EMPLOYMENT TRIBUNALS

Claimant: Ian James MacKendrick

Respondent: Frenkel Topping Limited

Heard at: **Manchester** **On:** **22 July–2 August 2024**

Before: **Employment Judge Leach; Dr B Tirohl; Mr B Rowan**

Representation:

Claimant: Mr Matovu (counsel)

Respondent: Mr Stone KC (counsel)

JUDGMENT

The Unanimous Judgment of the Tribunal is as follows:-

1. The claimant's complaint of unfair dismissal fails and is dismissed.

2. The claimant's complaints that the respondent failed in its duty to make reasonable adjustments (contrary to sections 20(3) and 20(5) Equality Act 2010 fail and are dismissed.

3. The claimant's complaints that the respondent discriminated against him contrary to section 15 Equality Act 2010 (because of something arising in consequence of the claimant's disability) fail and are dismissed.

4. The following complaints are dismissed on withdrawal by the claimant:-

    a. A complaint of breach of contract (wrongful dismissal).
    b. Complaints that the respondent made unauthorised deductions from the claimant's wages.
    c. Complaints that the respondent did not compensate the claimant for accrued untaken annual leave.

REASONS

Introduction

1 In these claims the claimant complains that the respondent committed various breaches of the Equality Act 2010 (protected characteristic, disability) and that he was unfairly dismissed by the respondent.

2 The respondent's position is that the claimant's dismissal was as a result of the claimant's misconduct at two work related social events and it was fair. It accepts that the claimant had at all relevant times a disability but it denies any discrimination or any failure to make reasonable adjustments.

3 Various other complaints were made in these claims but the parties have been able to reach agreement and those complaints have been dismissed on the claimant withdrawing them.

4 These 2 claims were issued against 11 individual respondents in addition to Frenkel Topping Limited (the remaining respondent and the claimant's former employer). Shortly before the final hearing began, complaints against the individual respondents were withdrawn by the claimant although each individual who had been named as a respondent, attended the Tribunal hearing to give evidence.

This hearing

5 The hearing was listed for 10 days. On day one we identified 3 issues to be discussed and determined before hearing the evidence:-

> 5.1 An application to amend the claims to include a complaint under Regulation 16 Working Time Regulations 1998 (WTR). This application was first made by the claimant's solicitors in correspondence dated 3 June 2024 but fell to be determined at this final hearing.
>
> 5.2 An application objecting to the admissibility of evidence in some paragraphs of statements from 2 of the respondent's witnesses.
>
> 5.3 An application objecting to the admissibility of a follow up report from an appointed expert.

6 Mr Matovu also told us that the list of issues (that had been agreed) was no longer agreed. Mr Matovu explained that the claimant's/his concerns were around the issues identified in the complaints under section 15 Equality Act 2010 (discrimination arising). Mr Matovu did not on day one provide alternative wording for consideration by Mr Stone or us but explained the concern about the List of

Issues was linked to the need for the expert evidence. In principle he understood that a supplementary report commenting on evidence that had not been disclosed when the expert report was first drafted, might be helpful. It would for example avoid the need for supplementary questions at the start of that expert witness evidence. However, if the issues in this case were correctly described in the list then the expert evidence would not be relevant.

7 On the morning of day 2 we received Mr Matovu's redrafted list of issues. We were also told that the WTR complaint had been resolved and the claimant did not therefore need to proceed with the amendment application. We were also told the remaining money claims had been resolved and we only needed to proceed to hear and decide the complaints under the Equality Act 2010 and the unfair dismissal complaint.

8 However time was then taken up on day 2 discussing the List of Issues and particularly the changes that the claimant wanted to see to the wording of the complaints under section 15 Equality Act 2010.

<u>The claimant's application for changes to the List of Issues.</u>

9 The proposed changes were to:-

9.1 Reduce the number of complaints of unfavourable treatment. There was no objection to this.

9.2 Change what the claimant alleges is the "*something arising in consequence of*" his disability.

10 The list of issues as drafted in around September 2022 and as provided on day one of this hearing as an agreed list identifies the *something arising* as the claimant's conduct at 2 work related social events. For the purposes of this part of the Judgment we note that:-

10.1 In early 2022 the claimant was taken through 2 disciplinary processes relating to allegations of misconduct at 2 different events (one disciplinary process for each event).

10.2 The relevant conduct can be broadly described as sexual harassment.

10.3 The claimant's position is that he has no recollection of his misconduct and if it happened as alleged, that it must have been linked to an adverse reaction between medication he had been prescribed and alcohol that he consumed on each occasion.

10.4 The medication was prescribed to help the claimant with his disability of ADHD.

10.5 The current list of issues asks the Tribunal to decide whether the claimant's conduct on those evenings arose in consequence of his disability.

10.6 That current list of issues also asks the Tribunal to decide whether the respondent treated the claimant unfavourably because of his conduct on those evenings.

11 A list of issues was drafted and attached to Case Management Orders sent to the parties following a preliminary hearing on 7 September 2022. A relevant extract is as follows:-

> *25. Did C's conduct on the evening of 17-18/12/2021 arise in consequence of one or more of his disabilities?*
> *26. If so, did the Rs treat C unfavourably because of his conduct on the evening of 17-18/12/2021?*

12 We are satisfied from our review of the document sent to the parties after the hearing on 7 September 2022, that there was a discussion about the complaints. The draft list of issues was then sent to the parties and they were given 14 days to raise any objections/required amendments. No objections were made.

13 The list of issues is consistent with the terms of the claimant's claim forms; at para 121 of the Grounds of Claim attached to the first claim form.

> *The Respondents have treated the Claimant unfavourably as follows because of something arising in consequence of disability, namely the Claimant's conduct on the evening of 17-18 December 2021:*
>
> (9 allegations of unfavourable treatment are then listed)

14 As for the second claim form, more "*something arising*" allegations are made but they all effectively amount to the thing arising being the claimant's conduct on the nights in question.

> *The* [Respondents] *have treated the Claimant unfavourably as follows because of something arising in consequence of disability, namely (a) the Claimant's conduct on the evening of 17-18 December 2021, (b) the Claimant's admission of the same, (c) the Final Written Warning that was issued on 3 February 2022, (d) the Claimant's actions in taking his medication incorrectly on 25 November 2021 and, (e) insofar as it might be found proven (and without prejudice to the Claimant's denials more generally) the Claimant's conduct on the evening of 25-26 November 2021:*

15 Mr Matovu did not want to proceed with the case that the something arising was the claimant's conduct at the 2 events. His alternative wording is as follows:-

> *" To the extent at the Tribunal finds that Claimant was treated unfavourably as alleged …. was he so treated because of something arising in consequence of his disability? The alleged something is the potential influence of Claimant's medical conditions and his medication mixed with alcohol on his behaviour."*

16 In support of his application, Mr Matovu referred us to various witness statements provided by the respondent. We set out below 2 paragraphs from the statement of Mr Moroz (disciplining manager in the first disciplinary process)

> *41. Due to the severity of Ian's actions, and the serious policy breaches, which constituted gross misconduct, the usual outcome under the Disciplinary Policy and Procedure was summary dismissal **(page 296).** We considered whether the mitigation we had accepted should reduce the usual outcome to a lower sanction.*
>
> *42. Having considered the range of sanctions which could apply, and taking into account the mitigating factors, including the potential side effects of Ian's medication, his remorse and the various efforts he had made to change his lifestyle, we concluded that the most appropriate sanction was a final written warning, which would remain live for 12 months. In addition, we recommended that Ian be prohibited from consuming alcohol at work events and be allowed to issue an apology to those affected by his behaviour if appropriate.*

17 Another example is from the statement of Tracey Maw

> *34. I accepted that it was possible that Ian's medication could have had a contraindication with alcohol, particularly with the large quantities Ian had drunk, but there was no medical evidence which suggested that this type of contraindication could (or was likely to) make Ian behave as was alleged (i.e. sexually harass someone). Nor was there any medical evidence to suggest that the contraindication would make him forget his actions (which he said was the case). Nevertheless, we gave Ian the benefit of the doubt (about exactly what the contraindication could be) which was why we recommended he should receive a final written warning for actions we concluded were gross misconduct (and which would normally, according to FTL's disciplinary policy, result in summary dismissal*

18 The application to change the list of issues relied on these comments (and similar/consistent comments by other witnesses). The evidence of those witnesses was effectively that the usual outcome for the misconduct that was found to have taken place would have been dismissal. Due to the possibility or potential of the prescribed medication having side effects when mixed with alcohol, the sanction decided on was a final written warning.

19 Mr Stone, for the respondent, resisted the application and submitted that the claimant was now trying to frame his complaint differently; that if the change were permitted, it would not be the same complaint.

20 Mr Matovu initially put forward the proposed wording on the basis that it provided more clarity of what the something arising was. He also accepted that a change to the wording of the list of issues would be required to advance the case that the claimant wanted to put, but that frequently occurred in Employment Tribunals including during a final hearing. In response to a submission that there would need to be an application to amend the claim (and there had not been) he noted that pleadings in employment tribunals often involved imprecise drafting. In other words, he was not (and did not) make an application to amend the claim. Mr Matovu sought to fit his proposed change to the list of issues into the framework of the existing claim.

21 Mr Matovu referred us to **Pnaiser v NHS England UKEAT/0137/15** and particularly paragraph 31 of that decision. He emphasised that there could be multiple reasons for the unfavourable treatment. In the case before us, Mr Matovu submitted that it is apparent from the relevant witness statements that one reason why the respondent decided to treat the claimant unfavourably (by applying a final written warning) was because of the recognition by those deciding to discipline the claimant, of a possibility of a link between the medication and the misconduct.

22 When the s15 complaint is framed and recognised in this way, said Mr Matovu, there is no requirement for expert evidence opining on a link (or absence of a link) between conduct and medication.

23 When making his application, Mr Matovu was not clear about whether the claimant was no longer making the case that his conduct was something that arose from his disability.

24 In his submissions, Mr Stone noted how precisely the list of issues as drafted reflected the case as pleaded. He submitted that Mr Matovu was looking to reframe the claimant's case, recognising that the expert report presented the claimant with a difficulty. The question of whether the conduct is something that arises in consequence of the claimant's disability is an objective question that we need to answer.

25 Mr Stone also noted that the possibility of a link between medication and (when combined with alcohol) the claimant's misconduct was raised by the respondent witnesses as a point in mitigation; that they would have dismissed the claimant – had there not been that possibility of a link. It was not what caused the unfavourable treatment, it was what mitigated against harsher treatment. In response to this point, Mr Matovu noted that there could be a number of reasons why a claimant is treated unfavourably (a submission that we readily accepted) and it was clear that one of the reasons that the claimant was treated unfavourably was because the various managers involved believed that there was a possibility of the medication (specifically its inter play with alcohol) having some impact on the claimant's behaviour.

26 We decided not to permit the amendment. Had we allowed it then it would have enabled the claimant to put forward a complaint that was not in the claim form and had not been recognised since the claims were issued (up to the morning of day one of this hearing).

27 We did not agree with Mr Matovu that this was merely a clarification of the complaint that was already being made. Under the terms of Mr Matovu's new draft, the original complaint under section 15 was abandoned and a different complaint put forward. We do not agree with Mr Matovu's submission that the amendment provided clarity. It did not clarify the existing s15 complaint. It changed it.

28 In reaching our decision we considered whether the amendment at such a late stage was because the respondent's position may have changed or been clarified in witness statements. But the respondent's position on this point was set out in clear terms in the ET3 response forms.

Progress of the hearing.

29 Having given our decision on this application, we heard from the claimant,. The claimant started to give his evidence from the afternoon of day 2 and throughout day 3 and into the morning of day 4.

30 We heard from the expert on the afternoon of day 4 and then the respondent's 11 witnesses on days 5 6 7 and the morning of day 8.

31 We heard from the following witnesses:-

Mark Holt (MH) -the respondent's managing director and one of 3 Group board directors; MH had management responsibilities for the claimant.

Tracey Atkinson (TA) - the respondent's (and the Group's) Director of HR.

Paul Haywood (PH) - HR Manager for Partner in Costs Limited (PIC) (another company within the Group); investigating officer.

Andrew Moroz (AM) - Legal Costs services manager employed by PIC; co-chair of disciplinary hearing.

Sarah Skesser (SS) - another manager employed by PIC and co-chair of disciplinary hearing.

Reuben Glynn (RG)– Managing Director of PIC; co-chair of appeal panel.

Teresa Aitkin (TA2) – Chief Executive of PIC; co-chair of appeal panel

Dominic Woodhouse (DW)– National Training Manager with PIC; co-chair of second disciplinary hearing.

Tracey Maw (TM) – manager at PIC; co-chair of second disciplinary hearing.

Denise Moore (DM) – respondent's Compliance Director

Clare Harrison (CH) – manager with the respondent; CH had management responsibilities for the claimant.

32 The 11 witnesses called by the respondent, were the individual respondents referred to in para 4 above. Witness statements had been provided before the claims against the 11 individuals were withdrawn and all witnesses attended. Mr Stone and Mr Matovu agreed that if questions were put to one of the co-chairs in relation to the disciplinary or appeal processes, no issues would be taken if the same questions were not put to the other co-chair.

33 Both counsel provided submissions (written and oral) on day 9. On day 10 we sat without the parties present to consider the evidence and reach our decisions on the various complaints.

34 We were provided with an agreed bundle of documents, agreed chronology and cast list. Reference to page numbers below are to the bundle which comprises 2964 pages.

Adjustments

35 On days one and 2 we discussed with Mr Matovu and the claimant, adjustments which may assist the claimant's participation in this hearing of his claim. We ensured that the claimant was aware he could request breaks at any time and anyway, we had regular breaks, tending to sit for no (or little) more than an hour at a time.

36 A screen was provided which limited the claimant's view of people in the Tribunal room. The claimant told us at the start of day 3 that was helpful to him. Mr Stone rephrased a number of questions for the claimant and the claimant was confident enough to ask for assistance where he said he did not understand a question. We were satisfied that the claimant was able to process and answer the questions put to him.

37 We noted that the claimant's professional work included his attendance at civil trials as an Expert witness and therefore would be familiar with the process of providing evidence in a formal legal setting. However we also recognised that this case was his own complaint and he was not here giving evidence to, for example, justify calculations that he had carried out in his professional capacity.

The issues

38 Discussions took place between the parties in the days leading up to the final hearing and during the final hearing itself. An outcome of these was agreement between the parties on some complaints. Those complaints have been dismissed following withdrawal by the claimant.

39 We still had a long list of issues to consider and determine and discussions about the list of issues continued through the first week. By day 6 the parties disagreed over one issue/proposed issue which was whether the list should include a particular complaint that the ACAS Code had been breached by TA acting as an investigation manager and also as someone who had directly intervened to influence the decision to dismiss. Following discussion the respondent did not resist the inclusion of this particular issue.

40 This resulted in an agreed list of issues which is set out in the Annex to this judgment.

Findings of Fact

The Parties

41 The respondent is a professional services company. One of its activities is to provide expert finance support in litigation, particularly the calculation of complex damages claims involving loss of earnings.

42 The respondent is part of a larger group of companies called the Frenkel Topping Group (Group). Other companies in the Group provide litigation support, such as case management services and costs expertise.

43 The claimant is a financial planning expert. His employment with the respondent required him to provide the following services:-

> 43.1 to provide individuals, particularly those who had suffered catastrophic and life changing injuries, advice to create financial plans to ensure astute management and investment of damages/awards made in their favour.
>
> 43.2 To be an expert witness in litigation, providing reports (and giving evidence in support of those reports) on certain heads of loss, particularly loss of income, the cost of accommodation, the cost of financial advice and financial structures of awards.

44 The claimant's employment with the respondent began in January 2015. He joined with very significant financial planning experience. He is a fellow and chartered financial planner.

45 Whilst employed by the respondent, his job title was consultant. Prior to the events that gave rise to these Tribunal proceedings, the claimant was successful in his employment with the respondent. He was at times the respondent's highest fee earner and in return he was well remunerated through basic pay and bonuses.

46 The claimant worked primarily from a home office. He lives in Brighton. The respondent's main office is in Salford. The claimant did not always work from home. Sometimes for example he attended client meetings including at various solicitors offices and about every 5 weeks or so he attended the respondent's main office. But mostly he worked from home. The extent of home working and remote meetings increased from March 2020, when the coronavirus pandemic impacted UK workplaces and working practices. Home working was also an arrangement that benefitted the claimant as explained below.

<u>The claimant's disability</u>

47 In March 2017 the claimant was told that he has an autistic spectrum condition; which he refers to as Aspergers syndrome. (ASC). At that stage he was prescribed an anti-depressant called Sertraline. This prescription continued throughout the time period that is relevant to this case.

48 Initially the claimant decided not to inform the respondent of his diagnosis. However in January 2020 he made the respondent's HR Director (TA) aware of his ASC.

49 This disclosure led to the respondent undertaking steps to consider what could be done to support the claimant in his work. Arrangements were made for the National Autistic Society (NAS) to carry out a workplace assessment. The respondent was initially on a waiting list for an assessment. The assessment itself took place (remotely, as the UK was then in the midst of managing the pandemic) in June 2020 and the report (pages 387-409) is dated August 2020. It made

various recommendations for reasonable adjustments and put them in categories of higher, medium and lower priorities.

50 There is no dispute between the parties that many of these were implemented. Others are relevant to the complaints under the Equality Act 2010 and these are the ones we have focussed on and make findings about in the sections that follow.

51 In January 2021, the claimant was diagnosed with attention deficit hyperactivity disorder (ADHD). Following diagnosis, the claimant was prescribed a drug called Elvanse to help him manage the impact of ADHD. Elvanse is an amphetamine. His consultant psychiatrist explained to the claimant that people with ADHD have a shortage of dopamine and need to stay "on the go" in order to avoid their brain shutting down due to this shortage. Amphetamine based drugs are able to help with this. The claimant worked with his psychiatrist to identify the best strength of daily dose. The initial prescribed dose was 20mg. By July 2021 the claimant was being prescribed 40mg (page 2239) and by November 2021 it was 50mg.

52 We summarise the impact of the claimant's impairments, particularly the impact on his professional life:-

52.1 Sensory issues. For example,

52.1.1 the claimant finds it difficult to function in an open plan office due to noise and disturbances. Generally the claimant worked from home. This was only an issue on infrequent (every 6-8 weeks) trips to the respondent's offices.

52.1.2 The claimant struggles when required to travel on busy public transport. He is able to largely overcome this by travelling first class and using noise cancelling headphones.

52.1.3 He is adversely impacted by normal lighting and has dimmable lighting in his home.

52.1.4 Noises distract him. He benefits from noise cancelling headphones.

52.1.5 Other distractions. He benefits from assistance with work planning and a clear desk environment.

52.1.6 He is adversely affected by temperature changes.

52.2 Communication and processing issues. Sometimes the claimant misunderstands communications whether written and verbal. The claimant also found that colleagues sometimes misunderstand communications from him and working with a team that better understood the claimant's ASC benefitted him (see below) Processing information can sometimes be difficult for the claimant which can adversely impact communications and his ability to organise.

52.3 The difficulties outlined above lead to feelings of anxiety in certain situations, including social situations.

52.4 The claimant also told us that his disability brings some benefits to his work. He described an ability to hyper focus which helps achieve positive work outcomes.

53 The respondent accepts that the claimant's ASC and ADHD are disabilities within the meaning of section 6 Equality Act 2010.

Adjustments – up to late 2021

54 TA and the claimant met on 13 August 2020 to discuss and agree on the measures that would be taken, following consideration of the NAS report. Action points from this meeting are referenced at page 412.

55 The respondent assisted the claimant in various ways including by the provision of noise cancelling headphones, a silent (or near silent) cooling and heating fan for his home office, agreeing to fund first class rail travel and recognising that the claimant would work from home for a substantial part of his working time.

56 We set out below our findings about adjustments that are relevant the complaints under s20 Equality Act 2010. First though we note that at no stage before disciplinary proceedings were taken against the claimant did he complain about a failure to make reasonable adjustments. On the contrary, he expressed his gratitude for the arrangements that had been put in place. The claimant also expressed gratitude in January 2022 after he had been informed that concerns about his behaviour were being investigated. In a long email to the respondent's board of directors, the claimant stated: "*the business have supported me really well so far and I am very grateful*." During a disciplinary hearing on 20 January 2022 the claimant stated that "*the business, Mark Clare and Tracey in particular couldn't have looked after me better."*

57 Providing advice/information to managers/employees working with the claimant.

57.1 One of the recommendations in the NAS report was to develop manager and colleague understanding. (page 397). The report contains a link to a course "*understanding autism in the workplace*."

57.2 The claimant and CH met on 12 August 2020 when it was resolved that the claimant would be more open with a wider team of employees about his ASC, that more information would be provided to team leaders and cascaded. The information to be provided was to be discussed at a subsequent meeting on 7 September 2020.

57.3 On 15 September 2020 there was a meeting of various team leaders and other employees who worked closely with the claimant. Information about Autistic Spectrum Conditions (ASCs) were shared with those attending. Those attending discussed and agreed working strategies to assist the claimant. The bundle does not include any notes of this meeting. In a follow up email to those attending the meeting, CH noted "*Ian and I will be discussing at our next meeting the best way forward to move forward so that we can help devise the best strategies to put clear strong practices in place that will help us work much more efficiently within each team and I will be in touch about this.*" Whilst the bundle does to include documentary evidence

of the next meeting and what was discussed and agreed with the claimant, we find that the respondent (CH particularly) worked with the claimant o develop strategies that assisted him with his work. This finding is supported by the claimant's comments at 56 above as well as by the CH's evidence.

58 Commencing work support/counselling.

58.1 This was another recommendation from NAS. The claimant was already accessing counselling from an individual called Kay. In October 2020 the claimant contacted TA and told her that he had managed to arrange an appointment with Kay, that she was a specialist Aspergers Counsellor and that she could offer workplace support.

58.2 On 12 October 2020 the claimant asked if he should obtain anything in writing from the counselling service. TA replied to the claimant to ask for sight of support plans that the counsellor/service provider would provide. We have not seen any written information from the counselling service provider other than invoices. The counselling arrangements were ones that the claimant had made. That is what he asked for and the respondent agreed to. The relationship was between the claimant and the service provider. It was reasonable to expect the details about the service to be provided by (or thorough) the claimant.

58.3 On 10 November 2020 TA emailed the claimant to confirm that she was happy for the claimant to book another session with the counsellor but that she also wanted to discuss how many sessions the claimant was looking to attend and to agree a limit of sessions that the respondent would be willing to contribute to. The email also noted that TA would set a call up.

58.4 We have no evidence of a call. We do know that sessions continued until 8 July 2021. The next session should have been in August 2021.

58.5 In response to a question asking for evidence of the claimant's asking for funding for a counselling session, the claimant replied that he had asked and that there was "only so often you can bang your head against a wall" (or similar words). We have seen no documentary evidence (emails, texts and the like) in which the claimant asks for the next session to be funded.

58.6 The claimant's evidence is that he continued counselling sessions and we note evidence that the claimant started to receive help from another counsellor called Dr Shawn Katz.

58.7 Separately, the respondent had an existing policy (through Canada Life) which funded counselling and other assistance to employees. We have no evidence of the claimant accessing counselling through these arrangements until January 2022 (page 1002).

59 One to one meetings.

59.1 Regular meetings took place between the claimant and one of his managers, CH. They began in mid-2020 and tended to take place on

Wednesday afternoons as that was when it was likely that CH and the claimant would be able to meet remotely, undisturbed.

59.2 The meetings provided the claimant access to his line manager to the extent that other employees did not have. Sometimes the meetings were in the style of an informal chat, including about the claimant's ASC. CH has a son with autism and the claimant would ask about him. The meetings were generally work focussed though. The claimant would share his observations about work and support and CH would provide feedback to the claimant that she had received from his colleagues in the office. It was important for the claimant to hear from CH what was going on in the business, so that he could understand and anticipate changes before they took effect.

59.3 The meetings were frequent, every 2 weeks. Sometimes during the year the claimant and/or CH would be unable to meet. An example given (and which we accept) was at the respondent's financial year end. The respondent's financial year was 1 January to 31 December. The period shortly before and after year end was a very busy time for the claimant and CH.

59.4 A scheduled one to one meeting between the claimant and CH did not take place in January 2022. However the claimant and CH did meet (remotely) in January. There was a lengthy discussion between the 2 on 7 January 2022, following the claimant's return from holidays. We accept CH evidence that this discussion did not go well as the claimant was completely focussed on the fact that he was facing disciplinary allegations (see below). We also accept that CH felt compromised in discussing the allegations as she was a witness to some of the alleged incidents and had provided/was due to provide a statement as part of the investigation.

59.5 CH contacted the claimant on 17 January 2022 to move a scheduled meeting again.

59.6 On 19 January 2022 the claimant contacted CH to raise various operational points (page 963). He finished the email by saying this.

> *Perhaps we can go through these at our next catch up, which I understand might be delayed, although I am really struggling at the moment, so it would be good to chat things through - I have contacted the EAP but nobody there has the expertise/understanding that you have.*
>
> *Thanks a lot, I know you are also probably in a tricky position with all of this.*
>
> (The reference to EAP is to an Employee Assistance Programme that the respondent funded and the claimant could access, particularly during a time that allegations of misconduct against him were being investigated.)

59.7 CH replied, an hour or so later.

> *Thanks for your email and sorry I missed your call earlier I am in and out of meetings most of this week.*
>
> *As Director of Operations and as you know having been called as part of the investigation I am fully aware of all that is going on at the moment and do understand that you may be feeling anxious and stressed about this.*
>
> *I will arrange to sit down with you at the end of the month/beginning of Feb when things have concluded to go through the KPIs for 2022.*

59.8 The 2 exchanged emails on 24 January 2022

> *"Hi Clare ……conscious that we haven't had any of our regular catch ups since before Christmas and want to make sure that myself and the team are on track and doing everything expected. If you could let me know when we can reinstate these please that would be great – you've been a great support and I really value these sessions.*
> *Cheers Ian"*
>
> *"Hi Ian .. you beat me to the email. In the next week or so I am in meetings most days trying to get the group CRM system up and running but we will definitely still be having our meetings I just need to get through these initial few weeks of year end stuff and planning meetings.*
> *I will have a look at my diary and get something booked in asap. I am on this call at 2pm so will see you then."*
>
> And from the claimant
>
> *"brilliant – you have been so supportive and helpful, its only with the gap that has been highlighted even more."*

59.9 As explained later in this judgment, there was a disciplinary hearing on 27 January 2022. The claimant was told of the outcome of this hearing on 3 February 2022 and was then suspended from work on 10 February 2022.

59.10 There was no one to one meeting between CH and the claimant after 7 January 2022 before the claimant's suspension although the 2 did engage particularly in departmental meetings (therefore with other employees present). The reason for this was in part, the year end and in part the disciplinary investigation and hearing that took place in January and particularly CH's wish to avoid another long discussion with the claimant about this.

59.11 During this period, there was dialogue between CH and the claimant as CH continued to manage the claimant.

60 Admin/organisational assistance.

60.1 Following the NAS report, arrangements were made to support the claimant with a small team of advisers to work with him to assist with tasks such as research and report writing.

60.2 Whilst the respondent's consultants were able to access support for their tasks, arrangements were made for the claimant to work with a small, dedicated team. One of the respondent's graduate trainees (who we will refer to as OP) was allocated to the claimant. Following the NAS report, an additional support of a paraplanner (who we will refer to as CR) was also allocated to the claimant.

60.3 Both OP and CR were aware of the claimant's condition and how their support helped the claimant. As noted above, the claimant acknowledged the effectiveness of the support provided.

60.4 Arrangements were being made by December 2021 to replace OP with a new graduate trainee. OP was ready to move to the next stage of her career, having completed the graduate training programme. Another graduate trainee (David Cole (DC)) was identified to take over much of the support role that OP had been carrying out. We have seen notes of an internal meeting that CH held with DC, OP and CR on 25 November 2021. We accept that new arrangements were proposed; those new arrangements included the transfer of a lot of the tasks and support OP had been providing to DC. The proposals also required OP to continue to work with the claimant on a few cases.

60.5 Having shared details of the proposals, CH invited OP, DC and CR to offer their comments so that she could draw up a document to share with the claimant. We accept CH's evidence that she intended to do this at the start of 2022 but that the events (particularly the disciplinary issues that were detail below) then took place. We also accept CHs evidence that:-

60.5.1 in January 2022 OP continued to provide support to the claimant.

60.5.2 the claimant had started to receive support from DC.

60.5.3 that DC had been informed of the reasons why he was being asked to help the claimant – in other words about the claimant's disability. In her evidence CH told us that she was sure this information had been provided to DC. Whilst there is nothing explicit in the relevant documentation, having read the documents relating to changes in support to be provided for the claimant, we are satisfied that those being informed of (and part of) these changes must have been informed of the reasons. See for example the notes of the meeting on 25 November 2021 at pages 505-507.

60.5.4 in January 2022 the claimant was very focussed on the disciplinary investigation and CH found it very difficult to talk with the claimant about anything else.

60.5.5 because she was a witness in the disciplinary investigation, she considered herself to be in a difficult position when being asked questions by the claimant about the investigation and allegations. She did not want to talk to the claimant about them.

Relevant Policies

61 We note the following:-

61.1 References in the claimant's employment contract (at pages 271 278 and 283) to the respondent's disciplinary rules, grievance rules and the Employee Handbook.

61.2 The 2 disciplinary procedures at pages 293-301).

61.3 The respondent's anti bullying and anti-harassment policy dated September 2021 (pages 302-306).

61.4 The respondent's Staff Social and Work-Related Events policy dated November 2021 at pages 307-8.

62 As far as the Staff Social and Work-Related Events policy is concerned, that was no provided to the claimant until 1 December 2021 (reference at page 516).

The respondent's Christmas party .

63 On 17 December 2021, the respondent (and the Group) held a Christmas party in Manchester. Of the 370 or so employees in the Group only about 100 attended. In December 2021 the country was in a state of change as far as the coronavirus pandemic and lockdowns were concerned. This inevitably had a negative impact on attendance. We also note that some of the group companies were based in locations that were some distance from Manchester. No employee was required to attend the function.

64 The claimant decided that he would attend and he travelled from his home in Brighton up to Manchester. He met colleagues at a hotel which was close to the party venue and he and colleagues had some drinks there before they attended the party.

65 The party was in a large venue called Manchester Central. The respondent's employees were not the only ones attending the function. Various other organisations had tables there.

66 The respondent provided drinks for its employees. On arrival, attendees were provided with a wristband that had 6 or 7 tabs or tokens. Each tab could be exchanged for a drink. Wine was also available on the table.

67 Providing the option of so many drinks meant that an attendee could become drunk. But that was not inevitable. That was up to each individual attendee.

68 The claimant's conduct at the party resulted in the disciplinary process that we refer to next.

The first disciplinary process.

69 On 20 December 2021, two of the respondent's directors spoke with TA about the claimant's conduct at the party.

70 Iain Cherry (IC) informed TA that the claimant was very drunk at the party and had made inappropriate comments to young, female employees.

71 MH also spoke with TA about the claimant's conduct. At the party itself, MH had spoken with the claimant and told him to calm down and drink some water. After the event, MH's sister-in-law (another of the respondent's employees) had told MH that the claimant had lifted her skirt up when she was on the dancefloor.

72 TA considered there were serious concerns about the claimant's behaviour and that they needed to be investigated. However she decided not to speak with the claimant until the New Year. This decision was made after MH suggested it. The claimant was due to take holiday over the Christmas period and to travel overseas with his daughter. We also note that the claimant was based at his home and probably engaged in year-end activities during his remaining 2 or so working days before the Christmas break and his holiday.

73 TA called the claimant on 4 January 2024 to tell him about the concerns that had been raised. During that discussion the claimant told TA that he wanted to apologise to those affected by his behaviour. TA decided that allowing the claimant to contact complainants/witnesses to offer his apologies would not be appropriate.

74 Shortly after the call, the claimant sent an email to TA (page 553). In it the claimant raises a possibility that his behaviour was affected by his medication, particularly Elvanse. He said it felt as if he had "been spiked" at the Christmas Party and that he was looking into interactions between medications, noting that they are controlled substances "illegal to buy over the counter." He also stated his intention to speak with his doctors/practitioners.

75 Although the claimant had by then been prescribed Elvanse for some time (since January 2021) the dosages had increased a number of times through 2021. By late November 2021 the claimant was prescribed daily dosages of 50mg. The maximum prescribed amount is 70mg per day.

76 The respondent carried out an investigation. P H was appointed as an investigation manager and interviewed some 20 witnesses about the claimant's behaviour at the Christmas party.

77 The claimant was interviewed on 13 January 2022. He was accompanied by a work colleague he had chosen to accompany him. We summarise the evidence provided at this interview (notes at 834-849):-

77.1 He had been drinking at a hotel bar before attending the party.

77.2 He recalls walking over to the party venue but does not remember too much after that.

77.3 He woke up the next day and felt like his drinks must have been spiked.

77.4 He is on prescribed medication, Elvanse, and Sertraline.

77.5 Elvanse is a controlled substance. He can only access one month's supply at a time.

77.6 He did not know about any contra indications with alcohol but had been looking into this. The research indicated that combining with alcohol results in psychosis which was how he would describe how he felt the following morning.

77.7 This had not happened to him before.

77.8 He had a memory of a colleague and friend called Sam Buckley not being happy with something the claimant had done – although the claimant could not recall – and the claimant had called him the following morning.

77.9 In response to one of the many concerns raised, he volunteered that he probably did show/expose his tattoo which is on his leg/hip.

77.10 He was mortified by his actions, wanted to apologise and accept responsibility for them.

78 The respondent decided to hold a disciplinary hearing. A letter from the respondent to the claimant dated 18 January 2022 (page 916) required the claimant's attendance at a disciplinary hearing on 27 January 2022. It set out the allegations against him:

78.1 That the claimant had broken the respondent's Social Events policy, noting the following extracts:

> *If alcohol is served during a staff/work event, employees must take an appropriate and responsible approach to alcohol consumption*.
>
> *Equal opportunity and anti-discrimination are a high priority within the company and employees are required to be mindful of their behaviour consistent with the Workplace Anti Bullying and Anti-Harassment Policy*.
>
> [employees must not] *behave in any way that is likely to cause offence to other attendees or third parties present at the venue. This might include, but is not limited to excessive drunkenness, unlawful discrimination, inappropriate behaviour, acting in an*

aggressive, threatening or harassing manner or using abusive, profane, or offensive language, consistent with the Anti-Bullying & Harassment Policy.

Otherwise behave in any way that could bring the Company's name or reputation into disrepute.

78.2 That the claimant had behaved inappropriately, making the following specific allegations:

Pulled a colleague's dress up on the dance floor.

Whispered to a colleague who had pulled her dress up from the top (to adjust it) on the dancefloor - "don't do that around me."

Said "I'd get naked on this table, here's to getting naked" on a table with colleagues and again when doing a toast when he had bought the females on the table a drink.

Said "it's been a long time since I had sex with a 21-year-old" to a 21-year-old colleague on the table after asking all the girls on the table their ages and then repeated this comment to the said individual as she later returned to the table.

Made a comment to a female colleague about her sexual activities with her partner when a group of employees went out to a bar after the event closed.

Exposed his tattoo on his hip area to colleagues on the dancefloor (by pulling his trousers down, to what exact level wasn't disclosed).

Picking up a colleague in the welcome area of the venue.

Dancing in the venue in such a way that it made staff members feel uncomfortable and where other colleagues needed to step in and dance them away to separate them, also dragging members of staff around the dancefloor.

Grabbed a female member of staff's waist and ran with them to the dancefloor making them feel uncomfortable.

Said to a male colleague on the table he joined that "he wasn't going home alone tonight."

Made a comment directly to a female colleague about her "having a nice pair of legs" which made her feel uncomfortable.

Dragged the same colleague onto the dancefloor by her waist which caught her "off guard" and uncomfortable.

> *Was drinking excessively and dancing erratically not just around FT staff, but external companies.*

79 The disciplinary hearing was chaired by SS and AM; managers with a group company called Partner in Costs Limited. Notes of the meeting are at 1065 – 1103.

80 Between the meeting and the disciplinary hearing the claimant provided further information, most notably a long representations document dated 20 January 2022 (992-1006) and a letter from the claimant's consultant psychiatrist (2243).

81 The claimant's representations document included information that the claimant put forward following his own research on combining amphetamines and alcohol as well as possible side effects of sertraline. In this document he stated again that he did not recognise or remember any of the alleged incidents and could not be sure of the truth. Whilst commenting that most evidence is hearsay (1001) he acknowledged that a few instances would have been very upsetting and noted that witnesses must have been worried about speaking out about a senior employee. The claimant also noted changes being made to his lifestyle and a willingness to learn from the episode.

82 The claimant also made representations about withholding pay and the adjustments/support being provided. We refer to those points separately.

83 The claimant was accompanied to the disciplinary hearing by the same colleague who had accompanied him to the disciplinary interview.

84 During the hearing the claimant provide an explanation again about his medication. However on this occasion he indicated that he may have taken twice his daily dose of Elvanse:.

> " *Every day I get up and have my health shake, take my tablets and they're all in their days' order. When I go away, I don't have that and they're boxed up, I can't tell you how stressful it is going away. So, what we think has happened that I've probably taken it as normal in the morning and then because I don't know if I've taken it in the morning or not because it's part of my routine. My understanding of the medication is that it helps me, so I've taken it before I've gone out, not realizing this.*

85 In response AM asks the claimant whether his psychiatrist thinks he may have taken a "*double dose of medication*" The claimant replies as quoted below, also noting that he had not been told about mixing Elvanse with alcohol.

> *Yeah, but even if I had taken a double dose, apparently you can have a drink, but it has to be after 12 hours after you take it because it stays in the system. I didn't know that. So, I was taking it (whether I did or didn't in the morning, that's not relevant) but just taking it in the evening because I went straight out drinking.*

86 The claimant also provided information about a difficult upbringing and family situation; he provided more information about the impact of his disabilities and about his previous professional and personal life. Whilst he said he did not recall the incidents he commented on a number of them and noted various witnesses stating that his behaviour was out of character (or similar).

87 AM and SS concluded that the events had happened as alleged. Having read the various statements and the claimant's own accounts at the investigation and disciplinary hearings, we do not have any criticism of that conclusion.

88 AM and SS also considered the evidence provided about the claimant's disabilities and the potential impact of the medication. By that stage the letter from the claimant's psychiatrist had been provided. The letter is quite brief:-

> *This is to confirm that Mr MacKendrick suffers from Aspergers Syndrome and ADHD (Attention Deficit Hyperactivity Disorder).*
>
> *For his ADHD he takes Elvanse, which is a stimulant medication. On 17th December 2021, Mr MacKendrick has likely taken twice the dose of Elvanse i.e.both in the morning and in the afternoon, prior to attending a Christmas party where he has consumed more than his usual amount of alcohol.*
>
> *It is not possible to totally exclude that his subsequent behaviour at the event could be due to the combined effect of both the Elvanse and the alcohol. Usually he takes Elvanse only in the mornings and by late afternoon /evening the quantity of it in the body is much reduced and unlikely to react significantly with alcohol consumed later in the day (after 10-12 hours).*
>
> *I believe Mr MacKendrick is under investigation for his behaviour. I hope that the possible contributory effect of his pre-existing mental health conditions will be sympathetically considered.*

89 AM and SS did not regard the letter as providing definitive guidance or conclusive findings and noted that this was the first time the claimant had referred to taking twice the daily dose.

90 AM and SS decided to issue the claimant with a final written warning. They produced a report (which is at pages 1115-1118). In summary:-

90.1 AM and SS concluded that the events had happened as alleged.

90.2 That the claimant's actions breached the respondent's Social Events Policy, the disciplinary policy and the anti-bullying and harassment policy.

90.3 That the effect of the claimant's disability "*explain but do not excuse"* his behaviour at the party.

90.4 Taking into account the impact of the claimant's disability, they concluded that his conduct was serious misconduct but not gross misconduct and issued a final warning.

91 We set out below a passage from their findings report in which AM and SS explain what they mean by the claimant's disability explaining but not excusing his behaviour.

> *To explain the above in more detail, we consider that Mr MacKendrick's conditions mean that the Christmas Party was a stressful event which took place in an environment which he is likely to have found disorientating. These factors, together with his difficulties in deciphering non-verbal communication in any environment, in our view reduce his culpability for the events in question but cannot excuse him completely - the events occurred, and a policy put in place to protect all staff from inappropriate behaviour was breached. With regard to his alcohol consumption and its impact on staff, the previously unknown (to Mr MacKendrick) side-effects of mixing alcohol with his prescribed medication go some way towards explaining Mr MacKendrick's behaviour, albeit it does not lessen the impact on the other employees present. Full credit should also be given when deciding on the level of sanction to Mr MacKendrick's remorse, desire to apologise, independent attempts to change his own lifestyle to prevent this behaviour recurring and his insight into the effect of his actions on those present.*

92 In their evidence provided at this hearing, further explanation for their decision was given.

92.1 That they accepted that the claimant's actions appeared to be out of character, noting his previously unblemished record. The contention that this was a one off also confirmed that it was not the claimant's ASC or ADHD causing him to behave as he did.

92.2 That the Christmas party was probably stressful for the claimant and it was possible that he had taken more than his prescribed amount of Elvanse.

92.3 That he was not aware of the possibility of a reaction between the Elvanse and alcohol.

92.4 That it was not accepted that any possible interaction between the Elvanse and alcohol fully explained or excused his actions. It did not absolve the claimant of responsibility for his actions.

92.5 Whilst the claimant said he had not read the Social Events policy, their view was that he was aware that he should not have behaved as he had.

93 The claimant was informed of the decision by letter dated 3 February 2022 (pages 1127-1129). In addition to the final written warning, he was told that he must in future, whilst taking his medication, refrain from drinking alcohol at work events. The claimant was also told that the respondent would provide support and

guidance to help him achieve this. The signatory to the decision letter is TA in her capacity as HR Director. We are satisfied, having considered the evidence and heard from the witnesses that the decision to issue the final warning was made by SS and AM.

94 As for the support and guidance offered:-

94.1 It was to help him achieve the requirement to refrain from drinking alcohol at work events.

94.2 We have no evidence of any work events arising after 3 February 2022 involving the claimant.

The claimant's appeal.

95 The claimant was given a right to appeal against the decision to issue him with a final written warning.

96 Initially the claimant did not engage with the appeal process. On 3 February 2022 he wrote to MH (page 1131). In his email he asked to apologise to those affected, noted the professionalism of the disciplinary process, told MH that he hoped to be able to use the experience to benefit others and that there was no reason why life could not now return to normal. He also asked about a salary increase and element of bonus that had been withheld pending the outcome of the process.

97 On 7 February 2022 the claimant wrote to P H. In this long email (pages 1142-1146) the claimant was much less accepting of the disciplinary process and outcome. He noted that he may choose to appeal but asked for more time to reflect and get advice. He wanted the email to be placed on his file, together with the disciplinary outcome because that outcome did not adequately reflect the truth of what happened. He explained that, had he been aware of the effects of a second dose of Elvanse, he would not have taken one just before he went out; that these social events are "*absolutely terrifying*" for him. There are other themes/topics in this email that are not necessary for us to include in our findings of fact.

98 In response, P H agreed to put the email on the claimant's HR file and asked for confirmation about whether he was appealing against the decision to issue a final written warning. He was told that his appeal needed to be made by 14 February 2022.

99 On 9 February 2022 the claimant emailed P H to state that he had decided not to appeal but asked for the following to be considered

99.1 That he be given an opportunity to apologise to those affected.

99.2 That *"*as *this situation arose out of a medication/clinical/disability issue, rather than a* character *issue and given that nothing like this has ever occurred in my working life, let alone at FT"* he asked that the severity of the warning be reduced to a first warning to be in place for 3 or 6 months, rather than 12 months.

100 On 13 February 2022 the claimant emailed TA to state his intention to appeal and to request the respondent's policy on appeals. (1242). The claimant had by that stage been suspended (see below) and the appeal process took place during the claimant's suspension from employment.

101 The appeal hearing was on 28 March 2022. It was chaired by Reuben Glynn (RG) (Chief Executive of A&M Bacon Limited) and Teresa Aitkin (TA2) (Chief Executive of Partners in Costs Limited). By that stage the claimant, through his solicitors, had provided a detailed written appeal (pages 1435-1450). It took place remotely, by video conference. The claimant attended with his legal representative.

102 We heard from RG and TA2 about the appeal process and their decision to reject the claimant's appeal. We are satisfied that the decision to reject the appeal was theirs and was not made by or with anyone else.

103 We accept that:-

103.1 RG and TA2 reviewed the decision made to provide the claimant with a final written warning.

103.2 They considered the appeal points put forward by the claimant and his legal representative and, having done so, were satisfied that the mitigating factors put forward by the claimant had been considered and factored into the decision and, had they not been, the claimant would have been summarily dismissed.

103.3 They decided that it was appropriate to provide the claimant with a second chance that the final written warning provided.

103.4 They rejected arguments put forward by the claimant that there was a drinking culture within the respondent and the respondent's group of companies.

<u>The claimant's suspension</u>

104 On 10 February 2022 (i.e. just a week after the claimant was issued with a final written warning) the respondent was told of another complaint about the claimant's conduct, this time at an event held jointly with a firm of solicitors called HCC. HCC is a client and joint venture partner of the respondent. The joint venture is called Keystone and an event launching the Keystone business took place on 25 November 2021. One of HCC's partners contacted IC to tell him that a female employee of HCC had complained that the claimant had behaved inappropriately towards her at the Keystone launch event.

105 IC told MH about the complaint, who in turn told TA.

106 A decision was made to suspend the claimant pending an investigation. One of the complaints made in this claim, concerns the decision to suspend and we need to set out our findings about it.

106.1 The decision to suspend the claimant was made in a discussion between MH and TA.

106.2 TA called the claimant on 10 February 21022 to tell him of the decision to suspend him.

106.3 A letter confirming the decision to suspend was sent on that same day. It is signed by TA (page 1187).

106.4 We are satisfied that the decision was made by both TA and MH. TA proposed that the respondent should suspend. MH agreed. TA may have told MH that she recommended the claimant's suspension, But we find the decision was effectively a joint one.

107 The claimant was told that he was being suspended so that 2 matters could be investigated (1) inappropriate comments and actions at the Keystone launch event and (2) invoices submitted for work not fully completed.

108 As explained below, the claimant did not return to work at any stage before his dismissal on 17 June 2022.

Invoice issues

109 One of the allegations that the claimant was told was being investigated was an allegation that he had submitted invoices and claimed fees for work that had not been fully completed.

110 Concerns had been raised about some invoices and MH (and CH) had started to look into these before the allegations about the claimant's behaviour at the Keystone launch event ("Keystone Allegations") were known to them. Had the Keystone Allegations not been raised, the investigations into the invoice issues would have continued without a need to suspend the claimant. Because the claimant was suspended pending investigation into the Keystone Allegations, the invoice concerns were made part of the disciplinary investigation. CH also raised some invoicing concerns that she came across in Mach 2022 when reviewing files during the claimant's suspension and sickness absence (see email from CH to TA dated 18 March 2022 at page 2555). .

111 As for the invoice concerns themselves, we do not find that they were in some way manufactured or exaggerated as alleged by the claimant. We note an email from MH to his 2 main board director colleagues, dated 20 January 2022. This email preceded the outcome of the first disciplinary hearing and was well before the respondent became aware of the Keystone Allegations. It refers to other employees within the Group that had raised concerns about some of the claimant's invoices (the claimant is not named in this email but we find that this email referenced the claimant's invoices). We also accept MH's evidence that he had raised issues with the claimant about fee levels at a quarterly review meeting in April 2021.

112 As it was, TA looked into the concerns as part of her disciplinary investigation, and decided that they should not proceed to a disciplinary hearing.

The claimant's sickness absence

113 On 11 February 2022 the claimant provided a statement of fitness to work ("fit note") informing the respondent that he was not fit to work for a 2-week period.

114 On 22 February 2022 the claimant provided a fit note to say he would not be fit to work for a period of 2 months. was singed off for 2 months (2247).

115 On 28 February the respondent wrote to the claimant's GP (the claimant having given permission for it to do so) requesting a medical report (pages 1367-1368).

116 Inevitably this absence impacted the progress of the internal processes.

The second disciplinary process

117 TA appointed herself as the investigating officer. Her evidence (which we accept) was that she did so because the HR manager, P H had conducted the first investigation. TA was the other senior member of the HR team within the Group.

118 TA intended to interview the claimant on 16 March 2022 but this was delayed initially to 21 March 2022.

119 On 16 March 2022 the respondent received long and detailed correspondence from the firm of solicitors instructed by the claimant (Gaby Hardwicke (GH) (pages 1433 -1450). This correspondence comprised:-

119.1 The claimant's grounds of appeal against the final written warning (see our findings above).

119.2 A grievance raising various complaints including that the respondent had failed to make reasonable adjustments but also complaints relevant to the disciplinary process and decision.

119.3 A data subject access request (SAR) (see our findings below).

120 The claimant asked (and the respondent allowed) the claimant to be accompanied by Mr Grant of GH to the investigation interview. Mr Grant also accompanied the claimant to the later grievance hearing and disciplinary hearing.

121 In the interview the claimant was asked for his recollection of events on the evening of the Keystone launch. The claimant told TA that he could not remember much about the night. He was able to name several individuals who had been there because he had received messages from them saying they had a good night.

122 He was asked whether he recalled speaking with a female employee of a firm of solicitors (we refer to her as "K"). Comments and actions which had been alleged by K were put to the claimant. One allegation put to the claimant was that he made a comment about kissing K on the lips; another, that he had touched K's bottom on 2 occasions. The claimant denied behaving as alleged. The notes show

that the claimant shook his head when various allegations were put to him. Part way through the interview the claimant raised his medication.

> *The only thing it can possibly be because I've managed to 47 years old without behaving like that before and the only thing that is different is the Elvanse medication. I sent pages and pages of evidence that says if you mix that with alcohol which I didn't know about, it can cause blackouts, memory loss, psychosis, coma, seizures, heart attack, death, all sorts of scary things not just the poor lady if she's had that experience that night. That's horrendous for her.*

123 The claimant was asked whether he had taken the Elvanse medication that day and he replied as follows:-

> *We haven't been in drinking/party mode for some time because of covid. My understanding was it was helping the symptoms I get. The habit I was in was taking some nearer the time I went out because I was scared and anxious about the social side of things which in hindsight now isn't very helpful because of the link between Elvanse and alcohol. This appears to be the same thing in a different disguise.*

124 We note here (because it was a factor that the respondent later took into account) the inconsistency between the claimant's explanation about his use of Elvanse and his explanation during the first disciplinary hearing.

125 Other allegations were put to the claimant and he denied them. He noted the free bar at the event. He explained some recollection of being outside of a club venue at the end of the evening but, in summary, his account was that he had very little recollection of the evening.

126 TA asked the claimant about whether he had taken any other drugs and asked whether he would be willing to be screened for drugs. This was a line of enquiry that arose from the claimant's description of how he felt (for example describing that it felt like his drinks had been spiked, that he had no recollection of events) and the description of the claimant that witnesses had provided. We have no criticism of TA asking this question. As it was, this line of enquiry was not followed through.

127 At the interview the claimant was also questioned about the invoice concerns. We have already commented on these.

128 TA decided that the Keystone Allegations should be considered at a disciplinary hearing. It did not take place until 5 May 2024. As already noted, the invoice issues were not taken further.

129 Between the investigation interview and the disciplinary hearing TA carried out more investigation. On 28 April 2022, she interviewed another attendee at the Keystone event who the claimant had mentioned (Amber Braybrook (AB), a partner of HCC. AB confirmed that she was in attendance, that she did not know the claimant before that evening, that she did not witness any unusual behaviour

by the claimant. She also told TA that K had spoken to her and PM on 16 December 2021 stating her concerns about the claimant's behaviour at the Keystone event.

130 Also between the investigation interview and disciplinary hearing, increasingly litigious correspondence came from the claimant's solicitors making various allegations about the treatment of their client, the claimant. Set out below are our findings about the contentious issues that are relevant to the complaints and issues in this case.

131 Length of time taken to respond to the SAR.

131.1 As noted above, the claimant (through his solicitors) made a SAR. It is unnecessary to set out the terms. It was an extensive request.

131.2 By email dated 3 April 2022 TA wrote to the claimant's solicitor to state that they considered the SAR as "complex" under relevant data protection legislation and would endeavour to respond, "as quickly as possible" and (as permitted under that legislation) within an extended 3-month period.

131.3 Further SARs were made on 30 March 2022 to Partners in Costs Limited and to A & M Bacon Limited. Whilst not as extensive as the SAR made to the respondent, those requests were also extensive. TA wrote on similar terms in response to these, noting their view that the requests were complex under data protection legislation and that they would endeavour to respond as soon as possible but within the 3-month extended period permitted for complex requests.

131.4 By letter dated 26 April the claimant's solicitors objected "*in the strongest possible terms"* and that they and their client regarded the respondent's position regarding these DSARs to be "*disingenuous"* and *"calculated to defer the sharing of relevant material until long after the conclusion of the current disciplinary action."*

131.5 Responses to the SARs were sent to the claimant and his solicitors by various zip files on 8 June 2022 (page 1915).

132 Iain Cherry interview notes.

132.1 On 7 April 2022 the respondent had provided the claimant with various documents in preparation for the disciplinary hearing. One document was an interview held with a witness that was at that time identified as "witness 1" but was in fact Iain Cherry.

132.2 On 13 April 2022 the claimant's solicitors (Gaby Hardwicke(GH)) wrote to the respondent raising various issues. It noted that the claimant's position was that the Keystone Allegations were concocted *"or otherwise coached by the business".*

132.3 In their letter GH raised concerns about what seemed to be gaps in the notes provided; also that the claimant was entitled to know the names of witnesses.

132.4 TA and P H had both interviewed IC. On receiving the letter of 13 April, TA returned to the notes of that interview and recognised some gaps. On 20 April she sent GH a set of fuller notes.

132.5 This provoked complaints from GH (contained in a long letter from them to the respondent dated 26 April 2024 – pages 1595-1598). Amongst their complaints is an accusation of an intention to conceal information and of tampering with evidence. We find that there was no intention to conceal information or tamper with evidence. The interview notes initially provided were not complete. Gaps were identified by the claimant/GH. TA and P H considered the concerns raised, reviewed their notes and provided a fuller version. The events are no more complex or sinister than that.

133 Amber Braybrooke

133.1 In their letter of 13 April GH noted that AB did not appear to have been interviewed and, as noted above, TA contacted HCC and attempted to arrange a time and date to interview her. She was unable to do so but AB provided written responses to various questions that TA had asked.

133.2 AB sent her response to TA by email of 28 April 2022. TA did not then forward this to GH until 4 May 2022.

133.3 This delay led to further accusations from GH; effectively that TA had deliberately held back the information from AB until the latest possible time.

133.4 We note that a bank holiday weekend fell between 28 April and 4 May. We note various other tasks relating to the claimant alone that TA was engaged in at the time including queries about pay; providing additional evidence (at GH's insistence) to those instructed to chair the disciplinary hearing; rearranging the time of the hearing; receipt of medical information from GH.

133.5 We also note that the information provided by AB was limited. Whilst we are sure that TA would have wanted to review it (possibly with solicitors) before forwarding it to GH, that should not have taken long. Ideally it would have been sent more quickly than it was. But we do not find that TA deliberately withheld this information until late on 4 May.

The second disciplinary hearing.

134 The letter inviting the claimant to attend the second disciplinary hearing is dated 7 April 2022 (page 1555 - 1557). It set out allegations against the claimant as follows:-

Allegations where it is alleged that you have:

Broken the organisation's Social Events policy by your alleged conduct following the Keystone Launch event that took place on 25th November 2021, specifically as highlighted below:

- *If alcohol is served during a staff/work event, employees must take an appropriate and responsible approach to alcohol consumption.*
- *Equal opportunity and anti-discrimination are a high priority within the company and employees are required to be mindful of their behaviour consistent with the Workplace Anti Bullying and Anti-Harassment Policy.*
- *Behave in any way that is likely to cause offence to other attendees or third parties present at the venue. This might include, but is not limited to excessive drunkenness, unlawful discrimination, inappropriate behaviour, acting in an aggressive, threatening or harassing manner or using abusive, profane, or offensive language, consistent with the Anti-Bullying & Harassment Policy.*
- *Otherwise behave in any way that could bring the Company's name or reputation into disrepute.*

Behaved inappropriately, where it is alleged that you:

- *Touched the bottom of witness 2 twice at the Cocktail Club*
- *Pulled witness 2 top up out of the back of her skirt at the Cocktail Club almost putting your hand on her bare back.*
- *Outside the Coq d'Argent bar made a comment to witness 2 about her age, asked if she was single and then said 'oh, I can't kiss you on the lips then' making her feel uncomfortable.*
- *At the Cocktail Club near witness 2 and putting your hand over your mouth in a gesture meant to suggest that you couldn't kiss her*
- *Dancing on the chairs in the Cocktail Club and being asked by security to get down, then being asked to leave the venue as you continued to dance on the chairs.*
- *Waiting outside the Cocktail Club until it closed and trying to arrange lunch with witness 2 making her again feel uncomfortable.*
- *Making a comment to a passer-by outside the venue relating to witness 2's age again.*

135 DW and TM were tasked with chairing this disciplinary hearing. Neither had chaired a disciplinary hearing involving misconduct allegations. They were provided with guidance from the HR team, being P H and TA. There was a meeting between the 4 of them on 12 April 2022.

136 We have seen various documents and draft documents that provide an insight into the decision making in this second disciplinary hearing. The documents show confusion about the role the disciplinary panel considered they had. We are

not critical of DW and TM's commitment to the process. The fault is with poor guidance from the HR professionals which in turn led to DW and TM being confused. In summary:-

136.1 DW made handwritten notes of the discussion on 12 April 2022. Those notes include an indication that TA had decided the allegations (against the claimant) were true and that the hearing was an opportunity for the claimant *"to put forward mitigation."*

136.2 As recently as the day before the hearing, a document provided by DW sets out some of his thoughts and preparations. It includes the following comments about possible interactions between the claimant's prescription drugs and alcohol:

> *"What does he remember? Is he saying he didn't do any of it because he remembers the night and recalls not doing it, or doesn't remember and is just pointing out inconsistencies in the evidence?"*
>
> *"all of this is irrelevant if he didn't actually do it? i.e. either he did it and the medication and alcohol issue is mitigation/explanation or he didn't do it, and those things are irrelevant save to explain why he has no memory of the evening but can disprove the happening of the incident by analysis of the evidence produced?"*
>
> *"Do we now have to reach a decision on whether we think it happened or not? I thought the position was that had already been decided?"*

136.3 The first 2 quotes indicate a requirement to consider and reach decisions about what happened. The third indicates that decision may already have been made before the matter handed over to DW and TM.

136.4 At the beginning of the disciplinary hearing, the notes (at 1833) record TM making an opening statement including the following comment:

> *The letter that was sent on the 7th April held the following allegations, that Ian you made inappropriate comments and carried out inappropriate actions to an individual which was following the Keystone Launch event which was on the 25th November 2021. Ian, you are obviously aware of the allegations that have been made and if you'd like to talk us through and tell us your mitigation to these allegations.*

136.5 Understandably this provoked comment from IM's legal representative who attended the hearing with IM. A discussion then followed including with a solicitor instructed by the respondent who also attended the hearing. She indicated that the term "mitigation" was not being used in the sense that legal representatives would usually expect it to be used.

137 Having considered the documents noted above, the notes of the disciplinary hearing and heard from DW and TM, we are satisfied that they applied themselves to decide whether or not the claimant behaved as was alleged on 25 November 2022. The term "mitigation" was an unhelpful and confusing one and was used incorrectly in the meeting. The guidance provided by TA and P H left DW and TM somewhat confused. But by the start of the hearing DW and TM understood that they needed to consider the evidence and decide whether the alleged incidents had happened. That is what they then did.

138 We have also considered to what extent TA influenced the outcome of the disciplinary hearing. We are satisfied that the decision was DW's and TM's. We particularly note a draft outcome document that DW and TM put together and shared between themselves but no one else (page 2643 -2645).

139 As with the first disciplinary hearing, the claimant provided a statement in advance of the hearing (pages 1637-1692). We are satisfied that DW and TM read through this statement and considered it when reaching their decision.

Questions about drugs

140 The claimant was asked by TM and DW about whether he had taken any illegal drugs (transcript of recording of meeting – page 1779). This arose from descriptions of the claimant's behaviour and appearance, particularly about the Christmas Party episode. The claimant acknowledges this for example in his appeal letter dated 16 March 2022. (page 1439, para 23).

Decision following second disciplinary hearing.

141 Following the disciplinary hearing on 5 May, DW and TM took the following steps:

141.1 Considered more information about the first disciplinary allegations and warning given. They considered this was relevant to consider further the claimant's allegation that the Keystone Allegations had been concocted.

141.2 Listened to the recordings of some interviews, particularly the interview with K.

141.3 Considered further medical evidence being provided by the claimant (a report from the claimant's psychiatrist dated 20 May 2022 was provided on 1 June 2022).

142 DW and TM reviewed this information as they discussed and started to reach their conclusions through May. They decided that the claimant had acted on 25 November 2021 as K had alleged. They recognised that he could not have breached the respondent's Social Events policy because this was not distributed to employees (including the claimant) until 1 December 2021 (i.e. 6 or so days after the Keystone Event). They put together a note of their decision – pages 1911 - 1913, in which they set out their findings that the claimant had acted in the various

ways alleged. They found that dancing on tables was not misconduct but the various other behaviours were.

143 Under the heading of "Mitigation" they recorded their findings as follows:-

> *Accepted that the mixture of the Elvanse medication with alcohol and possibly Sertraline likely contributed toward the behaviour complained of*
>
> *Accepted that IM was not advised against consuming alcohol whilst on the medication.*
>
> *Such mitigation is put in the context that IM accepts he deliberately took two doses of his medication on 25.11.21, the second immediately before going to the function. This is expressly advised against in the product information leaflet, and Dr Naliyawala confirms that IM was in his opinion aware of the maximum once-daily does. This does not appear to DW and TM to be responsible use of that medication.*
>
> *Accepted that IM likely drinks infrequently generally and likely would not prior to 25th November have had cause to be concerned about interaction with Elvanse.*
>
> *Accepted previously of good character.*
>
> *Accepted that he's made various efforts to change his life.*

144 They decided that the sanction for the Keystone Allegations was a final written warning.

145 In reaching this decision, DW and TM decided that K had made allegations against the claimant in good faith, that she had not made them up, that they had not been concocted. They were helped in reaching this view by a better understanding of the allegations at the Christmas party. they regarded his behaviour there as similar to the Keystone allegations.

146 They also made a finding that they were not aware of any reason why K would make up the allegations that she did and they were satisfied that her account of the events was true.

147 They also took into account what they regarded as an inconsistency in his defence. He alleged that the allegations were concocted but also wanted to rely on the defence that his medication had affected him and he could not remember much of the evening of 25 November 2021.

148 As for the impact of the medication, they recognised inconsistencies between the version of events that the claimant had put forward in response to the first (Christmas Party) disciplinary allegations and the second (Keystone) allegations. They found it surprising that he had not mentioned in response to the Christmas party allegations that he had also taken twice his daily dose of Elvanse at the Keystone launch event and that it had affected him in the same way. The

explanation provided in response to the Christmas party allegations was that his decision to take twice his daily dose was a one off. His explanation in response to the Keystone Allegations was that he was in the habit of taking twice the daily dose in advance of social events.

149 They decided that the claimant should take responsibility for

149.1 his decision to take twice his daily dose, particularly highlighting warnings/cautionary messages in the information leaflet that came with the medication.

149.2 his decision to then drink a large amount of alcohol.

150 They took account of the report from the claimant's psychiatrist which included the following:-

150.1 That the claimant was aware of the maximum daily dose (and, by implication, that when taking a second dose of Elvanse he was exceeding the maximum daily dose).

150.2 That the claimant had never been told to take twice his daily dose.

150.3 The following comment from the psychiatrist.

> "*If however, he had taken, by mistake, Elvanse in the late afternoon as well as in the morning and had then drank an excessive amount of alcohol, then the reaction to that could well be unpredictable and what has been described could well be the outcome.*

<u>Decision to Dismiss the claimant.</u>

151 Having made their findings and decision about the Keystone allegations, DW and TM met again with P H and TA. They were of course already aware of the fact that the claimant had a "live" final written warning. They learned of this in discussions with TA and P H before the disciplinary hearing. There is no dispute that TA told DW and P H that if they decided to issue the claimant with another warning then the outcome would be his dismissal.

152 Mr Matovu on behalf of the claimant is very critical of this, noting the relevant term of the respondent's disciplinary policy (at page 295) which provides that *"further misconduct within the specified period may result in their dismissal."* We agree with Mr Matovu that this wording provides an element of discretion.

153 We make the following findings about the decision to dismiss.

153.1 That DW and TM did apply their mind to the decision to dismiss; that decision did not automatically follow from their findings about the Keystone Allegations although those findings made it very likely that the claimant would be dismissed.

153.2 They considered whether the employment relationship had broken down. In considering this they asked TA for her view. They did this because she was an employee of the respondent, its HR director and knew the claimant. They were not employees of the respondent and did not know the claimant.

153.3 The claimant (and his solicitor who accompanied him to the disciplinary hearing) knew that dismissal was a possible outcome and therefore had an opportunity to address this. For example it is referenced in the claimant's statement that he provided in advance of the disciplinary hearing (see paras 86 and 130b and e of the statement). As it was, the claimant's position was that (1) the allegations were concocted; if not concocted the evidence is so unreliable they should not be accepted and (3) even if they were not, such was the impact of the medication that he was blameless for his actions and should not be dismissed.

154 We accept that DW and TM decided that the claimant should be dismissed. These are their reasons:-

154.1 They decided that would be the usual outcome when an employee had already been provided with a final written warning and then there was further disciplinary misconduct.

154.2 It would be a big reputational risk for the respondent to keep employing the claimant after he had behaved as he had.

154.3 That they were concerned that the claimant's commitment to changing his life and not drinking at work events would be short lived, that there was a good chance that he would revert to drinking whilst still taking Elvanse and that the respondent should not bear the risk.

155 The final 2 reasons are neatly summarised in the final paragraph of the dismissal letter:

> *"We are sorry that it has come to this, Ian, but your actions are wholly unacceptable, and we cannot allow you to continue to work for the Company and risk it. or something similar, happening again.*

156 The decision and dismissal letter is long and detailed. It was drafted with considerable legal input. We accept the evidence of DW and TM that they were actively involved in the preparation of the letter and they agreed its contents. The letter is in their name.

<u>Our findings about Elvanse and its effect on the claimant.</u>

157 We have considered the following evidence:

157.1 The claimant's own evidence.

157.2 Medical reports, particularly from the claimant's psychiatrist;

157.3 The reports from Sade Abiola (SA), pharmacy expert, appointed by the respondent.

157.4 Articles provided by the claimant about concurrent use of anti-depressants and prescribed amphetamines (2191) and about mixing alcohol and prescribed amphetamines (2260).

157.5 Information provided about Elvanse.

158 Our findings are below:-

158.1 If Elvanse is not used properly, it may cause abnormal behaviour. (Elvanse leaflet at page 1536)

158.2 The Elvanse leaflet also notes that some users may experience a severe allergic reaction, episodes of seeing or hearing things, paranoia and delusions. The claimant had been taking this medication since January 2021 and there is no evidence of these side effects from the Elvanse (see further below)

158.3 That mixing Elvanse and alcohol can make a person feel like they can drink more because the combination can lead to the user perceiving that they are less drunk than when taking alcohol alone. (SA report at page 2264)

158.4 That the mix tends to give a user a drunken feeling without the fatigue associated with it. The user can feel more confident and chattier than using alcohol alone. (SA report at 2270).

158.5 That concurrent use of alcohol and amphetamines can increase wakefulness and mask the depressive effects of alcohol (2015 article in the Dove Press journal provided by the claimant at 20191- 2221 and particularly 2197). This is broadly consistent with the view expressed by SA as noted above.

159 In correspondence with the respondent, the claimant has noted potential dramatic and harmful effects that he says can result from combining Elvanse and alcohol. He accepts that it did not have such catastrophic impacts on him. (letter from claimant to respondent dated 7 February 2022 at paragraph 6).

160 The combined effect of Elvanse and alcohol meant that the claimant's conduct was less inhibited that it would have been had he not taken the medication.

161 The minority (Dr Tirohl) accepts the claimant's evidence that the combined impact of alcohol and Elvanse, affected him to the extent that he has no recollection of the incidents in question. Dr Tirohl finds that the combining the substances (and the amounts of Elvanse and alcohol taken) affected the claimant to the extent that he had little mental control over his behaviour late in the evenings in question.

162 The majority do not find that it had such an impact on the claimant. We find that the claimant has exaggerated the impact of the medication on him. His behaviour became less inhibited but the combination of substances did not mean that he lost control. In deciding not to accept the claimant's evidence, the majority took account of the following:-

162.1 RG's observations that the evidence is that the claimant's behaviour became worse later in the evening of the Christmas party. The claimant had taken a second dose of Elvanse before he left his hotel. He combined this with alcohol at the hotel bar, early that evening. There is no evidence that he was affected by combining the 2 drugs. He did not misbehave until later in the evening when he had had a lot to drink.

162.2 The majority make the same observations about the Keystone launch event evening. Notably there is no indication of inappropriate behaviour at the launch event itself, at a time when, according to the claimant, he had taken a second dose of Elvanse and was drinking alcohol (claimant's witness statement at para 68).

162.3 Whilst the majority accept that the impact of Elvanse probably made the claimant feel like he could drink more, it did not make him drink more. The majority notes the claimant's evidence about his use of alcohol; that before the Keystone launch event (25 November 2021).he had rarely drunk alcohol more than once a month and when he did, only had "*one or 2 beers or glasses of wine."* That included the year 2021, when the claimant was also taking Elvanse – albeit in different and increasing doses. This evidence from the claimant, of limiting and understanding his alcohol intake confirms that the claimant knows how to measure and control his alcohol intake.

162.4 The claimant has not been truthful about his use of Elvanse. The majority took in to account the different versions provided during the first and second investigation and disciplinary processes about his use of Elvanse. They conclude from this untruthfulness that the claimant has exaggerated the impact of his medication as a means to explain and excuse his behaviour. When he just faced the allegations about the Christmas party the claimant (eventually) referenced a one-off use of Elvanse before attending a social event. When the allegations from the Keystone launch event were raised, his version necessarily changed as he wanted to use Elvanse as a possible excuse for his behaviour on this second (but earlier) occasion.

162.5 There is nothing to indicate that the claimant reported (either to his doctor or to his psychiatrist) the side effects he has described in his evidence to this Tribunal and at the disciplinary hearing. During 2021 the claimant and his psychiatrist were monitoring the strength of medication being prescribed (Sertraline and Elvanse) and the impact on the claimant. In a message to his psychiatrist, on 18 February 2021 (page 2230) the claimant described some potential side effects of medication; in a text message of 3 October 2021 the claimant stated his view that he needed an increased dose of Elvanse; there is no report from the claimant to his psychiatrist about the adverse reactions the claimant says he experienced at the Keystone launch

event or the Christmas party (until after the claimant had been told his conduct was being investigated).

162.6 The comments made by his psychiatrist in correspondence dated 24 January 2022.

> *It is not possible to totally exclude that his subsequent behaviour at the event could be due to the combined effect of both the Elvanse and the alcohol. Usually he takes Elvanse only in the mornings and by late afternoon /evening the quantity of it in the body is much reduced and unlikely to react significantly with alcohol consumed later in the day (after 10-12 hours).*

A reasonable interpretation of this comment is that it is possible but unlikely that the behaviour was due to the combined effect.

163 We are unanimous in our view that the claimant knew what the maximum dose of Elvanse was and that he knew he should not be taking more than the prescribed amount. We are supported in this by:-

163.1 The claimant's own evidence about Elvanse being a controlled drug, that he was unable to access more than one month's prescription at a time. In essence, the claimant knew it was medication that had to be treated with respect.

163.2 The claimant knew what his prescribed daily amount was and that it had been increased from 40mg to 50 mg.

163.3 The psychiatrist's report stating that the claimant knew that the maximum daily dose that could be prescribed was 70mg per day. He knew therefore that he was taking more than the maximum daily amount of this controlled drug.

164 We are unanimous in our view that the claimant knew how much he was drinking. The claimant is a 47-year-old professional, who is experienced at attending (and hosting) corporate events involving alcohol. The claimant's own accounts of the 2 evenings show that he knew he was, voluntarily, drinking a lot of alcohol.

165 We are unanimous in our view that knowingly taking more than a prescribed amount of a controlled amphetamine and drinking a lot of alcohol does not provide the claimant with an excuse to behave in the way that was reported. In reaching this view we have taken account of our finding that Elvanse probably made the claimant feel like he could drink more. But that was the extent to which it affected him. The claimant decided to have a lot to drink. He became very drunk. Neither the drug nor his disability made the claimant's consumption of alcohol somehow involuntary. Neither the drug nor his disability made the claimant behave in the way that he was reported to have behaved.

<u>Other Findings of fact.</u>

166 Grievance

166.1 We need to make findings of fact about the time taken to deal with the claimant's grievance.

166.2 The claimant raised a grievance, via his solicitors, on 16 March 2022. He raised this at the same time as providing details of his appeal against the final written warning dated 3 February 2022. (enclosed with the letter at page 1434) and submitting SARs.

166.3 Some points raised in the grievance related to the final written warning (they are at pages 1445-6).

166.4 TA responded on 22 March 2022 and proposed that the appeal and the grievance be considered at the same time (page 1493).

166.5 The claimants solicitors however had proposed that the grievance should only be dealt with after the respondent had complied with the SARs.

166.6 Whilst the respondent (TA) did not agree to delay the grievance until the outcome of the DSARs was provided to the claimant, that is what happened. The managers appointed to hear the claimant's appeal (RG and TA2) did attempt deal with the grievance during the appeal hearing on 28 March 2022. The claimant was resistant to it and it was not progressed during that meeting.

166.7 On 30 March 2022 the claimant made more SARs

166.8 TA appointed another manager (Paul Cruikshank (PC)) to consider and make decisions about the claimant's grievances. By email dated 21 April 2022 the claimant was told that investigations into his grievances were continuing.

166.9 By email dated 19 May 2022 the claimant was invited to a meeting on 26 May 2022 to discuss his grievances (page 1896-7)

166.10 The claimant's solicitors replied on 24 May to refer to the outstanding SARs and to reiterate the expectation that the SARs would be complied with and information provided to the claimant, in advance of the grievance hearing. They asked for a delay until the end of June or early July.

166.11 As noted above, the claimant received responses to his SARs on 8 June 2022. The grievance meeting took place on 4 July 2022.

167 Updating clients about the claimant's absence.

167.1 One of the complaints that we need to decide on is whether MH and CH told clients that the claimant was not returning to the business.

167.2 We accept CH's evidence that, after the claimant had been suspended, where necessary she told clients/referrers that the claimant was out of the business for a while. This evidence is supported by emails dated 11 February 2022 at pages 1191 and 1230.

167.3 We also accept CH's evidence that during the period that the claimant was suspended and absent due to sickness, she did not simply transfer cases away from the claimant to other consultants. Where the claimant was the appointed court expert, the respondent did not try to change that formal appointment. Instead, a discussion would take place with the relevant solicitors to let them know about the claimant's absence and if any work needed doing, to direct queries to CH.

167.4 The evidence of MH is consistent with this. Again, we accept his evidence on this point.

168 Regulatory issues

168.1 The respondent is subject to regulatory obligations of the Financial Conduct Authority (FCA). It employs DM as a compliance director whose role includes ensuring that the respondent meets its regulatory obligations.

168.2 Sometimes DM sources external expertise from a company called Threesixty Services LLP (360). She was told of the claimant's suspension on 10 February 2022 and decided to contact 360 and obtain a professional regulatory review on the position. 360 provided advice by email of 14 February (pages 2564). The advice provided was very general as it appears they did not have much information about the relevant circumstances of the disciplinary investigation taking place.

168.3 The matter came to DM's attention again in April 2022 when she learned more detail about the allegations and considered the FCA's conduct rules and whether he may have broken these.

168.4 A decision was taken at that stage to inform the claimant that he might have breached the FCA conduct rules. This is what the claimant was told in correspondence (an invite letter) of 26 April 2022.

> *As you may be aware, due to the nature of the allegations, there may be potential regulatory implications. I have discussed these implications with our Compliance Director and am therefore writing to update you as regards the regulatory position.*
>
> *Given that you are in a Certified Function role under the Senior Managers and Certification Regime, the allegations against you fall to be considered under the FCA's Conduct Rules in the FCA Handbook, in particular:*
> *Rule 1 (COCON 2.1.1R): You must act with integrity; and*

Rule 2 (COCON 2.1.2R): You must act with due skill, care, and diligence.

The disciplinary panel will therefore consider whether the allegations against you set out in the disciplinary invite letter of 7 April 2022 amount to a breach of the above conduct rules.

In addition, please note that the outcome of the disciplinary proceedings and any information the Company considers relevant to the assessment of fitness and propriety may be referred to in any regulatory reference in accordance with the Company's regulatory disclosure obligations.

168.5 Whilst DM was broadly in agreement with the extract above, her evidence(which we accept) was that the letter from which this passage was taken was not written or checked by her and that the person who would need to decide whether to refer the conduct to the FCA would be DM and no one else (not therefore, the appointed disciplinary panel).

168.6 DM reviewed the circumstances and decided that the claimant's conduct would not be reportable to the FCA under its individual conduct rules. That was confirmed in the disciplinary outcome letter dated 17 June 2022. This is what the relevant extract from the disciplinary outcome letter says:

"Given that you are in a Certified Function role under the Senior Manager and Certification Regime, our Compliance Director, Denise Moore has had to consider whether your misconduct amounts to a breach of the following Individual Conduct Rules:

• COCON 2.1.1R - You must act with integrity; and
• COCON 2.1,2R - You must act with due skill, dare and diligence.

The Compliance Director has considered the nature of the misconduct and the matters that were considered as part of the disciplinary process, the extent to which this may impact on your ability to perform your role in a regulatory context and the FCA's specific guidance on the Individual Conduct Rules in COCON 4.1.

Although you have been found to have committed acts of gross misconduct, on balance it is not found that conduct amounted to a breach of Individual Conduct Rules 1 and 2.

168.7 However DM remained concerned about the FCA's fitness and propriety requirements and she decided to notify the FCA. Her evidence (which we accept) was that she made this decision because the annual declaration from the FCA asks regulated businesses to consider an individual's integrity, honesty and reputation and particularly where a regulated employee has been dismissed.

168.8 DM therefore informed the FCA about the claimant's dismissal. She provided the FCA with what she considered to be the relevant details on an FCA form called Form C. The information on this form included the following.

> *Mr Mackendrick has been subject to 2 internal disciplinary procedures relating to his conduct at the firm's Christmas party on 17th December 2021 and an event hosted by Keystone Case Management (part of the Frenkel Topping Group), on 25 November 2021.*
>
> *Following the first disciplinary procedure (relating to the Christmas Party), Mr Mackendrick was found to have committed misconduct and received a final written warning. Following the second disciplinary procedure (relating to the 25 November 2021 event), Mr Mackendrick was found to have committed gross misconduct and received a second final written warning and was dismissed on 17 June 2022.*
>
> *It should be noted that at the time of the first disciplinary procedure, the firm had not been made aware of any allegations concerning Mr Mackendrick's conduct at the 25 November 2021 event, even though that event happened earlier. In both cases, Mr Mackendrick was found to have engaged in non-financial misconduct (sexual harassment) which amounted to gross misconduct. However, in both cases, the following mitigating factors were taken into account in imposing the sanction of final written warning rather than summary dismissal:*
>
> *(i) certain medical conditions from which Mr Mackendrick suffers which impact on his ability to deal with social situations,*
> *(ii) the fact that Mr Mackendrick had combined alcohol with new medication which he had started taking (on medical advice) shortly before November 2021 which may have contributed to his behaviour, and*
> *(iii) Mr Mackendrick's length of service and previous clean disciplinary record with the firm, as well as the various efforts he has made to change his lifestyle in order to prevent such incidents happening again.*
>
> *As Mr Mackendrick had a live final written warning on file for very similar misconduct and received a second final written warning, Mr Mackendrick's employment was terminated with notice in accordance with the Company's disciplinary policy.*
>
> *Given that the conduct did not directly concern any clients of the firm, the firm concluded, on balance, that Mr Mackendrick did not breach the conduct rules, but that the information that was considered during both disciplinary processes may potentially affect the FCA's assessment of his fitness and properness (SUP*

10A.14.10R(c)) and in particular concerning the reputation element of "Honesty, integrity and reputation".

168.9 The claimant is critical of the respondent's decision to provide this information.

168.10 We make the following findings.

168.10.1 The account provided to the FCA was thoughtfully written, balanced and objective. We note for example that it makes clear that the gross misconduct was not financial related which is obviously important from an FCA regulatory perspective.

168.10.2 The description of the misconduct as sexual harassment is a reasonable description applied to the misconduct – or many aspects of it. It also reflects the second disciplinary outcome in that the term sexual harassment is used in the decision letter (page 1921)

168.10.3 DM provided this report and account because she believed that the respondent needed to, to comply with FCA requirements.

169 Reference to Tenet

169.1 Following his dismissal, the claimant applied for a position with an accountancy firm called Tenet. The respondent was obliged under FCA regulatory requirements, to provide a reference.

169.2 Given the regulatory nature of the reference, DM dealt with it. The format of the reference was in accordance with FCA requirements. There are 3 questions on the reference form (questions E F and G) that the reference provider is obliged to answer. These questions are consistent with (and effectively apply) the tests that DM applied when considering whether anything should be reported by the respondent to the FCA.

169.3 The respondent answered "no" to Question E- "have we concluded that the individual was not fit and proper to perform a function." (p2020)

169.4 The respondent also answered "no" to Question F – which asks whether disciplinary action concerning breaches of specific FCA recognised functions.

169.5 The respondent answered yes to Question G- which asks about any concerns when applying the fit and proper test; the same test that DM applied when deciding to submit Form C to the FCA (see above). Further details were provided.

169.6 DM shared with the claimant's solicitors, a draft reference. The long response from GH was:-

169.6.1 that the proposed course of action was "*wholly unnecessary and vindictive*"

169.6.2 to insist that the respondent should answer "no" to Question G; and if they did not, then.

169.6.3 to provide a reference that was supportive noting that the claimant is a disabled person who has been dismissed and will be disadvantaged in the job market.

169.6.4 That if the respondent proceeds as proposed, then the terms of the reference would be included as another complaint in these Tribunal proceedings and DM would be personally named as a respondent.

169.7 DM did consider the response and make some changes before ethe reference was sent. Those changes noted that the claimant had appealed against the final written warning and had issued employment tribunal claims.

169.8 As with the report to the FCA, we find the terms of the reference to Tenet to be (1) accurate and (2) carefully drafted.

170 Internal email dated 27 June 2022.

170.1 On 27 June 2022, MH sent an email to all employees of the respondent. It said this.

> *As you may know, Ian Mackendrick has been employed by Frenkel Topping Limited since January 2015.*
> *Unfortunately over recent months a number of incidences have been reported to the Executive and we have undertaken thorough, independent investigations into these allegations.*
> *Following these investigations Ian Mackendrick is no longer employed by Frenkel Topping Limited.*
> *This may come as a surprise to many of you but please be assured that for over 40 years, FTL has prided itself on its integrity and professionalism and we continue to strive to offer the best experts and the best service for you and your clients, pre and post settlement.*
> *If you have any concerns or questions then please do feel free to contact me via email or my mobile which is included below. Alternatively if you have an ongoing case then Sam Buckley, Manager of the Expert Witness Team will be able to assist.*

170.2 MH sent this email because the claimant had been dismissed. The purpose of the email was to update the respondent's workforce about the claimant's dismissal.

Submissions

171 On day one we were provided with detailed written submissions by both Mr Stone and Mr Matovu. Both counsel supplemented their written documents with

oral submissions. These submissions have helped inform our findings of fact, our understanding and application of the relevant law and our conclusions.

The Law

Unfair dismissal.

172 The respondent bears the burden of proving, on the balance of probabilities, the reason why it dismissed the claimant and that the reason for dismissal was one of the potentially fair reasons stated in s98(1) and (2) ERA. If the respondent fails to persuade us that it had a genuine belief in the reason and that it dismissed him for that reason, the dismissal will be unfair.

173 The reason for dismissal is a set of facts known to the respondent or a set of beliefs held by it, which caused it to dismiss the claimant.

174 If the respondent does persuade us that it held that genuine belief and that it did dismiss the claimant for one of the potentially fair reasons, the dismissal is only potentially fair. Consideration must then be given to the general reasonableness of that dismissal, applying section 98 (4) ERA.

175 Section 98 (4) ERA provides that the determination of the question of whether a dismissal is fair or unfair depends upon whether in the circumstances (including the respondent's size and administrative resources) the respondent acted reasonably or unreasonably in treating misconduct as a sufficient reason for dismissing him. This should be determined in accordance with equity and the substantial merits of the case.

176 In considering the question of reasonableness under section 98(4) ERA, an Employment Tribunal should have regard to the decisions in **British Home Stores v. Burchell [1980] ICR 303 EAT**; **Iceland Frozen Foods Limited v. Jones [1993] ICR 17 EAT; Foley v. Post Office, Midland Bank plc v. Madden [2000] IRLR 827 CA** and **Sainsbury's Supermarkets v. Hitt [2003] IRLR 23** ("Sainsbury)

177 In summary, these decisions require that an Employment Tribunal focuses on whether the respondent held an honest belief that the claimant had carried out the acts of misconduct alleged and whether it had a reasonable basis for that belief having carried out as much investigation into the matter as was reasonable. A Tribunal should not however put itself in the position of the respondent and decide the fairness of the dismissal on what the Tribunal itself would have done. It is not for the Tribunal hearing and deciding on the case, to weigh up the evidence and substitute its own conclusion as if the Tribunal was conducting the process afresh. Instead, it is required to take a view of the matter from the standpoint of the reasonable employer.

178 The function of the Tribunal is to determine whether, in the circumstances, the respondent's decision to dismiss the claimant fell within the band of reasonable responses. This band applies not only to the decision to dismiss but also to the procedure by which that decision was reached.

179 We also note (and have taken account of) the ACAS Code of Practice on Disciplinary and Grievance Procedures and the ACAS Guide on Discipline and Grievances at work 2015.

180 When determining compensation for unfair dismissal, Employment Tribunals must apply s123 ERA.

> *"s123(1) ….the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant n consequence of the dismissal in so far as that loss is attributable to action taken by the employer.*
>
> *….*
>
> *S123(6) 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."*

181 Compensation is reduced under just and equitable principles under s123(1) in 2 broad categories of cases:-

181.1 Where the employer can show that the employee was guilty of misconduct which would have justified dismissal, even if the employer was not aware of this at the time of the dismissal.

181.2 Where it is just and equitable to apply a "Polkey" reduction (applying the case of **Polkey v. AE Dayton Services Limited 1988 AC 344)**.

182 Provisions providing for an adjustment to the basic award are at section 122(2) ERA which requires a tribunal to reduce the amount of a basic award where it is just and equitable to do so, having regard to the claimant's conduct before the dismissal.

Section 15 Equality Act 2010

183 Section 15 provides as follows:-

> *15(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.*
>
> *15(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.*

184 Subsection 2 above does not apply to this case. The respondent accepts it knew that the claimant had a disability.

185 In **Secretary of State for Justice and anr v Dunn UKEAT 0234/16** the Employment Appeal Tribunal ("EAT") noted 4 findings to be made, for the claimant to succeed in a section 15 claim:-

185.1 there must be *unfavourable treatment;*

185.2 there must be *something* that arises in consequence of the claimant's disability;

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

185.4 the alleged discriminator cannot show that the unfavourable treatment is *a* proportionate *means of achieving a legitimate aim*.

186 The term "Unfavourable treatment" is different to (and must be distinguished from) other concepts in the Equality Act 2010 – being "less favourable treatment" and "detriment." Unlike complaints of direct discrimination under section 13 Equality Act 2010 ("less favourable treatment") there is no requirement for a comparator.

187 In deciding whether there was unfavourable treatment, we must consider the following questions:-

187.1 What was the relevant treatment?

187.2 Was it unfavourable to the claimant?

(Williams v. Trustees of Swansea University [2018]UKSC 65 at para 12**)**

188 Where we have decided that there is unfavourable treatment, we need to follow the guidance at paragraph 62 of the judgment in **Sheikholeslami v. University of Edinburgh [2018] IRLR 1090**

> *On causation, the approach to s 15 Equality Act 2010 is now well established and not in dispute on this appeal. In short, this provision requires an investigation of two distinct causative issues: (i) did A treat B unfavourably because of an (identified) something? and (ii) did that something arise in consequence of B's disability? The first issue involves an examination of the putative discriminator's state of mind to determine what consciously or unconsciously was the reason for any unfavourable treatment found. If the 'something' was a more than trivial part of the reason for unfavourable treatment then stage (i) is satisfied. The second issue is a question of objective fact for an employment tribunal to decide in light of the evidence.*

189 This is consistent with the EAT's guidance in **Pnaisner v.NHS England (UKEAT/0137/15/LA)** which we summarise below.

189.1 The Tribunal should decide what caused the treatment complained of – or what the reason for that treatment was.

189.2 There may be more than one cause. The "something" might not be the sole or main cause but it must have a significant impact.

189.3 Motives are irrelevant.

189.4 The Tribunal should decide whether the/a cause is "*something arising in consequence of*" the claimant's disability. There could be a range of causal links under the expression *"something arising in consequence of…"*

190 When deciding whether a measure is proportionate in the context of the legitimate aim being pursued (s15(1)(b) EqA above) a tribunal must weigh the real needs of the employer against the discriminatory effect of the proposal. (see **DWP v. Boyers UKEAT/0282/19).**

191 Mr. Matovu referred to **Burdett v. Aviva Employment Services UKEAT 0439/13 (Burdett)** submitting that there were considerable parallels between the facts of that case and Mr. MacKendrick's. Burdett concerned an employee who suffered from a paranoid schizophrenic illness who discontinued his medication and then sexually assaulted female colleagues and members of the public before being detailed under the Mental Health Act 2007. Whilst it was accepted that the dismissal amounted to discrimination arising from disability (the unfavourable treatment being Mr. Burdett's dismissal for misconduct which arose from his disability at a time it was not being controlled by medication) the Employment Tribunal decided that the decision to dismiss the claimant was proportionate means of achieving the legitimate aim of protecting its other employees and maintaining workplace standards. Mr. Burdett's appeal to the EAT was successful. The EAT decided that the Employment Tribunal had identified the employer's legitimate aims but had not taken any account of the claimant's disability (the factor that had caused him to breach the expected standards of conduct). Whilst dismissing the claimant was a means of achieving those standards, there was no apparent recognition of the impact of that decision on the claimant and no apparent consideration of alternative measures that might also achieve the same aim.

Duty to Make Reasonable Adjustments (EQA s20)

192 The claimant makes claims under s20(3) EQA and s20(5) EQA.

193 Section 20(3) imposes a duty on an employer *"where a provision criterion or practice of* [the employer] *puts a disabled person at a* substantial *disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage."*

194 Section 20(5) imposes a duty on an employer "*where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not* disabled*, to take such steps as is reasonable to have to take to provide the auxiliary aid*."

195 We note that, for the duty to make reasonable adjustments to apply, a claimant needs to show that s/he has been put to a substantial disadvantage in relation to a relevant matter in comparison to persons who are not disabled.

PCPs

196 For a provision criterion or practice (PCP) to be valid for the purposes of s20, it must be more widely applied (or would be more widely applied) than to the claimant alone.

197 Chapter 4 of the EHRC Code of Practice on Employment 2011 at paragraph 4.5 says this in relation to PCPs:-

> *The phrase provision criterion or practice is not defined by the Act but it should be construed widely so as to include for example any formal or informal policies rules practices arrangements criteria conditions prerequisites qualifications or provisions. A provision criterion or practice may also include decisions to do something in the future - such as a policy or criterion that has not yet been applied - as well as a one off or discretionary decision."*

198 Whilst PCPs should be construed widely, there are limits. The word "practice" indicates some degree of repetition and where a PCP was identified from what happened on a single occasion, there must be some evidence of a more general practice. Paragraph 59 of the judgment in **Gan Menachem Hendon Limited v Ms Zelda De Groen UKEAT/0059/18:-**

> *So, while it is possible for a provision, criterion or practice to emerge from evidence of what happened on a single occasion, there must be either direct evidence that what happened was indicative of a practice of more general application, or some evidence from which the existence of such a practice can be inferred.*

199 We must decide whether a PCP placed the claimant at a substantial disadvantage. We note the terms of section 212 EQA, that *"substantial means more than minor or trivial."*

200 Where we decide that a PCP puts the claimant at a disadvantage then we need to consider the issue of reasonable adjustments. We note here:-

a. There is no duty to take measures that would impose a disproportionate burden on the employer.
b. The test as to what is reasonable is an objective one – not therefore what an employer reasonably believes is (or is not) reasonable, but objectively what the Tribunal assesses as reasonable (**Smith v. Churchills Stairlifts plc [2005] EWCA 1220**).

c. The Tribunal must identify the practical step that was reasonable for the employer to have taken to overcome the substantial disadvantage identified. There must be sufficient specificity to the practical step identified.

d. The following guidance from the judgment of the EAT in **Project Management Institute v. Latif UKEAT/0028/07** (at paras 54 and 55)

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

Auxiliary Aids

201 Section 20(5) Equality Act 2010 creates a duty to make reasonable adjustments where, but for the provision of an auxiliary aid, an employee would be put at a substantial disadvantage in comparison with non-disabled persons.

202 An auxiliary aid can include an auxiliary service (section 20(11) Equality Act 2010).

Time Limits

203 The time limit issues in this case relate to the reasonable adjustments complaints only. Section 123 of the EQA provides that proceedings may not be brought after the end of the 3 months of the act complained of or such other period as the Tribunal considers as just and equitable. Allowance is made separately (section 140B EQA) for early conciliation.

204 Complaints of failures to make reasonable adjustments often relate to omissions rather than acts. Section 123(4) is relevant.

> *"In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something-*
> e. *When P does an act inconsistent with doing it*
> f. *If P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it."*

205 We note here the Court of Appeal's decision in **Matuszovicz v. Kingston upon Hull City Council [2009] EWCA Civ 22 (Matuszovicz)** and

particularly the conclusion at paragraph 21 of Lloyd LJ's judgment as well as Sedley LJ's judgment at 35-38.

206 Mr Cross referred us to the more recent decision of the EAT – **Fernandes v DWP [2023] IRLR 967 (Fernandez) a**nd particularly to paragraph 16 of that judgment.

207 We summarise the position as follows:-

207.1 The duty to make an adjustment arises as soon as there is a substantial disadvantage to the employee.

207.2 A breach of the duty to make reasonable adjustments is not a continuing act.

207.3 Where the employer failed to comply with the duty but did not do so deliberately (the failure was a result of for example a lack of diligence or competence), then time will start to run from a date when it was reasonable for the employee to conclude that the employer will not comply.

207.4 Where the employer does something which is inconsistent with the fulfilling the duty, then time will run from the date of that inconsistent act.

Burden of Proof – EQA Claims

208 We are required to apply the burden of proof provisions under section 136 EA when considering complaints raised under the EQA.

209 Section 136 states:

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

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

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

210 We have also considered the guidance contained in the Court of Appeal's decision in **Wong v. Igen Limited [2005] EWCA 142**. This case concerned the test as set out in discrimination legislation that pre-dated the EqA but the guidance provided in there remains relevant. The annex to the judgment sets out guidance.

211 Finally, on the issue of burden of proof, we are mindful of guidance from case law indicating that something more than less favourable treatment may be required in order to establish a prima facie case of discrimination; see for example **Madarassy v. Nomura International [2007 ICR 867]** where the following was noted in the judgment:

"*The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination."*

Discussion and Conclusion

Issue One

Jurisdiction: time limits

1. The Claimant's (C's) 1st ET1 was submitted on 26/5/2022. The first notification to ACAS was on 16/3/2022 and the earliest ACAS certificate was issued on 26/4/2022. For any alleged act of discrimination which occurred on or before 16/12/2021:

*a. Did it form part of "conduct extending over a period", of which there was a final act within time: s.123(3(a) Equality Act 2010 ("**EqA**"); and, if not*
b. Was the claim brought within such other period as the Tribunal thinks just and equitable: s.123(2) EqA.

Response

212 We comment on time limit issues below in relation to those allegations of discrimination arising before 16 December 2021.

Issues 2 and 3

Unfair dismissal

2. Was C dismissed for a potentially fair reason? The Respondent (R) says that C was dismissed for a reason relating to C's conduct, alternatively some other substantial reason of a kind such as to justify the dismissal of C.

3. In the circumstances did R act reasonably in treating C's conduct as sufficient reason for dismissing him in accordance with s 98(4) of the Employment Rights Act 1996 (ERA 1996)?

Response

213 The reason for dismissal related to the claimant's conduct. The claimant was dismissed because:-

213.1 The respondent decided that his conduct on the evening of 25 November 2021 at the Keystone event was misconduct.

213.2 When that decision was made, the claimant was already subject to a final written warning for misconduct at the Christmas party.

214 As for the fairness of that decision, we find as follows:-

214.1 The decision to dismiss the claimant was made by DM and TM having diligently carried out the tasks of conducting the hearing, considering all of the evidence available and reaching a decision.
:-
214.2 Both honestly believed that the claimant had engaged in the misconduct at the Keystone launch event as alleged and set out in the dismissal.

214.3 Both had reasonable grounds for their belief. Whilst there was no eyewitness corroboration of K's account; they were reasonable in taking in to account any apparent absence of motive by K to have fabricated an account about the claimant's conduct that evening; to have listened to K's account when providing her evidence and forming the view that they believed her; to have taken in to account the similarities between the events at the Keystone launch event and the Christmas party; to have formed a negative view about the reliability of the claimant's evidence particularly about his use of medication.

214.4 The decision to dismiss was within the range of reasonable responses. We have taken in to account the following: (1) that the claimant was already subject to a final written warning; (2) the fact that the claimant knowingly took more than his prescribed amount of Elvanse; (3) that the claimant knowingly consumed large quantities of alcohol; (4) the seriousness of the claimant's misconduct and its potential damage to the respondent's reputation; (5) that the 2 instances of serious misconduct demonstrate a concerning pattern of behaviour: (6) that the claimant's evidence in the second disciplinary process about the use of Elvanse was inconsistent with the evidence in the first disciplinary process. These are all factors that were addressed in the dismissal letter dated 17 June 2022. Having considered these factors, we are satisfied that dismissal was within the range of reasonable responses.

214.5 The procedure followed was fair. We have considered evidence concerning the role given to DW and TM, particularly whether they were just to consider mitigating factors or whether they were to reach decisions about whether the claimant did what was alleged. As we make clear in our findings of fact, we are critical of the advice and guidance given by HR professionals. We are also satisfied that DW and TM did reach their own decision about the alleged misconduct.

214.6 We have also considered whether TA unduly influenced the outcome. Mr Matovu has raised concerns about DW and TM meetings with TA both before and after the disciplinary hearing. The fact that an HR manager investigates allegations of misconduct does not in itself make a dismissal unfair; nor does the fact that the same HR manager then provides advice and guidance to the disciplinary panel. The confusing guidance provided in this case might well have caused or contributed to an unfair process and that is something we considered carefully; but we accept the evidence provided by DW and TM and are satisfied that they reached decisions about the truth of the allegations as well as their serious and any mitigation. We are satisfied that

the decision reached was theirs, following a careful consideration of the evidence.

214.7 We have also considered whether TA's comment to TM and DW - that the relationship had broken down – was also something that amounted to an overbearing influence on DW and TM when making the decision that the claimant should be dismissed. Again, we are satisfied that DW and TM approached the issue independently and the decision to dismiss was not made unfair by TA expressing this view. We also note that the comment really amounted to no more than a statement of the obvious. For example, a review of the correspondence from the claimant's side in the lead up to the disciplinary hearing in itself indicates a breakdown in the relationship; the claimant's response to the allegations – that individuals within the respondent were conspiring to have him dismissed by concocting the allegations – also indicates a broken relationship.

214.8 We reject a point made by Mr Matovu on submissions that the claimant was not given the opportunity to make representations on the issue of sanction – that a further warning would lead to dismissal and that there was a relationship breakdown. We are satisfied that the claimant and his legal representatives were very clear about dismissal being a potential outcome, had an opportunity to address the disciplinary panel on this and did so.

Issues 4-7

Remedy

4. *If the Tribunal finds that C was unfairly dismissed for any reason:*

   a. *Would it be just and equitable to reduce any basic award by reason of C's conduct prior to his dismissal (s 122(2) ERA)?*

   b. *Would it be just and equitable to make any compensatory award to C (s 123(1) ERA)?*

   c. *Did C cause and/or contribute to his own dismissal such that it would be just and equitable to reduce any compensatory award under s 123(6) ERA?*

   d. *Has C mitigated his losses?*

5. *If the Tribunal finds that R failed to follow a fair procedure in relation to C's dismissal, would he have been dismissed fairly in any event such that it is appropriate to make a Polkey reduction?*

6. *Should any compensation awarded to C be reduced by up to 25% to take into account his unreasonable failure to exhaust R's internal disciplinary procedure?*

7. *Should any compensation awarded to C be increased by up to 25% to take into account R's unreasonable failure to (i) carry out necessary investigations to establish the facts of the case, (ii) provide C with all evidence (without delay), (iii) go through the evidence with C at the disciplinary hearing, (iv) issue first warnings, (v), appoint a 'manager' with authority to dismiss. (vi) have relevant disciplinary rules in place prior to the allegations? (vii) comply with ACAS Code of Practice in that the same person, namely TA, acted as investigation manager and directly intervened to influence the decision to dismiss at the disciplinary hearing stage.*

Response

215 We do not need to make any findings about issues 4-7.

Reasonable adjustments (ss 20 and 21 and Schedule 8 EqA) (against R1 only)

Issue 8

8. Did R fail to take such steps as were reasonable to provide an auxiliary aid, contrary to s. 20(5) and s. 20(11) EqA by ceasing to arrange or fund a workplace advisor after 16/4/2021?

a. C asserts that without the provision of a workplace advisor he was put to the substantial disadvantage of being more prone to misunderstandings (in connection with communications and interactions) and stress/low- mood

b. Did R know, or could it reasonably have been expected to know, that C was likely to be placed at that disadvantage without the provision of the auxiliary aid?

Response

216 This complaint is outside of the primary time limits. The last date that the claimant received counselling from a counsellor that the claimant said was also a workplace adviser, was July 2021.

217 Applying **Matuszovicz and Fernandez,** we find that time starts to run from August 2021 – the following month. We base this primarily on the claimant's own evidence that he asked and asked about ongoing counselling, that there were only so many times that he could ask. (para 58 above). The claimant was unable to give evidence about any specific correspondence or discussion when he asked and was refused or ignored. However, assuming that evidence is accurate, then the claimant must have known from August latest that the respondent was not going to find another session or was ignoring his requests to an extent that time would start to run from then. .

218 The claimant retained control of the arrangements. The counsellor that the respondent was funding was one that the claimant had engaged privately before the date that the duty to make this reasonable adjustment applied. It was the claimant who volunteered that the counsellor was also a recognised workplace adviser. But the respondent received no information about this and didn't have the information that it had requested about what it was funding and for how long.

219 The complaint is out of time and we have decided that it is not just and equitable to extend time. In reaching this decision we have taken account of an apparent gap in evidence. The claimant told us that he had made numerous requests for more funding but documentary evidence of these has not been provided by either the claimant or the respondent. If such documentary evidence existed then the respondent had not been put on notice of the importance of

retaining it. On the contrary, even in January 2022 the claimant made clear that the respondent could not have done more to help him (para 56)

220 We have not extended time because of this gap in evidence. The gap in evidence makes it difficult to reach a finding that is fair.

221 If in fact there is no gap in evidence then:-

221.1 We do not accept the claimant's evidence that he had asked numerous times for funding and been either ignored or refused. Had this been a feature of the latter part of 2021, the claimant would not have expressed gratitude for the respondent's support. Further, he would have emailed his requests when asking for the funding.

221.2 We would have found that the reasonable adjustment of funding a workplace adviser was made. The claimant retained control of arrangements to access the workplace adviser. There is no evidence of the respondent refusing to pay for any session that the claimant claimed for such as straightforward evidence of a submitted invoice and a failure to pay.

Issue 9

9. Communication

a. R accepts that it applied to its consultants a provision, criterion or practice (PCP) of expecting them to communicate with other individuals in relation to their work.

b. Did this PCP place C at a substantial disadvantage in comparison to persons who were not disabled? C asserts that he was more prone to misunderstandings and stress/low-mood.

c. If so, did R know, or could it reasonably have been expected to know, that C was likely to be placed at that disadvantage?

d. If so, did R fail to take such steps as were reasonable to avoid the disadvantage? C asserts that it would have been reasonable for R to have arranged or otherwise made a workplace advisor available to C after 16/4/2021 (including by meeting the costs).

Response

222 The respondent accepts that its consultants were required to communicate with other individuals in relation to their work and accepts that to be a valid PCP.

223 See our findings above regarding the provision of a workplace adviser. The respondent did not fail to make this reasonable adjustment.

Issue 10

10. One-to-one meetings

a. R accepts that it applied to its consultants a PCP of working independently or otherwise without regular supervision.

b. Did that PCP place C at a substantial disadvantage in comparison to persons who were not disabled? C asserts that the substantial disadvantage was being less equipped to plan and prioritise his work and/or manage his tasks/time,

c. If so, did R know, or could it reasonably have been expected to know, that C was likely to be placed at that disadvantage?

d. If so, did R fail to take such steps as were reasonable to avoid the disadvantage? C asserts that it would have been reasonable for R1 to arrange one-to-one meetings between C and R3 since December 2021.

Response

224 The claimant's evidence is that he wanted to work from home. We also find that his hyper focus enables him to work independently with tremendous work outputs.

225 We accept that the claimant benefitted from being updated about operational issues within the setting of one-to-one discussions with CH. Some advance disclosure of updates and being able to discuss these with CH (who knew the claimant and had some understanding of autism) helped the claimant with workplace communications and avoiding any misunderstandings.

226 For almost all the relevant time (from August 2020) the respondent was willing to provide the claimant with the benefit of these one-to-one meetings. The last detailed discussion with the claimant was on 7 January. That was not like previous discussions as the disciplinary allegations that the claimant was facing, dominated the discussion and CH was uncomfortable with this.

227 The issue for us is whether it was a reasonable adjustment to have another one-to-one meeting before the disciplinary hearing had concluded (3 February 2022) or whether that was beyond what was reasonable.

228 Addressing the complaint itself:-

228.1 There is no evidence that independent working disadvantaged the claimant. On the contrary, homeworking benefitted him. The respondent recognised this.

228.2 The claimant did benefit from one-to-one meetings so that he could be told about potential changes and give and receive feedback on his work and working relationships. These one-to-one meetings were provided except for a one-month period between 8 January 2022 and 10 February 2022.

228.3 The claimant was not put to any substantial disadvantage by this gap or pause in one-to-one meetings (or what would have been a pause had the claimant not been suspended on the respondent becoming aware of the Keystone allegations).

228.4 If we are wrong in this conclusion then we note that the circumstances of the disciplinary investigation into allegations arising from the Christmas Party made it unreasonable for CH to engage in a one-to-one meeting with the claimant until the conclusion of that process. The discussion on 7 January 2022 had not gone well. CH reasonably felt that she was in a difficult position given that she was a witness to some of the claimant's misconduct. She made clear to the claimant her intention to hold another one-to-one meeting with him, once the disciplinary process was over.

Issue 11

11. Disability awareness/training

a. Did R apply to its consultants a PCP of requiring them to communicate clearly with each other;

b. Did that PCP place C at a substantial disadvantage in comparison to persons who were not disabled? C asserts that the substantial disadvantage was that he was more prone to misunderstandings in connection with communications and interactions.

c. If so, did R know, or could it reasonably have been expected to know, that C was likely to be placed at that disadvantage?

d. If so, did R fail to take such steps as were reasonable to avoid the disadvantage? C asserts that it would have been reasonable for R to:

i. inform the new recruits of C's diagnosis or about his conditions;

ii. ask C for permission to reveal his diagnosis or information about his conditions to the new recruits;

iii. encourage C to reveal his diagnosis or information about his conditions to the new recruits himself;

iv. provide disability awareness training to staff and specifically to new recruits (including David Cole).

e. Did R apply to its consultants a PCP of arranging a Christmas event at which they would all attend together and where alcohol would be consumed?

f. Did that PCP place C at a substantial disadvantage in comparison to persons who were not disabled? C asserts that the substantial disadvantage was that he was more prone to misunderstandings in connection with communications and interactions, and more prone to anxiety.

g. If so, did R know, or could it reasonably have been expected to know, that C was likely to be placed at that disadvantage?

h. If so, did R fail to take such steps as were reasonable to avoid the disadvantage? C asserts that it would have been reasonable for R to:

i. inform the new recruits of C's diagnosis or about his conditions;

ii. ask C for permission to reveal his diagnosis or information about his conditions to staff;

iii. encourage C to reveal his diagnosis or information about his conditions to the staff himself;

iv. provide disability awareness training to staff.

Response

229 The complaint arising from the application of the PCP to communicate clearly, is out of time. We have decided that it is not just and equitable to extend time. These are our reasons:-

229.1 The PCP has been applied to the claimant from the start of his employment with the respondent.

229.2 The potential disadvantage caused by the application of this PCP (and potential reasonable adjustment) was identified by the NAS report in August 2020.

229.3 In meetings between CH and the claimant on 12 August 2020 and with the claimant and other employees on 15 September 2020, the respondent made clear to the claimant what steps it was taking to inform and train other employees as part of a strategy to help the claimant overcome disadvantages that his disability may cause. It shared these with the claimant.

229.4 From that date, the claimant knew for example that the respondent was not intending to provide training and information to the entire workforce, but to limit it to the employees who had been selected to work with the claimant.

229.5 Had there been an issue the claimant could (and would) have raised it then.

229.6 The claimant did not raise any issue until early 2022 after the second tranche of allegations of misconduct were made against him.

229.7 There was no reason until then why the respondent would consider its actions might be challenged. As a consequence, evidence and recollections about exactly what was done, discussed and agreed or not agreed will inevitably be lost or have become less reliable.

229.8 The claimant has not explained why he did not raise his concerns about the arrangements in August or September 2020.

230 Had we decided that it was just and equitable to extend time, then:

230.1 based on the evidence provided, we would have found that

reasonable adjustments to overcome the disadvantage cause by the application of this PCP were made. See our findings at para 57 above. As for David Cole, the arrangements for transferring responsibilities to him were underway and we accept CH evidence that he was being informed and updated about the claimant's impairment and methods of working with the claimant (see our findings at para 60 above).

230.2 we would have found that the claimant did not raise any concerns about the adjustments when they were discussed with him in August and September 2020. We would also have concluded that he did not do so because he did not have any concerns.

230.3 we would have found that the adjustments that were discussed and agreed in August and September 2020 were in fact implemented. This finding would have been supported by the absence of any complaint about the arrangements until after the second disciplinary investigation into the claimant's misconduct was underway. It would also have been supported by the claimant's comments in January 2022 (para 56).

Issue 12

12. Did R fail to take such steps as were reasonable to provide an auxiliary aid, contrary to s. 20(5) and s. 20(11) EqA by not providing disability awareness training to the new recruits?

a. C asserts that without the provision of the disability awareness training to the new recruits he was put to the substantial disadvantage of being more prone to misunderstandings (in connection with communications and interactions)

b. Did R know, or could it reasonably have been expected to know, that C was likely to be placed at that disadvantage without the provision of the auxiliary aid?

Response

231 This claim is out of time. See our findings to issue 11 above which are relevant to this complaint too.

Issue 13

13. Support with organisation and processing aspects of work

a. R accepts that it applied to its consultants a PCP of: i) requiring them to plan or manage their workload, including managing deadlines and prioritisation of tasks; and ii) expecting them to meet deadlines.

b. Did that PCP place C at a substantial disadvantage in comparison to persons who were not disabled? C asserts that the substantial disadvantage was the reduced ability to manage and prioritise his own workload, added mental pressure, having to rush work or otherwise face greater time pressures, facing an increased risk of missing deadlines, and anxiety/increased stress.

c. If so, did R know, or could it reasonably have been expected to know, that C was likely to be placed at that disadvantage?

d. If so, did R fail to take such steps as were reasonable to avoid the disadvantage? C asserts that it would have been reasonable for R to:

i. arrange a replacement for Olivia Petrie once she was promoted;
ii. arrange or allow for C and David Cole to meet. Including in each case, in a timely manner.

Response

232 The arrangements for replacing OP with DC were underway (see para 60 above). We have no criticism of the respondent's actions in this regard. Nor did the claimant (see his comments in January 2022 at para 56) until after the second disciplinary investigation was taking place.

Issue 14

14. Did R fail to take such steps as were reasonable to provide an auxiliary aid, contrary to s. 20(5) and s. 20(11) EqA by not providing support between the departure of Ms Petrie and the commencement of Mr Cole?

a. C asserts that without the provision of such support he was put to the substantial disadvantage of having a reduced ability to manage and prioritise his own workload, added mental pressure, having to rush work or otherwise face greater time pressures, facing an increased risk of missing deadlines, and anxiety/increased stress.

b. Did R know, or could it reasonably have been expected to know, that C was likely to be placed at that disadvantage without the provision of the auxiliary aid?

233 Our conclusions at para 227 above are also relevant here.

Discrimination arising from disability (s 15 EqA) (against R1 and the individual respondents identified in relation to each complaint)

Issue 15

15. Did R treat C unfavourably in the following respects:

a. R, TA, AM, SS and PH issuing a final written warning on 3/2/2022 and/or aiding or abetting each other in doing so. [R admits that the final written warning was issued on 3/2/2022 because of C's conduct on the evening of 17-18/12/2021. R avers that the decision to issue the final written warning was made by AM and SS].

b. R, TA, RG and T Aitken rejecting C's appeal and upholding the final written warning and/or aiding or abetting each other in doing so.

Response to 15

234 The final written warning and the rejection of the claimant's appeal was unfavourable treatment.

Issue 16

16. To the extent that the Tribunal finds that C was treated unfavourably as alleged under paragraph 15 above, was he so treated because of something arising in consequence of his disability? C says that the relevant "something arising" was his conduct on the evening of 17-18/12/2021.

Response to 16

235 The claimant was provided with a warning because of his conduct on the evening of 17 -18 December 2021. His appeal was rejected because the appeal managers concluded that the decision to give the claimant a final written warning was the correct decision.

236 The claimant's conduct at the Christmas party was not something that arose in consequence of his disability. It arose from the way he behaved after he had chosen to (1) take more than the prescribed dose of prescribed medication and more than the daily limit; (2) drink a lot of alcohol and then (3) behave in the way that he did.

Issue 17

17. If so, can R show that the treatment of C was a proportionate means of achieving a legitimate aim? They rely upon the following:

a. maintaining acceptable standards of conduct;

b. acting in accordance with R's duty of care towards other employees and external stakeholders; and

c. maintaining trust and confidence in employees.

Response to 17

237 No conclusion required.

Issue 18

238 Issue 18 is a long list of unfavourable treatments for the purposes of section 15 Equality Act 2010. Issue 19 requires us to reach conclusions as to whether the claimant was unfavourably treated, as alleged, because of something arising in consequence of his disability. We provide our conclusions to issues 18 and 19 below.

18. Did R treat C unfavourably in the following respects:

a. CH and MH failing to provide 'support and guidance' to C to achieve the objectives associated with the final written warning (or at all), and, it follows, 'review and

discuss' the actions;

239 See our findings at para 94 above. There was no failure to provide this support.

240 We also note that there was only a week between the date of the final written warning and the claimant's suspension. We are satisfied that, had the second disciplinary issue not arisen then the claimant would have continued to have been supported by the respondent and this support would have included support on the issue of his conduct at company/client events.

b. TA suspending C on and since 10/2/2022. [R admits that C was suspended on 10/2/2022 as a result of a complaint about C's conduct on 25-26/11/2021 and that it was TA and MH's decision to do so];

241 Yes. The claimant was suspended and it was a decision that TA and MH made. The decision to suspend was unfavourable treatment. It arose because of the Keystone allegations.

242 Our conclusions to issue 16 are also relevant here and for the same reasons that we concluded the final written warning following the Christmas party was not something arising in consequence of the claimant's disability, we make the same conclusions here.

c. CH and MH re-allocating C's work on or since 10/2/2022 and failing to provide him with any indication about how this was done;

243 Reallocating an employee's work responsibilities during an extended period of absence, does not amount to unfavourable treatment.

d. TA, CH and PH inciting, soliciting or encouraging MH to make allegations of over-charging against C.

244 Relevant finding of facts are at paras 109 – 112. It was MH and CH who had some concerns about invoicing. Some of the concerns predated the Keystone Allegations being raised with the respondent. Other concerns arose when CH reviewed the claimant's files in March 2022, during his suspension and sickness absence. Neither TA nor P H incited, solicited or encouraged MH (or CH) to make the allegations. CH did not incite, solicit or encourage MH. She identified concerns for herself. The unfavourable treatment as described did not occur.

e. TA forming a suspicion or otherwise inferring to C that he had consumed illegal drugs on 14/2/2022;

245 Relevant findings of fact are at paragraph 126. In so far as this line of questioning amounted to unfavourable treatment, it arose from the descriptions provided by the claimant and others, about the claimant's conduct at the Christmas party and the Keystone launch event. Those descriptions were not things that arose in consequence of the claimant's disability.

f. MH on 24/2/2022 making wholly incorrect or exaggerated allegations against C in relation to invoicing;

246 The inclusion in the second disciplinary investigation of concerns relating to invoicing, did amount to unfavourable treatment.

247 Relevant finding of facts are at paras 109 – 112.

248 The unfavourable treatment arose because of concerns that MH and CH had about some invoices. Had the claimant not been suspended then the concerns around invoicing would still have been looked in to although they would not have been the subject of a disciplinary investigation. The respondent did not raise its concerns because of the claimant's conduct at the Christmas party or at the Keystone event.

g. TA and PH subjecting C to oppressive disciplinary action including by:
i. Falsifying, tampering or otherwise withholding or delaying an accurate record of an interview with Iain Cherry;
ii. Seeking to withhold from C or otherwise delaying the disclosure of its investigation with Amber Braybrooke;
iii. TA providing disingenuous reasons for the above.

249 Relevant findings of fact are at 132 and 133 above. The events described by the claimant of falsifying, tampering with and/or "seeking to" (which we take to mean – consciously and deliberately trying to) withhold evidence, did not happen.

h. TA on 26/4/2022 enlarging the disciplinary case to include allegations that C had breached the FCA's Conduct Rules and threatening to refer C to the FCA.

250 Relevant findings of fact are at para 168. The claimant was told about a possible referral to the FCA in the letter inviting to a disciplinary hearing. The respondent told the claimant about this possibility because of a genuine belief on their part (specifically DM) that, if the allegations were upheld, they might be reportable under the FCA Rules. Those concerns arose because of the claimant's conduct; but his conduct was not something that arose in consequence of the claimant's disability.

i. DW and TM subjecting C to an oppressive disciplinary hearing by:
- *Instructing C to offer 'mitigation' for his actions;*
- *Asking C if he took illegal drugs.*

251 Relevant findings of fact are at paragraphs 136 and 137 (regarding the use of the term "mitigation") and paragraph 140 (regarding question about illegal drugs).

252 The comment about mitigation arose from poor guidance from the HR professionals and TM's misunderstanding of the term "mitigation." That misunderstanding is not something arising The question about drugs arose in consequence of the claimant's disability.

253 The question about drugs were asked because of descriptions provided about the claimant's appearance and behaviour. Neither those descriptions nor

the claimant's appearance and behaviour are things arising in consequence of the claimant's disability. The claimant's appearance and behaviour arose in consequence of his decision to take twice the prescribed dose of Elvanse and then drink too much alcohol.

254 The use of the term "mitigation" was something that arose from the poor guidance provided by TA and P H. It had nothing to do with the claimant's disability.

255 DRUGS – something that arose from his conduct and appearance . That, in turn, arose from the claimant's decision to take double his daily prescription of Elvanse and

j. TA, RG and T Aitken failing since 16 and 30/3/2022 to respond to C's DSARs and R2 giving disingenuous reasons for the delay.

256 Relevant findings of fact are at paragraph 131 above. The reason for the respondent deciding to respond within a 3-month period was the extent of the SARs, not something arising in consequence of the claimant's disability.

k. TA since 16/3/2022 and 30/3/2022 failing to progress C's grievance.

257 The time taken to consider the claimant's grievance was influenced by the length of time taken to comply with the DSARs –and the claimant's insistence that the grievance meeting should not take place until after he had received the responses to his DSARs. See findings at para 166 above.

258 These are not things arising in consequence of the claimant's disability.

l. CH and MH informing C's clients, referrers, prospects or other contacts that C was not returning to the business.

259 Relevant findings of fact are at para 167. Neither CH nor MH told clients, referrers or other contacts that the claimant was not returning to the business.

m. CH and MH reassigning C's work, including in litigation cases in which C had been appointed by the Court as an expert and/or which would not require action for months to come.

260 See findings of fact at para 167 above. The respondent took steps to ensure work was being managed effectively during the claimant's absence, as any professional firm would do.

Issue 19

19. To the extent that the Tribunal finds that C was treated unfavourably as alleged under paragraph 18 above, was he so treated because of something arising in consequence of his disability? C says that the relevant "somethings arising" were his conduct on the evenings of 17-18/11/2021 and/or 25-26/11/2021

Response to 19

261 See responses to 18 above.

Issue 20

262 Issue 20 is another long list of unfavourable treatments for the purposes of section 15 Equality Act 2010. Issue 21 requires us to reach conclusions as to whether the claimant was unfavourably treated, as alleged, because of something arising in consequence of his disability.

20. Did R treat C unfavourably in the following respects:

a. MH reassigning cases in which C had been appointed as an expert witness (insofar as this occurred or continued since the presentation of the 1st ET1);

263 No. See our conclusions to 18(m) above.

b. Insofar as DW and TM can satisfy the Tribunal that they genuinely did so, by preferring [K's] *account and by upholding the allegations against C on 17/6/2022;*

264 DW and TM genuinely believed the account of K. They did so following an analysis of the evidence available to them. See our findings at paras 145-148 above. That decision was unfavourable to the claimant but they treated the claimant unfavourably because they believed K's account rather than the claimant's. That is not something arising as a consequence of his disability.

c. DW and TM stating that "damage would likely occur to [R's] reputation and/or client relationships if [C] were to remain employed";

265 DW and TM reached that view because of the claimant's conduct at the Keystone launch event and the Christmas party. That conduct is not something arising as a consequence of the claimant's disability (on this see our conclusions to issue 16 above).

d. DW and TM stating there was a "risk" of the same or similar allegations reoccurring;

266 We repeat our conclusions under 20(c) above. We also note the reference to the concerns expressed in their decision letter about a pattern of behaviour (para 214.4 above). This comment was made by DW and TM because they had reached a conclusion that there was some risk of reoccurrence. Their conclusion was not something that arose in consequence of the claimant's disability.

e. DW and TM dismissing Claimant.

267 We repeat our conclusions under 20(c) above.

f. MH sending an email to C's client base on 27/6/2022.

268 See our findings of fact at para 170 above.

g. DM submitting the reference about C to Tenet on 14-15/7/2022.

269 We refer to our findings of fact at para 169 above. DM submitted the reference in the terms she drafted because those terms were accurate and it was necessary to provide Tenet with an accurate reference which addressed the

questions put. We repeat the findings about the claimant's conduct not being something arising in consequence of the claimant's disability.

21. To the extent that the Tribunal finds that C was treated unfavourably as alleged under paragraph 20 above, was he so treated because of something arising in consequence of his disability? C says that the relevant "somethings arising" were :

a. C's conduct on the evening of 17-18/12/2021;

b. C's admission of the same;

c. the final written warning issued on 3/2/2022;

d. C's actions in taking his medication incorrectly on 25/11/2021;

e. insofar as it is found proven, C's conduct on the evening of 25-26/11/2021;

f. (in respect of 20(f) above), C's dismissal.

Response to 21

270 See responses to issues under 20 above.

Issue 22

22. If so, can R show that the treatment of C was a proportionate means of achieving a legitimate aim? It relies upon the following:

a. maintaining acceptable standards of conduct;

b. acting in accordance with R's duty of care towards other employees and external stakeholders;

c. maintaining trust and confidence in employees; and

d. (in respect of 20(g), above), complying with R's regulatory obligations.

Response to 22

271 No conclusions required.

Employment Judge **Leach**
Date 11 September 2024

JUDGMENT & REASONS SENT TO THE PARTIES ON
16 September 2024

FOR THE TRIBUNAL OFFICE

Public access to employment tribunal decisions
Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

Recording and Transcription

Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here:

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

ANNEX

AGREED LIST OF ISSUES FOR DETERMINATION

Key to Respondent names

	Name	Initial/name used below	Previously
	Frenkel Topping Limited	Respondent	Respondent 1
	Tracey Atkinson	TA	Respondent 2
	Clare Harrison	CH	Respondent 3
	Mark Holt	MH	Respondent 4
	Andrew Moroz	AM	Respondent 5
	Sarah Slesser	SS	Respondent 6
	Paul Haywood	PH	Respondent 7
	Reuben Glynn	RG	Respondent 8
	Teresa Aitken	T Aitken	Respondent 9
	Dominic Woodhouse	DW	Respondent 10
	Tracy Maw	TM	Respondent 11
	Denise Moore	DM	Respondent 12

Jurisdiction: time limits

1. The Claimant's (C's) 1st ET1 was submitted on 26/5/2022. The first notification to ACAS was on 16/3/2022 and the earliest ACAS certificate was issued on 26/4/2022. For any alleged act of discrimination which occurred on or before 16/12/2021:

   a. Did it form part of "conduct extending over a period", of which there was a final act within time: s.123(3(a) Equality Act 2010 ("**EqA**"); and, if not
   b. Was the claim brought within such other period as the Tribunal

thinks just and equitable: s.123(2) EqA.

Unfair dismissal

2. Was C dismissed for a potentially fair reason? The Respondent (R) says that C was dismissed for a reason relating to C's conduct, alternatively some other substantial reason of a kind such as to justify the dismissal of C.

3. In the circumstances did R act reasonably in treating C's conduct as sufficient reason for dismissing him in accordance with s 98(4) of the Employment Rights Act 1996 (ERA 1996)?

Remedy

4. If the Tribunal finds that C was unfairly dismissed for any reason:

a. Would it be just and equitable to reduce any basic award by reason of C's conduct prior to his dismissal (s 122(2) ERA)?

b. Would it be just and equitable to make any compensatory award to C (s 123(1) ERA)?

c. Did C cause and/or contribute to his own dismissal such that it would be just and equitable to reduce any compensatory award under s 123(6) ERA?

d. Has C mitigated his losses?

5. If the Tribunal finds that R failed to follow a fair procedure in relation to C's dismissal, would he have been dismissed fairly in any event such that it is appropriate to make a Polkey reduction?

6. Should any compensation awarded to C be reduced by up to 25% to take into account his unreasonable failure to exhaust R's internal disciplinary procedure?

7. Should any compensation awarded to C be increased by up to 25% to take into account R's unreasonable failure to (i) carry out necessary investigations to establish the facts of the case, (ii) provide C with all evidence (without delay), (iii) go through the evidence with C at the disciplinary hearing, (iv) issue first warnings, (v), appoint a 'manager' with authority to dismiss. (vi) have relevant disciplinary rules in place prior to the allegations? (vii) comply with ACAS Code of Practice in that the same person, namely TA, acted as investigation manager and directly intervened to influence the decision to dismiss at the disciplinary hearing stage.

Disability Discrimination

R accepts that by virtue of suffering with Asperger's Syndrome (Asperger's) and Attention Deficit Hyperactivity Disorder (ADHD), C was disabled in accordance with the definition set out at s 6 EqA at all material times, and that R was aware of that diagnosis at all material times.

Reasonable adjustments (ss 20 and 21 and Schedule 8 EqA) (against R1 only)

8. Did R fail to take such steps as were reasonable to provide an auxiliary aid, contrary to s. 20(5) and s. 20(11) EqA by ceasing to arrange or fund a workplace advisor after 16/4/2021?

a. C asserts that without the provision of a workplace advisor he was put to the substantial disadvantage of being more prone to misunderstandings (in connection with communications and interactions) and stress/low- mood
b. Did R know, or could it reasonably have been expected to know, that C was likely to be placed at that disadvantage without the provision of the auxiliary aid?

9. Communication

a. R accepts that it applied to its consultants a provision, criterion or practice (PCP) of expecting them to communicate with other individuals in relation to their work.

b. Did this PCP place C at a substantial disadvantage in comparison to persons who were not disabled? C asserts that he was more prone to misunderstandings and stress/low-mood.

c. If so, did R know, or could it reasonably have been expected to know, that C was likely to be placed at that disadvantage?

d. If so, did R fail to take such steps as were reasonable to avoid the disadvantage? C asserts that it would have been reasonable for R to have arranged or otherwise made a workplace advisor available to C after 16/4/2021 (including by meeting the costs).

10. One-to-one meetings

a. R accepts that it applied to its consultants a PCP of working independently or otherwise without regular supervision.

b. Did that PCP place C at a substantial disadvantage in comparison to persons who were not disabled? C asserts that the substantial

disadvantage was being less equipped to plan and prioritise his work and/or manage his tasks/time,

c. If so, did R know, or could it reasonably have been expected to know, that C was likely to be placed at that disadvantage?

d. If so, did R fail to take such steps as were reasonable to avoid the disadvantage? C asserts that it would have been reasonable for R1 to arrange one-to-one meetings between C and R3 since December 2021.

11. Disability awareness/training

a. Did R apply to its consultants a PCP of requiring them to communicate clearly with each other;

b. Did that PCP place C at a substantial disadvantage in comparison to persons who were not disabled? C asserts that the substantial disadvantage was that he was more prone to misunderstandings in connection with communications and interactions.

c. If so, did R know, or could it reasonably have been expected to know, that C was likely to be placed at that disadvantage?

d. If so, did R fail to take such steps as were reasonable to avoid the disadvantage? C asserts that it would have been reasonable for R to:

i. inform the new recruits of C's diagnosis or about his conditions;

ii. ask C for permission to reveal his diagnosis or information about his conditions to the new recruits;

iii. encourage C to reveal his diagnosis or information about his conditions to the new recruits himself;

iv. provide disability awareness training to staff and specifically to new recruits (including David Cole).

e. Did R apply to its consultants a PCP of arranging a Christmas event at which they would all attend together and where alcohol would be consumed?

f. Did that PCP place C at a substantial disadvantage in comparison to persons who were not disabled? C asserts that the substantial disadvantage was that he was more prone to misunderstandings in connection with communications and interactions, and more

prone to anxiety.

g. If so, did R know, or could it reasonably have been expected to know, that C was likely to be placed at that disadvantage?

h. If so, did R fail to take such steps as were reasonable to avoid the disadvantage? C asserts that it would have been reasonable for R to:

i. inform the new recruits of C's diagnosis or about his conditions;

ii. ask C for permission to reveal his diagnosis or information about his conditions to staff;

iii. encourage C to reveal his diagnosis or information about his conditions to the staff himself;

iv. provide disability awareness training to staff.

12. Did R fail to take such steps as were reasonable to provide an auxiliary aid, contrary to s. 20(5) and s. 20(11) EqA by not providing disability awareness training to the new recruits?

a. C asserts that without the provision of the disability awareness training to the new recruits he was put to the substantial disadvantage of being more prone to misunderstandings (in connection with communications and interactions)

b. Did R know, or could it reasonably have been expected to know, that C was likely to be placed at that disadvantage without the provision of the auxiliary aid?

13. Support with organisation and processing aspects of work

a. R accepts that it applied to its consultants a PCP of: i) requiring them to plan or manage their workload, including managing deadlines and prioritisation of tasks; and ii) expecting them to meet deadlines.

b. Did that PCP place C at a substantial disadvantage in comparison to persons who were not disabled? C asserts that the substantial disadvantage was the reduced ability to manage and prioritise his own workload, added mental pressure, having to rush work or otherwise face greater time pressures, facing an increased risk of missing deadlines, and anxiety/increased stress.

c. If so, did R know, or could it reasonably have been expected to know, that C was likely to be placed at that disadvantage?

d. If so, did R fail to take such steps as were reasonable to avoid the disadvantage? C asserts that it would have been reasonable for R to:

i. arrange a replacement for Olivia Petrie once she was promoted;

ii. arrange or allow for C and David Cole to meet. Including in each case, in a timely manner.

14. Did R fail to take such steps as were reasonable to provide an auxiliary aid, contrary to s. 20(5) and s. 20(11) EqA by not providing support between the departure of Ms Petrie and the commencement of Mr Cole?

a. C asserts that without the provision of such support he was put to the substantial disadvantage of having a reduced ability to manage and prioritise his own workload, added mental pressure, having to rush work or otherwise face greater time pressures, facing an increased risk of missing deadlines, and anxiety/increased stress.

b. Did R know, or could it reasonably have been expected to know, that C was likely to be placed at that disadvantage without the provision of the auxiliary aid?

Discrimination arising from disability (s 15 EqA) (against R1 and the individual respondents identified in relation to each complaint)

15. Did R treat C unfavourably in the following respects:

a. R, TA, AM, SS and PH issuing a final written warning on 3/2/2022 and/or aiding or abetting each other in doing so. [R admits that the final written warning was issued on 3/2/2022 because of C's conduct on the evening of 17-18/12/2021. R avers that the decision to issue the final written warning was made by AM and SS].

b. R, TA, RG and T Aitken rejecting C's appeal and upholding the final written warning and/or aiding or abetting each other in doing so.

16. To the extent that the Tribunal finds that C was treated unfavourably as alleged under paragraph 15 above, was he so treated because of something arising in consequence of his disability? C says that the relevant "something arising" was his conduct on the evening of 17-18/12/2021.

17. If so, can R show that the treatment of C was a proportionate means of achieving a legitimate aim? They rely upon the following:

a. maintaining acceptable standards of conduct;

b. acting in accordance with R's duty of care towards other employees and external stakeholders; and

c. maintaining trust and confidence in employees.

18. Did R treat C unfavourably in the following respects:

a. CH and MH failing to provide 'support and guidance' to C to achieve the objectives associated with the final written warning (or at all), and, it follows, 'review and discuss' the actions;

b. TA suspending C on and since 10/2/2022. [R admits that C was suspended on 10/2/2022 as a result of a complaint about C's conduct on 25-26/11/2021 and that it was TA and MH's decision to do so];

c. CH and MH re-allocating C's work on or since 10/2/2022 and failing to provide him with any indication about how this was done;

d. TA, CH and PH inciting, soliciting or encouraging MH to make allegations of over-charging against C.

e. TA forming a suspicion or otherwise inferring to C that he had consumed illegal drugs on 14/2/2022;

f. MH on 24/2/2022 making wholly incorrect or exaggerated allegations against C in relation to invoicing;

g. TA and PH subjecting C to oppressive disciplinary action including by:

i. Falsifying, tampering or otherwise withholding or delaying an accurate record of an interview with Iain Cherry;
ii. Seeking to withhold from C or otherwise delaying the disclosure of its investigation with Amber Braybrooke;
iii. TA providing disingenuous reasons for the above.

h. TA on 26/4/2022 enlarging the disciplinary case to include allegations that C had breached the FCA's Conduct Rules and threatening to refer C to the FCA.

i. DW and TM subjecting C to an oppressive disciplinary hearing by:
i. Instructing C to offer 'mitigation' for his actions;
ii. Asking C if he took illegal drugs.

j. TA, RG and T Aitken failing since 16 and 30/3/2022 to respond to C's DSARs and R2 giving disingenuous reasons for the delay.

k. TA since 16/3/2022 and 30/3/2022 failing to progress C's grievance.

l. CH and MH informing C's clients, referrers, prospects or other contacts that C was not returning to the business.

m. CH and MH reassigning C's work, including in litigation cases in which C had been appointed by the Court as an expert and/or which would not require action for months to come.

19. To the extent that the Tribunal finds that C was treated unfavourably as alleged under paragraph 18 above, was he so treated because of something arising in consequence of his disability? C says that the relevant "somethings arising" were his conduct on the evenings of 17-18/11/2021 and/or 25-26/11/2021

20. Did R treat C unfavourably in the following respects:

a. MH reassigning cases in which C had been appointed as an expert witness (insofar as this occurred or continued since the presentation of the 1st ET1);

b. Insofar as DW and TM can satisfy the Tribunal that they genuinely did so, by preferring [K's] account and by upholding the allegations against C on 17/6/2022;

c. DW and TM stating that "damage would likely occur to [R's] reputation and/or client relationships if [C] were to remain employed";

d. DW and TM stating there was a "risk" of the same or similar allegations reoccurring;

e. DW and TM dismissing Claimant.

f. MH sending an email to C's client base on 27/6/2022.

g. DM submitting the reference about C to Tenet on 14-15/7/2022.

21. To the extent that the Tribunal finds that C was treated unfavourably as alleged under paragraph 20 above, was he so treated because of something arising in consequence of his disability? C says that the relevant "somethings arising" were :

a. C's conduct on the evening of 17-18/12/2021;

b. C's admission of the same;

c. the final written warning issued on 3/2/2022;

d. C's actions in taking his medication incorrectly on 25/11/2021;

e. insofar as it is found proven, C's conduct on the evening of 25-26/11/2021;

f. (in respect of 20(f) above), C's dismissal.

22. If so, can R show that the treatment of C was a proportionate means of achieving a legitimate aim? It relies upon the following:

a. maintaining acceptable standards of conduct;

b. acting in accordance with R's duty of care towards other employees and external stakeholders;

c. maintaining trust and confidence in employees; and

d. (in respect of 20(g), above), complying with R's regulatory obligations.

Remedy

23. If the Tribunal upholds any of the allegations of discrimination, to what compensation is C entitled under s 124 Equality Act 2010.

24. Is C entitled to aggravated and/or stigma and/or punitive and/or exemplary damages?

25. Should any sums awarded to C be increased by up to 25% to take into account R's unreasonable failure (i) carry out necessary investigations to establish the facts of the case, (ii) provide C with all evidence (without delay), (iii) go through the evidence with C at the disciplinary hearing, (iv) issue first warnings, (v), appoint a 'manager' with authority to dismiss. (vi) to have relevant disciplinary rules in place prior to the allegations, (vii) hold a grievance hearing without unreasonable delay, (vii) communicate a decision without unreasonable delay, (ix) act fairly overall (as a result of DW and TM deciding C's grievance without prior warning) and (x) comply with ACAS Code of Practice in that the same person, namely TA, acted as investigation manager and directly intervened to influence the decision to dismiss at the disciplinary hearing stage.