Neutral Citation Number: [2024] EAT 138

Case No: EA-2022-001251-AS

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 25 July 2024

Before:

GAVIN MANSFIELD KC, DEPUTY JUDGE OF THE HIGH COURT

- -

Between:

LEICESTER CITY COUNCIL

Appellant

- and -

MR JOHN GIBBIN

Respondent

- -
- -

Mr Peter Linstead (instructed by Leicester City Council Legal Services) for the **Appellant**
Mr Nick Bidnell-Edwards (instructed by Lawson West Solicitors) for the **Respondent**

Hearing date: 25 July 2024

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JUDGMENT

SUMMARY

DISABILITY DISCRIMINATION

The Claimant was a long-standing employee of the Respondent. He was a disabled person, on account of depression. He had periods of absence from work, some due to depression, others due to other health conditions. He perceived himself to have been bullied by his line managers. On 27 June 2019, while on sick leave due to depression he attended the office at the end of the day to access files on his computer. He had permission from a more senior manager to do so. He was seen by his line managers and questioned in a manner found by the tribunal to be heavy-handed. His line manager commissioned an IT search to find out what the Claimant had been doing on his computer, which yielded no suspicious results. The tribunal found that to be heavy handed, and outside the manager's authority.

The Claimant subsequently returned to work. He was issued a warning under the Respondent's absence procedure. Separately, a further IT investigation was carried out. The Tribunal could make no clear finding as to why that came about, other than that it was not initiated by the manager who had dealt with the incident on 27 June. That investigation found images on the Claimant's computer that were said to be racist, sexist and offensive. A disciplinary investigation was commenced in October 2019 which led to a final written warning (against which an appeal was rejected).

The Claimant brought claims of disability discrimination, under section 15 Equality Act 2010 (discrimination because of something arising out of disability) and ss.20-21 (breach of a duty to make reasonable adjustments). The tribunal found in favour of the Claimant on some, but not all of the claims.

There was no appeal against a finding on claim 1 that the Claimant's line managers made discriminatory comments between September 2018 and March 2019. The Respondent appealed all other findings against it (claims 4(b) and 4(c), claim 5, claim 7(b)(c)(d)).

Claims 4(b) and 4(c): The tribunal held that the initial investigation into the Claimant's computer use on 27 June 2019 and the subsequent decision to inform him of a disciplinary investigation on 23 October 2019 were discriminatory contrary to section 15.

The tribunal had not erred in its consideration of "something arising" out of the Claimant's disability. The tribunal directed itself to the relevant principles and made findings of fact which it was entitled to make. Properly understood, there was no inconsistency between its findings on that issue. Ground 1 and the cross-appeal would be dismissed.

However, the tribunal erred in the question of whether the less favourable treatment was because of the "something arising" that it had identified. The tribunal erred in applying a but for test of causation. The tribunal found that the Claimant's computer use on 27 June was not something arising from his disability. His attendance at the office was "something arising" but that was not itself the cause of the first IT investigation, nor the IT investigation that later led to the disciplinary process. The appeal would be allowed on ground 2.

Claims 7(b)(c)(d): the tribunal held that the Respondent breached a duty to make reasonable adjustments in pursuing a formal investigation into the images, in pursuing it at the particular time, and in not dealing with the matter informally.

The tribunal failed to distinguish between two different types of disadvantage that the Claimant, as a disabled person, might suffer in relation to the disciplinary proceedings: first, a risk that his depression would be exacerbated by being subject to a disciplinary process; second, a difficulty in being able to participate in the process because of his disability. Only the first was pleaded. There was no adequate evidence to support either disadvantage. The tribunal erred in relying on the Claimant's demeanour in giving evidence to the tribunal, some years later, which could not be relevant to either. Further, it is clear from the reasons that the tribunal proceeded on the basis that the disciplinary process was commenced and undertaken while the Claimant was on sick leave. It was clear from the tribunal's earlier findings of fact that the Claimant had

been back at work for some months before being invited to an investigatory meeting. The appeal would be allowed on ground 4.

Claim 5: The tribunal found that the separate warning under the attendance procedure was a breach of both s.15 and s.20-21. Under both causes of action, the tribunal erred on the question of justification. It failed to direct itself as to the correct legal principles, and failed to weigh the Respondent's evidence as to the justification for issuing warnings under its attendance procedure. The appeal would be allowed on ground 3.

GAVIN MANSFIELD KC, DEPUTY JUDGE OF THE HIGH COURT:

INTRODUCTION

1. This is an appeal brought by Leicester City Council against a judgment of the employment tribunal sitting at Leicester, comprising Employment Judge Adkinson and lay members.

2. The Claimant, Mr Gibbin, was a long-standing employee of the Respondent in its housing department. He suffered from depression for many years. It is not in dispute that he was a disabled person. He brought a series of complaints to the tribunal about his treatment by his managers from 2018 through to 2020.

3. The tribunal upheld some, but not all, of his allegations. The tribunal's findings related - and I put it very broadly at this point in time - first, to an investigation into the complainant's computer use, which resulted in a final written warning for storing and saving inappropriate material on work computer systems; and second, to a final warning under the Respondent's attendance procedure given in August 2019, following periods of absence.

4. The claims that were upheld by the tribunal were of two legal causes of action:

    a) First, unfavourable treatment because of something arising in consequence of disability, Section 15 of the Equality Act 2010.

    b) Second, breach of the duty to make reasonable adjustments, Sections 20 and 21.

5. The Respondent challenges all but one of the findings against it. It appeals on the basis that the tribunal misdirected itself and failed properly to apply various stages of the legal test under both claims.

LEGAL PRINCIPLES

6. I will begin with the legal framework. First of all, the Section 15 claim. Under Section 15 of the Equality Act 2010:

> "(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."

7. The correct approach to that statutory test is set out in the decision of Mrs Justice Simler, (President of the EAT as she then was) in the case of **Pnaiser v NHS England** [2016] IRLR 170, in particular paragraph 31, where she drew together the principles from a number of earlier cases. She said this:

> "(a) A Tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.
>
> (b) The Tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a section 15 case. The 'something' that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.
>
> (c) Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant: see **Nagarajan v London Regional Transport** [1999] IRLR 572. A discriminatory motive is emphatically not (and never has been) a core consideration before any *prima facie* case of discrimination arises, contrary to Miss Jeram's submission (for example at paragraph 17 of her Skeleton).
>
> (d) The Tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is "something arising in consequence of B's disability". That expression 'arising in consequence of' could describe a range of causal links. Having regard to the legislative history of section 15 of the Act (described comprehensively by Elisabeth Laing J in **Hall**), the statutory purpose which appears from the wording of section 15, namely to provide protection in cases where the consequence or effects of a disability lead to unfavourable treatment, and the availability of a justification defence, the causal link between the something that causes unfavourable treatment and the disability may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability."

8. She then went on to give an example from one of the cases before saying,

> "(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."

9. At (g), after addressing the submission raised by counsel in the case in front of her, Mrs Justice Simler said this:

> "…the difference between the two stages - the 'because of' stage involving A's explanation for the treatment (and conscious or unconscious reasons for it) and the 'something arising in consequence' stage involving consideration of whether (as a matter of fact rather than belief) the 'something' was a consequence of the disability."

10. So she drew a clear distinction between the processes involved at the two stages.

11. At (i), drawing on the decision of Ms Justice Langstaff in **Basildon & Thurrock NHS Trust v Weerasinghe** [2016] ICR 305, she said:

> "…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."

12. I was referred to a number of other cases by Mr Linstead, but it seems to me that the passage that I have just quoted from extensively in **Pnaiser** sets out the relevant principles. There is no disagreement, as I understand it, at the Bar about the principles. The question for me to determine is whether the tribunal adequately directed itself as to those principles and applied them.

13. There is one additional authority to which I do need to refer relation to the question of proportionate means of achieving the legitimate aim. Mr Linstead referred me to **Hensman v Ministry of Defence** UKEAT/0067/14/DM. That case makes clear that in a Section 15 claim,

the approach to be adopted to objective justification is that as set out in **Hardys & Hansons Plc v Lax** [2005] ICR 1565 - a case of justification of indirect sex discrimination.

14. In **Hensman**, paragraph 41 of the decision, the EAT directed itself as to the approach in **Hardys & Hansons**, quoting from the decision of Lord Justice Pill in that case. At paragraph 31 of **Hardys**, Lord Justice Pill had said:

> "It is for the employment tribunal to weigh the real needs of the undertaking, expressed without exaggeration, against the discriminatory effect of the employer's proposal. The proposal must be objectively justified and proportionate."

15. In the following paragraph, Lord Justice Pill said:

> "…I accept that the word "necessary" … is to be qualified by the word "reasonably". That qualification does not, however, permit the margin of discretion or range of reasonable responses for which the appellants contend. The presence of the word 'reasonably' reflects the presence and applicability of the principle of proportionality. The employer does not have to demonstrate that no other proposal is possible. The employer has to show that the proposal, in this case for a full-time appointment, is justified objectively notwithstanding its discriminatory effect. The principle of proportionality requires the tribunal to take into account the reasonable needs of the business. But it has to make its own judgment, upon a fair and detailed analysis of the working practices and business considerations involved, as to whether the proposal is reasonably necessary. I reject the appellants' submission … that, when reaching its conclusion, the employment tribunal needs to consider only whether or not it is satisfied that the employer's views are within the range of views reasonable in the particular circumstances."

16. At paragraph 44 of **Hensman**, the EAT accepted the submission that the tribunal must reach its own judgment upon a fair and detailed analysis of the working practices and business considerations involved. It must have regard to the business needs of the employer.

17. I turn next to the duty to make reasonable adjustments: Section 20 and 21 of the Equality Act. Section 20, insofar as material, provides under the heading '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."

18. Only the first of those is relevant in this case:

> "(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."

19. Section 21, headed "Failure to comply with duty":

> "(1) A failure to comply with the first … requirement is a failure to comply with a duty to make reasonable adjustments.
> (2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.
> (3) A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purpose of establishing whether A has contravened this Act by virtue of subsection (2); a failure to comply is, accordingly, not actionable by virtue of another provision of this Act or otherwise."

20. As the EAT said in **Environment Agency v Rowan** [2008] ICR 218, para 27 (a decision referred to by the tribunal in this case at paragraph 225), the tribunal needs to look at: the PCP applied by or on behalf of the employer, or the relevant physical feature of the premises occupied by the employer; the identity of non-disabled comparators (where appropriate); and the nature and extent of the substantial disadvantage suffered by the claimant. The tribunal needs to look at the overall picture.

21. Mr Linstead referred me to the EAT's decision in **Sheikholeslami v University of Edinburgh** [2018] IRLR 1090, whether there is a substantial disadvantage as a result of an application of the PCP in a particular case is a question of fact to be assessed on an objective basis, measured by comparison with what the position would be if the disabled person in question did not have a disability.

THE FACTS

22. I turn next to the material background facts of the case which I can take from the employment tribunal's decision.

23. The Claimant was a technician in the Respondent's housing department.

24. He worked for the Respondent from 1977 to 1987 and then from 1997 onwards. Since 1996 he had suffered from depression and, as a result of that depression, he was a disabled person at all material times. The tribunal found, and it is not challenged, that the Respondent had knowledge of the disability at all relevant times.

25. From the summer of 2018 onwards there were issues between the Claimant and his managers, in particular Mr Craig and Mr Farmer. The tribunal found that negative comments were made to him related to his mental health and that there was a lack of support from his managers.

26. The Claimant was absent from work for a time in November 2018 through to January 2019 for medical reasons not related to his disability. He had surgery for carpal tunnel syndrome.

27. There was an occupational health report on 13 February 2019 saying he was fit to continue in his role. The focus of that report was on his surgery, not on his depression.

28. On 6 March 2019 he received a first warning under the Respondent's attendance procedure in circumstances where he had had 27 days of absence. During this period the Claimant was caring for his stepson who was ill and in March of 2019 there was an agreement for a period of flexible working that would be reviewed in May. That was called a carer's passport.

29. It is not necessary for the purpose of this judgment to go into detail but there were some difficulties, as is clear from the tribunal's findings, around arrangements of working hours and an application for flexible working. The Claimant's perception was that he was being bullied by his immediate managers, Mr Craig and Mr Farmer. He applied to move to an apprentice role but that was refused and that too, he perceived as being bullying.

30. Very sadly, on 8 May 2019 the Claimant's stepson passed away and the Claimant took some time off.

31. In June the carer's passport was revoked, the reason given being that the Claimant's stepson had passed away. There was no longer a need for the working arrangements to allow him to care for him.

32. The Claimant's depression took a turn for the worse and he was absent from work from 6 June 2019 to 17 July 2019. While off work, he attended the office on 27 June 2019.

33. According to the tribunal's findings there were three reasons for doing this. He had a concern that documents would be lost in a computer upgrade; he wanted to access a grievance he had compiled on his work computer; and he wanted to use the work computer to apply for alternative employment to get away from his managers.

34. He obtained permission from the director of housing, Mr Burgin, to attend. He asked to come in at the end of the working day so as to avoid Mr Farmer and Mr Craig. However, when he did attend at the end of the working day on 27 June, he was seen by Mr Farmer at his computer.

35. Mr Farmer, attended by Mr Craig and a third person, spoke to him and asked him what he was doing. The Claimant said he was saving work to his server but he did not refer to the grievance or the job application and nor did he say Mr Burgin had given him permission. The tribunal's finding was that the behaviour of the managers on that day was heavy-handed and intimidating.

36. However, it also found that for the managers to raise questions of the Claimant and to be concerned and suspicious as to the reasons for his presence were "entirely understandable and justifiable."

37. Following the 27 June, Mr Farmer asked the corporate investigations department of the Respondent to investigate the use that the Claimant had been making of his computer. The tribunal was critical of that decision, regarding it as a disproportionate step. It rejected Mr Farmer's evidence that he did so for data protection reasons. It also found that Mr Farmer did

not have the authority to request the investigation. The investigation was referred to in the tribunal's decision as the 'interception'.

38. In any event, the outcome of the interception at that time, in a report dated 26 July 2019, was that there was no relevant internet usage and the tribunal refers to no other material findings at that particular stage.

39. The Claimant returned to work on 16 July 2019, and on 14 August he was given a final written warning in relation to his attendance. By that time, the Respondent had two occupational health reports, one of 13 June 2019 and the second of 24 July 2019.

40. On 2 September the corporate investigations department decided to undertake another search of the Claimant's computer. The tribunal's finding was that it did not know what had prompted that, but it made a specific finding that the impetus for it did not come from Mr Farmer. It was that investigation, and not the original interception, which found a number of inappropriate images on the Claimant's computer.

41. The tribunal set those out in detail in paragraphs 110 to 122 of its reasons. They comprised of a number of supposedly humorous documents which could be read (and in due course the Respondent found were to be read), as offensive, racist and sexist. There were two images of a colleague, Mr Riley, potentially bringing the Respondent into disrepute.

42. The tribunal found that those images had been collected over the whole of the Claimant's employment. The tribunal rejected an argument by the Claimant that the images had been collected or distributed by the Claimant because of his depression. The tribunal made a specific finding about that at paragraph 109.

43. Following the discovery of those images, a formal investigation was initiated by Mr Kerry and it progressed to a disciplinary hearing on 4 and 5 March 2020. The disciplinary panel found that the Claimant had used his work computer and email for personal matters and stored personal material on the work hard drive, contrary to the Respondent's policies. It found that

the interception following 27 June was not disproportionate and it found that he had sent and stored inappropriate images on the Respondent's systems of a highly offensive and derogatory nature. A number of the images were held to be sexist, racist and offensive. A final written warning was issued for a year.

44. The Claimant appealed against the warning and, due to Covid, the appeal did not take place until October 2020. The appeal was rejected, so the warning stood. Those are the material facts.

THE CLAIMS AND THE TRIBUNAL'S DECISION

45. I turn next to the claims and the tribunal's decision. The tribunal addressed eight claims. Claims 1 to 5 were section 15 claims. Claims 6 to 8 were claims of breach of a duty to make reasonable adjustments. Several of the eight claims contained a number of separate allegations, effectively the sub-claims.

46. The tribunal upheld some but not all of the claims. I will need to consider in some detail the reasoning on the findings that were upheld, but first of all it is important to see the successful claims in the context of the claims as a whole.

47. First of all, the Section 15 claims: claims 1 to 5.

48. In claim 1, the tribunal upheld a claim about negative comments made by Mr Craig between September 2018 and March 2019. It rejected some claims relating to criticisms of the Claimant's work.

49. The tribunal rejected claims 2 and 3 in their entirety. They related to the Respondent's refusal of flexible working requests in April and June 2019.

50. Claim 4 related to the investigation of the Claimant's use of IT facilities following the 27 June attendance and the subsequent disciplinary proceedings. Claim 4 comprised seven sub-claims, 4(a) to 4(g).They started with Mr Farmer questioning the Claimant about his attendance

and use of IT facilities on 27 June itself, and ran through to the dismissal of the appeal in October of the following year.

51. The tribunal upheld only claims 4(b) and 4(c).

i) 4(b) related to the interception request made to the IT department to check what the Claimant had been doing on his computer. That is the initial interception that was carried out immediately following 27 June.

ii) Claim 4(c) related to the Claimant being informed of the allegations against him on 23 October 2019 and being invited to attend an investigatory meeting which took place on 6 December 2019.

52. The tribunal rejected claim 4(a) and found that the initial questioning of the Claimant by Mr Farmer was not unfavourable treatment at all.

53. It rejected claims 4(d) to 4(g). These were all complaints of unfavourable treatment in the disciplinary process after the investigation meetings, starting with being informed that there was a case to answer, then the issuing of the warning and the dismissal of the appeal. So I note, materially, that the tribunal rejected the claim that the issuing of a final written warning to him was unlawful discrimination contrary to Section 15.

54. Claim 5 related the issue of a formal written warning in respect of attendance issued in August and that was a claim that the tribunal upheld.

55. Turning next to the reasonable adjustments claims, claims 6 to 8, the tribunal rejected claim 6 which related to an alleged PCP of investigating staff who attended work premises while off sick. The tribunal found that there was no such PCP.

56. Claim 7 broadly was a reasonable adjustment claim relating to subjecting the Claimant to the disciplinary proceedings. The Claimant alleged five reasonable adjustments should have been made. The tribunal rejected claim 7(a), that there should not have been an IT interception

ordered in the first place, and it rejected 7(e), that was the claim that a reasonable adjustment would have been to show compassion to the Claimant. The tribunal found, understandably, that that was too vague to be of any meaningful content.

57. But the tribunal found in the Claimant's favour on claims 7(b), (c) and (d); that is:

i) Claim 7(b), the Respondent should not have pursued a formal investigation;

ii) Claim 7(c), the Respondent should not have pursued the Claimant at the particular time; and

iii) Claim 7(d), the Respondent should have addressed the matter informally.

58. Finally, claim 8 related to the formal written warning in respect of attendance, i.e., the same decision to issue a warning that was a Section 15 claim under claim 5. The tribunal also found that there was a breach of the duty to make reasonable adjustments in issuing that warning.

THE GROUNDS OF APPEAL

59. There is no appeal in this case against the finding in claim 1, but all of the other findings made against the Respondent are the subject of appeal. The Respondent appeals the decisions in respect of claims 4(b) and(c), claims 5 and 8 and claims 7(b), (c) and (d).

60. There are four grounds of appeal.

61. Ground 1 and 2 relate to the Section 15 findings on claims 4(b) and (c).

i) Ground 1 alleges that the tribunal erred in its findings as to "Something Arising 5" and "Something Arising 6". I will explain what those terms mean in a moment.

ii) Ground 2 challenges the finding that the Respondent's actions in ordering the interception, commencing the investigation and inviting the Claimant to an

investigation meeting were because of either Something Arising 5 or Something Arising 6.

62. Ground 4, which is not the next numbered ground but is logical to take next, relates to the Section 20 reasonable adjustments findings in respect of claims 7(b), (c) and (d), i.e., the breach of duty to make reasonable adjustments in relation to the investigation and disciplinary process.

63. I interject at this point that the Claimant has a cross-appeal in relation to Something Arising 5, where part of that alleged "something arising" was rejected by the tribunal. That is closely related to ground 1 and is appealed by the Claimant.

64. Finally, ground 3 relates to the findings in relation to the attendance warning, and that is in a challenge to both the decision that that was a breach of Section 15, and was a breach of duty to make reasonable adjustments. I should add that the appeal against the finding that the attendance warning was given in breach of a duty to make reasonable adjustments was introduced by re-amendment to the notice of appeal. That application was made relatively late in the day. I heard it yesterday and gave permission to re-amend the notice of appeal for reasons that I gave orally yesterday morning.

GROUND 1

65. In respect of claims 4(b) and (c), the tribunal's reasoning was as follows.

66. There were two unfavourable treatments:

i) 4(b): when Mr Farmer requested an interception report to check what the Claimant had been doing on his work computer: that was unfavourable treatment (paragraph 269).

ii) 4(c) being informed of allegations and asked to attend an investigatory meeting was also unfavourable treatment.

67. There were re two relevant "somethings arising", to use the expression used by the tribunal, for the purposes of this particular claim. Something Arising 5 is dealt with at paragraph 251 with the reasons. Something Arising 5 was framed in the list of issues in this way:

> "on 27 June 2019 [the Claimant] attended the Respondent's premises at the end of the working day, whilst signed off with depression, and used the Respondent's IT facilities to apply for a role in another department?"

68. At paragraph 251 the tribunal said this:

> "Based on the evidence we accept that he attended out of hours because of his depression. The circumstantial evidence in our view supports the fact that his depression left him vulnerable and unable to face a meeting with Mr Farmer and Mr Craig. It is inherently plausible he would feel that way. We do not think the request to attend and attendance out of hours could be described as typical or expected behaviour from a non-depressed person."

69. At paragraph 252:

> "We do not accept that the use of the City Council's IT facilities to apply for another role is something that arose from depression. There is no evidence that his depression meant he had to use the respondent's IT facilities to make the applications."

70. Something Arising 6 was framed in this way:

> "When the Claimant was questioned by Mr Farmer and/or Mr Craig the Claimant did not explain that the reason why he was using the Respondent's IT facilities outside of working hours, and whilst off sick, was because he was applying for a different acting up role as a Senior Technician so he would not have to work with Mr Farmer?"

71. The tribunal's conclusion was this, 253:

> "We conclude this arose from his disability. We are satisfied that his depression left him vulnerable and not as strong-willed as a reasonable person without depression might be. This is apparent from the tenor of his evidence. We are satisfied that three managers gathering around the claimant is going to increase that vulnerability. He sought permission to attend after work to avoid meeting them which is consistent with the suggestion that meeting them was what he wanted to avoid. In the circumstances it is inherently plausible he would feel unable to explain to

> them the reason why he was there, since it would have put him in potential conflict with Mr Farmer."

72. The tribunal went on to find that the unfavourable treatment, 4(b) and 4(c), was because of Something Arising 5 and Something Arising 6. It did so at paragraphs 275 to 279.

73. At paragraph 275, the tribunal found that the interception request arose from Something Arising 5. The reason it was requested was because of suspicion about why the Claimant was in the office after hours when on long term sick. He was there because of his depression and the resultant wish to avoid contact with Mr Craig and Mr Farmer.

74. At paragraph 276 the tribunal said it was satisfied that the allegation, and invitation to attend the investigatory meeting (claim 4(c)), arose from Something Arising 5:

> "…There is a direct link between the interception, the results and the investigatory process. We do not accept that the [sic] there is a break because it is based on what was found on the computer rather than on the interception. If the interception had not been ordered the investigatory invite and making of allegations would not have happened."

75. The tribunal went on to find that none of the remainder of claim 4 was linked to Something Arising 5 because by the time that the Claimant was informed there was a case against him, there was more evidence and matters had moved on.

76. At paragraphs 278 and 279 the tribunal found that 4(b) and (c) were also because of Something Arising 6, because his failure to answer led to the order for the interception. It also rejected the claim that 4(d) to 4(g) were because of Something Arising 6.

77. The tribunal then found that the unfavourable treatment, 4(b) and (c), was not justified. The Respondent had legitimate aims of maintaining appropriate standards in the workplace and investigating suspicious or concerning behaviour, but it did not act proportionally given that the Claimant was not questioned after 27 June. No enquiries were made of Mr Burgin, a director, and Mr Craig did not have the power to order the interception.

78. Under Ground 1 the Respondent challenges Something Arising 5. The Respondent's case is that the finding that the Claimant attended out of hours because of his depression at

paragraph 251, to which I have already referred, is directly contradicted by its findings at paragraph 165. Paragraph 165 makes the point that the reason he asked to attend at the end of the working day was because he felt if he attended during the working day he would meet Mr Farmer and Mr Craig and that would simply promote a continuation of what he perceived as mistreatment. Further, the Respondent submits, even when taken on its face, paragraph 251 is in error.

79. Mr Linstead makes the following points:

i) First, the tribunal applied the wrong comparator. The appropriate comparison is not of a non-disabled person, but a non-disabled person who perceived themselves to be bullied.

ii) Second, wanting to avoid bullies is a thing of universal application, and that care needed therefore to be taken in analysing whether or not the disability was more than a trivial cause.

iii) He submits that there are a number of links in the chain of causation between depression and attending out of hours and that one link, at least, was unrelated to depression - the perception of bullying. The tribunal had found in terms that perception was not related to depression. He says that medical evidence could have shown depression made the Claimant want to avoid bullies, but there was no such evidence.

80. The Claimant's submission in response, put at its simplest, is that there is no inconsistency between the findings; that the tribunal was faced with a question of fact and was entitled to make the findings that it reached.

81. On this point I agree with the Claimant that the tribunal reached a finding it was entitled to make. I see no inconsistency between paragraph 165 and paragraph 251. It is an unsurprising

conclusion that, in his depressed state, the Claimant wanted to avoid people who he perceived as bullying him. Depression left him less able to confront them. I bear in mind also that the bullying, as he perceived it, was due in his own mind to his mental health.

82. The tribunal put it succinctly itself at paragraph 275 when dealing with the 'because of' question, where they said that the Claimant went to the office at the end of the day because of his depression and the resultant wish to avoid contact with Mr Craig and Mr Farmer.

83. Mr Linstead submitted that this was no different to a non-disabled person who would want to avoid bullies, and that anybody would want to do that. That may or may not be right but it is a question of fact. Indeed, at this stage of proceedings it is no more than an assertion of fact. It is a factual question and I cannot say that the tribunal erred in not reaching the same conclusion. Indeed, it is far from clear to me that that is the way that the matter was put below.

84. On this point, in my judgment, the Respondent's submissions are over-elaborate in analysing the links in the chain and I reject the submission that it was necessary to have constructed a more elaborate comparator than the tribunal in fact constructed.

85. I also reject the submission that this was a matter that would have required medical evidence in order to determine it in the Claimant's favour. It is a matter of a factual assessment, and the tribunal reached a conclusion it was entitled to reach.

86. For similar reasons I reject the challenge to Something Arising 6. The Respondent argues that saying that the failure to explain arose from depression and saying it arose from wanting to avoid conflict are contradictory. I do not accept that. The Respondent further submits that a non-depressed person would also have been reluctant to explain the position to Mr Farmer and submits that the tribunal failed to construct an appropriate comparator. I reject those submissions for similar reasons to Something Arising 5. I see nothing contradictory in the findings that the tribunal made. The tribunal reached a common-sense conclusion and not a surprising one. The finding of the impact of the depression on the reluctance of the Claimant

to confront his managers and not get into conflict is one the tribunal was entitled to make, based upon the assessment of the evidence it heard, including the witnesses.

87. Whilst constructing a comparator may be a useful tool, effectively a thought experiment in determining the facts of the case, it is not a misdirection by the tribunal to have failed to do so. I also reject the argument that the tribunal's findings on Something Arising 5 and Something Arising 6 were perverse.

THE CROSS-APPEAL

88. It is convenient at this point to deal with the cross-appeal. That challenges the tribunal's decision that the use of the computer was not something arising in consequence of disability. The Claimant says it was wrong to separate out the attendance on 27 June from the use of the computer on that date. It says that the use was the reason for attendance. It also points out that the reason for use of the computer was to access the grievance documents and to apply for another job.

89. The Claimant says that based on other findings, the tribunal should have found that the use of IT was connected to, or in consequence of, disability. He was motivated by a desire that the documents he worked on were not detected by managers.

90. The Respondent submits that the tribunal approached the question in a legally permissible way and made a finding of fact that it was entitled to make and that attendance and IT use were not inseparable, or at least the tribunal was not obliged to treat them as inseparable. I accept the Respondent's submissions on that point. I see no error of law in the tribunal's assessment of Something Arising 5 and the component of that "something arising" that was rejected by the tribunal.

91. So, I reject ground 1 and I reject the cross-appeal; leaving the findings in relation to Something Arising 5 and Something Arising 6 intact.

GROUND 2

92. I turn next to ground 2. Was the unfavourable treatment 4(b) or 4(c) because of Something Arising 5 or Something Arising 6? The Respondent's argument runs as follows.

93. First, that the tribunal applied an incorrect "something arising" at paragraph 206. In that paragraph the tribunal did no more than find a link between the interception and the ensuing disciplinary proceedings but the interception was not the relevant "something arising". The "something arising" was attendance out of hours on 27 June.

94. The flaw in the Respondent's argument is that it fails to take into account paragraph 275, in which the tribunal found that the interception request arose from Something Arising 5. So reading paragraphs 206 and 275 together, the tribunal found that the sequence of events from the interception and then the initiation of the investigatory process arose from Something Arising 5.

95. However, that is not the end of the argument on ground 2 for the Respondent. The Respondent also argues that the tribunal applied the wrong test. At this stage when considering 'because of' - was the unfavourable treatment because of the "something arising" - the focus is on the reason in the mind of the decision maker. That is the first proposition, and the second proposition is that it is necessary to look for the effective reason or cause of the unfavourable treatment.

96. Paragraph 276, the Respondent argues, is flawed in two ways. First, it is not clear that that is the test that the tribunal applied and second, it appears to have applied a 'but for' test of causation, at least in the final sentence of 276:

> "If the interception had not been ordered the investigatory invite and making of allegations would not have happened."

97. The Claimant's answer to that is to say that the correct test was applied and that the tribunal reached a conclusion that it was entitled to reach; I put that shortly, but that is the gist of its submission.

98. On this ground, in my judgment, the Respondent is clearly right. The last sentence of 276 can only be read, in my judgment, as applying a 'but for' test. Whilst it is true to say that if the interception had not been ordered, the ensuing investigatory proceeding would not have taken place, that is no more than a 'but for' approach to causation and not the requisite approach to causation here.

99. It is a surprising proposition, in my judgment, to say that the reason for the disciplinary investigation and proceedings was because the Claimant attended the office on 27 June. In reality, the more striking reason and the more effective reason seems much more likely to be the fact that inappropriate material had been found on the computer of the Claimant.

100. I bear in mind that the images which gave rise to the investigation were not found in the first interception in June and were not in fact found until the second interception in September of 2019.

101. I also bear in mind a point made by Mr Linstead in his oral submissions that the disciplinary investigation was initiated and carried out by a different manager to those who had asked for the interception.

102. The attendance on 27 June seems no more than the opportunity for the inappropriate material to come to light, rather than the reason for the disciplinary procedures that ensued. In my judgment, the tribunal erred in its approach to the 'because of' question, i.e. the reasons test required by **Paisner,** and I am going to allow the appeal against 4(c) on that ground.

103. Turning to 4(b), the Respondent has two limbs to its argument. One limb of its challenge to 4(b) depends upon its challenge to Something Arising 5 being in error. That is a ground 1 point, which I have rejected.

104. However, the Respondent has another argument, which is this. The tribunal found that the reason why Mr Craig and Mr Farmer wanted to find out what the computer was being used for (i.e. the reason the interception was ordered) was not Something Arising 5 or Something

Arising 6. The reason the Respondent wanted to find out about the computer use was the fact that the Claimant had been using the computer. The problem with that, says Mr Linstead, is that the computer use was rejected by the tribunal as being something arising out of disability.

105. The Claimant's argument is that the tribunal was entitled to find that the suspicions of Mr Farmer and Mr Craig were aroused by Something Arising 5: attending at the premises outside working hours whilst off sick. The difficulty for that is that what might seem to be an essential component of the IT investigation, the use of the computer, was expressly found by the tribunal not to be something arising in consequence of disability.

106. On its own, I might have been persuaded that the tribunal was entitled to come to the conclusion that it reached in relation to 4(b); but as is clear from the reasons I have just outlined in relation to claim 4(c), I am not at all persuaded that the tribunal applied the right causation test to this claim. I have found that it did not do so in 4(c) and I am not confident, not persuaded, that it did so in relation to 4(b).

107. So in conclusion I allow the appeal on ground 2, against the findings of both claim 4(b) and claim 4(c).

GROUND 4

108. I turn next to ground 4 as it concerns the subsequent disciplinary process relating to the computer images. Ground 3 concerns the attendance warning, and I will return to that later in this judgment.

109. Ground 4 is a challenge to the tribunal's decision that the Respondent breached a duty to make reasonable adjustments in pursuing the disciplinary process. That is claims 7(b), (c), (d).

110. The tribunal's reasoning was as follows. The Respondent operated a PCP of invoking disciplinary procedures against employees who misused its IT facilities. That PCP placed the

Claimant at a substantial disadvantage compared to non-disabled people in that his depression was exacerbated by the stress of the disciplinary proceedings. The tribunal held at paragraphs 294 and 295:

> "294. We conclude PCP2 did subject Mr Gibbin to a substantial disadvantage compared to non-disabled employees. The manner he gave evidence to us shows how stress and challenging situations affect him. We are acutely aware that when we rely on how he gave evidence we are applying the manifestation of his disability now quite a way back in time. However, there is no suggestion his depression or how it manifests itself has worsened than since the relevant time from any party and in particular not from the respondent's witnesses who dealt with him at the time.
>
> 295. We also believe it is consistent with a person suffering depression that disciplinary proceedings would exacerbate it."

111. The tribunal rejected claim 7(a) (that it would have been a reasonable adjustment not to have ordered the IT interception): it held the adjustment would not have alleviated the PCP, as the interception did not form part of the disciplinary proceedings and the Claimant did not know of it at the time.

112. At paragraphs 299 to 304, the tribunal held that it would have been a reasonable adjustment to: (b), not pursue a formal investigation and (c), not pursue that investigation at this time. The core of the reasoning is at paragraph 301:

> "However pursuing Mr Gibbin at a time when he was ill with depression was clearly going to put him at a substantial disadvantage compared to a non-disabled person. Thus he was not going to be able to react with the clarity and composure one might expect of a non-disabled person. He was not going to have a reasonable chance to present his best case. The adjustments would alleviate that substantial disadvantage."

113. At paragraphs 304 to 308, the tribunal found it would have been a reasonable adjustment to address the matter informally. It found it telling that Mr Riley, who was in the most striking of the photographs, was dealt with informally.

114. As to the other documents and images found on the Claimant's computer, the tribunal said this at paragraph 306:

> "We accept there are other documents and images. They have to be weighed against Mr Gibbin's illness and the effect of procedures on him. We do not believe reasonable person would conclude the other documents are so bad that only formal action is appropriate. Instead the reasonable person would have reflected on the totality, the fact the claimant had depression and how it affected him and on the decision to subject Mr Riley to an informal process only, and would then have concluded that this would be a reasonable adjustment."

115. The Respondent argues that there was no evidence to support a conclusion that the Claimant's depression would be exacerbated by the disciplinary process. There was no medical evidence to that effect and the Claimant's witness evidence did not address it. It further argues that the tribunal misdirected itself by relying on the Claimant's demeanour when giving evidence to the tribunal in 2022. That, it is said, cannot be an indicator of his condition in 2019. More materially, his demeanour in 2022 cannot be relevant to the question of whether his condition in 2019 was exacerbated by the instigation and continuation of the disciplinary process. The Respondent also argues that the tribunal misdirected itself by relying on its own belief, unsupported by the evidence, that the disciplinary proceedings would exacerbate depression. Either, it is said, the tribunal misdirected itself by taking into account impermissible or irrelevant matters, or reached a conclusion that is perverse.

116. Further, it is said that the tribunal further erred in its understanding of the relevant substantial disadvantage. At paragraph 301 the tribunal understood the substantial disadvantage to be a lack of clarity and lack of ability to deal with the disciplinary process. That is a different disadvantage to exacerbation of depression by being put through the process; it is not the substantial disadvantage that was identified in the list of issues. In any event, no findings of fact were made by the tribunal as to the Claimant being unable to put forward his case or present his case during the course of the disciplinary hearings.

117. The Claimant's position is that the assessment of the substantial disadvantage is a question of fact and the tribunal reached a conclusion it was entitled to reach. The Claimant points out that the tribunal had an occupational health report and also had evidence from the

Claimant in his own witness statement. I have been shown the relevant material during the course of the hearing.

118. The occupational health report dated 20 April 2021 is based on a consultation on that same date. It addressed the Claimant's position following an absence from work in February of 2021. It refers to low mood, anxiety, and significantly impaired sleep; all affecting concentration, focus and memory. That, however, is in 2021 and not a reliable guide to the condition in 2019 or 2020. Further, the report says nothing about the effect of the disciplinary proceedings in exacerbating the Claimant's depression.

119. The Claimant's witness statement was made on 15 March 2022. At paragraph 49 it refers to a diagnosis on 24 June 2019. The Claimant goes on to list his symptoms. It is not entirely clear whether he is listing them as at 2019 or as at 2022. It is fair to say also that one of them is short term memory loss, but his list of symptoms sheds no light on the question of exacerbation of depression by being subjected to disciplinary proceedings. In the passages I was shown in the statement, he does not address any contention that he was unable to deal with the proceedings or put his case forward as a result of his disability.

120. I agree with the submissions on this ground made by the Respondent. There is no evidence for the proposition that the Claimant's depression would be exacerbated by the disciplinary proceedings, neither at the time that those proceedings were brought in 2019, nor at all. That is a matter which required evidence; it is not something that is self-evident nor something of which the tribunal could take judicial notice.

121. Although the tribunal warned itself as to its reliance on the demeanour of the Claimant in the witness box at a later stage, nonetheless, it does still appear to have attached weight to that demeanour. It is particularly not a reliable guide so long after the event. What was important in this case, given the way in which the disadvantage was framed, was the question

of exacerbation of the depression by continuation of the proceedings. Demeanour in the witness box cannot possibly shed any light on that question.

122. As Mr Linstead said, and I accept, there is no evidence, at least no findings in the reasons, that the Claimant in fact had any difficulty in presenting his case or was unable to do so, nor that any such difficulty affected the outcome of the disciplinary proceedings. In my judgment, the tribunal's reasoning is confused and fails to draw a distinction between two different types of disadvantage:

i. The disadvantage that because of disability, one is vulnerable to a condition being made worse or exacerbated by the continuation of disciplinary proceedings; and

ii. The disadvantage that because of disability, one might not be able to participate properly in those ongoing disciplinary proceedings.

123. Those are two quite different things. Different evidence is likely to be required to demonstrate the advantage or the disadvantage, and different adjustments may be required to remove the effects of that disadvantage. I agree with the Respondent that at paragraphs 299 to 303, the tribunal deals with what one might call the "participation disadvantage", for which there was no evidence and it was not the way in which the disadvantage was framed.

124. Further, the tribunal's reasoning was compounded by a fundamental misunderstanding of its own factual findings. The disciplinary investigation had begun in October 2019. The warning was issued in March 2020 and the appeal was in October of 2020, after the first wave of the pandemic. However, the Claimant had returned from sickness absence on 16 July 2019. Even by the time of commencement of the investigation, he had been back at work for nearly three months. There is no suggestion that there was another period of absence in 2019 or 2020. Yet the tribunal's decision is clearly predicated upon the impression that the disciplinary investigation and process was undertaken, at least in significant part, whilst the Claimant was absent on sick leave.

125. At paragraph 299, under the headings *"(b) should not have pursued a formal investigation"*, *"(c) should not have pursued the claimant at this time"*, the tribunal said:

> "The lay members acknowledged that whilst it is possible to start disciplinary processes whilst on sick leave, in these specific circumstances that decision was not necessary without further advice being sought on the impact of his disability."

126. The underlying assumption is that the disciplinary process was started whilst the Claimant was on sick leave.

127. At paragraph 300.1, the tribunal said *"The claimant is away on sick leave for depression"*, and at 300.2 said *"The evidence had been preserved. The key evidence is the data that is fixed and objective. It would not be expected to deteriorate in the time before Mr Gibbin was expected to return."*

128. I interject at that point that, as I have already indicated, the inappropriate material was not found until September 2019, by which time Mr Gibbin had been back at work for some months.

129. Then at paragraph 303, in the context of a paragraph essentially about the date the cause of action arose for the purposes of limitation, the tribunal said:

> "While they should not have started, but have waited until he returned to work or was fit enough, they were able at any time to stop the process."

130. The Claimant argued that the tribunal looked at the disciplinary process as a continuum going right the way back to the 27 June interception and is really only making a point about the interception having taken place at a time when he was on sick leave.

131. However, the tribunal was clear in its findings elsewhere that the interception was not part of the disciplinary process. I am clear, on a plain reading of the judgment, that is not what the tribunal is referring to here. It is clear to me from the passages quoted that the tribunal was

under the impression that the Claimant was absent at the time that he was informed of the investigation and asked to participate in the investigation. That is contrary to the tribunal's own findings of fact.

132. At paragraph 301, the tribunal's concern is expressed as pursuing the Claimant while he was ill with depression. It is true that he remained depressed after he returned to work, something later medical evidence would seem to indicate. The tribunal's misconception that he was being subjected to disciplinary proceedings whilst he was absent due to his illness is, in my judgment, a fundamental error. Taken alongside the absence of any evidence that the process exacerbated the condition, in my judgment, the tribunal misdirected itself and reached a perverse conclusion that the PCP placed the Claimant at a substantial disadvantage.

133. I have considered carefully whether the separate finding at paragraph 305 to 306 that the Respondent should have addressed the matter informally can stand. I can see that it might be said that it would have prevented or reduced the risk of exacerbation not to have dealt with the matter formally but only informally.

134. However, that finding depends upon a proposition that any formal process would have exacerbated the Claimant's depression for which, as I have already indicated, there was no or no adequate evidence. Further, it is difficult to tell the extent to which the tribunal's conclusion that it would have been reasonable to deal with the matter informally was affected by its erroneous perception that the Claimant was being subjected to disciplinary process whilst he was off sick with depression. The finding at 7(d), that the matter should have been addressed informally, cannot stand in the light of those errors.

135. I will allow the appeal on ground 4, setting aside the judgments on claims 7(b), (c) and (d).

GROUND 3

136. That leaves me with ground 3. It is a separate issue as to the warning that was given under the absence procedure.

137. Following the re-amendment that I allowed at the beginning of this hearing, ground 3 relates to claim 5 (the Section 15 claim) and claim 8 (the Section 20 claim). The tribunal found that the warning was unfavourable treatment and that the unfavourable treatment was because of Something Arising 8, that is the Claimant's absence between 6 June 2019 and 16 July 2019. Those findings were plainly right and not challenged.

138. The tribunal found that the Respondent had a legitimate aim in maintaining consistent levels of attendance to allow efficient delivery of service. The challenge is to the tribunal's finding that the treatment was not a proportionate means of achieving that legitimate aim.

139. The totality of the tribunal's reasoning on the Section 15 claim is at paragraph 286. That reads as follows:

> "The Tribunal concludes the City Council's action was not proportionate. There appeared to be no proper enquiry into the absence and no evidence of any consideration of adjustments to trigger points (yet [sic] alone actual adjustments). It is not proportionate to not even consider those issues but go straight to a written warning."

140. The tribunal's reasons on these matters have to be considered as a whole and so I address at this point the tribunal's reasoning in relation to the reasonable adjustment claim in relation to the same warning; that is at paragraph 311 to 313.

141. Under that heading the tribunal asked itself whether or not the Respondent operated a PCP of issuing warnings to staff who were repeatedly absent. With some reformulation of the PCP, it did. It asked whether the Claimant had shown that he was placed at a substantial disadvantage and his depression meant that it was more likely that he would be absent. The

tribunal was satisfied that the final warning was likely to place him under more stress and worry because of his depression than might be expected of a non-disabled employee because of his absence history. Then it asked what, if anything, would have amounted to reasonable adjustments. The Claimant suggested the Respondent should not have issued him with a final written warning. At paragraph 313, the tribunal say this:

> "We agree this would be a reasonable adjustment. To issue a person prone to absences because of their disability with a formal warning is likely to add to the stress that put the claimant at a substantial disadvantage. The absence that resulted in the warning was 17 days and was for depression. In our view it would have been reasonable on this occasion not to issue a formal warning. The effect would have been to adjust the trigger point which is a reasonable adjustment. There is no suggestion that his absences caused particular problems beyond those one might expect from normal sickness absences."

142. The Respondent criticises the tribunal for a wholesale failure to direct itself properly on the question of objective justification. No reference to the legal principles in the cases to which I referred at the beginning of this judgment is to be found in the tribunal's reasons, nor to the principles derived from them. The cases, as I earlier outlined, require critical evaluation of the business needs of the undertaking against the discriminatory effect of the relevant treatment. The tribunal carried out no detailed analysis of the Respondent's working practices and business consideration.

143. There was evidence from the Respondent's witnesses as to the problems that were caused by absence and the need for the application of the Respondent's absence policy, but that is not mentioned anywhere in the reasons.

144. Further, it is said on behalf of the Respondent, that the one short paragraph dealing with this is at odds with a number of facts. The tribunal found that there was no proper enquiry, yet failed to reflect upon the fact that its own findings recorded there were two occupational health reports, one in June and one in July, and that the Respondent's manager, Mr Wingell, met with the Claimant before issuing the warning.

145. There was no reference to the fact there was already an earlier warning in respect of earlier periods of absence, which is contrary to the finding that the Respondent went straight to a written warning. Further, there is a reference to adjustments of trigger points, yet the Respondent's procedure has no specific trigger points in it.

146. The Claimant's case essentially is that there is no indication that the tribunal did not have the right principles in mind; it applied them and reached a conclusion of fact that it was entitled to reach.

147. I accept the Claimant's point that nothing turns on the trigger point reference. It is true to say that the procedure does not have fixed trigger points that are capable of being adjusted, and is a discretionary policy. However, even in a discretionary policy, there is a time when a level of absence is acceptable, and a time when it is not and a warning is appropriate. When it is appropriate to move from one to the other may depend on a number of questions in the particular circumstances, including questions of disability. It seems to me 'trigger' here means no more than an analysis of the point when one moves from taking no action to taking some action. So I do not accept the Respondent's submission that there was an error in referring to trigger points or that the tribunal misdirected itself in that respect.

148. I do, however, accept the broad thrust of the Respondent's submissions that it is far from clear that the tribunal had in mind the requirements of the test for justification, or that they applied the test.

149. In the very short paragraphs on setting out the tribunal's reasoning on section 15 and 16, there are a number of absences and apparent oversights and nothing to make clear that the tribunal has directed itself as to the balancing of considerations that are required by the authorities. Both the Section 15 claim and the Section 20 claim suffer from the same

deficiencies. For those reasons, I am satisfied the tribunal did err in its finding in relation to the written warning and I allow the appeal on ground 4.

CONCLUSION

150. So that brings me to the end of my judgment. In summary, I dismiss the appeal on ground 1, I dismiss the cross-appeal, I allow the appeal on grounds 2, 3, and 4.