EMPLOYMENT TRIBUNALS

Claimant: Mr D Collins

Respondent: Gloucestershire County Council

Heard at: Bristol **On:** 29, and 30 April and 1, 2 (in chambers) and 3 May 2024

Before: **Employment Judge Livesey**
Ms L Fellows
Mrs C Monaghan

Representation
Claimant: In person
Respondent: Miss Patterson, counsel

JUDGMENT having been sent to the parties on 29 May 2024 and written reasons having been requested in accordance with rule 62 (3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. Claim

1.1 By a claim form dated 13 February 2023, the Claimant brought complaints of unfair dismissal and discrimination on the grounds of disability.

2. Evidence

2.1 The Claimant gave evidence in support of his case. Mr Harvey, who attended the hearing, did not need to be cross-examined by the Respondent and his evidence was agreed. The Claimant also relied upon the written statements of Ms Gleed, Ms Smart and Ms Warwood.

2.2 The Respondent called the following witnesses;

- Mr Blacker; Director of Finance;
- Ms Marley; Integrated Social Care Manager;
- Mr Bird; Employee Relations Lead;
- Mr Barrett; Social Care Lead.

2.3 The Tribunal received the following documents;

- An agreed hearing bundle; R1;
- The Respondent's Cast List; R2;
- The Respondent's Chronology; R3.

3. Issues

3.1 The issues had been clarified, agreed and recorded by Employment Judge Danvers on 9 August 2023 at the Case Management Preliminary Hearing which she conducted. They were, in summary, as follows;

- Disability; the Claimant's disability (depression and/or anxiety) was not conceded by the Respondent (see its letter of 7 August 2023);
- Discrimination arising from disability; two main acts were alleged which related to the events of 28 October 2021 and, secondly, the Claimant's dismissal. Lack of knowledge and justification were both being advanced as defences;
- Harassment; the same two allegations were brought forward as alternative complaints under s. 26;
- Failure to make reasonable adjustments; the Claimant relied upon two provisions, criteria and/or practices ('PCPs'); the dismissal of employees for extended periods of absence and/or sending rude emails and, secondly, the conducting of disciplinary hearings in an employee's absence. The adjustments contended for were, first, medical retirement and, secondly, the delaying of hearings until employees were fit to attend;
- Unfair dismissal; the Respondent relied upon conduct as the fair reason for dismissal. In relation to matters of fairness under s. 98 (4), the Claimant had identified nine specific complaints (paragraphs 2.6.1 to 2.6.9 of the Case Summary);
- Jurisdiction; the Respondent asserted that some of the complaints of discrimination had been brought out of time.

4. Facts

4.1 The Tribunal reached the following factual findings on the balance of probabilities. It attempted to confine its findings to matters which were relevant to a determination of the issues. Page numbers referred to within these Reasons are to pages within the hearing bundle, R1, and have been cited in square brackets.

Introduction

4.2 The Claimant was a Social Worker, his employment with the Respondent having started in 1998. From April 2009, he worked within the Cotswolds Adult Social Care Locality Team.

4.3 His contract [522-5] included a general mobility clause (paragraph K [525]) and a flexibility provision (paragraph O [525]). A number of the Respondent's policies were referred to during the evidence, which included the Sickness and Absence Policy [477-494], the Disciplinary Policy [433-444] and the Code of Conduct [445-6].

4.4 The Claimant's line manager was Ms Bell. In October 2020, Ms Marley became Ms Bell's manager. During the relevant period leading up to April 2021, the Claimant was based at Cirencester Hospital. There, he worked to ensure that vulnerable people were released home with appropriate support. Such work was demanding; relatively quick assessments of an individual's needs were required, whilst bearing in mind the wishes of the individual, his/her family and the clinical staff.

Disability

4.5 In the Claimant's Claim Form, he said that he had a mental illness which had been caused by the Respondent. In his disability impact statement [70], he said that he had had a "*severe mental health breakdown*" in April 2021 because of a mixture of domestic and work issues. That statement, written in June 2023, referred to symptoms of panic attacks, mood swings and hallucinations. That evidence on causation was also confirmed in evidence; he confirmed that the events of April 2021 had triggered his problems and that he had had no mental health issues before that.

4.6 The Claimant's medical records commenced in April 2021 [457]. The section that was provided in evidence appeared to have been a small part of a larger record.

4.7 No mention of mental health issues appeared in the notes until June 2021 when "*panic type symptoms*" were referred to [458]. That seemed odd in light of the Claimant's evidence. Later in June, the notes suggested that his symptoms were mostly evident when driving. For example, he reported this in September;

> "*I am requesting an extension to my sick note from 1.10.21 for a final 4 weeks. I have said this before but the issues with me not being able to drive to work remain. I have been unable to transfer to a more local hospital or office and reports into one manager bullying will be concluded in this time.*"

4.8 In the latter part of 2021, the Claimant was prescribed an antidepressant, Sertraline. MED3s were also continually provided but, that aside, the Claimant's notes did not include the kind of repeated, concerning entries that the Tribunal was used to seeing in cases involving an individual with a serious and acute mental health crisis. Most of the entries, and there were quite a few, related to a persistent sore throat, a reflux problem and a urological issue, which the Claimant referred to in an email to his employer [112]. It was, perhaps, something of a surprise that he had been prescribed Sertraline in the context of the notes at that time.

4.9 In 2022, references to the Claimant's mental health did start to appear (for example, on 6 and 17 January [462]). An entry on 14 March was more informative [462-3]; it referred to heavy drinking, loss of emotional control and suicidal thoughts. He was then being prescribed Mirtazapine, a different antidepressant. An entry 10 days later referred to him having shouted at staff at the surgery because he had been late for an appointment [464]. In May and June, when the disciplinary and grievance processes were concurrently running, the Claimant said in evidence that that was a time

when he had threatened violence towards his partner, his mother and strangers on the street. In May, also, the Claimant was finally seen by OH and Dr Heginbotham's opinion was very important in a number of respects [267-270];

> "*From a mental health perspective Duncan is unwell and is not well enough for any form of work. The main reason for this appears to be the ongoing disciplinary process and grievance process at work. It is well known that these types of disputes have a significant impact on people's mental health and their ability to recover.*
>
> *I cannot see Duncan's mental health improving enough for him to go back to work until these issues have been resolved. I would therefore recommend that these proceedings are completed as soon as possible.*
>
> *We discussed retiring on the grounds of ill-health. In my opinion I do not feel that Duncan would be successful in obtaining early access to pension benefits due to ill-health if he applied. There are numerous reasons for this but perhaps the most important one is the ongoing disputes with management.*
>
> *I feel that with the right support from the NHS and with closure on the ongoing disputes then Duncan should be able to recover and be in a position to return to work again. Normally you would expect a substantial improvement in mental health to occur over 3 to 6 months once the circumstances have become conducive.*"

4.10 In June, his mother and partner wrote short statements attesting to the Claimant's character 'transformation'. It was said that his "*default setting is anger*", that he had mood swings and was "*verbally and physically abusive*" [382-3].

4.11 Later on in 2022, there was little remarkable in the notes. He seemed to have been improving a little [466] but nevertheless remained on Mirtazapine.

4.12 There were two sources of information from Dr Maxted, his GP;

4.12.1 He replied to a request for further medical evidence in support of the Claimant's application for a Personal Independence Payment in April 2022 [471-5]. When asked to address the effects of the Claimant's "*disabling condition on day-to-day life*", his response seemed remarkably low-key and the Claimant accepted in cross examination that the recorded impact was then "*relatively limited*";

> "*Due to his anxiety can struggle with making decisions and communicating his concern. Other areas not known.*";

4.12.2 He also provided a letter on 26 July 2023, which read as follows [470];

> "*Duncan Collins is a 53-year-old gentleman who has been seeing me with regards to his Mental Health since March 2020. His main issues included significant levels of anxiety and depression. He was started on medication to try and help his symptoms and did require*

2 or 3 different types of medication to find one that started to improve his symptoms to some degree. Unfortunately, these Mental Health issues were compounded by difficulties at work and being told that he was fabricating his illness which obviously exacerbated his levels of anxiety."

It was accepted by the Claimant in evidence that both the month and the year of the alleged onset suggested in the letter were wrong.

2018 and 2020 disciplinary issues

4.13 The Claimant was issued with a final written warning in December 2018 as a result of misconduct. His wrongdoing concerned him accessing his uncle's socials services files.

4.14 Ms Marley issued the Claimant with a further final written warning in February 2020 [97-8]. The matters which gave rise to that were a data breach, poor performance in relation to undertaking mental capacity assessments and the sending of inappropriate texts and/or emails. The last of those allegations related to events outside work. He had sent rude and disrespectful communications concerning the casting of a pantomime at a local theatre when drunk. Another one of the Respondent's employees had been involved, as had the police.

4.15 The issue was raised in supervision meetings by his line manager, Ms Bell [102]. He was reminded that any further breaches would be likely to lead to his dismissal. He was advised to ensure that all of his communications remained professional and that he discussed his frustrations with colleagues rather sending poorly composed emails.

April 2021 concerns

4.16 Issues were raised by a member of staff at Cirencester Hospital in relation to some of the cases that the Claimant was involved in. Specifically, a Senior Sister raised concerns about his failure to attend Multi-Disciplinary Team meetings, to complete assessments in good time and to keep families updated (see [108], which were the concerns raised to the Senior Sister, which she then referred on [287-8]).

4.17 The Claimant had some time off at the start of April because of an infection and other health issues. He was off from 6 April and did not, in fact, ever return to work.

4.18 When he had been due to return, he was directed to attend the Cotswold Locality Office, otherwise known as Lewis Lane, rather than the Hospital. The distance between the two sites is approximately a mile.

4.19 Ms Marley had a number of reasons for giving that direction; first, it would have enabled the concerns which had been aired at the Hospital to have been investigated. Secondly, it was intended to have enabled the Claimant to have become better acquainted with the new computer-based file management system, LAS, which had just been introduced. His previous training on the system had not gone smoothly. Indeed, he had become so frustrated with problems which he had experienced that, in an email to

external facilitators, he had threatened to jump out of a window [106]. Allied to that second issue, Ms Marley accepted in cross examination that the Claimant had failed to show that he had properly bought into the Respondent's post-covid social care initiative called 'Make the Difference'. She considered that a spell at the Locality Office would have helped him see how that initiative was being put into practice by his colleagues more closely and would have enabled him to raise any further concerns about his use of LAS.

4.20 The Claimant did not take the news about his move well [110];

> "*Just a heads up to say I will not be coming to work in the community hub. I am angry hurt and devastated by the Matrons lies but the decision to believe her without even discussing it with me is both unfair and unjust…*
>
> *I am 51 today are no longer prepared to be treated like an errant child. I expect to be immediately reinstated to the Hospital. Failing that I will tender my resignation by 5 pm this Friday. I will then instigate a tribunal for constructive dismissal and the Department's blatant failure to support and protect me through this. My position is non-negotiable on this and I have to make a stand.*"

4.21 He remained off sick and said that his position was unchanged [113]. He sent in sick notes and reiterated his position in further emails in which he said that he would not 'tolerate' the Respondent 'buying into Linda's [the Hospital Sister's] unrehearsed crap'. He threatened to resign as soon as his doctor had said that he was fit enough to do so [112].

4.22 He was referred to Occupational Health ('OH'). He did not attend the appointment on 29 April [117]. He said that he had been asleep when they had rung but he did not see how an assessment would have helped in any event.

4.23 In May, he was signed off again and said that he would contact his employer when his fit note expired and when he could have been assured that he would have been allowed to return to work at the Hospital [119].

4.24 In June, he said that he *was* fit to return to work, but would not do so because of the Respondent's position. He said that his position remained unchanged therefore too [124]. Ms Bell's attempts to direct him to the mobility clause within his contract merely provoked a reiteration of his stance [120-1]. But he then seemed to soften a little and said that he might have prepared to go to the Locality Office, but only "*under sufferance and protest*" [126]. A further attempt at an OH referral was therefore made, but that was also unsuccessful [129].

4.25 In July, the Claimant was beginning to become less easily contactable by his manager (see, for example, [129-134]). At that point, OH alleged that he had missed five appointments [137]. That reflected the GP notes which contained seven 'failed encounters' over the three months between July and October [459-461].

2021 disciplinary process

4.26 In August, an investigation was commenced into the Claimant's behaviour and continued absence. In relation to his conduct, the concerns related to his refusal to return to work at the Locality Office, his use of obstructive and disrespectful language in his communications and his response to his training on LAS when he had become frustrated and emotional. At that point, he had been off work for 62.5 days.

4.27 Ms Bell led the investigation and her report was prepared in late August [139-145]. The Claimant would only communicate with her by email. There had been no investigatory interview. He did not call Ms Bell back, despite his assurances to do so [142].

4.28 The Claimant was invited to attend a hearing on 28 October 2021 [303]. Ms Bell has since left the Respondent's employment and we were told that there had been difficulty finding some of the older correspondence in the case following an archiving exercise. It was the Respondent's case that the email of 28 October had followed an earlier formal invitation letter which could not be found, but we noted that the email itself nevertheless explained the basis of the hearing and his right to have been accompanied. The cover email on the same page also indicated that it had not been the first invitation. Given the other correspondence in the bundle, we considered that it was likely that such an earlier letter had been sent.

4.29 Ms Marley chaired the hearing on 28 October and was supported by Mr Bird from HR. Ms Bell attended as did the Claimant. A dedicated notetaker was present who recorded the lengthy hearing notes [150-164]. During his evidence to the Tribunal, the Claimant asserted that the notes had been edited at certain points. The Respondent asserted that they were accurate. We concluded that they were likely to have been the most reliable record of the hearing available. No alternative notes were put forward.

4.30 The Claimant alleged that Ms Marley had called him a 'spoilt brat' during the hearing and accused him of making 'brattish demands'. He said that she also accused him of 'faking' his condition and that his GP had colluded with him. It was specifically those comments which he asserted had been edited from the hearing notes.

4.31 Ms Marley and Mr Bird were very clear that those things were simply not said. The Claimant shied away from putting them directly to the witnesses in cross examination, despite an invitation from the Tribunal to do so. We concluded that it was unlikely that he had been called a 'spoilt brat' and/or 'brattish'. Ms Marley and Mr Bird gave clear, robust and credible evidence whereas the Claimant appeared selective and stated that he could not remember many of the events at the time because of his alleged mental health condition. We also noted how he had subsequently conceded that *he* had used the word 'brat' in relation to Ms Marley at the appeal hearing [258].

4.32 It was clear that there was a discussion at the hearing about the Claimant having used his absence to try to get what he wanted. The suggestion had been made to go back to Cirencester Hospital [158-9];

"*JB; Do you understand that you cannot hold the organisation to ransom? It is a reasonable management request for you to go somewhere, you are not in a position to dictate whether that is reasonable or not.*

DC; I can if it caused me stress and messed up my life I can.

SM; So if we said to you, you can come back, you would have to come off of sickness then.

CD; I would have been alright.

SM; and you would have stopped being sick.

DC; yes well my stress would have gone wouldn't it."

4.33 That did not appear to have been a controversial thing to have said in light of the Claimant's emails after April. The Respondent tried to explain its reasons for having moved him from the Hospital, but they appeared to make little headway. Ms Marley explained that, in order for the Respondent to have been satisfied that he was fit to return to work, he would needed to have been seen by OH [163], specifically because of how *he* said that he was then functioning [154]; he said that he 'did not have capacity', that he 'did not know what he was doing half the time' and that he was 'mentally ill'. At the hearing, Mr Bird considered that the Claimant did show signs of being mentally unwell (paragraph 19 of his witness statement). Ms Marley, however, knew him better. She saw evidence of frustration, disgruntlement and unhappiness, but did not share Mr Bird's view. His conduct was resonant to her of how he had behaved in 2020 when he had been issued with a final written warning.

4.34 On 8 November 2021, the Claimant was notified of the outcome of the hearing [165]; he was issued with a final written warning to last for twelve months [146-9]. The conduct that was covered concerned his poor communications with those at the Hospital, those who had provided LAS training and others at the Respondent following the inception of the investigation and his failure to engage with OH, resulting in his continuing absence.

4.35 The Claimant appealed against the decision. His appeal was heard by Ms Smith on 20 January 2022, having been rearranged from 7 January [495-513]. The appeal was dismissed, although the formal outcome letter has, again, been lost. Nothing turned upon it.

Social Work England registration

4.36 The Respondent became aware that the Claimant's registration as a social worker with Social Work England, the regulatory body ('SWE'), lapsed in October 2021. In May 2022, SWE contacted the Respondent about the Claimant having possibly acted as a social worker on a private basis [259-260]. That would have been a serious matter; an individual who holds himself out as a social worker when not registered potentially commits a criminal act and, if he had been working in a secondary, private role without the Respondent's permission and/or whilst off sick, serious conduct issues may have arisen.

4.37 As it was, nothing came of the SWE letter. The Claimant said in evidence that he had been mischievous and had merely tried to give SWE the idea that he was working in order to see what enforcement action it took.

2022 grievance process

4.38 In 2022, two processes ran almost concurrently; a grievance and a disciplinary process.

4.39 The Claimant's grievance was issued in January [166-170]. He alleged, first, that Ms Marley had failed in her duty of care towards him and, secondly, that a reference which she had provided in the Summer of 2021 had been inaccurate and unfair. The reference had been completed with input from HR because Ms Marley knew that some of her answers were likely to have been negative. When the Claimant had seen it, he had responded in an email which he accepted has been confrontational [138];

> "*I have received a copy of the 'reference' given by you and I am incensed. I want a full explanation for the comments. Poor timekeeping? Unreliability? Private disagreements with colleagues? What the hell are you lying about? You will have to speak to me about this and this is all evidence for the tribunal. How dare you.*"

4.40 Ms Walker, a Project Manager in Adult Social Care, was appointed to investigate the grievance. In her report [176-255] she concluded that there had been no failure in the duty of care towards him but that, in relation to the reference, although it had reflected genuine concerns about his attitude, conduct and attendance, insufficient context had been provided and it was felt that it ought to have been discussed with him before it had been provided to the prospective employer.

4.41 A grievance hearing took place on 29 June before Ms Gallagher, Head of Adult Support Services. The Claimant attended with his partner [277-285]. Ms Gallagher dealt with the grievance along similar lines to the conclusions reached in the report; the first allegation was not upheld but, in relation to the reference, she considered that some responses within it, where he had been assessed as 'poor', might have been better recorded as 'needs improvement'. Issues around the provision of greater context and consultation with the Claimant were also upheld ([294-302] and [307-8]).

4.42 A subsequent appeal against the outcome was dismissed by Mr Blacker, Director of Finance. The outcome letter of 12 October 2022 [404-5] was not initially sent to the Claimant for reasons explained more fully later.

2022 disciplinary process

4.43 The tone and content of the Claimant's communications remained a concern for the Respondent. He continued to complain about the disciplinary process in 2021, the reference which had been provided and the grievance report. Intemperate and rude emails continued, including those at [257-8];

> "*I do not care if my wording offends you. You offend and disgust me. Shame on you all.*"

4.44 In May, the Respondent commenced a further investigation into alleged unprofessional conduct associated with those communications [357-9]. Ms Page, Integrated Social Care Manager, led the investigation and she invited the Claimant to an investigatory meeting, to which he replied on 3 May as follows [367];

> "*Are you taking the piss?..*
>
> *Marley has committed the criminal act of libel by lying barefaced in that reference that cost me a 12 month (at least) post at the GWH.*"

4.45 On 18 May, Ms Page wrote to find out whether he was going to attend the meeting the following day [263]. His reply [263], which was copied into a number of others (Ms Marley, Ms Walker and Mr Bird), was as follows [263];

> "*I will not be attending this, or any further kangaroo courts. My GP has stated that I must not attend as he will NOT have me subjected to any more stress. I am also tired of playing GCCs sick games…*
>
> *I will no longer be bullied by GCC. Bird, Ross and Marley are guilty of libel and will be facing action against them…*
>
> *I am calling the tune now and have made GCC a more than reasonable settlement terms. I have given them until close of business this Friday to confirm the full terms. Failing that the matters will be presented to my legal adviser, ACAS, the police and media. They know I am not bluffing and that I will never again be answerable to them those dishonourable hypocrites.*"

4.46 Mr Bird then asked him to modify his language in communications [262] which provoked another rude response [261-2];

> "*How dare you tell me how to act when you have all committed offences in your attempts to drive me over the edge ..*
>
> *All bloody hypocrites and I will never answer to any of you again. You will look great on the news when exposed for making someone mentally ill than continually punishing and tormenting. These 'investigations' are cooked up share it to protect your own necks.*"

4.47 At around this time, a further OH appointment had been arranged. This time he attended. The contents of the report have already been considered above [267-270].

4.48 In June, the Claimant started to email a broader range of people. On 6 June, he emailed the Leader of the Council and other councillors, the Sun newspaper and ITV and referred to the Respondent's alleged 'whitewash', 'cover-ups' and 'baseless' concerns. Individuals were named and accused of libel and the recipients were called 'rude and arrogant' and, in another, 'pig ignorant' [355]. In a following email, Ms Marley was referred to as a 'cow', HR as 'prats' and the Respondent generally as 'twats' [356]. Again, Mr Bird asked the Claimant to remember that he was an employee of the Respondent and was required to abide by its Code of Conduct [271].

4.49 Ms Page completed her investigation report in September [311-395]. She included 27 examples of inappropriate, unprofessional and rude emails

[315] and identified 5 Polices and Codes that had been breached as a result [321]. The Claimant accepted the accuracy of the report when he gave evidence. He said that he was ashamed of his conduct at that time and, in closing submissions, apologised for his actions. Ms Page commented as follows [321];

> "*The behaviour demonstrated within this report is not in keeping with my recollection of his behaviour back then, furthermore the content of Duncan's emails detailing his current Mental Health and well-being has concerned me. I have escalated my concerns with regards to Duncan's mental health and well-being directly to the Manager of the Occupational Health team and I have ensured that I have offered to arrange Counselling support to Duncan, to date Duncan has declined these offers.*"

4.50 The Claimant was invited to a disciplinary hearing on 23 September 2022 ([390-1] and [398]). He responded angrily again to that invitation in two emails written 10 minutes apart [393];

> "*Fuck off all of you and stop harassing me..*
>
> *Don't even contact me again you sick bitch..*
>
> *Go on bitch….sack me.*
>
> *ACAS have confirmed that I will win the tribunal for unfair dismissal..then I will have all of your sorry sagging arses. Bring it on darlin. You and the rest of the sick cunts.*"

4.51 On 19 September, the Claimant wrote to indicate that his email address was no longer going to have been in use. He resisted the possibility of receiving any further correspondence [399]. Two days later, he indicated that he was also homeless and wished the Respondent good luck in finding him. He told the Respondent to "*go to hell*" and said that he had been suicidal at the weekend and that he would see them "*next at the tribunal*" [400]. During his evidence, the Claimant accepted that he just wanted to disappear and be left alone at that point. He accepted that his relationship with the Respondent had totally broken down.

4.52 Not surprisingly, the Claimant did not attend the hearing on 23 September. He had not asked for it to have been postponed, nor had he sent any written representations, despite an invitation to do so. The hearing proceeded in his absence, chaired by Mr Barrett, Social Care Lead. Mr Barrett's recommendation was that the Claimant be dismissed for gross misconduct. His reasons for reaching that decision were set out succinctly within paragraphs 10 and 11 of his witness statement;

> "*10…..I did a factor in the impact that his mental health was having on his behaviour, but my overwhelming feel from the evidence put before me was that whilst he was suffering from poor mental health there was clear rational thought in some of the communications; they weren't all foul mouthed tirades, and some were more lucid than others. It was clear that he was felt the pressure of not being at work [sic], but I did believe that Duncan was able to think rationally at times, which led me to believe that he had control over the nature of his communications. I was also satisfied*

that the fact that he was asked to move from the hospital setting was not a reasonable reason for the behaviour he was demonstrating - in my experience, no social worker is based solely in a hospital setting, and it was a reasonable request for him to move elsewhere.

11. I was aware that Duncan did have a final live written warning for conduct, but was unaware of the background or reason for this… I was satisfied that Duncan's conduct on this occasion amounted to gross misconduct on a stand-alone basis.. I have never seen behaviour of this nature from an employee towards their work colleagues. I am ex-Royal Navy and I was very surprised at the level of language that Duncan was using - he was treating his colleagues in an appalling way."

4.53 An outcome letter, dated 28 September, was prepared but not sent. Because of the Claimant's reactions to the previous invitations to the investigatory and disciplinary meetings and because of his indication that he had attempted to take his own life in September [400], a decision was taken to hold the disciplinary and grievance appeal outcome letters in abeyance. They were eventually sent on 8 December [410] after the Claimant had made contact with the Respondent about a pay issue. The letter itself [402-3] made it clear that the Claimant had been dismissed summarily as a result of the conduct disclosed by the emails and not because the previous final written warning had been activated.

4.54 The letter referred to a right of appeal within a 14 day window (in other words, from 28 September). The cover email in December did not modify that date [410]. The Claimant did try to raise an appeal against the decision on 12 January [514], but that was over a month after the letter had been released to him. That was not one of the matters complained of by him as an issue in the case.

Post dismissal

4.55 Further members of staff received abusive emails from the Claimant after his dismissal (for example [411] and [414]). The Claimant also attended the Locality Office at Lewis Lane on 19 January 2023. A few days later, he was notified that, if he made further contact, matters would have been escalated through the Respondent to a different department [422-3].

5. Legal principles, discussions and conclusions

Disability; legal principles

5.1 A person had a disability if he had a physical or mental impairment which had a substantial and long-term adverse effect on his ability to carry out normal day to day activities (s. 6 of the Equality Act). These questions may overlap to a certain degree. However, the Tribunal should ensure that each step was considered separately and sequentially (*J v DLA Piper* [2010] ICR 1052, and *Goodwin v Patent Office* [1999] ICR 302). The burden was on the Claimant to prove the four conditions (*Kapadia v London Borough of Lambeth* [2000] IRLR 699 (CA)).

5.2 Schedule 1 of the Act contained further guidance in relation to the definition. In addition, we took into account the '*Guidance on the Definition of*

Disability' which we were required to, where relevant, under Schedule 1, Part 1, paragraph 12.

5.3 In *Goodwin-v-Patent Office* [1999] IRLR 4, the EAT gave detailed guidance as to the approach which ought to have been taken in determining the issue of disability. A purposive approach to the legislation was required. A tribunal had to remember that, just because a person could have undertaken day-to-day activities with difficulty, it did not mean that there had been no substantial impairment. The effect of medication ought to have been ignored for the purposes of the assessment.

5.4 The approach in *Goodwin* was approved in *J-v-DLA Piper UK LLP* [2010] ICR 1052, at paragraph 40. It was said at paragraph 38,

> "*There are indeed sometimes cases where identifying the nature of the impairment from which a Claimant may be suffering involves difficult medical questions; and we agree that in many or most such cases it will be easier – and is entirely legitimate – for the tribunal to park that issue and to ask first whether the Claimant's ability to carry out normal day-to-day activities has been adversely affected – one might indeed say "impaired" – on a long-term basis. If it finds that it has been, it will in many or most cases follow as a matter of common-sense inference that the Claimant is suffering from a condition which has produced that adverse effect — in other words, an "impairment". If that inference can be drawn, it will be unnecessary for the tribunal to try to resolve difficult medical issues of the kind to which we have referred."*

5.5 Whether someone had an impairment was a question of fact and the word was to have been given its ordinary meaning. Its cause was likely to have been irrelevant.

> "*Impairment for this purpose and in this context, has in our judgment to mean some damage, defect, disorder or disease compared with a person having a full set of physical and mental equipment in normal condition. The phrase 'physical or mental impairment' refers to a person having (in everyday language) something wrong with them physically, or something wrong with them mentally.*" (*Rugamer-v-Sony Music Entertainment UK Ltd* [2001] IRLR 664).

5.6 The day-to-day activities that were affected must have been "*normal*". The *Guidance* stated:

> *"In general, day-to-day activities are things people do on a regular or daily basis, and examples include shopping, reading and writing, having a conversation or using the telephone, watching television, getting washed and dressed, preparing and eating food, carrying out household tasks, walking and travelling by various forms of transport, and taking part in social activities."* (Paragraph D3)

5.7 The correct approach involved a consideration of all matters, but particular attention had to be paid to those activities that the claimant could not do or could only do with difficulty (*Leonard-v-Southern Derbyshire Chamber of Commerce* [2000] All ER (D) 1327).

5.8 The statutory definition of "*substantial*" was "*more than minor or trivial*" under s. 212 (1). Section B1 of the *Guidance* stated that "*the requirement that an adverse effect on normal day-to-day activities should be a substantial one reflects the general understanding of disability as a limitation going beyond the normal differences in ability which may exist among people*". Factors that illustrated "*substantial effect*" under Section B included the time taken to carry out an activity, the way in which it was carried out and the effects of environment.

5.9 An impairment will be treated as having had a substantial adverse effect if measures were being taken to treat it or correct it and, secondly, but for the measures, the impairment would have been likely to have had that effect.

5.10 Then there was the long-term requirement. It was clear from paragraph 2 of Schedule 1 of the Act that an impairment was long term if it had lasted for 12 months or more, was likely to have lasted that long or for the rest of the life of the Claimant. All three possibilities had to be considered (*McKechnie Plastic Components-v-Grant* UKEAT/0284/08). As to the question of likelihood, the Tribunal had to determine whether it 'could well happen' (*Guidance*, paragraph C3 and *SCA Packaging Ltd-v-Boyle* [2009] IRLR 746).

5.11 In *Tesco Stores Ltd-v-Tennant* [2020] IRLR 363, the EAT confirmed that a disability must have been long-term at the time that the alleged acts of discrimination were committed. Therefore, if the substantial adverse effect had not lasted at least 12 months at the time of the alleged discriminatory act (or, if there is more than one act, at the time of each act), the Claimant will not meet the definition of disability unless they could instead show that, at the time of the alleged discriminatory act (or acts), their condition was likely to have lasted for 12 months or for the rest of their life.

5.12 The Tribunal's determination of this "*long-term*" condition must be based only on what was known when the alleged discrimination took place, not with the benefit of hindsight - *Richmond Adult Community College v McDougall* [2008] EWCA Civ 4 per Pill LJ at [24]:

> "*The decision, which may later form the basis for a complaint to an Employment Tribunal for unlawful discrimination, is inevitably taken on the basis of the evidence available at that time. In my judgment, it is on the basis of evidence as to circumstances prevailing at the time of that decision that the Employment Tribunal should make its judgment as to whether unlawful discrimination by the employer has been established. The central purpose of the Act is to prevent discriminatory decisions and to provide sanctions if such decisions are made. Whether an employer has committed such a wrong must, in my judgment, be judged on the basis of the evidence available at the time of the decision complained of. In reaching that conclusion, I have had regard to the Guidance. I agree with the conclusion of Lindsay J and Elias J and with their analysis of the Guidance*".

5.13 The decision in *McDougall* was more recently ratified in *All Answers Ltd-v-W and another* [2021] EWCA Civ 606.

5.14 In cases involving mental impairments, the use of terms such as ‘anxiety’, ‘stress’ or ‘depression’, even by GPs, would not necessarily amount to proof of an impairment, even if such terms, or similar, had been referred to as part of one of the World Health Organisation International Classification of Diseases (*Morgan-v-Staffordshire University* [2002] IRLR 190 and *J-v-DLA Piper UK LLP* [2010] IRLR 936). The EAT said, at paragraph 42 and 43 of *J-v-DLA Piper*:

> *“42. The first point concerns the legitimacy in principle of the kind of distinction made by the tribunal, as summarised at para 33 (3) above, between two states of affairs which can produce broadly similar symptoms: those symptoms can be described in various ways, but we will be sufficiently understood if we refer to them as symptoms of low mood and anxiety. The first state of affairs is a mental illness—or, if you prefer, a mental condition—which is conveniently referred to as “clinical depression” and is unquestionably an impairment within the meaning of the Act. The second is not characterised as a mental condition at all but simply as a reaction to adverse circumstances (such as problems at work) or—if the jargon may be forgiven—“adverse life events”. We dare say that the value or validity of that distinction could be questioned at the level of deep theory; and even if it is accepted in principle the borderline between the two states of affairs is bound often to be very blurred in practice. But we are equally clear that it reflects a distinction which is routinely made by clinicians—it is implicit or explicit in the evidence of each of Dr Brener, Dr MacLeod and Dr Gill in this case—and which should in principle be recognised for the purposes of the Act. We accept that it may be a difficult distinction to apply in a particular case; and the difficulty can be exacerbated by the looseness with which some medical professionals, and most lay people, use such terms as “depression” (“clinical” or otherwise), “anxiety” and “stress”. Fortunately, however, we would not expect those difficulties often to cause a real problem in the context of a claim under the Act. This is because of the long-term effect requirement. If, as we recommend at para 40 (2) above, a tribunal starts by considering the adverse effect issue and finds that the Claimant’s ability to carry out normal day-to-day activities has been substantially impaired by symptoms characteristic of depression for 12 months or more, it would in most cases be likely to conclude that he or she was indeed suffering “clinical depression” rather than simply a reaction to adverse circumstances: it is a common sense observation that such reactions are not normally long-lived.*
>
> *43. We should make it clear that the distinction discussed in the preceding paragraph does not involve the restoration of the requirement previously imposed by paragraph 1(1) of Schedule 1 that the Claimant prove that he or she is suffering from a “clinically well recognised illness”;*

5.15 The EAT in *Morgan* underlined the need for a claimant to prove his or her case on disability; tribunals were not expected to have anything more than a layman's rudimentary familiarity with mental impairments or psychiatric classifications. The use of labels such as ‘anxiety’, ‘stress’ or ‘depression’ would not normally suffice unless there was credible and informed evidence

that, in the particular circumstances, so loose a description nevertheless identified an illness or condition which caused the substantial impairment required under the statute. The EAT recognised that there were significant dangers of a tribunal forming a view on the presence of a mental impairment solely from the manner in which a claimant gives evidence on the day of the hearing.

5.16 Paragraph 55 of the decision in *Royal Bank of Scotland plc-v-Morris* UKEAT/0436/10 was also relevant:

> "*The burden of proving disability lies on the Claimant. There is no rule of law that that burden can only be discharged by adducing first-hand expert evidence, but difficult questions frequently arise in relation to mental impairment, and in Morgan v Staffordshire University [2002] ICR 475 this Tribunal, Lindsay P presiding, observed that "the existence or not of a mental impairment is very much a matter for qualified and informed medical opinion" (see para. 20 (5), at p. 485 A-B); and it was held in that case that reference to the applicant's GP notes was insufficient to establish that she was suffering from a disabling depression (see in particular paras. 18-20, at pp. 482-4). (We should acknowledge that at the time that Morgan was decided paragraph 1 of Schedule 1 contained a provision relevant to mental impairment which has since been repealed; but it does not seem to us that Lindsay P's observations were specifically related to that point.)*"

5.17 Nevertheless, it was not always possible or necessary to label a condition, or collection of conditions. The statutory language always had to be borne in mind; if the condition caused an impairment which was more than minor or trivial, however it had been labelled, that would ordinarily suffice. Appendix 1 to the EHRC Code of Practice of Employment stated that there was no need for a person to establish a medically diagnosed cause for their impairment. What was important to consider was the effect of the impairment and not the cause.

5.18 In the case of mental impairments, however, the value of informed medical evidence was not to have been underestimated (see *Ministry of Defence-v-Hay* [2008] ICR 1247). Nevertheless, where there was no evidence that demonstrated that an employee was suffering from a disability at the time the alleged act of discrimination occurred, a tribunal was entitled to consider evidence of disability more generally and to infer from that evidence that the disability existed at the relevant time (*All Answers Ltd-v-Wain and another* UKEAT/00232/20/AT).

5.19 In cases where an employee blamed his or her work situation for the cause of their stress, the case of *Herry-v-Dudley Metropolitan Council and Governing Body of Hillcrest School* [2017] ICR 610, was of assistance in which the EAT expanded on the distinction drawn in *J-v-DLA Piper* and made the following observations:

(i) There was a class of case where the individual would not give way or compromise over an issue at work, and refused to return to work, yet

in other respects suffered no or little apparent adverse effect on normal day-to-day activities;

(ii) A doctor may have been more likely to have referred to the presentation of such an entrenched position as "*stress*" than as anxiety or depression;

(iii) An employment tribunal was not bound to find that there was a mental impairment for the purposes of disability in such a case. Unhappiness with a decision or a colleague, a tendency to nurse grievances, or a refusal to compromise, were not of themselves mental impairments: they may simply have reflected a person's character or personality;

(iv) Any medical evidence put before the tribunal that supported a diagnosis of a mental impairment must have been considered with great care, as must any evidence of adverse effect over and above an unwillingness to have returned to work until an issue was resolved to the employee's satisfaction; but in the end the question of whether there was a mental impairment was one for the employment tribunal to assess.

Disability; discussion and conclusions

5.20 In his oral evidence, his claim form [14] and in his disability impact statement [70], the Claimant had ascribed the beginning of his mental illness to the events of April 2021.

5.21 Even if his condition then had caused a substantial interference with his normal day-to-day activities (and we were not convinced that it did for the reasons that we will explain) his condition was not *then* long-term because it had not lasted for at least 12 months, nor was it necessarily likely to have done so.

5.22 We did not consider that the Claimant had the necessary level of impairment (which caused a substantial interference with his day-to-day activities) in or soon after April 2021 for the following reasons.

5.23 First, the GP notes simply did not reflect someone who then appeared to have been suffering from an acute mental health crisis. The only entries which were in evidence from April or May contained attendances for epididymitis, a high temperature and an ophthalmic issue [458]. It was not until June that panic attacks were referred to. Secondly, even then, the notes suggested that the symptoms were not extensive and were focused upon a claimed inability to travel (his asserted experiences of panic attacks when driving [458-9]). Thirdly, although we did not have the fit notes which were issued at that time, the references to them in the records did not suggest that what they were initially issued as a result of any mental health issues (the one that was issued on 17 May related to a high temperature [458]);

5.24 By May or June 2022, however, we did consider that the effects upon the Claimant were such that it could properly have been said that he was experiencing a substantial impairment in his normal day-to-day activities;

- His GP notes contained more references to mental health symptoms and they appeared to reflect a deterioration throughout the first half of the year. For example, his problems appeared to have been fluctuating and variable in January [462] and the entry dated 14 March was more pessimistic (and we noted the references to increased drinking) [463];
- The OH report in May 2022 referred to the Claimant's inability to work in any form at that point as a result of his mental health [270];
- The Claimant told us in evidence that, at the same time, he was demonstrating aggression towards his partner, his mother and strangers;
- Their own statements [382-3] were corroborative and contemporaneous;
- Other observers considered that his conduct had appeared out of character (Ms Page, for example [321]).

5.25 What of the evidence of the period in between? That was very mixed and somewhat inconsistent.

5.26 Whilst the Claimant had been prescribed Sertraline on 30 September 2021 [460], in the entries before and after that attendance, there were no references to significant psychological symptoms other than a message which he left on 24 September in relation to his ability to drive [459]. The many attendances over that period concerned respiratory symptoms, a persistent sore throat and a reflux problem. And that was the position until the end of the year.

5.27 At the hearing on 28 October 2021, Mr Bird's view of his mental health was clearly not one shared by Ms Marley, who knew him better.

5.28 In March 2022, there was the GP entry relating to drinking and suicidal ideation yet, in April, there was the very limited description of symptoms provided by Dr Maxted in support of the Claimant's PIP application. In May, however, there was the OH opinion which indicated that "*from a mental health perspective…*[the Claimant was]…*unwell and..not well enough for any form of work*" [270].

5.29 Where did all of this leave us? It was difficult to discern a coherent pattern or course of the Claimant's condition. Even the more recent letter from Dr Maxted was clearly wrong in that it had referred to the wrong year and month of onset [470]. We were, of course, conscious of the fact that the burden of proof lay on the Claimant to prove his disability.

5.30 Doing the best that we could, we considered that there was sufficient evidence to justify a finding that he had reached a sufficient level of impairment within the meaning of s. 6 of the Act by approximately May 2022. At that point, it was difficult to look beyond the Respondent's own OH opinion which strongly supported such a finding.

5.31 But even then, when was it long term?

5.32 It was not possible to predict that the Claimant's condition would necessarily have remained at that level for at least 12 months in May 2022. Again, the evidence beyond that date was inconsistent. There were, for example, GP

notes which suggested an improvement within the latter part of 2022 [466], whereas the Claimant suggested that he had been suicidal in September [400].

5.33 Both OH and the Claimant's GP had predicted a recovery in his condition once the grievance and disciplinary processes had run their course. They were seen as maintaining and/or exacerbating his problems. It was noteworthy that the Claimant did appear to make a recovery after he had received knowledge of the outcomes and finality was achieved. He contacted the Respondent in an attempt to appeal in January, he contacted ACAS in February and then launched his proceedings. When he then contacted Dr Maxted for evidence towards his case in March 2023, he was referring to having *been* in a "*severe, dark depressive episode*" in the past [467]. In May, looking back at the previous months, it was said that he "*had been doing well*", albeit that the stress of the tribunal proceedings was beginning to cause some symptoms [468].

5.34 We therefore concluded that, whilst the Claimant had undoubtedly had a mental health crisis in the mid part of 2022 which could have been said to have operated at a sufficient level so as to have been defined as a disability under the Equality Act, it did not last for a year or more at that level. It appeared to have waned by the end of 2022 and there was little compelling evidence which suggested continuation at the same debilitating level thereafter.

5.35 Even if we were wrong about that, we wondered whether a prediction of a continuation for 12 months might have been made before the Claimant's dismissal. At that time, when the relevant decision was taken in September, the Claimant may have only suffered symptoms at a sufficient level for three or four months. It would have been difficult for anyone to have predicted that they 'could well' have lasted for a further eight or nine months so that the 'long-term' requirement was satisfied.

5.36 For all of those reasons, the Claimant was not disabled within the meaning of the Act during the relevant period.

<u>Discrimination arising from disability; legal principles</u>

5.37 When considering a complaint under s. 15 of the Act, we had to consider whether the employee was "*treated unfavourably because of something arising in consequence of his disability*". There needed to have been, first, '*something'* which arose in consequence of the disability, which was an objective question and, secondly, unfavourable treatment which was suffered because of that '*something*' (*Basildon and Thurrock NHS-v-Weerasinghe* UKEAT/0397/14). That second question was subjective, in the sense that it required us to examine the employer's mind in order to establish whether the treatment had been by reason of its attitude or reaction to the '*something*' (*Dunn-v-Secretary of State for Justice* [2019] IRLR 298, CA). Although an employer must have had knowledge (actual or imputed) of the disability, there was no requirement for it to have been aware that the relevant '*something*' had arisen from the disability (*City of York-v-Grosset* 2018] IRLR 746, CA).

5.38 Although there needed to have been some causal connection between the '*something*' and the disability, it only needed to have been loose and there might have been several links in the causative chain (*Hall-v-Chief Constable of West Yorkshire Police* UKEAT/0057/15 and *iForce Ltd-v-Wood* UKEAT/0167/18/DA). It need not have been the only reason for the treatment; it must have been a significant cause, in the sense of 'more than trivial' (*Pnaiser-v-NHS England* [2016] IRLR 170 and *Bodis-v-Lindfield Christian Care Home Ltd* [2024] EAT 65), but the statutory wording ('in consequence') imported a looser test than 'caused by' (*Sheikholeslami-v-University of Edinburgh* UKEATS/0014/17 and *Scott-v-Kenton Schools Academy Trust* UKEAT/0031/19/DA).

5.39 In *IPC Media-v-Millar* [2013] IRLR 707, the EAT stressed the need to focus upon the mind of the putative discriminator. Whether conscious or unconscious, the motive for the unfavourable treatment claim needed to have been "*something arising in consequence of*" the employee's disability.

5.40 No comparator was needed. '*Unfavourable*' treatment did not equate to '*less favourable treatment*' or '*detriment*'. It had to be measured objectively and required a tribunal to consider whether a claimant had been subjected to something that was adverse rather than something that was beneficial. The test was not met simply because a claimant thought that the treatment could have been more advantageous (*Williams-v-Trustees of Swansea University Pension and Assurance Scheme* [2019] ICR 230, SC).

5.41 We approached the case by applying the test in *Igen-v-Wong* [2005] EWCA Civ 142 to the Equality Act's provisions concerning the burden of proof, s. 136 (2) and (3):

> "*(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.*"

5.42 In order to trigger the reversal of the burden, it needed to be shown by the Claimant, either directly or by reasonable inference, that a prohibited factor may or could have been the reason for the treatment alleged. More than a difference in treatment or status and a difference in protected characteristic needed to be shown before the burden would shift. The evidence needed to have been of a different quality, but a claimant did not need to have to find positive evidence that the treatment had been on the alleged prohibited ground; evidence from which reasonable inferences could be drawn might suffice. Unreasonable treatment of itself was generally of little helpful relevance when considering the test. The treatment ought to have been connected to the protected characteristic, although unexplained, unreasonable conduct could be sufficient to shift the burden in some cases (as in *Law Society-v-Bahl* [2003] IRLR 640]).

5.43 If the Claimant was able to demonstrate the essential elements of the test within s. 15 (1)(a), the Respondent had a defence if it could show that the

treatment was "*a proportionate means of achieving a legitimate aim*". (s. 15 (1)(b)).

5.44 Proportionality in this context meant 'reasonably necessary and appropriate' and the issue required us to objectively balance the measure that was taken against the needs of a respondent based upon an analysis of its working practices and wider business considerations (per Pill LJ in *Hensman-v-MoD* UKEAT/0067/14/DM at paragraphs 42-3). Just because a different, less discriminatory measure might have been adopted which may have achieved the same aim, it did not necessarily render it impossible to justify the step that *was* taken, but it was factor to have been considered (*Homer-v-West Yorkshire Police* [2012] IRLR 601 at paragraph 25 and *Kapenova-v-Department of Health* [2014] ICR 884, EAT). The test was not as loose, however, as the range of reasonable responses test (*Scott-v-Kenton Academy Schools* UKEAT/0031/19/DA, paragraph 58).

5.45 It was important to remember that justification had to be considered against the PCP's impact upon the business generally, not just the individual employee (*City of Oxford Bus Services Ltd-v-Harvey* UKEAT/0171/18/JOJ) and that the section required a Tribunal to make its own '*critical evaluation*' of the evidence against the statutory test.

5.46 The following key principles were set out by Lady Hale in *Homer-v-Chief Constable of West Yorkshire Police* [2012] IRLR 601 [22-24]:

(i) To be proportionate, a measure had to be both an appropriate means of achieving a legitimate aim and (reasonably) necessary in order to do so;

(ii) If the measure went further than was (reasonably) necessary to achieve the aim, it will have been disproportionate;

(iii) Assessment of justification included a comparison of the impact of the act upon a claimant as against the importance of the aim to the employer.

5.47 In *Homer*, the Supreme Court expressly applied the judgment of the CA in *Hardys & Hansons plc v Lax* [2005] IRLR 726. It was made clear in that case that the latitude given to an employer when considering the objective justification defence was not akin to the band of reasonable responses test applicable in an unfair dismissal claim.

<u>Discrimination arising from disability; discussion and conclusions</u>

5.48 Even if we were wrong about our findings on disability, we went on to consider the merits of the claims that were advanced under the Act under ss. 15, 26 and 20.

5.49 The Claimant advanced two main complaints under s. 15 (paragraph 4.1 of the Case Summary [89]). In relation to the first, the comments attributed to Ms Marley on 28 October 2021, the Tribunal did not find that those things had been said as a mater of fact. Further and in any event, the assertion that the comments may have arisen from the Claimant's disability was not

understood, particularly as the allegation was framed within paragraph 4.2 of the Case Summary. The Claimant did not explain to us how his disability may have caused Ms Marley to have formed the view that he was lying about and/or faking his illness. The formulation of the claim was misconceived.

5.50 In relation to the Claimant's second complaint, that of dismissal (paragraph 4.1.2), the case on causation captured in paragraph 4.2 appeared to relate to the allegations arising out of 28 October meeting, rather than the dismissal itself. His case on causation in relation to paragraph 4.1.2 had to be that his poor communications had been a symptom of his disability. We did not, however, have any sufficient evidence upon which we might have concluded that the emails for which he had been dismissed had arisen from his claimed disability. Dr Maxted and/or OH had not suggested as such and, although the Claimant described himself as a different person in mid-2022 because of his mental health crisis, many of the emails which he had written in 2021 were of a similar style and invective. He had been issued with a final written warning in 2020 for similar communications as well.

5.51 Yet further, even if the case under s. 15 could have been established, the Respondent had a compelling argument on justification. Its aim, to protect employees from abuse and intimidation, was appropriate and legitimate. Its choice of dismissal, rather than any other sanction, was proportionate at the time, given that the Claimant had failed to abide by previous disciplinary warnings and guidance from Mr Bird and others and had shown every sign of continuing in his course of conduct.

5.52 The Respondent's further defence of lack of knowledge of disability did not need to be addressed.

Harassment; legal principles

5.53 In order to succeed under s. 26, not only did the conduct have to have been 'unwanted', but it also had to have been 'related to' a protected characteristic, which was a broader test than the 'because of' or the 'on the grounds of' tests in other parts of the Act (EHRC Code paragraph 7.9 and *Bakkali-v-Greater Manchester Buses* [2018] UKEAT/0176/17).

5.54 As to causation, we reminded ourselves of the test set out most recently in the case of *Pemberton-v-Inwood* [2018] EWCA Civ 564. In order to decide whether any conduct falling within sub-paragraph (1) (a) had either of the prescribed effects under sub-paragraph (1) (b), a tribunal must consider both whether the victim perceived the conduct as having had the relevant effect (the subjective question) and (by reason of sub-section (4) (c)) whether it was reasonable for the conduct to be regarded as having that

effect (the objective question). A tribunal also had to take into account all of the other circumstances (s. 26 (4)(b)). The relevance of the subjective question was that, if the Claimant had not perceived the conduct to have had the relevant effect, then the conduct should not be found to have had that effect. The relevance of the objective question was that, if it was not reasonable for the conduct to have been regarded as having had that effect, then it should not be found to have done so.

5.55 It was important to remember that the words in the statute imported treatment of a particularly nature; it was said in *Grant-v-HM Land Registry* [2011] IRLR 748, CA that "*Tribunals must not cheapen the significance of these words. They are important to prevent less trivial acts causing minor upset being caught by the concept of harassment.*" See, also, similar dicta from the EAT in *Betsi Cadwaladr Health Board-v-Hughes* UKEAT/0179/13/JOJ.

Harassment; discussion and conclusions

5.56 As alternatives to complaints of discrimination arising from disability, these complaints did not succeed as allegations of harassment.

5.57 The factual allegations in relation to the meeting of 28 October 2021 were not proved and, in relation to the dismissal, it was difficult to understand how it could have been regarded as an act of harassment; it had not been 'related to' disability, nor was it capable of having been described as harassment in the *Grant-v-HM Registry* sense.

Failure to make reasonable adjustments; legal principles

5.58 In dealing with the complaints under s. 20, we bore in mind the guidance in the case of *Environment Agency-v-Rowan* [2008] IRLR 20 in relation to the correct manner that we should have approached the sections.

5.59 First, we had to identify whether and to what extent the Respondent had applied a provisions, criteria and/or practices (the 'PCPs'). Those words were to have been given their ordinary English meaning. They did not equate to 'act' or 'decision'. In the context of defining a PCP, a 'practice' generally required a sense of continuum. Although it did not need to have been applied before or applied to everyone, a claimant had to demonstrate that it would have been applied or that it was capable of broad application. It was akin to an expectation which applied to other employees or was repeated (*Ahmed-v-DWP* [2022] EAT 107. A PCP connoted a state of affairs and one off, isolated acts relating to the Claimant alone were unlikely to satisfy that test unless they were capable of having had broad application (*Nottingham City Transport-v-Harvey* [2013] Eq LR 4, *Gan Menachem*

Hendon Ltd-v-De Groen [2019] ICR 1023 and *Ishola-v-Transport for London* [2020] EWCA Civ 112).

5.60 In relation to the second limb of the test, it had to be remembered that a claimant needed to demonstrate that he or she was caused a substantial disadvantage when compared with those not disabled. It was not sufficient that the disadvantage was merely some disadvantage when viewed generally. It needed to have been one which was substantial when viewed in comparison with persons who were not disabled and that test was an objective one (*Copal Castings-v-Hinton* [2005] UKEAT 0903/04 and *Sheikholeslami-v-University of Edinburgh* [2018] 1090, EAT).

5.61 Further, in terms of the adjustments themselves, it was necessary for them to have been both reasonable and to have operated so as to have avoided the disadvantage. There did not have to have been a certainty that the disadvantage would have been removed or alleviated by the adjustment. A real prospect that it would have had that effect would have been sufficient (*Romec-v-Rudham* UKEAT/0067/07 and *Leeds Teaching Hospital NHS Trust-v-Foster* [2011] EqLR 1075).

5.62 It can be reasonable for an employer to make an adjustment even if the claimant does not suggest it. That underlines the importance for an employer to consult with a claimant when making appropriate assessments. However, at the stage when a claim is brought it is incumbent on a claimant to identify the adjustments which he or she says should reasonably have been made. That was made clear by the EAT in *Project Management Institute-v-Latif* (paragraphs 54 and 55):

> "*54….The key point…is that the claimant must not only establish that the duty has arisen, but that there are facts from which it could reasonably be inferred, absent an explanation, that it has been breached. Demonstrating that there is a [PCP] causing a substantial disadvantage engages the duty, but it provides no basis on which it could properly be inferred that there is a breach of that duty. There must be evidence of some apparently reasonable adjustment which could be made.*
> *55. We do not suggest that in every case the claimant would have had to provide the detailed adjustment that would need to be made before the burden would shift. However, we do think that it would be necessary for the respondent to understand the broad nature of the adjustment proposed and to be given sufficient detail to enable him to engage with the question of whether it could reasonably be achieved or not.*"

5.63 Furthermore, the duty to make adjustments did not generally arise unless or until a claimant was able to return to work, although that was not always the case (*Home Office-v-Collins* [2005] EWCA Civ 598, *NCH Scotland-v-McHugh* [2006] UKEATS/0010/06 and *London Underground Ltd-v-Vuoto* [2009] UKEAT/0123/09, paragraphs 119-125). In *Collins* there was no evidence that the adjustments contended for would have aided the claimant's return to work whereas, in *Vuoto*, a more positive view was

expressed by OH in relation to the proposed changes and the claimant's likely consequent return. What the cases demonstrated was that, in all such questions, the focus should always have been upon the extent to which the adjustment was likely to have overcome or alleviated the disadvantage suffered *at* work, assuming a likely return if the employee was actually absent.

5.64 We referred to the statutory Code of Practice and, specifically, paragraph 6 relating to the duty under ss. 20 and 21.

Failure to make reasonable adjustments; discussion and conclusions

5.65 The Claimant relied upon two PCPs as set out in paragraph 6.2 of the Case Summary [90]. They were addressed in turn.

5.66 The first was said to have been the dismissal of employees for sickness absence and/or emails that were perceived as rude.

5.67 The first part of that PCP had no relevance to the case. The Claimant had not been caused any substantial disadvantage by it if it had existed as a PCP since he was not dismissed by reason of his sickness absence. As to the latter part of the PCP, it was difficult to see how the Claimant could have established a policy or practice of dismissal in such circumstances. He had not been dismissed in 2020 or 2021 in similar circumstances. Similarly, for reasons explained more fully in our analysis of the complaint under s. 15, he was not caused a substantial disadvantage by the PCP as a result of his disability.

5.68 Even if that hurdle could have been overcome, what of the adjustments contended for? The Claimant suggested medical retirement instead of dismissal (paragraph 6.5.1). That would still have caused the termination of his employment, albeit on more financially advantageous terms. It would not have avoided or alleviated the disadvantage of dismissal itself though (see *Vuoto* above).

5.69 In the alternative, the Claimant suggested that the disciplinary process ought to have been delayed until he was fit enough to attend. Again, it was difficult to see how that could have alleviated or removed the substantial disadvantage of dismissal. For reasons explained more fully below, dismissal seemed inevitable in the circumstances. The adjustment would only have altered the point in time that the dismissal had occurred, not the dismissal itself. It could not have been said that it was a reasonable adjustment to have made in circumstances in which neither his GP nor OH had recommended it. Both suggested that his condition might have been improved if matter were resolved.

5.70 Again, the issues of knowledge did not need to be addressed in light of our other findings.

Unfair dismissal; relevant legal principles

5.71 In cases involving dismissals for reasons relating to an employee's conduct, the Tribunal had to consider the three stage test in *BHS-v-Burchell* [1980] ICR 303;

(i) Did the Respondent genuinely believe that the Claimant was guilty of the misconduct alleged;

(ii) Was that belief that based upon reasonable grounds;

(iii) Was there a reasonable investigation prior to the Respondent reaching that view?

5.72 Crucially, it was not for the Tribunal to decide whether the employee actually committed the act complained of.

5.73 We were also asked to consider the fairness of the sanction imposed. In doing so, we were not permitted to impose our own view of the appropriate sanction. Rather, we had to ask whether it fell somewhere within the band of responses available to a reasonable employer in the circumstances (*Foley-v-Post Office, HSBC-v-Madden* [2000] ICR 1283 and *Graham-v-Secretary of State for Work and Pensions* [2012] EWCA Civ 903); a tribunal had to consider, by the objective standards of the hypothetical reasonable employer, rather than by reference to the it's own subjective views, whether the employer had acted within a band or range of reasonable responses to the particular misconduct found of the particular employee. An employer should consider any mitigating features which might have justified a lesser sanction and the ACAS Guidance was useful in that respect. Section 98 (4)(b) of the Act required us to approach the question in relation to sanction "*in accordance with equity and the substantial merits of the case*".

5.74 A Tribunal was entitled to find that a sanction *was* outside the band of reasonable responses without being accused of having taken the decision again; the "*band is not infinitely wide*" (*Newbound-v-Thames Water* [2015] EWCA Civ 677). The test was not the same as that of perversity.

Unfair dismissal; discussion and conclusions

5.75 The Claimant did not dispute the fact that he had been dismissed for a fair reason relating to his conduct. Further, he did not dispute the nature of that misconduct; he accepted that he had sent the 27 emails which had been included in Ms Page's report and was ashamed of them. He also accepted that they had rendered him in breach of 5 Codes and/or Policies also referred to in the report.

5.76 In relation to sanction, he did not suggest to Mr Barrett that he ought not to have been dismissed for his conduct. Given the context, the extent and tone of the emails and the broad range of recipients, both within and outside the Council, we did not consider that the decision to dismiss fell outside the band of responses available to a reasonable employer in the circumstances.

5.77 The Claimant did, however, raise a number of procedural complaints within paragraph 2.6 of the Case Summary [87-8]. Again, the 9 allegations were addressed in turn;

(i) The change in nature of 28 October 2021 meeting;

That allegation was unrelated to the Claimant's dismissal in 2022;

(ii) Ms Marley's refusal to allow the Claimant to return to work in his state;

That allegation was also unrelated to the Claimant's dismissal which Ms Marley was not involved in. Further and in any event, her request for him to have been signed off by OH before he returned to work was not unreasonable in light of his stated condition. He was then asserting that he 'did not know what he was doing half the time' [154];

(iii) The Respondent's continuation of the disciplinary process when the Claimant was unwell and when it was against his GP's advice;

There was no evidence that his GP had advised that the process ought not to have been continued to a conclusion. There was nothing in the GP notes to that effect and the Claimant had indicated to the Respondent otherwise [388]. OH agreed [270]. In cross-examination too, the Claimant considered that delaying the process would not have helped and that he had had no wish for it.

Although not clear from the list of issues within the Case Summary, this allegation may have encompassed the Respondent's continuation with the disciplinary hearing in his absence. In the circumstances which prevailed at the time, we did not consider that decision to have been unreasonable. OH had indicated that a conclusion of the process would have been likely to have been beneficial for his health. The Claimant had suggested that his GP had given similar advice. He had given no indication that he would have engaged with the process, nor that a failure to do so was as a result of his illness. We noted that he had attended the grievance hearing a few months earlier.

There was an expectation that he would have cooperated with the process within the Disciplinary and Dismissal Procedure [440]. There was also an expectation that he would have attended the hearing and, if he did not, there a possibility that it would have proceeded in his absence [441]. An adjournment was possible upon the supply of a Fit Note which specifically addressed his inability to attend [441]. No such medical opinion had been provided by anybody;

(iv) The issuing of a final written warning in October 2021 and the dismissal of his appeal;

The Claimant was dismissed summarily for gross misconduct and the 2021 warning was not activated. Even if it had been, he would have needed to demonstrate that it had not been issued in good faith and/or that it had been manifestly inappropriate (see *Davies-v-Sandwell MBC* [2013] EWCA Civ 135);

(v) The Respondent's failure to take into account the reasons (frustrations) behind his emails as a result of his removal from Cirencester Hospital in April 2021;

That was not a procedural complaint but, rather, one relating to substance and sanction. As stated above and/or by Ms Patterson in her closing submissions, it was in the band of responses available to a reasonable employer to dismiss the Claimant for referring to colleagues and others as 'cunts' and 'twats', rather than to have issued a different sanction because his communications had been written out of 'frustration' at his move from Cirencester Hospital in the circumstances which had prevailed in April 2021;

(vi) The fact that the decision to dismiss was predetermined because he had challenged the contents of the reference through the grievance process and/or to avoid medical retirement;

Mr Barrett was not challenged in cross examination as to whether his decision had in any way been influenced by the existence of the Claimant's grievance. There was no basis upon which we could have reached that conclusion.

Further, there was no basis upon which Mr Barrett could have chosen to medically retire the Claimant. In our experience, that was not a decision which he could have taken in the context of a disciplinary process. It was one which ordinarily had to be supported by medical evidence and the trustees of the pension fund. In this case, it was contraindicated by OH;

(vii) The wrong finding was reached that the Claimant's emails had amounted to gross misconduct;

Again, this was an allegation that concerned the substance of the Claimant's dismissal, which we have addressed above. Given his concessions in relation to his wrongdoing, it was difficult to understand how he asserted that the Respondent's conclusions were wrong;

(viii) Dismissal without his knowledge until 8 December 2022;

The reason for delaying the outcome letters in respect of the grievance appeal and disciplinary hearing were reasonable. The Respondent was being mindful of the Claimant's stated condition. The delay did not cause him any material disadvantage. It did not affect his pay, for example;

(ix) The discriminatory nature of the dismissal more;

See above.

5.78 Even if a procedural failing had been evident, it was likely that we would have found that it would have made no difference to the outcome under the principles of the case of *Polkey-v-AE Dayton Services Ltd.* Even if the Respondent had not somehow chosen to dismiss, the Claimant himself considered that his relationship with his employer had totally broken down.

5.79 Yet further and in any event, we considered that the Claimant's conduct would inevitably have led to a high finding of contributory conduct under ss. 122 (2) and 123 (6).

Jurisdiction (time); legal principles

5.80 Under section 123 of the Equality Act 2010 a complaint of discrimination may not have been brought after the end of the period of three months starting with the date of the act to which the complaint relates (s. 123 (1)(a)). For the purposes of interpreting this section, conduct extending over a period was to have been treated as done at the end of the period (s. 123 (3)(a)) and this provision covered the maintenance of a continuing policy or state of affairs, as well as a continuing course of discriminatory conduct.

5.81 It was generally regarded that there were 3 types of claim that fell to be analysed through the prism of s. 123;

(i) Claims involving one off acts of discrimination, in which, even if there had been continuing effects, time started to run at the date of the act itself (as in *Moore Stephens LLP and others-v-Parr* UKEAT/0238/20/OO which was a claim about the continuing consequences of a one-off act

(ii) Claims involving a discriminatory rule or policy which caused certain decisions to be made from time to time. In such a case, there was generally a sufficient link between the decisions to enable them to be joined as a course of conduct (e.g. *Barclays Bank-v-Kapur* [1991] IRLR 136);

(iii) A series of discriminatory acts. It was not always easy to discern the line between a continuing policy and a discriminatory act which caused continuing effects. In *Hendricks-v-Metropolitan Police Commissioner* [2002] EWCA Civ 1686, the Court of Appeal established that the correct test was whether the acts complained of were linked such that there was evidence of a continuing discriminatory state of affairs. One relevant feature was whether or not the acts were said to have been perpetrated by the same person (*Aziz-v-FDA* [2010] EWCA Civ 304 and *CLFIS (UK) Ltd-v-Reynolds* [2015] IRLR 562 (CA)), although the issue was not necessarily conclusive (paragraph 50 (7) of *E-v-X, L and Z* UKEAT/0079/20). It was important to remember that the conduct needed to have been discriminatory over the relevant period. Acts linked by having occurred against the same 'factual setting' would not necessarily meet the test (*Allen-v-Worcestershire Health and Care NHS Trust* [2024] EAT 40).

5.82 Should a claim have been brought outside the three month period, it was nevertheless possible for a claimant to pursue it if the tribunal considered that it was just and equitable to extend time (s. 123 (1)(b)). There was no presumption in favour of an extension. The onus remained on a claimant to prove that it was just and equitable to extend time and, if he advanced no case in support of an extension, he would not be entitled to one (*Rathakrishnan-v-Pizza Express* [2016] ICR 23 and *Moray Hamilton-v-Fife Council* UKEATS/0006/20/SS). The Tribunal's discretion was wide and there was no rule of law that extensions were only to have been made in exceptional cases (*Robertson-v-Bexley College* [2003] EWCA Civ 576, *Caston-v-Chief Constable of Lincolnshire Police* [2009] EWCA Civ 1298 and *Jones-v-Secretary of State for Health and Social Care* [2024] EAT 2).

5.83 Time limits were not just targets, they were 'limits' and were generally enforced strictly. A good reason for an extension generally had to be demonstrated, albeit that the absence of one would not necessarily be determinative. A tribunal was not bound to refuse an extension in the absence of an explanation having been provided for the delay, but such an absence was undoubtedly a relevant consideration (*ABMU-v-Morgan* [2018] IRLR 1050 (CA), *Concentrix CVG Ltd-v-Obi* [2022] EAT 149 and *Owen-v-Network Rail* [2023] EAT 106). Nevertheless, there must be *some* material upon which a tribunal could exercise its discretion in favour of the Claimant (*Habinteg Housing Association-v-Holleron* EAT 0274/14 and *Edomobi-v-La Retraite RC Girls School* EAT 0180/16, per Laing J);

> *"In neither case, in my judgment, is there material on which the ET can exercise its discretion to extend time. If there is no explanation for the delay, it is hard to see how the supposedly strong merits of a claim can rescue a Claimant from the consequences of any delay."*

5.84 Tribunals had been encouraged to consider the factors listed within s. 33 of the Limitation Act 1980 (the *Keeble* factors), although it was not necessary to use the section as a framework for the approach (*Adedeji-v-University Hospital Birmingham NHS Foundation Trust* [2021] EWCA Civ 23). I/We have considered the length of and reasons for the delay, the extent to which the Claimant had sought professional help and the extent to which information, which he/she said that they needed, was not known by him/her until much later and the degree to which the Respondent should have been blamed for any late disclosure in that respect. We also had to consider whether the Claimant had dragged his/her feet once he/she knew all of the relevant information. It was thought that the touchstone, however, was the issue of prejudice; whether and to what extent the delay has caused prejudice to either side. Although certainly relevant, it was by means a determining factor (see Laing J in *Miller-v-Ministry of Justice* UKEAT/0003/15 at paragraph 13).

Jurisdiction (time); discussion and conclusions

5.85 Miss Patterson argued that the allegations concerning the meeting of 28 October 2021 were out of time. The Claim Form had been issued on 13 February, the Claimant had contacted ACAS on 27 January and obtained his ACAS certificate on 6 February 2023. Anything which had occurred before 28 October 2022 was therefore out of time on its face. The subject meeting had occurred a year earlier.

5.86 The person against whom the Claimant made those allegations was Ms Marley. She was not involved in his subsequent dismissal, an allegation which was in time. It could not have been said that the events had been part of the same course of discriminatory conduct. Further, there was no evidence upon which the Claimant had invited us to extend time on the basis of the just and equitable provisions within s. 123.

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Employment Judge Livesey

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Date 11 July 2024

JUDGMENT & REASONS SENT TO THE PARTIES ON

25 July 2024

Jade Lobb
FOR THE TRIBUNAL OFFICE