Case number: 2402734/22

EMPLOYMENT TRIBUNALS

Claimant: John William Kennedy Boggs

Respondents: 1. Warrington and Halton Teaching Hospitals NHS Foundation Trust
2. Ms Diane Matthew

Heard at: Liverpool **On:** 19 February to 1 March 2024 10 days and in chambers on 13 and 14 March 2024.

Before: Employment Judge Aspinall
Ms F Crane
Mr R Cunningham

Representation
Claimant: Mr Macmillan, Counsel
Respondents: Ms Barry, Counsel

CERTIFICATE OF CORRECTION

Employment Tribunals Rules of Procedure 2013

Under Rule 69, the judgment sent to the parties on 26 April 2024 is corrected as set out in block type at paragraph 3 and 384 of the corrected judgment.

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Employment Judge Aspinall
13 May 2024

Case number: 2402734/22

SENT TO THE PARTIES ON
28 May 2024

FOR THE TRIBUNAL OFFICE

Important note to parties:
Any dates for asking for written reasons, applying for reconsideration or appealing against the judgment are not changed by this certificate of correction and corrected judgment. These time limits still run from the date the original judgment or reasons were sent, as explained in the letter that sent the original judgment.

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CORRECTED JUDGMENT

This judgment is corrected under Rule 69
Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013
Corrections are shown in CAPITAL LETTERS

The judgment of the Tribunal is that:

1. The claimant's complaint of unfair dismissal fails.

2. The claimant's complaint of wrongful dismissal fails.

3. The claimant's complaint of discrimination arising out of disability SUCCEEDS IN PART.

4. The claimant's complaint of failure to reasonably adjust succeeds in part.

5. The claimant's complaint of harassment fails.

CORRECTED REASONS

The only correction appears in CAPITAL LETTERS at paragraph 384

Background

1. By a Claim Form dated 22 April 2022 the claimant brought complaints of unfair dismissal, disability and sex discrimination and claims for unpaid notice pay and holiday pay against the first respondent and two named individuals. He entered early conciliation on 10 February 2022 and achieved a certificate on 23 March 2022.

2. There was a case management hearing before EJ Feeney and a draft List of Issues was produced. The matter came to final hearing in person at Liverpool.

The claimant withdrew his sex discrimination complaint and his complaints of direct and indirect disability discrimination at the start of the final hearing. They were dismissed on withdrawal in a judgment dated 20 February 2024. The complaint against a second named individual was withdrawn and dismissed in the above judgment so that the claim proceeded against the first and second respondent as named above.

3. A timetable for the hearing was agreed.

4. The Tribunal invited the representatives to say if any witnesses or party needed any adjustments and reminded the parties that the Tribunal regularly makes adjustments such as screening, or additional breaks or use of aids so as to achieve best evidence and full participation. The claimant, who relies on autism and anxiety and depression taken together as his disability, did not request any adjustment.

The List of Issues

1. The issues for the Tribunal to determine were as follows:

Time Limits

1.1 Given the date the claim form was presented and the effect of early conciliation, any complaint about something that happened before 11 November 2021 may not have been brought in time.

1.2 Were the discrimination complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:

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

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

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

1.2.4 If not, were the claims made within such further period as the Tribunal thinks is just and equitable? The Tribunal will decide:

1.2.4.1 Why were the complaints not made to the

Tribunal in time?

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

2. **Unfair dismissal**

Dismissal

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

2.1.1 The respondent genuinely believed the claimant had committed misconduct;

2.1.2 there were reasonable grounds for that belief;

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

2.1.4 the respondent followed a reasonably fair procedure;

2.1.5 dismissal was within the band of reasonable responses.

2.2 Did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant?

3. **Remedy for unfair dismissal**

3.1 What basic award is payable to the claimant, if any?

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

3.3 If there is a compensatory award, how much should it be? The Tribunal will decide:

3.3.1 What financial losses has the dismissal caused the claimant?

3.3.2 Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?

3.3.3 If not, for what period of loss should the claimant be compensated?

3.3.4 Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?

3.3.5 If so, should the claimant's compensation be reduced? By how much?

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

3.3.7 Did the respondent or the claimant unreasonably fail to comply with it by ~~[specify alleged breach]~~?

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

3.3.9 If the claimant was unfairly dismissed, did s/he cause or contribute to dismissal by blameworthy conduct?

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

3.3.11 Does the statutory cap of fifty-two weeks' pay or [£86,444] apply?

4. **Wrongful dismissal / Notice pay**

4.1 The claimant was entitled to the statutory minimum notice period of 12 weeks.

4.2 Was the claimant paid for that notice period?

4.3 If not, can the respondent prove that the claimant was guilty of gross misconduct which meant that the respondent was entitled to dismiss without notice?

5. **Discrimination arising from disability (Equality Act 2010 section 15)**

5.1 Did the respondent know, or could it reasonably have been expected to know that the claimant had the disability?

The claimant relies on the combined impact of autism, anxiety and depression

From what date?

5.2 If so, did the respondent treat the claimant unfavourably in any of the following alleged respects:

5.2.1 Being subjected to attendance management process for sickness absence from 12 Mar 2020 (GoC para 76(b)(i))and escalation to a stage 3 sickness absence meeting and again on 19 Jul 2021 for absence.

5.2.2 *withdrawn*

5.2.3 Being subjected to a Final Written Warning for 18 Months from 6 Jul 2020 in relation to the criminal conviction;

5.2.4 Being investigated in July 2021 for the 25 June 2021 incident

and Ms Matthew escalating the matter to a formal disciplinary;

5.2.5 Not being able to practice as a pharmacist on his return from sick leave in August 2020 (GoC para 76(b)(ii)), when C says there was no regulatory bar to his doing so (pp678a-d);

5.2.6 *withdrawn*

5.2.7 the unfavourable measures that risk assessment of 18 January 2021 led to which C considered humiliating: namely C being assigned portering duties;

5.2.8 not being permitted to take unpaid leave instead of undertaking the portering duties.

5.3 Did the following things arise in consequence of the claimant's disability:

5.3.1 the claimant's sickness absence between 10 April 2019 and 10 Aug 2020;

5.3.2 the Claimant suffering emotional overreaction in response to stressful situations, namely the claimant's reaction when challenged during the car parking incident of 25 Jun 2021, (GoC para 34(c-d);

5.4 Has the claimant proven facts from which the Tribunal could conclude that the unfavourable treatment was because of any of those things?

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

5.6 If not, was the treatment a proportionate means of achieving a legitimate aim? The respondent says that its aims were:

5.6.1 Encouraging good attendance at work through the application of the absence management process (5.2.1);

5.6.2 Ensuring the safety of the Claimant, patients and staff (5.2.2, 5.2.3, 5.2.4, 5.2.5);

5.6.3 Ensuring adherence to good standards of behaviour at work **(**5.2.2, 5.2.3, 5.2.4)

5.6.4 ensuring compliance with GPhC requirements (5.2.5);

5.6.5 discharging R's duty of care to C (5.2.5);

5.6.6 ensuring C was able to fulfil all aspects of his role to the requisite standard (5.2.5).

5.6.7 Ensuring that the Respondent was able to conduct a disciplinary investigation in a timely manner 5.2.8);

5.7 The Tribunal will decide in particular:

5.7.1 Was the treatment an appropriate and reasonably necessary way to achieve those aims?

5.7.2 Could something less discriminatory have been done instead?

5.7.3 How should the needs of the claimant and the respondent be balanced?

6. **Reasonable Adjustments (Equality Act 2010 sections 20 & 21)**

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

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

6.2.1 Applying a multistage absence management procedure and

6.2.2 Applying R's a disciplinary policy;

6.2.3 Not permitting pharmacists to take unpaid leave but to accept demotion when unable to practice;

6.2.4 *withdrawn*

6.3 Did the PCPs put the claimant at a substantial disadvantage compared to someone without the claimant's disability, in that:

6.3.1 He was formally disciplined and placed on an 18-month warning where those with the claimant's condition would similarly be more likely to suffer recurrent incidents during the currency of the warning (namely, the car parking incident of 25 Jun 2021),

6.3.2 and/or C was at greater risk of suffering further periods of absence due to illness and going to a stage 3 hearing in March 2020;

6.3.3 Having to fulfil a humiliating portering role relative to his senior position;

6.3.4 The imposition of a risk assessment in which he had not been consulted?

6.4 Did the respondent fail in its duty to take such steps as ii would have been reasonable to have taken to avoid the disadvantage? The claimant says that the following adjustments to the PCP would have been reasonable:

6.4.1 Amend the trigger thresholds for stage 3 absence management or discount a lengthy period of disability related absence

6.4.2 and/or take account of the impact of C's conditions on his conduct in relation to the car park incident; in particular

6.4.2.1 accept that his condition impacted on his conduct
6.4.2.2 not applied the disciplinary process at all or
6.4.2.3 if applying the disciplinary process, have regard to the impact of the condition on his conduct in relation to sanction and apply a lesser sanction than dismissal

6.4.3 Permitted the claimant to have taken unpaid leave as he requested;

6.4.4 Consulted the claimant as to the appropriateness of any risk assessment and consulted with the claimant about any adjustments.

6.5 By what date should the respondent reasonably have taken those steps?

7. **Harassment related to disability (section 26 Equality Act 2010)**

7.1 Did the respondent do the following alleged things:

7.1.1 Obliging the claimant to work as a porter and be de facto demoted in circumstances where, for reasons related to his disability, the claimant had been unable to fulfil his usual role?

7.1.2 *withdrawn*

7.1.3 Did the first respondent's workplace become a hostile environment in which the claimant's training was halted on 25 June 2021 without reasonable explanation?

7.1.4 Was the first respondent's failure to address either the claimant's grievance or appeal in a timely or adequate manner unwelcome where both related to the claimant's disability related complaints?

7.1.5 Was the claimant's dismissal disability related and unwanted conduct?

7.2 The Tribunal will decide whether it was unwanted conduct.

7.3 Was it related to the claimant's disabilities?

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

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

8. **Remedy for discrimination**

8.1 Should the Tribunal make a recommendation that the respondent take steps to reduce any adverse effect on the claimant? What should it recommend?

8.2 What financial losses has the discrimination caused the claimant?

8.3 Has the claimant taken reasonable steps to replace lost earnings, for example by looking for another job?

8.4 If not, for what period of loss should the claimant be compensated?

8.5 What injury to feelings has the discrimination caused the claimant and how much compensation should be awarded for that?

8.6 Has the discrimination caused the claimant personal injury and how much compensation should be awarded for that?

8.7 Is there a chance that the claimant's employment would have ended in any event?

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

8.9 Did the respondent or the claimant unreasonably fail to comply with it by [specify breach]?

8.10 If so, is it just and equitable to increase or decrease any award payable to the claimant?

8.11 By what proportion, up to 25%?

8.12 Should interest be awarded? How much?

The Hearing

5. The parties had prepared an agreed bundle of 1542 pages over three lever arch files.

6. The respondent's witness Jacqui Ward substituted a witness statement of 90 paragraphs for one of 88 paragraphs by consent.

Oral evidence

7. The Tribunal heard oral evidence from Mr Durrand, the claimant's representative from the Pharmacists Defence Association at the disciplinary and appeal hearing. He gave his evidence in a helpful way.

8. The claimant gave evidence over two days. He gave his evidence in a helpful way.

9. The respondent called 8 witnesses and relied on the witness statement evidence in chief of Ms Sally Proffitt (SP), whom the claimant did not need to question.

10. Ms J Ward (JW) gave her evidence in a helpful way. She was familiar with her own contemporaneous notes of many supportive conversations that she had had with the claimant, particularly during late 2019 and early 2020.

11. Diane Mathew (DM) was guarded in giving evidence. The reason she gave for attending the claimant's home address, uninvited and outside of normal working hours was not plausible.

12. The respondent's other witnesses; Philip James (PJ), Ian Wright (IW), Victoria Young (VY), Hilary Stennings (HS), Amanda Heaton (AH) and Daniel Moore (Mr Moore) each gave their evidence in a straightforward and helpful way. Ms Young took great care to be exact in her responses. Ms Stennings did not have a good recollection of what she had seen or not seen in arriving at her decision to dismiss but was robust as to her rationale for dismissal.

The Facts

13. The claimant started working for the respondent on 1 June 1999. At the time of the matters complained of he was a Band 7 Pharmacist. His manager was JW and her manager was MM and her managers were two Deputy Chief Pharmacists, later JP and VY, and the Chief Pharmacist was DM.

14. The claimant's practice was regulated by the General Pharmaceutical Council GPhC. For the purposes of this judgment the Tribunal accepts that pharmacists have to maintain their position on a register held by GPhC and do this by submitting proof of their continuing professional development. The claimant was required to submit his CPD statement by 31 October each year and if he did not do so would be removed from the register from 31 December of that year. GPhC had discretion, if someone was off ill or unable to engage in CPD, to adjust the CPD submission requirement or give exemption. In 2020 GPhC, in response to the pandemic, there was a lesser CPD requirement for all pharmacists.

<u>April 2019 Absent from work anxiety and depression</u>

15. On 10 April 2019 the claimant began a period of sickness absence for psychological symptoms. His managers referred him to OH.

<u>17 July 2019 OH meeting</u>

16. The claimant attended a meeting with Dr Hadland who reported on 17 July 2019 that the claimant's psychological symptoms meant that the provisions of the Equality Act applied to the claimant. The claimant was not fit to return to work and Dr Hadland arranged a follow up appointment. Welfare meetings took place on 21.6.19, 30.7.19, 2.8.19.

<u>25 September 2019 WM meeting</u>

17. The claimant met with JW. He was still off sick and awaiting referral for diagnosis and treatment of psychiatric and orthopeadic issues. The orthopaedic issues have not played any part in the issues in this case and are not mentioned further in this judgment. At the meeting it was agreed that the claimant would be contacted by telephone not letter. He had told JW that he found lots of correspondence about medical appointments and

referrals difficult to follow.

15 October 2019 WM meeting (p143)

18. The claimant met with JW in the union office at work. He was still unfit for work. He was waiting to be referred to psychiatric services. It was agreed he would speak again to GP about his medication for anxiety and that he would speak to GPhC about validation issues.

19. He was continuing to suffer extreme anxiety that caused a tremor, vomiting, sleeplessness and inability to concentrate. At times he could not even summon the energy to make a telephone call to mental health services. His neighbour had a dog that howled continuously and teenage children that played loud music. He was friendly with his neighbour and had a good relationship with her and did not want to raise the noise with her. This exacerbated his anxiety. He had for many months prior to going off sick been avoiding going home because of the discomfort and distress the noise caused. Further, there was a residential home nearby which housed patients with mental health issues. One of the patients would sit in a car and honk the horn loudly and repetitively. The noise was an issue for all of the neighbours but the claimant was particularly sensitive to it.

The 19 October 2019 incident at the nursing home

20. On 19 October 2019 after two nights of no sleep and extreme anxiety and noise sensitivity there was an incident at the residential home which the claimant says was noise related and sent him “bonkers” and which resulted in his being arrested and charged. He subsequently pleading guilty and was convicted of offences.

28 October 2019 catch-up meeting (p144)

21. The claimant told JW about the incident at the nursing home. He said he had been arrested for aggression and had had a bad week. She recorded in her note of the meeting that he was exhibiting classic symptoms of severe depression. She found him very emotional during the meeting and recorded that he was experiencing insomnia and anxiety.

22. JW raised his GPhC position with regard to submitting his CPD by 31 October and the claimant told her he had filled out the exemption form and needed to upload the evidence to achieve exemption from 2019 CPD requirements for revalidation. On 19 November 2019 JW referred him to OH. JW noted on the referral that the claimant had been seen by a mental health practitioner who had diagnosed severe depression.

29 November 2019 catch-up meeting (p149)

23. Again the claimant spoke with JW. He was tearful, anxious and stressed and told her he was due in court next week in relation to the criminal charges. He told her the detail of those charges. He shared with her that his family were in touch. He raised that noises at his home, which he had found difficult, had reduced.

2 December 2019 catch up meeting with JW

24. On 2 December 2019 the claimant told JW that he had not told the GPhC of his arrest and the incident on 25 October 2019. His plan was to tell them the following week after his court hearing. He had told GPhC of his mental health absences. He had been communicating with GPhC about the need for revalidation to remain on the professional register and the usual requirement to demonstrate Continuing Professional Development. He had now paid his fee to stay on the register and was not required to produce evidence of CPD for 2019 as he had been off sick for most of the year. JW agreed to delay the next WM meeting, that a senior manager had agreed to delay the meeting and that JW would inform HR of that decision.

25. On 4 December the claimant met with JW and agreed that DM would be his emergency contact whilst JW was on leave. DM then helped the claimant to complete a declaration form to inform GPhC of the incident. The claimant pleaded guilty in the magistrates court in early December and he was referred up to the Crown Court for sentencing.

26. On 6 January 2021 the claimant received a suspended custodial sentence and was placed under curfew with electronic tagging for three months.

27. DM prepared a document to commission a disciplinary investigation into the claimant's criminal conviction. She set out the full allegations of gross misconduct that were to be investigated. She did not send it that day. She consulted HR on 7 January 2020 but did not inform the claimant of the commissioning of the investigation at that time.

<u>8 January 2020 Welfare Meeting (p157)</u>

28. At this meeting with JW the claimant told her that as part of the criminal process he had been seen by a psychiatric nurse who had suggested that he may have autism. The claimant was very distressed at the meeting with JW, just two days after his sentence. JW was so concerned for him that she arranged for him to be seen by the OH nurse that day. He saw nurse CE that day. He was tearful, confused and mentally unwell.

29. It was agreed at the 8 January meeting that all management meetings would be put on hold as the claimant was too unwell to participate in them.

30. The claimant was frustrated that what he needed was urgent mental health referral but his GP would not refer him and OH could not prescribe nor expedite counselling for him. Nurse CE spoke to a counselling provider for the claimant to try to expedite treatment for him but without result. On 8 January CE wrote

I would suggest he is not fit to attend a meeting with management and HR for the next few weeks

31. JW prepared a letter recording the content of that meeting but did not send it as the claimant was so unwell. He was not told at that meeting that his absence was being managed under the AMP and that the next stage would be to go to a hearing as a result of which he could be dismissed. He was not told that DM had prepared a document to commission a disciplinary investigation because of his criminal offences.

32. At around this time articles appeared in the press about the claimant's

criminal case. There was a staff meeting at which DM referred to the press interest and instructed staff not to talk about it. The claimant remained off sick due to anxiety and depression. His fit note expired on 30 January 2020. On 28 January 2020 JW asked OH if she could send the 8 January letter she had drafted to him. Nurse CE replied that it m*ay be worth waiting for next week.* She said perhaps JW could meet with the claimant before the meeting with Dr Hadland which was scheduled for 3 February 2020.

31 January 2020 catch up meeting with JW

33. The claimant met with JW. She enquired about GPhC and the claimant said he had no further contact from GPhC about fitness to practice. He told her his severe depression was the problem but that he was feeling slightly better on changed medication and had had contact from the Autism Assessment Centre (ASC).

34. On 31 January 2020 IS from HR emailed JW and CE to say that the claimant's sick pay entitlement would expire in April 2020 and she recorded that management had already informed the claimant that the respondent could not support his employment indefinitely. The email said

Had it not been for the recent incident {we} would most likely have been taking the matter to a hearing soon to consider the possible termination of his employment on health grounds.

The email continued that it was important to progress on the AMP.

Occupational Health Referral (p174)

35. Dr Hadland saw the claimant on 3 February 2020 and decided that he was unfit for any work at that time and too unwell to be able to give a return to work date. The claimant was finding the actions of the respondent intrusive and oppressive but he did not say this to Dr Hadland. He did not say that he wanted the processes to all be put on hold until he recovered sufficiently to be able to deal with them. The OH report again said that the Equality Act applied. Dr Hadland quoted IS's email which must have been shared with him saying that it was important to progress the AMP. Dr Hadland said the claimant was fit to attend meetings with management but should be accompanied.

36. The claimant received letters from GPhC about his mental health and his criminal conviction. GPhC informed him that it would conduct an investigation to. They wanted him to speak to a psychiatrist of their nomination. They explained that the investigation could take up to six months.

7 February 2020 Welfare Meeting p178

37. The claimant met with JW to discuss the latest OH report. Dr Hadland had said that the claimant was unfit for any work and that he could not give a return to work date at that time. The claimant told JW he was due to have his autism assessment on 25 February 2020 and a mental health matters assessment (for counselling) on 27 February 2020. The claimant said he was not finding the OH referrals useful as what he needed was someone to expedite his access to a mental health assessment and to counselling. The

claimant said he had arranged to see a private psychiatrist and had changed GP.

38. At the meeting the claimant told JW that he had had a letter from GPhC saying he was being investigated. JW told him that she understood GPhC were saying that they had not been informed of the conviction. The claimant said he had done the declaration in December and they were investigating him. He said he understood that if the conviction was due to health reasons then he could not be removed from the register.

39. The claimant was not told at that meeting that management were preparing to move to a dismissal hearing because of his absence. JW made notes of the meetings and MM put a handwritten note on the top saying *Fitness to practice regarding conviction?*

DM considering suspension

40. DM prepared a decision rationale document to consider suspension of the claimant. The rationale included:

"Although the incident occurred outside work there are concerns about the nature of the incident and the need to assess / assure the safety of the employee, patients and staff before a return to work is considered."

41. DM said that she considered a further incident unlikely but that if there were one it could result in a custodial sentence. DM thought it not possible to move the claimant to another work area as an action short of suspension. She thought that his practice could be limited and supervised but that:

"Due to his length of service from work his practice would need service updates, supervision and competency assessment as per Departmental Standards."

42. She included that the claimant's fitness to practice was under consideration by GPhC.

8 February 2020 Private Medical Assessment (p179)

43. The claimant, having tried alternate routes to get counselling or other mental health support on the NHS, now consulted a private psychiatrist Dr Al-Asady. Dr Al-Asady changed the claimant's medication and prepared a report letter which the claimant shared with the respondent. The letter cited difficulties the claimant had had with noises, both loud music and dog barking, from his next door neighbour preventing him from sleeping and making him feel vulnerable. The claimant reported his history of depression with occurrences in 1997 and 2005. Dr Al-Asady found him to be anxious, worried and emotional during the consultation when describing recent events. Dr Al-Asady diagnosed recurrent depressive disorder currently of moderate severity. He changed the claimant's medication and recommended CBT. He recommended a follow up in six weeks' time.

44. The claimant had taken other steps to aid his recovery including changing GP and seeking out alternate counselling (which was not forthcoming).

17 February 2020 WM

45. The claimant was accompanied by workplace colleague TK at a meeting with JW and IS. JW prepared a letter setting out the content of the meeting. It recorded the claimant's absence history and Dr Al-Asady's diagnosis of recurrent depressive disorder and his imminent assessment for autism on 25 February 2020.

46. The claimant said he did not think the criminal incident would have occurred if he had been well. He said he was recovering and hoping to get back to work soon. IS told the claimant that they had intended to discuss his absence and potential incapability dismissal at the previous meeting but had decided not to because of concerns about his mental health. IS said it was now necessary to refer the matter to a hearing to decide whether his employment should be terminated on health grounds. She said a report would be prepared setting out the details of his long term absence. The letter sent by JW after the meeting recorded its content and repeated:

    "*You will have a copy of the report in advance and will be entitled to attend the hearing to give your side of the matter. You will be entitled to be accompanied at the hearing."*

47. JW then informed the claimant, after consulting IS, that the claimant's actions in the criminal incident may fall under the Trust's Disciplinary Policy and that there would be a process but that neither JW nor IS would be involved in the process but that DM as Chief Pharmacist would be in touch about it. JW said that she had not wanted that news to set the claimant back in his recovery and that is why she had chosen to tell him about it face to face so it was not a surprise to him.

<u>The AMP</u>

48. JW prepared a management statement of case for the AMP hearing. The management statement of case included a full sickness absence history, the claimant had had no significant absence prior to April 2019, and a record of the welfare meetings and OH referrals. It stated that the disability provisions of the Equality Act 2010 are likely to apply. It set out that the claimant had attended a private appointment a consultant psychiatrist was seeking out counselling and CBT. The statement of case concluded:

    "JB was involved in a serious police incident in October 2019, this incident and subsequent court appearances had an adverse impact on his mental health and recovery. This limited the opportunity to meet with him and discuss his ongoing long-term absence. However, since the conclusion of the police action January 2020, it appears that JB is now actively seeking medical support and counselling and is beginning to make progress towards recovery."

49. The statement of case also said that JB was assisting the GPhC with respect to registration related matters.

50. On 26 February 2020 DM wrote to HR seeking advice and saying that she had a member of staff *who will need to be investigated under the Disciplinary Policy following his conviction in January.* DM went on to say that there was a potential that the claimant could return to work in April and she said:

"Absence on ill-health grounds has priority over suspension, in the event that he is deemed fit to return to work though we may need the option to suspend pending completion of the investigation. I have completed the suspension decision rationale attached. As a director and professional lead I would appreciate your view on the content please."

27 February claimant gets notice of potential dismissal

51. JW's 25 February 2020 meeting letter was sent. The claimant received the letter which referred to a potential dismissal on health grounds. The letter also referred to a potential dismissal on disciplinary grounds because of the October incident.

52. On 27 February 2020 there as a further welfare meeting. The claimant said that his autism assessment had been cancelled as the clinician was ill and that his mental health matters review to access counselling had also been cancelled. The claimant said he was feeling better and was planning to ask the GPhC if he was able to return to work whilst the investigation team was ongoing. He informed JW that his electronic tag would be removed on 5 April 2020 and that he hoped to have it removed before returning to work. The plan at that meeting was a return to work before the end of April 2020. JW explained the format of the AMP stage III hearing which was due to take place.

53. The claimant's autism assessment took place on 2 March 2020.

4 March 2020 attendance at claimant's home

54. On 4 March 2020 DM attended the claimant's home without prior agreement outside of office hours and knocked at the door. The claimant answered the door and was shocked to see his manager's manager's manager, the Chief Pharmacist, on the doorstep. He was wearing underwear and a T shirt and was embarrassed both that he was not fully dressed and that his undress revealed the electronic tag on his ankle. He asked DM to step inside so that he could not be seen from the street. DM told him she was delivering a letter inviting him to a disciplinary investigation meeting and that he would be suspended once he had a return to work date.

55. The letter from DM invited the claimant to a disciplinary process investigation meeting to look into the impact of the criminal conviction at work. DM had decided to commission the investigation in January but had not been able to send the letter because OH had said he was too unwell. She had consulted AC about the process on 26 February because she was worried that he might be returning to work in April. The letter invited the claimant to a meeting on 11 March 2020 in her office to discuss the investigation and told him of his right to be accompanied at that meeting.

56. On 11 March 2020 the claimant again saw Dr Hadland. Dr Hadland reported that the claimant reported an improvement in his psychological symptoms. Importantly, the report said that the claimant would be likely to return to work in the coming weeks.

57. JW updated her management statement of case document for the AMP hearing to include the 11 March OH report to reflect a likely to return to work in the coming weeks.

58. The respondent's Managing Sickness Absence (AMP) policy contained provisions for managing intermittent sickness absence and also for managing long-term sickness absence. The long-term sickness absence provisions included a requirement for welfare meetings to take place monthly after the first month of absence.

    "The purpose of the (welfare) meeting is to provide support to the employee for a return to work and the meeting should be conducted sensitively….

    If after the third welfare meeting a return to work date has not been agreed, and workplace health and well-being advice indicates that a return to work is not going to be in the foreseeable future then a meeting must be convened to consider the impact of the ongoing absence on the employee's employment with the Trust.

    If there is no advice at this time to indicate that the individual will not return in the foreseeable future, the four weekly welfare meetings should continue until a return to work date is agreed or advice is received which confirms a return to work is unlikely in the foreseeable future, in which case a meeting must be convened to consider the impact of the ongoing absence on the employee's employment with the Trust.

59. The policy provided information on Termination of Employment on the Grounds of Ill-health. It said:

    "If a return to work date is not agreed and/or suitable redeployment cannot be found, a final review of an employee's case must be carried out under the following circumstances:

    - *following the third welfare meeting or at any point…. If the health and well-being team advised the employee is unfit for the foreseeable future*

    - *in all other cases and where employees are entitled to 6 months full pay in six months half pay, at the very latest, 12 weeks prior to expiry of Occupational Sick Pay*

    ……

    An appropriate manager with the power to dismiss under the Trusts Disciplinary Policy must be present and make the decision. The employee will be encouraged to attend the meeting accompanied by the trade union representative or workplace colleague and are HR Business Partner will also be present to support the manager chairing the meeting. Both manager and the HR Business Partner will have had no prior involvement in the case.

    The outcomes of the meeting will include one of the following options

    - *where medically the health and well-being department advised a member of staff is likely to return by specified date there may be a recommendation to return to work….*

    - *Where the health and well-being department advised that medically the employee is unlikely to return to work in the foreseeable future may be a recommendation termination of contract. The employee will have the right of appeal against any decision made to terminate the contract."*

60. The Policy contains separate guidance for Managing Sickness Absence and the Equality Act 2010. It provided that where an employee has declared an underlying condition and OH has confirmed that the condition is covered by the Equality Act then the managers:

    "must consider whether or not the condition contributed to any of the absences in the employee's absence record and must then go on to consider are there any adjustments suggested in order to support the employee to maintain his or her attendance."

The guidance provided the employer:

> *"must consider making reasonable adjustments for disabled employee if it becomes aware of their disability and an employee sickness record or delay in returning to work is linked to their disability*.
>
> *Reasonable adjustments can include amending the triggers set out in the section above (this must only be undertaken if health and well-being advised the nature of the condition means that the standard of attendance expected should be amended, and in agreement with an HR Business Partner)."*

61. Provision therefore existed for reasonable adjustment to the triggers at each stage of the Managing Sickness Absence Policy.

<u>12 March 2020 suspension</u>

62. On 12 March 2020 the claimant attended the investigatory meeting with DM at her office, she was supported by KH from HR and he by his workplace colleague TK. DM told him that during his welfare meetings he had disclosed criminal convictions and that she considered that they amounted to 4 separate allegations of gross misconduct. DM cited the disciplinary rules that she felt applied; Rules 12,19, 21 and 24. She said that because of the serious nature of the allegations the claimant would be suspended. She noted that he remained unfit for work and the claimant told her that he was due to see his psychiatrist again in two weeks, that he had been seeing OH and that he was hoping to return to work. DM raised GPhC and said she understood that they were pursuing two separate paths in relation to his fitness to practice; his mental health and his criminal convictions.

63. DM then read through the suspension checklist. She explained that sickness absence would override suspension so he would remain on sick pay but that he was suspended with immediate effect from his post as clinical pharmacist to enable a full investigation to take place and would remain suspended until the investigation was completed. She gave him a copy of the Disciplinary Policy.

64. On 12 March 2020 DM put the content of the meeting and the terms of the suspension in a letter to the claimant. It said that it was hoped the investigation would be completed in as short a time as possible. It directed the claimant to the Trust's Freedom to Speak Up Guardian JH.

65. There was also the AMP underway. The claimant received a formal invitation letter to the Stage 3 AMP hearing dated 18 March 2020 from JW. It set out his right to be accompanied and enclosed the JW Management

Statement of Case. The letter advised him that a possible outcome of the hearing was termination of employment.

26 March 2020 Stage 3 Attendance Management Hearing

66. The hearing took place on 26 March 2020. PJ chaired the hearing and was supported by KH from HR. The claimant was accompanied by TK. JW presented the management statement of case, supported by IS. The claimant had the opportunity to ask questions and make submissions. He had prepared and handed in a written submission. He said that if he had had help managing his mental health the October incident would not have happened. He described the difficulties he had had in accessing mental health support. He set out what he had done to gain support including changing GP, trusting CE who had said she would get him face to face counselling with Care First through the respondent, consulting a private psychiatrist and getting his medication changed and getting himself assessed for Adult Autism Spectrum Condition Disorder. He explained how he had engaged in the regular contact with pharmacy management, HR and OH. Included in the pack that PJ saw were the claimant's letters to GPhC and his letter from Dr Al-Asady his private psychiatrist. He said in the letter to GPhC, which PJ and HR saw.

"Perhaps if anyone had listened to what I was trying to tell them last summer I would have been on an appropriate medication regime and wouldn't have got into the trouble in October when I was still very unwell."

67. The claimant's submission said that he had worked for the Trust for over twenty years and been proud to do so and had had a good sickness absence record. KH asked if he had thought about any adjustments needed for a return to work and the claimant said that he:

"Found high pitch noises an issue….OCD tendencies….."

68. The hearing adjourned for half an hour then resumed. PJ decided not to dismiss. He said you will not be dismissed today. He noted the psychiatric report that said a return to work could help the claimant's recovery. He said that if the claimant did not return to work there would be another final stage hearing. He also referred to the "parallel" disciplinary process which was outside of his control but might mean the claimant could not return in his own role and might lead to redeployment. PJ wrote to the claimant on 27 March 2020 to confirm the outcome and said:

- The claimant was not dismissed
- He would need to return to work or there may be another Stage 3 hearing
- Discussions with line manager should be held to determine if the claimant could actually return to work because of the parallel process
- That an outcome was needed from GPhC re the claimant's fitness to practice

69. There was a plan for a further OH consultation on 30 March 2020. The OH report found the claimant fit to return to work and suggested a phased return to work and supportive weekly meetings. It said:

"However, I note his return to work is likely to be delayed until further information is provided by GPhC…."

70. This was not information that had come from the claimant who knew himself to be registered and exempt from 2019 CPD requirements and under investigation for fitness to practice but with no current conditions or restrictions on practice.

Return to work and suspension

71. JW and KHg from HR agreed following a request from the claimant that he would return to work on 14 April 2020 but that he would be suspended on full pay. He remained suspended from 14 April 2020 until and his suspension was reviewed by DM fortnightly and letters extending his suspension sent on Suspension letters extending suspension 414 441 445 468

ASC report

72. On 24 April the ASC Diagnostic Service reported that the claimant had a diagnosis of autism spectrum condition. The report outlined

- The claimant has difficulty with change.
- He is sensitive to noise particularly high pitched noise and he reported a lot of external noise at work. Noise can lead to him feeling overwhelmed because of sensory processing difficulties.
- His language is good and he has excellent communication skills. He has a good sense of humour but is aware he can be perceived as being blunt so takes care in case his words are taken the wrong way. He usual social gestures including smiles and is good at talking to people. He has limited social imagination skills. He shows good understanding of his emotions and is able to relay how he feels to other people.

73. The report provided recommendations and recommended reasonable adjustments including:

- Ensure background distractions are minimized particularly background music or noise.
- His communication can change if he is feeling anxious or uncomfortable in an interaction, do not pressure him to provide an answer, allow him to respond in his own time. If he is feeling overwhelmed reduce the complexity and allow processing time.
- John benefits from a quiet working environment or one where he is in control of any noise.
- Allow him to plan in advance and maintain routine.

11 ay 2020 occupational health report

74. This was a telephone consultation during the pandemic lockdown. The report set out the diagnosis of autism spectrum condition and that the

claimant remained suspended from work and awaiting a decision from GPhC as to how they would respond to his convictions. Dr Hadland reported that the claimant was fit to return to work.

75. JW had been keeping in touch with the claimant and was able to update IS from HR on 18 May 2020 that she had had a good chat with the claimant who was eager to get back to work and felt his mental health was improving.

76. DM then appointed SP to conduct a disciplinary investigation into the claimant's criminal conviction. DM prepared an investigation plan document setting out the terms of reference which included:

    "to undertake a thorough and robust investigation into the above allegations against JB, obtaining relevant information to establish the issues of fact in line with the disciplinary policy

    to meet with JB and any other relevant parties to obtain information as appropriate, including confirmation of the outcome of the court hearing

    …

    The purpose of the report will be to set out the facts as ascertained by the investigation team and will be used to determine the next steps and whether the case should proceed to a disciplinary hearing."

77. SP contacted JW and obtained a statement from her and then contacted the claimant on 19 May 2022 to invite him to an investigatory interview. The meeting took place on Tuesday, 26 May 2020. The claimant attended with his workplace colleague TK. The interview was conducted by SP who was supported by ER from HR. The claimant gave a detailed account of the incident on 19 October 2019. He gave the broad context of having been off work sick from April 2019 with anxiety and depression and the immediate context of noise of a car horn sounding repetitively. He gave details of contact with occupational health and the support he had had from DM in informing the GPhC of his convictions and ill-health. He said that GPhC were running their own investigation and wanted an independent medical assessment but that he did not think the GPhC position prevented him coming back to work. He gave SP a copy of the ASC report. He said that the report showed that he had issues with noise which is a typical indicator of having autism and that he had never been able to deal with high-pitched noises. He also gave SP the statement that he had submitted to the AMP hearing.

78. On 27 May 2020 JW had a further catch up meeting with the claimant who again said that he was keen to return to work. JW said that she would go through the autism report to look at adjustments. The claimant consented to the pharmacy team seeing the report but said he didn't want people wasting time adjusting to all of the recommendations in the report.

79. On Thursday 28 May 2020 the claimant sent DM, in response to her chasing him, a letter he had from GPhC saying that there were no restrictions on his practice.

<u>4 June 2020 decision to proceed to disciplinary hearing</u>

80. DM received SP's investigation report into the criminal conviction. It was open to her to decide either: no case to answer, informal action or disciplinary action. The report concluded that the claimant had been mentally unwell at the time of the October 2019 incident, that noise had been a factor in the 2019 incident, that he had since been diagnosed with autism and that part of his condition was an adverse reaction to noise. SP recorded that the claimant had said that it was very out of character for him to have behaved that way, that it had been a result of his mental ill-health and that he was very disappointed that the incident had occurred. SP concluded by asking DM to consider all of the information and advise whether the matter needs to be referred for consideration at disciplinary hearing.

81. DM decided there was a disciplinary case to answer. She wrote to advise the claimant of this on 8 June 2020 and to convene a disciplinary hearing to take place on 17 June 2020. The claimant was advised of his right to be accompanied and told that the hearing would be decided by IW, Associate Director of Estates and Facilities and that she, DM would present the management side case. She enclosed the management side documentation and asked for the claimant to provide any documentation to be included to her at least five days before the hearing. The letter advised the claimant that if the allegation was proven disciplinary action may lead to dismissal. She set out the following allegations derived from the Disciplinary Rules

    <u>Gross misconduct</u>

    12. Criminal conduct at work or other than at work which may have relevance to the duties and tasks employee is required to perform and/or impact on professional registration.

    19. Engaging in activities that may bring the Trust into disrepute, including the use of the Internet and social networking sites.

    21. Physical or indecent assault on any person whilst on or off duty and or on the trust premises.

    24. Serious or repeated breach of Trust Values and Behaviours.

17 <u>June 2020 the disciplinary hearing took place.</u>

82. The decision maker was IW. The documents before the panel included; the transcript of the interview with the claimant, the statement from JW, the ASC report, the personal statement from the claimant which had been used at the AMP hearing, and the following character statements in support of the claimant.

    a. a staff nurse on intensive care unit described him as a pleasure to work with

    b. neighbours TM and SM who said he was a good neighbour and the first to offer help and assistance to anyone in need. They found him to be a quiet well spoken man who's been unwell for the best part of the year and described how they and others had done as much as they could to support and help him.

c. neighbours W, E and AK who said they been shocked to hear about the criminal matters, they had been neighbours for over 10 years and found to be an exemplary member of the community. They described him as a thoroughly decent and kind man who had been through a traumatic time.

d. Friends C and NJ described him as courteous, respectful and honest and held him in high regard as a man of integrity.

Communications with GPhC were also included in the pack as was Dr Al-Asady's letter and a letter detailing the criminal convictions.

83. For some reason, DM, not SP who had prepared the report, presented the management statement of case. The claimant described how he had flipped in October 2019 and then been badly advised by his solicitor and barrister and let down at the last minute for representation so that he pleaded guilty to avoid the risk of a custodial sentence and that he had not had medical evidence to submit in mitigation at the time but now had his autism diagnosis and that his anxiety and depression were now well controlled and that it could be sure there would be no repetition of the conduct he had exhibited in October 2019.

84. 6 July 2020 disciplinary outcome letter

85. On 6 July 2020 IW wrote to the claimant to say that he had decided not to dismiss but to impose a first and final written warning which would remain on his record for 12 months. IW said:

"…this was clearly a significant incident and one which could serve to undermine your employment with the Trust and it was clear that you have acted in a way which would breach the Trust disciplinary rules. Accordingly, serious consideration was given to terminate your employment on the grounds of gross misconduct. However, your long service with the Trust was considered …as was the evidence that this incident was linked to an undiagnosed and uncontrolled medical condition. This condition has since been diagnosed treated and therefore appears to now be well controlled which makes any repetition unlikely as well as providing further mitigation."

86. The claimant was informed of his right to appeal but did not appeal this outcome.

GPhC write to the respondent

87. On 30 June the respondent received a letter from GPhC requesting information. DM replied on 14 July 2020 providing factual responses but also offering further information expressing reservations as to whether the claimant had sufficiently recovered from his illness to be able to cope with work, whether the claimant had sufficient insight into his underlying health conditions to be able to recognise signs of symptoms returning and develop coping strategies, as to what adjustments might be needed and whether they would be reasonable, as to the technological changes that had occurred since the claimant was lasting work and the level of support needed to provide complete training and competency requirements. Also express the reservation that there may be:

"potential or persisting triggers that might put the claimant at risk of future actions that could lead to a custodial offence or further disciplinary action."

88. DM asked what position would the GPhC take in relation to the two fitness to practice concerns, health and disciplinary, and whether the claimant's registration status would allow him to practice as a pharmacist. She said this was a complex situation and that the Trust had significant concerns but that the Trust would always wish to support its employee where appropriate and reasonable to do so.

89. On 14 July 2020 DM also wrote to invite the claimant to a return to work discussion which took place by Teams on 22 July 2020. MM was present. DM confirmed that the claimant's suspension was lifted. They discussed the GPhC position. DM was concerned about the view of the professional body. She was concerned that there were outstanding issues in relation to the claimant's mental health and revalidation and the criminal matter.

90. The claimant accepted that having been out of pharmacy practice for so long he would need retraining. He raised that he would like to be retrained on the pharmacy computer system Lorenzo and on the patient management system EPMA. They discussed the recommendations of the latest OH report that said the claimant should have a phased return and weekly supporting meetings. DM said that the claimant would need to return to work at Warrington, not Halton. He had been working at Halton before he went off sick and felt that was a quieter place of work. He had been hoping to return to Halton but did not feel, whilst he was still on suspension, able to negotiate or ask for anything other than what DM said. DM said there would need to be a risk assessment for his return to work. The claimant explained that the only adjustment he felt he would need was the robot alarm situated in the pharmacy to be relocated so as to minimize his exposure to the repetitive alarm noise. DM repeated that he contact Access to Work for headphones.

91. DM wrote to the claimant setting out the content of their return to work discussion but failed to include his request for a reasonable adjustment in *relocation* of the robot alarm and refers only to it in terms of his contacting Access to Work.

92. It was agreed the claimant would return to work in a non-patient facing role. He was given duties in the clinical office for pharmacy, reviewing policy documents. He found that a welcoming environment and was pleased to have the company of others. He was then allocated to a small office, without a telephone, off the main corridor. He made no complaint about the office allocation at the time, still feeling he was at risk at work but he was concerned that DM was seeking to isolate him from colleagues. He did raise there not being a phone and nothing was done.

93. There was then agreement that the claimant would take leave from 23 July 2020 to 7 August 2020 and return on 10 August 2020.

<u>12 August 2020 return to work meeting with JW</u>

94. A staged return was agreed and the claimant accepted that he needed re-training and that competency assessment would have to be undertaken. Everyone understood this to be being given 500 items to dispense over a

2-3 week period with a requirement for a high degree of accuracy. If the accuracy standard was not met a further 100 items would be required to be dispensed to meet the standard. The claimant accepted that he would need to read Standard Operating Procedures (SOP) before beginning the competency assessment and that might take three days.

27 August 2020 Catch up meeting

95. JW met with the claimant who had returned to work the previous week on staged return and was doing Controlled Drug (CD) Audits and reviewing the SOPs prior to commencing competency assessment.

21 September 2020 catch up meeting with JW

96. The claimant was working a full week by 21 September 2020 and finding he was very tired towards the end of the week. He was using annual leave to take Fridays off. He was still doing CD audits and reading. When asked he said he felt the department were doing all they could to support him at that time.

1 October 2020 catch up meeting with JW

97. The claimant told JW he was shocked to have heard from GPhC that they had referred his case to senior lawyer. He was still doing CD audits and had not started his competency assessment. He said he was getting "snow blindness" with the CD audits and reading as it was monotonous. She suggested he take some annual leave. They agreed there would be a risk assessment so as to get the claimant back into working in (following competency assessment) in his professional role in the dispensary and an OH referral, the aim being to start the claimant on his training (prior to competency assessment) back in the dispensary on 12 October 2020.

9 October 2020 catch up meeting with JW

98. The claimant had received a letter from GPhC telling him that it would convene a Fitness to Practice hearing in view of his conviction but that it would not be until some time next year. He had a deadline in December for submitting his documents for that hearing. He was very upset at this news. It led to an exacerbation of his anxiety and depression so that he was not fit for work again for a short period from 9 October 2020.

12 October 2020 catch up meeting with JW

99. The claimant was very anxious at this meeting and still off sick. JW encouraged the claimant to talk to his counsellor. She provided him with details of the wellbeing hub and told him she would ask OH what tasks he was fit to undertake. He made contact with the home treatment team and had visits from them whilst off sick. They talked for over 45 minutes.

15 October 2020 catch up meeting with JW

100. The claimant returned to work and met with JW. This was an hour long meeting. The claimant was upset and even said that he was having some suicidal thoughts and was not sure he should be doing CD Audits if GPhC thought there was an issue about his fitness to practice. He said that

his anxiety is about the GPhC issue but that he was dreading coming to work to have to complete another CD audit and was weary of that work. The claimant was not put in dispensary to begin training for reassessment. The claimant continued doing CD Audits.

29 October 2020 meeting

101. The claimant met with JW again and again said he was fed up doing CD Audits but was told that it was important to complete one task before moving on to another and she told him he should tell her if the work was unmanageable. The claimant had been attending wellbeing sessions which he was finding helpful.

5 November 2020 catch up meeting with JW

102. JW had spoken to DM and confirmed that there were only two policy documents left for the claimant to read before retraining could begin. They discussed the importance of him completing his tasks on time and not staying late. The claimant asked about taking a period of extended leave to return to Northern Ireland.

103. JW was aware that the October absence meant the claimant would trigger the AMP and she asked KHg at HR about that. She expressed concern because he was disabled and wondered if attendance targets applied to him. She says she wasn't sure where he stood. KHg asked what was the reason for absence, was it his anxiety and psychological symptons. JW said that it was ie disability related. On 12 November 2020 KHg says that his long term absence would be covered under the Equality Act and says she has looked at the OH reports but can't see that. KHg advised JW to progress to stage 1 AMP.

104. On 17 November 2020 the claimant was told that his absence in October had triggered stage 1 AMP and that he would be called to a stage 1 meeting.

105. The claimant applied to have special leave to attend afternoon appointments at the wellbeing hub. It was granted.

Stage 1 AMP meeting

106. On 24 November 2020 the claimant attended a stage 1 AMP meeting with MM who sent a letter that same day recording the outcome. He was told that the respondent had ignored the April 2019 to April 2020 absence. That the Equality Act had applied and therefore the claimant had not progressed to stage 1 following the stage 3 hearing. He was told that he had had five days absence in October 2020. He was told that five days in October triggered the 10 days in any twelve month period.

107. The report said that the claimant was working a four day week using annual leave to reduce his working hours. He had continued to carry out administrative work and had still not restarted refresher training or competency assessment for dispensary duties. OH found him fit to continue at work.

108. JW interpreted Dr Hadland's "carry on as you are" as meaning the

claimant could only do administrative duties such as policy review of CD audits. Dr Hadland had not been asked that. There was nothing to say that the claimant couldn't commence dispensary retraining and competency assessment. JW consulted HR as to whether the claimant's pay at Band 7 pharmacist could continue whilst he was only doing administrative duties.

109. The claimant continued working in November. On 16, 17 November and 20 -21 November he was absent due to an adverse reaction to a COVID vaccination.

110. The claimant returned to work and carried on performing the administrative and audit tasks allocated to him. He was not put back in the dispensary.

111. In January 2021 there was an allegation that the claimant had accessed medical records inappropriately. This came through PALS. The complaint was made by someone known to him from the motor sports world. The claimant had two days absence. He was anxious and vomiting. Return to work interviews were conducted on each occasion. The PALS issue was being looked into.

112. In early 2021 KHg chased updates from the GPhC and was told that updates would not be provided as they were confidential to the claimant. KHg sent the GPhC the outcome letter from the IW disciplinary hearing.

17 January 2021 Catch up meeting with JW

113. On 17 January 2021 JW told the claimant that she did not propose to take any action in relation to the PALS complaint. She discussed comments he had made on social media about the complainant and guided him not to make comments that would be considered unacceptable to the Trust. He said he was struggling with emotional outbursts. 18 January 2021 JW wrote to him to confirm that meeting and to remind him about professional responsibilities and standards and the importance of getting help. She reminded him that he must not be providing medical or pharmaceutical advice whilst he is not practicing.

Risk Assessment

114. On 5 February 2021 JW completed a risk assessment for the claimant which repeated the respondent's requirement that the claimant not counsel patients or colleagues with pharmaceutical advice. He was not undertaking any clinical or patient facing duty. The claimant was still working a 4 day week because his mental health and anxiety caused him fatigue. He was using annual leave, but had now switched his annual leave day to Wednesday.

115. The RA recorded that the claimant was not undertaking clinical or patient facing duties or refresher training or competency assessment because they were

Pending further information from professional body

23 March 2021 catch up meeting with JW

116. The claimant and JW met and he had at this time been given a date for his GPhC hearing on 6 and 7 July 2021. JW encouraged the claimant to continue to use his accumulated annual leave. He had booked leave for the week of his GPhC hearing. He was told he needed to book 60% of his annual leave by October. The respondent was concerned at the amount he was accumulating. There was open discussion about his medication and health. The claimant had still not started retraining in the dispensary but had been doing fridge temperature audits across the site. JW then did an OH referral and asked:

"Can he undertake full time duties or would a temporary reduction in working hours be considered?

Advice re best use of annual leave

Can he return to pharmacist related duties – retraining and competency assessment?"

Would a case conference be useful?

31 March 2021 OH report

117. This was the first time Dr Hadland had been asked if the claimant was fit to do his retraining and competency assessment and he said yes he was. The referral took place on 31 March 2021. Dr Hadland said the claimant was fit to attempt a return to 5 days a week, he recommended the claimant used his annual leave and said:

"There is no medical reason to consider John unfit to restart the training and competency assessment"

118. He did not think a case conference was needed.

13 April 2021 catch up meeting with JW

119. The claimant reported increasing anxiety in relation to the GPhC hearing. It was agreed he would restart a 5 day week, book some annual leave, that timescales would be put in place to start training and:

"John has a responsibility to let us know if noise is affecting his training."

120. The claimant had said, as long ago as April 2019 that the noise of the robot alarm disturbed his work in the pharmacy. Nothing had been done about that.

26 April 2021

121. The claimant had been absent 23 – 25 April 2021 following a car accident and whiplash incident. He met with JW and they agreed they would meet next week and if the claimant wanted they could start with him re reading the dispensing Standard Operating Procedures again prior to starting retraining and competency assessment. The claimant went home sick after being checked out at ED for headache and dizziness.

6 May 2021 catch up meeting with JW

122. The claimant had shared his ASC report with management. He disagreed with a lot of the recommendations. He said again that his main trigger was the robot alarm and that he did not have an issue with the noise from staff.

123. They discussed a forthcoming welfare meeting with HR. The claimant had had an invite letter dated 5 May 2021 from KHg to discuss working arrangements and the contents of the latest OH report.

13 May 2021 HR meeting

124. On 13 May 2021 the claimant, met with KHg and JW. They discussed the ASC report and said they would email OH about any adjustments following that report. KHg again referred the claimant to the wellbeing hub and Access to Work. The claimant told JW and KHg that he felt DM was on his case, that there had been an incident when she had taken him into the office and blocked the door and that she tries to get him to react and that he had felt bullied by her. KHg offered a facilitated discussion or mediation but the claimant did not want to go down that route. They talk about the need to do the RA and the need for the claimant to have coping strategies for his anxiety. At the HR meeting the claimant raised again that the only adjustment he felt he needed was for the robot alarm to be moved to another location within pharmacy.

125. There was a second meeting that day, this time with MM who said a nurse had come to her with concerns for his mental health because of the level of detail he had gone into when talking to her. The claimant said he did not need an urgent referral to mental health. He talked again about the GPhC and his retraining and assessment. He said that as there was a Fitness to Practice hearing still to go ahead with GPhC it may not be worth starting the reassessment now as he may not be able to practice at all going forward.

18 May 2021

126. JW wrote to the claimant setting out the content of the meeting of 13 May with her and KHg. She outlined the process she would follow to complete the RA which would be to take into account the ASC recommendations, OH comment on that report and the claimant's beliefs and feelings. She recorded his concerns about the robot alarm and feeling bullied by DM. Her plan was to do the RA and for him to start retraining.

24 May 2021 OH report 14

127. The claimant met with Dr Hadland again. He was still carrying out audit work but it was recorded that he hoped to start refresher training and competency assessments next week. Dr Hadland suggested contact with Access to Work for support in implementing the recommendations of the ASC report. He noted that the claimant had significant concerns about the report and recommended a reassessment. He also recommended the claimant contact Access to Work.

128. The claimant then had some annual leave and returned on 1 June 2021. JP, a pharmacist colleague, then wrote to him to thank him for the audit work that had been completed and to say that he had to read SOPS

before starting refresher training.

15 June 2021 claimant works in the dispensary

129. The claimant moved back into the dispensary and began an assessment period. He had to keep a log of what he was dispensing and dispense around 500 items and have that log checked for accuracy. If all was well, within acceptable standards of accuracy then the claimant could resume pharmacy role. If the claimant did not meet the accuracy standard then he could be reassessed. The claimant was paired with a pharmacy colleague GD for this process.

130. The next day JW met with him to discuss how he felt about being back in the dispensary. The claimant was pleased to be doing something he was employed to do. He said he had counselled patients. JW told him that he was not supposed to have done that. She escalated that to MM. She also reminded the claimant that he must read the SOPS and be familiar with them before undertaking dispensing. JW wrote to KHg in HR:

"He has not been given a verbal or written warning but I did meet with him in the presence of my line manager to discuss this and once again reiterate that he needs to be aware of his limitations …..and to abide by the restrictions we have put in place."

21 June 2021 Occupational Health Report 15

131. Dr Hadland's report of 21 June 2021 recorded that the claimant had started refresher training and competency assessment. It noted that the claimant had not contacted Access to Work as requested.

21 June 2021 catch up meeting with JW

132. The claimant said he was going to seek reassessment with ASC, as discussed with Dr Hadland, as he did not agree all of the recommendations in the report but that he would leave this until after his GPhC hearing which was imminent. The claimant was working happily on dispensary training full time and was happy to continue. JW asked him again to contact Access to Work, management could not get Access to Work support unless the claimant initiated it, and the claimant said he would look again at their website before deciding whether or not to contact them. He knew that headphones or ancillary equipment was not what he needed. He needed and had asked repeatedly for the robot alarm to be relocated.

133. The respondent had not been able to obtain an update direct from GPhC for confidentiality reasons. KHg in HR now asked JP, a registered pharmacist, to write to the GPhC and outlined terms he might use, for example saying:

"He (JP) is new to the Trust and has been made aware of the pending hearing for JB. He is aware that DM sent through some information for them in July 2020 but if they require any further information or update, prior to the hearing you are happy to provide it."

134. KHg was suggesting language that JP should use so that the respondent could send more unsolicited information to influence the

claimant's GPhC hearing.

The car park incident at work

135. On 25 June 2021 the claimant came onto site in his car after lunch and found the only available parking space would mean blocking in a colleague who had parked horizontally across three bays instead of vertically as indicated by the yellow parking lines. The claimant parked vertically, blocking the vehicle in. He took photographs of the two cars and reported to security that he may be needed to move his car later. He gave his details. Later, security informed him that someone needed him to move his car. He went to the car park quickly intending to move his car and approached the other driver NB. NB was seated in her car and put up her hand and told him to wait as she was talking on her phone. He waited. She then said that she was stuck because of his inconsiderate parking. He attempted to explain the direction of the lines and convention of parking vertically. She told him to stop talking and just move his car. A heated exchange took place. He raised his voice and swore at her *can't you see the fucking yellow lines.* NB said *You are the most horrible, disgusting, vile man that I have ever spoken to I just want you to move your car."* The claimant walked away to calm down before returning within minutes to move his car. Whilst he had been away NB had called security. The claimant moved his care and then, upset and distressed, went to see his pharmacy colleague JP.

136. The security guards stopped NB as she was leaving the car park and found her to be visibly shaken and upset. One of the guards told NB that the claimant had a criminal history and that she should look him up. The guards went to the patient flow office and reported to HS that there had been a car park incident involving John from Pharmacy. HS asked *where is John now ?* and the guards said that he had gone back to pharmacy. HS then rang JP in Pharmacy to ask was John there and was told that he was upset. HS asked were security there and did JP need any assistance. A male security guard was there and JP did not need assistance.

137. HS asked the security guards in patient flow office *how was the driver ?* and was told NB was very upset. A week later HS had an email from colleagues to say that NB had had an incident in the car park. HS spoke to NB's line colleagues about the incident and requested that NB prepare a factual statement and HS asked to meet with NB. HS directed that NB report a DATIX incident log which she did. By the time NB logged the incident NB had searched and found and knew of the claimant's convictions. On 28 June 20212 line manager colleague HL then emailed HS to say:

"Thank you for your support with this incident. A datix was completed and submitted this afternoon.

Hilary, I understand that you have requested a factual statement (below) and to meet with Nicola. I have copied Nikki into this email and let her know…she is free to meet with you when you are available."

138. The Datix report giving NB's version of the car park incident was attached.

139. HS then emailed DM to say:

"Please see statement below from a member of therapy staff affected by the incident last Friday."

140. JP told DM about the incident. DM, who had received reports from JP and HS, decided to commission an investigation into the claimant's conduct.

28 June 2021 Welfare meeting with JW

141. JW and MM met the claimant to discuss the car park incident. He told them that the autism report said that he can dwell on things and that he had spent the weekend going over and over the incident from Friday. He said he had been tearful and taking diazepam. He said he had not been well on Friday, that emotion had been running high and that he had not meant some of the things he had said. MM explained that was why managers were reluctant to have him work in pharmacy. It was agreed he was unfit for work and he went home.

142. Following that discussion JW made a further occupational health referral giving the reason as:

"Difficulty controlling emotions leading to aggressive behaviour and visible physical and verbal signs of distress."

143. It would appear that by 28 June 2021 JW had decided that the claimant had been aggressive in the incident and that her manager MM had decided that his behaviour in the incident (about which there had been no fact find at that point) substantiated concerns that MM and DM had had about him returning to pharmacy dispensary practice.

Sickness Absence

144. The claimant was under enormous pressure in June and July 2021. He was to face his Fitness to Practice Hearing on 6 and 7 July 2021. The claimant went off sick on 28 June 2021. He saw his GP about his anxiety level and was prescribed diazepam and propranolol.

6 July 2021

145. Whilst the claimant was at his GPhC hearing KHg emailed JW marked strictly private and confidential to advise that the claimant, by his recent absence, had triggered stage 2 of the AMP. She advised JW to do a return to work meeting and then give notice of a stage 2 meeting.

The GPhC hearing

146. The claimant went to London to his hearing. He had a solicitor represent him. He was so anxious that he could hardly eat. He was not sleeping and was vomiting. His anxiety caused a tremor in his arms and legs. He had prepared a written submission and found this incredibly difficult to do as his mental state was one of such anxiety that concentration was difficult.

147. On 6 and 7 July the claimant's GPHC hearing took place. The outcome of that hearing was that the claimant was suspended from

pharmacy practice by his professional body for two months, from 5 August to 5 October 2021. The claimant was distressed at this outcome as he had hoped only to receive a warning. He was also relieved not to have had a harsher sanction. He took the rest of the week off as annual leave.

12 July 2021 first day back after GPhC

148. On 12 July 2021 MM met the claimant to conduct a return to work interview. He was not well at this time. He immediately told the respondent of the outcome of the GPhC Fitness to Practice hearing. He had two months suspension from practice from 5 August to 5 October 2021. MM said that as his sickness absence from 28 June to 7 July had exceeded 8 days he would need to send a GP fit note. MM told the claimant that he had reached Stage 2 of the AMP. The claimant said that his absence in January should be discounted. MM agreed to look into that.

149. During the meeting the claimant became tearful when describing his anxiety levels over the past 18 months. He had lost a lot of weight and even feared he might have cancer. He told her how difficult he had found his London trip, including the fact that he had cried when he was told on his return journey that his ticket wasn't valid for the train he wanted to take.

150. MM asked him to make a written statement about the car park incident on 25 June 2021. He described the car park incident and said it had not been handled well by security who had taken the side of NB. He described a previous road traffic incident he had been involved in in which a female driver had sworn at him, details of which he had shared with GPhC, and how he felt that GPhC had held it against him because she was a woman and that GPhC had said that he had provoked her. He described his extreme anxiety following death threats he had received after publication of details of his court case in 2019. He had been so scared that he had kept fire extinguishers at home in case of an arson attack. He shared a history of being a victim of assault himself on several occasions. He asked if he could take unpaid leave for the duration of GPhC suspension, to go home to Northern Ireland, at the request of his sister and father.

Unpaid leave decision

151. JW escalated the request to DM who took HR advice and decided that the claimant could not have unpaid leave because he would be needed to participate in the investigation. DM did not consider getting his agreement to remain available to attend investigatory meetings, either in person or by camera, whilst on unpaid leave. The claimant returned to work but his retraining in dispensary was stopped.

The claimant's written statement of the car park incident

152. The claimant responded to MM's request on 12 July 2021 that he write a statement about 25 June car park incident. He did not include in his statement that he had raised his voice or said *can't you see the fucking yelllow lines.* On 16 July 2021 DM wrote to the claimant to tell him that she had commissioned an investigation into the car park incident. DM used the words *extremely aggressive behaviour* in the letter setting out the allegation. The claimant was again referred to OH.

19 July OH meeting

153. On 19 July 2021 the claimant saw Dr Hadland. The OH report from that meeting said:

"John is continuing to take medication as prescribed for psychological symptoms…… There is a diagnosis of autistic spectrum disorder which was made in April 2020…… I also note the incident which occurred in the car park on 25 June 2021 when security was involved. Today John told me that his anxiety levels had increased prior to the GPhC hearing that this has now improved. … There is a history of vomiting but John told me that there has been no further vomiting since the GPhC hearing.

I consider John medically fit to remain in work…. I recommend his retraining continues to be paused until his suspension period is completed. …. In my opinion John will benefit from increased management support over the coming months. I recommend that he has weakly supported contact with his line manager."

154. The OH referral had asked Dr Hadland did his stress and increased anxiety contribute to the alleged incident (25 June 2021) and Dr Hadland replied:

"this does seem possible."

155. The OH referral had asked Dr Hadland could John's management of the alleged incident have been linked to his diagnosis of autism and Dr Hadland replied:

"I recommend that management consult the ASC diagnostic service report dated 24 April 2020 with regards to this question."

156. The OH referral had asked Dr Hadland whether or not John was able to recognise when his symptoms were increasing in order to enact his coping strategies and Dr Hadland replied:

"it does seem that John is able to recognise his own psychological symptoms."

157. Dr Hadland's view was that the claimant did have insight into his own actions and behaviours and was able to contact any necessary support services for himself.

The 19 July 2021 Role Agreement and Risk Assessment

158. On 19 July 2021 JW and the claimant met to discuss what roles he could perform (i) between 19 July 2021 and the start date of his GPhC suspension on 5 August 2021 and (ii) during the suspension from 5 August 2021 to 5 October 2021. The claimant was told that he could perform a pharmacy porter role, delivering medicines around the hospital.

159. JW then undertook a Risk Assessment of the claimant for that role. She relied on the content of the OH reports and the ASC report. The claimant had said repeatedly that he did not accept the recommendations from the ASC report; he found them insulting, and that he had not found Dr

Hadland at OH helpful; what he had needed from OH was support accessing counselling and he had not had that. JW took the recommendations from both ASC and Dr Hadland and created a table with columns; recommendation, comments and agreed outcome. An example of a recommendation from the ASC report is:

"Ensure that you have John's full attention before giving him information or asking a question. Ask John to repeat back if the instruction is important to ensure his understanding."

160. The claimant told JW that he found that level of recommendation insulting, he had worked as a senior pharmacist for twenty years, that he did not need his colleagues to use checking back questions. JW took on board what he said and acceded to that request and the agreed outcome for that recommendation was:

"We have considered this requirement of the ASC report and it is John's wish not to have information repeated back to him whilst undertaking training to work as a porter. This risk assessment is for working as a porter only and we feel this is appropriate."

161. The RA document was 7 pages long and it covered the issue of background noise. It said:

"If the noise within the department is distracting to John he will refer to the senior in the dispensary/ stores and request that they deal with the situation.

The alarm to the pharmacy robot may be a potential trigger for John to lose his concentration. John has a responsibility to raise this concern with the senior in the dispensary and request that they deal with the situation."

It missed the point that it was not getting someone else to deal with the alarm that was needed but a relocation of the alarm so that it sounded away from the claimant's desk. For this risk assessment the claimant was working as a porter so would be out and about around the hospital. The RA continued:

"Ward areas are by nature busy and noisy, John will take responsibility and remove himself from situations when he feels uncomfortable or anxious."

162. The RA provided:

"John must not provide any clinical information to other staff members and any patients."

163. The RA provided nominated individuals GD/KH to assist the claimant and act as a first port of call for him for any issues arising whilst he was undertaking the portering role. It was also agreed that the claimant would have regular meetings with his line manager (this had been recommended by OH) to discuss any issues. Provision was made for one hour per day to be ring fenced for the claimant to undertake clinical refresher reading and provide him with quiet time away from interaction with colleagues. The ASC had report had said he might experience overwhelm. JW required in the RA that:

"John is to complete one delivery at a time and has been informed that on

come occasions he may need to undertake multiple runs to the same ward."

164. The RA quoted from the ASC report saying *for new tasks demonstrations and observed practice are better than verbal descriptors.* The RA recorded that the claimant did not think this necessary or appropriate. The RA nonetheless required that *the claimant be supported on delivery runs by a pharmacy assistant until his competency pack is complete* and it said:

"John may find that he has suggestions on how to improve the current process, he has been informed that although new suggestions are welcomed there are to be no changes to the process in the absence of KH and IJ……he is to adhere to the process….at all times."

165. The RA recorded:

"John is particularly bothered by the robot alarm as it may cause him to lose his concentration. John to escalate this issue in a timely manner……John has been informed of planned maintenance work on the robot scheduled between 26 July and 30 July which may cause increase in noise and disruption to daily routine."

166. During the meeting the claimant asked if he could be permitted to take two months unpaid leave for the duration of the GPhC suspension. It was his preference to return home to Northern Ireland and spend time with family. JW explained that this would need to be discussed and approved with HR and with DM. The claimant consented to the RA being shared with colleague KH.

167. On 22 July 2021 JW recorded in an email to the claimant the content of the 19 July 2021 meetings and attached the RA.

168. The claimant felt he had not grounds on which to counter much of what was said in the RA. The respondent had taken content from the Autism report and included it in the risk assessment for the portering role. The claimant felt this was humiliating. He had been a pharmacist for over 20 years and the respondent, JW with whom he had worked, was now accepting the report and not listening to his assertion that much of the report adjustment recommendations were not needed.

169. The claimant felt it was futile to object to the RA as the respondent had decided to adopt the approach of acting on everything the ASC report said, whilst largely disregarding his view of the adjustments needed. He had said that he disagreed with most of its content. He had raised again, on 19 July 2021, the robot alarm which was an adjustment he had first asked for prior to going off sick in April 2019. The ASC report addressed loud noises but the recommendation that was actioned was to *raise a concern*, which he felt was ineffective as he had been raising it for over a year and asking for it to be relocated and nothing had been done. The respondent did not at any time ask an electrical technician to come and see what might be involved in relocating the robot alarm from the pharmacy desk area, despite work being done on the robot in July 2021. DM knew that the sounding of the robot alarm behind his workstation was a problem for him and she had said "it doesn't bother me" and not acted on his request that it be moved. The claimant had also raised regularly and on 19 July 2021 the

other matter that affected him in his work which was the respondents EPR system which shut down regularly or froze and closed without saving entries made. These were examples of things that led the claimant to conclude that it was futile to object to the RA. The claimant agreed the content of the risk assessment.

Absence management at 19 July 2021 meeting

170. The 19 July meeting also addressed absence management issues. KHg from HR was present. The claimant told JW and K Hg that he had had 18 months of constant aggravation, stress and worry, that anxiety was making him sick every day. The claimant was presented with his sickness absence record and told that he was now given a Stage 2 warning and told it will remain on his file for 12 months so that any further sickness absence will then take him to a stage 3 hearing at which he could lose his job.

- April 2019 to April 2020: recurrent depressive disorder
- 8 October to 13 October 2020: anxiety, mental health reasons
- 16 November to 17 November 2020: general malaise nausea neck and shoulder pain
- 20 November to 21 November 2020: self isolation awaiting Covid result
- 7 January to 8 January 2021: Covid vaccine reaction
- 23 April to 25 April 2021: whiplash
- 28 June to 7 July 2021: stress anxiety induced nausea and vomiting

The claimant was told for the first time that his period of absence in January 2021 was being discounted from his absence history.

171. JW wrote to the claimant after the meeting on 19 July 2021 setting out the stage 2 warning and stating:

"As previously communicated to you, I advised you that the prolonged period of sickness absence from April 2019 to April 2020 would have triggered a stage I in line with the Attendance Management Policy, however following receipt of advice from OH that the reason for your sickness absence would be classed as a disability in line with the Equality Act, an adjustment to the policy was made and you did not progress to stage one at this time. We discussed that you were issued with a first notification of concern on 24 November 2020 which was to remain on your file for 12 months.

I advised that as you had reached the trigger of two episodes in three months or 10 working days in a rolling 12 month period I was therefore issuing you with the final notification of concern at stage 2 of the Attendance Management Policy, which will remain live for 12 months."

Disciplinary Investigation terms of reference

172. On 19 July 2021 Diane Matthew commissioned an investigation into the allegation that the claimant attended the car park and displayed extremely aggressive behaviour towards a member of staff including shouting and swearing. Deputy Chief Pharmacist Victoria Young was the investigating manager. KHg and KM were HR advisors to the investigation. The allegations were:

- *it is alleged that JB attended the car park and displayed extremely aggressive behaviour towards the member of staff, which included shouting and swearing*

- *as a consequence of this it is alleged that JB has breached the following disciplinary rules*

gross misconduct

- *rule 5: violence or exceptionally offensive behaviour*

- *rule 18: serious professional misconduct*

- *rule 24: serious or repeated breach of Trust values and behaviours*

- *rule 28: serious examples of disrespectful or negative attitudes to patients visitors or staff*

misconduct

- *rule 6: dangerous horseplay or unacceptable behaviour whilst on duty*

- *rule 11: reach of Trust values and behaviours*

- *personal or professional misconduct of a nature sufficiently serious to affected employees position at work*

173. The Terms of Reference were:

"To fully investigate the allegations listed above in order to determine the facts in the circumstances.

The investigation is to be conducted in a fair, impartial and timely way.

The investigation should consider all facts surrounding the above allegation including any mitigating circumstances or factors. The investigating officer should include all key findings and details in the investigation report for consideration by the Commissioning Manager.

During the course of the investigation, the investigating officer will arrange to meet with the relevant individuals and witnesses. A number of statements have already been obtained. Further statements have been requested.

Any additional information received from the Occupational Health and Well-being Department will be reviewed and appropriate action taken."

The GPhC suspension pay band reduction

174. During his GPhC suspension the claimant was told by DM that he would be downgraded from a Band 7 to a Band 5 with consequent pay reduction. The rationale for this was that he could not perform the duties of a pharmacist during that period. The claimant had not been performing the duties of a pharmacist since April 2019 but had been at Band 7 pay rate throughout.

175. The claimant was interviewed by VY on 29 July 2021 in the presence of his workplace colleague TK and gave his full version of the incident. At the outset of the meeting he was told:

"It is a purely fact-finding investigation and until it is complete we cannot determine whether it will warrant a disciplinary hearing."

176. Notes were taken and he was able to amend the notes so that the version that went forward to disciplinary showed his tracked changes. He did not say that NB had been shouting or swearing at him. He said:

"When I get anxious my short term memory goes."

He accepted that he swore on one occasion saying *the fucking yellow lines are not there as a suggestion they show you where to park* and he said that NB may have sworn at him too. He said NB was aggressive and that he had been animated and was trying to stay calm because NB was suggesting it was all his fault. He said she was of the opinion she had not done anything wrong and he wanted her to understand. He said:

"She was giving me the hand. She is a Karen, if you have heard that expression, do and say what she wants."

He said that he could have parked elsewhere but would have been late and then someone in pharmacy would have pulled him up. He said:

"I feel like I am being watched all the time."

He said:

"She gave me a load of verbal. This incident caused me to have a complete nervous breakdown."

177. That same day 29 July 2021 VY interviewed NB. NB denied swearing at the claimant and said she had remained calm. NB said she had told the claimant:

"You are the most horrible, disgusting, vile man that I have ever spoken to I just want you to move your car."

She said security guards then attended and told her they had "read up about him" and had attended as she was a woman. NB said she had since become aware of the claimant's history and felt that it was all premeditated, his blocking her in. She said, referring to the time when the claimant had walked away before moving the car, *it was like he was gloating that he had the power*.

178. VY also interviewed JP. JP said that he had received a call from HS to tell him that the claimant had been involved in an altercation in the car park

and was on his way back to pharmacy. HS asked JP to keep her posted. JP said the claimant was upset, tearful, not aggressive, not swearing and saying that it was the other member of staff's fault and that she was rude to him. He described that two female security officers then came into the pharmacy office and asked the claimant *why* he had sworn and *why* he had been aggressive and *why* had he been shouting. JP said the security officers were pressing the claimant and winding him up, but all the claimant said was that they weren't there and hadn't seen the exchange and that he was upset too. JP asked the female security officers to leave and brought JW into the room with the male security guard who was calm. JW and the guard calmed the claimant and made sure he could get home safely.

179. VY interviewed the female security guards SH and PR. SH said that PR had told NB about the claimant's criminal history and PR denied saying that. PR said that she had seen the claimant after the incident and that he was shaking and visibly distressed. PR said SH swore at the claimant in the pharmacy. PR went to the patient flow office to discuss the incident and cannot be sure if HS was there or not. PR said:

"We need as a team to know if there's something we need to know like a mental health issue that we need to be aware of…I'd support John by talking to him… I talk to him to see how he is now and …I kept a check on NB to make sure she was OK."

180. VY interviewed male security guard RF. RF said he had seen NB after the incident and that she had been upset and crying, she said she had parked stupidly and the claimant had been verbally aggressive towards her. RF said that PR had told NB that the claimant *had form* and had taken a sledgehammer to one of his neighbours (these are the words of the guard and not a description by the Tribunal of what happened in October 2019) and that PR told NB to google him. RF said that when he saw the claimant shortly after that he was upset and the anxiety was kicking in.

<u>OH 2 August 2021</u>

181. The claimant again saw Dr Hadland. He told Dr Hadland about his GPhC outcome and the disciplinary process for gross misconduct and misconduct. The claimant said he agreed to suspend his retraining and assessment whilst he was on GPhC suspension. He reported increased anxiety. Dr Hadland said he was fit to remain in work. He was doing the portering which he found demeaning.

<u>4 August 2021 claimant attends ED</u>

182. On 4 August 2021 the claimant was felt by a colleague to be unwell and advised to attend ED. The claimant was reluctant to do so in case it led to absence that would trigger a stage 3 AMP and a possible dismissal. He reluctantly presented at ED. After receiving advice and treatment he went to pharmacy to tell his colleagues that he would go home, consult his GP for treatment and expect to return to work. That same day DM emailed AJ in HR with specific detail of the claimant's condition and treatment at ED that the claimant had not shared with his colleagues. She expressed the opinion that:

"The nature of his problem may not be so easily resolved, by self

discharging there may be a delay in determining the extent of his problem, important therapy has not been received, other management of this condition may be delayed and the signs and symptoms he has been experiencing, which now fall into place, are unlikely to disappear unless he brings his problem under control. OH has been contacted… They are making space for him to be seen on 16 August 2021."

183. It is not clear where the detailed information, *self-dishcarging, therapy not received, signs and symptoms fall into place, brings his problem under control,* that DM passed to AJ including her assertion that the claimant had self discharged from ED, came from.

The disciplinary investigation report

184. VY's report was dated July 2021 and included as appendices.

185. The Datix report, the claimant's written statements, interview notes with NB, the claimant, JP, SH, PR and RF, a photograph of the parked cars. It concluded:

"There were no witnesses to the conversation excepting JP and NB themselves. However, JP has stated that he raised his voice and swore as part of the conversation. He did not consider this to be aggressive but that it was a disagreement. Despite him not feeling this to be aggressive, raising his voice and swearing at another member of staff, which he has admitted to, it could be considered to be a breach of the Trust disciplinary policy as NB did feel intimidated by the conversation was clearly upset as evidenced by her own statement and that of security staff.

Having said this JB has described that he felt NB to be verbally aggressive and he was also upset as a result of their interaction. NB has stated that she was not aggressive and did not raise her voice. NBs actions are outside the terms of reference of this investigation have been included as they may have impacted on JB's actions.

It is recommended that the commissioning manager review this evidence to ascertain whether a disciplinary hearing is warranted."

186. It is not clear when DM received the investigation report. The claimant was informed on 3 September 2021 that DM had decided to progress the matter to a full disciplinary hearing.

187. The claimant contacted JH, the freedom to speak up Guardian, on 10 September 2021. He had been corresponding with her since the car park incident. On 10 September 2021 he told her that he hadn't yet received a copy of the investigators report but had been told he will be given a date for the disciplinary meeting. He said he needed help, that he didn't feel able to trust his line manager or her line manager as everything he said seemed to get back to DM. He said he felt this was ongoing bullying harassment intimidation and discrimination from DM. In July 2021 he had told JH about his concerns with DM; about having been locked in an office by her for privacy during conversation and about her attending his home address on 4 March 2020 at approximately 11 PM to hand deliver a letter. He had said in July 2021 to JH that he saw this parking incident as her latest attempt to get rid of him, that she had wanted to get rid of him since his conviction. He

had told JH on 21 July 2021 that he had been diagnosed with Autism Spectrum Condition in April 2020 and felt that his diagnosis is constantly being used as a weapon against him to prevent him from doing his job properly. He said he was at his wits end.

Disciplinary hearing

188. In late September 2021 HR were attempting to assign someone to chair the claimant's disciplinary hearing. HR asked JH if she could chair the hearing but she declined. She had supported the claimant as a FTSU guardian. HR then asked FW who agreed to chair the hearing on 1 November 2021.

189. During the last week of September the claimant met with JP and MM to forward plan for the duties he could undertake when his GPhC suspension ended on 5 October 2021. They asked him to confirm in writing that there would be no further conditions or restrictions imposed upon him by GPhC. On 1 October 2021 the claimant wrote to JP to confirm that there would be no conditions on his practice as a pharmacist imposed by GPhC following completion of the period of suspension. Apart from the period of suspension and despite him not being allowed to perform pharmacist dispensing role since 2019, there never had been.

190. His period of suspension ended on 5 October 2021

Invitation to disciplinary hearing

191. On 7 October 2021 the respondent wrote to the claimant to tell him that he was required to attend a disciplinary hearing on Monday, 1 November 2021. He was given the location and purpose of the hearing and told who would be in attendance. VY said that she would present the management statement of case and call any witnesses. She explained that if the claimant wished to call any witnesses it was his responsibility to make arrangements with those individuals and offered to help do so. She informed him of his right to be accompanied by a representative of his Trade Union, professional association or workplace colleague.

192. The letter set out the disciplinary allegations and their potential classification as gross misconduct and or misconduct. She enclosed the management statement of case including copies of the witness statements and asked that the claimant let her have any relevant documents that he wished to be shared with the panel at least five days before the hearing. VY's letter referred him to JH the FTSU Guardian and asked him to acknowledge receipt of the letter.

Disciplinary Hearing

193. The disciplinary hearing was chaired by HS and took place on 16 November 2021. The date had been changed to accommodate the attendance of the claimant's representative. The change of date necessitated a change in person to conduct the hearing so that FW stood aside and HS stepped in. AH, head of HR, provided HR advice to HS, VY attended to present the management statement of case. There was no one present to be a notetaker.

194. The claimant attended in person and was supported by JD of the pharmacist Defence Association who attended online by Teams. VY presented her management statement of case and was questioned by JD. JD asked VY if she knew that the claimant was disabled. VY said that she knew this now but could not be sure when she had become aware of it. The claimant was then invited to present his management statement of case. He gave his account of the 25 June 2021 incident and accepted that he had raised his voice and sworn at NB. The claimant set out the areas of disagreement in account between himself and NB.

195. The claimant said he been under a lot of stress at the time. JD repeated that the claimant was registered disabled and had had a long period of mental health including anxiety and depression. JD said that the claimant was someone who is in need of support and reasonable adjustment and the management needed to accept that his behaviour and his communication may be impacted by his condition. JD said that management should take that into consideration. The claimant concluded by citing his previous 22 years of good service.

196. The hearing was adjourned for approximately an hour while HS reached her decision. AH was present with her throughout the adjournment time to provide HR support and guidance.

197. The hearing was reconvened and HS told the claimant that she considered his conduct on 25 June 2021 amounted to gross misconduct. She said she had considered his mitigation that he was under stress at the time and felt anxious due to a professional hearing regarding his registration and she said she had considered his disability carefully. She said that accepting behaviour that has the impact of causing distress to others is not reasonable. She had had regard to the current warning in force and decided that as his medical condition had been taken into account in mitigation on that occasion she did not think it reasonable for her to allow medical considerations to mitigate a second occasion of gross misconduct.

198. She also said that she had taken into account the fact that the claimant had not offered an apology for the incident the impact it had on NB. She said that the claimant had not offered any reflection on the incident to show that he had learned from it or offered any other form of assurance that an incident would not re-occur. She therefore concluded that the appropriate outcome was summary dismissal. HS informed the claimant of his right to appeal. HS and AH then went to AH's office and together compiled the letter confirming his dismissal.

199. HS sent the outcome letter dated 22 November 2021 to the claimant. It was 6 pages long and set out in detail her reasoning for her decision. The letter recorded:

"Jim Durand presented that he wanted us to be aware of the issues surrounding John's mental ill health and registered disability. Jim outlined the need for support and reasonable adjustments, that acceptance of this behaviour and that your communication may be impacted by your condition, should be considered."

200. The letter also recorded that the claimant had said he was under a lot of

stress at the time as a result of a separate hearing (GPhC) and that at the time of the incident the claimant had personal matters causing stress. The letter said:

the issue of that hearing was confirmed to be separate and not for consideration in this regard.

201. HS had not taken the exacerbation of the claimant's anxiety and depression caused by the imminent GPhC hearing into account as mitigation.

202. The claimant lodged his grounds of appeal in short form on 7 December 2021. In the section of the form entitled reason for appeal the claimant ticked the boxes:

- *The trust procedure was not applied properly or fairly*
- *The decision reached at the hearing was unfair and unreasonable*
- *Further information has come to light which had been known by the disciplinary panel at the time of the hearing may have affected the panel's decision*

203. The claimant said that he objected to the fact that no minutes were taken of the dismissal meeting and that this rendered the process unfair. The claimant raised that there were contradictory provisions in the disciplinary policy date by which is appeal must be lodged.

- He argued that the conduct of the hearing was subjective and predetermined said he had been denied the opportunity to question inconsistencies in the management statement of case.
- He said that there had been a failure to consider his disability (autism) in relation to any part of the disciplinary process nor the depression and anxiety which was the Trust was aware of.
- He said no consideration was given to his disability in relation to the circumstances of the incident on 25 June 2021.
- He said in light of the prejudicial evidence relied on the decision to dismiss was unsafe and tainted by both the lack of consideration of disability and personal circumstances and tainted by the effect the security guard gossip had had in a fair investigation outcome.
- He said JP's statement was not taken into consideration regarding his emotional state and his allegation that NB had started the altercation and was aggressive towards him.

204. The claimant also said that he was raising a grievance regarding failures by the Trust in relation to his disabilities and the actions of DM when he returned to work following anxiety and depression and a diagnosis of autism. He alleged that he suffered discrimination on his return to work and that her decision to commission an investigation into the incident of 25 June 2021 was an act of discrimination which led to his dismissal.

205. The claimant sent further detail grounds of appeal and grievance in a 14 page narrative document dated 22 December 2021.

206. The eight grounds of appeal in the 14 page detailed document can be summarised as follows:

(1) No minutes were taken of the meeting, the meeting was procedurally unfair and any decision unsafe as there was no agreed record of the meeting.

(2) JD's questions provided for the disciplinary hearing were not addressed. JD was not allowed to question the full evidence or challenge inconsistencies in the witness statements.

(3) There was no independent witness to the car park incident, fair and independent hearing was not possible as it was tainted by gossip and therefore unsafe.

(4) The matter was not dealt with objectively. No consideration being given to the claimant's disability of anxiety depression and autism and the surrounding circumstances regarding the GPHC hearing, his demotion, his micromanagement from August 2020, consideration of the enormous pressure he was under.

(5) The investigation was biased in favour of NB from the start and this was a discriminatory bias on the grounds of the claimant's sex (male) because much emphasis was placed on how upset NB (female) was. The effects of the claimant's disability (on his conduct and behaviour that day) were entirely ignored during both the investigation and disciplinary hearing.

(6) The claimant had never been told that NB had made a complaint. The investigation was initiated by DM. Security staff discussed the claimant's court case with NB before she made the DATIX report. She was therefore influenced by prejudicial gossip which made the DATIX evidence unsafe and tainted a fair process being carried out. Relying on that DATIX report and failing to give consideration to the claimant's disability and information known to the Trust was unfair and discriminatory.

(7) No account was taken of how the claimant was affected by the altercation and the corroborative evidence in JP statement as to how upset he was.

(8) The claimant felt watched all the time from point of return in August 2020, felt under pressure from DM throughout that period, the pressure having influenced his decision to park on site on 25 June 2021.

207. The claimant then set out 26 paragraphs of grievance allegations detailing chronologically ways in which he felt let down by the respondent following his sick leave which began on 10 April 2019. In short, they related to:

- Excessive use of welfare meetings.

- Excessive referrals to occupational health.

- Application of the sickness absence management policy (AMP) to take the claimant to a stage III hearing at which he might have lost employment on 26 March 2020.

- Pressing on with the stage III AMP when Dr Hadland had said it seemed likely the claimant would return to work within the coming weeks.

- DM attending the claimant's home on 4 March 2020 to hand deliver a letter informing the claimant that he was going to be suspended pending an internal investigation into the criminal incident from 19 October 2019.

- Failing to act on the ASC diagnostic report at the end of April 2020.

- Convening a disciplinary hearing regarding his criminal convictions.

- Requiring the claimant to attend the pharmacy whilst off sick to collect the outcome letter from the June 2020 disciplinary hearing.

- Imposition of a first and final written warning for the 19 October 2019 incident and failing to take the claimant's anxiety and depression and autism into account in imposing that warning.

- DM making remarks in July 2020 to the effect that she did not think autism was compatible with being a pharmacist.

- DM's failure to deal with the claimant's request to have the robot alarm removed both prior to the autism report and post the autism report which set out that one of the effects of his autism is a sensitivity to high-pitched noise.

- DM continually pressing the claimant for an update about the GPhC investigation.

- DM informing the claimant that the Trust would not continue to support the claimant if the GPhC hearing was postponed again, after it having been postponed from 17 and 18 March 2021 to 6 and 7 July 2021.

- DM deciding that the claimant could not do any clinical work following the October 2019 incident and later whilst under investigation despite GPhC having said that there would be no restrictions on this practice during the investigation.

- DM requiring the claimant not to counsel / give any pharmaceutical advice to colleagues friends or family during the GPhC the investigation.

- The RA of 19 July 2021 one of the terms being that the claimant was not to speak to pharmacy staff other than about work-related matters.

- DM's response to the claimant's adverse reaction to the COVID vaccine in January 2021 when she had shouted at him in front of office

staff and disputed that the vomiting he had experienced was caused by an adverse reaction to the vaccine.

- The Risk Assessment of 21 July 2019 done by JW which the claimant found insulting.

- Being allocated a disused store room without a telephone line from which to undertake work.

- DM commenting in October 2020 to MM about tasks that the claimant could undertake and asking should MM send the claimant some standard operating procedures to read and DM saying *yes do that I suppose he can at least read.*

- DM's instruction to the claimant to review A&E treatment pathways but failure to tell him where to locate them.

- DM's failure to refer to the claimant feedback on the work he did on the A&E pathways.

- DM telling a colleague GH that she would hamper his career progression if you remain friends with the claimant by saying *if you want to get anywhere in this department you shouldn't associate with certain people.*

- DM reprimanding the claimant for not having undertaken the fridge audit of A&E in the office in front of colleagues VY and JP, and disregarding the 93 locations that the claimant had managed to complete and his explanation for not having been able to complete the A&E audits.

- A nurse the claimant had spoken to being contacted by someone from pharmacy to ask her what she had been talking to the claimant about, that person said they were concerned about the claimant.

- The respondent's failure to consider the pressure of the GPhC fitness to practice hearing and the pressure from the harassment and the impact of his disability.

- The prejudicial completion of the investigation report into the 25 June 2021 incidents including, HS conducting the dismissal hearing when she had received the initial report.

208. The claimant also made the following submissions:

Key findings of the investigation report were cherry picked to fit the required outcome. There had been an inappropriate focus on the emotional state of Nicola Brown but not the effect of the incident on the claimant. The investigation report was flawed as it relied on the prejudicial views of the security guards. The anecdotal evidence of the security guard was favoured over that of JP. The claimant's email expressing concerns on 27 July and email on 18 August were not included in the investigation report. The investigation report did not take into consideration NB's aggression towards the claimant. The final written warning imposed by IW was itself unsafe and tainted by

prejudice and the imposition of that warning had been disability discrimination.

The claimant then made submissions about his increased anxiety in recent weeks and the increase of one of his antidepressant medications. The claimant requested a thorough investigation of his grievance *before* the appeal was dealt with as, he said, the facts are inextricably linked to the manner in which the disciplinary hearing was conducted and the outcome.

209. On 10 February 2022 the claimant contacted ACAS to give the requisite information to begin early conciliation.

The appeal hearing took place on 24 February 2022 at 2 PM

210. The appeal was chaired by Chief Operating Officer Mr Moore. A second panel member was CR a Non-Executive Director and the third was SK an Associate Director.

211. LH deputy chief people officer was there to provide HR support to the panel. The claimant attended and was represented by JD again. HS attended to present the management statement of case and was supported by JOB from HR in place of AH. An assistant HR adviser LO was the notetaker.

212. At the outset of the hearing JD introduced the occupational health report dated 19 July 2021. He said that it had been sent to HR in July 2021 and was surprised that it had not been included in the pack. A five minute adjournment then took place whilst the documents were obtained and shared with the panel. Mr Moore did not follow the recommendation in the OH report to read the ASC report.

213. The panel chair decided that the claimant would present his case first. Before the claimant began JD asked if the panel would hear the grievance before the appeal in accordance with ACAS guidelines. Mr Moore said that the panel would listen to all the information before deciding on appropriate next steps. LH clarified the panel would be hearing the appeal and grievance together. JD said that the appeal was set out under 8 grounds and that the grievance document was included in the pack. The claimant agreed to go ahead and then spoke to the detailed account of how he was treated that was recorded in both the grievance and appeal grounds.

214. JD supplemented the claimant's submissions referring specifically to DM's attitude to the claimant on his return to work after sickness absence and her failure to take into account his disability and autism. The claimant complained about being de-skilled and required to remain in a non-pharmacist role despite there being no such requirement from the GPhC. The claimant referred to having to be micromanaged and watched, denied unpaid leave and had a portering role though the claimant accepted that he had agreed to do portering.

215. The claimant spoke in detail about the car park incident. He said that he hadn't started the argument, that NB had shouted at him and he had raised his voice in response. JD said in relation to the claimant's response to the car park incident:

"In situations where people suffer with JB's disability it must be difficult and things can happen."

216. The claimant said that he regretted having sworn just once and that yes he was sorry about the incident. When asked if he could give an assurance that it wouldn't happen again he said that he had not brought his car on site since. DMoore asked would the claimant act differently or would he still swear and raise his voice. The claimant said he had learned through experience not to get into a "shouting match". DMoore asked the claimant if he had raised the issues about DM before today. The claimant said that he had, that he had a meeting with JW and KH in May 2021 and had explained then that he felt he was being bullied by DM. The claimant said that things had ramped up since his autism diagnosis and he referred to how she had previously called at his house when he was off sick.

217. HS then began her management statement of case. HS did not address the point about her own prior involvement in the case of potential bias. HS said at appeal that the claimant had agreed at the disciplinary hearing that he been aggressive. JD challenged this saying the claimant had not said that in that this was why it was important to have minutes taken. JD repeated that he had thought because of the terms of the grievance that he and the claimant would not be expected to come to a meeting with HS. JD's closing submission was that the panel should consider their whole comprehensive documentation that had been sent, but the appeal bullet points and the grievance content. JD submitted that as there were only four weeks remaining on the written warning sanction on the claimant's file, at the time of the incident, that ought to have been taken into account.

218. JD said that the sanction imposed should have been less as the panel needed to consider the claimant's disability and a reasonable adjustment should have been made. JD said that the claimant's treatment had been unreasonable as his disability was not discussed, reasonable adjustments were not made (to the classification of the offence as gross misconduct) and therefore the dismissal ought to be overturned. JD pointed out that although the disciplinary panel had said that they had not known anything about underlying health conditions the Trust had in its possession the OH reports.

219. The panel adjourned to reach a decision and agreed to send a written decision by the end of the following week. On 23 February 2022 the claimant obtained his ACAS early conciliation certificate. On 8 March 2022 DMoore sent his appeal outcome letter. The appeal was denied.

220. Appeal ground one about there having been no notes of the disciplinary hearing was dismissed because the claimant had agreed to proceed knowing there would be no notetaker and because a detailed outcome letter had been provided which recorded the meeting.

221. Appeal ground two about the process having been unfair because the claimant could not challenge the evidence was denied because the panel found that the claimant had had opportunity in accordance with disciplinary processes to challenge evidence and ask any witnesses to attend if he had wanted to question them and had chosen not to. The panel commented that HS had taken into account that there was no witness to the car park incident.

222. Appeal ground 3 about security guard gossip (telling NB about the claimant's conviction) tainting the whole process was rejected as the panel found there to be no evidence that NB's account was not credible. The panel

recorded that HS had set out her rationale for reaching her decision which included that the claimant had agreed that he had raised his voice and sworn. The appeal panel also noted that during its hearing the claimant had made contradictory statements about the incident in the car park, saying that he had walked away calmly, but also describing the incident as a "shouting match".

223. Appeal ground 4 about failure to consider disability was denied. The panel said that the claimant accepted that he had not shared information about his disability with the investigating officer. The panel found that JD had put the claimant's anxiety, depression and autism and the stress of GPhC hearing forward as mitigation and that HS had considered it as mitigation and decided it did not outweigh the dismissal. HS had recorded in her letter of dismissal *accepting behaviour that has the impact of causing distress to others is not reasonable.* This was the *causative or contributive* point being picked up, without using those words, at appeal. The panel agreed that even if the disabilities caused or contributed to the conduct it still amounted to gross misconduct and the mitigation did not outweigh the dismissal because, and here the panel upheld HS' decisions that:

- As disability had been used as mitigation once in relation to the IW hearing FWW it would not be used again.
- As the claimant had given assurances that his condition (anxiety and depression) was well managed and would not lead to another incident (like the 19 October 2019) incident again, but then the 25 June 2021 incident had happened, the respondent could not rely on any assurance that aggression would not happen again.
- The actions of 25 June 2019 amounted to gross misconduct in their own right.

224. Appeal ground five about being treated less favourably as a man and his disability not being taken into account was denied. The panel found no evidence that a male investigator or male decision maker would have responded differently or that a female accused would have been treated any differently. The panel felt that HS had taken the claimant's disability into account but found it did not mitigate the offence.

225. Appeal ground six was about process and how the panel concluded that the investigation began because NB logged a Datix incident. The letter said in relation to the claimant's appeal and grievance about DM.

> *"While the panel notes your complaints regarding her conduct towards you, ultimately she was not responsible for the decision to dismiss you."*

226. Appeal ground seven was about JP's statement not having been considered. The appeal panel concluded that as the statement was in the pack HS would have taken it into account.

227. Appeal ground eight was about intimidation, harassment and discrimination by DM. The panel found that the claimant had only raised these matters as part of his appeal. HS had told the appeal panel *you had not raised any concerns to either her or the investigating officer regarding intimidating behaviour from DM or her subordinates.* The Tribunal finds as a fact that was not true, the claimant had complained about DM and had been offered

mediation which he declined.

228. The panel found that having listened to what it said the claimant "considered to be a grievance", that it would have had no material impact on the incident in the car park, which was what had led to his dismissal. The panel did not accept the background of intimidation by DM as grounds for why the claimant had to park in a hurry or behave as he did. The panel said that the claimant had admitted that he had sworn and raised his voice and irrespective of the background HS had found that unacceptable.

229. The panel did not address the claimant's grievance in any further detail. It said:

> *"While you asked for a full investigation of your grievance prior to the appeal process being concluded, we do not consider that any such further investigation would be material to the outcome of your appeal."*

230. The letter, which was 10 pages long, addressed each of the grounds of appeal and the key submissions in the grievance and concluded upholding the dismissal.

231. On 22 April 2022 the claimant lodged his tribunal complaint. The claimant's last date of employment had been 16 November 2021 and he had not received notice pay on termination of employment.

Relevant Law

232. Section 94 Employment Rights Act 1996 (ERA) provides that an employee has the right not to be unfairly dismissed by his employer.

233. Section 98 provides:

> **"(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;**
>
> **……..**

234. The burden of proof lies on the employer to show what the reason or principal reason was, and that it was a potentially fair reason under section 98(2). According to Cairns LJ in **Abernethy v Mott, Hay & Anderson [1974] ICR 323**:

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

This requires the Tribunal to consider the mental processes of the person who made the decision to dismiss. In **Linfood Cash and Carry v Thomson**

> **"The Tribunal must not substitute their own view for the view of the employer, and thus they should be putting to themselves the question -could this employer, acting reasonably and fairly in these circumstances properly accept the facts and opinions which it did? The evidence is that given during the disciplinary procedures and not that which is given before the Tribunal".**

235. **Jhuti** in the Court of Appeal cited Arnold J in the EAT in **Burchell v British Home Stores [1978] IRLR 379** which set out the standards for determining whether dismissal for (mis)conduct is fair:

> **"First of all there must be established by the employer the fact of that belief; that the employer did believe it. Secondly, that the employer had in his mind reasonable grounds on which to sustain that belief. And thirdly, we think that the employer, at the stage at which he formed that belief on those grounds...had carried out as much investigation into the matter as was reasonable in all the circumstances of the case."**

236. Where the employee has admitted his misconduct the employer will be acting reasonably in believing that the misconduct has been committed so the requirement for investigation will be reduced **Royal Society for the Protection of Birds v Croucher [1984] IRLR 425**

237. Where the employer does show a potentially fair reason for dismissing the claimant the question of fairness is determined by section 98(4).

> **"(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."**

238. In **Iceland Frozen Foods Limited v Jones [1982] IRLR 439,** Browne-Wilkinson J formulated the correct test in the following terms

> **"…the correct approach for the Industrial Tribunal to adopt in answering the question posed by Section 98(4) Employment Rights Act 1996 is as follows:**
> **(1) The starting point should always be the words of Section 98 (4) themselves;**
>
> **(2) In applying the section the Industrial Tribunal must consider the reasonableness of the employer's conduct, not simply whether they (the members of the Industrial Tribunal) consider the dismissal to be fair;**
>
> **(3) In judging the reasonableness of the employer's conduct an Industrial Tribunal must not substitute its decision as to what the right course to adopt for that of the employer;**

> **(4) In many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take the one view, another quite reasonably take another;**
>
> **(5) The function of the Industrial Tribunal, as an industrial jury, is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair."**

239. If the three parts of the **Burchell** test are met, the Employment Tribunal must then go on to decide whether the decision to dismiss the employee (instead of imposing a lesser sanction) was within the band of reasonable responses, or whether that band fell short of encompassing termination of employment. In a case where an employer purports to dismiss for a first offence because it is gross misconduct, the Tribunal must decide whether the employer had reasonable grounds for treating the misconduct as gross misconduct: see paragraphs 29 and 30 of **Burdett v Aviva Employment Services Ltd UKEAT/0439/13.**

240. Generally gross misconduct will require either deliberate wrongdoing or gross negligence. Even then the Tribunal must consider whether the employer acted reasonably in going on to decide that dismissal was the appropriate punishment. An assumption that gross misconduct must always mean dismissal is not appropriate as there may be mitigating factors: **Britobabapulle v Ealing Hospital NHS Trust [2013] IRLR 854** (paragraph 38). The Tribunal must determine whether dismissal was a response that no reasonable employer could have adopted in the circumstances.

241. The Court of Appeal in **Salford Royal Northern Foundation Trust v Roldan 2010 IRLR 721** determined that more will be expected of a reasonable employer where the allegation is one of misconduct and the consequences to the employee if they are proven, are particularly serious. Elias LJ, at paragraph 13, quoting his own judgment from A v B [2003] IRLR 405 said

> **"*the relevant circumstances {in Section 98(4)} include the gravity of the charge and their potential effect upon the employee. So it is particularly important that employers take seriously their responsibilities to conduct a fair investigation where, as on the facts of that case, the employee's reputation or ability to work in his or her chosen field of employment is potentially apposite. In A v B the EAT said this:***
>
> ***"a careful and conscientious investigation of the facts is necessary and the investigator charged with carrying out the inquiries should focus no less on any potential evidence that may exculpate or at least point towards the innocence of the employee as he should on the evidence directed towards proving the charges against him"***

242. In **London Ambulance Service NHS Trust v Small 2009 EWCA Civ 220** Mummery LJ reminded tribunals that it is all too easy to slip into a substitution mindset. A tribunal must avoid conducting its own fact-finding forensic analysis. The real question is whether the employer acts fairly and reasonably in all the circumstances at the time of the dismissal.

243. When applying Section 98(4) the Tribunal must take into account the size and administrative resources of the respondent, any relevant Code of Practice

and the Human Rights Act 1998. The ACAS Code on Disciplinary and Grievance Procedures provides at paragraph 4:

- **Employers and employees should raise and deal with issues promptly and should not unreasonably delay meetings, decisions or confirmation of those decisions.**
- **Employers and employees should act consistently.**
- **Employers should carry out any necessary investigations, to establish the facts of the case.**
- **Employers should inform employees of the basis of the problem and give them an opportunity to put their case in response before any decisions are made.**
- **Employers should allow employees to be accompanied at any formal disciplinary or grievance meeting.**
- **Employers should allow an employee to appeal against any formal decision made.'**

244. The band of reasonable responses test applies to all aspects of the dismissal process including the procedure adopted and whether the investigation was fair and appropriate: **Sainsburys Supermarkets Ltd v Hitt [2003] IRLR 23.** The focus must be on the fairness of the investigation, dismissal and appeal, and not on whether the employee has suffered an injustice.

245. The ACAS Code at paragraphs 5 -7 addresses the elements of an investigation

> **"5. It is important to carry out necessary investigations of potential disciplinary matters without unreasonable delay to establish the facts of the case. In some cases this will require the holding of an investigatory meeting with the employee before proceeding to any disciplinary hearing. In others, the investigatory stage will be the collation of evidence by the employer for use at any disciplinary hearing.**
>
> **6. In misconduct cases, where practicable, different people should carry out the investigation and disciplinary hearing.**
>
> **7. If there is an investigatory meeting this should not by itself result in any disciplinary action. Although there is no statutory right for an employee to be accompanied at a formal investigatory meeting, such a right may be allowed under an employer's own procedure."**

246. The Tribunal should consider procedural fairness together with the reason for dismissal **Taylor v OCS Group Ltd [2006] EWCA Civ 702.** The tribunal must decide whether in all the circumstances of the case the employer acted reasonably in treating the reason they have found for the dismissal as a sufficient reason to dismiss.

247. **Polkey v AE Dayton Services Limited [1987] IRLR 50 HL** established that where a claimant is successful a reduction may be made to an award on the basis that if the employer had acted fairly the claimant would have been dismissed in any event at or around the same time. This may take the form of a percentage reduction, or it may take the form of a tribunal making a finding that the individual would have been dismissed fairly after a further period of employment (for example a period in which a fair procedure would have been completed). The question for the tribunal is whether the *particular employer*

(as opposed to a hypothetical reasonable employer) would have dismissed the claimant in any event had the unfairness not occurred.

248. The Employment Rights Act 1996 at section 122 and section 123 provides for a reduction in compensation because of contributory fault by the claimant.

Wrongful dismissal

249. The right to summarily dismiss an employee arises when the employee commits a repudiatory breach of contract. An employer can then waive the breach or treat the contract as discharged.

250. In **Mbubaegbu v Homerton University Hospital NHS Foundation Trust UKEAT/0218/17 (18 May 2018, unreported) cited in Harvey,** Choudhury J quoted a passage from **Neary v Dean of Westminster [1999] IRLR 288** which relied on a breach of the term of mutual trust and confidence. In that case the conduct in question "must so undermine the trust and confidence which is inherent in the particular contract of employment that the master should no longer be required to retain the servant in his employment. More recently, the test was set out by Collins Rice J in **Palmeri v Chares Stanley & Co Ltd [2021] IRLR 563**

> **"The test I am required to apply for that is variously formulated in the authorities. It includes considering whether, objectively and from the perspective of a reasonable person in the position of Charles Stanley, Mr Palmeri had "*clearly shown an intention to abandon and altogether refuse to perform the contract*" by repudiating the relationship of trust and confidence towards Charles Stanley (*Eminence Property Developments v Heaney [2011] 2 All ER (Comm) 223*). In a case like this "*the focus is on the damage to the relationship between the parties*" (*Adesokan v Sainsbury's Supermarkets Limited [2017] ICR 590* per Elias LJ paragraph 23). There is relevant analogy with the formulations in the employment cases: "*the question must be — if summary dismissal is claimed to be justifiable— whether the conduct complained of is such as to show the servant to have disregarded the essential conditions of the contract of service*." (*Laws v London Chronicle [1959] 1 WLR 698*, pages 700-701) It must be of a "*grave and weighty character*" and "*seriously inconsistent – incompatible – with his duty as the manager in the business in which he was engaged*" (*Neary v Dean of Westminster [1999] IRLR 288*, paragraph 20), or "*of such a grave and weighty character as to amount to a breach of the confidential relationship between employer and employee, such as would render the employee unfit for continuance in the employer's employment*" (*Ardron v Sussex Partnership NHS Foundation Trust [2019] IRLR 233* at paragraph 78)."

251. A repudiatory breach might be said to be conduct the effect of which is to render the continued relationship unsustainable. Conduct that is wilfull, a deliberate flouting of essential contractual conditions will cross a repudiatory line. The Tribunal therefore has a fact finding function in wrongful dismissal, to establish what the employee has actually done and not just, as in unfair dismissal, what the employer reasonably believes him to be guilty of **British Heart Foundation v Roy UKEAT/0049/15.**

Time limits in discrimination complaints

252. The Equality Act 2010 provides that a complaint of discrimination must be brought within (a) the period of 3 months starting with the date of the act to which the complaint relates, or (b) such other period as the employment tribunal thinks just and equitable. Conduct extending over a period is to be treated as done at the end of the period and failure to do something is to be

treated as occurring when the person in question decided on it. In the absence of evidence to the contrary, a person is to be taken to decide on failure to do something when he does an act inconsistent with doing it, or if he does no inconsistent act, on the expiry of the period in which he might reasonably have been expected to do it.

253. A continuing course of conduct might amount to an act extending over a period, in which case time runs from the last act in question. Hendricks v Commissioner of Police of the Metropolis [2003] IRLR 96 considered the circumstances in which there will be an act extending over a period.

> "The concepts of policy, rule, practice, scheme or regime in the authorities were given as examples of when an act extends over a period. They should not be treated as a complete and constricting statement of the indicia of "an act extending over a period." I agree with the observation made by Sedley LJ, in his decision on the paper application for permission to appeal, that the Appeal Tribunal allowed itself to be side-tracked by focusing on whether a "policy" could be discerned. Instead, the focus should be on the substance of the complaints that the Commissioner was responsible for an ongoing situation or a continuing state of affairs in which female ethnic minority officers in the Service were treated less favourably. The question is whether that is "an act extending over a period" as distinct from a succession of unconnected or isolated specific acts, for which time would begin to run from the date when each specific act was committed."

Early Conciliation Provisions

254. Section 18A of the Employment Tribunals Act 1996 contains a requirement that before a person (the prospective claimant) presents an application to institute relevant proceedings relating to any matter, the prospective claimant must provide to ACAS prescribed information in the prescribed manner about that matter.

255. The prescribed period means prescribed in Employment Tribunal procedure regulations. In relation to claims for disability discrimination the prescribed period is three months.

256. The case law on the application of the "just and equitable" extension provides that it is the task of the tribunal to take account of all relevant factors, and leave out of account any which are not relevant: **Abertawe Bro Morgannwyg University Local Health Board v Morgan [2018] EWCA Civ 640.** Leggatt LJ said this at paragraphs 18-19:

> **"18. First, it is plain from the language used ("such other period as the employment tribunal thinks just and equitable") that Parliament has chosen to give the employment tribunal the widest possible discretion. Unlike section 33 of the Limitation Act 1980, section 123(1) of the Equality Act does not specify any list of factors to which the tribunal is instructed to have regard, and it would be wrong in these circumstances to put a gloss on the words of the provision or to interpret it as if it contains such a list. Thus, although it has been suggested that it may be useful for a tribunal in exercising its discretion to consider the list of factors specified in section 33(3) of the Limitation Act 1980 (see British Coal Corporation v Keeble [1997] IRLR 336), the Court of Appeal has made it clear that the tribunal is not required to go through such a list, the only requirement being that it does not leave a significant factor out of account: see Southwark London Borough**

Council v Afolabi [2003] EWCA Civ 15; [2003] ICR 800, para 33. The position is analogous to that where a court or tribunal is exercising the similarly worded discretion to extend the time for bringing proceedings under section 7(5) of the Human Rights Act 1998: see Dunn v Parole Board [2008] EWCA Civ 374; [2009] 1 WLR 728, paras 30-32, 43, 48; and Rabone v Pennine Care NHS Trust [2012] UKSC 2; [2012] 2 AC 72, para 75.

19. That said, factors which are almost always relevant to consider when exercising any discretion whether to extend time are: (a) the length of, and reasons for, the delay and (b) whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh).”

257. In **Robertson –v- Bexley Community Centre (T/A Leisure Link) 2003 [IRLR 434]** the Court of Appeal considered the extent of the discretion to extend time on a just and equitable basis under the discrimination legislation. The Employment Tribunal has a “wide ambit”. At paragraph 25 of the judgment Auld LJ said:-

“It is also of importance to note that the time limits are exercised strictly in employment and industrial cases. When Tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify a failure to exercise the discretion. Quite the reverse. A Tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule.”

Discrimination arising from disability

258. Section 15 Equality Act 2010 provides:

“(1) a person (A) discriminates against a disabled person (B) if –

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

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

(2) Subsection (1) does not apply if (A) shows that (A) did not know, and could not reasonably have been expected to know, that (B) had the disability”.

259. A Section 15 claim will not succeed if the respondent shows that it did not know, and could not reasonably have been expected to know, that the claimant had the disability.

260. In McQueen v General Optical Council [2023] EAT 36 the Employment Appeal Tribunal upheld the first instance decision that the claimant’s disabilities (dyslexia, Asperger’s, neurodiversity and hearing loss) had no effect on the aggressive behaviours for which he was disciplined. The tribunal found that the Claimant’s conduct arose not out of his disabilities, but from a short temper and resenting being told what to do. Mr Justice Kerr said at para 52, commenting on the written judgment in that case:

52. It would have been better if the tribunal had structured its decision by asking itself the questions (i) what are the disabilities (ii) what are their effects (iii) what unfavourable treatment is alleged in time and proved and (iv) was that unfavourable treatment “because of” an effect or effects of the disabilities. Or, the tribunal could have reversed the order of questions and asked instead (i) what unfavourable treatment is alleged in time and proved (ii) what was the reason for that unfavourable treatment (iii) what were the effects of

the disabilities and (iv) was the reason for the unfavourable treatment and effect or effects of the disabilities.

53. Whichever way the tribunal decides to approach the issues, it should structure its decision so that a reader can understand clearly what is being asked and answered at each stage of the analysis.

…

58. …once the tribunal had determined that the disabilities did not have any effect on the claimant's conduct on the occasions in question the further question whether any unfavourable treatment was "because of" that conduct did not arise.

…

59 …. The tribunal found that those effects did not play any part in the conduct that led to the unfavourable treatment complained of. It was not the tribunal's finding that those effects played a significant but less than predominant role in causing that conduct. This is therefore not a case where dual or multifactor causation had to be analysed.

261. Scott v Kenton Schools Academy Trust [2019] UKEAT 0031 considered the test, under Section 15, of something arising in consequence of the disability. HHJ Auerbach said at paragraph 41 of the judgment:

"The test has been examined in prior authorities now on a number of occasions, as well as other aspects of Section 15. The most useful guidance to be found in one place, I think, is that in the decision of the President of the EAT, as she then was, Simler J, in Pnaiser v NHS England & Another [2016] IRLR 170 where she drew the threads together of the previous authorities, as follows:

31. …….the proper approach to determining section 15 claims …. can be summarised as follows:

(a) A Tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.

(b) The Tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a section15 case. The 'something' that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.

(c) Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant: see Nagarajan v London Regional Transport [1999] IRLR 572. ..

(d) The Tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is "something arising in consequence of B's disability". That expression 'arising in consequence of' could describe a range of causal links. Having regard to the legislative history of section 15 of the Act (described comprehensively by Elisabeth Laing J in Hall), the statutory purpose which appears from the wording of section 15, namely to provide protection in cases where the consequence or effects of a disability lead to unfavourable treatment, and the availability of a justification defence, the causal link between the something that causes unfavourable treatment and the disability may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.

I observe that the tenor of all of this guidance is that, whilst it is a causation test, and whilst there must be some sufficient connection between the disability and the something relied upon in the particular case in order, for the "in consequence test" to be satisfied, the connection can be a relatively loose one."

262. The Court of Appeal in Robinson v Department for Work and Pensions [2020] EWCA Civ 859 considered causation in a section 15 complaint. Bean LJ at paragraphs 55 and 56 of the judgment rejected a "but for" test in establishing whether the treatment (unfavourable treatment for a section 15 complaint and less favourable treatment for a section 13 complaint) was *because of* the claimant's disability or something arising in consequence of it. Bean LJ affirmed Underhill LJ in Dunn v Secretary of State for Justice [2018] EWCA Civ 1998 who stated that a prima facie case under section 15 is not established solely by the claimant showing that she would not be in the situation…if she were not disabled. The Tribunal must look at the thought processes of the decision maker concerned to ascertain "the reason why they treated the claimant as they did. Was it wholly partly because of something that arose in consequence of the claimant's disability?".

Harassment

263. Section 26 Equality Act 2020 provides:

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

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

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

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

……

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

(a) the perception of B;

(b) the other circumstances of the case;

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

264. In a harassment complaint the unwanted conduct must be related to the protected characteristic. The EHRC Code at paragraph 7.9 states that 'related to' should be given a broad meaning 'a connection with the protected characteristic'. Context will be relevant and mere reference to a protected characteristic may not be sufficient to establish that the conduct was "related to" the characteristic. It must be shown that the characteristic was the ground or reason for the treatment to which objection is taken. In the EAT case of **Warby v Wunda Group PLC** UKEAT/0434/11 Langstaff J stated:

> **"We accept that the cases require a Tribunal to have regard to context. Words that are hostile may contain a reference to a particular characteristic of the person to whom and against whom they are spoken. Generally a Tribunal might conclude that in consequence the words themselves are that upon which there must be focus and that they are discriminatory, but a Tribunal, in our view, is not obliged to do so. The words are to be seen in context; the context here was that the dispute and discussion was about lying. The conduct complained of, as the Tribunal saw it, was a complaint emphatically made about lying; it was not made to the Claimant because of her sex, it was not made to the Claimant because she was pregnant, and it was not made to the Claimant because she had had a miscarriage. In the words of Ahmed at paragraph 37, as earlier quoted:**
>
> **"The fact that a Claimant's sex or race is a part of the circumstances in which the treatment complained of occurred, or of a sequence of events leading up to it, does not necessarily mean that it formed part of the ground, or reason, for that treatment."**

265. The conduct complained of must be unwanted. It will normally suffice that the claimant genuinely did not welcome the conduct. The conduct must have the required purpose or effect. Conduct with purpose requires an examination of the alleged harasser's intentions. It may be necessary for the tribunal to draw inferences from the surrounding circumstances. Effect must be assessed from the victim's point of view subject to the important qualification that the conduct must reasonably be considered to have violated the victim's dignity or to have created an unpleasant environment for him or her. The tribunal will be required to assess whether the victim actually took offence and if it was reasonable for him to do so. It is important to note that if the tribunal finds that the alleged harasser behaved deliberately and that his purpose was to violate his victim's dignity or create an intimidating, hostile, degrading, humiliating or offensive environment for his victim, the test is met even if the conduct did not have this effect. The claim may be successful, but there may be no injury to feelings in such circumstances.

Duty to make adjustments

266. Section 20 and section 21 Equality Act 2010 provide for the duty to make reasonable adjustment for disabled people.

(1) The duty comprises the following three requirements.

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.

The second requirement is a requirement, where a physical feature 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.

(5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put 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 provide the auxiliary aid.

……..

In relation to the second requirement, a reference in this section or an applicable Schedule to avoiding a substantial disadvantage includes a reference to —

(a) removing the physical feature in question,

(b) altering it, or

(c) providing a reasonable means of avoiding it.

Applying the Law to the Facts

Unfair dismissal

<u>If the reason was misconduct, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant?</u>

Reason

<u>The respondent genuinely believed the claimant had committed misconduct</u>

267. The Tribunal heard oral evidence from the dismissing officer HS. Applying <u>Burchell</u> it accepts that she genuinely believed that the claimant had sworn at NB, raised his voice and walked away before returning to move his car. HS had reasonable grounds for that belief as the claimant admitted having sworn, raised his voice and walked away. HS had seen the Datix report of the incident from NB, the investigation report of JW, the statements of security guards SH and PR who had seen NB shortly after the incident and the claimant's own statement from his interview with JW. She knew that both NB and the claimant were upset after the incident. HS heard from the claimant and his representative at the disciplinary hearing. She also had her own first impression of the incident having received a report of it on 25 June 2021 from the female security guards.

268. HS formed a genuine belief on reasonable grounds of the guilt of the claimant of misconduct in the car park incident. HS described it as gross misconduct under the respondent's policy. She also described it as aggression. This was something the claimant took offence to, but the Tribunal finds that HS acted reasonably when concluding that describing swearing at someone seated in a car when you are standing, raising your voice and then walking away can reasonably be described as aggression.

At the time the belief was formed had the respondent carried out a reasonable investigation

269. Deputy Chief Pharmacist VY carried out the investigation. She was commissioned to do so by DM. The claimant was informed of the allegations in detail in the letter inviting him to the investigatory interview. VY spoke to the claimant who admitted having sworn at NB once, raised his voice and walked away. Applying, RSPB v Croucher, this admission meant that the investigation need not have gone further. However, it was a detailed investigation and whilst there was no direct witness to the altercation in the car park, statements were taken from the security guards SH and RP and from NB, and from JP who saw the claimant immediately after the incident. VY's report was thorough and presented the facts as she found them to be. She did not set out a recommendation but left the decision as to whether to proceed to disciplinary or not to DM.

270. Ms Barry for the respondent took the Tribunal through the investigatory process and notes of meetings with the claimant showing the responses he gave to questions he was asked about the incident. The Tribunal accepts her submission that he did not make a full disclosure when first questioned about the incident.

271. The Tribunal finds that HS was satisfied as to the guilt of the claimant of misconduct having carried out such investigation as was reasonable in all the circumstances. The reason for dismissal was that contained in section 98(2)(b), the conduct of the claimant.

Fairness

272. Section 98(4) provides that where the employer has established the reason for the dismissal the determination of whether the dismissal is fair or unfair depends upon 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 sufficient reason for dismissing the employee. The Tribunal must determine that point in accordance with equity and the substantial merits of the case.

273. HS was the dismissing officer. She took into account the allegations, the accounts of the incident from the claimant and his representative, the content of the management statement of case, the respondent's Disciplinary Rules, Policy and Procedure, NB's Datix report and statement. She attached little weight to the reports of the female security guards because she recognised that one of them may have inflamed the situation by telling NB of the claimant's conviction.

274. A circumstance that she considered relevant was the claimant's history of criminal conviction, his final written warning (which ran from July 2020 to July 2021) in relation to that conviction and his previous assertion to IW's hearing in July 2020 that there would be no repetition of aggression from him. She concluded there had been aggression from him in the car park incident on 25 June 2021 during the final written warning period. She reached that conclusion because he had admitted raising his voice and swearing.

275. JD made submissions at the dismissal hearing that the claimant had not had reasonable adjustments he had asked for. JD made submissions about

intrusive and oppressive absence management from DM and others and the Tribunal finds, resolving this point about whether or not submissions had been made by JD in the claimant's favour, that HS heard submissions from JD that the respondent had failed to take into account the claimant's disabilities in deciding to progress the matter to a disciplinary hearing. DM had made the decision to progress to a disciplinary hearing. HS considered that decision and the classification of the conduct as gross misconduct within the respondent's Disciplinary Rules and Procedures. HS decided that swearing and raising his voice amounted to a breach of rule 24 *serious or repeated breach of Trust values and behaviours* and rule 28 *serious example of disrespectful or negative attitudes to staff* by the claimant. Even if DM had failed to take into account disability and or had been motivated against the claimant because of his conviction in deciding to progress to disciplinary hearing, HS considered for herself the classification of the conduct and concluded it was gross misconduct in breach of those rules. In relation to unfair dismissal the motivation of DM made no material difference to the classification of the offence as gross misconduct by HS nor to the consideration of mitigation nor the sanction imposed by HS.

276. There were no notes of the disciplinary hearing in this case. The respondent's explanation was that no note taker was provided, that HS and AH took notes but destroyed them in confidential waste after preparing the outcome letter. The Tribunal found this unusual in an organization of the size and with the resources of the respondent. The claimant did not go so far as to submit that an adverse inference should be drawn from the absence of the notes. Where there has been a disagreement about what was said, the Tribunal has looked to the claimant's evidence, JD's evidence, HS's evidence, AH's evidence and the letter of dismissal to reach its findings.

277. During the tribunal hearing an issue arose as to whether JD had submitted that the claimant's disabilities ought to be taken into account in relation to (a) the conduct of the disciplinary hearing and or (b) in relation to the impact of autism, anxiety and depression on his conduct in the car park. The respondent submitted that it was only (a) and the claimant that it was both (a) (though no adjustments were needed) and (b). The Tribunal finds in the claimant's favour on this point that HS was told by JD at the disciplinary hearing that she must take into account that the claimant's disabilities may have impacted on his behaviour in the car park. The Tribunal accepts the evidence of JD that this was said and notes it is corroborated by HS's own letter of dismissal where she sets out that submission by JD recited in full from her letter in the facts section above and in short here where she said:

> *"..acceptance of this behaviour and that your communication may be impacted by your conditions should be considered".*

278. HS found out for the first time at the disciplinary hearing that the claimant had disabilities of autism, anxiety and depression. Her understanding of that at the time and at the tribunal hearing was that she should consider any adjustments needed at the hearing. None were needed. She did not understand, even from JD's submission which she recited in her letter, that there might be a causation or contribution point being made, that if the disability caused or contributed to the behaviour then this may be relevant to the classification of the behaviour as gross misconduct, misconduct or otherwise. She did not appreciate that point. Accordingly, she made no

finding as to whether the disabilities had caused or contributed to the claimant's conduct on 25 June 2019. The claimant had admitted that he raised his voice, swore and walked away. Despite JD submitting on the claimant's behalf that his disabilities were contributing factors to his conduct in the car park, the claimant himself did not say that was the case. At tribunal the claimant's own position in evidence was that it was his stress about the forthcoming GPhC hearing that was affecting him in the car park. HS concluded at her dismissal hearing that no matter what caused the behaviour she could not accept that behaviour in the workplace.

Did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant?

279. The Tribunal asked itself can it be said that no reasonable employer would have dismissed for that misconduct?

280. HS was convincing in her evidence about the circumstances that mattered to her. What she was faced with was an employee with a criminal conviction for aggression, who had a final warning for that conviction which had been mitigated down from a dismissal because of his anxiety, depression and autism, length of good service and assurances that there would be no repeated aggression, (given that his anxiety and depression were well managed) and yet he had acted aggressively in the car park on 25 June 2019 within both the currency of the final written warning and the suspended criminal sentence. A key factor for her was that the claimant had not shown any contrition, that his position was that this was a low-level car parking altercation.

281. The Tribunal cannot say that no reasonable employer would have dismissed in those circumstances. The decision falls within the range of reasonable responses. The *circumstances* in the previous paragraph, which in unfair dismissal law she is entitled to take into account, in HS's mind, warranted dismissal. She then turned her mind to sanction. HS considered mitigation. She knew of the claimant's long service and took that into account. HS knew that the claimant was under extreme pressure and fear for loss of his ability to practice in his profession on 25 June 2021 because of his imminent Fitness to Practice Hearing at GPhC. She decided that was not a mitigating factor and confirmed in her letter of dismissal on this point *the issue of that hearing was confirmed to be separate and not for consideration in this regard.*

282. HS decided that as the claimant's anxiety and depression and autism had been taken into account in mitigation at the previous disciplinary hearing she did not think it reasonable to allow medical considerations to mitigate a second instance of gross misconduct. The Tribunal is critical of this reasoning. A disability is not a "joker" to be played once and once only.

283. The respondent had access, through HR, to the many OH reports stating that the claimant was disabled and the ASC report setting out the impact of his autism. Dr Hadland had been asked could the autism affect his behaviour and had replied *this does seem possible* and directed the reader to the ASC report. The respondent had all of that information. AH was present with HS throughout the hearing and the adjournment at which the decision was made. AH did not direct HS to the OH reports and ASC report. It was JD who informed the hearing that the claimant was disabled. HS did not consider,

and was not advised by HR to consider, an adjournment to take time to read the reports and possibly seek more information about the relationship, if any, between the disabilities and the conduct complained of. The Tribunal finds that even if she had, if the possibility of a connection had been explored and found to exist, it would have made no difference to the outcome.

284. HS acted within the range of reasonable responses in deciding that autism, anxiety and depression did not outweigh the fact that the claimant had previously given an assurance that there would be no repetition of aggressive behaviour and yet there had been.

285. By the letter dated 7 October 2021 the claimant knew the allegations he was to face. He had a reasonable amount of time to prepare for the disciplinary hearing. He was informed of his right to be accompanied at that hearing and was in fact represented at the hearing by JD of the PDA. The claimant was sent a copy of the investigation report and management statement of case with its appendices. He knew that the security guards had said that NB was shaking and upset after the incident. He was able to submit that he too had been upset, that JP could attest to that. Both he and JD made submissions about the impact of his autism, anxiety and depression and the stress of doing alternate duties and facing a Fitness to Practice hearing on his conduct at the dismissal hearing on 25 October 2021.

286. The decision to dismiss fell within the range of reasonable responses. The process, despite failings in the absence of provision of disciplinary hearing notes and failure to consider in detail the impact of disability on the conduct complained of, was fair. The Tribunal finds that such failings as there were in HS having had a first impression of this case (from her role on the date of the incident), and in there being no consideration of the *causative or contributive* impact of disability (only consideration of disabilities as mitigation of sanction) and in there being no notes of the hearing made no material difference to the outcome.

The appeal

287. Applying Taylor v OCS the Tribunal considers the fairness of the decision to dismiss all the way through to the outcome of the appeal. At the appeal hearing the claimant was represented by JD. He had seen the management statement of case for his dismissal. He had submitted detailed written grounds of appeal and grievance and had been given adequate notice of the hearing date. He had been offered the opportunity to call witnesses and had chosen not to do so.

288. There were three panel members D Moore, CR and SK none of whom had any prior involvement in the case. The hearing lasted a full day and the panel adjourned to consider their decision and presented it in writing with 10 pages of full written reasons for the decision, responding to each of the appeal points and showing that it had considered the possible impact of the grievance points on the appeal outcome.

289. The claimant argued that he and JD had come prepared to present their grievance issues first and have that dealt with separately before coming on to deal with the disciplinary issue. The claimant and JD consented to proceed with the hearing on the basis that there was no restriction on any submissions

they made. The Tribunal finds that the appeal panel acted reasonably in deciding to allow the claimant to make any submissions he wished whether grievance or appeal related at the appeal hearing. It acted reasonably in obtaining the represented claimant's consent to proceed with the appeal without dealing with the grievance first or separately. The claimant was able to make submissions about the following key matters in his grievance at the appeal hearing:

- DM being motivated to terminate his employment, a background of intimidation from her which affected his conduct in the car park.
- Intrusive and oppressive use of the AMP against him.
- Unhelpful OH reports.
- His opposition to the content of his ASC report.
- The impact of his autism, anxiety and depression on his conduct on 25 June 2021.

290. The Tribunal notes that there was some confusion caused by a letter having been sent from HR acknowledging the appeal, and HR evidence to the Tribunal that the appeal and grievance were being heard together, and then Mr Moore declining to address the grievance separately. The letter was an unfortunate miscommunication from HR.

291. The Tribunal accepts the oral evidence of Mr Moore and finds that the appeal panel acted reasonably in considering the following context of the claimant in its decision not to address the grievance first or separately

- He was no longer an employee,
- He had lodged his grievance only post termination of employment,
- He had never raised the matters contained in the grievance in a formal, written complaint or grievance before,
- He had been represented by JD throughout the disciplinary process and supported by workplace colleague TK prior to that, had had support from JH at FTSU Guardian,
- When he had said that he was being bullied and intimidated by DM he had been offered mediation with DM and declined it.

292. The Tribunal finds that the appeal panel acted reasonably in declining to make specific findings on the points in the grievance. It recorded in its outcome letter:

"The panel do not consider that having listened to these particular grounds of appeal and what you would consider to be a grievance, that this would have had a material impact upon the incident in the car park, which was the incident being investigated which led to your subsequent dismissal."

293. The ACAS uplift applies where a complaint of unfair dismissal succeeds and there has been an unreasonable failure to follow the Code. If the unfair

dismissal complaint had succeeded there would have been no unreasonable failure to follow the Code in relation to the grievance in this case. In handling the appeal the panel acted reasonably in its decision to focus on the reason for dismissal and the process followed in arriving at the dismissal. It looked at what HS had taken into account in classifying the conduct as gross misconduct and in deciding if it justified dismissal and in considering mitigation.

294. The appeal panel acted within the range or reasonable responses in concluding that irrespective of any findings on the content of the grievance the incident in the car park would have led to his dismissal. The panel did not accept that a background of intimidation by DM or any of the other matters contained in the grievance, if found in his favour, would have amounted to justification for the claimant's conduct in the car park in HS's mind.

295. The appeal hearing was presented with the OH report of 19 July 2021 which referred to the ASC report. Mr Moore accepted in evidence that he did not go and read the ASC report. The appeal panel upheld HS's reasoning that his conduct, whatever caused or contributed to it, was not acceptable. The appeal panel agreed that it amounted to gross misconduct of itself.

296. The panel also considered the sanction and looked at what HS had taken into account in relation to mitigation and what she had declined to consider as mitigation. It acted reasonably in adopting this approach. It agreed with HS that the factors put forward at disciplinary hearing were insufficient to mitigate against dismissal.

297. The panel scrutinised HS's decision and accepted that she was faced with an incident of aggression after a reassurance had already been made that there would be no further aggression. The panel went back and looked at the IW outcome letter which recorded that the claimant had said *there would be no repetition of this or other similar incidents.* The panel were satisfied that HS had looked at the previous assurance given and found that there had been a repetition. The panel upheld the decision that the car park incident was gross misconduct under the Policy in its own right and that the claimant's disabilities, to the extent if any that they caused or contributed to the conduct, did not mitigate against dismissal because HS had no confidence, an assurance having been given before and broken, that there would not be another incident. The Tribunal finds that the issue was poorly worded by HS in her outcome letter and that, having heard her oral evidence, she had lost confidence in the claimant because he had said it would not happen again to IW, and it had happened, and going forward a further incidence of aggression was a risk she was not willing to take.

298. The appeal panel was satisfied that HS had a genuine belief on reasonable grounds that the claimant had committed an act of misconduct sufficient to justify his dismissal and that she had taken mitigation into account and not heard anything to outweigh the decision to dismiss. The appeal panel was satisfied that the response of dismissal, in the circumstances of HS being faced with the claimant who had a criminal conviction, final written warning, had breached an assurance there would be no further aggression and had acted aggressively during the currency of his suspended sentence and final written warning, was justified.

HS and impartiality

299. The claimant was also able to make submissions at appeal about the lack of impartiality of HS. The Tribunal accepts that this point may have acquired a disproportionate emphasis at Tribunal to that given to it by the claimant at appeal. On a reading day during the final hearing the Tribunal noticed correspondence in the bundle, to which it had not been taken in cross-examination, between HS and colleagues about the car park incident around the time of the incident which showed HS asking for NB to be asked to file a report of the incident and HS offering to meet with NB. The facts are set out above. HS was recalled and asked supplemental questions and cross-examined on the points.

300. In her presentation of the management statement of case at appeal HS did not respond to the ground that she had not been impartial beyond saying that she had not been influenced by the security guard statements. The appeal panel did not look at whether or not HS had been impartial. The Tribunal has considered whether the failure of the appeal panel to consider the impartiality point and the failure of HS to recuse herself at the disciplinary hearing renders the dismissal unfair. The Tribunal finds it does not, it made no material difference, for the following reasons.

301. The Tribunal finds that HS had received a report of the incident on the car park on the day it happened. She had asked *where* was the claimant and was security with him and she had rung and spoken to JP to check that was the case. She had heard outline reports from the female security guards who had come to the patient flow office about the incident. One of these was the security guard who had told NB, after the incident but before she left site and before she had indicated any intention of her own to log a report of the incident, that the claimant had *taken a sledge hammer to his neighbour and been convicted.* The guard had told NB to look him up. The Tribunal finds that the female security guards were not reliable witnesses as to the incident as they had not been present and did not give a reliable account of the impact on NB as they had contributed to factors that could affect NB's reaction and had inflamed the situation. SH and PR then went to the patient flow office on 25 June 2021 after the incident and gave outline reports that coloured HS's first impression of the situation.

302. HS had asked *how* was NB and on 28 June (the next working day) had been in email exchanges to seek out a written report from NB and was offering to meet with NB to see how she was. For the Tribunal HS's evidence that she had asked *where* was the claimant and was security with him and *how* was NB spoke of a first impression that the claimant had done something that needed to be contained and that NB needed support, was problematic. It gave rise to the possibility of a lack of impartiality. However, this did not render the disciplinary hearing unfair because the Tribunal accepts HS's evidence that she focused on what the claimant had admitted. Once HS read the investigation report and interview statements of the claimant and heard from him at the hearing it was apparent that the claimant admitted he swore, he raised his voice and he walked away, for however long, leaving NB unable to move her vehicle. HS read the report and statements before opening the hearing. The claimant's admission aligned with HS's first impression. The Tribunal accepts the oral evidence of HS that she did not meet with NB and that she took into account the impact of the incident on both NB and the

claimant.

303. The appeal panel dealt with the part of this impartiality point that related to HS having been influenced by the security guard accounts. The appeal panel focused on the extent to which HS had relied on the claimant's statement and NB's statement, not the statements of the security guards. The appeal panel recorded in its outcome letter that HS had considered the points about who to believe about the incident and had not heard anything that called into question the credibility of NB's account of the incident. It also noted that HS had focused on the behaviour that the claimant had admitted.

304. For those reasons, the impartiality point which emerged at Tribunal did not render the dismissal hearing or appeal hearing unfair.

305. The claimant's complaint of unfair dismissal fails.

Wrongful dismissal

306. This area of law is different from unfair dismissal. In unfair dismissal the Tribunal must not substitute its view for that of the respondent. It must apply Burchell and Iceland and look to see if the respondent acted reasonably in all the circumstances.

307. In wrongful dismissal law the Tribunal must look objectively to see if the conduct complained of amounts to a repudiatory breach of contract. It is the conduct that is relevant.

308. The Tribunal finds as a fact that NB had parked the wrong way, that the claimant parked the right way but blocking her in and told security he had done this and gave his details to them expecting to be called back to move his car. When he returned to move the car NB was sitting in her car and held up her hand to him to indicate that he should wait while she was talking on the phone. The claimant raised his voice at NB, he pointed out that she had parked the wrong way and he he said *the fucking yellow lines.* He walked away, however momentarily, whilst NB was sitting in her car trapped by his car, without moving it immediately to release her.

309. To be a repudiatory breach of contract the conduct complained of must be "weighty", "serious" and such that it means that the continued employer employee relationship is not sustainable. The Tribunal finds that the conduct complained of in terms of the car park incident alone in this case was not of such a weighty or serious type as to amount to a repudiatory breach. However, the conduct looked at objectively but taking into account all the facts known to HS, that is to say the car park incident in the context of the claimant's previous final written warning and assurance given about no further aggression, and his conviction and live suspended sentence, crosses the threshold for a repudiatory breach.

310. The respondent was entitled in contract law to act on the claimant's conduct as a breach of contract and dismiss without notice. His complaint of wrongful dismissal fails.

The discrimination complaints and time issues

311. The claimant's employment was terminated on 16 November 2021. He

entered early conciliation on 10 February 2022. His appeal against dismissal was heard on 24 February 2022 and the outcome communicated to him on 8 March 2022. The claimant achieved an ACAS certificate on 23 March 2022. He brought his claims on 22 April 2022.

312. Given the date the claim form was presented and the effect of early conciliation, any complaint about something that happened before 11 November 2021 may not have been brought in time. Were the discrimination complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:

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

If not, was there conduct extending over a period?

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

The Section 15 Complaints

Were the complaints stand alone acts or part of a course of conduct extending over a period of time, the last of which was in time?

5.2.1 the AMP process

313. The AMP process ran from 12 March 2020 to 19 July 2021 with various decision makers including JW, DM and PJ on 26 March 2020.

314. The AMP process from 12 March 2020 to 19 July 2021 culminated in a stage 2 warning for the claimant which would remain on his file for twelve months so that as at 19 July 2021 he was at risk of any further absence triggering a stage 3 dismissal hearing. The Tribunal finds that the imposition of the 19 July 2021 warning amounted to a continuing state of potentially discriminatory affairs bringing the AMP process complaints from 12 March 2020 to termination of employment into time.

5.2.2 the suspension This is not pursued.

5.2.3 the FWW for the criminal conviction

315. The final written warning was imposed by IW for 18 Months from 6 July 2020 in relation to the criminal conviction. The decision of IW to impose the final written warning for the criminal conviction was an isolated specific decision with ongoing impact but not an ongoing discriminatory state of affairs. The claimant's time in which to complain about the sanction (which he did not appeal) ran from the date the decision was communicated to him for three months, less a day, plus time in ACAS early conciliation if he had gone to ACAS. The decision was communicated on 6 July 2020. Time would have run for three months less a day plus time in ACAS if he had gone to ACAS at that time, from that date. The claim was brought on 22 April 2022 by which time the complaint was 16 months out of time.

5.2.4 being investigated for the car park incident and decision to progress to disciplinary

316. DM commissioned the investigation and communicated that to the claimant in her letter dated 16 July 2021. She decided to proceed to disciplinary hearing and informed the claimant of this on 3 September 2021. The respondent's response to the car park incident, commissioning the investigation and proceeding to disciplinary hearing, was a continuing state of affairs and therefore part of a course of conduct extending from the date of the incident to the date of termination of employment and is brought within time.

5.2.5 not being able to practice as a pharmacist

317. The complaint relates to being prevented from undertaking pharmacy practice from August 2020 to termination of employment on 16 November 2021 when there was no regulatory bar on the claimant doing so save for during the period of his GPhC suspension 5 August to 5 October 2021. DM through JW required alternate duties for the claimant. This was a continuing state of affairs from August 2020 until the termination of the claimant's employment. Throughout that period there had been delay in starting his retraining and competency assessment so that he had not undertaken unsupervised dispensing and the training and assessment had not been completed as at the termination of his employment. The Tribunal finds that as a fact he had not been permitted to perform the full duties of a pharmacist from August 2020 to termination of employment. This complaint is brought within time.

5.2.6 not being able to contribute to his RA This is not pursued.

5.2.7 being assigned portering duties

318. The portering duties came about after the 12 July 2021 return to work and 19 July 2021 RA. They continued during the GPhC suspension and until termination of employment on 16 November 2021. This complaint is about an ongoing state of discriminatory affairs and is brought in time.

5.2.8 being denied unpaid leave

319. This decision was made by DM on or shortly after 12 July 2021 when the claimant requested unpaid leave for the period of his GPhC suspension. Her rationale was that he would need to be available to participate in the disciplinary investigation that she had commissioned. It is not clear when the decision was communicated to the claimant, though JW discussed it with him in late July 2021. This was an isolated decision made by DM and had taken effect after 19 July 2021 when the claimant was performing portering duties. Time would have run from late July 2021 for three months less one day plus any time in ACAS early conciliation if he had gone at that time. The complaint was not brought until 22 April 2022. It was by then approximately 5 months out of time.

For those complaints, at paras 5.2.3 *final written warning*, 5.2.6 *risk assessment* and 5.2.8 *unpaid leave* which the Tribunal has found were out of time, were the claims made within such further period as the Tribunal thinks is just and equitable? The Tribunal will decide:

Why were the complaints not made to the Tribunal in time?

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

320. Applying Bexley, the Tribunal reminded itself that the exercise of the discretion to extend time is an exception and not the rule. It is for the claimant to adduce evidence in support of his contention that the discretion should be exercised in his favour. The Tribunal may take into account all the relevant circumstances. The claimant gave no evidence as to why his complaints were not brought in time. He said, in relation to the duties he was allocated and by implication generally following his return to work post sentencing, that he had not wanted to make waves and so did not complaint. The Tribunal had regard to the fact that during the whole period from March 2020 to termination of employment he had support from a workplace colleague TK, then latterly a PDA representative JD and throughout he had access to the Trust's FTSU Guardian JH and had access to the internet. He was supported in his GPhC case in 2021 by a solicitor. He was able to prepare his own submissions for his AMP stage 3 hearing in March 2020 and for the disciplinary hearing in July 2020. He was able to attend work and participate in regular meetings with JW. He was able to change GP and seek out a private psychiatrist for a report letter and advice. He was able to seek support (only provided latterly,) from counselling services. He was able to submit to ASC assessment and when he saw the report, respond to its content and discuss his objection to some of the recommendations with Dr Hadland and, in detail with JW and MM.

321. The impact of allowing the complaints out of time would be to expose the respondent to additional complaints and not allowing them would deny the claimant the right to complain. In the circumstances above, and having regard to the overriding objective to act fairly and justly to both parties, time is not extended. The Tribunal does not have jurisdiction to hear the complaints at paras 5.2.3 *final written warning* and 5.2.8 *unpaid leave* of the List of Issues.

Discrimination arising from disability (Equality Act 2010 section 15)

Did the respondent know, or could it reasonably have been expected to know that the claimant had the disability? The claimant relies on the combined impact of autism, anxiety and depression and if so from what date?

322. The respondent conceded knowledge of anxiety and depression from 2019 and autism from May 2020.

If so, did the respondent treat the claimant unfavourably in any of the following alleged respects:

Unfavourable treatment

323. Unfavourable treatment is a similar concept in discrimination law to that of detriment. It is something that is detrimental to the claimant. It has to be more than a neutral act. The acts that were brought in time were at *5.2.1 application of the AMP and 5.2.4 decision to go to disciplinary and 5.2.5 being denied pharmacist duties and 5.2.7 allocation of portering duties* of the List of Issues.

5.2.1applicaiton of the AMP: Being subjected to attendance management process for sickness absence from 12 Mar 2020 (GoC para 76(b)(i) and escalation to a stage 3 sickness absence meeting and again on 19 Jul 2021 for absence.

324. The application of the AMP process in moving to a stage 3 hearing in March 2020 was unfavourable treatment because it put the claimant at risk of dismissal. During January 2020 the claimant was very unwell, so unwell that JW had called for OH practitioner CE on 8 January 2020 who had said that the claimant was not fit to engage in management meetings. He had been sentenced two days before and was at a low point. He had been diagnosed with severe depression and was having difficulty accessing any mental health support.

325. He was able to meet with management by 31 January 2020 and was immediately told that there would need to be progress under the AMP. On 17 February he was told that the matter would go to a final hearing to consider health related dismissal. He was also told that he would be subject to disciplinary proceedings because of the conviction. On 25 February 2020 a letter was sent to the claimant confirming the AMP stage 3 dismissal hearing and the disciplinary process. On 4 March 202 DM called to the claimant's home, on 12 March 2020 the claimant was suspended. The AMP hearing was convened for 26 March 2020.

326. On 19 July 2021 the application of the AMP process was also unfavourable treatment because it again put him at risk of dismissal. In late July he had had his GPhC hearing and was to be suspended from practice for two months and he had had the incident in the car park. This was another low point for the claimant.

327. The Tribunal rejects the respondent's submission that the application of the AMP in either March or July was beneficial as it could result in more support being provided to get the claimant back to work or at least neutral in application. The AMP stage 3 hearing was convened to consider bringing the claimant's employment to an end. It was detrimental to him.

328. The impact of the application of the AMP in January 2020 was to maintain pressure on a very poorly person. It ought never to have happened. The absences that related to anxiety and depression ought to have been wholly discounted. If they had been the claimant would not have been at stage 3 in March 2020 and not at stage 2 in July 2021.

329. The respondent's Policy provided for adjustment to triggers. The claimant was let down by the respondent in its failings in the application of the AMP and the Tribunal finds that the constant threat of termination of employment, far from being beneficial, could have exacerbated his anxiety and depression and may have impeded him in his recovery.

<u>Being subjected to a Final Written Warning for 18 Months from 6 Jul 2020 in relation to the criminal conviction</u>

330. If it had not been brought out of time this would have amounted to unfavourable treatment as it meant that the claimant was at a higher risk of dismissal if anything else happened.

<u>*5.2.4 disciplinary process:* Being investigated in July 2021 for the 25 June 2021 incident and Ms Matthew escalating the matter to a formal disciplinary</u>

331. This investigation did not amount to unfavourable treatment. It was a neutral act. It was a fact finding investigation.

332. The decision to proceed to disciplinary was unfavourable treatment. The Policy provided for three options; no case to answer, informal guidance or disciplinary route. A disciplinary hearing put the claimant at risk of sanction including dismissal.

5.2.5 not pharmacist duties: Not being able to practice as a pharmacist on his return from sick leave in August 2020 (GoC para 76(b)(ii)), when C says there was no regulatory bar to his doing so

333. This was unfavourable treatment. The claimant was at all times registered with GPhC and his registration could have been checked in minutes online yet DM required that there was something else he needed to do, some proof he was supposed to provide that he could practice. In the absence of this proof and without ever clarifying exactly what it was she required, she required that JW allocate the claimant duties other than those of a full dispensing pharmacist. JW said in evidence that there were reasons why the claimant's retraining assessment could not take place before June 2021 and that one of them was that she and senior management were waiting for him to furnish them with something in writing from the GPhC to the effect that he was revalidated and that there were no conditions or restrictions on his practice. This was not credible. JW accepted in cross-examination that his revalidation could readily be assumed from his continuing presence on the Register maintained by GPhC which could be accessed and searched online in an instant.

334. The Tribunal rejects the evidence of JW and DM that they were waiting for something in writing from the claimant to attest to his ability to practice. It was not credible that JW or senior management had asked the claimant to provide them with any written confirmation that there were no conditions or restrictions because (i) JW kept detailed notes of almost weekly welfare meetings and there is no explicit reference to the respondent waiting for the claimant to provide such written confirmation as a prerequisite to retraining and assessment in any of those notes and (ii) the respondent put important content into letters and wrote to the claimant often in relation to risk assessments, welfare meetings, HR meetings, application of the Attendance Management Policy and Disciplinary Policy. If it had been the case that the respondent was waiting for a letter from the claimant there would have been written requests and chase ups (iii) the matter is not raised in an OH referral as to why the claimant hasn't provided the alleged awaited written confirmation and might there be any medical barrier to his having done so, when there are detailed referrals including a request that the doctor comment on whether the claimant's own view of his fitness to work can be relied on.

335. The claimant accepted he would need to read up on Standard Operating Procedures and be retrained and assessed but everyone agreed that would take around two weeks of full time work. There was no credible reason why the claimant couldn't have begun that process on his phased return to work, part time and been back to full pharmacy duties before Christmas 2020. The claimant was not his own best advocate during this time. He was compliant with DM's instructions and the Tribunal accepts his evidence that he did this because he did not want to make waves. He was asking about retraining and saying he found the duties demeaning and, in relation to CD Audits that he was going "snow blind" with it all, but the respondent did not take steps to expedite his retraining, assessment and return to full duties.

336. The Tribunal finds that the delay is evidence of a reluctance to have the claimant back in his full dispensing pharmacist role. It would have taken two weeks, he worked from August 2020 to June 2021 and it was not done. This was unfavourable treatment.

5.2.7 portering duties

337. This was unfavourbale treatment. The claimant was compliant with the allocation of these duties to him because he did not want to make waves but requiring him to remain in employment (not take unpaid leave) so that he was visible to his colleagues during his period of GPhC suspension and to undertake lower level duties was demeaning to him.

5.2.8 Being denied unpaid leave

338. If this had not been out of time it would have been unfavourable treatment. The claimant requested unpaid leave for the duration of his GPhC suspension. He wanted to be able to go to Northern Ireland and spend time with his family. DM decided he could not have that unpaid leave. The Tribunal was not referred to any policy document or criteria for exercise of that discretion. There was no letter declining the request and giving a rationale. It was fed back to the claimant by JW from DM that he could not have unpaid leave as he would need to be available to participate in the investigation. This rationale did not make sense as the claimant could participate by Teams or fly back to attend as needed. He had been off sick and on suspension during the previous investigation and had fully participated. He had attended regular meetings with JW and welfare meetings with HR and had attended his OH appointments. He had had regular telephone contact with JW throughout his absences. There was nothing to suggest that the claimant would not participate. This was an arbitrary decision made by DM and was unfavourable treatment of the claimant.

Did the following things arise in consequence of the claimant's disability?

339. Following the guidance given by the EAT in McQueen v General Optical Council the Tribunal asked itself:

(i) What are the disabilities? The claimant relied on autism, anxiety and depression as his disabilities.

(ii) What are their effects?

340. The effects in the ASC report were disputed by the claimant. In oral evidence he said he found them insulting and offensive and alluded instead to his 20 years service as a pharmacist in the NHS. He described the only effects of his autism as a sensitivity to high pitch noise, alternately stating that this was because he has acute hearing in one ear and not because of autism.

341. In his Grounds of Complaint the claimant said that an effect of his disability of autism is an emotional overreaction to stressful situations. His representative at the disciplinary hearing JD submitted that HS must take into account the impact of his disabilities on his behaviour. The claimant himself said it was the stress he was under because of the imminent GPhC hearing that effected his reactions in the car park. **The Tribunal finds that his conduct in the car park, swearing, raising his voice and walking away,**

did not arise from disabilities but from his anger that NB had parked the wrong way and then held up her hand to him. The claimant was adamant, at the time and in his tribunal evidence, that NB was the one who had parked the wrong way. In his investigatory incident he referred to her as a "Karen", a derogatory term meaning a woman who won't listen, who wants things her own way. This showed the tribunal that it was his anger about her failure to accept that she was in the wrong that caused the claimant to swear, raise his voice and walk away. His actions did not arise from disability.

342. The Tribunal finds the claimant's absences for anxiety and depression on the following dates arose from disability.

- April 2019 to April 2020: recurrent depressive disorder
- 8 October to 13 October 2020: anxiety, mental health reasons
- 28 June to 7 July 2021: stress anxiety induced nausea and vomiting

(iii) what unfavourable treatment is alleged in time and proven and;

(iv) was that unfavourable treatment "because of" an effect or effects of the disabilities.

5.2.1 the AMP process

343. Some of the claimant's absences from work arose out of his anxiety and depression. DM progressed the claimant to stage 3 AMP in March 2020 because of his ongoing absence from April 2019 and because of the part of the Policy that said that a case must progress to AMP stage 3

> *in all other cases and where employees are entitled to 6 months full pay in six months half pay, at the very latest, 12 weeks prior to expiry of Occupational Sick Pay*

Applying Pnaiser, there is a sufficient connection between absence and the 12 weeks prior to expiry of pay and the decision to convene a Stage 3 AMP hearing for this progression to stage 3 AMP to have arisen out of disability.

344. In July 2021 the claimant was told he was at Stage 2. It is necessary to back track to understand if that could be the case. Following the March 2020 AMP hearing the claimant had his absence April 2019 to April 2020 discounted. He was then absent

> 13 October to 18 October 2020: anxiety, mental health reasons, 5 days
>
> 16 November to 17 November 2020: general malaise nausea neck and shoulder pain, 1 day

On 24 November 2020 the claimant attended a stage 1 AMP meeting with MM who sent a letter that same day recording the outcome. He was told that the respondent had ignored the April 2019 to April 2020 absence, that the Equality Act had applied and therefore the claimant had not progressed to stage 1 following the stage 3 hearing. Effectively the clock had been reset as at March 2020. He was told that he had had five days absence in October 2020. He was told that five days in October triggered the 10 days in any twelve month period. The Tribunal finds that

this letter did not properly apply the policy. If the April 2019 to April 2020 absence was being ignored because of disability he would not have triggered 10 days in twelve months between October 2019 and October 2020, and if disability absence was discounted then the October 2020 absence was also disability related, yet he was issued with a Notice of Concern.

345. The claimant was then absent

> 20 November to 21 November 2020: self isolation awaiting Covid result, 1 day
>
> 7 January to 8 January 2021: Covid vaccine reaction, 1 day
>
> 23 April to 25 April 2021: whiplash, 3 days
>
> 28 June to 7 July 2021: stress anxiety induced nausea and vomiting

346. He returned to work after his GPhC hearing on 12 July and MM said that as his sickness absence from 28 June to 7 July had exceeded 8 days he would need to send a GP fit note. MM told the claimant that he had reached Stage 2 of the AMP. The claimant said that his absence in January should be discounted. MM agreed. The Tribunal finds that the respondent had not properly applied its own policy in July 2021. The claimant should not have been a stage 1 in October 2020. That notice was invalid. No further notice of concern was issued. The claimant then had, between July 2020 and July 2021 3 instances of absence (non disability related) amounting to 5 days in total. That would not trigger, under the respondent's policy either a stage 1 or stage 2 warning. Then, on 19 July 2021 the claimant was presented with his sickness absence record and told that he was now given a Stage 2 warning and told it will remain on his file for 12 months so that any further sickness absence will then take him to a stage 3 hearing at which he could lose his job. The Tribunal finds that imposition of a Stage 2 warning was inappropriate because (i) the claimant had not previously been at stage 1 and even if he had been (ii) in July 2021 the claimant's June /July absence ought to have been discounted as it related to his disability and he was told that his January absence was not counted as it was Covid related. He was therefore taken to stage 2 for 1 day in November, previously counted in the erroneously issued stage 1, and for the 3 days whiplash in April. The November and April would not have triggered a stage 2, even if the claimant had been at stage 1.

347. The Tribunal finds that the respondent counted absence which arose out of disability and which out to have been discounted in both March 2020 and July 2021. This part of his complaint succeeds.

5.2.4 the decision to progress to disciplinary for the car park incident

348. This decision did not arise out of the claimant's disability. DM decided to progress because she considered that the claimant had acted extremely aggressively in the car park. The Tribunal accepts her evidence that she decided the conduct warranted a disciplinary hearing because the claimant had raised his voice, sworn and walked away. She considered that this was potential gross misconduct. This part of the complaint fails at this point.

5.2.5 not being able to practice as a pharmacist

349. The Tribunal finds that DM did not want the claimant to return to full

pharmacy practice until after a GPhC Hearing. The reasons for this finding are that since her knowledge of the criminal incident she had

i. not allowed the claimant to return to retraining, assessment and full pharmacy practice and

ii. responded to the GPhC providing more information than was required

iii. written to GPhC seeking information and been rebuffed

iv. suspended the claimant the day after he was told he could return to work soon.

v. attended at his home to deliver a letter

vi. prompted JP to write to the GPhC and

vii. denied the claimant unpaid leave and

viii. downgraded him from Band 7 to Band 5, for a rationale that he could not perform full pharmacist duties, that the tribunal rejects because he had been prevented from performing full pharmacy duties since April 2019 yet not downgraded

ix. progressed the AMP in March and July 2021 and

x. allocated demeaning duties to the claimant (other than portering during his GPhC suspension) and

xi. had imposed an obstacle in the form of some (unspecified) proof (beyond his entry on the register) that she required from GPhC to allow him to practice as a pharmacist

350. For all of the above reasons the Tribunal finds that DM was motivated to exclude the claimant from full pharmacy duties. This motivation was wholly distinct from the claimant's disabilities. It related to the criminal incident. Her decision to exclude / the delay in return did not arise out of disability so this part of the complaint under section 15 fails here but this reasoning on DM's motivation is relevant to the harassment complaint below.

5.2.7 being denied unpaid leave

351. The claimant was denied unpaid leave. The reason DM gave was that he needed to be available for investigation. The Tribunal does not accept that was the real reason. The Tribunal finds, for the reasons set out above, that DM was motivated against the claimant because he had been convicted of criminal offences. This does not arise out of his disability so this part of the complaint fails here.

5.2.8 portering

352. The claimant was assigned portering duties. This was not because of his disability but because he was suspended from practice as a pharmacist by GPhC. This part of his complaint fails here.

Has the claimant proven facts from which the Tribunal could conclude that the

unfavourable treatment was because of any of those things?

353. The claimant has proven that application of the AMP arose out of his disability. That part of his section 15 complaint succeeds so far. The Tribunal now considers the respondent's defence to the complaint.

Was the treatment a proportionate means of achieving a legitimate aim?

354. The Tribunal accepts that the respondent had the following legitimate aims in relation to the AMP

- Encouraging good attendance at work through the application of the absence management process (5.2.1)

and asked itself

(1) Was the treatment an appropriate and reasonably necessary way to achieve those aims? Could something less discriminatory have been done ?

In relation to the progression to Stage 3 in March 2020 it was not a proportionate response. The AMP required absence for disability to be discounted. DM could see in January to March 2020 when convening the stage 3 hearing that the claimant was still absent due to disability. It was not appropriate to disregard the part of the Policy that said that the absence should be discounted and instead focus on the part that said there should be a hearing 12 weeks before sick pay expired. It was not reasonably necessary to go to a Stage 3 hearing to inform the claimant that sick pay was due to expire and to consider ways of managing his absence and return. There were many welfare meetings and catch up meetings at which the claimant was continuing to discuss his health and prospects of return to work. There was an OH report that said the claimant was *likely to return in the coming weeks*. Beyond the date of that report it was not appropriate nor reasonably necessary to achieve the aim of good attendance in requiring the claimant to face a potential dismissal hearing.

(2) Could something less discriminatory have been done instead?

355. The absence from April 2019 ought to have been discounted at the stage that DM was considering convening an AMP in January 2020, wholly discounted and no hearing called. That would have been less discriminatory. The claimant should not have been facing a hearing at which he could lose his employment because of disability related absence.

(3) How should the needs of the claimant and the respondent be balanced?

356. The needs of the respondent and claimant could have been balanced without progression to a Stage 3 AMP hearing. The respondent was entitled to know when the claimant might return to work and it had that information in front of it from the date of the OH report. The claimant was entitled to have his disability related absence discounted. JW amended her management statement of case to acknowledge a likely return in coming weeks and at that stage, if not sooner, the Stage 3 hearing ought to have been cancelled. In that way the needs could have been balanced.

357. In July 2021 the needs of the claimant and respondent could have been

balanced through appropriate application of the AMP and discounting of disability related absence. As at July 2021 because the claimant had had three periods of non disability related absence, two in November 2020 and one in April 2021 the respondent was entitled to count and consider those absences in accordance with the AMP. On 19 July he was told he had had *two episodes in three months or 10 working days in a rolling 12 month period* and was therefore being issued with a Stage 2 notice. The claimant had had two non disability related absences in November 2020, that had not been acted on. He had not had two non disability related absences in the three months prior to 19 July 2021. He had not had ten working days of non disability related absence in the 12 months prior to 19 July 2021. The application in July 2021 was not a proportionate means of achieving a legitimate aim.

The claimant's complaint for discrimination arising out of disability in relation to the application of the AMP succeeds.

The section 21 complaints

358. The claimant complains at paragraphs *6.4.1, 6.4.2* and *6.4.3* and *6.4.4* of the List of Issues that the respondent failed to make reasonable adjustments.

359. The duty to take reasonable steps arises when the respondent knew or ought to have known that the claimant was disabled. The respondent concedes that it knew the claimant was disabled by reason of anxiety and depression from 2019 and by reason of autism from May 2020.

6.4.1 amend trigger thresholds in AMP or discount disability related absence

360. The claimant was first brought to a stage 3 AMP hearing on 26 March 2020. At this point the claimant was disabled by reason of anxiety and depression.

361. On 24 November 2020 he was given a notification of concern to remain on his file for 12 months. By this time both anxiety and depression and autism are disabilities of which the respondent has knowledge. He was then given a stage 2 warning on 19 July 2021 to remain on file for twelve months. The Tribunal finds that as at termination of employment the claimant was on a stage 2 warning and at risk of any further absence triggering a stage 3. Applying Hendricks, this amounts to an ongoing state of affairs with potentially discriminatory impact. The complaint about the thresholds and the application of the AMP is in time.

6.4.2 have regard to the impact of disabilities on his conduct

362. The claimant says the respondent ought to have taken his anxiety, depression and autism into account when deciding whether or not to move to disciplinary process in relation to the car park incident and in relation to what sanction to apply at disciplinary hearing. The decision to dismiss was made by HS on 16 November 2021. The processes leading to that dismissal, the investigation and decision to convene a disciplinary hearing amount to a course of conduct extending over a period of time, with the same decision maker DM, culminating in the decision of HS to dismiss. The failure to adjust complaint in relation to the impact of disabilities on conduct is brought in time.

6.4.3 being denied unpaid leave for August to October 2021

363. This was a decision made by DM in late July 2021 when the claimant requested unpaid leave for the period of his GPhC suspension. Her rationale was that he would need to be available to participate in the disciplinary investigation that she had commissioned. It is not clear when the decision was communicated to the claimant, though JW discussed it with him in late July 2021. This was an isolated decision made by DM, not a continuing state of potentially discriminatory affairs, and had taken effect after 19 July 2021 when the claimant was performing portering duties. Time would have run from late July 2021 for three months less one day plus any time in ACAS early conciliation if he had gone at that time. The complaint was not brought until 22 April 2022. It was by then approximately 5 months out of time.

6.4.4 failure to consult re RA and adjustments was not pursued.

For the complaint at *6.4.3 being denied unpaid leave* which the Tribunal has found to be out of time, it asks was the claim made within such further period as the Tribunal thinks is just and equitable? The Tribunal will decide:

Why were the complaints not made to the Tribunal in time?

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

364. For the same reasons as set out above in relation to the section 15 complaints it is not just and equitable to exercise the discretion to extend time in relation to *6.4.3* The Tribunal has no jurisdiction to hear that complaint.

365. The complaints for failure to reasonably adjust in relation to *6.4.1 application fo the AMP* and *6.4.2 have regard to disability re decisions in disciplinary* are in time.

Reasonable Adjustments (Equality Act 2010 sections 20 & 21)

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

- Applying a multistage absence management procedure and applying R's disciplinary policy;

Did the PCPs put the claimant at a substantial disadvantage compared to someone without the claimant's disability, in that:

(1) He was formally disciplined and placed on an 18-month warning where those with the claimant's condition would similarly be more likely to suffer recurrent incidents during the currency of the warning (namely, the car parking incident of 25 Jun 2021); and/or

(2) C was at greater risk of suffering further periods of absence due to illness and going to a stage 3 hearing in March 2020;

367. Did the respondent fail in its duty to take such steps as it would have been reasonable to have taken to avoid the disadvantage? The claimant says that the following adjustments to the PCP would have been reasonable.

Amend the trigger thresholds for stage 3 absence management or discount a lengthy period of disability related absence.

368. From the diagnosis of anxiety and depression in 2019 and the OH report in 2019 that says the claimant is disabled, absences relating to those conditions should have been discounted from the trigger thresholds under the AMP. The claimant was at a substantial disadvantage as he was more likely to have absences and increasingly likely to lose his job due to disability related absence. Discretion to adjust the AMP to discount those absences existed in the AMP and DM failed to discount the absences. That would have been a reasonable step. The respondent failed him on two occasions, in January 2020 and 12 July 2021. The ongoing effect of the failure to discount disability related absence from January 2020 to termination of employment was to increase and maintain pressure on the claimant so that he felt constantly in fear of losing his job.

369. The Tribunal notes that DM's visit to the claimant's home on 4 March 2020, whether at 5.45 pm or 10.45 pm or unannounced at all during his sickness absence, was a significant error of judgment that indicated to the Tribunal the motivation of DM in seeking to ensure the claimant's exclusion from the workplace and from his pharmacist duties. This is relevant to the reasoning on harassment below.

6.4.2 failure to take into account disability

370. DM decided to commission an investigation and described the conduct in her first letter to commission the investigation as *extremely aggressive conduct*. This showed the Tribunal that she viewed the conduct as something that could lead to dismissal from the outset. The claimant was at no substantial disadvantage because of his disabiltiy in this regard. The disadvantage at being investigated and disciplined would be the same for a non disabled person. If the complaint had not failed at that point the Tribunal finds that it would not be a reasonable adjustment to fail to investigate an incident because the alleged perpetrator was disabled. The respondent was entitled to investigate and DM was entitled having read the investigation report to decide to escalate to a disciplinary hearing. There was no failure to reasonably adjust in relation to the commissioning of the investigation or decision to go to disciplinary hearing.

371. HS did not pause the disciplinary hearing to consider the OH report and ASC report and decide whether or not the disabilities were a contributing factor to the car park conduct. There is a potential for substantial disadvantage here. For example, if a person had Tourettes' Syndrome and is being disciplined for swearing, then that person may be at a substantial disadvantage when compared to a not-disabled-by-Tourette's person.

372. In this case the Tribunal accepts the evidence of HS that even if there had been impact of disability on car park conduct, it would have made no difference to the outcome. HS' evidence about why she classified the offence as gross misconduct and how she considered mitigation is accepted as set out in the reasoning on unfair dismissal above. Even if the claimant's disabilities had affected his reactions in the car park, and the Tribunal has found in relation to the section 15 complaint that his conduct did not arise out of disability, it would not have changed HS's decision on dismissal. The Tribunal finds that in this case where the conduct did not arise out of disability, **the potential substantial disadvantage was no different for a non-disabled person**. The claim fails at this point but if it had not then the Tribunal would have found that it would not be a reasonable adjustment to stop short of dismissing for conduct that was

not disability related. The Tribunal accepts the oral evidence of HS that the reasons for not mitigating were not related to his disability but because he already had a final written warning, had given assurances of no further aggression and was under criminal suspended sentence.

373. The complaint for failure to reasonably adjust at *6.4.1* succeeds. The other complaints for failure to reasonably adjust fail.

The Harassment Complaints

Were the complaints stand alone acts or part of a course of conduct extending over a period of time, the last of which was in time?

7.1.1 demotion to the role of porter

374. The portering duties came about after the 12 July 2021 return to work and 19 July 2021 RA. They continued during the GPhC suspension and until termination of employment on 16 November 2021. This complaint is about an ongoing state of discriminatory affairs and is brought in time.

7.1.2 the RA assessment process and demeaning outcomes – not pursued

7.1.3 training halted on 25 June 2021

375. The decision to suspend retraining for competency assessment was made after the car park incident. Time ran from the date the decision was communicated to the claimant on 12 July 2021. The claimant had three months less one day and time in ACAS to bring his harassment complaint. He did not bring the complaint until 22 April 2022 by which time it was approximately 5 months out of time.

7.1.4 failure to address grievance or appeal in a timely manner

376. The claimant lodged his grievance and appeal on 7 December 2021 and supplemented the content of his grievance by a further document sent on 22 December 2021. He set out 8 grounds of appeal and 26 paragraphs of grievance. The claimant went to ACAS on 10 February 2022 and brought his claim in time.

7.1.5 dismissal

377. The claimant knew of his dismissal on 16 November 2021. He went to ACAS on 10 February 2022, got a certificate and brought his complaint about dismissal in time.

For the complaint *7.1.3 training halted* which the Tribunal has found to be out of time, it asks was the claim made within such further period as the Tribunal thinks is just and equitable? The Tribunal will decide:

Why were the complaints not made to the Tribunal in time?

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

378. For the same reasons as set out above in relation to the section 15 complaints and section 21 complaints it is not just and equitable to exercise the discretion to extend time in relation to *7.1.3*. The Tribunal has no jurisdiction to

hear those complaints.

Harassment related to disability (section 26 Equality Act 2010)

379. Did the respondent do the following alleged things:

7.1.1 Obliging the claimant to work as a porter and be de facto demoted in circumstances where, for reasons related to his disability, the claimant had been unable to fulfil his usual role?

The Tribunal finds that yes DM required the claimant to perform duties other than those of a pharmacist at periods other than during his GPhC suspension.

7.1.2 RA not pursued

7.1.3 Did the first respondent's workplace become a hostile environment in which the claimant's training was halted on 25 June 2021 without reasonable explanation?

380. The Tribunal finds that the claimant's training was halted in June 2021 because of the disciplinary investigation. This was not a reasonable explanation for halting training. It was possible at that time that there may have been no disciplinary case to answer following investigation. It was possible that even if it went to disciplinary the claimant could have been exonerated of any blame. It was possible that performing well in his role of Pharmacist could have assisted him in mitigation at any forthcoming disciplinary hearing. The decision to suspend training was made by DM, though the claimant in discussion with JW and under pressure because of his imminent GPhC hearing did not oppose the decision, and was made because DM had formed a view that the claimant's conduct was *extremely aggressive* and because she had since January 2020 motivated to exclude him because he had a criminal conviction.

7.1.4 Was the first respondent's failure to address either the claimant's grievance or appeal in a timely or adequate manner unwelcome and related to the claimant's disability related complaints?

381. The Tribunal finds as a fact that the claimant was permitted, and agreed, to raise any points in his grievance at his appeal hearing and did so. His appeal hearing took place in a timely manner. In relation to this part of his complaint there was no unwanted conduct. This part of the complaint fails here. If it had not failed, then the decisions about not hearing the grievance separately and the timing of the appeal were not related to the protected characteristic of disability. The decision to hear the grievance submissions within the appeal was made for the reasons set out above. The timing of the appeal was related to the availability of attendees and not the claimant's disability.

7.1.5 Was the claimant's dismissal disability related and unwanted conduct?

382. The Tribunal accepts the oral evidence of HS that the reason for dismissal was the claimant's conduct in the car park together with his previous final written warning, assurances given about no further aggression and the currency of his suspended criminal sentence at the time of the incident. The dismissal was unwanted conduct but it was not related to disability. This part of the complaint fails here.

Comment on matters not on the List of Issues

383. There were issues that mattered to the parties in the case and came out in cross-examination that were not on the List of Issues. The Tribunal agreed to comment on those issues in this judgment.

Robot Alarm: The Tribunal heard evidence about the robot alarm in the pharmacy and accepts that the claimant had been asking for it to be moved before his absence in April 2019. This was not part of his complaint in the claim in the List of Issues so the Tribunal has made no determination but comments that it is a shame that the respondent did not heed his request and investigate whether or not the alarm could be moved. Continuing to tell the claimant to go to Access to Work, to see if he could wear headphones and to report problems he had with the alarm, as late as the Risk Assessments in 2021 was unsatisfactory.

Risk Assessment: The claimant was understandably aggrieved at the content of the Risk Assessment and how heavily it relied on the ASC report that he disputed. The complaint about the risk assessment process was withdrawn so that the Tribunal made no determination but comments that the respondent was in a difficult position in having to balance the content of the ASC report with its own knowledge of the claimant and the OH reports. The claimant disputed the content of the report but did not challenge it with its author and had shared it with the respondent. The respondent was obliged to react to its content. The Tribunal accepted the evidence of JW that she had tried as best she could to balance what the report said and what the claimant was saying. The Tribunal can see that the process and the outcomes were demeaning to the claimant who had served as a pharmacist for almost twenty years and was now subject to a Risk Assessment (albeit derived from his own ASC report) that required him for example to only take one delivery at a time to a ward, and to have people use checking back questions so that they could be sure he understood)

Conclusion

384. The complaints fail for the reasons set out above. The claimant's complaint of failure to reasonably adjust succeeds. THE CLAIMANT'S COMPLAINT OF DISCRIMINATION ARISING FROM DISABILITY SUCCEEDS IN PART. There will need to be a remedy hearing. Separate case management orders are made in relation to remedy and will be sent to the parties.

Employment Judge Aspinall

Date 20 April 2024

Case number: 2402734/22

RESERVED JUDGMENT & REASONS
SENT TO THE PARTIES ON
26 April 2024

FOR EMPLOYMENT TRIBUNALS

CORRECTED JUDGMENT

Employment Judge Aspinall

Date 13 May 2024

CORRECTED JUDGMENT & REASONS
SENT TO THE PARTIES ON

28 May 2024

FOR EMPLOYMENT TRIBUNALS

Notes

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

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

Recording and Transcription

Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any

oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here:

https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/