EMPLOYMENT TRIBUNALS

Heard at:	London South	**On:**	4 to 11 November 2024
Claimant:	Mr C Burrell		
Respondent:	Network Rail Infrastructure Limited		
Before:	Employment Judge Ramsden		
	Mr M Cann		
	Mr J Hutchings		
Representation:			
Claimant	In person		
Respondent	Mr O Holloway, Counsel		

RESERVED JUDGMENT

Background

1. The Claimant began work for the Respondent on 24 April 2017, as a Train Delay Attributor.
2. He was dismissed summarily with effect from 23 February 2023, apparently for misconduct.
3. Following a period of ACAS Early Conciliation which began on 18 March and ended on 29 March, both of 2023, the Claimant presented a claim to the Employment Tribunal on 13 April 2023.

The complaints and issues

4. The Claimant's complaints, as defined in a Preliminary Hearing for Case Management before Employment Judge Hart on 10 May 2024, are that:

a) He was unfairly dismissed, as described in section 98 of the Employment Rights Act 1996 (the **1996 Act**);

b) He was treated unfavourably when he was dismissed because of something arising in consequence of his disability, pursuant to section 15 of the Equality Act 2010 (the **2010 Act**); and

c) He suffered harassment related to disability, in accordance with section 26 of the 2010 Act, by ten occurrences in the period 29 September 2022 to 27 February 2023.

5. While the Claimant "ticked the box" on the Claim Form to indicate that he was complaining that he was owed arrears of pay, no such complaint was articulated in the Claim Form, and the Claimant confirmed in the Preliminary Hearing before EJ Hart that that was not a matter he wished to pursue. This complaint was not dismissed because it was never in fact raised.

6. The Respondent confirmed by email to the Tribunal on 5 February 2024 that it accepted that the Claimant was disabled at the relevant times.

7. The list of issues discussed with the parties at the 10 May 2024 hearing by EJ Hart are appended to this judgment. This Tribunal has given each of the complaints a number in that list of issues, for ease of reference in this judgment.

8. At the outset of this hearing the Claimant clarified that:

a) The impairments he relies upon for the purpose of his disability discrimination complaints are generalised anxiety disorder (**GAD**) and agoraphobia; and

b) In relation to his discrimination arising from disability complaints:

(i) He says that his sickness absence arose out of his GAD and his agoraphobia; and

(ii) He says that his difficulty in properly and fully engaging in the disciplinary process and/or disciplinary hearing arose out of his GAD.

The hearing

9. The Respondent was represented in the hearing by Mr Holloway. The Claimant presented his own case.

10. The parties had prepared an agreed hearing bundle of 641 pages. The parties had been unable to agree on cast lists of chronologies, so each provided their own version of those documents. The Respondent had prepared a "key documents" reading list, which the Claimant did not dispute but he added one further document to the list that he asked the Tribunal to read at the outset of the hearing (which we did).

Adjustments

11. The hearing was conducted by Cloud Video Platform as a reasonable adjustment for the Claimant, who suffers from agoraphobia.

12. At the outset of the hearing the Employment Judge asked if any person involved in the hearing for either party was seeking any further adjustment (besides the hearing being conducted online) to the conduct of the hearing. The Claimant said that one way in which he tries to manage anxiety is, at moments of heightened anxiety, to read a chapter of his anxiety book. The Employment Judge told the Claimant that he could ask for short breaks whenever he wanted to, that breaks can usually be accommodated, and that Tribunal hearings do typically involve regular breaks. Every break the Claimant requested was accommodated, and there were times when breaks were suggested by the Tribunal when it considered that the Claimant may benefit from a break. No adjustment was sought by anyone else.

Witness evidence

13. The Tribunal heard evidence from:

    a) The Claimant, on his own behalf,

    together with:

    b) Mark Southon, Senior Delay Resolution Manager at the Respondent, who:

        (i) was the Welfare Manager for the Claimant in the period 19 October 2022 to 8 February 2023 (i.e., he was designated to keep in regular contact with the Claimant during his suspension from work);

        (ii) delivered the letter of suspension to the Claimant on 29 September 2022; and

        (iii) attended a meeting with the Claimant on 2 February 2023;

    c) Desmond Matthew, the Respondent's Area Planning Manager (London Bridge Area), who was the hearing manager for the first disciplinary process in respect of the Claimant in October and November 2022;

    d) Gunnar Lindahl, Operations Director for Wessex Route at the Respondent, who was the appeal hearing manager for the first disciplinary process in respect of the Claimant in February 2023;

    e) Alun Fowles, Head of Performance (Southern Region), who attended a meeting with the Claimant on 2 February 2023; and

    f) Gerardo Chiariello, the Respondent's Head of Control (Kent), who was the hearing manager for the second disciplinary process in respect of the Claimant in February 2023,

    each of whom gave evidence on behalf of the Respondent.

14. Written witness evidence in support of the Respondent's position was also provided by Chris Perkins, London Rail and Integration Director at the Respondent, who was the appeal hearing manager for the second disciplinary process in respect of the Claimant in March 2023. Mr Perkins was not available for cross-examination or Panel questions.

15. At times, the flow of the hearing was quite jerky, as:

    a) The Claimant is a frequent interrupter, but not someone who likes to be interrupted;

    b) The Claimant was keen to ensure that his perspective on events was expressed, rather than sticking to the question (e.g., when asked whether he could read certain words in certain paragraphs of notes of meetings, the Claimant would insist on giving his perspective of the truthfulness of the underlying statement, rather than simply confirming whether he observed that the notes recorded that a statement had been said); and

    c) On a number of occasions the Claimant needed to be reminded to pose questions to witnesses when cross-examining them, rather than stating his case. The Employment Judge gave him guidance on how to do this, and offered to turn his statements into questions for him, with him correcting those questions if they were not addressing the point he wished to put to the witness. The Claimant accepted these interventions with good grace.

16. The Tribunal recognised that this is likely at least in part a consequence of the Claimant's GAD, and so the Employment Judge endeavoured to strike a balance between allowing the Claimant to express his point while understanding the Respondent's desire to ensure that the Claimant understood and responded to the question asked of him. The Claimant was reminded that he could return to topics he had been taken to in cross-examination as part of re-examination, and could clarify answers he felt were not clear or were incomplete at that stage. The Claimant was permitted, by way of adjustment suggested by the Tribunal and not objected to by the Respondent, to have blank paper and a pen, and to take notes of matters that he wished to return to in re-examination, and the Claimant made use of this.

Applications

17. The Claimant had applied (on 14 October 2024) for a deposit order to be made against the Respondent as a result of what he says was a fabrication by the Respondent of the date of the letter dismissing him from their employment. The Tribunal refused that application, on the basis that it was not evident that the relevant test in Rule 39 of the Employment Tribunals Rules of Procedure 2013 was met (that the Respondent's resistance of the Claimant's unfair dismissal complaint had "*little reasonable prospect of success*"). The Tribunal said that it wanted to engage with the evidence around the unfair dismissal complaint by proceeding to hear evidence from the parties' witnesses.

18. On the morning of the second day of the hearing the Claimant sent the Tribunal an email in which:

    a) The Claimant referred to the fact that he had asked the Respondent's solicitors on a number of occasions for Claudia Sylvan, HR Business Partner, to be proffered by the Respondent as a witness, to which he had consistently received a negative response. The Claimant observed that Ms Sylvan had attended the first day of the hearing;

    b) The Claimant expressed the view that it was important for Ms Sylvan to give witness evidence to the Tribunal, particularly in light of the fact that Mr Perkins' evidence would now be written only. In oral discussion, it became clear that the Claimant's concern in this regard only related to Complaint 10, issue 4.1.8;

    c) The Claimant applied for the Employment Judge to recuse herself, as he observed that Ms Sylvan is a part-time magistrate, and the Claimant considered therefore that the Employment Judge, as a judicial office holder, would consequently be biased in Ms Sylvan's favour; and

    d) The Claimant asked why the anticipated hearing timetable was not being adhered to, as he expected evidence to begin with him being able to present his case, by the making of argument and the cross-examination of the Respondent witnesses.

19. In relation to Ms Sylvan giving evidence to the Tribunal, the Employment Judge:

    a) Explained that the Tribunal has the power, under Rule 32, to compel a witness to give evidence to the Tribunal, but the Tribunal had not received an application from the Claimant prior to this point for such a witness order (and the Claimant agreed that no such application had been made);

    b) After discussion with the Panel Members, confirmed that the Tribunal would not exercise that power in Rule 32 of its own initiative, and explained the legal test that the Tribunal would apply should the Claimant make such an application (that, as per *Dada v Metal Box Co Ltd* [1974] ICR 559, the Claimant would need to show that (i) Ms Sylvan can given evidence relevant to the issues in dispute, (ii) it is necessary to issue an order to compel attendance, and (iii) it is appropriate for the Tribunal to exercise the discretionary power in Rule 32 in the interests of justice);

    c) Explained that, if the Claimant does not make an application for a witness order, or if he does make such an application and it is refused, he can still make representations to the Tribunal that it should draw adverse inferences from the failure of the Respondent to call Ms Sylvan as a witness (and that, if he does so, the Respondent may then make representations as to why it considers the Tribunal should not do so);

    d) Noted that the Complaint 10:

(i) Is premised on a factual question that can be addressed by reviewing documents (whether the disciplinary appeal outcome, set out in a letter in the Bundle, failed to acknowledge or address five questions which the Claimant sent in an email, included in the Bundle, to Mr Perkins and Ms Sylvan); and

(ii) Is an allegation of disability related harassment, and so after the factual question above is answered, the Claimant can give evidence as to whether the conduct was unwanted, and the effect it has on him, and he can make submissions about whether the failure to acknowledge or address the questions related to disability, and whether it had the prescribed purpose; and

e) Asked the Claimant whether he wished to make an application for an order compelling Ms Sylvan to give evidence to the Tribunal under Rule 32.

20. The Claimant confirmed that, in light of the facts that:

a) He can make submissions about inferences that the Tribunal should draw from Ms Sylvan's absence; and

b) He agreed that the factual question of whether the disciplinary appeal outcome failed to acknowledge or address five questions which the Claimant had sent to Mr Perkins and Ms Sylvan on 17 March 2023 could be answered by reviewing those documents,

he did not wish to make such an application.

21. The Employment Judge said that she did not consider she had any bias towards Ms Sylvan, and noted that any replacement Employment Judge would also be a judicial officeholder. The Employment Judge declined to recuse herself, and this position was supported by the non-legal Members.

22. The Employment Judge discussed the hearing timetable anticipated in EJ Hart's Orders, and noted that that timetable began with preliminary matters and Tribunal reading time (which had happened on the morning of the first day of the hearing), and then referred to the Claimant giving evidence, which is what had followed. The hearing was therefore adhering to EJ Hart's anticipated timetable. It emerged that the Claimant had considered that the reference to "*Claimant's evidence*" in EJ Hart's timetable was to the Claimant cross-examining the Respondent's witnesses. The Employment Judge explained that that was not what "Claimant's evidence" meant, and that the Claimant was in fact giving his evidence (having made an oath as to the truth of his evidence). The Claimant accepted that.

23. Having dealt with those matters, the Claimant's evidence resumed, albeit that the timetable was no longer adhered to as time had been taken dealing with these matters which meant that the Claimant's evidence only finished at the end of the second day of the hearing, whereas the timetable anticipated by EJ Hart had envisaged that the Respondent's evidence commence on the afternoon of the second day.

Withdrawal

24. At the end of the second day of the hearing the Claimant withdrew Complaint 4 (issue 4.1.2). The Claimant initially expressed this withdrawal as being a withdrawal of his complaint against Mr Lindahl, but the Employment Judge made it clear that all of the complaints the Claimant has brought are against the corporate Respondent, Network Rail Infrastructure Limited. The Claimant confirmed that he understood that, but that nevertheless he wished to withdraw the complaint in the list of issues at paragraph 4.1.2, concerning Mr Lindahl, as his perception of what Mr Lindahl did and whether it related to disability had changed. The Claimant was very clear that he wished to withdraw this complaint, and the Employment Judge explained that, as a result, the Tribunal would dismiss that complaint upon its withdrawal.

Submissions

25. The hearing timetable anticipated that submissions would be made on day four of the hearing. In fact, the parties were ready to make oral submissions late morning on the fourth day, and a short break was taken ahead of those submissions beginning for the Tribunal to read the parties' written submissions. Unfortunately, the Claimant then experienced technical difficulties which could not be resolved until the fifth day of the hearing. Fulsome oral submissions were heard and responded to by the opposing party on the morning, and into the afternoon, of the fifth day of the hearing.

Facts

26. The Claimant began working for the Respondent as a Train Delay Attributor on 24 April 2017. The Claimant's job was to use network rail internal systems to investigate the reasons why trains were delayed.

27. The Respondent accepts that the Claimant had GAD and agoraphobia from 3 June 2021, and that those amounted to disabilities for 2010 Act purposes from that time.

28. On 14 December 2021, the Claimant met with various Respondent personnel, to discuss recommendations made by Occupational Health (**OH**), and possible reasonable adjustments. Shortly thereafter the Claimant started working at Three Bridges signal box in Crawley as part of the reasonable adjustments agreed with the Respondent.

The Incident occurred - 9 September 2022

29. The first conduct with which this claim is concerned occurred on 9 September 2022, when a disagreement arose between the Claimant and Helen Arnold, another Train Delay Attributor. The Claimant swore at Ms Arnold, calling her a "*bitch*" and a "*fucking woman*", before leaving the office and going home (the **Incident**). The Incident was witnessed by another colleague. Ms Arnold raised a

grievance concerning the Incident with the Claimant's line manager, Stephen Jones, Integrated Attribution Manager, on the same day (**A's Grievance**).

30. On 16 September 2022 the Claimant also raised a grievance relating to the Incident (the **First C Grievance**). In the First C Grievance the Claimant:

    (a) Admitted that he had raised his voice, explained his frustration, and used expletives directed at Ms Arnold in the presence of their colleague;

    (b) Said that Ms Arnold had provoked him by workplace incivility that had occurred in the few weeks leading up to the incident; and

    (c) Referred to the fact that the Incident and Ms Arnold's behaviours leading up to it had "*re-enacted mental health issues*" for the Claimant.

31. As A's Grievance and the First C Grievance both agreed that the Claimant had used expletives directed at Ms Arnold, the Respondent appointed Leon Butcher, the Respondent's Senior Project Engineer, to investigate the Claimant for alleged misconduct.

<u>Mr Butcher investigated the alleged misconduct pertaining to the Incident - September 2022</u>

32. Mr Butcher wrote to the Claimant on 22 September 2022. The heading of the letter was "*Investigatory Interview – Alleged Misconduct*", and it informed the Claimant that "*allegations have been made in relation to your conduct, which is currently being investigated*". The letter invited the Claimant to an interview to discuss "*Unreasonable behaviour including foul and abusive language to a work colleague. Alleged offence – Foul and abusive language. Aggressive behaviour. Cursing in Jamaican*". The letter included the following:

    "*Please be aware that if proven, these allegations could constitute misconduct which may lead to formal disciplinary action being taken against you which may include dismissal (either with or without notice).*"

33. The Respondent took measures to try to ensure that the Claimant and Ms Arnold did not come into contact during the time while this matter was ongoing, such as scheduling their work shifts so that they did not overlap or coincide.

34. Mr Butcher held a meeting with the Claimant, as part of his investigation, on 27 September 2022, where the Claimant referred to Ms Arnold making him feel uneasy and isolating him, and said that "*I just lost it, I don't take pride in it, it was around 3 and 4 minutes… I didn't just flip for no reason*", and referred again to the fact that Ms Arnold had isolated him and spoken to him in an undermining tone.

35. Mr Butcher's disciplinary investigation report of 27 September 2022 recommended that the Respondent proceed to formal action against the Claimant, and expressed Mr Butcher's view that the action in question amounted

to a breach of the Respondent's Bullying and Harassment policy, and was one of potential gross misconduct.

The Respondent suspended the Claimant - 29 September 2022

36. On 29 September 2022, Mr Southon travelled from his work-base in London Blackfriars to the Claimant's place of work in Three Bridges, and gave the Claimant a letter, signed by Mr Stephen Jones, which suspended the Claimant. That letter erroneously stated that:

    a) It followed a meeting on 28 September 2022 (there had been no such meeting); and

    b) The Claimant was suspended "*pending investigation*".

37. The letter also stated that the Claimant was the subject of "*an allegation of gross misconduct*" of "*Unreasonable behaviour including foul and abusive language to a work colleague*".

38. The Respondent says that its reasons for suspending the Claimant at this time and not previously were:

    a) Ms Arnold's evidence to Mr Butcher was that the preventative measures it had taken had not alleviated her fears of coming across the Claimant at work; and

    b) The recommendation by Mr Butcher that the allegation should be categorised as one of gross misconduct.

39. Mr Southon's evidence was that he delivered the letter given the pre-existing bad relationship between the Claimant and Mr Stephen Jones (which related to events pre-dating the subject matter of this claim).

40. The parties agree that in their meeting on 29 September 2022 (where the Claimant was accompanied by a colleague) the Claimant opened the letter Mr Southon gave him, and asked Mr Southon a series of questions, most of which Mr Southon was unable to answer. Mr Southon said that he would note the Claimant's questions, and obtain the answers to those questions from HR and provide those answers to the Claimant.

41. The Claimant says that in the course of this meeting Mr Southon told him that an external investigation into the disciplinary allegation concerning the Claimant's behaviour in the Incident was taking place. Mr Southon denies this.

42. As to this disputed fact:

    a) The Claimant points to the fact that the suspension letter states that "*you are suspended from work until further notice pending investigation into an allegation of gross misconduct*". The parties agree that Mr Butcher's investigation report had already been completed by this time. The Claimant says that he asked Mr Southon why, if Mr Butcher's investigation

had finished, a further investigation was needed, and that Mr Southon's response was that an external investigation was taking place.

b) The Respondent disagrees. It says:

(i) Mr Southon says (both in written and oral evidence to the Tribunal) that he did not say this, and his evidence should be believed;

(ii) There was, in fact, no external investigation taking place, so it makes no sense for Mr Southon to have said otherwise;

(iii) The list of questions that Mr Southon noted the Claimant had asked in the meeting does not include a question about an external investigation;

(iv) When Mr Southon sent the answers to the questions to the Claimant, the Claimant did not enquire about any missing Q&A pertaining to any external investigation;

(v) In the notes of the subsequent disciplinary hearing of 10 November 2022 (where the Claimant met with Mr Matthew, which is described below), there was discussion about the investigation conducted by Mr Butcher and the fact that the suspension letter referred to further investigation, but the Claimant did not mention that Mr Southon apparently told him that an external investigation was being conducted, which he would have done had Mr Southon said what the Claimant alleges; and

(vi) The first time the Claimant said that Mr Southon had referred to an external investigation was in the hearing of his appeal against the disciplinary sanctions on 10 January 2023 before Mr Lindahl. The Respondent says that it is significant that this is the first time there is written evidence of this subject being raised by the Claimant, when he has not been backward in offering criticisms of the Respondent's approach and procedures.

c) The Tribunal finds that, on the balance of probabilities, Mr Southon did <u>not</u> say that an external investigation was taking place. We do not doubt the truthfulness of the Claimant on this matter, but we consider the Claimant to be mistaken in this aspect of his recollection for the following reasons:

(i) Mr Southon was evidently ill-prepared for the meeting, and had to note down numerous questions the Claimant raised. Given his admitted ignorance of those matters, it is inherently unlikely that he would have said that there was an external investigation being undertaken if he had not been informed that there was one, and there was no reason for another person to have said so if one was not taking place; and

(ii) As the *Gestmin* case observes, human memory is subjected to powerful biases, and authenticity of memories is not a reliable measure of the truth. We have based our factual findings on inferences drawn from the documentary evidence and known or probable facts – i.e., the absence of

any reference to an "external" investigation in the Q&A document comprised of the Claimant's questions and Mr Southon's (HR's) answers.

While suspended the Claimant commenced a period of sick leave, with an anticipated return to work date of 18 January 2023 – 19 October 2022

43. The Claimant was deemed not to be fit for work by his GP on 19 October 2022 by reason of work related stress. The fit note advised that the Claimant would not be fit for work for a period of three months, recommending that the Respondent make a referral to OH in respect of the Claimant.

Occupational health referrals – October to December 2022

44. Mr Fowles referred the Claimant for an OH assessment on 26 October 2022.

45. In the period early November to mid-December 2022, there were five abortive attempts to attain an OH assessment of the Claimant:

    a) The Claimant did not answer a pre-arranged telephone call from OH on 4 November 2022 (the Claimant says he had difficulty sleeping at that time);

    b) The Claimant did answer the call made to him by OH on 9 November 2022, but the Claimant's mobile telephone reception was so poor that OH were not able to assess him;

    c) The Claimant did not answer a pre-arranged call from OH on 14 November 2022 (again, the Claimant attributes this to sleep difficulties);

    d) On 25 November 2022 the Claimant answered a telephone call from OH, but again his poor mobile 'phone signal meant the call was ended without the Claimant's having been assessed; and

    e) On 13 December 2022 a call with OH and the Claimant proceeded, but the Claimant declined to engage with the OH adviser, expressing a preference to speak to the OH physician with whom he had engaged 15 months earlier.

46. In light of these failed OH referrals, the Respondent's HR team determined that no further OH referrals would be made for the Claimant until he returned to work.

Disciplinary outcome related to the Incident – November 2022

47. On 10 November 2022, a disciplinary hearing was held. The hearing was chaired by Desmond Matthew, Area Planning Manager, and the Claimant was accompanied by a trade union representative, Dwain Jones.

48. The outcome of that hearing was, on 17 November 2022, the issuance to the Claimant of a final written warning and a disciplinary transfer.

49. The Claimant appealed that outcome on 24 November 2022, on the basis that:

a) The Respondent's grievance policy expects that the Claimant's line manager, who was Steve Jones at the time, should have tried to resolve the issue and he did not;

b) Mr Matthew was not willing to consider evidence that the Claimant presented to him that the Claimant had not presented to the investigating officer, Mr Butcher, namely that (as averred by the Claimant) (i) the Claimant's grievance had not been looked into by the Respondent and (ii) there was a conflict of interest because the witness to the Incident, Mr Tickner, had been trained by Ms Arnold;

c) The Claimant averred that the Respondent's Human Resources team had interfered or tampered with the disciplinary process; and

d) The disciplinary sanction (of a final written warning being in place for 24 months) was, in the Claimant's view, too harsh, and exceeds what is anticipated by the Respondent's disciplinary policy.

<u>The outcome of the Claimant's appeal of the disciplinary sanction pertaining to the Incident – January 2023</u>

50. An appeal hearing was held with Gunnar Lindahl, Operations Director, on 10 January 2023. The Claimant was accompanied at that meeting.

51. On 18 January 2023 Mr Lindahl wrote to the Claimant confirming the appeal outcome – it was not upheld. Mr Lindahl, though, made a number of forward-looking recommendations, being:

a) That Mr Fowles appoint a suitable manager to review the First C Grievance to the extent that it pertained to the events leading up to, but not including, the 9 September 2022;

b) That Mr Fowles, or his delegate, review the Claimant's complaints about the impact of his suspension on his pay;

c) That Mr Fowles, with HR support, review:

(i) whether more or different actions would have been appropriate in the months leading up to the Incident; and

(ii) whether the support provided to the Claimant after the Incident has been satisfactory; and

d) That Mr Fowles, or his delegate, assure themselves that the process for effecting the disciplinary transfer of the Claimant takes account of the wellbeing of all involved.

52. Mr Lindahl's 18 January 2023 letter concluded with the following sentence: "*If you have any further questions please do not hesitate to contact me.*"

53. On 24 January 2023, the Claimant wrote an email to Mr Lindahl, which included:

"*I know your role within this process, it was a complete shambles*".

This email was relied upon by the Respondent as evidence of the Claimant's emails to Mr Lindahl being aggressive and insulting.

54. The Claimant sent a further email to Mr Lindahl also on 24 January 2023, and Mr Lindahl replied on 30 January 2023, noting its contents, reminding the Claimant that the decision was final and that the internal process was now exhausted. Mr Lindahl ended his email by saying:

"*As my involvement in this matter is now concluded, I will not be responding to further correspondence on this topic.*"

55. The Claimant emailed Mr Lindahl again the next day.

The Back to Work Meeting – 2 February 2023

56. A meeting was held with the Claimant on 2 February 2023, to discuss moving forward, and in particular, the various recommendations that had been made by Mr Lindahl (the **Back to Work Meeting**). The Claimant was accompanied by Dwain Jones (his trade union representative), and also in attendance was Alun Fowles, Head of Performance, Zoe Mansell, Senior Human Resources Business Partner, who was there to provide advice and guidance on policies and procedures, and Mark Southon, in his capacity as the Claimant's welfare manager. There was no note-taker.

57. Various adjustments were made by the Respondent for the Claimant – the meeting was held on Teams, the Claimant was permitted to keep his camera turned off, and the Claimant's requests that both his trade union representative (Mr Dwain Jones) and his welfare manager (Mr Southon) be permitted to attend were acceded.

58. The Claimant agrees that he interrupted the others at the meeting, but says that they interrupted him, too. At one point there was a break in the meeting, and they returned and resumed their discussion.

59. The Claimant and Ms Mansell had some difficult interactions. The Claimant agreed in cross-examination that he said in the meeting that Ms Mansell "*seems touchy*". He also said that Ms Mansell tried to "*goad*" him by referring to the five failed OH referrals, and that in response he told her to "*keep typing while I ask Alun [Fowles], the chair of the meeting, this question…*".

60. Mr Fowles' evidence was that during the meeting Ms Mansell raised concerns with him about the Claimant's aggressive behaviour, saying that she was not happy with the way the Claimant was talking to her, and that she wouldn't expect that sort of behaviour and that she had not ever been spoken to like that before.

61. The meeting reached a conclusion with a summary of agreed action items.

62. Ms Mansell contacted Mr Fowles to complain about the Claimant's behaviour towards her in the meeting, and that she was not happy with Mr Fowles for not

having ended the meeting. Ms Mansell told him that she felt humiliated and undermined.

63. The Claimant vehemently denies that there was anything wrong with his behaviour in that meeting.

A further disciplinary process commenced - 3 February 2023

64. Mr Fowles gathered witness statements in the period 3 to 9 February 2023 from:

a) Mr Southon;

b) Ms Mansell;

c) Mr Dwain Jones; and

d) Himself.

65. It is agreed that no witness statement was taken from the Claimant.

66. The statements from Mr Southon, Ms Mansell and Mr Fowles were consistent as regards the Claimant's behaviour in the Back to Work Meeting. The statement from Mr Dwain Jones described the Back to Work Meeting in the following terms:

"*… like any other meeting the usual introductions and pleasantries were made at the start of the meeting.*

In my view I thought the meeting ran fine without any issues. I put my points across, and Chris did the same with his usual manner and character…

I do not recognize the events raised in the letter that I have seen titled Further misconduct for Chris Burrell.

Chris is very frustrated with this whole process – and I share his concerns. Chris has raised many time his mental state which has not been addressed adequately."

67. On 6 February 2023, Mr Fowles sent the Claimant a letter informing him that he was required to attend a disciplinary hearing. The allegations against him were of further gross misconduct - that, while the subject of a final written warning for the Incident, the Claimant displayed further unacceptable behaviour in the Back to Work Meeting. Specifically Mr Fowles said that the Claimant displayed a lack of respect for Ms Mansell, some aggression towards her, and that the Claimant attempted to degrade and humiliate her. The Claimant was also accused of having sent aggressive written communications to Mr Lindahl (following Ms Mansell having brought those emails to Mr Fowles' attention). The letter included the following:

"*You are required to co-operate and may be required to attend the workplace for investigative interviews of disciplinary hearings.*"

68. The letter also suspended the Claimant, pending the completion of that disciplinary process, once his then-current sick note expired. The Claimant's

employment terminated before that fit note expired, so the suspension never, in fact, took effect.

The Claimant complained about the process followed by the Respondent – 8 February 2023

69. Two days later, on 8 February 2023, the Claimant raised a grievance (the **Second C Grievance**), in response to the further disciplinary process.

70. Mr Fowles responded to the Second C Grievance on 9 February 2023, by letter.

71. When the Claimant asked about an investigation report, Mr Fowles emailed him on 9 February 2023, informing him that the disciplinary manager would "*have witness statements from all those in the room so will use this as evidence along with anything else you want to provide*".

72. Gerardo Chiariello, Head of Control, sent the Claimant a letter inviting him to a disciplinary hearing. While the copy of the letter in the Bundle is dated 9 February 2023, Mr Chiariello's evidence is that it was sent on 13 February 2023. The letter noted that:

    a) The purpose of the meeting was to consider the allegations of gross misconduct against the Claimant (and described them);

    b) Enclosed was "*a copy of the evidence gathered. These are witness statements from Alun Fowles, Mark Southon and Zoe Mansell who were all in attendance during the meeting on 02/03/23.*" Mr Chiariello's evidence to the Tribunal was that his letter had also enclosed the statement from Mr Dwain Jones;

    c) "*We do not intend to call any witnesses to the hearing*

    You have the right to ask relevant witnesses to attend the hearing who you believe are able to provide evidence relating to the allegation outlined above. If you intend to do this please let me have their names as soon as possible and no later than 16/02/23.

    If there are any further documents that you wish to be considered at the hearing, please provide copies as soon as possible…

    You will have the opportunity to put your case at the hearing"; and

    d) It enclosed "*a summary of the findings of the investigation*", though the parties agree that there was no investigation report or any such summary produced or enclosed.

73. The Claimant wrote to Mr Chiariello on 13 February 2023. The Claimant's email:

    a) Noted that he was on sick leave due to work-related stress;

    b) Saying that an OH referral should be made for him prior to the holding of the disciplinary hearing, for OH advice on how to proceed with that hearing;

c) Raised concerns about the investigatory process; and

d) Accused Mr Chiariello of partiality, and requested that an alternative disciplinary manager be appointed,

to which Mr Chirariello responded, on 15 February 2023 that:

e) The Claimant had been signed off work since October 2022 but had, in that time, attended a disciplinary hearing, an appeal hearing and the Back to Work Meeting, and requested that the Claimant provide him with a doctor's letter or other medical documentation evidencing that he could not attend the scheduled disciplinary hearing;

f) Observing that five OH appointments had been scheduled which he averred the Claimant had not attended;

g) Noting that he was happy to make reasonable adjustments if required, but deviation from the hearing timescale required medical proof;

h) Stating that the Claimant's concerns about the investigation would be addressed during the disciplinary hearing if the Claimant raised them then; and

i) Denying any partiality.

74. The Claimant then declined to attend that disciplinary hearing, saying, on 15 February 2023:

"*I will not attend any flawed hearing as my mental health would always come first, I have made peace with whatever outcome of this flawed disciplinary process and if it cannot be accommodated for a new hearing manager as a reasonable adjustment, then I have nothing else to say*".

75. The Claimant provided Mr Chiariello with a letter from June 2021 from a Consultant Clinical Psychologist, referring to his GAD and some agoraphobic symptoms. In the "*Prognosis & return to work plan*" section, the doctor noted that the Claimant was at work.

76. Complaint 6 contends that the Respondent failed to undertake an investigation and/or produce an investigation report in relation to the allegations of threatening behaviour pertaining to the Back to Work Meeting. The Respondent agrees that it did not produce an investigation report, but disputes that it did not investigate those allegations. It is clear to the Tribunal that the Respondent did begin an investigation into those allegations by taking the witness statements listed above. That investigation was not complete as an account had not been taken from the Claimant, as the Respondent anticipated that that would be provided at the disciplinary hearing.

<u>The disciplinary hearing; dismissal – 23 February 2023</u>

77. The meeting proceeded in the Claimant's absence on 23 February 2023, and he was found by Mr Chiariello to have committed gross misconduct. Mr Chiariello

determined that the Claimant would be summarily dismissed as a result, and he sent a draft letter explaining his conclusions and the reasons for them to the Respondent's HR team, so that they could include the relevant information about the Claimant's accrued but untaken annual leave.

78. While that letter was with HR for review, the Claimant on 24 February 2023 forwarded to Mr Chiariello an email the Claimant had received from Maximus Access to Work Mental Health Support Service. The email welcomed the Claimant to the scheme, and informed him that he would receive 9 months of bespoke vocational rehabilitation support. The Claimant avers that Mr Chiariello:

    a) Disregarded this email prior to sending the dismissal letter; and

    b) Failed to consider the positive impact access to work could provide to the Claimant before determining to dismiss him.

79. The Respondent, and Mr Chiariello, deny this. Mr Chiariello says that:

    a) He received this email after he had sent the draft dismissal letter to HR, but before he had received the information from them and so before he had sent that letter out; and

    b) He considered the email, but it did not either offer an explanation for the Claimant's behaviour in the Back to Work Meeting, or provide a reason why the Claimant was unable to attend the disciplinary hearing, and therefore he decided that there was no need to revisit the decision he had already taken on 23 February in light of that email.

80. The Tribunal accepted Mr Chiariello's evidence on this point. He was convincing in his explanation and it made sense given the email did not either explain the Claimant's health condition or its relevance to his behaviour in the Back to Work Meeting (which evidence Mr Chiariello had sought from the Claimant), nor why the Claimant was unable to attend the disciplinary hearing. Indeed, upon questioning, the Claimant's position was that he considered this email to be a reason for Mr Chiariello to reconsider the sanction of dismissal, not because it should influence the Respondent's assessment of his (as he puts it) entirely innocuous behaviour in the Back to Work Meeting, but rather that he would have so benefited from the assistance Maximus was willing to provide him while he was employed by the Respondent that the Respondent should have settled upon a different sanction so as to enable the Claimant to benefit from that tailored therapy. That was a different position to the case put by the Claimant – that Mr Chiariello had disregarded the email from an earlier date than it had been sent to him (or indeed, the Claimant) for a reason *related to* his disability. In any event, we found that Mr Chiariello did not disregard that email.

81. Mr Chiariello wrote to the Claimant on 27 February 2023 to inform him that:

    a) The allegations of gross misconduct were made out;

b) "*As you were on a final written warning, this was such a serious breach of your obligations*"; and

c) That, as per the Respondent's Disciplinary Policy and Procedure, this was gross misconduct and he was therefore summarily dismissed.

82. By Complaint 9 the Claimant avers that he was dismissed "*in the absence of an impartial investigation as per Network Rail policy*". The Tribunal finds that there is nothing in the Respondent's disciplinary policy that explicitly requires an impartial investigation.

The Claimant appeals the decision to dismiss him – 27 February 2023 onwards

83. On 27 February 2023 the Claimant appealed against the decision to dismiss him, in a very lengthy email. The Claimant was informed that Chris Perkins, London Rail and Integration Manager, had been appointed to hear his appeal.

84. On 14 March 2023 the Claimant telephoned Mr Perkins. In that telephone call the Claimant informed Mr Perkins that he would be bringing a complaint of discrimination under the Equality Act. The Claimant made that complaint in writing on 17 March 2023 to Mr Perkins and Claudia Sylvan, and requested that five specific questions be addressed (1. Does the appeal manager have ability to make an OH referral, and if so, why wasn't it done? 2. Why did Mr Fowles not act on Mr Lindahl's recommendations? 3. Why did Mr Fowles consider the Claimant's challenge of disability discrimination to be "insulting content"? 4. Why did Mr Chiariello not ask for the Claimant's consent to contact OH for a recent updated referral? 5. Why were no mitigating factors mentioned in the disciplinary outcome letter from Mr Chiariello?).

85. Early conciliation began on 18 March 2023.

86. The appeal hearing took place on 24 March 2023, chaired by Mr Perkins. The Claimant attended that meeting, accompanied by a trade union representative, Dave Barnes. In that meeting:

a) Mr Barnes expressed the view that the Claimant's behaviour should properly be regarded as a result of his anxiety, and that he was of the view that the Claimant's anxiety influences how he articulates himself. Mr Barnes said that the Claimant's behaviour should be treated as a health, rather than as a disciplinary issue; and

b) The Claimant:

(i) Spoke at length about his concerns with the process that the Respondent had followed, and about what occurred in the Back to Work Meeting.

(ii) Said that (in notes which the Claimant confirmed to the Tribunal were accurate):

i. "*he [i.e., the Claimant] did put his version of events to the disciplinary hearing manager in writing*"; and

ii. "*Due to process not being followed, [the Claimant] said he felt as though he had no choice but to not attend the disciplinary hearing*"; and

(iii) Was critical when Mr Perkins tried to interrupt him, and the notes record that the Claimant continued to set out his concerns after the point, and at a later point said that he had nothing else to add to the points he had made in the meeting and those made in his 17 March 2023 email; and

c) Mr Perkins said that he regarded the extent of the investigation of what took place in the Back to Work Meeting was a key point, and he told the Claimant that he would speak to Mr Dwain Jones as part of his investigation, in addition to what the Claimant said.

87. The Claimant says, as part of Complaint 2, that he had difficulty in properly and fully engaging in the disciplinary process and/or the disciplinary hearing, and that that difficulty arose from his GAD. The Respondent disputes that contention.

88. The Tribunal finds that the reason he did not engage with the disciplinary process was his perception of its procedural flaws. We conclude this for the following reasons:

a) The contemporaneous documents from the Claimant state that that was the reason for his not engaging with the disciplinary process (notably his email on 15 February 2023, and the notes of the appeal meeting with Mr Perkins);

b) The Tribunal explored with the Claimant whether he agreed with the contention of Mr Barnes, in the appeal hearing, that the Claimant's problematic behaviour displayed in the Back to Work Meeting was a consequence of his GAD, as we wondered whether this might indicate behavioural consequences of his GAD which could have inhibited his participation in the disciplinary process. However, the Claimant was adamant that there was nothing wrong with his behaviour in the Back to Work Meeting, and that he disagreed with Mr Barnes' assessment;

c) The Claimant was asked by Mr Chiariello to provide medical evidence to explain why he could not attend the disciplinary hearing, and the Claimant provided a letter from his Consultant Clinical Psychologist in June 2021 which observed that he was attending work. That letter was both significantly earlier than the disciplinary process concerned, and did not comment on the Claimant's difficulty in engaging with a disciplinary process; and

d) The Claimant has offered no evidence for any alleged difficulty, and indeed, the contemporaneous evidence and his oral evidence to the Tribunal was that he decided not to engage with that process until the appeal stage because of his view on its flaws and the fact that Mr Chiariello would not consider the matter fairly or impartially.

89. Early conciliation ended on 29 March 2023.

90. On 6 April 2023 Mr Perkins wrote to the Claimant to confirm that his appeal was unsuccessful, and that the decision to summarily dismiss him was upheld. It was a detailed five-page letter, though it did not address the five specific questions posed by the Claimant on 17 March 2023. Mr Perkins' covering email confirmed that he had interviewed Mr Dwain Jones, Mr Fowles and Mr Chiariello the previous Thursday. Attached to his email were the decision outcome letter and the minutes of the appeal hearing.

The Claimant presented a Claim Form to the Employment Tribunal – 13 April 2023

91. The Claimant presented a Claim Form to the Employment Tribunal commencing this claim on 13 April 2023.

92. A Preliminary Hearing for case management took place on 28 November 2023, and the Respondent was permitted to amend its Grounds of Resistance in light of the clarification of the Claimant's complaints. The Respondent provided that amended Grounds of Resistance on 9 January 2024.

93. The Respondent confirmed that it accepts that the Claimant was disabled at the relevant times on 5 February 2024 (and in this hearing the Claimant confirmed that the impairments he relies upon for his disability complaints are GAD and agoraphobia, and the Respondent confirmed that it accepts that the Claimant had those disabilities at the relevant times).

94. A Preliminary Hearing for case management took place on 10 May 2024 before EJ Hart.

95. The Claimant confirmed by email on 19 August 2024 that he is no longer asserting that he suffered personal injury as a result of the discrimination he avers the Respondent subjected him to.

Are there any inferences of discrimination that should properly be drawn from considering the totality of the primary facts?

96. The Tribunal is conscious that, as observed by Neill LJ in *King*, direct evidence of discrimination is unusual, but it does not mean that discrimination has not occurred. The Tribunal therefore needs to consider, in light of the totality of the primary facts (those agreed by the parties together with those found by the Tribunal), whether it is appropriate for us to infer from those facts, and all the circumstances of the case, that there was a disability ground for the acts the Claimant complains of (*Qureshi*). The significant number of allegations of procedural impropriety made by the Claimant in this case, and his belief that the Respondent was pursuing a plan to dismiss him which pre-dated the Back to Work Meeting, makes this exercise all the more important. We are also reminded that any inferences drawn must be based on evidence.

97. We concluded that no such inferences should be drawn.

98. There were aspects of the factual matrix, and other circumstances of the case (namely, aspects of oral evidence before the Tribunal), that gave us initial cause for concern:

    a) Much of the Respondent's case for dismissing the Claimant rested on the allegations of misconduct pertaining to the Back to Work Meeting, but initially neither Mr Fowles nor Mr Southon had regarded the Claimant's behaviour in that meeting towards Ms Mansell as sufficiently problematic to warrant intervention. It was only after the meeting, following representations from Ms Mansell, that they each reflected and designated the Claimant's conduct as bullying and harassment.

    b) While Mr Fowles sought evidence from Ms Mansell in relation to the disciplinary allegations relating to the Back to Work Meeting, he did not seek evidence from Mr Lindahl as to his perception of the tone and volume of the emails the Claimant sent to him. Mr Fowles in evidence to the Tribunal said that he did not require Mr Lindahl's reaction to the emails in order to assess the Claimant's behaviour in sending them against the Respondent's Bullying & Harassment policy, but it was not clear why in that case Ms Mansell's witness statement had been taken in relation to the allegations concerning her.

    c) Mr Fowles, who has relied on the emails from the Claimant to Mr Lindahl as part of his reason for commencing a disciplinary process against the Claimant that ultimately resulted in the Claimant's dismissal, was not copied in on those emails. Mr Fowles was provided with those emails by Ms Mansell. Moreover, those emails, while critical of the Respondent's process, do not appear to the Tribunal to be appropriately characterised as aggressive or insulting.

    d) The Respondent admits that there were some errors in the procedure it followed with the Claimant, including:

        (i) A confusion around the correct internal 'case number' used by the Respondent. Some of the Respondent's correspondence used one case number, some of it used another, prompting suspicion on the part of the Claimant; and

        (ii) The errors with the 29 September 2022 letter, referring as it did to the Claimant being suspended "*pending investigation*", when Mr Butcher's investigation had, by that time, concluded, and no further investigation was taking place.

    e) That any link between the Claimant's behaviour and his disabilities was not sufficiently understood by the Respondent.

99. However, it is important to put these matters into their proper context when considering whether they should form the basis for an inference of discrimination:

a) It is perfectly reasonable and appropriate for managers to reflect on different perspectives brought to them by other members of staff. As the Respondent's Bullying & Harassment policy acknowledges, "*What is acceptable to one person may not be acceptable to another and everyone has the right to decide what is acceptable to them and for this to be respected by others*" (paragraph 1.2, bullet point 2). The fact that Mr Fowles and Mr Southon reflected on Ms Mansell's feelings and reaction to the Claimant's behaviour does not automatically mean that they were improperly influenced or that conscious or subconscious discrimination based on disability played a part in that. From the evidence provided by Mr Fowles and Mr Southon, we consider that 'the thing that changed' was their reflection on the impact of the Claimant's conduct on Ms Mansell anticipated by the policy, rather than any discriminatory influence.

b) Mr Fowles had presided over the Back to Work Meeting that had resulted in distress on the part of Ms Mansell, and Mr Fowles felt (and feels) guilt about that. He considers he should have stopped the meeting and protected Ms Mansell, and that he failed to do so. In that situation, Mr Fowles' desire to capture Ms Mansell's evidence of how she said the Claimant's behaviour affected her is understandable. He only came to reflect on that meeting as involving conduct from the Claimant that went 'over the line' into misconduct once Ms Mansell had berated him for allowing the Claimant to treat her in the way she (and subsequently Mr Fowles, and Mr Southon) says he did. By contrast he says that he did not need Mr Lindahl's evidence of how Mr Lindahl regarded the Claimant's correspondence in order to characterise that correspondence as breaching the Respondent's Bullying & Harassment policy.

c) It is clear that, whether the Claimant appreciated or intended it or not, he patronised and belittled the role played by Ms Mansell in the Back to Work Meeting (when he told her to get back to her typing so he could talk to Mr Fowles). In that context Ms Mansell might be more inclined to read the Claimant's emails to Mr Lindahl (into which she was copied) as insulting and aggressive, and similarly Mr Fowles might be more likely to read them in that way in light of Ms Mansell's discussion with him about how she felt about the meeting.

d) The Claimant is inclined to regard the Respondent's behaviour as part of the execution of what he calls a "business decision" to get rid of him regardless of the Claimant's behaviour. He considers the disciplinary allegations as having been generated so as to get him out of the Respondent's employment. While we might expect that the Respondent would not leave evidence of any such plan 'out in the open', the Claimant's allegations are equally explicable by a series of unfortunate HR-related errors, which caused distress and concern for a person who suffers from

GAD. We considered the latter explanation more plausible and likely on the basis of the evidence presented to us.

e) The Respondent was looking to understand the nature of the Claimant's impairments and their impact on his work and his working relationships when it referred him to OH five times in the period November to December 2022. While the Claimant experienced difficulties engaging with two of those appointments due to the impact of his medication on his sleeping patterns, and with another two due to his poor mobile telephone signal in his home, the Claimant plainly could have done more to engage with OH (e.g., make arrangements to avoid the second-repeated instance of his sleeping through an appointment, or to hold the OH referral via an online platform such as Teams rather than by telephone), and he was obstructive when the fifth call seemed viable. It is plain to us that the Respondent *did* want OH input, and that Mr Chiariello, before determining whether to proceed with the disciplinary hearing in February 2023 requested that the Claimant provide him with relevant medical evidence for the points the Claimant was making, the Claimant was at best non-cooperative with that process in November 2022 to February 2023. If the Respondent did not understand the impact of the Claimant's disabilities on his behaviour, and if this was potentially relevant to the misconduct allegations he faced, it was not for want of trying on its part. The Respondent had taken the understandable business decision not to offer further OH referrals in light of the Claimant's non-engagement until his return to work after the fifth failed attempt.

100. We consider that, looking at the evidence and all the circumstances of the case, it is not appropriate to draw any inferences that there were the averred discriminatory grounds for the acts complained of. There are credible non-discriminatory explanations for each of the points of initial concern set out above.

Law

Contemporaneous documentary evidence versus human memory

101. Leggatt J (as he then was) made some observations on the reliability of evidence based on recollection in the case of *Gestmin SGPS SA v Credit Suisse (UK) Ltd and another* [2013] EWHC 3560 (Comm). He noted that:

a) human memory is subjected to powerful biases, and "*such processes are largely unconscious and that the strength, vividness and apparent authenticity of memories is not a reliable measure of their truth*"; and

b) "*In the light of these considerations, the best approach for a judge to adopt in the trial of a commercial case is, in my view, to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts. This does not mean*

that oral testimony serves no useful purpose – though its utility is often disproportionate to its length. But its value lies largely, as I see it, in the opportunity which cross-examination affords to subject the documentary record to critical scrutiny and to gauge the personality, motivations and working practices of a witness, rather than in testimony of what the witness recalls of particular conversations and events. Above all, it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth".

Unfair dismissal: The law on dismissal for misconduct

102. The protection of employees from unfair dismissal is set out in section 94 of the Employment Rights Act 1996 (the **1996 Act**).

103. Section 98(1) sets out that that an employer may only dismiss an employee if it has a **fair reason** (or principal reason) for that dismissal:

"*In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show:*

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held."

104. The Supreme Court in *Royal Mail Group Ltd v Jhuti* [2020] ICR 731 held that:

"*In searching for the reason for a dismissal... courts need generally look no further than at the reasons given by the appointed decision-maker*".

105. Subsection (2) of section 98 identifies "*the conduct of the employee*" as a reason falling within subsection 98(1).

106. In the context of a dismissal for "conduct", the employer must have reasonably believed the employee guilty of misconduct at the time of the decision to dismiss them. The seminal decision of *British Home Stores Ltd v Burchell* 1980 ICR 303, EAT, as refined in subsequent authorities such as *Singh v DHL Services Ltd* EAT 0462/12 and *Boys and Girls Welfare Society v McDonald* [1996] IRLR 129, set out three questions to be answered when assessing the fairness of a conduct dismissal:

a) Did the employer believe the employee guilty of misconduct at the date of dismissal?

b) Did the employer have reasonable grounds for that belief? and

c) At the stage when the employer's belief was formed, had it carried out as much investigation into the matter as was reasonable in the circumstances?

107. The fact that the *Burchell* decision directs that three questions are to be examined by the tribunal does not mean that each needs to be 'passed' in order for the dismissal to be fair. The tribunal must ask itself whether the dismissal fell within the range of reasonable responses (*McDonald*).

108. Subsection (4) of section 98 provides:

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

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

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

109. In other words, when the employer has been shown to have a potentially fair reason for dismissal, a further enquiry follows as to whether, looked at 'in the round', the dismissal was fair or unfair.

110. The test in section 98(4) is an objective one. When the employment tribunal considers the fairness of the dismissal, it must assess the fairness of what the employer in fact did, and not substitute its decision as to what was the right course for that employer to have adopted (*British Leyland v Swift* [1981] IRLR 91).

111. In many (though not all) cases, there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, another quite reasonably take another. The correct approach is for the tribunal to focus on the particular circumstances of each case and determine whether the decision to dismiss fell within the band of reasonable responses which a reasonable employer might have adopted in light of those circumstances. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair (*Iceland Frozen Foods Ltd v Jones* [1982] IRLR 439).

112. Therefore, once all three of the *Burchell* questions are answered, a further question must be answered by the Tribunal – whether the respondent otherwise acted in a procedurally fair manner, and whether, in light of its genuine and reasonable belief in the employee's misconduct, the sanction of dismissal was within the range of reasonable responses open to it on an objective basis (*Graham v Secretary of State for Work and Pensions (Jobcentre Plus)* [2012] EWCA Civ 903).

113. Section 98(4) (i.e., the fourth question referred to above) requires a tribunal to "*consider the fairness of procedural issues together with the reason for the dismissal and decide whether, in all the circumstances, the employer had acted reasonably in treating it as a sufficient reason to dismiss*" (*Taylor v OCS Group* [2006] EWCA Civ 702).

114. Consequently, not every procedural defect will render a dismissal unfair. As Mr Justice Langstaff (President) stated, in the EAT case of *Sharkey v Lloyds Bank Plc* UKEATS/0005/15/SM:

"*It will almost inevitably be the case that in any alleged unfair dismissal a Claimant will be able to identify a flaw, small or large, in the employer's process. It will be and is for the Tribunal to evaluate whether that is so significant as to amount to unfairness*".

115. Moreover, the assessment of the fairness of the dismissal required by section 98(4) takes account of the particular factual circumstances, including the "*size and resources of the employer*".

116. Summarising the above, this means that the tribunal must answer five questions when considering the fairness of a dismissal for misconduct:

a) Did the respondent genuinely believe the claimant guilty of misconduct at the date of dismissal?

b) Did the respondent have reasonable grounds for that belief?

c) When the respondent's belief was formed, had it carried out as much investigation into the matter as was reasonable in the circumstances?

d) Did the respondent otherwise act in a procedurally fair manner? and

e) Was the respondent's response – of dismissing the claimant – within the range of reasonable responses available to it?

117. When determining the reasonableness of a dismissal for misconduct, the tribunal must guard against substituting its own decision for that of the employer. The relevant examination is not what the tribunal would have done in the employer's shoes, but rather whether what the employer in fact did was within the range of reasonable responses which a reasonable employer might have adopted (*Foley v Post Office* [2000] IRLR 827).

<u>Unfair dismissal: Investigating misconduct</u>

118. While the range of reasonable responses test applies as much to the question of whether an investigation into suspected misconduct was reasonable in all the circumstances as it does to other procedural and substantive aspects of the decision to dismiss a person from his employment for a conduct reason (*Sainsbury's Supermarkets Ltd v Hitt* [2003] IRLR 23), that does not mean that the test is assessed multiple times to separate aspects of the same dismissal. The Court of Appeal in *Taylor* held that considering procedural fairness is part-and-parcel of considering whether the employer's decision to dismiss was within the range of reasonable responses.

119. The degree of thoroughness required for an investigation to be reasonable, that is, according to the EAT in the case of *ILEA v Gravett* [1998] IRLR 497:

"*infinitely variable; at one extreme there will be cases where the employee is virtually caught in the act and at the other there will be situations where the issue is one of pure inference. As the scale moves towards the latter end, so the amount of inquiry and investigation which may be required, including questioning of the employee, is likely to increase. At some stage, the employer will need to face the employee with the information which he has. That may be during an investigation prior to a decision that there is sufficient evidence upon which to form a view or it may be at the initial disciplinary hearing*".

120. The requisite degree of thoroughness of an investigation is assessed not only by reference to the weight of initial evidence of what the employee is alleged to have done (e.g., whether they have been "*caught in the act*"), but also by the gravity of the charges and their potential effect upon the employee (*A v B* [2003] IRLR 405).

121. The opportunity for an employee to put his side of matters is an important part of a reasonable investigation, and part of the basic requirements of natural justice (*Khanum v Mid Glamorgan Area Health Authority* [1978] IRLR 215) – but it is a principle rather than an absolute rule. Whether an investigation without the employee's input is in fact fair will depend on the circumstances of the case, "*But it must be very much the exception rather than the rule that the hearing could proceed without the employee attending*" (Ansell HHJ in *William Hicks & Partners (A Firm) v Nadal* UKEAT/0164/05/ZT).

122. There is usually a range of acceptable ways in which an investigation could be carried out. It is not necessary, in order for an investigation to be a reasonable one, for the employer to have kept an investigation log or to have produced an investigation report, though this may be done by an experienced investigator in a large organisation (*Now Motor Retailing Ltd v Mulvihill* UKEAT/0052/15).

123. The ACAS Code does not mandate that the employee who is the subject of the misconduct allegation be interviewed, and there is a range of practice (*Mulvihill at paragraph 39*).

124. The Court of Appeal in *Hussain v Elonex Plc* [1999] IRLR 420 observed that:

"*There is no universal requirement of natural justice or general principle of law that an employee must be shown in all cases copies of witness statements obtained by an employer about the employee's conduct. It is a matter of what is fair and reasonable in each case… there is a failure of natural justice if the essence of the case on which the employee's conduct is contained in statements which have not been disclosed to him, and where he has not otherwise been informed at the hearing, or orally or in other manner, of the nature of the case against him.*"

125. There is no absolute requirement at law for an investigatory hearing to be held separately to the disciplinary hearing, provided that the investigation is as full as the circumstances reasonably require (*Sunshine Hotel Ltd t/a Palm Court Hotel v Goddard* UKEAT/0154/19).

126. If there has been a procedural flaw at the 'decision to dismiss' stage, but that stage is followed by an appeal brought by the employee against that decision, it is the entirety of the employer's process (together with its reasons for dismissal) that should be assessed when considering whether the employer acted fairly in dismissing the employee (*Taylor*).

Appropriate response to a grievance raised in the course of a disciplinary process

127. Paragraph 46 of the ACAS Code provides that:

"*Where an employee raises a grievance during a disciplinary process the disciplinary process may be temporarily suspended in order to deal with the grievance. Where the grievance and disciplinary cases are related it may be appropriate to deal with both issues concurrently.*"

128. However, the appropriate response will be fact and circumstance-dependent, as shown by the EAT's rejection, in the case of *Jinadu v Docklands Buses Limited* UKEAT/0434/14/LA, of the suggestion made by the claimant that the respondents were obliged to put the disciplinary investigation on hold until they had they had dealt with her grievances.

129. ACAS guidance suggests that circumstances when it may be appropriate for a disciplinary process to be suspended until a grievance has been resolved may include:

a) Where the grievance relates to a conflict of interest that the manager holding the disciplinary meeting is alleged to have;

b) Bias is alleged in the conduct of the disciplinary meeting;

c) Management have been selective in the evidence they have supplied to the manager holding the meeting; and

d) There is possible discrimination.

Unfair dismissal: Misconduct dismissal when the employee has not attended the disciplinary hearing

130. There is no requirement in the 1996 Act for an employee to have been present at a disciplinary hearing in order for it to be fair, and the ACAS Code states that:

"*Where an employee is persistently unable or unwilling to attend a disciplinary meeting without good cause the employer should make a decision on the evidence available.*" (paragraph 25)

131. There are examples of cases where the appeal tribunal or courts have upheld the fairness of dismissals where the affected employees did not attend their disciplinary hearings (e.g., *Bashir v Sheffield Teaching Hospital NHS Foundation Trust* UKEAT/0448/09/ZT, where the claimants "*chose not to engage with the process at all*"). The question is whether the employer's decision was within the range of reasonable responses open to it, and ACAS guidance suggests that the

following factors may be relevant, as to whether proceeding in the employee's absence is fair:

a) Any rules the organisation has for dealing with failure to attend disciplinary meetings;

b) The seriousness of the disciplinary issue under consideration;

c) The employee's disciplinary record (including current warnings), general work record, work experience, position and length of service;

d) Medical opinion on whether the employee is fit to attend the meeting; and

e) How similar cases have been dealt with in the past.

Discrimination arising from disability

132. Section 15 of the 2010 Act provides that:

"*(1) A person (A) discriminates against a disabled person (B) if-*

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

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

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

133. This, as Simler J summarised in *Secretary of State for Justice v Dunn* UKEAT/0234/16/DM, means there are four elements that must be made out in order for a claim for discrimination arising from disability to succeed:

a) There must be unfavourable treatment;

b) There must be something that arises in consequence of the claimant's disability;

c) The unfavourable treatment must be because of (i.e., caused by) the something that arises in consequence of the disability; and

d) The alleged discriminator cannot show that the unfavourable treatment is a proportionate means of achieving a legitimate aim.

134. In addition, as per subsection (2), the respondent must have known, or should reasonably have known, that the claimant had the disability.

Harassment related to disability

135. 'Harassment' is defined in section 26, which includes, in subsection (1):

"*A person (A) harasses another (B) if—*
(a) A engages in unwanted conduct related to a relevant protected characteristic, and
(b) the conduct has the purpose or effect of—

(i) violating B's dignity, or
(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B."

136. In other words, there are three elements to this test:

a) There has been unwanted conduct;

b) That has the proscribed purpose or effect; and

c) That unwanted conduct relates to a relevant protected characteristic.

137. As for "*purpose or effect*", the requisite threshold is high – intending to or causing upset or offence is insufficient – the language used (e.g., "*violating*" and "*degrading*") points to purposes/effects which are serious and marked (*Betsi Cadwaladr University Health Board v Hughes* EAT 0179/13). "*Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment*" (Elias LJ in *Land Registry v Grant* [2011] ICR 1390)).

138. Section 26(1)(b)(ii) refers to the creation of an "*environment*". The meaning of the word "*environment*" was considered by HHJ Eady QC in *Pemberton v Inwood* UKEAT/0072/16/BA, in which she cited with approval the formulation in *Weeks v Newham College of Further Education* UKEAT/0630/11 that equated "*environment*" to a "*state of affairs*".

139. Section 26(4) requires that:

"*In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken account-*

(a) the perception of B;

(b) the other circumstances of the case; and

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

140. This is entails both subjective (the perception of B) and objective (whether it is reasonable for the conduct to have that effect) assessments of the effect of the conduct, as well as consideration of all the other circumstances of the case. The objective assessment is particular to the claimant – was it reasonable for the conduct to have the effect on that particular claimant?

141. The EHRC Code (at paragraph 7.18) indicates that the "*other circumstances of the case*" could be matters such as the personal circumstances of the claimant, such as their health, mental capacity, cultural norms, and previous experience of harassment, as well as the environment in which the conduct takes place.

<u>Inferring discrimination</u>

142. As has been acknowledged in the case law:

"*it is unusual to find direct evidence of racial discrimination. Few employers will be prepared to admit such discrimination even to themselves. In some cases the*

discrimination will not be ill-intentioned but merely based on an assumption that 'he or she would not have fitted in'."

Neill LJ in the Court of Appeal decision in *King v Great Britain-China Centre* [1992] ICR 516)

143. As described by the EAT in *Qureshi v Victoria University of Manchester* [2001] ICR 863, in relation to disputed facts in discrimination cases:

"*The function of the tribunal in relation to that evidence was therefore twofold: first, to establish what the facts were on the various incidents alleged by* [the claimant] *and, secondly, whether the tribunal might legitimately infer from all those facts, as well as from all the other circumstances of the case, that there was a racial ground for the acts of discrimination complained of.*"

144. This approach was confirmed in *Igen*: after the primary facts have been determined, tribunals must consider what, if any, inferences are appropriate to draw from those primary facts seen in their totality (*Qureshi*), so as to determine what facts it is proper to infer. After the primary facts have been determined and the consideration of whether it is proper to draw any inferences of secondary facts, the question of whether the claimant has established a prima facie case of discrimination can then be answered. If a *prima facie* case has been made out in relation to any of the complaints, the burden of proof then shifts to the respondent to demonstrate that the respondent's actions were in no sense whatsoever on the protected ground.

145. Inferences must have a basis in the facts agreed by the parties or found by the tribunal. "*A mere intuitive hunch, for example, that there has been unlawful discrimination is insufficient without facts being found to support that conclusion*" (*Chapman v Simon* [1994] IRLR 124).

146. Drawing inferences must be based on evidence, not by making use (without requiring evidence) of a verbal formula such as 'institutional discrimination' or 'stereotyping' (*Stockton on Tees BC v Aylott* [2010] ICR 1278).

147. Examples of matters that may be relevant to the consideration of whether inferences of discrimination can properly be drawn may include:

a) Whether there is a non-discriminatory explanation for the behaviour, and if so, the weight of that explanation;

b) The tribunal's assessment of the parties and their witnesses, and of the alleged discriminatory 'actor', including of their credibility, reliability and motives, tested by reference to objective facts and documents, possible motives and the overall probabilities;

c) The relationship between the parties (e.g., if it is one of hostility and there is nothing else to explain it);

d) If the respondent behaved badly towards the claimant, whether that is consistent with the respondent's treatment of other people who do not

have the claimant's protected characteristic (the 'generally-badly-behaving employer');

e) Whether there is a pattern of behaviour;

f) If there is a surprising lack of documents in evidence on a matter;

g) If there has been adherence to or a failure to follow applicable policies and procedures; and

h) Whether the claimant's response to the behaviour is reasonable. An justified sense of grievance cannot amount to a detriment for the purposes of less favourable treatment.

The *Polkey* principle

148. The House of Lords in *Polkey v AE Dayton Services Ltd* [1988] ICR 142 held that, in determining whether or not a dismissal is fair, the tribunal cannot consider whether a lapse in procedure in fact made any difference, i.e., whether the employee would have been fairly dismissed in any event. However, this question is relevant to an assessment of *remedy* for any unfair dismissal.

149. If the tribunal concludes that there was a real chance that the employee could and would have been fairly dismissed by the employer notwithstanding the unfairness identified, the tribunal may conclude that it is just and equitable to make a reduction to the compensatory award that might otherwise be awarded to the claimant, having regard to the loss sustained by the claimant from the dismissal.

150. Her Honour Judge Eady QC (as she then was) described the approaches that could be taken by an employment tribunal The EAT in *Williams v Amey Services Ltd* UKEAT/0287/14. In summary:

a) The tribunal has a very broad discretion;

b) The guiding principle what is "*just and equitable*" in the particular case-and-fact-specific circumstances. It is not a "*range of reasonable responses of a reasonable employer*" test, it is a determination by the tribunal as to what justice and equity require in the particular circumstances of that employer and the facts in the case; and

c) The tribunal could take one of three approaches:

(i) Confine the compensatory loss to the additional period of time which the tribunal concludes would have been taken by the employer if it had followed a fair process;

(ii) Reduce the compensatory award on a percentage basis to reflect the chance that the outcome would have been the same had a fair process been followed; or

(iii) Applying a combination of those two approaches, i.e., confine the compensatory award to the additional period of time during which a fair process would have been followed, and allowing for a percentage chance that the outcome would have been the same.

Contributory conduct

151. Blameworthy or culpable conduct on the part of the claimant can reduce any award made to them if their dismissal is unfair – specifically, this can reduce either or both of the basic and compensatory awards.

152. As for the basic award, section 122(2) of the 1996 Act sets out that:

"*Where the tribunal considers that any conduct of the complainant before the dismissal… was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly.*"

153. In the case of the compensatory award, section 123(6) of the 1996 Act provides that:

"*Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.*"

Application to the claims here

Admission of, and weight to be given to Mr Perkins' written evidence

154. The Tribunal finds that Mr Perkins' statement is clearly relevant to some of the issues in the claim, and we admit his statement on that basis.

155. As to the weight that should be given to it, one relevant consideration is how much of that statement is disputed. Upon enquiry of the Claimant, it became clear that significant parts of Mr Perkins' statement are not disputed. Of the 25 paragraphs in his statement, the Claimant agreed with or did not dispute most of them, and a few more he largely agreed with.

156. From the Tribunal's perspective, there were three paragraphs of Mr Perkins' statement with which the Claimant disagreed in a way that is significant to the complaints and issues:

a) Paragraphs 5.4 and 5.6 of that statement, which concerned the Claimant's behaviour in the appeal hearing; and

b) Paragraph 5.7, where Mr Perkins said that, in his closing comments the Claimant's trade union representative, Mr Barnes, "*suggested that Mr Jones' statement did not reflect what had happened at the meeting because he had expected the Claimant to exhibit rude behaviour when he faced challenges*".

157. The Claimant said that the weight that should be given to the disputed content should be very little, in light of the fact that Mr Perkins had not presented himself for cross-examination or Tribunal questions.

158. Mr Holloway for the Respondent said that:

a) Mr Perkins' evidence pertains to relevant matters, and so it is right for it to be considered by the Tribunal; and

b) It recognises that the Tribunal is likely to be able to attribute less weight to Mr Perkins' statement given he has not been cross-examined, but the Tribunal should still ascribe the weight to it that we consider appropriate.

159. The Claimant confirmed that the notes in the Bundle of the appeal hearing with Mr Perkins are accurate. In fact, the Claimant enthusiastically and wholeheartedly agreed that those notes were accurate. In light of that fact, and the fact that the significant points of dispute in Mr Perkins' statement relate to what was said in that meeting, the Tribunal considered it:

a) Appropriate to admit the statement into evidence due to its relevance to Complaint 1;

b) Appropriate for the Tribunal to accept as correct Mr Perkins' evidence agreed to or not disputed by the Claimant; and

c) Judge the appropriate weight to be ascribed to the disputed relevant paragraphs (the three listed above) based on the consistency or otherwise of that content with the notes of the appeal hearing. In the event, we have concluded that we have relied on the agreed upon notes of the appeal hearing, rather than Mr Perkins' characterisation of parts of that appeal hearing, given that characterisation is disputed by the Claimant and Mr Perkins did not present himself for cross-examination or Tribunal questions.

<u>Complaint 1: Unfair dismissal</u>

What was the reason or principal reason for dismissal? (Issue 1.1)

160. The Respondent says it dismissed the Claimant for the sole reason of his conduct. While the Claimant has said that that reason was a sham, and the Respondent dismissed him because it took the business decision to do so (he has made no argument nor offered any evidence that he was dismissed because of sickness absence, which is part of what is averred in Complaint 2), the Tribunal accepts the Respondent's explanation that it genuinely believed the Claimant guilty of misconduct, relating to three instances of conduct:

a) The Incident from 9 September 2022, which had resulted in the final written warning;

b) The Claimant's behaviour in the Back to Work Meeting on 2 February 2023; and

c) The Claimant's behaviour in:

(i) Continually emailing Mr Lindahl after being told that it was the end of the process, and after him saying that he would not reply to any further emails; and

(ii) The content of those emails, which were described by the Respondent as "*aggressive due to [the Claimant's] insulting content in [his] email*".

If the reason was misconduct, were there reasonable grounds for believing that the Claimant had committed the misconduct? (Issue 1.2.1)

161. There were three allegations of misconduct that contributed to the decision to dismiss the Claimant for conduct:

a) The allegation that the Claimant was in breach of the Respondent's Bullying and Harassment policy by what he said to Ms Arnold at the time of the Incident (**Allegation 1**);

b) The allegation that the Claimant displayed unacceptable behaviour in the Back to Work Meeting in further breach of the Respondent's Bullying and Harassment policy, specifically by:

(i) His tone and attitude towards Ms Mansell; and

(ii) Saying to Ms Mansell that she seemed "*touchy*", and that when she tried to speak to him the Claimant said "*no Zoe you just keep typing*", which violated Ms Mansell's dignity and created a very hostile environment, and left her feeling humiliated

(**Allegation 2**); and

c) The allegation that the Claimant continually emailed Mr Lindahl after the end of the disciplinary process pertaining to the Incident, with the Claimant's responses being aggressive and insulting, also in breach of the Respondent's Bullying and Harassment policy (**Allegation 3**). When we sought clarification from the Respondent as to where examples of these aggressive and insulting emails were, we were taken to the first of two emails from the Claimant to Mr Lindahl on 24 January 2023 that appear in the Bundle (i.e., the one where the Claimant said "*I know your role within this process, it was a complete shambles*").

162. The Tribunal finds that:

a) The Respondent did have reasonable grounds for believing that the Claimant had committed the misconduct alleged in Allegation 1, as he admitted that behaviour;

b) On the balance of probabilities the Respondent had reasonable grounds for believing that the Claimant had committed the misconduct alleged in Allegation 2. Our reasons for this conclusion are that:

(i) Three of the five attendees gave fairly consistent accounts about this behaviour;

(ii) The Claimant agrees that he said the specific comments alleged though he denies the tone and attitude alleged; and

(iii) Mr Dwain Jones' statement, while a challenge to the Respondent's characterisation of the meeting, is very short and lacks detail. Its reference to the Claimant behaving in "*his usual manner*" alludes to the Claimant having displayed behaviour that is typical of him, though different to most other people, which we consider could support a finding of the tone and attitude alleged; and

c) The Respondent did not have reasonable grounds for believing that the Claimant had committed the misconduct that comprised Allegation 3. The only evidence that the Tribunal was taken to by the Respondent was the earlier of the Claimant's two emails to Mr Lindahl on 24 January 2023. The Claimant was evidently upset, and he expressed his view of the process that had been followed bluntly, labelling it "*a complete shambles*", but the Tribunal does not read this as aggressive or insulting. It is critical, which an employee is entitled to be when they consider that an employer had not adhered to appropriate procedures, but it does not come across as aggressive or insulting, and this is consistent with Mr Lindahl's evidence to the Tribunal that he did not find this, or the other email the Claimant sent that day, to be so. Mr Fowles rightly told the Tribunal that he did not think that Mr Lindahl's view on the matter (not canvassed at the time) was determinative – he thought it was sufficient that he, Mr Fowles, regarded them as offensive or insulting. The Tribunal agrees that the Respondent could stand back and consider the emails objectively, and it was entitled to act on aggressive and insulting emails even if the recipient did not find them to be so – however, the more 'borderline' the judgment call, the more relevant Mr Lindahl's view would be to informing the making of that judgement call. Mr Lindahl's view was not sought in this instance, and we think that Mr Fowles and Ms Mansell did not view that email objectively, but rather in light of their assessment of the Claimant's behaviour in the Back to Work Meeting. Mr Lindahl's perspective of how those emails should properly be characterised could have counterbalanced their view. The Tribunal does not consider that the Respondent had reasonable grounds for believing that the Claimant's saying that the process had been "a complete shambles" was aggressive or insulting.

At the time when the belief was formed, had the Respondent carried out a reasonable investigation? (Issue 1.2.2)

163. In respect of Allegation 1, yes, as the conduct was admitted by the Claimant.

164. In respect of Allegations 2 and 3, the Tribunal does not consider that the Respondent had carried out a reasonable investigation at the time of Mr Chiariello's decision in February 2023.

a) In respect of Allegation 2, the significant missing piece of the investigation was the evidence from the Claimant, which was recognised by both Respondent Mr Fowles and Mr Chiariello, each of whom expected the Claimant to provide his evidence to Mr Chiariello at the disciplinary hearing.

b) In respect of Allegation 3, as we have said above, the significant gap in the investigation was the perspective on emails that were not evidently aggressive or offensive of the recipient – Mr Lindahl. Mr Lindahl would have read those emails in light of his interactions with the Claimant in the appeal hearing. Ms Mansell was cc-ed on those emails, and she had a perspective to offer (and, indeed, she did offer it orally to Mr Fowles), but this was dealt with by her witness statement at the time. The Claimant could also offer a perspective, based on the tone of his interactions with Mr Lindahl.

165. We acknowledge the efforts that Mr Chiariello went to in order to encourage the Claimant to attend the disciplinary hearing he held, but when the Claimant refused to attend, rather than simply proceeding without the Claimant's input Mr Chiariello could, and should, have sought written representations from the Claimant. If the Claimant still refused to provide it, Mr Chiariello could then have fairly proceeded to determine whether Allegations 2 and 3 were made out without him, if he also obtained Mr Lindahl's perspective on Allegation 3. Absent taking those further steps, we do not regard the investigation as reasonable. This is for the following reasons:

a) The Respondent's Disciplinary policy anticipates that an investigation could involve speaking to the employee for their version of events, and obtaining statements from available witnesses; and

b) The *Gravett* case notes that the degree of thoroughness required for an investigation to be reasonable is fact-dependent, but the less clear-cut the factual position, and the more serious the potential effect upon the employee, the more thorough that investigation needs to be in order to be reasonable (*A v B*). In this case, the Claimant was facing possible dismissal, and Allegation 2 in particular was very dependent on the recollections of the people who attended the meeting, given there was no note-taker present. Mr Chiariello did not have a consistent account from the statements that Mr Fowles had gathered, as Mr Dwain Jones' evidence contradicted that of Ms Mansell, Mr Fowles and Mr Southon. The Claimant's account would have added real value to the decision-making, as Mr Chiariello acknowledged when he tried to persuade the Claimant to attend. An alternative way to take account of the Claimant's recollection

and interpretation would be to seek his written representations or witness statement.

166. The Claimant has criticised the fact that no investigation report had been produced in connection with the second disciplinary process. We do not consider the absence of such a report significant (and this is consistent with *Mulvihill*, and the silence of the ACAS Code on this subject). As Mr Fowles observed, the witness statements communicated the recollections of those who had provided them, and there were no contemporaneous documents that shed any light on whether Allegation 2 was made out. Allegation 3 was entirely dependent on construing the relevant emails, and so again, an investigation report would add nothing. Indeed, an investigation report could have risked summarising or taking the reader away from the key evidence – the witness statements in relation to Allegation 2, and the emails in relation to Allegation 3.

167. The Claimant has also said that the eliding of the investigation process and the disciplinary hearing process that Mr Fowles determined was appropriate as regards the Claimant's evidence was unreasonable. We disagree. There is no requirement at law for an investigatory hearing to be held separately from the disciplinary hearing, provided that the investigation is as full as the circumstances reasonably require (*Sunshine Hotel*). It was perfectly possible for the Claimant's evidence to be gathered and considered as part of the disciplinary hearing – albeit that that was not in fact what happened.

168. While we have said that we do not consider that the Respondent had carried out a reasonable investigation at the disciplinary hearing stage, as the *Taylor* case makes plain, it is possible for that to be remedied at the appeal hearing stage. While parts of Mr Perkins' witness statement are disputed by the Claimant, we do not need to rely upon it to assess this. The notes of the appeal hearing, which the Claimant enthusiastically admitted were accurate, make it plain that the Claimant was given a full opportunity to provide his perspective on the Allegations, and he did do so. However, the further investigation carried out by Mr Perkins (encompassing both gathering the Claimant's evidence and discussions between Mr Perkins and each of Mr Dwain Jones, Mr Fowles and Mr Southon) did not extend to seeking Mr Lindahl's view of the emails that were the subject of Allegation 3. While we find that Mr Perkins' appeal process remedied part of the defect of the investigation relied upon by Mr Chiariello at the disciplinary hearing stage, it did not correct the defect of failing to obtain Mr Lindahl's perspective on Allegation 3.

169. The Tribunal finds therefore that when Mr Perkins confirmed the conclusion initially reached by Mr Chiariello on all three Allegations, a reasonable investigation had been conducted in relation to Allegations 1 and 2, but not in relation to Allegation 3.

Did the Respondent otherwise act in a procedurally fair manner? (Issue 1.2.3)

170. The Claimant has made a number of criticisms of other, non-investigatory, aspects of the Respondent's process, and we will deal with those first:

a) The relabelling of the disciplinary allegations against him as part of the first disciplinary process concerning the Incident from "*misconduct*" to "*gross misconduct*"

(i) We have no concern with this. Mr Butcher's initial invitation to the Claimant to attend an investigatory meeting made it plain that Allegation 1 could result in the Claimant's dismissal with or without notice. While to the initiated that is the same as referring to possible sanctions of dismissal on notice (which could be for misconduct or gross misconduct) or summary dismissal for gross misconduct, that may not be plain to those unaccustomed to these processes – but the key point is that the Claimant was aware that one possible outcome of the process was that he could be dismissed without notice. (In fact, at the conclusion of that first disciplinary process he was not dismissed with or without notice, but given a Final Written Warning and relocated to a different place of work.)

b) The suspension process, and the confusion around the conclusion of the investigation into the Incident

(i) It is regrettable that the Respondent did not take more care in its correspondence to ensure consistent case numbers, and to remove the errors from the suspension letter about a prior meeting and the continuing investigation. This would be unsettling for anyone, but more so for the Claimant, who suffers from GAD (of which the Respondent knew).

(ii) It is more regrettable that Mr Southon was insufficiently prepared for that meeting to ask some basic questions which the Claimant posed to him, and which could and should have been anticipated. (The Tribunal can see those questions from the Q&A summary that was later produced to answer them.) Again, while Mr Southon did not personally know of the Claimant's GAD, the Respondent did, and the inability of the Respondent to provide answers in that meeting to some relatively straightforward questions about next steps reduced the Claimant's confidence in the process still further. To be suspended from work in the context of a disciplinary process where he had been warned that dismissal was a possible outcome was very serious, and the process should have been treated with greater care by the Respondent – but these errors were corrected in time by:

i. Mr Southon's obtaining answers to the Claimant's questions and providing them to him;

ii. the Respondent generally clarifying that Mr Butcher's investigation report had concluded the investigation;

iii. the Respondent agreeing that no meeting had been held between the Claimant and Mr Steve Jones the previous day; and

iv. the Respondent providing the Claimant with the correct case number and acknowledging its error in using a different case number on some of the documents sent to him.

c) The severity of the sanction for the Claimant's behaviour in relation to the Incident

(i) The Tribunal does not consider the Final Written Warning and the disciplinary relocation to be inappropriate outcomes for the conduct the Claimant displayed in relation to Allegation 1. It was very serious misconduct to treat Ms Arnold in the way that he did. The Respondent reduced the sanction it would otherwise have applied to him in light of his health and the fact that the Claimant did not have his medication there. We are satisfied that this was an appropriate course of action.

(ii) The Claimant has also objected to the fact that the Final Written Warning was in place for 24 months rather than the more typical 12 months. This in fact made no difference whatsoever, as the Back to Work Meeting and the emails that formed the basis for Allegation 3 occurred within 12 months of the issuance of that Final Written Warning in any event.

d) Mr Chiariello's decision to proceed to the disciplinary hearing in the Claimant's absence

(i) As noted above, we are critical of Mr Chiariello's failure to seek written representations from the Claimant before proceeding to hold the disciplinary hearing, but we consider Mr Chiariello took all reasonable steps to establish whether the Claimant was fit to attend the disciplinary hearing.

(ii) What is plain from the correspondence is that the reason the Claimant did not attend that meeting was because of his decision not to, in light of what he regarded as the Respondent's flawed process. We disagree that the Respondent's process was, at that point in time, sufficiently flawed to have justified this stance. It was only after the Claimant made the fact that he would not attend clear that it became appropriate, and necessary for a fair investigation to be carried out, for Mr Chiariello to seek the Claimant's views on Allegations 2 and 3 in writing.

e) Mr Chiariello's im/partiality

(i) The Claimant criticises Mr Chiariello as not being "impartial" on two bases:

i. That Mr Chiariello did not recognise the Respondent's process at that point in time – in not holding a separate investigatory meeting with the Claimant, in not producing an investigation report, in relation to the errors in the suspension letter – as flawed; and

ii. That the way in which Mr Chiariello's former career ended made him an inappropriate person to determine the Claimant's case.

(ii) We consider neither of these criticisms to be well-founded.

i. As noted above, it was acceptable to gather and consider the Claimant's evidence on Allegations 2 and 3 in the disciplinary hearing.

ii. There was no need to produce a separate investigation report, and in a situation where there were a small number of short witness statements and two emails, a report risked misleading the reader when the actual evidence was relatively brief.

iii. The suspension letter errors were unsettling and regrettable, but they had been clarified by this point.

iv. The way Mr Chiariello's former career ended did not affect his partiality in this matter. He had not been involved in the Back to Work Meeting, and did not have personal relationships with any of the people involved in Allegations 2 and 3. He was a member of the management team, as was Mr Fowles and Mr Lindahl, but that would be the case for any disciplinary manager.

(iii) The Tribunal does note that in the letter inviting the Claimant to the disciplinary hearing dated 9 February 2023 that Mr Chiariello wrote that "*We do not intend to call any witnesses to the hearing*". This "*we*" is clearly a reference to Management, and it indicates a possible bias in favour of the management case for the disciplinary allegations to be made out, but equally could just reflect poor expression. As we have already noted that Mr Perkins' appeal hearing corrected the errors in the disciplinary hearing vis-à-vis Allegation 2, this concern has no bearing on the ultimate fairness of the Claimant's dismissal.

f) The relevance and status of the Claimant's grievances

(i) The Claimant has made much of the fact that he had raised two grievances – the First C Grievance on 16 September 2022, and the Second C Grievance on 8 February 2023 - and he was not satisfied that either had been adequately dealt with before the decision to dismiss him was taken.

(ii) The Respondent says that:

i. The Claimant was told on 20 October 2022 that: "*The grievance you submitted against Helen was reviewed, considered and dealt with as part of the disciplinary investigation and so will not be progressed separately. You should explain anything to do with this grievance to the Hearing Manager and it will form part of any decision made.*" The Claimant attended a meeting with Mr Butcher, and did discuss the circumstances surrounding his grievance then.

ii. The First C Grievance effectively sought to put the Claimant's behaviour in context, and was considered as part of the determination of the appropriate sanction for Allegation 1, resulting in a Final Written Warning

and a relocation of the Claimant's place of work, instead of a higher sanction that could have been warranted for gross misconduct.

iii. The Second C Grievance was not formally dealt with, because it was closely linked to the disciplinary process. In any event, Mr Fowles responded to that grievance on 9 February 2023. Of the 19 points raised by the Claimant in the Second C Grievance, Mr Fowles concluded there were no grounds for further investigation, and the remaining two related to the First C Grievance, and Mr Fowles asked the Claimant for further information on those in light of Mr Lindahl's recommendations, which were due to be followed up by Mr Fowles after the completion of the disciplinary process.

(iii) The Tribunal considers that the First C Grievance was dealt with as part of the disciplinary process relating to Allegation 1. None of the Claimant's concerns in the Second C Grievance raised any concern that went to the propriety of Mr Chiariello proceeding with the disciplinary hearing scheduled for 23 February 2023. Many of the points could have been raised with Mr Chiariello in the disciplinary hearing had the Claimant attended, and were raised by the Claimant in the appeal hearing before Mr Perkins. In any event the Claimant had a fulsome opportunity to make the points he wished to make to Mr Perkins at that hearing, and so any defect with the prior process was corrected at that point. As observed in the case of *Jinadu*, there is no automatic requirement for a disciplinary process to be suspended to first complete a grievance process. We find that the failure to do that here in relation to the Second C Grievance did not detract from the disciplinary process the Respondent followed.

171. Moving on to the further points relating to the fairness of the procedure considered by the Tribunal:

a) The failure of Mr Perkins to provide the Claimant with notes of his discussions with Mr Dwain Jones, Mr Fowles and Mr Chiariello

(i) This was not a point raised by the Claimant, but the Tribunal can see that Mr Perkins had further discussion with Mr Dwain Jones, Mr Fowles and Mr Chiariello, and it appears that notes were not taken of those discussions (as those were not included in the Bundle). Each had already provided a witness statement, and each of those witness statements had been shared with the Claimant. Mr Perkins thoroughly reasoned his conclusions in the appeal outcome letter, and there is no suggestion that any of those persons said anything inconsistent with their witness statements in those discussions. In light of this, the Tribunal is not concerned that there was any failure of natural justice, and we do not consider Mr Perkins' approach to be a flaw in the procedure (although, of course, it would have been preferable for transparency if notes had been taken and shared). We

consider this approach consistent with the decision of the Court of appeal in *Elonex*.

b) The relevance of the Claimant's state of health

(i) The notes of the appeal hearing include a long passage, early on in that meeting, from the Claimant's trade union representative, Mr Barnes, where Mr Barnes raises concerns about the impact of the Claimant's state of health on his behaviour. Mr Barnes questions whether the Respondent should have followed a disciplinary procedure at all, rather than dealing with the issues arising from Allegations 2 and 3 as a health issue. The Tribunal explored this with the Claimant.

(ii) The Claimant said that he did not agree with Mr Barnes about this, that he recognised that Mr Barnes was advocating on his behalf, but that his position (i.e., the Claimant's position) was that he *did* say the things he admitted saying to Ms Mansell in the Back to Work Meeting, and that he did interrupt others in that meeting, including Ms Mansell. The Claimant said that the characterisation of his behaviour as "unacceptable", and as breaching the Respondent's Bullying and Harassment policy, was not correct. He said that there was nothing wrong with his behaviour, or his emails, and that he was told at the outset of the meeting that he would get a chance to talk, and he was frustrated at attempts to stop him doing so. The interruptions of and comments directed at Ms Mansell were because she provoked him, and that with hindsight he believed that the Respondent had set-up the situation so that Ms Mansell would goad him so as to provoke a reaction and provide justification for dismissing him.

(iii) Mr Perkins did consider the points made by Mr Barnes, and responded to them in the appeal outcome letter. He concluded that there was no evidence of any lack of managerial or medical support that would make it appropriate for the Allegations to be treated as a health matter rather than a disciplinary one.

(iv) The Tribunal looked at the medical evidence provided by the Claimant, and none of it indicates that interrupting or aggressive behaviour is attributable to or related to the Claimant's GAD or agoraphobia. While we suspected that the GAD might be connected to it, there is no evidence before us that supported that finding. Consequently, we do not consider that the Claimant's health altered the process that should have been followed with him beyond the numerous adjustments the Respondent made.

Was dismissal within the reasonable range of responses? (Issue 1.2.4)

172. Our conclusions that:

a) Allegation 3 was not supported by the evidence before the Respondent. The Respondent did not, at either the disciplinary or appeal hearing

stages, have reasonable grounds for the belief in the Claimant's misconduct on the basis of Allegation 3;

b) The flaws with the investigation of Allegation 3 at the disciplinary hearing stage were not rectified at the appeal hearing stage; and

c) Mr Chiariello relied on the combination of Allegations 1, 2 and 3 as providing the basis for a conclusion that the Claimant had committed gross misconduct, and that summary dismissal was the appropriate sanction, and Mr Perkins upheld these conclusions,

affect the breadth of the range of reasonable responses open to the Respondent.

173. The Respondent had already taken account of the Claimant's conduct in relation to the Incident in issuing him with a Final Written Warning, and so, in the absence of Allegation 3 having a reasonable basis, the additional conduct that it was reasonable for the Respondent to take into account was Allegation 2. That was serious misconduct, involving belittling and demeaning a colleague – behaviours clearly inconsistent with the Respondent's Bullying and Harassment policy.

174. The question then arises as to whether dismissal was within the range of reasonable responses open to the Respondent (*Iceland Frozen Foods*).

175. The minority of the Tribunal consider that dismissal was still within the range of reasonable responses open to the Respondent the Claimant had not heeded the Final Written Warning issued to him in connection with Allegation 1. He was "on notice" that further conduct of that ilk could result in his summary dismissal, and there was no evidence that he presented to the Respondent that that behaviour was connected to his health conditions (he insisted that the behaviour was reasonable). In those circumstances the Respondent was entitled to dismiss him.

176. The majority of the Tribunal considers that the Claimant's behaviour that formed the basis of Allegation 2 could not be significant enough to justify the Claimant's dismissal in light of the fact that neither of Mr Fowles nor Mr Southon appreciated its significance until after Ms Mansell pointed it out to them. While, as the Bullying and Harassment policy rightly notes, different people can reach difference conclusions about what is, and what is not, acceptable to them, the Claimant's behaviour in the Back to Work Meeting was evidently not sufficiently serious to justify the extreme sanction of his dismissal if neither of the two experienced managers in that meeting realised it was at the time. The majority of the Tribunal therefore concludes that dismissal was not within the range of reasonable responses open to the Respondent.

Polkey

177. We consider that there is a real and very substantial chance that the Claimant could and would have been fairly dismissed by the Respondent if it had not taken account of Allegation 3.

178. The evidence was clear that the primary allegations that were of concern to Mr Fowles were Allegations 1 and 2 – that, at a time when the Claimant was the subject of a final written warning for behaviour that breached the Respondent's Bullying and Harassment policy, the Claimant acted in a way that Mr Fowles considered breached that policy. Allegation 3 was an "extra" allegation, which Mr Fowles considered supplemented the case for disciplinary action provided by Allegations 1 and 2. That was clear from his oral evidence ("*The meeting was focused on getting you back to work… Things changed from the behaviour within the meeting – moved to my belief that there was a case to answer at a disciplinary hearing*") and his witness statement ("*I concluded that a disciplinary process was required in respect of the Claimant's behaviour at the [Back to Work] Meeting*"), and from the letter sent to the Claimant commencing that disciplinary process (which gives the Back to Work Meeting as the context for that decision, before the specific allegations – which included Allegation 3 – were set out). This conclusion is consistent with the fact that witness statements gathered by Mr Fowles centred upon Allegation 2, and no investigation was undertaken regarding Allegation 3, despite the apparently offending email not clearly being aggressive and insulting, as was alleged.

179. This, the Tribunal finds, was also the perspective of Ms Mansell, who had seen the correspondence between the Claimant and Mr Lindahl before the Back to Work Meeting but had not brought that to Mr Fowles' attention until after the Back to Work Meeting. Ms Mansell was not a decision-maker as to whether disciplinary proceedings should be commenced, or on the conclusion of that process, but she was influential on Mr Fowles.

180. Mr Chiariello, the decision-maker, in his emails to the Claimant preceding the disciplinary hearing, was also focused on Allegation 2 in light of the final written warning in place in connection with Allegation 1. This is shown by his email of 15 February 2023, in which he wrote: "*The allegations stems from your conduct in a meeting on 02/02/23.*"

181. The appeal hearing minutes (which the Claimant confirmed were an accurate record of what was discussed) refer to Mr Perkins:

    a) Describing the "gap" in that the appeal hearing could deal with as being the Claimant's "*opportunity to provide his side of events* ***in relation to the incident on 02/02/2023***" (emphasis added); and

    b) Referring to Allegation 3 as "*less compelling*" when compared with Allegation 2.

182. The appeal outcome letter upheld Allegation 3, but there was a difference in the language used by Mr Perkins to describe the allegations, indicating a hierarchy between them. Mr Perkins said, in relation to Allegation 2: "I have found that, on the balance of probability, the alleged behaviour on 2 February did occur, and that it amounted to a further act of misconduct whilst you were on a Final Written Warning." As for Allegation 3, Mr Perkins wrote: "*I consider your behaviour on 24 January (in relation to the email exchange with Gunnar Lindahl) and on 2 February (in relation to the Recommendations Outcome meeting) to have breached the levels required*." We were not able to ask questions of Mr Perkins, but it does appear that he regarded Allegation 3 as amounting to a breach, but it was the breach represented by Allegation 2 that was the focus of why Mr Perkins upheld the decision to dismiss.

183. The counter-arguments to this evidence that the Respondent would have dismissed the Claimant in any event, without placing reliance on Allegation 3, is that neither Mr Chiariello's decision letter, nor Mr Perkins' appeal outcome letter, expressed clearly a distinction between the weight of Allegations 2 and 3 as to whether the misconduct found justified the sanction of dismissal. Neither clearly states whether it was appropriate to dismiss the Claimant on the basis of Allegations 1 and 2 alone.

184. For this reason, we do not consider that a 100% *Polkey* reduction is appropriate, because there is a chance – albeit one that we assess to be small - that the Claimant would not have been dismissed by Mr Chiariello, and/or that Mr Perkins would not have upheld that decision, in the absence of Allegation 3.

185. There is an inevitable degree of uncertainty (recognised and accepted by the case law) in settling on the appropriate size of any *Polkey*-type deduction. In this case we have concluded that an 80% *Polkey* reduction to any compensatory award made to the Claimant is just and equitable in light of our belief that there is a real and very substantial chance that the Respondent could and would have fairly dismissed the Claimant on the basis of the aggregate of Allegations 1 and 2 alone (and upheld that dismissal on appeal).

Contributory conduct

186. While the Tribunal has concluded that the Claimant's conduct was the reason for his dismissal, and so the potential to make a reduction to the award to the Claimant's basic and compensatory awards exists, we cannot conclude that it is just and equitable to make such an award.

187. We feel there is a distinct lack of evidence about the effects of the Claimant's GAD on his behaviour, with really only a letter from the Claimant's consultant psychologist from June 2021, which contains only a brief description of the effects the condition *was then having* on the Claimant in the workplace. This evidence is not recent, and it does not address the question we would wish to understand –

which is whether the Claimant's GAD could cause him to display the conduct the Claimant was found by Mr Chiariello to have displayed in the Back to Work Meeting. The focus of the June 2021 description was a generic consideration of how the Claimant was affected by his GAD in the workplace – not how the GAD might affect his behaviours in a pressured situation such as the Back to Work Meeting.

188. Without more evidence about the effects of his GAD, we cannot be confident that the problematic behaviours the Claimant displayed which led to Allegation 2 are not attributable to that impairment. We therefore cannot conclude that it is "*just and equitable*" to make any reduction to his basic or compensatory awards on the basis of his behaviour, and so we make no such reduction.

Complaint 2: Discrimination arising from disability

189. It is accepted that the Respondent dismissed the Claimant, that that was unfavourable treatment, and that the Respondent knew the Claimant was disabled by reason of GAD and agoraphobia at the time of his dismissal (issues 3.1 and 3.6).

Did the Claimant's sickness absence arise in consequence of the GAD and/or agoraphobia? (Issue 3.2.1)

190. The Respondent did not dispute that it did.

Did the Claimant have difficulty in properly and fully engaging in the disciplinary process and/or disciplinary hearing? (Part of issue 3.2.2)

191. As noted in the Facts above, we find that the Claimant did not have difficulty in properly and fully engaging in the disciplinary process and/or disciplinary hearing – he chose not to do so because of his perception of the flaws with that process. This is supported by the fact that he participated in the disciplinary hearing in relation to the Incident, the appeal of the conclusion of that process, and the appeal hearing of the second disciplinary process, and he did so effectively.

If so, did that difficulty arise in consequence of his GAD? (Remainder of issue 3.2.2)

192. This is not relevant given our finding that the Claimant did not experience that difficulty.

Was the Claimant dismissed because of his sickness absence? (Part of issue 3.3)

193. No, as noted above, we find that the Claimant was dismissed because of his conduct.

194. Because of our answers to the above questions, Complaint 2 does not succeed.

Harassment related to disability (Complaint 3 to 12)

Complaint 3

Did Mr Southon on or around 29 September 2022 make a misleading statement to the Claimant when he said that there was an "external investigation taking place" and because of this there was a need to suspend him? (Issue 4.1.1)

195. As noted in the Facts above, we find that Mr Southon did not say that there was an external investigation taking place.

Was that unwanted conduct? (Issue 4.2)

196. If he had said this, it would have been unwanted conduct – the Claimant had participated in and seen the conclusions of Mr Butcher's report.

Did it relate to disability? (Issue 4.3)

197. Even if Mr Southon had said that there was an external investigation taking place (which we find he did not), we consider it would have been said out of ignorance as to the process which the Respondent had been following, in light of the Claimant's informing him that the internal investigation (conducted by Mr Butcher) had concluded.

198. Mr Southon's surprising evidence to the Tribunal was that he had not read the suspension letter he handed to the Claimant at this meeting (although he had been briefed by HR about its contents), and therefore he was unable to answer the Claimant's questions about next steps. This is why he took down the Claimant's questions and later sent the Claimant the answers to the questions which Mr Southon obtained from the HR team. If Mr Southon had referred to an external investigation taking place, we consider it would have been a knee jerk reaction to Mr Southon being caught without the requisite information.

199. We do not see any connection between this comment and the Claimant's disabilities, and the Claimant has neither argued nor made any case that it was.

200. In light of the above conclusions, Complaint 3 does not succeed.

Complaint 4

201. This was withdrawn by the Claimant on the second day of the hearing.

Complaint 5

Also on 18 January 2023, was Mr Fowles advised to address some welfare recommendations in Mr Lindhal's outcome letter? (Part of issue 4.1.3)

202. It is not disputed that Mr Lindahl made a number of recommendations in the letter concluding the Claimant's appeal against the disciplinary process that followed the Incident. The recommendations in that letter, of 18 January 2023, included that Mr Fowles, with HR support, was to review whether:

    a) More or different actions would have been appropriate in the months leading up to the Incident; and

    b) The post-Incident support provided to the Claimant was satisfactory.

Did he fail to do so? (Part of issue 4.1.3)

203. It is also not disputed that Mr Fowles failed to undertake that review, with the Respondent maintaining that what occurred in the Back to Work Meeting meant that a further disciplinary process needed to be completed before these welfare recommendations should be acted upon.

Was that unwanted conduct? (Issue 4.2)

204. Yes – the Claimant wanted those recommendations to be acted upon as soon as possible following Mr Lindahl having made them.

Did it relate to disability? (Issue 4.3)

205. We find that this failure did not relate to the Claimant's disabilities.

206. We find that Mr Fowles had clear intentions to act on Mr Lindahl's recommendations – as demonstrated by the holding of the Back to Work Meeting and Mr Fowles' determination for that meeting to result in forward-looking action items. Mr Fowles' evidence, which we accepted, was that he was so determined to ensure that the Back to Work Meeting resulted in a forward-looking plan based on Mr Lindahl's recommendations that he now considers he should have stopped the meeting at an earlier point so as to protect Ms Mansell from the Claimant's behaviour.

207. It is clear to the Tribunal that Mr Fowles' reasons for the unwanted conduct was that his intentions to act on Mr Lindahl's welfare recommendations were superseded by the allegations of misconduct arising out of that meeting.

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

208. No – Mr Fowles' purpose in pursuing the misconduct allegations was clearly to respond to Ms Mansell's distress, and having reflected himself on the acceptability of the Claimant's conduct and found it wanting. We find that Mr

Fowles' purpose was not to violate the Claimant's dignity, or create an intimating, hostile, degrading, humiliating or offensive environment for the Claimant.

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

209. We find that the distress caused to the Claimant was the second disciplinary process and his ultimate dismissal. We do not consider that the delay to Mr Fowles acting on Mr Lindal's welfare recommendations had this effect, and in any event we consider it would be unreasonable for it to do so, even given the Claimant's state of health, in light of:

    a) the seriousness of the allegations of further misconduct made against him; and

    b) the fact that they were made at a time when he was subject to a final written warning for behaviour he admitted.

210. Consequently, Complaint 5 fails – the behaviour did not relate to disability, it did not have the proscribed purpose or effect, and even if it did have that effect, it was not reasonable for it to do so.

<u>Complaint 6</u>

From 2 February 2023 onwards, did the Respondent fail to undertake an investigation and/or produce an investigation report in relation to the allegations of threatening behaviour (issue 4.1.4)?

211. We have found that the Respondent *did* undertake an investigation, albeit that that investigation was not completed until Mr Perkins' appeal hearing, because the Claimant's evidence was not heard until that time. This part of Complaint 6 does not succeed.

212. The Respondent agrees that an investigation report was not produced in relation to this.

Was that unwanted conduct? (Issue 4.2)

213. The Claimant did want an investigation report in relation to this alleged misconduct – this is evident from his 8 February 2023 email to Mr Fowles requesting one, as well as the terms of the Second C Grievance.

Did it relate to disability? (Issue 4.3)

214. It is clear that this did not relate to disability. Mr Fowles was of the view that there was no need for an investigation report to be produced, as it would simply repeat what the witnesses had said. While the Respondent's policy requires that "*The manager will keep a confidential written note of the investigation, together with*

any witness statements taken", there is no requirement for an investigation report to be produced by that policy. The Tribunal finds that it was:

a) Mr Fowles' belief in the sufficiency of that witness evidence; and

b) The fact that a report could do little more than repeat the witness statements taken by that point,

rather than the Claimant's disabilities, which meant that no investigation report was produced.

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

215. No, we consider that Mr Fowles' purpose was to efficiently pursue the conclusion of the disciplinary process, rather than to violate the Claimant's dignity, or create an intimidating, hostile, degrading, humiliating or offensive environment for him, that was the reason for there being no investigation report.

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

216. The Claimant was upset by the instigation of the disciplinary process, and by the failure to engage with him about the allegations prior to (as the Respondent anticipated) the disciplinary hearing, rather than the absence of an investigation report, that caused that upset. The Claimant's dignity was not violated by the absence of such a report, and nor did it create an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant.

217. Consequently, Complaint 6 does not succeed.

Complaint 7

From 2 February 2023 onwards, did Mr Fowles fail to allow the Claimant the opportunity to put forward an explanation of events prior to pursuing dismissal proceedings which led to grievance being produced? (Issue 4.1.5)

218. Yes – the Respondent does not dispute this, but says rather that the Claimant's opportunity to present his explanation was at the disciplinary hearing (which the Claimant chose not to attend).

Was that unwanted conduct? (Issue 4.2)

219. Yes, the Claimant raised the Second C Grievance on 8 February 2023 about what he regarded as a lack of investigation into the further alleged misconduct.

Did it relate to disability? (Issue 4.3)

220. The Tribunal finds that the unwanted conduct of not conducting an investigation with the Claimant in relation to the alleged further misconduct before the disciplinary hearing was because Mr Fowles did not consider that whether the Claimant had committed the misconduct in question required further investigation. Allegation 2 had been witnessed and was being attested to by two of the Respondent's managers, namely him and Mr Southon, and by Ms Mansell, and Allegation 3 was, Mr Fowles considered, evidenced by the Claimant's emails to Mr Lindahl. Mr Fowles considered that the Claimant's explanation could be provided and considered at the disciplinary hearing.

221. The Tribunal finds that Mr Fowles' for not investigating the Claimant's version of events prior to the disciplinary hearing was not because of his disability.

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

222. We find that failing to investigate the Claimant's perspective ahead of the disciplinary hearing did not have the purpose of violating the Claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant, but rather had the purpose of efficiently proceeding to the disciplinary hearing to determine the complaints.

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

223. We find it did not have that effect. It is clear that the Claimant was angry that his version of events was not being sought before a decision to proceed down a disciplinary process had been taken, but (conscious that we should not "*cheapen the significance of [the legislative] words*" – *Grant*) it did not violate the Claimant's dignity, or create a degrading, humiliating or offensive environment for the Claimant. What is clear is that Mr Fowles told the Claimant on 9 February 2023 that he would have the opportunity to set out his case and answer the allegations made against him at the disciplinary hearing, and Mr Chiariello actively encouraged the Claimant to attend the disciplinary hearing and express his position on the allegations (in two emails of 15 February 2023). The Respondent made it clear that the Claimant's participation in the process was desired.

224. As for the environment the decision created, it was already an environment of conflict and seriousness, given it related to disputed allegations of misconduct that could result in the Claimant's dismissal. The decision not to investigate the Claimant's side of things prior to the disciplinary hearing did not create an environment for the Claimant that was any more intimidating or hostile than the disciplinary process had already created.

225. We find that the treatment did not, in fact, have the prescribed effect, but if we are wrong about that and it did actually violate the Claimant's dignity or create the proscribed environment, we find that it was not reasonable for the treatment

to have done so. Section 26(4) requires that, when considering the whether the conduct has the proscribed effect, account must be taken of:

a) The perception of the Claimant;

b) The other circumstances of the case; and

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

226. Here, the perception of the Claimant was that he should have had his say before the decision was taken to proceed to a disciplinary hearing (and that had been his experience in the prior disciplinary process), but the other circumstances of the case that the Tribunal considers relevant are:

a) That neither the case law nor the ACAS Code requires this;

b) The Respondent's Disciplinary Policy does not require that its investigation is *completed* before the matter is progressed to a disciplinary hearing; and

c) That it was made clear to the Claimant by both Mr Fowles and Mr Chiariello that he would have the opportunity to put his perception of the allegations across before the disciplinary decision was taken.

227. We have considered the effect of the Claimant's disabilities in the "*other circumstances of the case*". We asked whether the evidence of those effects meant that it was reasonable for the conduct to have the proscribed effect on the Claimant, but there is no evidence to support this, and nor was this contended by the Claimant.

228. In the circumstances of the case, including the perception of the Claimant, we do not think it reasonable for the Respondent's conduct in not investigating the Claimant's side of events prior to the disciplinary hearing to have violated the Claimant's dignity or created an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant.

229. Consequently, Complaint 7 does not succeed.

Complaint 8

From 19 February 2023 onwards, did Mr Chiariello fail to apply mitigation by disregarding an email sent on the 24 February 2023 prior to Mr Chiariello sending his dismissal letter on 27 February 2023, without considering the positive impact access to work (Maximus UK) could provide for the Claimant? (Issue 4.1.6)

230. As set out in the Facts section above, we find that Mr Chiariello did not disregard the Maximus email, it simply did not, in his view, give him a reason to revisit the decisions either that the gross misconduct allegations were made out, or that the appropriate sanction was to summarily dismiss the Claimant, which he had already taken.

Was that unwanted conduct? (Issue 4.2)

231. Yes – the Claimant wanted Mr Chiariello not to dismiss him so that he could receive the tailored therapy.

Did it relate to disability? (Issue 4.3)

232. No, it didn't, it related to the fact that Mr Chiariello did not consider that the email gave him a reason to rethink the decisions he had already taken about whether the allegations were made out or the appropriate sanction.

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

233. No, Mr Chiariello was charged with carrying out a disciplinary process, and he did that. The Claimant has not persuaded us that Mr Chiariello's conduct had the proscribed purpose. Indeed, Mr Chiariello's evidence about his experience in his previous career making him determined to ensure that the Claimant was given the opportunity to 'have his say' was persuasive. We find that Mr Chiariello, who had had no previous involvement with the Claimant, did not have the proscribed purpose.

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

234. No – the Claimant was disappointed that the Maximus treatment did not take place, but we do not consider that it had the proscribed effect which, as the *Betsi Cadwaladr* and *Grant* cases remind us, involves language that should not be cheapened. Mr Chiariello's decision did not violate the Claimant's dignity, or create an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant.

235. Consequently, Complaint 8 is not made out.

Complaint 9

On 27 February 2023, did Mr Chiariello dismiss the Claimant from the effective date of 23 February 2023 whilst still on official work related stress leave until 25 February 2023 in the absence of an impartial investigation as per Network Rail policy? (Issue 4.1.7)

236. The Respondent agrees that:

a) Mr Chiariello dismissed the Claimant with effect from 23 February 2023; and

b) At that time the Claimant was on sick leave by reason of work-related stress.

237. The Respondent disagrees that there had been no impartial investigation at the time Mr Chiariello dismissed the Claimant, and disagrees with the assertion that its disciplinary policy was not followed.

238. As noted above, we find that there was no explicit requirement in the Respondent's policy for an impartial investigation to be carried out – though we note that we do not consider the part of the investigation carried out by Mr Fowles to be impartial. By the time that the investigation was completed by Mr Perkins we consider that the material had been scrutinised by an impartial person, who was required to complete the investigation because of the Claimant's non-engagement and Mr Chiariello's failure to interview Mr Dwain Jones. Mr Perkins completed the investigation that Mr Fowles had begun.

Was that unwanted conduct? (Issue 4.2)

239. Yes, the Claimant did not want to be dismissed.

Did it relate to disability? (Issue 4.3)

240. The Claimant's dismissal did not relate to disability – it related to his conduct. We do not doubt Mr Chiariello's evidence that the Claimant's conduct was the reason the Claimant was dismissed. Similarly, Mr Perkins' appeal outcome letter makes it clear that he upheld Mr Chiariello's decision because of the Claimant's conduct.

241. The Tribunal explored with the Claimant whether his behaviour could properly be regarded as related to his conduct, and he said:

a) In relation to Allegation 1, yes, because he did not have his medication with him, and that meant his reaction to Ms Arnold's provocation was less controlled than it would have been had he had his medication with him.

b) In relation to Allegations 2 and 3, the Claimant said that there was nothing wrong with his behaviour or his emails. He did not accept that there was any connection between the behaviours alleged in those allegations and his disabilities (he had his medication with him in the Back to Work Meeting when he also says he was provoked).

242. As Allegation 1, where the behaviour did relate to his disability, had resulted in a Final Written Warning and the Respondent took a decision not to dismiss him for that conduct taking account of the fact that he did not have his medication with him, the behaviour that led to his dismissal was that behind Allegations 2 and 3, which the Claimant says was not related to disability, because it did not happen in the way the Respondent has characterised it.

243. Therefore the Claimant's dismissal was not related to his disability.

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

244. We find the dismissal of the Claimant (and the upholding of that decision at the appeal stage) did not have the proscribed purpose. Mr Chiariello's evidence (which on this point we accept) was to respond to the Claimant's conduct – it was not to create an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant.

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

245. We find that the Claimant's dismissal did not violate his dignity. The evidence shows that the Claimant was treated with respect throughout the disciplinary process, and Mr Chiariello sought to obtain the Claimant's position on what had happened in the Back to Work Meeting. We do not think that the manner of his dismissal violated his dignity, and nor did the decision. The Claimant accepted that he had acted in the way that had been alleged in relation to Allegation 1 (he just disagreed that that should have resulted in a Final Written Warning). He knew that any further misconduct risked dismissal. While the decision to dismiss him was unwanted, we do not consider it violated his dignity.

246. The case law on the meaning of the term "environment" indicates that it a state of affairs (*Weeks*, *Pemberton*). The Respondent's summary dismissal of the Claimant did not create the proscribed environment – as the Claimant's working environment was ended summarily, and he did not continue to have a relationship of employment with the Respondent, and so it did not create an intimidating, hostile, degrading, humiliating or offensive state of affairs for the Claimant.

247. The dismissal of the Claimant did not have the proscribed effect.

248. Consequently, both because dismissal did not "relate to" disability, and because dismissal did not have the proscribed purpose or effect, Complaint 9 is not made out.

<u>Complaint 10</u>

On 6 April 2023, did the disciplinary appeal outcome fail to acknowledge or address five questions which had been sent to Chris Perkins and Claudia Sylvan on 17 March 2023? (Issue 4.1.8)

249. Yes, the disciplinary outcome letter did fail to address the five specific questions the Claimant had asked Mr Perkins to answer in his email on 17 March 2023.

Was that unwanted conduct? (Issue 4.2)

250. Yes.

Did it relate to disability? (Issue 4.3)

251. No. Mr Perkins wrote a lengthy letter to the Claimant, after carrying out some further investigation to that conducted by Mr Chiariello. He explained his conclusions thoroughly, as was necessary to conclude the appeal process. Mr Perkins' written witness statement does not say why he failed to answer the five questions the Claimant asked him to answer, but the Claimant has not put any case to us that Mr Perkins' reason for not doing so related to his disabilities, and we are inclined to think that he did not think it necessary to answer them given the large number of points of appeal which he was dealing with, having found it necessary to carry out some further investigation.

252. In light of the above finding, there is no need to consider purpose or effect. Complaint 10 cannot succeed if there is no relation between the failure to answer those questions and the Claimant's disabilities.

Complaint 11

From 9 February 2023 onwards, did Mr Fowles, and the Respondent generally, fail to deal with the Claimant's grievance which was raised on 8 February by email to Mr Fowles? (Issue 4.1.9)

253. No – Mr Fowles wrote to the Claimant on 9 February 2023 responding to the Second C Grievance.

254. Consequently, Complaint 11 fails.

Complaint 12

On 27 February 2023, did the Respondent, through Mr Chiariello, dismiss the Claimant prior to making enquiries as to whether he was fit enough to participate in the disciplinary process? (Issue 4.1.10)

255. It is clear that Mr Chiariello asked the Claimant to provide any evidence that he was not fit enough to participate in the disciplinary process on 15 February 2023. This Complaint 12 cannot therefore succeed.

Conclusions

256. Complaint 4 is dismissed following its withdrawal by the Claimant.

257. For all of the above reasons, the Tribunal is unanimous that the Claimant's complaints of:

    a) Discrimination arising from disability; and

    b) Harassment related to disability,

    do not succeed and are dismissed.

258. By a majority, the Tribunal finds that the Claimant was unfairly dismissed.

259. We unanimously conclude (in light of the majority finding that the Claimant was unfairly dismissed) that:

    a) it is appropriate to make a deduction to reflect the real and very substantial chance that the Claimant could and would have been fairly dismissed by the Respondent notwithstanding the unfairness with the decision we have identified. The Tribunal concludes that an 80% reduction to the Claimant's compensatory award is appropriate in those circumstances; and

    b) we are not satisfied that is "*just and equitable*" to make a reduction to either the Claimant's basic award or any compensatory award made to him for contributory conduct, though we find that his conduct did contribute to his dismissal. We decline to make an adjustment for the Claimant's contributory conduct.

Employment Judge Ramsden

Date 28 November 2024

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

List of liability-related issues from EJ Hart's Case Management Orders of 11 May 2024

1. Unfair dismissal (Complaint 1)

1.1 What was the reason or principal reason for dismissal? The respondent says the reason was conduct. The Claimant does not accept that this was the real reason for dismissal; he asserts the dismissal was a sham. The Tribunal will need to decide whether the respondent genuinely believed the claimant had committed misconduct.

1.2 If the reason was misconduct, did the respondent act reasonably or unreasonably in all the circumstances, including the respondent's size and administrative resources, in treating that as a sufficient reason to dismiss the claimant? The Tribunal's determination whether the dismissal was fair or unfair must be in accordance with equity and the substantial merits of the case. It will usually decide, in particular, whether:

1.2.1 there were reasonable grounds for that belief;

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

1.2.3 the respondent otherwise acted in a procedurally fair manner;

1.2.4 dismissal was within the range of reasonable responses.

2. Disability

2.1 The respondent accepts that the claimant was disabled at the time of the events the claim is about.

3. Discrimination arising from disability (Equality Act 2010 section 15) (Complaint 2)

3.1 Did the respondent treat the claimant unfavourably by:

3.1.1 Dismissing the Claimant

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

3.2.1 The claimant's sickness absence

3.2.2 Difficulty in properly and fully engaging in the disciplinary process and/or disciplinary hearing

3.3 Was the unfavourable treatment because of any of those things?

3.4 Was the treatment a proportionate means of achieving a legitimate aim? The respondent says that its aims were:

3.4.1 Ensuring the welfare of its employees

3.5 The Tribunal will decide in particular:

3.5.1 was the treatment an appropriate and reasonably necessary way to achieve those aims;

3.5.2 could something less discriminatory have been done instead;

3.5.3 how should the needs of the claimant and the respondent be balanced?

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

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

4.1 Did the respondent do the following things?

4.1.1 On or around 29 September 2022 Mark Southon made a misleading statement to the Claimant when he said that there was an “external investigation taking place” and because of this there was a need to suspend him (**Complaint 3**).

4.1.2 On 18 January 2023 Gunnar Lindhal failed to uphold the Claimant’s complaint (**Complaint 4**).

4.1.3 On 18 January 2023, Alun Fowles was advised to address some welfare recommendations in Mr Lindhal’s outcome letter, but failed to do so (**Complaint 5**).

4.1.4 From 2 February 2023 onwards, the Respondent failed to undertake an investigation and/or produce an investigation report in relation to the allegations of threatening behaviour (**Complaint 6**).

4.1.5 From 2 February 2023 onwards Alun Fowler failed to allow the claimant the opportunity to put forward an explanation of events prior to pursuing dismissal proceedings which lead to grievance being produced (**Complaint 7**).

4.1.6 From 19 February 2023 onwards, Gerardo Chiariello failed to apply mitigation by disregarding an email sent on the 24 February 2023 prior to him sending his dismissal letter on 27 February 2023, without considering the positive impact access to work (Maximus UK) could provide for the claimant (**Complaint 8**).

4.1.7 On 27 February 2023, Mr Gerardo Chiariello dismissing the claimant from the effective date of 23 February 2023 whilst still on official work related stress leave until 25 February 2023 in the absence of an impartial investigation as per Network Rail policy? (**Complaint 9**)

4.1.8 On 6 April 2023 in the disciplinary appeal outcome, fail to acknowledge or address five questions which had been sent to Chris Perkins and Claudia Sylvan on 17 March 2023 (**Complaint 10**).

4.1.9 From 9 February 2023 onwards Mr Fowles, and the Respondent generally, failed to deal with the Claimant's grievance which was raised on 8 February by email to Mr Fowles (**Complaint 11**)

4.1.10 On 27 February 2023, dismiss the Claimant (Gerardo Chiariello), prior to making enquiries as to whether he was fit enough to participate in the disciplinary process (**Complaint 12**).

4.2 If so, was that unwanted conduct?

4.3 Did it relate to disability?

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

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

5. Remedy issues to be determined at the liability hearing

Unfair dismissal

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

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

5.3 If the claimant was unfairly dismissed, did they cause or contribute to dismissal by blameworthy conduct?

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

Discrimination or victimisation

5.5 Is there a chance that the claimant's employment would have ended in any event? Should their compensation be reduced as a result?