Case Number 1301319/2022
Type V

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondent**
Mr M Mistry		**E.ON UK Plc**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL
(RESERVED JUDGMENT)

HELD AT Birmingham **ON** 10 – 14 June 2024
17 June 2024 (Panel Only)

EMPLOYMENT JUDGE GASKELL **MEMBERS: Mr S Woodall**
Mr P Simpson

Representation
For the Claimant: **Mr S Harding (Counsel)**
For the Respondent: **Ms A Niaz-Dickinson (Counsel)**

JUDGMENT

The unanimous judgment of the tribunal is:

1 The respondent did not, at any time material to this claim, act towards the claimant in contravention of Section 39 of the Equality Act 2010. The claimant's complaints of direct disability discrimination, discrimination arising from disability and failure to make adjustments pursuant to Section 120 of that Act, are dismissed.
2 The respondent did not, at any time material to this claim, act towards the claimant in contravention of Section 40 of the Equality Act 2010. The claimant's complaint of disability related harassment, pursuant to Section 120 of that Act, is dismissed.
3 The claimant's claim for victimisation is dismissed upon having been withdrawn by the claimant on 11 September 2023.
4 The claimant was unfairly dismissed. The claimant is entitled to a remedy which will be determined by the tribunal at a remedy hearing on a date to be fixed and notified to the parties.

REASONS

Introduction

1 The claimant in this case is Mr Manesh Mistry who was employed by the respondent, E.ON UK Plc, as a Duel Fuel Metre Technician, from October 2017

until 26 December 2021 when he was dismissed the reason given by the respondent at the time of the claimant's dismissal was misconduct.

2 By a claim form presented to the tribunal on 23 February 2022, the claimant brings claims for unfair dismissal and disability discrimination. The strands of discrimination alleged are direct discrimination, discrimination arising from disability, a failure to make adjustments, and disability related harassment. There was also a claim for victimisation, but this claim was withdrawn at a hearing before Employment Judge Kelly on 11 September 2023. We can find no record of the withdrawn claim having been dismissed. For the sake of completeness, we have therefore dismissed it today.

3 Upon presenting his claim, the claimant maintained that he was a disabled person by reason of suffering from the mental health conditions of stress, anxiety and depression and the learning difficulty of dyslexia. At the hearing before Judge Kelly on 11 September 2023, she determined that at the relevant time the claimant was not disabled by reason of suffering from stress, anxiety and depression. The respondent concedes that at the relevant time the claimant was a disabled person by reason of suffering from the learning difficulty of dyslexia.

4 An agreed list of issues is set out at Paragraphs 5 – 12 of Judge Kelly's Order following the hearing on 11 September 2023 - which was issued to the parties on 13 September 2023.

The Evidence

5 As much of the case related to the claimant's dismissal and the procedure which led to it, and bearing in mind that dismissal was admitted, it was agreed by all parties that the respondent would present its case first. The respondent relied on the evidence of 5 witnesses:

(a) Mr Matt Haylett - Field Team Leader, who conducted an investigation into concerns relating to the claimant's conduct.
(b) Mr John Hemming - Field Team Leader, who conducted a disciplinary hearing and whose initial decision was that the claimant should be dismissed. Mr Hemming also heard the claimant's grievance but did not uphold it.
(c) Mr Kevin Massey – Field Services Manager, initially appointed to deal with the claimant's appeals arising from Mr Hemming's decision. Mr Massey determined that Mr Hemming's decisions should be retaken. He then heard and partially upheld the claimant's grievance; and he dealt with the disciplinary hearing into one element of the alleged misconduct - finding that there was no disciplinary case to answer.

(d) Mr Isaac Walker - Lead Business Development Manager, who conducted the disciplinary hearing into the other element of the claimant's alleged misconduct and who decided that the claimant should be dismissed.
(e) Mr Gavin Tate – Field Resource Manager, who heard the claimant's appeal from Mr Walker's decision and upheld the decision that the claimant should be dismissed.

The claimant gave evidence on his own account: he did not call any additional witnesses.

6 We were provided with an agreed hearing bundle running to some 737 pages. Additionally on the first morning of the hearing claimant provided a short supplementary bundle running to some 15 pages. During the course of the evidence, we were provided with a single page referred to in evidence by Mr Hemming and titled "*Stacking of Warnings*".

7 There was no dispute between the parties as to the basic chronological facts of the case. The areas dispute came in interpreting some of those facts and the legal niceties applicable in particular to Mr Massey's decision. We found all 6 witnesses to be truthful and honest. But as he had been during the investigation and disciplinary process, the claimant was vague and evasive - often stating that he could not remember. There were numerous examples where when challenged as to his interpretation claimant simply retorted that he was reporting how he felt at the time. Of course, the claimant's feelings at the time are of no probative value.

Chronology

8 The only information provided to us regarding the claimant's dyslexia was a copy of a report dated 8 February 2005 from Karen L Jones - Chartered Psychologist. At the time of the report, the claimant was 23 years of age. The claimant was engaged on the first year of a course at the Manchester Metropolitan University studying Hospitality and Management. The purpose of the report was to inform both the claimant and the University of an assessment for specific learning difficulties of a dyslexic nature and the general support which he might require. In summary, the report found that the claimant had specific learning difficulties with regard to short-term visual memory and the rapid processing of visual information he also had problems with tasks requiring good visual reasoning and visual spatial awareness. The claimant was encouraged to utilise his strengths which were assessed as verbal comprehension and working memory. There is no evidence as to when all with whom at the respondent this report was shared prior to these proceedings.

9 The only other medical information available to us were some fit notes provided by the claimant's GP detailing occasions when the claimant was unfit for work through stress and anxiety, and a report following an Occupational Health Assessment carried out by telephone on 2 November 2021. That report indicated that the claimant was at that time unfit to attend work (although it was anticipated that he would regain fitness fairly soon), but he was fit to attend meetings.

10 The claimant commenced employment with the respondent in October 2017. Mr Haylett became the claimant line manager 8 months later. It is conceded that during his initial training, because of his dyslexia, the claimant was given additional time when taking written tests. We accept Mr Haylett's evidence that he had no actual knowledge that the claimant had dyslexia or that he was disabled. It certainly appears that by the time of the investigation which lead to the claimant's dismissal, Mr Haylett would have constructive knowledge that the claimant suffered from dyslexia (HR should have made him aware of this when he conducted the investigation. It seems highly unlikely that anyone in the respondent was actually aware that the dyslexia was a cause of disability.

11 In January 2020, the claimant carried out work at an address in Norwich following which a gas escape occurred. There was the disciplinary process and, on 15 October 2020, the claimant was given a final written warning to remain on his record for a period of 12 months. The disciplining officer on that occasion was Ms Jemma Faulkner – Field Team Leader. Ms Faulkner was aware of the claimant's dyslexia and took account of it when determining the appropriate sanction. The claimant had been represented at the disciplinary hearing by Mr Stuart Jones claimant did not appeal the outcome.

12 On 6 July 2021, there was reported to be a serious non-conformity with an installation at an address in Leamington Spa (the Regulation 31 incident). The claimant had attended the installation with a co-worker by the name of Mr Justin McBride. Mr Haylett was appointed to conduct an investigation. He met the claimant for an investigatory meeting on 4 August 2021. The claimant was represented at the meeting by a trade union representative, Mr Zayad Nawaz.

13 It is clear upon reading the notes of the meeting, that from the outset Mr Nawaz was openly hostile to Mr Haylett. He was determined to prevent Mr Haylett from conducting an investigation; he appeared to wish to chair the meeting himself. During cross-examination before us, the claimant admitted that his answers to Mr Haylett's questions were often vague and non-specific; he agreed that on no less than 7 occasions during the meeting he requested an adjournment to enable him to speak to Mr Nawaz privately; in response to key questions the claimant simply referred to a pre-prepared statement; and in response to other questions he simply refused to comment.

14 In response to Mr Nawaz's behaviour, Mr Haylett accepts that he lost his cool and behaved unprofessionally.

15 After the investigatory meeting, but before Mr Haylett had completed his report, on 19 August 2021, the claimant was involved in a collision whilst driving one of the respondent's vehicles (the RTI). Mr Haylett was asked to conduct an investigation into this incident as well. Mr Haylett conducted an investigatory meeting with the claimant on 31 August 2021, on this occasion the claimant was represented by another trade union representative Mr Malcolm Robinson.

16 Mr Haylett's report into the Regulation 31 incident is dated 16 August 2021. His report into the RTI is dated 2 September 2021. In each case, Mr Haylett's recommendation was that there appeared to be a disciplinary case to answer and that there should be a disciplinary hearing.

17 On 15 September 2021, the claimant raised a grievance which related to Mr Haylett's conduct of and during the investigatory meeting into the Regulation 31 incident conducted on 4 August 2021.

18 Mr Hemming was appointed to conduct the disciplinary process. As the grievance related to an integral part of the investigation, he was appointed to hear the grievance as well. Mr Hemming had never met the claimant or Mr Nawaz. The disciplinary hearing was fixed for 18 November 2021 and the claimant attended with Mr Nawaz. The hearing did not proceed: this appears to be because of disagreements between Mr Hemming and Mr Nawaz as the approach to be taken. Mr Hemming complained to us about Mr Nawaz's conduct. The claimant complained to HR about Mr Hemming's conduct and asked for another manager to be appointed. Mr Hemming was certain that he was impartial and could deal with matters objectively and so the request that he be replaced was refused. The meeting on 18 November 2021 was adjourned until 23 November 2021. The claimant steadfastly refused to attend a meeting with Mr Hemming although he did indicate a willingness to attend if the meeting was conducted via Teams. Mr Hemming was not comfortable with conducting the meeting in that way because of Mr Nawaz's behaviour. He felt that it was only at a face-to-face meeting that he could maintain control.

19 The claimant failed to attend the adjourned disciplinary meeting on 23 November 2021. Mr Hemming decided that he would proceed with meeting in the claimant's absence. He considered Mr Haylett's report into the 2 incidents, and he considered the claimant's grievance. He concluded that the claimant had provided insufficient information regarding his grievance and thus the grievance could not all be upheld. So far as the conduct allegations were concerned, he determined that there was culpable misconduct on the claimant's part in both

cases. For each incident, he determined that the appropriate sanction was a warning. However, as the claimant had an extant final written warning which had been placed on his file on 15 October 2020 (less than 12 months before either of the incidents with which Mr hemming was dealing), Mr Hemming determined that the outcome would be dismissal with notice. When questioned about how he had taken account of the earlier final written warning, Mr Hemming indicated that he was aware that he did not need to impose the sanction of dismissal but he also referred to the "*Stacking of Warnings*" document which we have already referred. He considered that the claimant situation fitted Scenario 5 of document with dismissal with notice as the appropriate outcome. By letter dated 24 November 2021, Mr Hemming advised the claimant of the decision the claimant was given one month's notice with his employment to terminate on 26 December 2021. The claimant was advised of his right to appeal.

20 By an email dated 30 November 2021, the claimant submitted his appeal. He disputed the substance of both misconduct offences: suggesting that the Regulation 31 incident was the responsibility of his colleague Justin McBride; and that the RTI was "*simply an accident*" and that for there to be culpable misconduct there would have to be a finding of speeding, intoxication, or operating a mobile phone whilst driving. The claimant also challenged the decision for the hearing to proceed in his absence: he acknowledged that OH had stated he was fit to attend meetings; but nevertheless suggested that it was a reasonable for him to be required to attend a meeting in person rather than by Teams.

21 Mr Massey was initially appointed to deal with the disciplinary appeal and the appeal against the grievance outcome. He wanted some additional information from the claimant relating to the grounds of appeal and wrote requesting it. The response he received was from Mr Nawaz: it did not provide the information requested but was a very searching request for information to be provided to the claimant. Mr Massey did his best to provide that information and he also sought guidance from HR. Mr Massey concluded that he was uncomfortable with the fact that the claimant's grievance had been rejected and the disciplinary hearing had proceeded in the claimant's absence. Mr Massey was content that such meetings could take place using Teams. Therefore without considering the substance of either the grievance or the disciplinary incidents, Mr Massey decided that the entire process should be reheard. Mr Massey wrote to the claimant on 6 January 2022 advising of this decision and also indicating that either he could deal with the rehearing, or he could arrange for a new disciplining manager to be appointed. He received a response from the claimant confirming that he was content for Mr Massey to continue.

22 Mr Massey also concluded that the 3 separate matters (the grievance, the Regulation 31 matter, and the RTI) should be heard separately.

23 The grievance meeting commenced on 1 February 2022 and was resumed on 7 February 2022 after Mr Nawaz had sent some additional information for consideration. Mr Massey's evidence was that again Mr Nawaz took control of the meeting and made it very difficult for the claimant to answer any questions by effectively answering for him.

24 On 17 February 2022, Mr Massey sent the claimant the grievance outcome letter. He decided that many of the grievance points could not be resolved pending the further hearing of the disciplinary issues. But he upheld 2 elements of the grievance relating to Mr Haylett's behaviour at the investigation meeting on 4 August 2021 (the investigation into the Regulation 31 incident). Although these 2 elements of the grievance were upheld, and the claimant was reassured that appropriate action would be taken, Mr Massey concluded that the investigation was ultimately fair and the conclusions of the investigatory report could be relied upon.

25 Because of his own workload, Mr Massey then concluded that the 2 disciplinary issues should be dealt with separately: he would deal with the Regulation 31 incident and another manager would be appointed to deal with the RTI. The disciplinary hearing relating to the Regulation 31 incident went ahead on 3 March 2022 again the claimant was represented by Mr Nawaz whose conduct was as before seeking to control the meeting. Ultimately the meeting reached the conclusion at an adjourned hearing date of 21 March 2022.

26 By a letter dated 1 April 2022, Mr Massey informed the claimant of his decision which was that there was in fact no disciplinary case to answer and therefore no disciplinary sanction in respect of the Regulation 31 incident. Mr Massey did make clear that on the claimant's return to work (he was at that time off sick), he would make a recommendation for a performance improvement plan over a period of 3 months. As there was no disciplinary sanction there was no right of appeal.

27 Mr Walker was appointed as the disciplinary manager in relation to the RTI. The meeting took place on 20 April 2022 the claimant was represented by Mr Nawaz. Mr Walker gave evidence that once again Mr Nawaz seized control of the meeting and started to question Mr Haylett quite aggressively. In the notes of the meeting, there is no record of the claimant saying anything. Mr Nawaz was concerned that documents had been submitted to Mr Walker in advance of the meeting which Mr Walker appeared not to have received. In the light of this concern, the meeting was adjourned.

28 The meeting was reconvened for 27 April 2022, by this date Mr Walker had been informed by HR that Mr Nawaz was no longer permitted to represent

the claimant. At first, during the evidence no one seemed to be aware of the reason for this, and Mr Harding presented this during cross-examination as an affront to the claimant's right to be represented by a trade union official or a work colleague of choice. However, when the claimant gave evidence he was clearly well aware that by 27 April 2022 Mr Nawaz had been suspended from work. We were not told of the reasons for the suspension. Despite being aware of his suspension, and that he could no longer represent the claimant, Mr Nawaz attended the meeting on 27 April 2022. The meeting was held by Teams. There were some difficult exchanges between Mr Walker and Mr Nawaz (Mr Walker genuinely did not know why Mr Nawaz was not permitted to represent the claimant), but ultimately Mr Nawaz left the meeting. The claimant was then given 2 options: he could continue with the meeting unrepresented; or the meeting could be adjourned for alternative representation to be found. The claimant made clear that his preference was to continue to be represented by Mr Nawaz, but it was agreed that the meeting would be adjourned for the claimant to consider his position.

29 Ultimately the claimant refused to participate in a further meeting unless he was represented by Mr Nawaz. He sent quite a threatening email to Mr Walker expressing the view that Mr Walker could proceed in his absence but threatening action in the tribunal if the outcome was not to the claimant's liking. Mr Walker suggested that a fair way to resolve the impasse might be for him to submit questions to the claimant in writing for the claimant to respond. Mr Walker was aware that this would allow the claimant to obtain help from Mr Nawaz. This ultimately is what happened.

30 Mr Walker concluded that the RTI did demonstrate culpable misconduct on the claimant's behalf – namely, the negligent driving of a company vehicle causing damage to 2 vehicles and injury to a fellow employee. He concluded, as had Mr Hemming, that the appropriate sanction was a warning. However, like Mr Hemming, he concluded that in the light of the extant final written warning the appropriate outcome was dismissal with notice. Mr Walker confirmed the position in a letter dated in a letter dated 6 June 2022 which confirmed that the claimant remained dismissed as of the end of his notice period - 26 December 2021. The claimant was advised of his right of appeal.

31 By an email dated 10 June 2022, the claimant lodged an appeal citing the following 2 grounds:

(a) The appeal went ahead without him or his representative.
(b) That Mr Walker had failed to consider all of the evidence regarding the incident and had failed to demonstrate negligence on the claimant's part.

Mr Tate was appointed to hear the appeal. Mr Tate's efforts to arrange an appeal meeting were frustrated by the claimant's continued insistence that he wished to be represented by Mr Nawaz Mr Tate was aware that Mr Nawaz was not permitted to represent although he was unaware that Mr Nawaz had been suspended.

32 Ultimately, Mr Tate arranged an appeal meeting for 12 September 2022 to take place by Teams. On that date Mr Nawaz was in attendance, he was permitted to make a few comments relating to the grounds of appeal but then left the meeting. By this time, both Mr Tate and the claimant were aware that another trade union representative Mr Ian Reid had been allocated to represent the claimant. The claimant was given 2 options: to continue that day unrepresented or for there to be an adjournment for him to have sufficient time to discuss the case with Mr Reid. The meeting was adjourned to enable the claimant to collect his thoughts.

33 During the period of the short adjournment, Mr Tate received a somewhat threatening and intimidating telephone call from Mr Nawaz.

34 When the hearing resumed, the claimant indicated that he would continue unrepresented. He continued to complain about being denied his representative of choice. When the meeting reached a discussion regarding the substance of the decision, the claimant repeated that he failed to see how any negligence had been established against him. For the first time the claimant raised the issue of whether the final written warning was still extant or whether the 12 month period should have run from the date of the first incident (January 2020) rather than from the date of issue (October 2020).

35 On 13 September 2022, Mr Tate wrote to the claimant advising that having considered all of the available material he was upholding Mr Walker's decision to issue a warning for the RTI - which coupled with the extant final written warning meant that the decision to dismiss the claimant would be upheld.

The Law

36 **The Equality Act 2010 (EqA)**

Section 13: Direct discrimination

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

Section 15: Discrimination arising from disability

(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.

Section 20: Duty to make adjustments

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

(2) The duty comprises the following three requirements.

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

Section 21: Failure to comply with duty

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

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

Section 26: Harassment

(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.

Section 39: Employees and applicants

(2) An employer (A) must not discriminate against an employee of A's (B)—

(*a*) as to B's terms of employment;
(*b*) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;
(*c*) by dismissing B;
(*d*) by subjecting B to any other detriment.

(5) A duty to make reasonable adjustments applies to an employer.

Section 40: Employees and applicants: harassment

(1) An employer (A) must not, in relation to employment by A, harass a person (B)

(*a*) who is an employee of A's;

Section 123: Time limits

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

(*a*) the period of 3 months starting with the date of the act to which the complaint relates, or
(*b*) such other period as the employment tribunal thinks just and equitable.

(3) For the purposes of this section—

(*a*) conduct extending over a period is to be treated as done at the end of the period;
(*b*) failure to do something is to be treated as occurring when the person in question decided on it.

Section 136: Burden of proof

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

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

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

Schedule 8 – Part 3: Limitations of the Duty [to make adjustments]
Paragraph 20: Lack of knowledge of disability etc.

(1) A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know—

(*b*) that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement.

37 **Decided Cases – Disability Discrimination**

Nagarajan v London Regional Transport **[1999] IRLR 572 (HL)**
Villalba v Merrill Lynch & Co **[2006] IRLR 437 (EAT)**

If a protected characteristic or protected acts had a significant influence on the outcome, discrimination is made out. These grounds do not have to be the primary grounds for a decision but must be a material influence. Discrimination and victimisation may be conscious or sub-conscious.

High Quality Lifestyles Limited –v- Watts **[2006] IRLR 850 (EAT)**
Aylott –v- Stockton on Tees Borough Council **[2010] IRLR 994 (EAT)**

In order to establish direct discrimination, it is not sufficient for the claimant to show that his treatment was on the grounds of his disability. It has to be established that the treatment was less favourable than the treatment which would have been afforded to a comparator in circumstances that are “not materially different”

There are dangers in attaching too much importance to constructing a hypothetical comparator and to less favourable treatment as a separate issue. If a claimant is dismissed on the ground of disability then it is likely that he will be

treated less favourably than a hypothetical comparator, not having the particular disability, would have been treated in the same relevant circumstances,

Ladele –v- London Borough of Islington **[2010] IRLR 211 (CA)**
JP Morgan Europe Limited –v- Chweidan **[2011] IRLR 673 (CA)**

There can be no question of direct discrimination or discrimination arising from disability where everyone is treated the same.

Bahl –v- The Law Society & Others **[2004] IRLR 799 (CA)**
Eagle Place Services Limited –v- Rudd **[2010] IRLR 486 (CA)**

Mere proof that an employer has behaved unreasonably or unfairly would not, by itself, trigger the transfer of the burden of proof, let alone prove discrimination.

Richmond Pharmacology Limited v Dhaliwa **[2009] IRLR 336 (EAT)**
Grant –v- HM Land Registry **[2011] IRLR 748 (CA)**

The necessary elements of liability for harassment are threefold: (1) Did the respondent engage in unwanted conduct? (2) Did the conduct in question either (a) have the purpose or (b) the effect of either (i) violating the claimant's dignity or (ii) creating an adverse environment for him. (3) Was the conduct on a prohibited ground? There is substantial overlap between these questions. Whether conduct was "unwanted" will overlap with whether it creates an adverse environment.

It may be material to consider whether it should reasonably have been apparent whether the conduct was or was not intended to produce the proscribed consequences: the same remark may have a very different weight if it was evidently innocently intended rather than if it was evidently intended to hurt.

Where harassment is said to result from the effect of the conduct - that effect must actually be achieved. However, the question of whether or not conduct had that adverse effect is an objective one - it must reasonably be considered to have that effect; although the alleged victim's perception of the effect is a relevant factor.

Igen Limited –v- Wong **[2005] IRLR 258 (CA)**

The burden of proof requires the employment tribunal to go through a two-stage process. The first stage requires the claimant to prove facts from which the tribunal could that the respondent has committed an unlawful act of discrimination. The second stage, which only comes into effect if the complainant has proved those facts, requires the respondent to prove that he did commit the

unlawful act. If the respondent fails then the complaint of discrimination must be upheld.

Madarassy v Nomura International Plc **[2007] IRLR 245 (CA)**

The burden of proof does not shift to the employer simply on the claimant establishing a difference in status (eg race) and a difference in treatment. Those bare facts only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that the respondent had committed an unlawful act of discrimination. Although the burden of proof provisions involve a two-stage process of analysis it does not prevent the tribunal at the first stage from hearing, accepting or drawing inferences from evidence adduced by the respondent disputing and rebutting the claimant's evidence of discrimination.

Laing –v- Manchester City Council **[2006] IRLR 748**

In reaching its conclusion as to whether or not the claimant has established facts from which the tribunal *could* conclude that there had been unlawful discrimination the tribunal is entitled to take into account evidence adduced by the respondent. A tribunal should have regard to all facts at the first stage to see what proper inferences can be drawn.

Pnaiser v NHS England **[2016] IRLR 170 (EAT)**

(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... 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.
(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... the causal link between the something that causes unfavourable treatment and the disability may include more than one link.
(e) However, the more links in the chain there are between the disability

and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact.

(f) This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.

(g) there are effectively 2 tests of causation: what was the reason for the unfavourable treatment?, Was that a reason which arose from the claimant's disability?

(h) It does not matter precisely in which order these questions are addressed. Depending on the facts, a Tribunal might ask why A treated the claimant in the unfavourable way alleged in order to answer the question whether it was because of "something arising in consequence of the claimant's disability". Alternatively, it might ask whether the disability has a particular consequence for a claimant that leads to 'something' that caused the unfavourable treatment.

Morse –v- Wiltshire County Council **[1999] IRLR 352 (EAT)**

A tribunal hearing an allegation failure to make reasonable adjustments must go through a number of sequential steps: It must decide whether the provisions of EqA impose a duty on the employer in the circumstances of the particular case. If such a duty is imposed it must next decide whether the employer has taken such steps as it is reasonable all the circumstances of the case for him to have to take.

Smith –v- Churchills Stairlifts plc **[2006] IRLR 41 (CA)**

The test is an objective test; the employer must take "such steps as it is reasonable to take in all the circumstances of the case". What matters is the employment tribunal's view of what is reasonable.

Project Management Institute –v- Latif **[2007] IRLR 579 (EAT)**

In order for the burden of proof to shift to the respondent, the claimant must not only establish that the duty to make reasonable adjustments has arisen but also that there are facts from which it can reasonably be inferred that it has been breached.

Environment Agency –v- Rowan **[2008] IRLR 20 (EAT)**

An employment tribunal considering a claim that an employer has discriminated against an employee by failing to comply with the duty to make reasonable adjustments must identify:

(a) the provision criterion or practice apply by or on behalf of the employer, or

(b) the physical feature of the premises occupied by the employer, and

(c) the identity of non-disabled comparators, and
(d) the nature and extent of a substantial disadvantage suffered by the claimant.

Unless the tribunal has gone through that process it cannot go on to judge if any proposed adjustment is reasonable.

DWP –v- Alam **[2010] ICR 665 (EAT)**
Wilcox –v- Birmingham CAB Services Limited **[2011] EqLR 810 (EAT)**

The duty to make adjustments is not engaged unless the employer knows (or ought to know) of both the disability and the substantial disadvantage.

Royal Bank of Scotland –v- Ashton **[2011] ICR 632 (EAT)**

Before there can be a finding that there has been a breach of the duty to make reasonable adjustments an Employment Tribunal must be satisfied that there was a provision criterion or practice that placed the disabled person, not merely at some disadvantage viewed generally but, at a disadvantage that was substantial viewed in comparison with persons who are not disabled.

38 **Employment Rights Act 1996 (ERA)**

Section 94 : The right not to be unfairly dismissed

(1) An employee has the right not to be unfairly dismissed by his employer.

Section 98: General Fairness

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a) the reason (or, if more than one, the principal reason) for the dismissal, and
(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
(b) relates to the conduct of the employee,
(c) is that the employee was redundant, or

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

(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.

39 **Cases on Unfair dismissal**

British Homes Stores v Burchell **[1978] IRLR 379 (EAT)**
Graham v Secretary of State for Work and Pensions (Jobcentre Plus) **[2012] EWCA 903 (CA)**

In a case where an employee is dismissed because the employer suspects or believes that he or she has committed an act of misconduct, in determining whether that dismissal is unfair an employment tribunal has to decide whether the employer who discharged the employee on the ground of the misconduct in question entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. This involves three elements. First, there must be established by the employer the fact of that belief. Second, it must be shown that the employer had in his mind reasonable grounds upon which to sustain that belief. And third, the employer at the stage at which he formed that belief on those grounds, must have carried out as much investigation into the matter as was reasonable in all the circumstances of the case.

West Midlands Co-Operative Society Ltd v Tipton **[1986] 2 WLR 306 (HL)**

Where an employee is summarily dismissed and his appeal under the domestic appeal procedure succeeds he is reinstated with retrospective effect; if his appeal fails his dismissal takes effect from the original date when notice of immediate dismissal was given, in the absence of express contractual provision to the contrary.

Iceland Frozen Foods v Jones **[1982] IRLR 439 (EAT)**
Post Office –v- Foley & HSBC Bank plc –v- Madden **[2000] IRLR 827 (CA)**
Tayeh v Barchester Healthcare Ltd **[2013] EWCA Civ 29 (CA)**

It is not for the tribunal to substitute its own view but to consider whether the respondent's decision came within a range of reasonable responses by a reasonable employer acting reasonably.

Sainsbury's Supermarkets Limited –v- Hitt **[2003] IRLR 23 (CA)**

The objective standards of the reasonable employer must be applied to all aspects of the question whether an employee was fairly and reasonably dismissed.

40 **The ACAS Code**

We considered the provisions of the ACAS Code of Practice on Disciplinary and Grievance Procedures 2015, together with the ACAS Guide on Discipline and Grievances at Work 2020. A breach of the Code or a failure to follow the Guide do not of themselves render a dismissal unfair. But an employer who adheres to the Code and follows the Guide is unlikely to have been found to have unfairly dismissed an employee by reason of an unfair procedure.

The Claimant's Case on Disability Discrimination

Direct Discrimination

41 The act of direct discrimination alleged by the claimant is simply "*a failure to ensure that the disciplinary process was handled in a fair way*".

Discrimination Arising From Disability

42 The claimant's case it is that the thing which arose in consequence of his disability was that "*the claimant was unable to process information quickly*".

43 the claimant alleges that the following actions by the respondent were unfavourable treatment because of his inability to process information quickly:

> "*On 4 August 2021, Matt Haylett said the claimant's answers were vague and not specific enough and asked the claimant 'are you going to adjourn every time so that you can go out and answer the questions?*'

Reasonable Adjustments

44 It is the claimant's case that the respondent applied the following PCPs:

(a) The respondent required employees attending disciplinary hearings to do so in person.
(b) The respondent required the disciplinary hearings to be chaired by a manager which it had nominated without diverging from that nomination.
(c) The respondent required employees attending disciplinary hearings to attend on short notice.
(d) The respondent did not provide employees in advance of disciplinary and grievance meetings with the questions which they would be asked.
(e) The respondent refused to adjourn disciplinary hearings so that companions could attend in person.
(f) The respondent failed to issue notes of meetings on time or at all.

45 it is the claimant's case that the application of those PCPs caused him substantial disadvantage in the following ways:

(a) dyslexia is a processing issue and making the claimant more stressed exacerbated the processing issue, and so the claimant did not attend the disciplinary hearing
(b) The claimant did not have enough time to process the information in light of dyslexia.

46 The claimant contends that the following adjustments should have been made:

(a) To bring in another manager to make the disciplinary decision.
(b) To allow the hearing to be held virtually.
(c) To allow the claimant the time to provide a written statement.
(d) To provide extended notice of disciplinary hearings.
(e) To give the claimant a list of questions to be asked prior to hearings.
(f) To adjourn the hearing to allow the companion of the claimant's choice to attend.

Harassment Related To Disability

47 The claimant's case is that the following conduct amounted to disability-related harassment:

(a) On 4 August 2021, Matt Haylett said the claimant's answers were vague and not specific enough and asked the claimant 'are you going to adjourn every time so that you can go out and answer the questions?'

(b) Gabrielle Breen (of HR) arranged for someone to collect the claimant from his home address for a meeting on 23 Nov 2021 despite his request for it to be held virtually.
(c) Gary Comyns attended the claimant's home address on or around 24 Nov 2024to deliver a letter when the claimant had asked for communication by email.

Our Findings on Disability Discrimination

Direct Discrimination

48 The case as it is put by the claimant presupposes a finding that the disciplinary process was not conducted fairly. Our findings on this are set out below when we deal with the unfair dismissal claim. However, the claimant has singularly failed to establish that the disciplinary process in which he was involved was conducted in any way differently to the manner in which it would have been conducted at the employee involved not been dyslexic. There is no merit whatsoever in the suggestion that any unfairness which did arise was because of the claimant's disability.

49 For those reasons we find that the claim for direct disability discrimination is totally without merit and it is dismissed.

Discrimination Arising From Disability

50 There is no evidence before us that the claimant's disability was such that he had a general inability to process information quickly the psychologist report to which we have referred found that the claimant "*had specific learning difficulties with regard to short-term visual memory and the rapid processing of visual information he also had problems with tasks requiring good visual reasoning and visual spatial awareness*". The claimant was encouraged to utilise his strengths which were assessed as verbal comprehension and working memory. There is no evidence that the claimant's difficulty with short-term visual memory and the rapid processing of visual information was ever in play during the disciplinary process generally the claimant was expected to answer verbal questions either face-to-face or via teams he was not asked to process visual information.

51 During cross-examination, the claimant agreed that his answers were vague and unspecific and that he could have given more specific answers without difficulty. There was no suggestion either during the investigatory meeting on 4 August 2021, or during evidence before us, that the reason for the many adjournment requests was related to any difficulty which the claimant was encountering in dealing with the questions. It is clear from the meeting notes and

for Mr Haylett's evidence, that the purpose of the many adjournment was to allow Mr Nawaz to maintain control of the meeting and prevent the claimant from answering simple questions.

52 Mr Haylett's comments were therefore quite justified, and they were wholly unrelated to the claimant's dyslexia.

53 Accordingly we find firstly that the "thing arising" did not arise at all. And was not a consequence of disability. And secondly, we find that to the extent that Mr Haylett's comments were unfavourable, they would not unfavourable because of the claimant's disability.

54 In these circumstances we find that they claim for discrimination arising from disability is wholly without merit and it is dismissed.

Reasonable Adjustments

55 With regard to the first PCP, certainly this was a requirement which was applied in the early stages of the process. It is clear that the respondent was able to demonstrate flexibility later on.

56 There is no evidence of a PCP where the respondent required hearings to be chaired by a particular manager and refused to diverged from that nomination. Indeed, the contrary was established by Mr Massey's decision that Mr Walker should chair the disciplinary hearing into the RTI. The complaint here relates to Mr Hemming's refusal to stand down. But the claimant has provided no basis upon which Mr Hemming needed to stand down. It cannot be the case that an employee under investigation is allowed to choose which manager who will chair the meeting. In our judgement, this PCP was simply never applied.

57 There was no evidence before us of the claimant being required to attend any meeting at unduly short notice.

58 There was no evidence before us of any suggestion from the claimant that he would be assisted by questions in advance. And there is no basis to suggest that this was needed because of his disability. Ultimately, Mr Walker did provide questions in writing in advance as a way of resolving the impasse when the claimant refused to attend the meeting without Mr Nawaz.

59 The final PCP relates to Mr Tate's refusal to adjourn the appeal hearing indefinitely until the question of Mr Nawaz's suspension was resolved. Mr Tate was unwilling to do this because an alternative representative approved by the claimant's trade union was available. This was not a PCP, it was a management decision taken by Mr Tate.

60 In any event, regardless of the application of any of the purported PCPs, the claimant has simply not established that any of them placed him at a substantial disadvantage compared with a non-disabled employees in the same circumstances. What was in play here was the claimant (and Mr Nawaz) seeking to manipulate the process by insisting on replacements of hearing managers, the manner in which hearings took place, and not accepting that Mr Nawaz's suspension disqualified him as a representative.

61 In the circumstances, it has not been established that the duty to make adjustments ever arose. Accordingly, the claim for a failure to make adjustments must fail. It is totally without merit and it is dismissed.

Harassment Related To Disability

62 The complaint set out at Paragraph 47(a) relates to the meeting conducted by Mr Haylett on 4 August 2021. Mr Haylett admitted that he lost his cool with Mr Nawaz's behaviour and that he behaved unprofessionally. But the comments which he made regarding the conduct of both the claimant and Mr Nawaz were entirely legitimate and wholly unrelated to the claimant's disability. The claimant admitted that his answers had been vague and unspecific and confirmed that he could have given more specific and detailed answers without difficulty. The continued requests for an adjournment were unrelated to dyslexia, they were entirely to try and enable Mr Nawaz to maintain control of the meeting.

63 We are quite satisfied that Mr Haylett's comments did not have the purpose proscribed by Section 26(1)(b) EqA. Nor is there any evidence that the comments had the proscribed effect. If they did, then it would have been quite unreasonable for them to have such an effect. Accordingly, in our judgement, the comments made by Mr Haylett at the meeting did not constitute disability -related harassment.

64 The complaint set out at Paragraph 47(b) relates to the period when the claimant was seeking to avoid a face-to-face meeting with Mr Hemming. There has been no suggestion that this avoidance related to dyslexia. The claimant had simply set his face against a face-to-face meeting. In our judgement, this was because Mr Nawaz could better control the meeting if it took place by Teams. During email exchanges relating to that meeting, the claimant informed HR that he could not attend a face-to-face meeting because he was unable to drive because of medication he was taking for anxiety and stress. It was in response to this apparent need, that a member of HR arranged for someone to collect the claimant from his home.

65 This was a helpful gesture unrelated to the claimant's disability. It certainly did not have the proscribed intent and in our judgement there is no evidence of it having the proscribed effect. Such an effect would have been quite unreasonable. Accordingly, in making arrangements for the claimant to have a lift, there was no act of harassment.

66 With regard to Paragraph 47(c), it was Mr Hemming that arranged for the dismissal letter to be hand-delivered. When he was asked about it, he could not really explain why, but he wanted there to be no doubt that the claimant had received the letter. Our judgement is that this was wholly unrelated to the claimant's disability. There was certainly nothing to suggest the proscribed intent; no evidence of the proscribed effect; and in our judgement, such an effect would have been wholly unreasonable.

67 Accordingly and for these reasons we find that there have been no acts of disability-related harassment. The claim for disability-related harassment is totally without merit and it is dismissed.

The Claimant's Case on Unfair Dismissal

68 In the list of issues the claimant set out the following instances of alleged unfairness which permeate the entire disciplinary process:

(a) The investigation was flawed in respect of the statement of a customer relied on and the way in which the disciplinary hearing of 4 Aug 2021.
(b) The respondent relied on a mistaken understanding of the code of practice relevant to the claimant's work in deciding that the claimant had breached it.
(c) The disciplinary manager was selective in the evidence which he took into account.
(d) The disciplinary manager evidenced bias in his questioning of the claimant in the disciplinary hearing and his conduct of the disciplinary hearing.
(e) The disciplinary manager proceeded on the basis that the claimant had failed to complete the relevant installation in compliance with policy when this was not proved or accepted by the claimant.
(f) There was incorrect information in the investigation report.
(g) The decision was predetermined.
(h) The investigating manager handled the investigation in a biased way.
(i) The investigating officer manipulated evidence.
(k) The disciplinary finding relating to the traffic accident did not merit a disciplinary warning.
(l) The disciplinary manager took into account incorrect information in making his decision.
(m) The respondent's failed to make adjustments for the claimant's health.

(n) The disciplinary hearing was held in the absence of the claimant.
(o) Sarah Grundy and Matt Haylett participated in the decision to dismiss the claimant.
(p) The claimant was not sent notes of meetings at all or they were sent late.

Our Findings on Unfair Dismissal

69 There is not a shred of evidence to suggest that Mr Haylett was in any way biased against the claimant or that he had prejudged anything. He genuinely wanted to undertake a proper and thorough investigation; Mr Nawaz appeared determined to prevent this from happening. Mr Haylett acknowledged that he had lost his cool and behaved unprofessionally: but this was entirely in response to Mr Nawaz's behaviour; it was not directed at the claimant. We have been able to identify no actual shortcomings in the investigation and the report sets out the facts of both incidents objectively and reaches an eminently reasonable conclusion that disciplinary proceedings are justified. The claimant was unable to point to any incorrect conclusions (as opposed to differences of opinion) or to any manipulation of evidence. In relation to Mr Haylett's part in the process there is no legitimate criticism and no merit in the claims made in Paragraph 68 (a), (f), (g), (h), (i) and (o) above.

68 In our judgement, Mr Hemming conducted the initial disciplinary hearing in a reasonable fashion. It was for him to determine whether the hearing should proceed face-to-face or by Teams. This was not a decision to be taken by the claimant or Mr Nawaz. The claimant failed to attend – this was his quite unreasonable decision. In our judgement, Mr Hemming reached conclusions as to the Regulation 31 incident and the RTI which were properly open to him on the evidence before him. Insofar as they relate to Mr Hemming, our judgement is that there is no merit in the allegations made in Paragraph 68 (b), (c), (d), (e), (g), (k), (l), (n) and (o).

70 That Mr Massey was uncomfortable with the disciplinary hearing having gone ahead in the claimant's absence, did not necessarily mean that the hearing was unfair or that it had reached an improper conclusion. In our judgement, Mr Massey's approach was extremely favourable to the claimant and he set aside Mr Hemming's decision on a very narrow basis which did not address and did not even purport to address the substance of Mr Hemming's findings.

71 In cross-examination, Mr Harding sought to advance the case that under the respondent's disciplinary procedure, on appeal, Mr Massey could only uphold or revoke the decision to dismiss or he could reduce the severity of the sanction. It was suggested that Mr Massey did not have jurisdiction to order a rehearing. In our judgement, this argument is absurd. Mr Massey identified what he regarded as a procedural shortcoming: he could put that right without any prejudice to the

claimant and that is exactly what he purported to do. In our judgement, this was entirely within his jurisdiction and it was manifestly fair.

72 There was considerable debate during closing submissions as to the legal effect of Mr Massey's decision to have a rehearing. Both counsel submitted that the claimant remained dismissed by Mr Hemming's decision, and it is true that whilst deciding that the matter should be reheard Mr Massey did not formally reinstate the claimant. But our judgement is that Mr Massey's decision was clear and that it was fully understood by the claimant. Effectively, Mr Hemming's decision was a nullity and all necessary decisions would be retaken. Mr Massey indicated that upon the decisions being retaken the claimant would be granted a further appeal. Applying the case of ***West Midlands Co-Operative Society Ltd v Tipton***, in our judgement by operation of law the claimant was effectively reinstated there was no requirement for an express statement to this effect from Mr Massey.

73 The effect of this finding is that no doubt the claimant could have brought a claim for unpaid wages for the period after 26 December 2021 until Mr Walker's decision was communicated to him on 6 June 2022 however no such claim has been made.

74 In our judgement, Mr Walker conducted an eminently fair procedure. The claimant had every opportunity to attend meetings and respond. Ultimately, he chose not to attend but he did provide answers to written questions accompanied by a statement which was taken into account. There is no basis to conclude that Mr Walker would have reached a different decision if the final hearing had been in person. The reason that the hearing did not take place in person was because of the impasse which was reached with regard to the claimant's representation.

75 In our judgement, the right of an employee to be represented by a trade union representative or a work colleague cannot be an entirely unfettered choice. Inevitably circumstances will arise from time to time where a nominated representative is simply not acceptable. We do not know why Mr Nawaz was under suspension; but our inclination is that if an employee is under suspension and it is not unreasonable for the employer to object to their representation of another employee. This is especially the case where an alternative representative was available and there is no reason to suppose that the alternative representative would not have provided adequate representation.

76 In our judgement, Mr Walker reached a conclusion in respect of the RTI which was eminently reasonable and well available to him on the evidence. Indeed although the claimant repeatedly alleges that there was no basis for a misconduct finding, this argument is utterly absurd. The claimant was involved in a road traffic accident where the vehicle he was driving collided with the rear of

the vehicle in front the vehicle in front driven by the claimant's colleague Mr Ishmail Patel. Mr Patel had braked suddenly because of something happening ahead of him. Mr Patel had braked without colliding with anything in front of him and the vehicle behind the claimant also braked without a collision with the rear of the claimant's vehicle. It follows that for the claimant to have been involved in the collision he was either driving too close to Mr Patel's vehicle or driving too fast or, as seems the most likely, he had a momentary lapse of concentration. There is no evidence to suggest that the claimant was not a competent driver; no evidence to suggest that any illness or mental health condition affected his driving on that day; and no evidence of any mechanical defect on the vehicle. The only explanation therefore is that the claimant had a lapse of concentration he was driving the respondents motor vehicle - an expensive piece of equipment. The accident caused fairly substantial damage to both the claimant's vehicle and that driven by Mr Patel and Mr Patel suffered injury.

78 In cross-examination, Mr Harding advance the case to Mr Hemming, Mr Walker and to Mr Tate that there was no evidence of injury to Mr Patel. We found it surprising therefore that when the claimant gave evidence he confirmed that he was well aware that Mr Patel had been injured; he had a small amount of time absent from work; and that on return to work it had to be on adjusted duties.

79 A finding of misconduct was in our view inevitable and the issue of a warning entirely reasonable. Insofar as they relate to Mr Walker, our judgement is that there is no merit in the allegations made in Paragraph 68 (b), (c), (d), (e), (g), (k), (l), (n) and (o).

80 Mr Tate conducted a fair appeal and again navigated his way around the difficulties caused by the claimant's unreasonable stance over representation in relation to the RTI he reached a permissible conclusion that the claimant was guilty of culpable misconduct and that a warning was an appropriate sanction.

81 The claimant advanced no evidence or argument with regard to any adjustments which should have been made for his health (OH had certified that he was fit to attend meetings), nor did we hear any evidence or argument with regard to any failure or delay in providing notes of meetings. The allegations set out at Paragraph 68 (m) and (p) are also without merit.

82 We find that the claimant was dismissed for a reason relating to his conduct which is a potentially fair reason for dismissal under the provisions of Section 98(1) and (2) ERA.

83 The operative instance of misconduct related to the RTI which occurred on 19 August 2021. We are satisfied that both Mr Walker and Mr Tate genuinely

believed that the accident was caused by culpable misconduct on the part of the claimant.

84 There was ample evidence to justify this conclusion. Indeed the facts of the incident speak for themselves. The claimant lost concentration and collided with the vehicle in front of him. We entirely accept, and the respondent has never suggested otherwise, that there was an absence of aggravating features such as excessive speed, intoxication or the unlawful use of a mobile phone.

85 The investigation conducted by Mr Haylett was thorough and perfectly adequate. Indeed no complaint was ever raised by the claimant in respect of the investigatory meeting held in relation to the RTI - the meeting at which the claimant was represented by Mr Robinson and not by Mr Nawaz.

86 As to the sanction, we are quite satisfied that the imposition of a warning for the claimant's misconduct of poor driving on 19 August 2021 was entirely reasonable.

Say something about procedural fairness

87 This then brings us to what in our judgement is the only viable issue in the case: namely, whether the decision to dismiss the claimant fell within the range of reasonable responses available to a reasonable employer acting reasonably. The respondent does not suggest that the conduct involved in the RTI was deserving of anything more serious than a first level warning. The claimant found himself dismissed because of the operation of an extant final written warning issued in October 2020.

88 Both Mr Walker and Mr Tate said in evidence that they considered all of the circumstances around the existence of the final written warning and what its effect should be. They did not however give us any explanation as to their analysis and why they felt that the final written warning should now lead to dismissal.

89 Mr Walker and Mr Tate agreed that dismissal would not be inevitable simply because of the existence of the final written warning; that they had a discretion and needed to decide. Frankly we find it difficult to imagine any circumstances where the existence of a final written warning would not lead to dismissal if not in this case.

90 The factors which Mr Walker and Mr Tate should have considered include the following:

(a) The final written warning was issued for an entirely different type of disciplinary offence.
(b) There was a period of 9 months between that offence and the actual issue of the warning with no further examples of misconduct.
(c) This meant that by the time Mr Walker was considering the RTI, 2½ years had elapsed since the incident leading to the issue of the final written warning.
(d) The instance of misconduct with which Mr Walker was dealing was a momentary lapse of concentration with no aggravating features.

91 We are acutely conscious that we must not substitute our decision for that of the respondent. We are only concerned with whether decision taken by the respondent was within a range of reasonable responses. In our judgement this decision fell outside that range. It would not be right simply to have a tariff stating that any instance of misconduct after a final written warning must lead to dismissal. If that proposition is accepted then, as we say, it is difficult to envisage an instance of misconduct less serious than that found against the claimant following the RTI on 19 August 2021.

92 On this narrow basis therefore, and on this narrow basis alone, we find that the claimant was unfairly dismissed. He is entitled to a remedy for unfair dismissal which will be determined at a remedy hearing on a date to be fixed and notified to the parties

93 The parties are referred to the case management order issued by Employment Judge Gaskell at the same time as the issue of this reserved judgement with regard to preparation for the remedy hearing.

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Employment Judge Gaskell

11 July 2024