds of his race:

221.1. Fred Gasasira ("FG") [437] – FG is African. The only specific information FG gives about conduct suffered by the claimant is that which the claimant has reported to him; he was not an eye witness. Otherwise, FG's comments are very generic, about minorities being treated unfairly by managers, with nothing specific about JC first hand. In fact, FG notes that

JC always smiles at him. In fact, FG has never worked with JC, and never been on the same shift with him.

221.2. Satish Sookha ("SS") [438] – SS gives evidence that he considers that some partners are treated unfairly, possibly because of the colour of their skin. Again, in terms of the claimant specifically, SS only reports what the claimant has told him, saying "he told me he was targeted. I don't know why he thought he was targeted".

221.3. Nathan Robinson ("NR") [439] – NR reports a personal issue between himself and JC, but states specifically "[n]ot seen racial discrimination but I can see a pattern".

221.4. Reda Bouaou ("RB") [440] – RB expressly states "[the claimant] has been picked on. [The claimant's] manager is a Millwall supporter and [the claimant] is black and African and Muslim". However, RB gives no specific examples, or why it is that he considers the claimant being black is a reason for any targeting.

221.5. Jon Ababio ("JA") [441] – Although JA complains about treatment from JC, he does not attach that treatment to race as a cause of the treatment.

222. TM sent her decision letter regarding the appeal to the claimant on 29 June 2021 – [456]. We find that TM had a genuine belief that the claimant was guilty of damaging the Truck and failing to report it. As with BM, although the claimant initially stated that the manner in which the appeal was conducted was because of his race/religion, he stated to us that he did not think that TM had discriminated against him. As such, there was no sustained challenge to her genuine belief in his guilt.

223. In light of all the steps she took above, we find that TM conducted a reasonable investigation into the claimant's appeal.

Discrimination allegation 20 – failure to review the evidence on appeal (May/June 2021) – TM

224. In view of all the steps taken by TM in her appeal process, as set out above, we find that there was no failure by her to review any evidence relevant to the appeal. She interviewed all the people the claimant had asked her to, as well as all other relevant people. She had given the claimant every opportunity to go through his appeal. There is no evidence to suggest that, having had all that information and evidence, TM did not give it fair consideration.

225. We find that TM had reasonable grounds for holding her genuine belief that the claimant was guilty of the misconduct for which he was dismissed.

Discrimination allegation 21 – failure to comply with provisions of the disciplinary procedure (paragraphs 3.3.1, 3.3.6, 3.5.1, 3.5.1.1, 3.5.8 (April to June 2021) – BM and TM

226. We set out each paragraph referred to in this allegation immediately below:

226.1. Paragraph 3.3.1 – "before you decide if you should use a formal procedure, an appropriate manager must carry out a full and fair investigation to establish the facts. Investigations are not formal disciplinary hearing meetings so the partner does not have the right to be accompanied by a work colleague or trade union official/representative";

226.2. Paragraph 3.3.6 – "If a partner's sickness absence is due to genuine medical reasons, managers should refer to the Absence Management Standard";

226.3. Paragraph 3.5.1 – "the partnership must demonstrate that it has followed a fair procedure if it considers dismissing a Partner";

226.4. Paragraph 3.5.1.1 – this paragraph does not exist within the policy. We considered whether the reference may be to 3.5.11, which states – "any sanction will depend on the nature of the offence or performance issue and other relevant circumstances, and could include one or a combination of the following: warnings, demotion or transfer (as an alternative to dismissal), dismissal without notice, or summary dismissal";

226.5. Paragraph 3.5.8 – "After the meeting has explored the issue and the evidence, and after the Partner has had every opportunity to put their case forward, the manager must call a break for a reasonable amount of time".

227. In relation to each alleged breach, we find as follows:

227.1. Paragraph 3.3.1 – JC was an appropriate manager, and carried out a reasonable investigation. There was no breach of this paragraph;

227.2. Paragraph 3.3.6 – OH advice was obtained before going ahead with the disciplinary meeting. We find that this was sufficient in the circumstances. There was no breach of this paragraph;

227.3. Paragraph 3.5.1 – we have found that the procedure followed by the respondent was a reasonable one. There was no breach of this paragraph;

227.4. Paragraph 3.5.1.1 – this does not exist. If we assume it is a reference to 3.5.11, this paragraph sets out possible sanctions. There is no duty within this paragraph that is capable of being breached;

227.5. Paragraph 3.5.8 – we have found that BM did call a break in the disciplinary hearing. There was no breach of this paragraph.

Emptying the claimant's lockers

228. Although not the subject of a specific allegation, the claimant contends that the emptying of the claimant's lockers was in some way underhand. We find that, on the balance of probabilities, nothing untoward occurred during the process of the claimant's lockers being emptied.

229. During the appeal, the claimant told TM that he had not been given his personal property in his locker, and so she set in motion the process for his personal locker to be emptied.

230. Following the claimant raising concerns about information within his locker during the appeal meeting, TM asked JC about the situation in relation to the claimant's lockers – [446].

231. JC replied, explaining that the claimant had two lockers, a personal locker and an equipment locker – [446]. JC arranged for security to empty the contents

of both lockers and take them to the Security Office for the claimant to collect. He told TM that the contents would be ready for collection from 1300hrs on 25 June 2021.

232. TM reported this information back to the claimant, and stated that if, as he had suggested at the appeal hearing, that the claimant had some evidence in his personal locker that he wanted TM to consider, then he could send a copy on to her by 30 June 2021 – [450].

233. JC told us that he was not present at the point when the security guards emptied both of the claimant's lockers. There is no good evidence to suggest he was present: the claimant was not there when his lockers were emptied and so cannot shed any light on this first hand.

234. It is fair to say that the claimant showed us video footage of his visit to the security office to collect his items. In that video, the security guard told the claimant that it was his manager who had requested that his lockers be emptied. The security guard in the video also stated that he himself was not present when the lockers were emptied and that "it has nothing to do with us, the manager did everything". When the claimant asked "it was the manager that brought it [his box of belongings] here?" the security guard said "yeah".

235. We are not satisfied that this evidence is sufficiently robust to rebut JC's evidence that he was not present on the emptying of the claimant's lockers. The security guard seemed fairly equivocal and uninterested in the conversation, keen to make it clear that the emptying of lockers was nothing to do with him. JC is not named in the conversation specifically and, given that the security guard was not present when the lockers were emptied, he could not assist with whether or not JC was present at that point either.

236. There is no good evidence to support the claimant's assertion that there was some kind of collusion or plot related to the emptying of his lockers.

Disability status – stress

237. We have spent some time considering the medical evidence regarding the claimant's stress available to us in the bundle: it all relates to April 2021 and is as follows:

237.1. GP note – [340];
237.2. PHQ-9 and GAD-7 test results– [761];
237.3. GP records – [768];
237.4. Occupational Health Clinical Assessment – [739].

238. These documents tell us that, following a telephone consultation with his GP, the claimant was signed off work due to stress at work on 21 April 2021 for a month. On the same day he undertook the standard PHQ- and GAD-7 tests, scoring high scores on both. The only other mention of stress is in the claimant's GP records, following a telephone call to the claimant on 21 September 2021, in which the claimant reported being very depressed due to losing his job. He wanted antidepressants and was given information about Talking Therapies and the Crisis Team.

239. There is no good evidence before us that the claimant suffered stress prior to April 2021. Although the claimant stated in his disability impact statement

that he had suffered clinical depression since 2009, there is no medical evidence to support this assertion. If this were the case, we would expect to see some medical evidence at least from a GP, but we have nothing.

240. Although there is reference to Talking Therapies within the GP record, we have no evidence to show us that the claimant was in fact referred for their services: we have a list of referrals at [786], and there are none for Talking Therapies, or indeed the Crisis Team.

241. The claimant referred to the managers' notes at [277] as evidence that he had informed his manager of his stress prior to 13 April 2021. However, on inspection of that page, the entries pre-13 April 2021 relate solely to the claimant's shoulder injury, there is no mention of stress.

242. There is a contemporaneous record of the claimant's own view of his stress in the OH report of 20 April 2021 at [741], in which it is recorded that he "felt stressed by the issue and subsequent potential disciplinary action".

243. For the purposes of the disability discrimination claim, the question for us is whether the claimant's stress was a disability under s6 of the EqA as at 30 April 2021.

244. Our findings of fact, based on the medical evidence and the claimant's evidence, are as follows:

244.1. Prior to 13 April 2021, the claimant had not experienced stress;
244.2. The claimant only started to experience stress on 13 April 2021, following the investigation meeting on 12 April 2021;
244.3. The 13 April 2021 was the first time he told the respondent that he was experiencing stress;
244.4. As at 30 April 2021, the medical evidence was that the claimant was signed off with stress until 20 May 2021;
244.5. The claimant experienced reactionary stress due to the disciplinary situation at work;
244.6. As at 30 April 2021, the stress had not lasted for one year;
244.7. As at 30 April 2021, we have no good evidence to support a case that the stress was likely to last for a year, or was likely to recur, given the fact that this was reactionary and the claimant had not suffered stress before.

Disability status – shoulder injury

245. The Tribunal has much more evidence regarding the claimant's shoulder injury that he suffered in 2009 – from [657]. We have had sight of numerous fit notes spanning the years since 2009 stating that the claimant's shoulder made him unfit to work without adjustments for various periods. Occupational Health ("OH") at the respondent had also been involved in the claimant's case for some years prior to his dismissal, due to his shoulder injury – see [693] onwards. We also have hospital documentation within the bundle that demonstrates a long history of shoulder pain and complications requiring surgery.

246. On 8 March 2021, management made a referral to OH, which was requested by the claimant due to his shoulder pain – [730]. That referral set out the respondent's knowledge of the history of the claimant's shoulder pain, spanning from 2011 to date.

247. This referral was dealt with on 11 March 2021, following which the OH Physician recommended that adjustments be made to the claimant's role due to his shoulder issues, including lighter duties and alternative roles/redeployment – [733].

248. We accept, on the evidence we have, that

248.1. As at 30 April 2021, the claimant had a physical impairment, namely a shoulder injury;
248.2. That injury had been in existence since 2009;
248.3. There had been a substantial level of medical involvement, including from the respondent's OH department;
248.4. Adjustments had been considered, and made, on several occasions over the years of the claimant's employment;
248.5. The effects of the claimant's shoulder injury had lasted more than 12 months by 30 April 2021;
248.6. They had a more than trivial or minor effect on his ability to perform day to day activities, including his job which required a certain level of manual labour/lifting.

249. In light of the OH department's involvement with the claimant's case, and the management referrals up to and including 2021, we find that the respondent knew of the level of effect that the claimant's shoulder injury had on his day to day tasks. This is further demonstrated by the respondent's willingness to make reasonable adjustments to the claimant's role.

Law

Unfair dismissal – s98 ERA

Reason for dismissal

250. The relevant legislation is found at s98(1), (2) and (4) ERA:

> (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—
>
> (a) the reason (or, if more than one, the principal reason) for the dismissal, and
>
> (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
>
> (2) A reason falls within this subsection if it—
>
> (a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
>
> (b) relates to the conduct of the employee,
>
> (c) is that the employee was redundant, or

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(3) In subsection (2)(a)—

(a) "capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and

(b) "qualifications", in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.

251. It is for the employer to show the reason for dismissal and that it is a potentially fair one, such as conduct: this is not a high threshold for a respondent. In Gilham and Ors v Kent County Council (No2) 1985 ICR 233, the Court of Appeal held as follows:

> "The hurdle over which the employer has to jump at this stage of an inquiry into an unfair dismissal complaint is designed to deter employers from dismissing employees for some trivial or unworthy reason. If he does so, the dismissal is deemed unfair without the need to look further into its merits. But if on the face of it the reason could justify the dismissal, then it passes as a substantial reason, and the inquiry moves on to [s98(4)] and the question of reasonableness."

Substantive fairness

252. Regarding conduct cases, the case of British Home Stores Ltd V Burchell [1978] IRLR 379 encompasses the relevant test for fairness:

252.1. Did the Respondent have a genuine belief that the Claimant was guilty of the misconduct alleged by the Respondent?
252.2. If so, were there reasonable grounds for the Respondent in reaching that genuine belief? and,
252.3. Was this following an investigation that was reasonable in all the circumstances?

253. In all aspects of such a case, including consideration of sanction, in deciding whether an employer has acted reasonably or unreasonably within s98(4) ERA, the tribunal must decide whether the employer acted within the band of reasonable responses open to an employer in the circumstances. Whether the tribunal would have dealt with the matter in the same way or otherwise is irrelevant, and the tribunal must not substitute its view for that of a reasonable

employer – Iceland Frozen Foods Ltd v Jones [1982] IRLR 439, Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23, London Ambulance Service NHS Trust v Small [2009] IRLR 563.

Procedural fairness

254. Following the case of Polkey v AE Dayton Services Ltd [1988] ICR 142, it is well established that fairness in procedure is a vital part of the test for reasonableness under s98(4) ERA. It is not relevant at this (the liability) stage to consider whether any procedural unfairness would have made a difference to the outcome: that is a matter for remedy (the issue in Polkey is set out below).

255. If there is a failure to adopt a fair procedure, whether by the ACAS Code's standards, or the employer's own internal standards, this will render a dismissal procedurally unfair.

256. Regarding dismissal for conduct issues, the reasonableness of the procedure rests fairly heavily on the reasonableness of the investigation, and the provision of opportunity for the employee to make his position, explanation and mitigation heard and understood.

257. Procedural and substantive fairness do not stand as separate tests to be dealt with in isolation – Taylor v OCS Group Ltd [2006] ICR 1602. It is, ultimately, a view to be taken by the tribunal as to whether, in all the circumstances, the employer was reasonable in treating the reason for dismissal as a sufficient reason to dismiss. It may therefore be that in a serious case of misconduct, it may be fair to dismiss, even if there are slight procedural imperfections. On the other hand, where the conduct charge is less serious, it may be that a procedural issue is sufficient to tip the balance to make the dismissal unfair.

Wrongful dismissal/breach of contract

258. This claim requires the Tribunal to perform a different exercise when compared to the test under s98 ERA. Here, the question is, as a matter of fact, was there a breach of contract in that the employer failed to pay the employee their contractual notice pay?

259. This requires the Tribunal to consider first whether the employee acted in a way so as to fundamentally breach their contract to enable the employer to summarily terminate the employment contract.

260. Unlike under a claim for unfair dismissal, regarding a wrongful dismissal claim, it is for the tribunal to make findings of fact as to the nature and extent of the employee's conduct. The reasonableness of actions by the employer is irrelevant.

261. Therefore, a wrongful dismissal is not necessarily unfair, and an unfair dismissal is not necessarily wrongful – Enable Care and Home Support Ltd v Pearson EAT 0366/09.

Limited remedy issues

Polkey reduction

262. The decision in Polkey v AE Dayton Services Ltd [1987] UKHL 8 permits the reduction of compensation when, even if a fair procedure had been followed, the Claimant would have been dismissed in any event.

263. Compensation can be reduced as a percentage, if a tribunal considers that there was a percentage chance of the employee being dismissed in any event. Alternatively, where it is found that a fair procedure would have delayed dismissal, compensation should reflect this by compensating the employee only for the length of time for which dismissal is found to have been delayed.

264. The Tribunal has to consider what difference a fair procedure would have made, if any. It is for the Respondent to adduce evidence on this point. It is always the case that a degree of uncertainty is inevitable, unless the process was so unreliable it would be unsafe to reconstruct events. However, the Tribunal should not be reluctant to undertake the exercise just because it requires speculation – Software 2000 Ltd v Andrews [2007] ICR 825.

Contribution

265. Under s123(6) ERA, the test is whether any of the claimant's conduct prior to dismissal was "culpable or blameworthy" – Nelson v BBC (No.2) 1980 ICR 110, CA. This requires the Tribunal to look at what the claimant in fact did, as opposed to being constrained to what the respondent's assessment of the claimant's culpability was – Steen v ASP Packaging Ltd [2014] ICR 56.

266. The Employment Appeal Tribunal ("EAT") in Steen summarised the approach to be taken under s122(2) and s123(6) ERA, at paragraphs 8-14:

266.1. Identify the conduct which is said to give rise to possible contributory fault;
266.2. Ask whether that conduct was blameworthy, irrespective of the Respondent's view on the matter;
266.3. Ask, for the purposes of s123(6), whether the conduct which is considered blameworthy caused or contributed to the dismissal; and, if so,
266.4. Ask to what extent the award should be reduced and to what extent it was just and equitable to reduce it.

267. Under s122(2) ERA, the relevant test is whether it is just and equitable to reduce compensation in light of conduct of the Claimant prior to the dismissal. The conduct need not contribute to the dismissal. The EAT has confirmed that the same test of "culpable or blameworthy" applies to the s122(2) reduction question as to s123(6) ERA – Langston v Department for Business, Enterprise and Regulatory Reform UKEAT/0534/09.

Direct race/religious discrimination – s13 EqA

268. Employees are protected from discrimination by s39 EqA:

> (2) An employer (A) must not discriminate against an employee of A's (B) -
> …
> (d) by subjecting B to any other detriment.

269. Direct discrimination is set out in s13 EqA:

> (1) a person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

270. There are two parts of direct discrimination: (a) the less favourable treatment and (b) the reason for that treatment. Sometimes however it is difficult to separate these two issues so neatly. The Tribunal can decide what the reason for any treatment was first: if the reason is the protected characteristic, then it is likely that the claim will succeed – Shamoon v Constable of the Royal Ulster Constabulary [2003] UKHL 11.

"Because of": reason for less favourable treatment

271. In terms of the required link between the claimant's race and the less favourable treatment she alleges, the two must be " inextricably linked" - Jyske Finands A/S v Ligebehandlingsnaevnet acting on behalf of Huskic: ECLI:EU:C:2017:278.

272. The test is not the "but for" test, in other words it is not sufficient that, but for the protected characteristic, the treatment would not have occurred – James v Eastleigh Borough Council [1990] IRLR 288.

273. The correct approach is to determine whether the protected characteristic, here race, had a "significant influence" on the treatment – Nagarajan v London Regional Transport [1999] IRLR 572. The ultimate question to ask is "what was the reason why the alleged perpetrator acted as they did? What, consciously or unconsciously, was the reason?" - Chief Constable of West Yorkshire Police v Khan [2001] UKHL 48. This is a question of fact for the Tribunal to determine, and is a different question to the question of motivation, which is irrelevant. The Tribunal can draw inferences from the behaviour of the alleged perpetrator as well as taking surrounding circumstances into account.

274. If there is more than one reason for the treatment complained of, the question is whether the protected characteristic (in this case, race) was an effective cause of the treatment – O'Neill v Governors of ST Thomas More Roman Catholic Voluntary Aided Upper School [1996] IRLR 372.

Failure to make reasonable adjustments – ss20/21 EqA

275. Sections 20/21 EqA provide:

> "20(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.
> (2) The duty comprises the following three requirements.
> (3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.
> (4)…
> (5)…
> (6)...

(7)...

(8) A reference in section 21 or 22 or an applicable Schedule to the first, second or third requirement is to be construed in accordance with this section.

…

21(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.

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

(3) A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purpose of establishing whether A has contravened this Act by virtue of subsection (2); a failure to comply is, accordingly, not actionable by virtue of another provision of this Act or otherwise."

Provision, criterion or practice

276. The first requirement of this claim is that there be a PCP. The terms "provision, criterion or practice" ("PCP") are not defined within the legislation, and are to be given their ordinary meaning; they are broad and overlapping terms and should not be narrowly construed – Ishola v Transport for London [2020] EWCA Civ 112. A PCP can cover informal as well as formal arrangements.

277. The finding of a PCP is a matter of fact for the Tribunal – Jones v University of Manchester [1993] IRLR 218.

Substantial disadvantage

278. There is no requirement under ss20/21 for a comparator to be considered regarding the alleged disadvantage suffered – Sheikholeslami v University of Edinburgh [2018] IRLR 1090:

> "It is well established that the duty to make reasonable adjustments arises where a PCP puts a disabled person at a substantial disadvantage compared with people who are not disabled. The purpose of the comparison exercise with people who are not disabled is to test whether the PCP has the effect of producing the relevant disadvantage as between those who are and those who are not disabled, and whether what causes the disadvantage is the PCP. That is not a causation question … For this reason also, there is no requirement to identify a comparator or comparator group whose circumstances are the same or nearly the same as the disabled person's circumstances."

279. The definition of "substantial" is at s212(1) EqA, which provides that substantial means more than minor or trivial.

Reasonableness of adjustments

280. The ECHR Code of Practice on Employment (2011) sets out various factors that may be relevant when considering the reasonableness of any proposed adjustments:

- "whether taking any particular steps would be effective in preventing the substantial disadvantage;
- the practicability of the step;

- the financial and other costs of making the adjustment and the extent of any disruption caused;
- the extent of the employer's financial or other resources;
- the availability to the employer of financial or other assistance to help make an adjustment (such as advice through Access to Work); and
- the type and size of the employer."

281. There is no requirement that adjustments suggested by a claimant should remove the substantial disadvantage in its entirety – Noor v Foreign and Commonwealth Office [2011] ICR 695. The statute states that the reasonable adjustment should "avoid" the disadvantage. Therefore, a respondent will not avoid liability solely by demonstrating that the disadvantage would have been suffered even with the adjustment. If the adjustment would have acted to avoid the disadvantage, that is sufficient for liability to attach under ss20/21.

Respondent's knowledge

282. The knowledge required of respondents under ss20/21 is that they are aware that (a) the claimant is disabled and (b) that the claimant would likely be placed at the substantial disadvantage in question. The issue of knowledge covers both constructive and actual knowledge. In other words, as set out in Eastern and Coastal Kent Primary Care Trust v Grey [2009] IRLR 429, at para 11, a respondent will escape liability if it:

> "(i) does not know that the disabled person has a disability;
> (ii) does not know that the disabled person is likely to be at a substantial disadvantage compared with persons who are not disabled;
> (iii) could not reasonably be expected to know that the disabled person had a disability; and
> (iv) could not reasonably be expected to know that the disabled person is likely to be placed at a substantial disadvantage in comparison with persons who are not disabled."

Victimisation – s27 EqA

283. S27 EqA sets out:

> "(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. …"

284. The relevant subsections in the present claim are ss27(2)(c)&(d).

285. Regarding "*doing any other thing for the purposes or in connection with this Act*", this is the catch-all provision. Under pre-Equality Act legislation, it was held that the requirement that something be done "*in reference to*" the Race Relations Act would be met if it was done by reference to that Act "*in the broad*

sense, even though the doer does not focus his mind specifically on any provision of the Act" – Aziz v Trinity Street Taxis Ltd and ors [1988] ICR 534.

286. In terms of "*making an allegation...*", although it is not necessary for the Equality Act to be mentioned, it is vital that the facts as set out by the claimant would be capable of amounting to a breach of that Act.

287. The meaning of detriment is set out above. For a detriment to be *because of* a protected act, it is necessary that it had a significant influence on the perpetrator, where significant simply means "more than trivial" – Igen Ltd (formerly Leeds Careers Guidance) and ors v Wong and other cases [2005] ICR 931.

Conclusions

Unfair dismissal

Reason for dismissal

288. We are satisfied that the reason for the claimant's dismissal was conduct. Given that the claimant stated that neither BM nor TM had discriminated against him, there was no real challenge to their genuine belief of his guilt.

Reasonable grounds following a reasonable investigation

289. The claimant raises several criticisms of the investigation; criticisms which he says must mean that the respondent did not have reasonable grounds for its finding of guilt against him.

Lack of evidence from trailer driver

290. The claimant states that the investigation was flawed in that there was no evidence from the driver of the trailer onto which the claimant drove the Truck, upon which the accident was said to have occurred.

291. The claimant alleges that the driver should have been interviewed, as he would have been able to say that he felt and heard nothing during the claimant's time on the trailer.

292. We have found that it was reasonable for the respondent not to attempt to seek this evidence, and that in any event it would have added nothing to the investigation. As such, this factor does not make the investigation unreasonable.

Different treatment

293. The claimant alleges that he was treated differently during the course of the investigation process to his colleague EG. Factually this is true, but this is because by the time the claimant had reviewed all the evidence at the point of his investigation, he was satisfied that it was the claimant that was the driver of the Truck at the time it was damaged, not EG. This was on the basis of the key fob information and the CCTV. We accept that this was the reason for any difference in treatment (namely, EG was released to return to his duties). We

are not satisfied that this is evidence of a biased or flawed investigation process.

Sham disciplinary

294. The claimant argues that JC put in place some form of conspiracy to push him out. This on the basis of two main points:

294.1. [JC/WS/27] states that EG reported the accident to JC at 1115hrs. The accident is said to have happened between 1155hrs and 1200hrs and therefore JC must be lying, and manufacturing that conversation; and

294.2. The claimant challenges the time and date of the CCTV, and argues that the CCTV is not genuinely of the events of 8 April 2021.

295. We have made findings about both these issues:

295.1. We have found that the time recorded in JC's witness statement was a genuine mistake, and that the time at which EG reported the accident to JC was around 1315hrs;

295.2. We have found that the CCTV footage is that of 8 April 2021, showing the claimant with a truck that, at the beginning, was undamaged, and at the end was damaged.

296. We conclude that there is no good evidence that JC was attempting to push the claimant out, or that he was attempting to mount a sham disciplinary process.

Identity of the Truck driver

297. During these proceedings, the claimant has argued that the driver of the Truck seen in the CCTV is not in fact him. We have found that this is not the case. In any event, we note that this point was not raised by him at any stage during the internal process. Therefore, the respondent had no reason to investigate or question the identity of the Truck driver. It was reasonable of the respondent to conclude that the driver was the claimant.

298. We conclude that there was a reasonable investigation done in all the circumstances. Just to recap the key points:

298.1. The respondent had CCTV of the claimant causing damage to the Truck;
298.2. The only reason the damage came to light was because EG reported it to JC;
298.3. The claimant had admitted that an accident had occurred and it was his fault during the investigation process;
298.4. The claimant never denied that he was the driver in the CCTV;
298.5. The key fob information supported the fact that the driver of the Truck was the claimant.

299. In light of the above, no further investigation was necessary.

300. In relation to the appeal, we have found that all of the claimant's witnesses were interviewed, and provided no direct evidence that JC had been discriminating against the claimant. In terms of the claimant's new allegation at appeal that JC had told him to say that he had caused an accident, TM explored this with JC as part of the appeal process: he vehemently denied this allegation. TM also interviewed BM to explore his reasons for dismissing the claimant.

301. Taking into account all the circumstances, this was a reasonable investigation. The above points also provided reasonable grounds upon which BM and TM could base their genuine belief of the claimant's guilt. We refer back to paragraphs 201-205 and 222-223 above.

Unfair process

302. The claimant has raised various complaints about the process to us, such as:

302.1. The failure by the respondent to provide the CCTV during the internal process;
302.2. The appointment of JC as the investigator;
302.3. The failure of the decision makers to review the evidence before them properly;
302.4. The format of the meetings being by video.

303. We have made findings in relation to these points as follows:

303.1. The respondent did show the CCTV to the claimant;
303.2. JC was an appropriate investigator;
303.3. The evidence was reviewed properly at both the disciplinary and appeal stage;
303.4. There was no detriment to the claimant in holding the meetings remotely by video.

304. We conclude that a full and fair process was conducted.

Sanction

305. We are not able to look behind the final written warning that was imposed on the claimant in July 2020. As such, we accept that the starting point for BM to consider in the index disciplinary process was that the claimant had a live final written warning on his record.

306. Within the respondent's Disciplinary Standard, at paragraph 3.5.1.4, it provides – [334]:

> "The Partnership may take a more serious sanction (up to and including dismissal) if:
> - The same (or similar) issue resulted in a warning happens against during the warning period; or,
> - If the Partner's performance does not improve within the set period".

307. In light of the existence of the final written warning, we accept that dismissal for damaging the employer's equipment and failing to report it was a sanction that fell within the range of reasonable responses available to a reasonable employer. In other words, with the facts before the respondent as we have found them to have been, we do not conclude that no reasonable employer

would have dismissed the claimant. The test for us is not whether a lesser sanction could have been imposed, but whether dismissal was an appropriate sanction in all the circumstances: we conclude it was.

Breach of contract/notice pay

308. We have found that the claimant was dismissed for conduct, and that in fact he was guilty of that conduct, namely damaging the Truck and not reporting it.

309. We are satisfied that this level of misconduct is such as to amount to a fundamental breach of the claimant's employment contract, particularly in light of the extant final written warning.

310. As such, the respondent was entitled to treat itself as released from its obligations under the contract of employment. As such there was no obligation to pay the claimant notice pay.

311. The respondent was therefore not in breach of contract by summarily dismissing the claimant.

Disability status

312. We conclude that the claimant did not, as at 30 April 2021, meet the definition of disability within s6 of the EqA in relation to his alleged mental impairment of stress. It had not lasted, nor was it likely to last 12 months as at 30 April 2021, nor was it likely to recur.

313. The claimant was however disabled as at 30 April 2021 by reason of his shoulder injury. This was a physical impairment, the effects of which were substantial and adverse, as well as lasting for more than 12 months by 30 April 2021.

Respondent's knowledge of disability

314. We have found that the respondent had knowledge of the claimant's shoulder impairment, and the effects that this shoulder issue caused him over several years prior to his dismissal.

315. We conclude that the respondent had the requisite knowledge of the claimant's disability (namely his shoulder), as required by s20/21 EqA.

Failure to make reasonable adjustments

316. The respondent accepts that the disciplinary process amounts to a provision, criterion or practice ("PCP") at law.

<u>Substantial disadvantage</u>

317. The claimant relies on three substantial disadvantages:

317.1. He was compelled to attend a hearing on 30 April 2021;
317.2. He was unable to prepare fully for that hearing due to his disability;
317.3. He suffered an exacerbation of his mental health.

318. In relation to each of these alleged disadvantages, the claimant alleges that it was his stress that was the disability that meant the PCP placed him at a disadvantage. However, we have concluded that the claimant was not disabled by way of stress at the relevant time. As such, this claim must fail.

319. In any event, we conclude as follows:

319.1. The claimant was assessed as fit to attend a meeting by telephone, when the specific question was asked regarding the disciplinary process – [737]. As such, we conclude that the claimant suffered no substantial disadvantage in being compelled to attend the meeting on 30 April 2021.

319.2. The claimant was fully able to engage in the disciplinary hearing on 30 April 2021. We have seen and heard no good evidence to show that he was in any way disadvantaged in the manner in which he was able to prepare for the hearing. The claimant suffered no substantial disadvantage in his ability to prepare for the hearing.

319.3. In relation to the claimant's mental health, we accept that disciplinary processes generally cause stress for those involved. However, we have heard and seen no good evidence to demonstrate that the claimant's level of stress experienced was any greater than anyone else's who finds themselves subject to a disciplinary process. All references to the claimant's stress relate solely to the disciplinary hearing in any event. Therefore this is not a case where the process exacerbated an already existing condition.

320. The reasonable adjustments claim therefore fails at this stage. However, we will go on to consider the alleged reasonable adjustments in any event.

320.1. Delaying the disciplinary hearing. As above, the claimant was assessed as fit to participate in the disciplinary process – [739]. As such there was no need to make any adjustment to the hearing. Therefore delaying the hearing would not have been reasonable.

320.2. Redeployment. We have found that the claimant was offered the option of discussing redeployment but rejected that option, preferring to stay with his normal duties. This adjustment was therefore offered, but refused by the claimant.

321. The reasonable adjustments claim therefore fails.

Victimisation

<u>Protected acts</u>

322. The claimant alleges that he did two protected acts that led to him suffering detriments.

323. First, the claimant asserts that his discussion with EB in 2019, in which he asked to be assigned to a different manager, was a protected act. His case is that, in 2019, he reported to EB that JC was discriminating against him, and that this was the reason he wanted a change in manager.

324. We have found that the claimant did not mention discrimination to EB in 2019. As such, this conversation was not a protected act, as the claimant did not make an allegation that JC had discriminated, nor did the claimant do any other thing for the purposes of or in connection with the Equality Act in that conversation.

325. Second, he alleges that his attendance at the BLM event in 2020, organised by the respondent, amounts to a protected act. We reject this assertion. The event does not fall within any of the four definitions of protected act found at s27(2). The widest definition of protected act is found at s27(2)(c), which provides that a protected act is:

> "Doing any other thing for the purposes of or in connection with this Act."

326. We are not satisfied that the act of attending such an event is connected with the Equality Act so as to lead to all attendees of that event gaining protection against victimisation. To find that mere attendance at such events was a protected act would be to interpret the legislation too broadly, and lead to an opening of the floodgates, going beyond the purpose of the legislation.

327. The claimant's victimisation claim therefore fails on the basis that there were no protected acts. We will however go on to consider whether there were any detriments suffered due to the alleged protected disclosures in any event.

Detriment

328. The claimant relies upon his dismissal as being a detriment. Evidently, being dismissed is in fact a detriment. However the question is whether the protected acts significantly influenced the decision to dismiss.

329. We have found that BM's reason for dismissal was the claimant's conduct, namely damaging the Truck and not reporting it. There is no good evidence to show that BM even knew:

329.1. that the claimant had attended the BLM event; and/or,
329.2. that the claimant had approached EB to ask for a transfer from JC's management in 2019.

330. Furthermore, there is no good evidence to suggest that these two factors in any way influenced BM's decision to dismiss the claimant.

331. As such, we reject this claim of victimisation.

Race discrimination

332. First, we considered whether the burden of proof had shifted from the claimant to the respondent.

333. Taking an overview of the evidence in front of us, we are not satisfied that there is sufficient evidence to demonstrate that JC's conduct towards the claimant, in relation to the specific allegations of race discrimination, without further explanation, was discriminatory on the grounds of race. We so conclude for the following reasons:

333.1. The evidence obtained from the claimant's own witnesses during the appeal ([437-441]) and summarised in our findings, does not actually go to demonstrate that JC's treatment towards the claimant was racially motivated;

333.2. Although the claimant told us that other partners had informed him to be wary of JC as he does not like black people, this is hearsay evidence, and does not assist us;

333.3. Although the claimant made a complaint to EB and asked to switch managers from JC, we have found that the claimant did not raise race discrimination when discussing JC's line management of him;

333.4. The claimant never made a written complaint of race discrimination (until the appeal in this matter);

333.5. The claimant argues that JC must be racially motivated, as the claimant had a clean disciplinary record for years, until JC took over management of him. However, of the three disciplinary matters the claimant faced during his management by JC:

333.5.1. JC was not the one who decided to give the claimant a final written warning in July 2020;

333.5.2. JC handed over the disciplinary regarding the prior incident, indicating that he considered there was no case to answer;

333.5.3. JC was entitled to investigate the damage to the Truck in April 2021, quite properly sought HR advice, and then handed it to BM to take a disciplinary process forward.

We are therefore not satisfied that the disparity in the claimant's disciplinary record before and after JC's line management of him implies any racial motivation in JC's actions. In fact, JC's indication on the prior incident, of no case to answer, points away from a suggestion of JC targeting the claimant.

333.6. The claimant relies upon the Managers' Record, stating that it was completed in bad faith by four managers – [272]. We have found that there is no evidence of such bad faith, and so the Managers' Record does not provide evidence from which we could infer discrimination.

334. As such, we conclude that the burden of proof has not shifted to the respondent to demonstrate a non-discriminatory reason for the alleged acts of discrimination. As such the race discrimination claim fails. However, we will address each allegation in turn in any event further below.

Religious belief discrimination

335. The claimant also alleges that the alleged acts of race discrimination are also acts of religious belief discrimination. We again considered whether the burden of proof has shifted to the respondent in relation to this specific head of claim.

336. The sole evidence that the claimant relies upon from which he asks us to infer religious belief discrimination is that JC asked if he (the claimant) was Muslim, and then laughed when the claimant answered "yes".

337. We have found that JC did not in fact laugh, and that this question was asked in the context of it being Ramadan.

338. We conclude that this is not sufficient evidence from which, without an adequate explanation, we could infer religious belief discrimination. Furthermore, we note that the claimant was in fact given time off work for a religious festival, as marked in the Managers' Record – [273]. This tends to point away from the claimant suffering less favourable treatment because of his religion.

339. As such, the burden of proof has not shifted to the respondent, and the claim of religious belief discrimination fails. We will, in any event, address each specific discrimination allegation in turn below.

Individual race/religion discrimination allegations

Allegation 3 – failure to redeploy the claimant following his raising a grievance against JC for issuing a final written warning (2020) – perpetrator unspecified

340. Factually, this allegation is confused, as we have set out in our findings. In fact, this allegation is that EB failed to change the claimant's line manager after two conversations with the claimant in October and December 2019.

341. We have found that, as a matter of fact, EB did not change the claimant's line manager. The reason for that lack of change was that COVID-19 hit, no Partners changed managers, and the claimant had offered no good reason (certainly not a complaint of discrimination) as to why he should be moved.

342. We accept this rationale: there is no good evidence to rebut it. We are satisfied that in no way did the claimant's race or religion influence EB's decision not to change the claimant's line manager.

343. This allegation is rejected.

Allegation 4 – giving the claimant a pay rise equivalent to 3p per hour (2020) – perpetrator JC

344. Factually, the claimant received a pay rise of 2p for the year 2020. We find that this was because that was the appropriate raise for that year, and is in line with the raises in previous years.

345. In any event, JC is not the ultimate decision maker on pay increases: for the claimant that was EB or BM.

346. There is no good evidence from which we could infer that the claimant's pay increase in 2020 was influenced in any way by his race or religion.

347. This allegation is rejected.

Allegation 5 – permitting JC to become involved in the disciplinary process leading up to the claimant's dismissal (given that the claimant had raised a grievance against him in 2020) (April 2021) – perpetrator EB

348. Factually, we have found that this allegation did not occur. EB did not permit JC to be a part of the disciplinary process. JC undertook, of his own volition, an investigation into an accident. He then sought advice from HR and handed the matter on for a disciplinary process.

349. We accept the reason why JC undertook the investigation was that it was his managerial responsibility given that the damage had been reported to him.

350. We therefore conclude that the claimant's race and/or religion had no influence on JC undertaking the investigation.

351. We reject this allegation

Allegation 6 – line manager put pressure on the claimant to admit causing vehicle damage and/or not reporting it on the basis that it would not then be pursued as potentially dismissible misconduct (8-12 April 2021) – perpetrator JC

352. We have rejected this allegation on its facts, and have found that no such pressure was applied to the claimant.

353. As such, we reject this allegation.

Allegation 8 – line manager asked the claimant to attend an investigation meeting without a representative present (12 April 2021) – perpetrator JC

354. Factually, it is correct that the claimant was asked to attend the investigation without a representative. However, we have accepted the respondent's explanation for this, namely that this was an informal meeting, to which representatives are not invited.

355. This is a non-discriminatory reason for this treatment, and as such this allegation is rejected. The claimant's race and/or religion did not in any way influence JC's decision on this point.

Allegation 9 – failure to provide the claimant with details of the other vehicle (the trailer) involved in the accident (April 2021) – alleged perpetrator JC and BM

Allegation 10 – failing to take a statement from the driver of the trailer (in which the accident occurred) – alleged perpetrators JC and BM

356. We have found that there was no requirement for the respondent to obtain information about/from the trailer driver, as he was not present at the time of the accident, and the CCTV clearly shows that the damage to the Truck occurred whilst the Truck was on the trailer.

357. We have found that the reason for the lack of evidence from the trailer driver was that he had left the respondent's premises prior to JC being made aware of the damage to the Truck. Further, it would have been disproportionate/difficult to attempt to track down the driver, given that he was not an employee of the respondent.

358. Therefore, the reason for the lack of evidence from the driver is no in any way connected to the claimant's race or religion.

359. The claimant repeatedly made it clear that he did not accuse BM of discrimination. In relation to JC, the reason for his not tracking down the driver and obtaining evidence is as set out above. There is no good evidence from which we could conclude that JC was influenced in any way by the claimant's race/religion.

Allegation 11 – line manager (JC) and disciplinary hearing manager (BM) colluded to persuade EG to provide false evidence (April 2021) – alleged perpetrators JC and BM

360. We have found as a fact that this allegation did not occur; there was no collusion. As such, this allegation is rejected.

361. In any event, in terms of BM, the claimant confirmed repeatedly in his evidence that he did not accuse BM of discrimination.

Allegation 12 – disciplinary hearing manager denied the claimant access to the relevant CCTV footage prior to the disciplinary hearing (April 2021) – alleged perpetrator BM

362. We have found that BM did not deny the claimant access to the CCTV in advance of the disciplinary hearing. Therefore, this allegation fails.

363. In any event, the claimant confirmed repeatedly in his evidence that he did not accuse BM of discrimination. Specifically in relation to this allegation, he stated "I don't say I wasn't shown that information because I am Black or Muslim. I don't know what they didn't do certain things".

Allegation 13 – disciplinary hearing manager convened a disciplinary hearing despite the claimant being signed off work by his GP with stress and a shoulder injury (30 April 2021) – alleged perpetrator BM

364. We have found that, factually, the meeting did go ahead at a time when the claimant had a live fit note from his GP.

365. However, there is no good evidence from which we could infer that the reason for BM going ahead with the meeting was in any way connected to the claimant's race or religion. BM went ahead with the meeting in reliance upon the advice obtained from the OH Physician.

366. In any event, the claimant confirmed repeatedly in his evidence that he did not accuse BM of discrimination.

Allegation 16 – disciplinary officer did not have material available to him to conduct the disciplinary hearing appropriately (30 April 2021) – alleged perpetrator BM

367. We have found that this allegation is not made out on the facts. The allegation therefore fails.

368. In any event, the claimant confirmed repeatedly in his evidence that he did not accuse BM of discrimination.

Allegation 17 – conducting the disciplinary meeting by zoom so that the claimant had difficulty participating (30 April 2021) – alleged perpetrator BM

369. We have found that the claimant did not have any difficulty participating in the disciplinary meeting because it was conducted by video.

370. In any event, there is no good evidence to suggest that the decision to hold the meeting by video was in any way connected to the claimant's race or religion.

371. In any event, the claimant confirmed repeatedly in his evidence that he did not accuse BM of discrimination.

372. This allegation therefore fails.

Allegation 18 – proceeding with a disciplinary hearing in a pandemic (30 April 2021) – alleged perpetrator BM

373. The disciplinary hearing did proceed during a pandemic. However, the fact it proceeded, in the format of a video hearing rather than in person, was of no disadvantage to the claimant, on our findings.

374. The reason that the meeting went ahead, by video, was that this was the respondent's policy for managing disciplinary hearing during the pandemic.

375. There is no good evidence from which it could be found that the decision to go ahead with the hearing, in person, was in any way influenced by the claimant's race or religion.

376. In any event, the claimant confirmed repeatedly in his evidence that he did not accuse BM of discrimination.

377. This allegation therefore fails.

Allegation 19 – dismissal (30 April 2021) – alleged perpetrator BM

378. We have concluded that the reason for the claimant's dismissal was his conduct, and that this was a fair reason. We therefore reject the allegation that the reason for dismissal was the claimant's race or religion.

379. In any event, the claimant's own evidence on BM's motivation was inconsistent. During his evidence, he said the following:

379.1. "I don't' claim race discrimination against BM";
379.2. "I don't know [BM], I cant say I was dismissed because of my skin colour or because I am Muslim"; and,
379.3. "I do say he dismissed me because I am black".

380. When it was put to the claimant that he did not raised BM's discriminatory dismissal in the appeal, the claimant said:

> "I didn't' accuse BM of discrimination in the appeal. Now, I say it's because of my skin colour. Because he didn't do the process correctly, as a human being, before accusing someone he should have made sure he could see my face on the CCTV"

381. The claimant was effectively saying that, because he considered that the disciplinary had not been dealt with fairly, that must have been because of his race/religion. This is an baseless allegation without any supportive evidence. There is no good evidence from which we could infer that BM's decision to dismiss was in any way influenced by the claimant's race or religion.

382. We reject this allegation.

Allegation 20 – failure to review the evidence on appeal (May/June 2021) – TM

383. On the facts, we have found that there was no failure to review any evidence at the appeal stage.

384. In any event, the claimant stated several times in cross-examination that he did not claim that TM had acted in a discriminatory way towards him. Further, there is no good evidence from which we would draw an inference that TM was influenced in any way by the claimant's race or religion in the manner in which she dealt with that appeal.

385. This allegation fails.

Allegation 21 – failure to comply with provisions of the disciplinary procedure (paragraphs 3.3.1, 3.3.6, 3.5.1, 3.5.1.1, 3.5.8 (April to June 2021) – BM and TM

386. We have found that there was no failure to comply with any of the provisions cited within this allegation.

387. In any event, the claimant said several times during the course of his cross-examination that he did not accuse TM and BM of discrimination.

388. There is no good evidence from which we could infer that the manner in which BM and TM conducted their respective parts of the disciplinary process was in any way influenced by the claimant's race or religion.

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Employment Judge Shastri-Hurst

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Date: 16 February 2024

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON 27 February 2024

FOR EMPLOYMENT TRIBUNALS