EMPLOYMENT TRIBUNALS

Claimant: Mr J Abdulla

Respondent: Royal Mail Group Ltd

Heard at: Watford Employment Tribunal (In public; By video)

On: **24 to 28 February; 3 March 2025**

Before: Employment Judge Quill; Mr A Scott; Mr L Hoey

Appearances
For the claimant: in person
For the respondent: Mr G Edwards, solicitor

JUDGMENT and reasons having been given orally and written judgment having been sent to the parties and written reasons having been requested in accordance with Rule 60 of the Employment Tribunals Rules of Procedure, the following reasons are provided:

WRITTEN REASONS

Introduction

1. This is a claim brought by a former employee of the Respondent. He alleges that he has disabilities (and that is in dispute). He alleges that there were contraventions of the Equality Act 2010 connected to disability and connected to race. He was dismissed by the Respondent (allegedly because of conduct) and he alleges that the dismissal was unfair.

The Claims and the Issues

2. There had been a preliminary hearing before EJ Bunting on 16 February 2024 [Bundle 33] at which a list of issues had been produced.

3. There was a subsequent preliminary hearing before EJ Emery on 4 June 2024. That resulted in a judgment which dismissed some of the complaints. [Bundle 63].

4. As a result, the Respondent produced an updated list of issues. The document did not re-word the list of issues, but it removed the complaints decided by EJ Emery. It also removed what had been paragraph 1 of EJ Bunting's list. Subject to that, the sequence of the items in the list of issues was kept the same, and it was re-numbered. [Bundle 47 to 53]. That list read as follows (omitting sections 2 and 9, which deal with remedy).

1. Unfair dismissal

1.1. Was the claimant dismissed?

1.2. What was the reason or principal reason for dismissal? The respondent says the reason was conduct. The Tribunal will need to decide whether the respondent genuinely believed the claimant had committed misconduct.

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

1.3.1. there were reasonable grounds for that belief;

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

1.3.3. the respondent otherwise acted in a procedurally fair manner;

1.3.4. dismissal was within the range of reasonable responses.

3. Disability

3.1. Did the claimant have a disability as defined in section 6 of the Equality Act 2010 at the time of the events the claim is about? The Tribunal will consider the following:

3.1.1. Did they have the following physical or mental impairments?

3.1.1.1. Long Covid

3.1.1.2. Anxiety and Depression

3.1.1.3. Nerve compression

3.2. The Tribunal will decide, in relation to each one:

3.2.1. Did it have a substantial adverse effect on their ability to carry out day-to-day activities?

3.2.2. If not, did the claimant have medical treatment, including medication, or take other measures to treat or correct the impairment?

3.2.3. Would the impairment have had a substantial adverse effect on their ability to carry out day-to-day activities without the treatment or other measures?

3.2.4. Were the effects of the impairment long-term? The Tribunal will decide:

3.2.4.1. did they last at least 12 months, or were they likely to last at least 12 months?

3.2.4.2. if not, were they likely to recur?

4. Direct race discrimination (Equality Act 2010 section 13)

4.1. Did the respondent do the following things:

4.1.1. Make a comment referring to the claimant as a ‘lying little paki’.

4.2. Was that less favourable treatment?

4.3. If so, was it because of the claimant’s race?

5. Direct disability discrimination (Equality Act 2010 section 13)

5.1. Did the respondent do the following things:

5.1.1. Dismissal

5.2. Was that less favourable treatment?

The Tribunal will decide whether the claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the claimant’s.

If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether they were treated worse than someone else would have been treated.

The claimant has not named anyone in particular who they say was treated better than they were.

5.3. If so, was it because of disability etc?

5.4. The Tribunal will decide in particular:

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

5.4.2. could something less discriminatory have been done instead;

5.4.3. how should the needs of the claimant and the respondent be balanced?

6. Reasonable Adjustments (Equality Act 2010 sections 20 & 21)

6.1. Did the respondent know or could it reasonably have been expected to know that the claimant had the disabilities? From what date?

6.2. A “PCP” is a provision, criterion or practice. Did the respondent have the following PCPs:

6.2.1. Insisting on the claimant fulfilling his contracted hours in his contractual role

6.3. Did the PCPs put the claimant at a substantial disadvantage compared to someone without the claimant's disability, in that he was required to work when ill?

6.4. Did the respondent know or could it reasonably have been expected to know that the claimant was likely to be placed at the disadvantage?

6.5. What steps could have been taken to avoid the disadvantage? The claimant suggests:

6.5.1. Granting flexibility in relation to the claimant's working arrangements as requested.

6.6. Was it reasonable for the respondent to have to take those steps (and when)?

6.7. Did the respondent fail to take those steps?

7. Harassment related to race (Equality Act 2010 section 26)

7.1. Did the respondent do the following things:

7.2. Make (through Danny Moore) the comment on 18 July 2022.

7.3. If so, was that unwanted conduct?

7.4. Did it relate to race?

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

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

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

8.1. Did the respondent do the following things:

8.1.1. Inappropriately question (though Sanjeev Dewitt) the claimant about his entitlement to a blue badge in July 2022

8.1.2. Repeatedly Tannoy the claimant to request him attend reception during August 2022

8.2. If so, was that unwanted conduct?

8.3. Did it relate disability?

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

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

5. All time limit decisions had been removed from this version of list of issues. In fact, EJ Emery had dealt with some, but not all, time limit decisions. Paragraph 4 of his judgment specified what this hearing needed to address for time limits.

6. The parties both agree that there was an actual dismissal by the Respondent and that it was without notice, and that it occurred in May 2023. So that deals with paragraphs 1.1 and 5.1 of the list of issues.

7. The parties both agree that paragraphs 7.2 and 4.1.1 both refer to precisely the same alleged incident. They also agree that the date of the alleged incident was 8 July 2022 (not 18 July).

8. We raised with the parties that section 5 of the list of issues in the bundle could not be correct. Either the claim was one of direct discrimination [in which case the amendment to the list would be to remove paragraphs 5.4, 5.4.1, 5.4.2, 5.4.3], OR the claim was one of discrimination because of something arising in consequence of the Claimant's disability [in which case paragraphs 5.1 to 5.3 would need to be re-drafted.]

9. In order to discuss which claim the Claimant had actually brought, we looked at the actual ET1 from the Tribunal's own records. (The version of the bundle prepared by the Respondent was out of sequence and was incomplete). It contained no specific alleged acts or omissions for any of the EQA complaints. We asked if any further information had been supplied in writing. It turned out that it had not been. Rather the Claimant had explained his complaints orally to EJ Bunting.

10. The claim form for case number 3309413/2023 had been presented to the Tribunal by the Claimant's union in August 2023. In May 2024, solicitors acting for the Claimant had presented a different claim form, given case number 3305304/2024.

11. The parties had received notice of preliminary hearing for that new case, and been told that the preliminary hearing would consider whether the two claims should be heard together. The Respondent applied for postponement of the final hearing in this case until after that preliminary hearing. By letter dated 17 January 2025, the parties were informed that a judge had made the following orders:

> Respondent application to postpone the hearing 3309413/2023 is refused. The hearing will go ahead and the parties should prepare accordingly. The application for a further preliminary hearing is refused. The preliminary hearing in 3305304/2024 listed for 26th February 2025 is postponed. Once 3309413/2023 has been determined, 3305304/2024 can be considered.
>
> [This] is because to postpone 3309413/2023 would involve unacceptable delay in relisting it.

12. We informed the parties that we were potentially willing to re-visit that decision provided that they both agreed that it was appropriate to do so. We informed the parties that it might be possible to retain the current final hearing dates and deal with both claims together, but only so long as both sides agreed that that was appropriate, and that they were adequately prepared to deal with both cases. The Respondent stated that it was willing for us to do that; the Claimant's position was that the other claim should remain separate. Since there had not been a change of circumstances since the 17 January 2025 order, and since it was the Claimant's stance that the second claim should be dealt with separately, we agreed (subject to the points in the next paragraph) that we would only deal with the 2023 claim in this hearing. We pointed out to the parties that it did not necessarily follow that the 2024 claim would proceed to a final hearing, because case management in that claim would include making decisions about whether any parts of the 2024 claim cannot proceed because they simply duplicate the 2023 claim, and/or for other reasons. However, in the circumstances, this panel, in this hearing, was not making any decisions about the outcome of the 2024 claim.

13. We mentioned to the parties that the 2024 claim form, prepared on the Claimant's behalf by professional representatives, largely dealt with similar complaints to those in the list of issues for claim 3309413/2023.

    13.1 However, significantly, rather than allege direct disability discrimination for the dismissal, it alleged that the dismissal was unfavourable treatment because of something arising in consequence of the Claimant's disability (alleged to be disability-related absence coinciding with the dismissal date, and the weeks immediately preceding it).

    13.2 We asked the Claimant to explain why, for the 2023 claim, he alleged that his dismissal amounted to disability discrimination. He informed us that it was because he was absent during the investigation / dismissal process.

    13.3 On that basis, the changes we made to section 5 of the list of issues were to treat it as an allegation of discrimination within the definition in section 15.

14. Based on those discussions with the parties, the final version of the list of issues was as follows

0. Time Limits

The Tribunal at the full merits hearing will determine whether the all or any of the remainder of the disability discrimination allegations (direct, harassment, a failure to make reasonable adjustments), and race discrimination (direct, harassment), are acts continuing over a period of time (and if not, is it just and equitable to extend time). The claimant's case is that shift managers co-ordinated with each other to create grounds for dismissing him, that the different acts therefore amount to an act occurring over time.

1. Unfair dismissal

1.1. The claimant was dismissed.

1.2. What was the reason or principal reason for dismissal? The respondent says the reason was conduct. The Tribunal will need to decide whether the respondent genuinely believed the claimant had committed misconduct.

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

1.3.1. there were reasonable grounds for that belief;

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

1.3.3. the respondent otherwise acted in a procedurally fair manner;

1.3.4. dismissal was within the range of reasonable responses.

3. Disability

3.1. Did the claimant have a disability as defined in section 6 of the Equality Act 2010 at the time of the events the claim is about? The Tribunal will consider the following:

3.1.1. Did they have the following physical or mental impairments?

3.1.1.1. Long Covid

3.1.1.2. Anxiety and Depression

3.1.1.3. Nerve compression

3.2. The Tribunal will decide, in relation to each one:

3.2.1. Did it have a substantial adverse effect on their ability to carry out day-to-day activities?

3.2.2. If not, did the claimant have medical treatment, including medication, or take other measures to treat or correct the impairment?

3.2.3. Would the impairment have had a substantial adverse effect on their ability to carry out day-to-day activities without the treatment or other measures?

3.2.4. Were the effects of the impairment long-term? The Tribunal will decide:

3.2.4.1. did they last at least 12 months, or were they likely to last at least 12 months?

3.2.4.2. if not, were they likely to recur?

4. Direct race discrimination (Equality Act 2010 section 13)

4.1. Did the respondent do the following things:

4.1.1. Make a comment - through Danny Moore, on 8 July 2022 - referring to the claimant as a 'lying little paki'.

4.2. Was that less favourable treatment?

4.3. If so, was it because of the claimant's race?

5. Direct disability discrimination (Equality Act 2010 section 13)

5.1. The Respondent dismissed the Claimant. By doing so, was the Respondent treating the Claimant unfavourably ?

5.2. If so, was it because of something arising in consequence of disability, namely the Claimant's absence(s) during 2023.

5.3 Has the Respondent shown that it did not know, and could not reasonably be expected to know, that the Claimant had the disability.

5.4. The Tribunal will need to consider:

5.4.1. was the treatment an appropriate and reasonably necessary way to achieve legitimate aims;

5.4.2. could something less discriminatory have been done instead;

5.4.3. how should the needs of the claimant and the respondent be balanced?

6. Reasonable Adjustments (Equality Act 2010 sections 20 & 21)

6.1. Did the respondent know or could it reasonably have been expected to know that the claimant had the disabilities? From what date?

6.2. A "PCP" is a provision, criterion or practice. Did the respondent have the following PCPs:

6.2.1. Insisting on the claimant fulfilling his contracted hours in his contractual role

6.3. Did the PCPs put the claimant at a substantial disadvantage compared to someone without the claimant's disability, in that he was required to work when ill?

6.4. Did the respondent know or could it reasonably have been expected to know that the claimant was likely to be placed at the disadvantage?

6.5. What steps could have been taken to avoid the disadvantage? The claimant suggests:

6.5.1. Granting flexibility in relation to the claimant's working arrangements as requested.

6.6. Was it reasonable for the respondent to have to take those steps (and when)?

6.7. Did the respondent fail to take those steps?

7. Harassment related to race (Equality Act 2010 section 26)

7.1. Did the respondent do the following things:

7.2. Make a comment - through Danny Moore, on 8 July 2022 - referring to the claimant as a 'lying little paki'.

7.3. If so, was that unwanted conduct?

7.4. Did it relate to race?

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

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

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8.1. Did the respondent do the following things:

8.1.1. Inappropriately question (though Sanjeev Dewitt) the claimant about his entitlement to a blue badge in July 2022

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

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

The Hearing and the Evidence

Connection Issues

15. Throughout the hearing, the Claimant had some connection issues. The panel, and the Respondent's representative and the Respondent's witnesses, had no technical issues.

16. We made clear to the Claimant that we were willing to explore all other options, including (if possible) having remainder of hearing in person with same hearing dates or adjournment for alternative arrangements. We suggested that he might go to a friend's or family member's house. The Respondent's representative gave him details of their offices, about 2 miles from his home, and explained that they could set up a room there, which was next door to the toilets.

17. The Claimant’s preference was to persevere, and we did so. The problems were very severe on the morning of Day 4, to the extent that – after several other options had been tried and failed – the Claimant was connected to the room by CVP for visuals, but the audio connection was that the judge had telephoned the Claimant and so the Claimant could hear and be heard in the video room via the judge’s phone.

The Respondent’s Witnesses and Statements

18. On the Respondent’s side, there were 5 witnesses. Each of them had prepared a written statement, which they swore to, and then answered questions from the Claimant and from panel. They were:

 18.1 Clare Tebbutt.

 18.2 Sanjeev Dewitt

 18.3 Danny Moore

 18.4 Glenn Smart

 18.5 Tom Sandhu

The Claimant’s statement

19. The Claimant’s evidence started shortly after 3pm on Day 1. However, he did not wish to use the version of the statement sent to the Respondent and the Tribunal on 7 February 2025. The remainder of the day was spent in the Claimant’s efforts to locate and to supply the Tribunal and the Respondent with what he intended to be his statement. This included his sending an email which he had sent to himself on 21 February and also sending 4 image files (two of which were duplicates) of the 3 pages of a hard copy item which he had. The text of the 21 February item and the photographed item were the same.

20. On the morning of Day 2, he sent some more versions by email. He decided that the version at 7.23am that day should be treated as his statement. The Respondent's representative mentioned that there were several grounds on which it could potentially object, but was content to proceed on that basis. The Claimant swore to the accuracy of that document, and also to his impact statement [Bundle 54 to 57]. He answered questions from the Respondent's representative and the panel.

Documents

21. We had a bundle of documents which ended on page 424, with an index. In these reasons, “[Bundle XXX]” refers to page number XXX from that bundle.

22. There were two significant defects in the bundle.

22.1 Firstly, the ET1 was not properly copied. The Tribunal was able to access a complete and accurate version from HMCTS records.

22.2 Secondly, [Bundle 247 to 251] was supposed to be a report produced by Lily Hemmens and sent to the Claimant under cover of a 14 October 2022 letter [Bundle 245]. However, the version in the bundle was incomplete (as the internal page numbering made clear). We were supplied with the completed version on Day 4.

23. The Claimant stated throughout the hearing that he believed that there were missing documents from what he said were previous versions of the bundle. We asked the Claimant to do two things: firstly, specifically identify the allegedly missing document; secondly, be clear about what he meant by “previous versions” of the bundle and/or be specific about when – as the case may be – his side disclosed the document to the Respondent's representative or else the Respondent's representative disclosed the document to his side. The Claimant stated that he was unable to do those things for a combination of brain fog, computer/email issues and the fact that some of the preparation had been done by Clements Solicitors on his behalf.

24. At one point, the Claimant stated that the missing documents were in the preliminary hearing bundle from EJ Bunting’s hearings. The Respondent provided the preliminary hearing bundles from each of EJ Bunting's and EJ Emery’s hearings. In the event, neither side took us to any of the documents from either of those. The Claimant’s description of page numbers from (what he believed to be) earlier versions of the hearing bundle did not match anything which the Respondent's representative had access to, and the Claimant was not able to give specific details about the dates on which he received that version, or from whom.

25. In terms of documents sent to the Claimant, he was not able to open – straight away – all items sent to him by the Respondent. This was not because the documents were defective (the panel could open them).

26. With the following exceptions, we have taken into account all of the late, proposed additions to the bundle. The two supplied by the Respondent which we do not agree to consider as evidence are:

26.1 “1 of 2”. The trail of emails headed by Ms Tebbutt’s email to Mr Edwards of 20:05 on 25 February 2025.

26.2 “2 of 2”. The trail of emails headed by Ms Tebbutt’s email to Mr Edwards of 20:05 on 25 February 2025

In each case, Ms Tebbutt was forwarding emails sent to her the same day by Richard Williams, which in turn were forwarding what was – on the face of it – email exchanges he had had in 2023 with particular individuals. We knew who those individuals were, based on the evidence we had heard. However, the lateness with which these emails were produced, coupled with the fact that the Claimant had not been questioned about them, and that neither Mr Williams nor the other participants in the exchanges had given evidence, meant that it was unfair to admit them into evidence. On the face of the emails, it was clear that the emails had been sent after an oral discussion between Mr Williams and the sender, and we had no evidence about the contents of the discussion.

27. The only item supplied by the Claimant that we are not willing to consider is the 16 August 2021 email sent to himself, supplied at 9.59am on Day 5. Apart from the fact that it had been sent to the Tribunal only, not to the Respondent (a situation we remedied), it had not been sent to the Respondent in August 2021 either, and it was (on the face of it) incomplete.

28. The items which we have taken into account (some, but not all, of which were the subject of questions to witnesses) are as follows. The fact that we have taken the document into account does not mean that we have decided it was relevant; it just means that we were willing to assess the relevance (if any) as part of the decision-making.

28.1 The photograph of the leave request form, as supplied by Simon Edmunds (the Claimant's union representative) to Ms Tebbutt during the dismissal appeal process.

28.2 The document "Outcome of Conduct Case for Jamal Abdulla" dated 11 October 2021 in the name of William Gallacher.

28.3 The 7 image files sent by the Claimant on 26 February 2025 (in three emails: 2.18pm, 2.23pm, 2.54pm)

28.4 The 25 image files sent by the Claimant at 8.54am on 28 February 2025 (which were not copied to the Respondent by the Claimant, but which were forwarded to the Respondent by the Tribunal).

The Facts

<u>Procedural matters relevant to time limits</u>

29. Early conciliation took place between 7 October and 14 November 2022.

30. The Claimant's dismissal took effect on 24 May 2023 when he was told by Human Resources by phone that he dismissed and when he read the dismissal letter that had been sent special delivery.

31. The claim form was presented on 2 August 2023, which is less than 3 months after the effective date of termination.

32. The fact that the Claimant was able to rely on the early conciliation certificate for all of the complaints in the claim form was decided by EJ Emery's judgment in June 2024 [Bundle 63].

33. The Claimant did not contact ACAS himself and he did not present the claim form himself. In each case, it was done on his behalf by the union. The Claimant has not supplied the names of the people who did it, or any correspondence between him and the union about it. His understanding is that the union believed that he had been discriminated against, and treated badly, and so they decided to take the respective actions of (i) commencing early conciliation and (ii) presenting the claim form.

34. The Claim Form itself is extremely brief. Apart from ticking the boxes for which claims were brought in section 8.1, the only details of the proposed claims were:

    34.1 "Bullying and harassment" (section 8.1)

    34.2 "Unfair dismissal. Racial discrimination. Bullying and harassment" (section 8.2)

    34.3 "Failure to comply with own company policy and procedures. Varies internal investigation basis outcome" (section 14). We infer that "varies" was supposed to read "various" and that "basis outcome" should have been "biased outcome."

35. The form also specifies his (alleged) disabilities in section 12.

36. The Claimant's position is that he is unable to comment on why the specific incidents / allegations from the list of issues were not included in the claim form, because that was, as he sees it, the choice of the union representative who submitted the form to the Tribunal.

<u>Medical Evidence</u>

37. For the period 3 January 2023 to 31 January 2023, the Claimant had a fit note (having been assessed by GP on 11 January 2023) which stated that he was not fit for work. The stated reasons were: "*stress at work, anxiety*".

38. The Claimant alleges that, for periods later than that, and prior to his dismissal:

    38.1 He was not fit for work

    38.2 He obtained fit notes

    38.3 He supplied those fit notes to Human Resources at the time

38.4 During the appeal process, he supplied Ms Tebbutt with the fit notes and/or proof that he had previously supplied them to the Respondent

38.5 During the litigation process, he supplied, to the Respondent's representatives: (i) copies of the fit notes and/or (ii) copies of the correspondence to Ms Tebbutt showing he supplied them to her.

39. Our findings are that we are sure that he did not supply them to Ms Tebbutt or to the Respondent's representatives. We believe her when she says she has no record of receiving them and that she is confident that she did not. We are satisfied that the Respondent's representative has carried out a proper check of the items disclosed to it. The Claimant was given the opportunity during the hearing to locate the items and send them to the Tribunal (and/or evidence that he had sent them to the Respondent or its representative previously). He was unable to do so.

40. On balance of probabilities, the Claimant did not obtain fit notes from his GP for the period later than 31 January 2023 and before his dismissal. He has supplied fit notes for some later periods (for example, 18 July to 21 August 2023 and 2 October 2023 to 1 December 2023 [Bundle 421, 422]); we think it is likely that, since he still had those items, if he had obtained fit notes during any part of the period February 2023 to May 2023, he would still have access to them, especially because part of his argument for the dismissal appeal was based on an assertion that he had been sick during that period, and that his managers were aware of that sickness, and that they failed to take it into account.

41. The most recent Occupational Health ("OH") report is from 6 December 2022. [Bundle 415 to 417]. The contents of that report are consistent with the other medical evidence in the bundle and with the Claimant's Impact Statement. The issue of whether the Claimant has any impairment that meets the definition of "disability" is a legal question for this panel to determine. However, as a finding of fact, we note that the OH advice to the Respondent was that the Claimant was:

> In my opinion, disregarding the effect of treatment, Mr Abdulla would be considered as disabled under the Equality Act. The conditions this relates to is his disc disease, depression and long-Covid. The main adjustment would be to take into account the impact of the condition on his ability to attend work and accommodate related absence so far as you reasonably can.

42. For the "nerve compression" issue (to use the phrase in the list of issues), OH identified 4 periods of absence for that between 5 February 2019 and 25 February 2020. [Bundle 416].

43. There is also an OH report from 19 June 2020. [Bundle 398]. This was based on telephone consultation, and included:

> Mr Abdula has been diagnosed with nerve compression affecting his lower spine with left leg involvement and which may require surgery. Due to covid-19 any discussions with his specialist have been put on hold and he managed 2-3 sessions of physiotherapy prior to this being stopped.
>
> Mr Abdula can undertake in certain daily activities such as washing/dressing/driving at a slower pace and with more stops required to reach his destination due to the discomfort. He has been prescribed strong pain relief and is required to take this daily.

44. It also included some suggested adjustments and requirements (giving reasons) which we have noted fully. It suggested that those adjustments should be in place for at least 8 weeks, and there should be a re-referral then.

45. We are satisfied that the Claimant's nerve compression issue had not been fully resolved by 25 February 2020, and that he continued to have pain after that date and that, as stated in the OH report, he was slowed down in some "daily activities". We are satisfied that, as of 19 June 2020, it was clear that it "could well happen" that the effects would last until at least December 2020.

46. The Claimant's August 2021 fit note [Bundle 405] stated that he was not fit for work because of: "Generally unwell and back pain". The 4 November 2021 fit note mentioned back ache. [Bundle 406].

47. For the "Long Covid" issue (to use the phrase in the list of issues), OH identified 12 periods of absence for that between 21 May 2021 and 20 December 2022. [Bundle 416]. It is not immediately obvious to us why the Consultant Occupational Physician decided that every one of those absences was for Long Covid (particularly the one marked "anxiety" and the one marked "unknown" and the one that was a reaction to an antibiotic). However, even if any of the absences in that list have been mis-categorised, we are satisfied that OH did think that the Claimant was having symptoms associated with "Long Covid" as early as May 2021 (having first had Covid in December 2020) and as late as November 2022. In other words, the Consultant Occupational Physician's opinion was that the effects had lasted for a year by May 2022 (and continued after that too).

48. The Claimant's fit notes in December 2020 and January 2021 referred to "post Covid lethargy. [Bundle 402, 404].

49. The Claimant's fit note produced 2 March 2022 [Bundle 411] stated that he was unfit to work because of "Post Covid - under covid clinic". The hospital letters in the bundle show that he was referred, by his GP, to the "Long COVID assessment service", and that he reported ongoing effects, and that further investigation was required as of the telephone assessment in March 2022. [Bundle 412]

50. For the "anxiety and depression" issue (using the term in the list of issues), OH identified a period of absence from 11 March 2020 to 5 June 2020 as being for "depression".

51. [Bundle 400] is a fit note for the period 29 June 2020 to 28 September 2020, which refers to "mental health issues" as well as physical issues, including back pain.

52. The Claimant was unfit for work between 23 October 2021 and 19 November 2021 because of "mental health problems" (as well as "back ache"). [Bundle 406].

53. The Claimant's full GP records are not in the bundle, but we accept that he was prescribed the medication as mentioned in his Impact Statement.

Employment Background

54. Different dates are given for the start date of the Claimant's employment in different documents (including the claim form and the response form and the two contracts in the bundle). As per his witness statement, the Claimant began his employment with Royal Mail Group Limited in mid-2016 as a Warehouse Operative.

55. The Claimant's shifts typically finished around 8 to 12 hours after they started. His exact start time varied. He usually worked overnight, so the calendar date of the start of the shift was usually different to the calendar date of the end of the shift.

56. The Respondent is a very large employer. As stated in the response form, it has around 130,000 employees. It has various sites around the country. The Claimant worked at a distribution centre in Daventry.

57. The Claimant was a member of the trade union, CWU.

58. The Respondent has various policies, including those including in the hearing bundle, such as: "When to Consider Precautionary Suspension", "Stop bullying and harassment policy", "The Appeal Process – A Guide for employees", "Royal Mail Group Conduct Policy", "Royal Mail Group Conduct Agreement", "Our Business Standards", "Equality and Fairness Policy".

59. The Respondent has employees who can provide Human Resources advice to managers.

60. Clare Tebbutt is employed by the Respondent as an Independent Case Manager. She has dealt with around over 200 appeals during her time with Royal Mail and we infer the Respondent has several other employees who are specifically employed to do work of that nature.

Gallacher Document. October 2021

61. The document is not directly discussed in the witness statement of Glenn Smart, though he refers to his the rationale for the dismissal [Bundle 324-327] where it is mentioned.

62. The document is directly referenced in paragraph 20 of Ms Tebbutt's written statement. She also spoke about it in her oral evidence.

63. The 5 page document is unsigned, but the Claimant accepts he received it around October 2021. The document discusses an investigation into the Claimant's conduct. The conclusions are stated as follows.

> Breached Royal Mail Business Code of Standards. On 20/04/2021 to 23/04/2021, 27/04/2021 to 08/05/2021 you were absent from duty without Managerial permission. I conclude that Jamal did know the A/L procedure and was aware that he had sufficient time to find out if the A/L was authorised before taking the leave. Jamal working for Royal Mail for 3 years proves that he had sufficient time to know the process, as Jamal had taken A/L prior to the incidents, and there was no problem with the forms being correctly processed via bookroom, Jamal knows if declined, that he had to go to shift manager to authorise the leave. However Jamal took leave knowingly that the A/L had been declined. As stated in the findings Jamal taken leave and went to Sanjeev Dewitt (temporary late-shift manager), after the he had taken the leave for Tuesday 4th May 2021, and Wednesday 5th May 2021, by requesting Sanjeev to authorise on the Thursday 6th May 2021. Hence Jamal breach Royal Mail Business Code of Standards
>
> Failed to Follow Workplace Procedures. On 28/04/2021 to 30/04/2021 you did not contact your manager to request leave from the unit due to a family emergency. I conclude that Jamal did know the process for when you do not attend work, Jamal working for Royal Mail for 3 years proves that he had sufficient time to know the process, As Jamal followed the process on the 22nd April 2021 by phoning book-room stating the reason why he hasn't turned up for work, and 30th April 2021 he hadn't turned up for work, however on the 28th April 2021 Jamal states he phone on the 28th April 2021 by proving on his phone he contacted the book room on 2 occasions 1 occasion for 1 minute and 2nd occasion for 3 minutes the book room did not have any recordings nor Jamal can remember what was said to book room that day, however Jamal cannot prove nor there is any evidence that Jamal had contacted the book room for 29th April 2021. Hence Jamal breach Royal Mail Business Code of Standards.
>
> Breached Royal Mail Health and Safety Standards. On 20/04/2021 to 23/04/2021, 27/04/2021 to 08/05/2021 you did not sign in on the Signing In forms. I conclude that Jamal did know the signing in procedure, Jamal working for Royal Mail for 3 years proves that he had sufficient time to know the process, in the finding proves that Jamal on Saturday 24 April 2021 could sign in correctly but previous days couldn't remember, Jamal reply .he signed but stated someone else put the times, probability looking at signing on sheet that someone else did it was slim, therefore Jamal had an alternative motive why he didn't put the times in for previous days. Hence Jamal breach Royal Mail Business Code of Standards.
>
> **Decision**
>
> I note that Mr Jamal Abdulla and will consider appropriately, I have to consider disciplinary action as Jamal has breached all of the Royal mail standards, however a clear conduct, and length' of service I have taken into consideration, and given the

severity of the misconduct would no way excuse or mitigate that misconduct and make a lesser penalty appropriate to award

Penalty

24 months suspended dismissal

64. On 4 August 2022, when interviewed by Lily Hemmens, the Claimant stated:

> 144. JA: After that they did a big investigation on me, they tried to raise that I breached the standards, and I was missing from point of duty. I was given a 2-year serious outcome. Even though I supplied all the relevant information, documents, everything was given, I was given a 2 year serious. It was Lionel from the CWU representing me. When the outcome was given, Darren Perry said I could appeal the decision, but at least I have a job.
>
> 145. LH: Who is Darren Perry?
>
> 146. JA: Another CWU rep on site.
>
> 147. LH: Did you choose to appeal?
>
> 148. JA: No, because I thought, what's the point? The rep is telling me I'm lucky that I still have a job. Because I had this 2 year serious, I put my head down and carried on with my job. After that was issued, I was issued with a stage 2 attendance review. When I took time off for coronavirus in September last year, it triggered the attendance review. The rep that I was going to go to the meeting with said it would be ok, it should be disregarded. The manager still went ahead and issued me with a stage 2 attendance review. The union was quite baffled, I was advised to send an email to my manager who issued the stage 2 about why he felt he needed to issue it when nationally guidelines were covid absence would not be issued. On 10th April 2022, I wrote to my manager [Gary] and hr@royalmail.com and I asked him for the reasons that he gave me the stage 2 and he never responded.
>
> 149. LH: Did you raise this any further with the union or management?
>
> 150. JA: No, the email was sent, and I am still waiting for the response for that.

65. So the Claimant decided not to appeal the 2 year warning issued by William Gallacher. According to what he told Ms Hemmens, he raised a query about the outcome of an attendance review, but that was separate to the Gallacher warning.

66. In June 2023, during the dismissal appeal hearing with Ms Tebbutt, the Claimant's comments included the following (paragraph 23 on [Bundle 356]):

> I had been given a 2 year serious warning by William Gallagher, and so this has led to the dismissal.

<u>Attendance Warning. April 2022</u>

67. The comments made to Ms Hemmens about an attendance warning appear to refer to [Bundle 180] and/or to [Bundle 178-9]. [Bundle 180] is an email addressed to Gary Lowerson. However, the email address for Mr Lowerson is not correct.

(For the reasons mentioned below, the email address for HR also is likely to be incorrect). [Bundle 178-179] is some handwritten comments (presumably written by the Claimant) on a warning letter issued by Gary Lowerson, a work area manager.

68. The Claimant did not give witness evidence to the Tribunal about submitting an appeal / request for reasons about the warning, and did not ask the Respondent's witnesses (who did not include Mr Lowerson) if the Respondent received it.

69. When Ms Hemmens interviewed Mr Lowerson on 23 August 2022 [Bundle 222], there was the following exchange.

> 19. LH: Jamal states that around 10th April 2022, Jamal was issued with an attendance review 2 by you despite his absence being due to COVID-19 coronavirus. Is this correct?
>
> 20. GL: His most recent absence was for covid, but he was regularly ringing in saying he couldn't make it and not attending work. I took all of the facts into consideration and all of his non-attendance. It wasn't down to the fact of covid. We did have a meeting with a CWU rep 29th January 2022 where it was explained to him that special leave was a privilege offered to employees. We told Jamal that special leave needs to be authorised by a manager, he was continually advising the book room he was going to take annual leave or special leave C. He was told to speak to me, his PSP manager or the relevant shift manager. That was witnessed by Mohammed Pathan one of the union reps.
>
> 21. LH: Is it correct that RMG changed the policy on covid related absences, and we can now issue attendance reviews when people have been absent due to covid?
>
> 22. GL: Yes, that's right.

70. That was the end of that part of the discussion. In other words, he was not expressly asked if the Claimant had challenged the warning, and nor did he comment one way or the other.

<u>Blue Badge Incident – June or July 2022. Tannoy August 2022</u>

71. Sanjeev Dewitt is employed by the Respondent as a Late Shift Manager. He had held the Shift Manager position for more than 5 years by summer 2022. He had few dealings with the Claimant. They were in different roles and they usually worked different shifts. There was a particular occasion (and the exact date does not matter, but it was in late June or early July 2022) when the Claimant was doing overtime and so they were at work at same time.

72. There is a dispute about exactly what happened. Our findings below are made on balance of probabilities. There was no exactly contemporaneous documentation. However, we take into account the Claimant's account of the incident given to Lily Hemmens on 4 August 2022 [document commencing page 187, with the Claimant's description starting at paragraph 217 on page 196]. We also take into

account Mr Dewitt's 5 September 2022 interview with Ms Hemmens. [Bundle 229]. We have heard each of them give witness evidence and be cross-examined.

73. It was reported to Mr Dewitt that there was a car in a disabled space, with no blue badge on display. Mr Dewitt asked for a Tannoy announcement to be made. The announcement (or the first announcement, if there was more than one) did not call for the Claimant by name; it asked the owner of the vehicle with a particular registration to come to reception.

74. The Claimant did so, and identified himself to Mr Dewitt as the owner of the vehicle and said that he was entitled to park in the space, as he had a blue badge.

75. Whether they then went directly to the Claimant's car together, or whether the Claimant went to the car alone, and Mr Dewitt followed him, or whether the Claimant first returned to work and was called back again a bit later is not important to our decision. Either way, when Mr Dewitt first spoke to the Claimant in reception, the blue badge was not on display in the vehicle. Some time slightly later in the shift, it was still not on display. Mr Dewitt therefore asked the Claimant some further questions about the badge, and asked to see it. The Claimant showed it to him, and all was in order. Mr Dewitt asked the Claimant to leave it on display in the car so that it was visible through the window, and that was the end of the matter as far as Mr Dewitt was concerned.

76. The reasons that Mr Dewitt wanted to see the badge for himself included that:

76.1 the car was in a parking space reserved for disabled employees;

76.2 part of his duties included ensuring that disabled employees were able to use the space (that is, ensuring it was not improperly used by persons who were not entitled to use it);

76.3 the car did not have a blue badge on display;

76.4 he was aware that there had been some instances of employees parking in the disabled bay and displaying a badge that did not belong to them;

77. It is not true that Mr Dewitt said, "is it your grandma's badge?" or words to that effect.

78. It is true that he asked the Claimant if it was the Claimant's own badge, and that he asked to look at it.

79. Mr Dewitt had no prior knowledge of whether the Claimant did, or did not, have any particular health condition. Mr Dewitt was not involved in managing the Claimant on a day to day basis.

80. This was the only day on which Mr Dewitt caused a Tannoy announcement which led to the Claimant having to come to reception. It was probably just once, but even if it was twice, it was for the same reason, namely that the badge was not on display in the vehicle.

81. The Claimant believes that there were later Tannoy announcements for him during August 2022. Even if he is correct in that recollection, those were not announcements which Mr Dewitt or Mr Moore made, or caused to be made.

8 July 2022

82. There is a specific allegation that the words "lying little paki" ("the Alleged Words") were used to the Claimant, and about the Claimant, by Danny Moore on 8 July 2022. During the hearing, the words were repeated as few times as possible, but we asked that, for the avoidance of ambiguity, the exact words were put to the witnesses when necessary.

83. Both Mr Moore in his oral evidence, and the Respondent throughout the hearing accept that the last word of the phrase in question is extremely offensive and that it is related to race. For the remainder of these reasons, we will use the expression "the Alleged Words" to describe the specific three word phrase referred to in the list of issues, other than where we are quoting directly from a document.

84. Danny Moore has worked for the Respondent since 2003. In July 2022, he was temporarily acting up as Head of Operations, which involved managing shift managers.

85. Mr Moore did not directly manage the Claimant. They were not usually on the same shift as each other. It is a large site, and they did not encounter each other very often even when both on same shift.

86. There is a dispute about exactly what happened. Our findings below are made on balance of probabilities. There was no exactly contemporaneous documentation. However, we take into account:

86.1 Notes of phone call dated 25 July 2022 [Bundle 181].

86.2 The Claimant's account of the incident given to Lily Hemmens on 4 August 2022 [Bundle 187].

86.3 Mr Moore's 8 August 2022 interview with Ms Hemmens. [Bundle 210].

86.4 The comments in Ms Hemmens' report about messages which the Claimant showed her, namely:

> … between himself and Andrew Finnigan and between himself and Darren Perr (CWU representatives) whereby Jamal stated, "Danny Moore just stopped me

questioning where I am going, and he's then called me a liar. I feel I'm being harassed please help me" (sent to Darren Perr Friday 8th July 2022 at 15:01, sent to Andrew Finnigan at 15:04).

86.5 The image file disclosed by the Claimant at the start of Day 5 which seems to include the exchange with Andrew Finnigan that he showed to Ms Hemmens.

86.6 We have heard each of them give witness evidence and be cross-examined.

87. In the notes of 4 August, there is reference to an email apparently setting out the Claimant's recollections. However, neither side can now find such an email. The Claimant thinks it might be a reference to [Bundle 181] which might have been circulated by email.

88. Ms Hemmens report referred to "Date Concerns Raised" as 12 July 2022. It is not obvious where that date came from. However, the Claimant's recollection is that very soon after the alleged incident, either on 8 July itself, or possibly the next day, he telephoned the Respondent's "Bullying and Harassment helpline" (as noted [Bundle 101] within the Stop Bullying & Harassment Policy). The 25 July note is from when he was called back, or, at least, when he was successfully called back.

89. We infer that Ms Hemmens had some evidence that the Claimant raised an issue with the employer by, at the latest, 12 July. We do not know if she saw evidence that the Alleged Words formed part of the allegation by 12 July. The earliest written record about the Alleged Words is in the note of the 25 July telephone call. The document appears to show that the helpline worker asked the Claimant several questions about what happened, and what was said. No allegation of any overtly racist words was made in those answers, prior to this exchange:

> You advised in your complaint that Danny called you something of a racial nature?
>
> Mr. Abdulla replied "Yes that is right. He called me a lying little paki or something like that".

90. We infer that the reference to "your complaint" is the Claimant's earlier call to the helpline, which led to the call on 25 July 2022.

91. So our finding is that, by 12 July 2022, the Claimant had reported that there had been racist abuse 4 days earlier, on 8 July.

92. On 8 July 2022, the Claimant's shift started at 1pm. We accept Mr Moore's account that he was in his office and, through the window, he saw the Claimant sitting in his car after 1pm. (Around 1.15pm is his estimate). He asked for enquiries to be made. It is common ground that a manager spoke to the Claimant while he was in his car. The Claimant believes that he had not seen the manager before.

93. Mr Moore believes that the manager who spoke to the Claimant was Celisa Rosas Dos Santos Goncalve, Work Area Manager. We accept Mr Moore's account that, it was reported to him that the Claimant had told Ms Goncalve that his shift did not start until 2pm.

94. As related to Ms Hemmens, the Claimant's account of what happened earlier in the day, and at the time the Alleged Words were used, is as follows:

> 165. JA: I came into work as I normally do, I had come in a little early and I realised that I had forgotten to take my medicine. I told my work area manager Renju, "at some point, will I be able to go and get my medication from the car?" As I had come in early, I forgot to take it out. She said, "ok." I had swiped in and gone to my work area, loading the Manchester bay, loading the bay, and going onto the trailer. I was loading my trailer, once I had loaded the trailer, I had gone to the toilet. I am giving you the version of events of what happened on the shift. Should I find my notes? It's all in the email?
>
> 166. LH: I'm just asking you to tell me in your own words what happened.
>
> 167. JA: I loaded the trailer, I sought permission from the manager to get medication, I went to the toilet, I went to the canteen to get a drink because it was a hot day. Another female work area manager, I had never seen her before, I had gone into the car and I was administering my medicine. She spoke to me, I said, "I have come to get my medication." She was having a cigarette and a chat with another manager who had come to do some training. About 20 minutes later, I had gone back into my work area, I wanted to go to the toilet. The disabled toilet near my work area was locked. I had no choice but to go to the main toilet. Danny stopped me really aggressively and said, "where do you think you're going to?" I said, "toilet," he said, "why don't you go to the ones down there?" I said they are locked. He wasn't very happy, he thought I was doing nothing. I carried on going to the toilet then went back to my work area. A couple of minutes later, Cecilia the work area manager came to me and said, "you might want a union, I want to have a quick chat with you and go to the office." This was around 13:45 or 13:50, there's only one union. There was hardly anyone on the floor, we were short staffed and there was a lot of backlog of work. Des, John, I've forgotten his name, John the rep?
>
> 171. JA: I was quite busy and asked Cecilia, "what's it about?" She said she needed to speak now. She tried to ring John, he didn't answer. We both tried to ring him. She said come to the office, you were seen in the car for over 30 minutes in scorching hot heat, a formal investigation needs to take place and I will receive a letter. You were seen from above. I was baffled. I told the union this is what happened, Cecilia is investigating it, she has asked me. I have been off, I have not been paid, me and Des have spoken about this. I am already struggling with my mental health and anxiety. I couldn't breathe, I had to go and get some fresh air. This was a chap called Vipul. I said, "Can I come off the floor? I need to go and get my pump; I'm finding it hard to breathe." As I was walking to the soft seating area. Danny was walking towards me, charging towards me, asking, "where do you think you're going?" He put me on the spot. Because of my anxiety, having been put in that position. Danny said, "You are going to the toilet again? You are a liar; you are a dirty little liar." I said to the work area manager I am going to toilet and get my pump. I went to soft seating area. Then

him and another manager were looking for me. When they saw me, Danny was like, "I need to have a word with you, come here." They took me to the signing in area, it is quite closed off, that's when he was verbally abusing me, that's when I had to go through what he said to me, it wasn't nice. I said, "you can't speak to me like that, I need to get someone who can help me." I was frozen, my hands and whole body were shaking, I was in shock. A chap called Sufiyan was talking to me and he said, "are you ok?" The first person I spoke to was a bay marshal and he said, "are you ok?" I said, "I don't think so," I told him what had happened. He said to get hold of the union, that was when I got hold of John Evans and Khaled Patel.

198. LH: Thank you. Was Danny standing with Luis when he spoke to you?

199. JA: Luis was standing there, yes.

200. LH: Was that the whole time?

201. JA: Yes. Basically, I think he got a promotion. I think Danny became the operations manager, so it seemed to me that he was showing off in front of the shift manager and showing his power. When I said to him you can't talk to me like that, let me get a rep. Danny said, "go and tell who you like, it will be your word against mine and nobody will believe you."

202. LH: Was there anyone else there?

203. JA: It was just them two. There was a guy that saw everything, his name is... Bear with me, I am trying to find that email that had all the notes on it. His name is Sufiyan. I don't know his surname.

210. LH: What exactly did Danny say to you?

211. JA: He said a lot to me. He called me a "lying little paki," that's what really took me back, that shouldn't happen to anybody, especially in a workplace like RMG. It was really disheartening, it really really took me back, then calling me a "dirty liar." He was being very abusive. I was really shocked at his behaviour, the way he spoke to me. He was really proud of the fact he had taken all his frustration I was helpless. He said, "go and tell who you like, no one will believe you, it's your word against mine." That was really hard, I had to speak to feeling first class, it really had a detrimental impact on my mental health.

212. LH: Did he say anything else?

213. JA: The good thing the union told me to do was to write everything down. The email I wrote, I gave a copy of that to Darren Perry who said he would discuss that with Chris Brown and get back to me.

214. LH: What else did Danny say?

215. JA: "Lying little paki" and I'm a "disgusting horrible liar," "no one likes you, why don't you just leave the business do everyone a favour," "watch, I'll do you," "all the managers have a code of conduct against you." I said you can't speak to me like this. He really took advantage of this, he cornered me in a place no one could see. That chap Sufiyan was there. He asked what was going on, Sufiyan said, "he was laying into you." When I said, "I need to seek a union." He said, "go and tell who you like no one will believe you, it's your word against mine, I'll have you removed from this place." He knew I was suffering from long covid; he knew I had a disability; he knew I

> was suffering. I am a community activist, a grown man with a family. For him to come out with that racial slur, that shouldn't happen to everybody. I'm sure Royal Mail has a policy about discrimination, I was subject to racial discrimination and disability discrimination, telling me to go to a locked toilet and asking me about going to the toilet, it really put me down, I could not. I had to seek help from Andrew Finnigan on his day off and had to call him to get the union to speak to me. I was broken Des; it was hard enough for me to be at work.

95. As already mentioned, we asked for the email which is referenced there, and it was not supplied to us.

96. Based on the available evidence, the Claimant did not state to any of the union representatives (John Evans, Khalid Patel, Andrew Finnegan, Darren Perry) at the time that the Alleged Words, or any other racist words, had been used.

97. It is common ground that there was a discussion between the Claimant and Mr Moore, and that Luis Santos was present. We now have a copy of the Claimant's text messages to Andrew Finnegan. A one page image file of some messages was one of the items disclosed on Day 5, before Mr Sandhu's evidence, but after all the other witnesses, including the Claimant had been cross-examined. The content is consistent with the line of questioning put to the Claimant, and with the contents of Ms Hemmens's report. Based on the timing of the messages, the discussion with Mr Moore took place prior to 3.04pm.

98. Mr Moore's account is that he saw the Claimant away from his work station (around 3.30pm was his recollection) and asked the Claimant where he was going. The Claimant said that he was going to the toilet. Mr Moore's account is that another manager, Chris Brown made a phone call a bit later in the day (and Mr Moore is not sure whether the call was taken by himself or by Luis Santos) stating that the Claimant was in the car park, sitting in his car.

99. Mr Moore's account is that he and Mr Santos waited for the Claimant to return to the building (he says he made no Tannoy announcement, because it would not have been heard in the car park) and then challenged the Claimant.

100. According to his witness statement:

> I was notified that Mr Abdulla had been seen sat in his car again. When he returned 30 minutes later, I asked him for a chat with Luis Santos present. I stated "On two occasions today, you have been challenged as to where you were or where you had been. On 2 occasions you have lied. I find this behaviour of lying to managers disgusting. Celisa felt silly and embarrassed that she challenged you at 13:15 and you said you don't start until 14:00. You lied to her and it's disgusting."

AND

> The allegation that was relayed to me was that I called Mr Abdulla a 'disgusting liar'. For completeness, I did not call Mr Abdulla a 'disgusting liar' either, I made reference to him being a 'known liar'.

101. His account to Ms Hemmens, on 15 August 2022, included similar comments about conversations with CWU representatives on 8 and 9 July 2022. In relation to the incident itself, he said (line breaks added for ease of reading):

> 66. DM: In NDC the window of the office where I sit overlooks the carpark. I noticed that at 13:15, 15 minutes after JA started work, he was sitting in his car. I spoke to the shift manager at the time Patrick Penard, and he called Celisa Santos (CS) to go and challenge JA to why he was sitting in his car so soon after he had started work.
>
> The time CS got there, it was probably about 13:45. She challenged him, walked away and JA came back into the building via reception. What is known to me now but wasn't at the time, is that JA told CS that he was sitting in his car because his duty didn't start until 14:00.
>
> CS confirmed this with the production control manager, Kishan Patel. He checked JA's duty against our Staff in Post and relayed back to CS that JA started at 13:00 and he signed in 12:57.
>
> CS sought an explanation as to why JA was dishonest when she challenged him and secondly, why he was sitting in the car in the first place. I think the decision was made to progress that formally, I had no involvement in that.
>
> At approximately 15:30 on Friday when we do resourcing, we start early on Friday then people go home early. I went on the operational floor to check the operation before I went home.
>
> On entry to the floor, JA was leaving the floor. I asked JA, "where are you going?" JA said "toilet," I said, "fine, are you going to come straight back?" He said, "yes, I am coming straight back."
>
> I can't recall whether Chris Brown (CB) had called me or Luis Santos (LS). Immediately after I had seen JA, CB had seen JA sitting in his car again when CB was leaving the site. CB tried to call me or LS to alert us of this. Me and LS waited for JA to return to the floor to have an informal conversation about why he had said he was leaving his work area to go to toilet and why he was then seen sitting in his car. JA didn't return immediately, he returned 30 minutes later.
>
> I approached him near the engagement centre and asked him for a chat. I was with LS. I just said to JA, "on two occasions today, you have been challenged as to where you were or where you had been. On 2 occasions you have lied. I find this behaviour of lying to managers disgusting. Celisa felt silly and embarrassed that she challenged you at 13:15 and you said you don't start until 14:00. You lied to her and it's disgusting."
>
> JA said, "I was just winding her up." He didn't challenge back; he never gave any mitigation to say he was ill or that he was sorry. He just said he was winding CS up. I said look LS you will have to speak to him off the floor. I left the situation and that was the last encounter I had with JA.

> 67. LH: Is that everything that was said during that conversation?
>
> 68. DM: Yes. There was nothing else, especially not the words that are written that I allegedly said in that allegation. It's just a challenge Lily, it's just a challenge that we make every day.
>
> 69. LH: Were there any witnesses?
>
> 70. DM: No, just LS.

102. Ms Hemmens asked various questions, based on what the Claimant had described, and we note all the answers. They included:

> 73. LH: JA alleges that you said, "You are a dirty little liar" to him or words to that effect. What is your response to that?
>
> 74. DM: That's completely untrue. I said the way he was lying was "disgusting behaviour." I never used any language around "dirty little liar." I did not call him any names or a liar, I said that his behaviour was disgusting.
>
> 75. LH: JA alleges that you said, "Go and tell who you like, it will be your word against mine and no one will believe you" or words to that effect. Is that true?
>
> 76. DM: No.
>
> 99. LH: On 8th July 2022, JA alleges that you called him a "Lying little paki" or words to that effect. what is your response to this?
>
> 100. DM: The same as all the other ones, completely untrue. I hold my hands up and I swear on my kid's life I never used such a racial remark. It's quite alarming that someone is saying I used such words. I understand OPG's might make comments that managers have said something they didn't, but not a severe racial remark. If I did use such language, there would have been a lot of noise after. The lead CWU rep would have contacted the plant manager without a doubt. There was never any noise until that statement came through. I am probably a little frustrated, that is bad faith in my opinion to make accusations like that.

103. The text message exchange with Mr Finnegan included 4 messages sent at 3.04pm:

> She asked me wat tym I started knowing well I started at 13:00hrs
>
> I then got taken to the mangers office and she
>
> Said a formal investigation will take place
>
> Danny Moore just stopped me questioning where i am going and he's then called me a liar I feel I'm being harassed please help me

104. After some intervening messages, there are two at 15.21

> Iv just been approached by [Mr Moore & Mr Santos] threatening me
>
> Please call me

105. There is a significant time difference between Mr Moore's account and the text messages.

  105.1 He puts the conversation about going to toilet later than 3.30pm

  105.2 He puts the later conversation more than 30 minutes after that

106. It is reasonable for us to infer that the time stamps are accurate, and we do so. There is no evidence that the clock on the Claimant's phone was set to an incorrect time.

  106.1 We are satisfied that it was earlier than 3.04pm when Mr Moore asked the Claimant where he was going.

  106.2 We are satisfied that it was earlier than 3.21pm when Mr Moore and Mr Santos spoke to the Claimant.

  106.3 No-one suggests that there was more than one conversation between the Claimant and Mr Moore that day where Mr Santos was also present. We are therefore satisfied that the conversation in which, on the Claimant's case, the Alleged Words were used was earlier than 3.21pm.

107. In themselves, these time stamps do not precisely specify the time gap between the two conversations, because it does not follow the first conversation was immediately before the 3.04pm messages. We have not necessarily seen the start of that trail of messages (or the end). On the Claimant's case, Mr Moore asked him where he was going, and the Claimant said "toilet" quite early in the shift, before 2pm (although he also says it happened again later).

108. We are confident that Ms Hemmens had seen a message which we have not, and that it was timed at 3.01pm, stating:

> "Danny Moore just stopped me questioning where I am going, and he's then called me a liar. I feel I'm being harassed please help me"

109. We infer that the first conversation, in which the Claimant stated that he was going to the toilet, happened earlier than 3pm. Possibly it was much earlier than 3pm.

  109.1 So Mr Moore's account of that is out by at least 30 minutes.

  109.2 He is not necessarily wrong that there was a gap of more than 30 minutes between the encounters. However, that would likely mean that the first one was no later than around 2.45pm. The bigger the gap between the two conversations, the greater the discrepancy with his 3.30pm estimate.

110. We have to consider whether the time discrepancy is an innocent error, or a deliberate lie. If it is a deliberate lie, we have to make a decision about whether

that is because his denial of using the Alleged Words is a lie, and he specified 3.30pm for the first conversation to try to make his story more credible (and/or to try to undermine the Claimant's credibility).

111. Luis Santos was interviewed by Ms Hemmens on 11 August 2022. [Bundle 204]. He also asserted that he thought that he and Mr Moore had spoken to the Claimant later than 3.30pm. He was vague about which manager had phoned to report that the Claimant was in his car in the car park. He recalled that Mr Moore referred to "lying" (his recollection being that Mr Moore said that lying was disgusting behaviour). He was expressly asked about the Alleged Words and stated that Mr Moore had not uttered them.

112. Chris Brown was interviewed by Ms Hemmens on 6 September 2022. [Bundle 234]. He said he left work at 3.30pm or so, and phoned Mr Santos to say that the Claimant was in his car. He said that he was aware that the Claimant had been spoken to (by Ms Goncalve) and thought Mr Santos should be aware.

113. We see no plausible theory as to why Mr Moore might have thought that deliberately lying about the toilet conversation happening after 3.30pm would bolster his denials about the Alleged Words. The time of day for the toilet conversation has no real bearing on the likelihood of there having been racial abuse in the second conversation.

114. On balance of probabilities, Mr Moore is simply mistaken as to the timing of the toilet conversation. We find that the fact that he made a mistake about the time of day about the toilet conversation is neutral as to whether he uttered the Alleged Words. Indeed, even if, as the Claimant implies, Mr Moore twice asked the Claimant where the Claimant was going, and the Claimant twice replied "toilet", the fact that Mr Moore only recalls one such conversation is neutral as to whether the Alleged Words were used during the conversation which took place after Mr Moore and Mr Santos had specifically searched for the Claimant in order to speak to him.

115. The fact that all of Mr Brown and Mr Santos and Mr Moore refer to a phone call either means that they are all telling the truth that there was a phone call, or else that they have got together and decided to lie to invent the phone call.

115.1 We have found that the conversation when Mr Moore and Mr Santos both spoke to the Claimant occurred earlier than 3.21pm.

115.2 If Mr Brown did leave work at, or after 3.30pm – as he claims – then, if he phoned Mr Santos at all, his phone call was not the reason for Mr Moore and Mr Santos to speak to the Claimant.

115.3 If a phone call from Mr Brown was indeed the reason for Mr Moore and Mr Santos to speak to the Claimant then it follows that the call was earlier than 3.21pm. If, as Mr Moore says, a significant time elapsed between the phone

call and the conversation with the Claimant, it seems to follow that the call was much earlier than 3.30pm.

116. It seems more likely that Messrs Brown, Santos and Moore have compared notes about the time of day of the (alleged) phone call than that they have each independently decided that it was after 3.30pm. However, in itself, that is not strong evidence that the phone call did not happen at all. It is also consistent with Mr Brown having left work earlier than he thought, and therefore having made the call earlier than he thought, and then, later on, his own time estimate of the time he left work having infected the recollections of his colleagues about what time the call was made. On balance, we are satisfied that (i) Mr Brown did, in fact, telephone Mr Moore or Mr Santos and (ii) it was this fact that caused them to go to speak to the Claimant jointly. In other words, Mr Brown saw the Claimant, and made the phone call, earlier than 3.21pm.

117. Safwan Patel was also interviewed. He said that he had seen the Claimant and Mr Moore and Mr Santos together but had not heard any part of the conversation. His comments are equally consistent with the Claimant's version of events and Mr Moore's.

118. We take into account that the Claimant reported the Alleged Words fairly promptly. Prior to the 25 July phone call, he had said there had been a racist remark. During the 25 July phone call, he alleged that something similar to the Alleged Words had been uttered by Mr Moore.

119. However, we find it to be very unlikely indeed that the Claimant would have omitted the Alleged Words from his accounts to the union representatives. It is not merely the fact that there is no allegation in the text messages sent on the day, but he did not mention the Alleged Words to his union representatives orally shortly afterwards either. He did say – on 8 and/or 9 July – to his union representatives that he had been called a liar. The precise words are in dispute, but Mr Moore accepts that he said the Claimant had been dishonest.

120. His written statement to the Tribunal stated he had referred to the Claimant as "known liar".

121. His account to Ms Hemmens (paragraph 66 on [Bundle 214] was:

> On 2 occasions you have lied. I find this behaviour of lying to managers disgusting. Celisa felt silly and embarrassed that she challenged you at 13:15 and you said you don't start until 14:00. You lied to her and it's disgusting

122. We are satisfied that Mr Moore did say that the Claimant was lying that day (and he admits that). We are satisfied that he used the word "disgusting" (and he admits that). It is clear that the meaning of the words was that the Claimant had done something which Mr Moore was asserting was disgusting.

123. Weighing up the evidence as a whole, we think it is more likely that the exact three word phrase (the Alleged Words) was not said, than that it was said. It is likely that the words "liar" and/or "lying" were used. In any event, whether the precise words "liar" and/or "lying" were used or not, the intended meaning of Mr Moore's comments to the Claimant was to inform the Claimant that he regarded the Claimant as a liar. The third word in the Alleged Words was not uttered.

Ms Hemmens' outcome report

124. On Day 5, the Claimant disclosed copies of his email exchange of 5 September 2022 with Ms Hemmens. Each side ought to have disclosed this document to the other if they had it in their possession (or, at the least, the Claimant should have done so, on the basis that he alleges the contents are important/relevant). However, our decision is that it is not relevant to any of the decisions we need to make.

125. Ms Hemmens interviewed 7 witnesses in addition to the Claimant. They included Tom Sandhu and Gary Lowerson. The notes of all 8 interviews are in the bundle. We are satisfied that they were all sent to the Claimant on 16 September 2022 with Ms Hemmens' letter of that date [Bundle 241]. The letter told him that he had until 23 September 2022 to make any further comments. According to the outcome report, the Claimant did supply further information.

126. On 14 October 2022, Ms Hemmens supplied the outcome report.

126.1 It stated that the Claimant had been employed since 2012 (which is consistent with the date stated in Grounds of Resistance).

126.2 It identified 7 separate complaints, each of which was "not upheld".

126.3 Two of the complaints related to 8 July 2022. One was about the Alleged Words, and the other was about Mr Moore's other alleged remarks, and general demeanour. Ms Hemmens decided that no racist remarks had been made. In relation to the comments about lying, she wrote: *I do think it is emotive and could have been worded better. I consider that Danny could have used the word "unacceptable" or "inappropriate" rather than "disgusting" and I will make a recommendation on this basis*

126.4 She rejected the complaint about Mr Dewitt's conduct.

126.5 There was an allegation against Tom Sandhu. It was that the Claimant had handed a grievance to him in August 2021, and no action had been taken on the grievance. This was rejected on the basis that the Claimant's assertion was not believed. It was observed that Mr Sandhu had only become shift manager in November 2021 and there would have been no reason for him to have been the recipient of a grievance that the Claimant wished to lodge in August 2021.

126.6 In relation to the 10 April 2022 attendance review, Ms Hemmens did not address whether there had been an appeal which had not been dealt with. However, our interpretation is that she accepted both (i) that Covid absence did not have to be ignored and (ii) that, in any case, many of the issues related to failing to follow the correct processes.

126.7 We do not need to comment on the other 2 complaints.

127. The Claimant was informed of the right to appeal, and he did appeal. Richard Williams was appointed to deal with it.

<u>December 2022 leave request</u>

128. In 2022, there was a week which included Monday 28 November, Friday 2 December, Saturday 3 December and Sunday 4 December.

129. That week included an incident which, on the Respondent's case, was the reason for the Claimant's dismissal.

130. It is common ground that during the course of that week the Claimant made a request for some time off. During December, the Respondent places significant restrictions on the granting of leave because it is a very busy period for the Respondent's business.

131. It is common ground that the Claimant completed a leave request form on paper. It is common ground that Tom Sandhu signed the form and handed it back to the claimant. It is common ground that the Claimant then submitted the paper document to Staff Resourcing by placing it in a location from where it would be collected and passed on to Staff Resourcing. It is the responsibility of the Staff Resourcing team to implement a leave request for record-keeping and payroll purposes, and/or to raise queries about the approval of the leave with the manager who approved it.

132. There are two versions of the leave request form that have been used during the hearing. One of those is at [Bundle 257]. The other is a photograph taken by the claimant. In terms of the latter, it is common ground that the claimant submitted a copy of this photograph during his appeal against dismissal and it is common ground that the photograph was taken when the document was in the Claimant's possession, after Mr Sandhu had signed it and before the Claimant handed it in to Staff Resourcing.

133. On the Respondent's case, the reason that the Claimant was dismissed is that the employer decided that the employee had dishonestly changed the form. The alleged dishonesty being as follows:

133.1 That Mr Sandhu approved leave for a 4 hour period (only) starting at 10pm on the Saturday and ending at 2am on the Sunday. These were the last 4 hours of that particular shift.

133.2 That, after Mr Sandhu had signed the form, and before it was submitted to Staff Resourcing, the Claimant altered the form to add in 6 more hours of leave, being from 8pm on the Sunday to 2am on the Monday (so the last 6 hours of the following shift).

134. On the Claimant's case, he did not change the form. His position is that Mr Sandhu signed the form with both requests (an aggregate of 10 hours, being 4 hours from one shift and 6 hours from the next) already on the form. In other words, according to the Claimant, absence from both shifts was approved by Mr Sandhu.

135. To some extent the Claimant argues that the Respondent's employees decided to deliberately lie throughout the process because they wanted the Claimant to be dismissed.

136. The Claimant did use the leave on the Saturday and on the Sunday. On the Claimant's case, this is because it had been approved.

137. Mr Sandhu's evidence to the Tribunal was that the leave form was returned to him by Staff Resourcing with a query. He claimed that the version of the form which was returned to him matches [Bundle 257]. His evidence to the Tribunal was that he noticed that 6 additional hours had been added to the form, and so he discussed the matter with Chris Brown. After that, he had no further dealings with the matter until contacted by Ms Tebbutt in June 2023.

138. We will discuss the competing versions of events, and the evidence about what happened, and when that evidence was obtained, in more detail below.

<u>Events of December 2022 to February 2023</u>

139. Mr Lowerson is a work area manager.

140. Mr Lowerson has not given evidence to the Tribunal. We have an exchange of emails between him and Ms Tebbutt in June 2023 [Bundle 375-376]. To the extent that the Claimant alleges that this is not a genuine document, we reject that. Our finding is that the answers in red on those pages are Mr Lowerson's answers to Ms Tebbutt's questions.

141. We accept that the letter at [Bundle 258] was genuinely produced around 15 December 2022 and that it was posted to the Claimant's home address. According to what he writes in the letter, Mr Lowerson had spoken to the Claimant on 6 December 2022 to ask him to attend an informal meeting on 10 December 2022,

and the Claimant had failed to attend. The letter invites the Claimant to a formal meeting on 30 December 2022. The letter was sent only by post and not by email.

142. A fairly similar letter dated 3 January 2023 is at [Bundle 264]. Both letters included:

> The purpose of this meeting is to establish the facts and to determine if any formal action under the conduct policy is required
>
> You may be accompanied at the meeting by your trade union representative or a work colleague normally from the same work location.
>
> Please confirm that you will be attending this meeting either via the e-mail address or telephone number detailed above or alternatively, by returning the reply slip, within two working days from receipt of this letter.
>
> I appreciate that going through this process may be worrying. If you have any health and wellbeing concerns or questions about anything within fills letter, please do not hesitate to contact me and you might also wish to contact our confidential and independent First Class Support service … [details supplied]

143. The December letter also included information that the companion should not also be a witness to the alleged incident. Neither letter included specific information about the alleged misconduct. We also accept that this letter was sent by post, and not by email, to the Claimant at the time.

144. On 11 January, the Claimant's GP issued a fit note [Bundle 418]. The Claimant was not fit for work for the period 3 January to 31 January 2023. As already mentioned above, the stated reason was "stress at work, anxiety".

145. On 12 January [Bundle 266], Mr Lowerson wrote to the Claimant. The letter stated:

> I am sorry that you are unwell and have been absent from work since 30/12/2022.
>
> I recognise that it may be a difficult time but I want to reassure you that we are concerned about your wellbeing.
>
> As a result I would like to arrange a meeting with you to see how I can support you, therefore I am inviting you to attend a meeting with me at 8:00 PM on 20/01/2023 at NDC, please meet me in reception, I need you to contact me to confirm you will be attending this meeting as I have been unable to make contact with you.
>
> The purpose of the meeting will be to explore ways we can help you get back to work as soon as possible and discuss what guidance and support Royal Mail Group can offer.
>
> Although this is an informal meeting if it would help, your union representative can join us at the meeting. If you would like them to attend with you please let me know.
>
> It is important that our contact continues throughout your absence to enable us to support you at this time and assist your return to work.
>
> I appreciate that going through this process may be worrying. If you have any health and wellbeing concerns or questions about anything within this letter, please do not

> hesitate to contact me and you might also wish to contact our confidential and independent First Class Support service: … [details supplied]

146. On Day 3 of the hearing, we received some image files from the Claimant. Two of them appear to be an email sent from the Claimant to Mr Lowerson on 15 January 2023. Our finding is that the email was sent by the Claimant on that date. As far as we can tell, it was correctly addressed to Mr Lowerson. The email had the subject line "stress at work" and it stated:

> Hello Gary, as you are aware that I am currently unfit to attend work and have received a letter inviting me to a conduct meeting I request that any process is paused upon my return to work as this is having a profound impact on my mental health and I'm unable to cope

147. On 19 January 2023, a letter was posted to the Claimant [Bundle 267]. It was from Mr Lowerson and it read:

> Final invitation to attend a fact-finding meeting
>
> As you. did not to attend the. fact-finding meeting that was arranged for 30/12/2022 and 13/01/2023 and you also .did not contact me to make suitable alternative arrangements. I would like to offer you a further final opportunity to attend a fact-finding meeting with myself.
>
> The meeting will take place with at 18:30 on 03/02/2023 at NDC, please meet me in Reception area.
>
> During the meeting you have the right to be accompanied by a trade union representative or by a work colleague normally from the same work location. It is your responsibility to arrange this, and I suggest that you speak to this person before the day.
>
> The purpose of this meeting is to establish the facts and to determine if any formal action under the conduct policy is required.
>
> I am aware that you have reported sick with Stress at Work on 30/12/2022 and so if you feel unable to attend a meeting please contact me as a matter of urgency to make suitable alternative arrangements.
>
> Please be advised that should you fail to attend the meeting and/or contact me to make suitable alternative arrangements this will result in the case being progressed based on the facts and information I currently have.
>
> I look forward to bringing this matter to a conclusion with you and ask that you contact me on [phone number] within 48 hours of receipt of this letter, to confirm that you will attend the meeting at NDC on 03/02/2023 at 18:30 or to make alternative suitable arrangements for this meeting to take place.
>
> I recognise that being faced with conduct action can be a stressful time and I would like to remind you that the Feeling First Class: Support services are available 24 hours a day on [phone number] if you feel that you require support

148. In other words, the letter made no reference to having received any email from the Claimant, dated 15 January, or at all.

149. On 4 February 2023, the Claimant returned to work and had a return to work meeting with a duty manager, Steffan Rogers. The notes were signed by the Claimant [Bundle 269-272]. The Claimant stated in the meeting that he had been off work because of stress, that he was fit to resume duty, that he was physically fit though mentally very fragile. He said that during the absence he had had treatment from his GP and also there had been a visit by an ambulance. He also referred to Long Covid. Mr Rogers wrote that he had advised the Claimant to discuss with his PSP (which was Mr Lowerson, though he is not named in the form) whether any adjustments might be required.

150. Later on 4 February 2023, an issue arose during the Claimant's shift. The precise details of what happened do not matter, and the Respondent does not argue that the Claimant was dismissed because of what happened on 4 February 2023. On the contrary, the Respondent argues that he was NOT dismissed for that reason. However, what is relevant is that:

150.1 The Claimant was asked to go home.

150.2 An employee named Mohammed Pathan gave a written account which appears at [Bundle 273]. We note the whole of what is written; it includes:

> Today I was at work. Weekend shift manager Tom Sandhu called me at 20:21 and ask me to go to his office. Upon arrival at his office Tom informed me that Jamal Abdulla has been missing from his point of duty for nearly half an hour and refusing to talk and answer to Gary. In short while Jamal turned up and ask me what do they want to talk to me about? I explained to him that they believe you were missing from your point of duty and when Gary came to talk to you, and you refused to talk. Therefor Tom called me to have a word with you.
>
> At first instance Jamal refused to talk unless regional representative represents him, and he wasn't willing to talk to anyone else. Upon me explaining this to Tom, he said if this is the case then he would not have any choice other then sending him home for cooling off period and he will deal with him on resuming his duty tomorrow.
>
> …
>
> Therefore, I would say that Mr Jamal's behaviour was completely wrong and unexpectable as its against Royal Mail standards, and I do request to deal formally with this in an urgent matter.

151. According to Mr Moore's email of 6 February 2023 (not copied to the Claimant) [Bundle 275], there had been a plan to suspend the Claimant when he attended work for the start of his next shift (having been sent home from the one commencing on 4 February 2023), but the Claimant had not attended that shift. Although there is no suspension letter in the bundle, the Claimant accepted in oral

evidence that he had next attended work around 10 February 2023 and had spoken to Kish Patel who had sent him home, telling him that he was suspended.

152. On 16 February 2023, Mr Lowerson sent the Claimant a letter [Bundle 277]. The letter attached two copies of the one page document that appears at [Bundle 269]. That document stated:

> In Attendance - Gary Lowerson, Work Area Manager
>
> Non-Attendance - Jamal Abdulla
>
> Mr Abdulla has been invited to a fact finding meeting on 3 occasions;
>
> Invite 1 - Letter sent 15/12/2022, Recorded Delivery VE210420127GB, signed for by Abdulla, meeting scheduled for 30/12/2022 at 18:30, Mr Abdulla failed to attend.
>
> Invite 2 - Letter sent 03/01/2023, Recorded Delivery VE210420881GB, signed for by Jamal, meeting scheduled for 13/01/2023 at 18:30, Mr Abdulla failed to attend.
>
> Invite 3 - Letter sent 19/01/2023, Recorded delivery VE210162961GB, signed for by Jamal, meeting scheduled for 03/02/2023at 18:30, Mr Abdulla failed to attend.
>
> As Mr Abdulla has failed to attend a meeting despite being invited on three occasions, he has also at no time contacted me in an attempt to make alternative arrangements.
>
> I have now looked at the allegation against Mr Abdulla of dishonesty whereby he has allegedly tampered with, an Annual Leave request form after the form was signed off by the Shift Manager Tom Sandhu.
>
> Mr Abdulla requested that Tom Sandhu sign an Annual Leave form at short notice, he requested 4 hours (22:00 - 02:00) on Saturday 03/12/2022, Mr Sandhu asked Mr Abdulla, his reason for requesting the short notice Annual Leave and Mr Abdulla' advised him his car had broken down on the motorway and the RAC were on their way to tow the car off the motorway. Mr Abdulla forwarded a text message which advised that the RAC were on route. Mr Sandhu advised Mr. Abdulla that he would sign off the annual. Leave however he wanted to see the documentation proving that he had been towed off the motorway, it is my understanding that Mr Sandhu has not as yet received this documentation.
>
> Mr Sandhu signed the Annual Leave form for 4 hours and handed the form back to Mr Abdulla to post into the book room.
>
> The Annual Leave form was then returned to Mr Sandhu by Ops Support advising that there was no space left that week for Mr Abdulla to be authorised to take Annual Leave, however when the form was returned to Mr Sandhu the time of 20:00-02:00 on Sunday 04/12/2022 had been added to the form and the Total Hours of 4 hours had been amended to 10 hours.
>
> I was then requested to. have an informal discussion with' Mr Abdulla on Saturday 10/12/2022 but Mr Abdulla failed to attend. As stated above, I have now tried on 3 occasions to conduct a fact finding meeting with Mr Abdulla but he has failed to attend any of these meetings.

> Therefore, I can only make a conclusion based on the evidence I have in front of me and I believe that Mr Abdulla has acted Dishonestly and tampered with the Annual Leave request form after it had been signed in good faith by Mr Sandhu.

153. So there was no mention of any 15 January 2023 email in that document.

154. On 17 February 2023, Richard Williams sent an email to the Claimant which read [Bundle 281]:

> Good evening Jamal
>
> I am pleased hear your have resumed work from sick absence. However, I also understand that you are currently suspended due to further conduct issues.
>
> I am keen to get your Appeal heard now you have resumed from sick absence.
>
> As per the attached, can you please attend the appeal hearing next Friday, 24th Feb at 13:00 @ Midlands Super Hub

155. The attachment was [Bundle 279], which commenced: "*I have been appointed to deal with your appeal against the decision not to uphold your concern …*".

156. The Claimant did receive Mr Williams' correspondence, and did attend the meeting on 24 February 2023. The notes [Bundle 286] were sent to the Claimant and he was asked to consider them. The Claimant emailed Mr Williams on 13 March 2023 requesting a further meeting with him. The Claimant did not dispute Mr Williams' comment that his sickness absence was over, and that he was now absent from work because of suspension rather than illness.

157. On 23 February 2023, Mr Lowerson wrote to the Claimant [Bundle 283]. The letter stated:

> Following our fact finding meeting on 03/02/2023 (which you failed to attend after 3 invites) concerning an allegation of dishonesty whereby you have tampered with an Annual Leave Form after the form was signed by a Manager, please note this case has now been referred to a higher authority manager for consideration of any further action, and I consider the potential penalty to be outside my level of authority.
>
> Glenn Smart will contact you shortly.
>
> I appreciate that going through this process may be worrying. If you have any health and wellbeing concerns or questions about anything within this letter, please do not hesitate to contact me and … [similar details to those in earlier letters]

158. In relation to the allegations about 4 February 2023, a different manager sent some letters to the Claimant inviting him to a fact finding meeting. In due course, the Claimant did attend a meeting about that on 18 March 2023. In so far as relevant to any of the issues that we have to decide:

    158.1 The Claimant confirmed that he returned to work for a shift starting at 2pm on Saturday 4 February 2023.

158.2 He confirmed that he had a return to work meeting that day.

158.3 He suggested that he was properly on a break which had been authorised by a manager and which was in line with OH advice. He said that he had been challenged about why he was not at his point of duty, and had not been aggressive when he answered.

158.4 He confirmed that he had not attended work on 5 February, and gave reasons for that. He confirmed that he had been told on 10 February that he was suspended. The notes include the following (OS is the manager conducting the meeting):

> OS When I was assigned to the case. We spoke on the Friday 10th to confirm the attendance. I was then sent an email from Hayden saying you were ill.
>
> OS Thank you for coming today.

159. We have not seen any email from “Hayden”.

<u>Dismissal</u>

160. On 24 March 2023, Glenn Smart sent a letter to the Claimant. This letter was sent special delivery and was signed for. The Claimant accepts that he received it. The letter attached: a copy of the document that is at [Bundle 257], the leave form; copies of Mr Lowerson’s letters inviting the Claimant to a fact finding meeting; a copy of the document that is at [Bundle 269], as quoted above. The letter included the standard information about helplines, and included the following:

> Following the 3 fact finding meetings you failed to attend concerning an alledged act of fraud you are now being invited to a formal conduct meeting to discuss the alledged fraud where you have altered an A/L form.
>
> Please attend the formal conduct meeting to consider the conduct notification(s) listed below:
>
> Gross misconduct in that you have alledgedly commited fraud by tampering with an official A/L form after it has been signed by a shift manager.
>
> The meeting will take place at 8:00 PM on 31/03/2023 at Room 104.
>
> At this meeting you will be given every opportunity to fully explain your actions and present any evidence or points of mitigation in relation to your case, before a decision is made.
>
> I enclose details of the investigation and copies of relevant witness statements and other documents that will be referred to during the formal conduct meeting. I have also enclosed a guide that explains what to expect at the meeting.
>
> You should be aware that:
>
> • I will take into consideration your conduct record which is currently a 2 year serious warning that expires on 11-10-2023.

• This formal notification is being considered as gross misconduct. If the conduct notification is upheld, one outcome could be your dismissal without notice.

You may be accompanied at the meeting by your trade union representative or a work colleague normally from the same work location.

Please confirm that you will be attending this meeting either via the e-mail address or telephone number detailed above or alternatively, by returning the reply slip, within three working days from receipt of this letter

161. The slip invited the employee to either confirm attendance, or give reasons for non-attendance. The letter did not state that the meeting might go ahead in employee's absence. We do not know what, if any, "guide" was included with the letter.

162. Apart from the fact that the Claimant signed for the letter, the other reason that we know he received the letter is that, after his cross-examination had concluded, he disclosed a particular document for the first time. During cross-examination, he had accepted that he might have received the letter, but said that he was unsure; in particular, he disputed that the signature on [Bundle 305] was his, and did not accept that that document was proof that he had received the letter. However, the item disclosed on Day 3 was an email with text which read:

Dear Glen

Due to unforeseen circumstances we are unable to attend this evening meeting

Please advise on forthcoming dates

Kind regards

Jamal

163. The Claimant intended the email to be received by Mr Smart and by HR and by his union. He told us, and we accept, that he got a bounceback email from the address he had used for HR. We also find that he got a similar bounceback email from the address that he had used for Mr Smart, telling him that the email was undeliverable. This is because we accept Mr Smart's evidence that (i) he did not get the email and (ii) his email address includes "glenn" rather than (as used by the Claimant) "glen". We can also see that, in May 2023, when the Claimant sent an email to the same (incorrect) email address, he got a bounceback email. [Bundle 337].

164. The email (which was not received by Mr Smart) did not:

164.1 state that the Claimant was off sick;

164.2 state that Mr Lowerson and/or Mr Smart and/or the employer knew that he was off sick;

164.3 state that he could not attend a meeting until after a particular date, or until after any specific event, or until after his health had changed.

165. The Claimant did not attend on 31 March 2023. Mr Smart sent two more invitation letters [Bundle 307 and 315] inviting the Claimant to meetings on 11 April and 28 April respectively. Each letter was sent special delivery, and was not signed for, and was not collected from the delivery office. The Claimant accepted in his oral evidence that he received some red cards through his door at around this time, notifying him that there were items to be collected from the delivery office. He could not say whether any such cards were for these letters. Our finding is that they were. Thus, the reason that the Claimant did not receive these particular letters is that he did not act on the cards notifying him that there were items for him to collect.

166. On 16 May 2023, Mr Smart wrote again [Bundle 322]. The letter included, as well as repeating the same standard information that appears in the other letters:

> Dear Jamal
>
> An investigation meeting was held on 28/04/2023 concerning the following allegation(s):
>
> 1) Gross misconduct in that you allegedly committed fraud by tampering with an official A/L form after it had been signed by a shift manager.
>
> Following this meeting, I am writing to inform you that I have finished my investigation and would like to invite you to a meeting to discuss my decision.
>
> The meeting will take place at 8:46 PM on 18/05/2023 at NDC.
>
> You may be accompanied at the meeting by your trade union representative or a work colleague normally from the same work location.

167. It is not suggested by Mr Smart or anyone else that he and the Claimant met on 28 April 2023. No formal notes of decision-making (which would have been in the Claimant's absence) bearing that date have been supplied to us.

168. The Claimant did not attend on 18 May 2023. Mr Smart sent the letter dated 23 May 2023 which appears at [Bundle 323], as part of the letter, underneath the signature, he included the section "Outcome of conduct code for Jamal Abdulla" [Bundle 324-327], which is signed and dated 22 May 2023. We accept that what is written in those items represents Mr Smart's genuine opinions. Within the document, he informed the Claimant that the Claimant was dismissed with "immediate effect". The letter also included the sentence "You will receive no notice and your last day of service with Royal Mail Group will be 22/05/2023."

169. The letter was posted on 23 May 2023. On 24 May, someone at the Claimant's address signed for it. [Bundle 330]. The Claimant says he does not know who signed for it, and that he found the letter inside his house on a table. He is not sure exactly when he read it, but accepts that it was before he sent an email on 25 May 2023, with subject line "Appeal against dismissal", which was incorrectly addressed and so got an auto-reply [Bundle 337].

170. In any event, on 24 May 2023, the Claimant noted that he had not been paid, and contacted HR by email. He was told by email to contact Mr Smart to discuss. He phoned HR on 24 May, and they told him, on 24 May 2023, that he had been dismissed. This was before he read the letter.

Appeal

171. On 26 May, the Claimant sent a correctly addressed email which forwarded to Mr Smart the "undeliverable" notification. Mr Smart acknowledged receipt within a few minutes, and asked for the reply slip from the dismissal letter to be completed.

172. Later the same day, the Claimant sent an email to Mr Smart [Bundle 338] which read:

> Thank you very much for your recorded delivery letter dated the 24th of May 2023
>
> It is to my great disappointment to learn via your letter received on Wednesday this week that you have taken the [decision] to dismiss myself without any notification or any attempt to seek a fair investigation into the matter upon your reasoning of dismissal.
>
> Having worked for Royal Mail for over 8 years since September 2016 and being a trusted reliable effective Committed employee to which Iam deeply shocked to discover my fate by letter.
>
> I there forth take this opportunity to express my regret to your decision and wish to appeal your decision on the grounds that I have been dismissed unfairly
>
> Please find attached the response to your letter a signed copy of your reply slip which you posted

173. Mr Smart acknowledged that on 2 June 2023 (still not having had the paper slip).

174. On 13 June 2023 [Bundle 343], Ms Tebbutt emailed a letter dated 12 June 2023 [Bundle 341]. Ms Tebbutt confirmed that she had been appointed to deal with the appeal. Included with the letter was a bundle of documents, which has not been supplied to us. (A letter dated 15 June 2023 [Bundle 344 to 345] with similar information was also sent.) The Claimant acknowledged receipt on 14 June 2023 [Bundle 343].

175. Ms Tebbutt had suggested a video meeting on 22 June. We note the contents of their email correspondence from [Bundle 353 to 346]. The Claimant proposed attending with a solicitor, and Ms Tebbutt refused, stating that it would need to be work colleague or union representative. The Claimant stated that he had not been able to arrange a union representative, and Ms Tebbutt supplied the name of a senior official who was available. She asked for the Claimant's permission to send the information to that representative. After some reminders, the Claimant agreed to that. At the Claimant's request, the meeting was put back to 27 June 2023. (There is an error on [Bundle 354]; the meeting was 27 June not 23 June).

176. On 27 June 2023, the appeal meeting lasted from 12:07 to 13.27. Subject to the date error just mentioned, the notes at [Bundle 354 to 360] are an accurate representation of the conversation. That version of the notes incorporates the comments made by the Claimant after the initial version was sent to him.

177. The Claimant acknowledged receipt of the bundle of documents and other information. We accept that Ms Tebbutt supplied him with all of Mr Lowerson's and Mr Smart's letters.

178. Ms Tebbutt informed the Claimant:

> The appeal is a rehearing of your case, that means your reasons and evidence should be full and complete to include material already presented at your consideration of dismissal interview plus anything you wish to expand upon and any new evidence which has come to light since then.
>
> Where evidence has not changed and is already documented, then I rely on you to refer me to the specific documentation which you feel supports your appeal. I have read the papers but its up to you to refer me to the ones that you believe are relevant.
>
> I can advise you that it is within my power to set aside the decision, reduce the penalty or decide that the penalty should stand.
>
> ... You will receive a copy of these notes to sign and return having read them and made any necessary amendments.
>
> When making my decision I will be considering evidence presented today, evidence that is already on file and any further evidence established through further investigation of this case. You will be given the opportunity to comment upon, any new evidence which comes to light as part of my investigations and which is material to my decision. It is also your responsibility to share any further information I send you with your representative.

179. We find that this was an accurate summary of what Ms Tebbutt was intending to do. That is, she was going to hear all of the evidence and reach her own decision as to (i) whether there had been any misconduct and (ii) if so, what the sanction should be.

180. The gist of the case presented to Ms Tebbut was in paragraph 3 of the notes:

> Yes on the letter I received from Glenn Smart in April inviting me to a meeting saying I tampered with an A/L form, that was passed on to Glenn by Gary Lowerson, who went ahead and conducted this investigation knowing I was sick and the placed on suspension, I had no contact with any staff from my area. They knew I was sick with work related stress, every time he asked me to a meeting I responded to that but they never accommodated me with regarding my stress and the fact I had an anxiety attack at work. He never took that into account or did anything about it. he then passed it to Glenn Smart, the meeting he scheduled on the 31st March I could not attend as I was still on sick leave. I never had any other letters after that and it was not until I had no pay had I realised I was dismissed, its hard as a father of three in this current crisis.

So my side of the story had not been heard and they allege I tampered with a leave form, which was not true. At the time of getting the form signed the common practice, advised by the reps is that of you request leave at short notice take a photo of it in case you need it, so I took a photo of that and the information on that form contradicts the information I the evidence pack. The form in the pack you have had been tampered with, but the form I have clearly states the dates and times on that from.

181. Ms Tebbutt asked about the tampering allegation, and the Claimant maintained that the full 10 hours had been requested at the time, and approved by Mr Sandhu. The Claimant confirmed that on the Sunday, he arrived for his shift as normal, and then left at 8pm, on the basis - according to the Claimant – that Mr Sandhu had approved time off from 8pm to 2am.

182. The notes include the following exchanges. SE is the Claimant's union representative. Ms Tebbutt's questions are in bold:

6. I don't think that is in dispute, its the fact that the times had been changed from Saturday 4 hours, to having had the Sunday added and change to 10 hours in total. Can you account for that change?

7. If you look at the photo form the third it clear shows that the Sunday was also requested. We had a meeting with Gary and my rep was there.

8. Who was the rep?

9. I cannot recall.

…

22. Why do you think then Tom is alleging he only signed off the Saturday for 4 hours?

23. Well for the past three years I have been a victim on harassment at NDC. I have raised various grievances and I raised one against Tom and Gary and Glenn, that was upheld by Lily Hammens who left the business, Richard Williams then heard my appeal and I still do not have a decision. I had been given a 2 year serious warning by William Gallagher, and so this has led to the dismissal. They took this opportunity to say I had tampered with the leave form, without doing a fair process, Gary took the opportunity to use this and he passed it to Glenn Smart, so he took this opportunity. I was precautionarily suspended in February by Kish Patel, he never wrote to me about his, but 2 weeks later I got a letter by another junior manager inviting me to a fact finding meeting, saying I was aggressive to other staff, this was a fabricated allegation. I got suspended for a different reason. They have not followed the processes and they have used this to dismiss me. The penalty I had by William, a junior manager it was not in his remit to give me this and the union said I could appeal it, but I was just putting my head down and got on with things. I have been through a lot in the past few years. The business know I am a clinically vulnerable employee, this was not considered.

24. It seems to me that the key witness is the rep that was at the meeting with you can you please try to think about who this was? Take a few minutes to try to recall this.

25. SE: Was it Mo Pathen? He is a rep there.

26. I can't seem to come across who the rep was, Mo was one of the reps but not sure who it was on that occasion.

…

29. You also said you contacted Gary about not coming to the fact-finding meetings, do you have any proof, i.e., text messages?

30. Yes I do have those, bear with me. I have evidence responding to Glenn's invitation.

31. Was that text or email?

32. Email. I will forward that to Simon. I also have text messages

33. Can you please provide those direct to me?

34. Yes

35. But when Glenn contacts you, you are no longer sick, your sick ended 03/02/23 so why do you not attend his meeting?

36. I was still sick.

37. Had you sent on a GP certificate?

38. On PSP your sick absence ends on the 3rd February

39. (GP cert shown ending 31st Jan 23.)

40. SE: The case was passed up 23rd February.

41. Do you have a later GP certificate?

42. Yes from the 11th Feb-4th March.

43. So how did you cover your absence in the week gap between those certificates?

44. The week prior I was not sure if I tested positive, so I self-certified and I think Gary asked for the test results for that when I sent him.

45. Who did you provide that too?

46. To the Ops support, NDC email address.

47. Do have the email showing that you sent the second certificate?

48. Yes

49. After your certificate ends Glen invites you for 2 further meetings, why not attend those?

50. I only had an invitation for the first meeting.

183. Our finding is that paragraphs 38 and 43, though not in bold, were actually questions from Ms Tebbutt. For paragraph 39, it is unclear whether Ms Tebbutt was showing the certificate to the Claimant, or vice versa. However, either way, it is the document on [Bundle 418].

184. On 15 June 2023, Ms Tebbutt had written to Mr Sandhu with some questions [Bundle 363]. She sent a copy of the leave form that she had, and asked which parts, according to Mr Sandhu, were altered after he signed it. His reply was 23 June 2023 [Bundle 361]. It was sent to the Claimant before the appeal meeting. It read:

> The from that I signed was only for 4 hours on the Saturday due to Jamal allegedly breaking down on the side of the motorway and having to abandon his car on the hard shoulder. These 4 hours were on the condition that he provided proof of his car breaking down I being recovered from the motorway. At no point did I authorise any leave for the Sunday. You can see from the form that it has been altered in terms of the times and total hours. The context of this A/L form is that this happened in an A/L embargo period due to Christmas pressure, as such this is why having any leave on the Sunday was never discussed or authorised.

185. The appeal meeting notes include the following:

> **71. Did you change the annual leave sheet?**
>
> 72. No, it tells you that at quarter past nine when I was in the room with Tom and Gary it shows I requested the 2 days and put it in the OPS support post box, the following day I came into work, nothing was said to me and the form was not return to me rejected, it only came to light in week safter when Gary wanted to investigate me for tampering with the form.
>
> **73. So your claim is that Tom signed the Saturday and Sunday for you?**
>
> 74. Yes he did.
>
> 75. Why do you think Tom is now saying he only signed the Saturday?
>
> 76. Like I said during the past 3 years I have been subject to Bullying at NDC, Tom, Gary and Glenn I have raised a grievance against them. They were interviewed and so they were aware I had raised concerns against the managers. Lily upheld this and thing were very hostile for me. I was subject to harassment, being spoken to rudely on the floor, no one has any care or welfare for me, he would discriminate and demean me. They would question me around others on their lunch break. In the staff canteen
>
> 77. I would also like to ask that I appeal the grievance raised to Lily and Richard was dealing with this how come he has not got back to me.
>
> **78. You provided a photo of the sheet signed by Tom to Simon, this was dated the 3rd Dec, and so it was still in your possession at this point and had not gone to staff resourcing at this point So, who else between you and Tom had access to this form before it went to Staff resourcing?**
>
> 79. No one.
>
> **80. I sent you some information I obtained from Tom Sandu, do you wish to make any comment upon it?**
>
> 81. Is that the email Sunday?
>
> 82. Yes that is the one.

83. Simon did you get that?

84. SE: Yes do you wanted me to read it out (Read out email)

85. I know it is difficult to respond to something that had been read out to you, but do you wish to respond to this?

86. Bear with me a second please. The form was signed with Gary and Tom and as I said common practice when requesting leave at short notice is to take a photo as soon is its been signed in case it gets lost It's a good job I had that copy as I would have proved that at the fact finding.

186. After the meeting, on 27 June 2023, Ms Tebbutt wrote to Mr Pathan [Bundle 370]. As the notes make clear, and as the Claimant pointed out in the Tribunal hearing, the Claimant did not name Mr Pathan as someone who was present in the meeting. Rather the Claimant said that some union representative was present, but he could not remember who it was; it was Mr Edmunds, the Claimant's representative at the meeting with Ms Tebbutt, who suggested that it might have been Mr Pathan.

187. We note the full trail of correspondence from [Bundle 370 to 366].

187.1 In her first email, Ms Tebbutt did not describe the incident that she wanted to discuss, other than to mention it was connected to the Claimant.

187.2 In his first reply, Mr Pathan mentioned that he gave a statement to Mr Sandhu.

187.3 In response to that, Ms Tebbutt's email included, "*The statement you gave to Tom relates to another matter, and not the one I am dealing with*." She then listed 6 questions.

188. The questions (in bold) and answers (supplied 1 July 2023) were as follows.

1. Do you recall attending a meeting with Mr Abdulla, Tom and Gary to get a leave request signed when Mr Abdulla's car broke down?

Yes, I Indeed attended said meeting upon Mr Abdulla's request to represent him.

2. Can you recall as much as you can about that meeting?

This is same as my statement on the day given to Tom Sandhu. I believe you are in receipt of this?

3. Do you recall what leave Mr Abdulla requested?

Mr Abdulla requested part day (few hours) for same day, as his car was broken down on motorway.

4. Do you recall what leave Tom signed as agreed?

Yes, Leave granted for few hours for the same day as requested by Mr. Abdulla.

5. Do you recall Tom handing the form to Mr Abdulla to put into the staff resourcing section?

Yes Tom handed leave request form to Mr. Abdulla, after authorising leave to drop in book room. I must say, this is the common practice at NDC.

6. Do you recall Mr Abdulla requesting the Sunday as leave as well, and did Tom sign this?

No, I don't as When Mr Abdulla approached me he said to me he needed rest of day needed as his car was broken down and recovery service was coming to tow his vehicle. Soon after Tom authorised his leave and handed his form back to him to be dropped in book room, I and Mr Abdulla left room and I went straight to my work station as Mr Abdulla going to drop form in book room on his way out of work place.

189. Mr Sandhu's evidence to the Tribunal is that he cannot recall receiving any statement from Mr Pathan about the December issue, and does not think he had one. After some initial uncertainty, Ms Tebbutt's evidence to the Tribunal was that she had not seen any statement from Mr Pathan about the December issue, and she thinks that what she said to Mr Pathan in her second email was correct. Namely, while she was aware that he had given a statement about the 4 February incident [Bundle 273], she had never seen one from Mr Pathan about the December issue. She told the Tribunal that she was not sure why she had not gone back to Mr Pathan again to query his answer to her question 2, other than to say that, at the time, she thought his answers were clear enough about the December 2022 events and she did not have more questions for him.

190. Our findings are (i) Mr Pathan did not supply a statement to Mr Sandhu about the December issue and (ii) Ms Tebbutt did not receive any documents from Mr Pathan, about the December issue, other than those in the email trail from [Bundle 370 to 366].

191. After the meeting, the Claimant supplied Ms Tebbutt [Bundle 372] with a copy of an email sent to HR on 11 January 2023. The image he sent to her is [Bundle 374]. It is clearly an incomplete copy of what is on [Bundle 418]. We do not need to decide whether, on 11 January 2023, the item sent to HR matched [Bundle 374] or matched [Bundle 418]. Either way, we are satisfied that Ms Tebbutt asked the Claimant to supply her a better copy, and supply all the evidence of fit notes.

192. Ms Tebbutt looked into the Claimant's sickness absence records and found that the Claimant was recorded as having been on sick leave up during January, but was recorded as having returned on 4 February 2023.

193. She also checked that the Respondent's records did not show him as having been off sick after 4 February, but rather showed that he was suspended. As per [Bundle 377], she was informed:

> ... I have checked his file and nothing is in there and the team have checked the email folder and nothing in there from him apart form a sick note that covered January and a query regarding pay from late May.

Did he mention how the sicknote was sent in??

194. She also investigated whether William Gallacher had been authorised to make the October 2021 decision [Bundle 379]. She decided that he had been.

195. Ms Tebbutt sent some further information and questions to the Claimant on 3 July. [Bundle 383]. She gave him a further opportunity to supply evidence that he had been off sick, and to comment on the Respondent's records showing that, from 4 February 2023 onwards, he was not regarded as being on sick leave. She also pointed out that, even based on the Claimant's assertion of possessing a fit note for the period up to 4 March 2023, he had signed for the 24 March letter inviting him to meet Mr Smart on 31 March, and asked him to comment on that.

196. The Claimant replied that evening at 20:55 [Bundle 381] and 20:47 and 21:33 [Bundle 386] and 21:55 [Bundle 385].

197. We accept that Ms Tebbutt considered all the information supplied to her. Her 5 July letter stated that the decision to dismiss the Claimant was appropriate, and the appeal was rejected. [Bundle 388]. Her detailed reasons were included in the document at [Bundle 389 to 396] and we find that that document includes her genuine opinions and reasons. Both items were emailed to the Claimant on 6 July 2023 [Bundle 397] and he received them.

The Law

198. The law which we need to take into account includes the following matters.

Disability

199. Section 6 of the Equality Act 2010 ("EQA") defines disability. It is one of the protected characteristics defined by EQA.

6 Disability

(1) A person (P) has a disability if—

(a) P has a physical or mental impairment, and

(b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.

(2) A reference to a disabled person is a reference to a person who has a disability.

(3) In relation to the protected characteristic of disability—

(a) a reference to a person who has a particular protected characteristic is a reference to a person who has a particular disability;

(b) a reference to persons who share a protected characteristic is a reference to persons who have the same disability.

(4) This Act (except Part 12 and section 190) applies in relation to a person who has had a disability as it applies in relation to a person who has the disability; accordingly (except in that Part and that section)—

(a) a reference (however expressed) to a person who has a disability includes a reference
to a person who has had the disability, and

(b) a reference (however expressed) to a person who does not have a disability includes a
reference to a person who has not had the disability.
...
(6) Schedule 1 (disability: supplementary provision) has effect.

200. The section refers to the need to take into account Schedule 1. The paragraphs in that schedule include the following extracts in Part 1.

2 Long-term effects
(1) The effect of an impairment is long-term if—
(a) it has lasted for at least 12 months,
(b) it is likely to last for at least 12 months, or
(c) it is likely to last for the rest of the life of the person affected.
(2) If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur.

5 Effect of medical treatment
(1) An impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if—
(a) measures are being taken to treat or correct it, and
(b) but for that, it would be likely to have that effect.
(2) "Measures" includes, in particular, medical treatment and the use of a prosthesis or other aid.
(3) Sub-paragraph (1) does not apply—
(a) in relation to the impairment of a person's sight, to the extent that the impairment is, in the person's case, correctable by spectacles or contact lenses or in such other ways as may be prescribed;
(b) in relation to such other impairments as may be prescribed, in such circumstances as are prescribed.

201. By virtue of section 15 of the Equality Act 2006, the Tribunal should take the Equality and Human Rights Commission's Equality Act 2010 Code of Practice into account. The EHRC has published both an Employment Statutory Code of Practice and the supplement to it.

202. The "Guidance on matters to be taken into account in determining questions relating to the definition of disability" is issued by the Secretary of State under section 6(5) of the Equality Act 2010. The guidance does not impose any legal obligations and is not an authoritative statement of the law. In other words, where appellate court decisions differ from the guidance, then it is the court decision which takes precedence in the interpretation of the legislation. The guidance must be taken into account (Part 2 of Schedule 1, paragraph 12), but, ultimately, it is the legislation itself which must be interpreted and applied by the Tribunal.

203. The Guidance includes the following extracts.

Meaning of 'impairment'

A6. It may not always be possible, nor is it necessary, to categorise a condition as either a physical or a mental impairment. The underlying cause of the impairment may be hard to establish. There may be adverse effects which are both physical and mental in nature. Furthermore, effects of a mainly physical nature may stem from an underlying mental impairment, and vice versa.

Section B: Substantial

Effects of treatment

B13. This provision applies even if the measures result in the effects being completely under control or not at all apparent. Where treatment is continuing it may be having the effect of masking or ameliorating a disability so that it does not have a substantial adverse effect. If the final outcome of such treatment cannot be determined, or if it is known that removal of the medical treatment would result in either a relapse or a worsened condition, it would be reasonable to disregard the medical treatment in accordance with paragraph 5 of Schedule 1.

Section C: Long-term

Recurring or fluctuating effects

C5. **The Act states** that, if an impairment has had a substantial adverse effect on a person's ability to carry out normal day-to-day activities but that effect ceases, the substantial effect is treated as continuing if it is likely to recur. (In deciding whether a person has had a disability in the past, the question is whether a substantial adverse effect has in fact recurred.) Conditions with effects which recur only sporadically or for short periods can still qualify as impairments for the purposes of the Act, in respect of the meaning of 'long-term' (**Sch1, Para 2(2), see also paragraphs C3 to C4 (meaning of likely).**)

C6. For example, a person with rheumatoid arthritis may experience substantial adverse effects for a few weeks after the first occurrence and then have a period of remission. See also example at paragraph B11. If the substantial adverse effects are likely to recur, they are to be treated as if they were continuing. If the effects are likely to recur beyond 12 months after the first occurrence, they are to be treated as long-term. Other impairments with effects which can recur beyond 12 months, or where effects can be sporadic, include … mental health conditions such as schizophrenia, bipolar affective disorder, and certain types of depression, though this is not an exhaustive list. Some impairments with recurring or fluctuating effects may be less obvious in their impact on the individual concerned than is the case with other impairments where the effects are more constant.

C7. It is not necessary for the effect to be the same throughout the period which is being considered in relation to determining whether the 'long-term' element of the definition is met. A person may still satisfy the long-term element of the definition even if the effect is not the same throughout the period. It may change: for example activities which are initially very difficult may become possible to a much greater extent. The effect might even disappear temporarily. ….

Assessing whether a past disability was long-term

C12. The Act provides that a person who has had a disability within the definition is protected from some forms of discrimination even if he or she has since recovered or the effects have become less than substantial. In deciding whether a past

condition was a disability, its effects count as long-term if they lasted 12 months or more after the first occurrence, or if a recurrence happened or continued until more than 12 months after the first occurrence (S6(4) and Sch1, Para 2).

Section D: Normal day-to-day activities

Meaning of 'normal day-to-day activities'

D3. In general, day-to-day activities are things people do on a regular or daily basis, and examples include shopping, reading and writing, having a conversation or using the telephone, watching television, getting washed and dressed, preparing and eating food, carrying out household tasks, walking and travelling by various forms of transport, and taking part in social activities. Normal day-to-day activities can include general work-related activities, and study and education- related activities, such as interacting with colleagues, following instructions, using a computer, driving, carrying out interviews, preparing written documents, and keeping to a timetable or a shift pattern.

D5. A normal day-to-day activity is not necessarily one that is carried out by a majority of people. For example, it is possible that some activities might be carried out only, or more predominantly, by people of a particular gender, such as breast-feeding or applying make-up, and cannot therefore be said to be normal for most people. They would nevertheless be considered to be normal day-to-day activities.

204. In Sullivan v Bury Street Capital Limited [2021] EWCA Civ 1694, the Court of Appeal approved the following list as setting out the questions that a tribunal is required to address when determining whether or not a claimant is disabled for the purposes of the Equality Act 2010.

204.1 Was there an impairment?

204.2 What were its adverse effects?

204.3 Were they more than minor or trivial?

204.4 Was there a real possibility that they would continue for more than 12 months or that they would recur?

205. The expression "day to day activities" encompasses activities which are relevant to participation in professional life as well as participation in personal life. It is not further defined in the legislation, and should be given its ordinary meaning, taking into account the Guidance and the Code. D3 of the Guidance give some examples, but, it would be impossible to create a complete list of things which fall within the meaning of the phrase.

206. Section 212(1) EQA defines "substantial" as meaning "more than minor or trivial."

207. There are three different routes by which a claimant can satisfy the long term condition (paragraph 2 of schedule 1 EQA). Where the claimant cannot demonstrate that the substantial adverse effects of the impairment had already

lasted 12 months (by the relevant date), then they must demonstrate that the substantial adverse effects of the impairment were (as of that date) "likely" to last either long enough to reach the 12 month mark, or else for the rest of the claimant's life.

208. The question of whether the effects are likely to last for more than 12 months is an objective test based on all the evidence, and it is not relevant whether the employer or employee knew (or could have known) that the effects were likely to last long enough.

209. In this context, the word "likely" means "it could well happen" and does not impose a requirement that it was more probable that it would occur than not occur: <u>SCA Packaging Limited v Boyle</u> [2009] UKHL 37; [2009] ICR 1056.

210. Conditions with effects which recur only sporadically or for short periods can still qualify as long term impairments. If the effects on normal day to day activities are substantial and are likely to recur beyond 12 months after the first occurrence, they are to be treated as long-term. It is for the claimant to establish this, but it is sufficient that they show that "it could well happen" that the substantial adverse effects recur (beyond 12 months).

211. The likelihood of recurrence is to be assessed as at the time of the alleged contravention. It does not follow from the fact that there was actually a subsequent recurrence of an impairment that, as of the date of the alleged discrimination, it must have been "likely" that there would be a recurrence. The issue of whether a recurrence was "likely" cannot be judged, based on what actually did happen after the relevant date; however, evidence created later (especially medical reports) can still be taken into account to help answer the question about whether, as of the relevant date, recurrence was "likely".

212. The fact that the substantial adverse effect has recurred episodically might suggest that a further episode was something that (as of the relevant date) "could well happen" again in the future. However, that is not an inevitable finding. Each case must be decided on its own facts and evidence.

213. As per paragraph 5 of schedule 1, it is important to ignore any beneficial effects of treatment and to ascertain the effects on day-to-day activities as they would otherwise be but for that medical treatment.

<u>Equality Act 2010 ("EQA")</u>

214. The burden of proof provisions are codified in s136 EQA and s136 is applicable to all of the contraventions of the Equality Act which are alleged in these proceedings.

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

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

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

215. It is a two stage approach.

215.1 At the first stage, the Tribunal considers whether the Tribunal has found facts - having assessed the totality of the evidence presented by either side and drawn any appropriate factual inferences from that evidence - from which the Tribunal could potentially conclude - in the absence of an adequate explanation - that a contravention has occurred.

At this first stage it is not sufficient for the claimant to simply prove that the alleged treatment did occur. There has to be some evidential basis from which the Tribunal could reasonably infer that there was a contravention of the act. The Tribunal can and should look at all the relevant facts and circumstances when considering this part of the burden of proof test.

215.2 If the claimant succeeds at the first stage then that means the burden of proof is shifted to the respondent and the claim is to be upheld unless the respondent proves the contravention did not occur.

216. In Efobi v Royal Mail Neutral citation: [2021] UKSC 33, the Supreme Court made clear that the changes to the wording of the burden of proof provision in EQA compared to the wording in earlier legislation do not represent a change in the law. Thus when assessing the evidence in a case and considering the burden of proof provisions, the Tribunal can have regard to the guidance given by the Court of Appeal in, for example, Igen v Wong Neutral citation: [2005] EWCA Civ 142 and Madarassy v Nomura International Neutral citation: [2007] EWCA Civ 33.

217. As per paragraph 57 of Madarassy, “could decide” in section 136(2) EQA is equivalent to: a reasonable tribunal could properly decide from all the evidence before it.

218. The burden of proof does not shift simply because, for example, the Claimant proves that there was a difference in treatment (in comparison to someone whose relevant protected characteristics were different) and/or that there was unwanted conduct. Those things only indicate the possibility of discrimination or harassment. They are not sufficient in themselves to shift the burden of proof; something more is needed.

219. It does not necessarily have to be a great deal more: Denman v Commission for Equality and Human Rights 2010 EWCA Civ 1279. For example - depending on the facts of the case - a non-response from a respondent, or an evasive or

untruthful answer from a respondent or an important witness, could be the "something more" that is required. In some circumstances, it may simply be the context of the act itself. In SRA v Mitchell, the EAT upheld a tribunal's decision that the burden of proof shifted based on a finding that the employer had given a false explanation of the less favourable treatment. That being said, it is important for us to remind ourselves that the mere fact alone that a Tribunal rejects the employer's explanation for some particular act or omission does not mean that the burden of proof necessarily shifts, see for example Raj v Capita Business Services.

220. Recent EAT cases have re-emphasised the importance of actually adhering to the two stage approach set out in section 136. We have taken note of the comments in Field v Steve Pye and Co (KL) Limited and ors [2022] EAT 68 and of the fact that several subsequent EAT decisions have cited those comments with approval.

221. As per Essex County Council v Jarrett [2015] UKEAT 0045/15/0411, where there are multiple allegations, the Tribunal has to consider each allegation separately when determining whether the burden of proof has shifted in relation to each one.

221.1 That does not mean that we must ignore the rest of the evidence when considering one particular allegation.

221.2 The opposite is true. When there are multiple allegations, and/or a lot of facts found as part of the background information, a Tribunal has to stand back and consider all of the evidence in the round to consider whether any inference of discrimination/victimisation should be drawn: see Qureshi v Victoria University of Manchester. There must be no failure to consider 'the bigger picture', as it was described in Humby v Barts Health NHS Trust [2024] EAT 17.

221.3 It just means that we assess separately, for each allegation, whether the burden of proof shifts or not, taking into account all of the facts which we have found.

Time Limits for EQA complaints

222. In EQA, time limits are covered in s123, which states (in part):

> (1) Subject to sections 140A and 140B proceedings on a complaint within section 120 may not be brought after the end of—
>
> (a) the period of 3 months starting with the date of the act to which the complaint relates, or
>
> (b) such other period as the employment tribunal thinks just and equitable.
>
> (3) For the purposes of this section—
>
> (a) conduct extending over a period is to be treated as done at the end of the period;

(b) failure to do something is to be treated as occurring when the person in question decided on it.

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—

(a) when P does an act inconsistent with doing it, or

(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it

223. In applying Section 123(3)(a) of EA 2010, the tribunal must have regard to the guidance in Commissioner of Police of the Metropolis v Hendricks ([2002] EWCA Civ 1686; [2003] ICR 530); Lyfar v Brighton and Hove University Hospitals Trust [2006] EWCA Civ 1548. Applying that guidance, the Court of Appeal has noted that in considering whether separate incidents form part of an act extending over a period, one relevant but not conclusive factor is whether the same or different individuals were involved in those incidents: Aziz v FDA 2010 EWCA Civ 304. The tribunal must consider all relevant circumstances and decide whether there was an act extending over a period or else there was a succession of unconnected or isolated specific acts. If it is the latter, time runs from the date when each specific act was committed.

224. A crucial distinction is between – on the one hand – an invariable rule which will inevitably result in a discriminatory outcome each time and – on the other hand – a discretionary decision made under a policy, in which the discretionary decision may sometimes result in an employee getting the desired outcome, and sometimes not. In the latter case, the discretionary decision causes the time to run (for a complaint based on that decision), regardless of arguments about whether the policy itself is discriminatory.

225. In considering whether it is just and equitable to extend time the Tribunal should have regard to the fact that the time limits are relatively short. That being said, time limits are there for a reason and the default position is to enforce them unless there is a good reason to extend. That does not meant that the lack of a good reason for presenting the claim in time is fatal. On the contrary, the lack of a good reason for presenting the claim in time is just one of the factors which a tribunal can take into account, and it might possibly be outweighed by other factors.

226. The Tribunal has a broad discretion to extend time when there is a good reason for so doing. Parliament has chosen to give the Employment Tribunal the widest possible discretion. Unlike, say, the Limitation Act 1980, s 123(1) of the Equality Act does not specify any list of factors to which the tribunal is instructed to have regard, and it is wrong to interpret it as if it contains such a list. A tribunal can consider the list of factors specified in s 33(3) of the Limitation Act 1980, but if it does so, should only treat those as a guide, and not as something which restricts its discretion.

227. The factors that may helpfully be considered include, but are not limited to:

227.1 the length of, and the reasons for, the delay on the part of the claimant;

227.2 the extent to which, because of the delay, the evidence is likely to be less cogent than if the action had been brought within the time limit specified in Section 123;

227.3 the conduct of the respondent after the cause of action arose, including the extent (if any) to which it responded to requests for information or documents

228. In particular, it will usually be important for the Tribunal to pay attention to (and, where necessary, make specific findings about) "whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh)": Abertawe Bro Morgannwg University Local Health Board v Morgan Neutral Citation Number: [2018] EWCA Civ 640.

Definition of Direct Discrimination – section 13 EQA

229. Direct discrimination is defined in s.13 EQA.

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

230. There are two questions: whether the respondent has treated the claimant less favourably than it treated others ("the less favourable treatment question") and whether the respondent has done so because of the protected characteristic ("the reason why question").

231. For the less favourable treatment question, the comparison between the treatment of the claimant and the treatment of others can potentially require decisions to be made about whether another person is an actual comparator and/or the circumstances and attributes of a hypothetical comparator. However, the less favourable treatment question and the reason why question are intertwined. Sometimes an approach can be taken where the Tribunal deals with the reason why question first. If the Tribunal decides that the protected characteristic was not the reason, even if part, for the treatment complained of then it will necessarily follow that person whose circumstances are not materially different would have been treated the same and that might mean that in those circumstances there is no need to construct the hypothetical comparator.

232. When considering the "reason why question" for the treatment we have found to have occurred, we must analyse both the conscious and sub-conscious mental processes and motivations of the decision makers which led to the respondent's various acts, omissions and decisions.

233. For comparators for direct disability discrimination allegations the EHRC Code gives useful guidance at paragraphs 3.29 and 3.30 in particular with the example quoted therein.

234. If we find that the reason for particular treatment of the claimant was - for example - the claimant's absence from work, then the relevant comparator (for the direct discrimination allegations) would have to be someone who was also absent from work for a similar amount of time, and so on.

<u>Harassment – section 26 EQA</u>

235. Harassment is defined in s.26 of the Act.

> (1) A person (A) harasses another (B) if—
>
> (a) A engages in unwanted conduct related to a relevant protected characteristic, and
>
> (b) the conduct has the purpose or effect of—
>
> (i) violating B's dignity, or
>
> (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
>
> (4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—
>
> (a) the perception of B;
>
> (b) the other circumstances of the case;
>
> (c) whether it is reasonable for the conduct to have that effect.

236. It needs to be established on the balance of probabilities that the claimant has been subjected to unwanted conduct which had the prohibited purpose or effect. However, to succeed in a claim of harassment, it is not sufficient for a claimant to prove that the conduct was unwanted or that it had the purpose or effect described in s.26(1)(b). The conduct also has to be related to the particular characteristic.

237. Section 136 EQA applies and so the claimant does not necessarily need to prove on the balance of probabilities that the conduct was related to the protected characteristic. If the tribunal finds facts from which it could conclude that the conduct was related to the protected characteristic then the burden of proof shifts.

238. The use of the word "or" in s26(b) (twice) is important.

239. "Purpose" and "effect" are two different things, and must be considered separately. Where it was the wrongdoer's "purpose" to do the things listed in s26(b), then the complaint can succeed even if the conduct did not successfully have that effect. Correspondingly, where the conduct does have the effect described in s26(b), then

the complaint can succeed even if the Respondent (or the person whose conduct it was) did not have the intention of causing that effect.

240. In Land Registry v Grant Neutral citation [2011] EWCA Civ 769, the Court of Appeal said that when considering the effect of the unwanted conduct, and when analysing s.26(4), it is important not to cheapen the words used in s.26(1).

> Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment. The claimant was no doubt upset … but that is far from attracting the epithets required to constitute harassment. In my view, to describe this incident as the Tribunal did as subjecting the claimant to a "humiliating environment" when he heard of it some months later is a distortion of language which brings discrimination law into disrepute.

241. When assessing the effects of any one incident of several alleged acts of harassment then it is not sufficient really to consider each instant by itself. We obviously must consider each incident by itself, but, in addition, we must stand back and look at the impact of the alleged incidents as a whole.

Discrimination arising from disability

242. Discrimination arising from disability is defined in s.15 of the Act.

> **15 Discrimination arising from disability**
>
> (1) A person (A) discriminates against a disabled person (B) if—
>
> (a) A treats B unfavourably because of something arising in consequence of B's disability, and
>
> (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.
>
> (2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

243. The elements that must be made out in order for the Claimant to succeed are that: there must be unfavourable treatment; there must be something that arises in consequence of the Claimant's disability; the unfavourable treatment must be because of, in other words caused by, the something that arises in consequence of the disability. Furthermore, the alleged discriminator must also be unable to show either that the unfavourable treatment was a proportionate means of achieving a legitimate aim or, alternatively, that it did not know and could not reasonably have been expected to know that the Claimant had the disability.

244. The word "unfavourably" in s.15 is not separately defined in the legislation but should be interpreted consistently with case law and the EHRC Code of Practice.

Dismissal, for example, can amount to unfavourable treatment but so can treatment which is much less disadvantageous to an employee than dismissal.

245. Pnaiser v NHS England [2015] UKEAT 0137/15 makes clear that, if there was unfavourable treatment, the Tribunal must decide by whom. The Tribunal must then decide what caused that person or persons to subject the Claimant to the treatment in question. That includes making decisions about the conscious and unconscious thought processes of the alleged discriminator. There may be more than one reason or cause for the treatment and the "something arising in consequence of disability" need not be the main or sole reason for the unfavourable treatment but must have a significant (ie more than trivial) influence so as to amount to an effective reason for or cause of it. Having made decisions about what caused the alleged discriminator to act as they did, the tribunal will then have to determine whether the reason or cause is "something arising in consequence of" the Claimant's disability.

246. In Risby v London Borough of Waltham Forest EAT 0318/15, the EAT made clear that an indirect connection between the Claimant's unfavourable treatment and the "something" that arises in consequence of the disability can be sufficient. The EAT decided that the employment tribunal had been wrong to reject the section 15 claim on the basis that an incident in which the employee lost his temper was unrelated to his disability. On the facts, an effective cause of the loss of temper had been the employer's decision to hold an event at a venue that was inaccessible to him because of his disability, that loss of temper led to his dismissal, and there was therefore a sufficient connection between the unfavourable treatment (his dismissal) and his disability for the purposes of section 15

247. When considering what the Respondent knew or could have reasonably been expected to know, the relevant time is the time at which the alleged unfavourable treatment occurred. Thus, where there are different allegations, then the Respondent's knowledge has to be assessed at the time of each alleged act or omission. For that reason, for example, what the Respondent knew (or could have been expected to know) at the time of a dismissal might be different than what it knew (or could have been expected to know) at the time of an appeal hearing.

248. The complaint will not succeed if the Respondent is able to show that the unfavourable treatment was a proportionate means of achieving a legitimate aim. The aim relied upon should be legal, should not be discriminatory in itself, and must represent a real objective consideration. Business needs and economic efficiency may be legitimate aims, but simply demonstrating that one course of action was less costly than another is not likely to be sufficient.

249. It is necessary for there to be a balancing exercise which takes into account the importance of the Respondent achieving its legitimate aim in comparison weighed against to the discriminatory effect of the treatment. Regardless of whether the

Respondent carried out that balancing exercise at the time (and it is not necessary for the Respondent to prove that it did), the tribunal carries out its own balancing exercise - based on the evidence presented at the hearing – in order to decide if the section 15(1)(b) defence succeeds.

250. If a Respondent has failed to make reasonable adjustments which could have prevented or minimised the unfavourable treatment, then it is going to be very difficult for the Respondent to show that the treatment was a proportionate means of achieving a legitimate aim.

251. Section 136 EQA applies to alleged contraventions of section 15 EQA.

<u>Failure to make reasonable adjustments,</u>

252. Section 20 EQA defines the duty. S.21 and schedule 8 also apply.

20 Duty to make adjustments

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

(2) The duty comprises the following three requirements.

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

(4) The second requirement is a requirement, where a physical feature 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.

(5) The third requirement is a requirement, 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 it is reasonable to have to take to provide the auxiliary aid.

(6) Where the first or third requirement relates to the provision of information, the steps which it is reasonable for A to have to take include steps for ensuring that in the circumstances concerned the information is provided in an accessible format.

(7) A person (A) who is subject to a duty to make reasonable adjustments is not (subject to express provision to the contrary) entitled to require a disabled person, in relation to whom A is required to comply with the duty, to pay to any extent A's costs of complying with the duty.

(11) A reference in this section, section 21 or 22 or an applicable Schedule to an auxiliary aid includes a reference to an auxiliary service.

21 Failure to comply with duty

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

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

(3) A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purpose of establishing whether A has contravened this Act by virtue of subsection (2); a failure to comply is, accordingly, not actionable by virtue of another provision of this Act or otherwise.

Schedule 8, Part 3, paragraph 20: Lack of knowledge of disability, etc.

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

(b) in any case referred to in Part 2 of this Schedule, that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement.

253. The expression “provision, criterion or practice” (usually shortened to “PCP”) is not expressly defined in the legislation. We have regard to the guidance given by EHRC to the effect that the expression should be construed widely so as to include, for example, any formal or informal policies, rules, practices, arrangements, criteria, conditions, pre-requisites, qualifications or provisions.

254. The Claimant must clearly identify the alleged PCPs to which the adjustments should have been made. The tribunal must only consider those PCPs as identified. See Secretary of State for Justice v Prospere [2015] UKEAT 0412/14/3004.

255. An expectation that employees ought to behave in a certain way, and that doing otherwise would be frowned upon, can potentially be sufficient to show there is a PCP, even if the employer did not enforce the expectation by any formal sanction.

256. It is also important to distinguish between the application of a PCP and any adjustment that may be in place to ameliorate the effect of it on the Claimant. If adjustments have been made for the Claimant, that does not, in itself, prove that there was no PCP.

257. When considering whether there has been a breach of s.21 we must precisely identify the nature and extent of each disadvantage to which the Claimant was allegedly subjected. Furthermore, we must consider whether there is a substantial disadvantage when the relevant alleged PCP is applied to the Claimant in comparison to when the same PCP is applied to persons who are not disabled.

258. The Claimant has the burden of establishing a prima facie case that the duty to make reasonable adjustments has arisen and that there are facts from which it could reasonably be inferred that the duty may have been breached. If he does then we need to identify the step or steps (if any) which the Respondent could

have taken to prevent the Claimant suffering the disadvantage in question, or to reduce that disadvantage. If there appear to be such steps, then the burden is on the Respondent to show that the disadvantage could not have been eliminated or reduced by such potential adjustments or, alternatively, that the adjustment was not a reasonable one for it to have had to make.

259. The Tribunal should take into account everything that is relevant when assessing reasonableness. The EHRC Code provides some guidance and examples. The type of factors that can be looked at include, but are not limited to:

259.1 the extent to which taking the step would prevent the effect in relation to which the duty was imposed (i.e. the effectiveness of the step)

259.2 the extent to which it was practicable for the employer to take the step

259.3 the financial and other costs that would be incurred by the employer in taking the step and the extent to which taking it would disrupt any of its activities

259.4 the extent of the employer's financial and other resources

259.5 the availability to the employer of financial or other assistance in respect of taking the step

259.6 the nature of the employer's activities and the size of its undertaking

260. There is no breach of s.21 if the employer did not know and could not reasonably have been expected to know, that the Claimant had the disability.

261. Furthermore, in relation to a particular disadvantage, there is no breach of s.21 if the employer did not know and could not reasonably have been expected to know, that the PCP would place the Claimant at that disadvantage.

<u>Unfair Dismissal</u>

262. Section 98 of the Employment Rights Act 1996 ("ERA") deals with fairness of dismissals.

> **98.— General.**
>
> (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—
>
> (a) the reason (or, if more than one, the principal reason) for the dismissal, and
>
> (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
>
> (2) A reason falls within this subsection if it—
>
> (b) relates to the conduct of the employee,

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

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

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

263. The respondent has the burden of proving, on the balance of probabilities, that the claimant was dismissed for the reason which the respondent is relying on. The reason in this sense is the set of facts known to the person taking the decision on behalf of the employer (or the set of beliefs held by that person) which cause the employer to dismiss the employee. See the court of appeal decision in Abernethy v Mott [1974] I.C.R. 323.

264. Furthermore, the employer must also satisfy us that this factual reason, the Abernethy reason, falls within at least one of the definitions in either section 98(2) or section 98(1)(b).

265. In this case, the respondent alleges that the reason was “conduct” as defined by section 98(2)(a) ERA.

266. “Conduct” can refer to the actions of an employee - whether done in the course of employment or not – that potentially affect the employer/employee relationship.

267. Provided the respondent does persuade us of (i) the dismissal reason and (ii) that it falls within one of the categories in s.98, then the dismissal is potentially fair. That means it is then necessary to consider section 98(4) ERA. In doing so, we take into account the respondent’s size and administrative resources and we decide whether the respondent acted reasonably or unreasonably in treating the employee’s conduct, as it found it to be, was a sufficient reason for dismissal.

268. For conduct dismissals, we take into account, amongst other things, the guidance in British Home Stores v Burchell.

268.1 Did the employer have a genuine belief that the employee had conducted himself as alleged;

268.2 if so, did it have reasonable grounds for that belief.

268.3 Did the employer carry out a reasonable investigation prior to forming the belief.

269. In terms of the sanction of dismissal itself we must consider whether this particular respondent’s decision to dismiss this particular claimant fell within the band of

reasonable responses in all the circumstances. The band of reasonable responses test applies not only to the decision to dismiss but also to our assessment of the reasonableness of the procedure by which that decision was reached.

270. It is not the role of the Tribunal to assess the evidence and to decide whether the claimant should or should not have been dismissed. In other words, it is not our role to substitute our decisions for the decisions made by the respondent.

271. The band of reasonable responses test is a wide one, but it is not infinite. In an appropriate case we could decide that the respondent had acted outside the band of reasonable responses and that dismissal was not an appropriate sanction for the actual conduct which it had decided had been proven.

272. Gross misconduct is a jargon term which has no statutory definition. However, it is often used, including by employers producing disciplinary rules or contracts of employment, as short hand for the type of conduct that merits dismissal without notice, and/or dismissal for a "first offence".

273. It does not automatically follow that dismissal for conduct which the Respondent deems gross misconduct is automatically within the band of reasonable responses, and it would be an error of law for the Tribunal to think that it did. See Brito-Babapulle v Ealing Hospital NHS Trust 2013 IRLR 854.

274. Even if an employer's decision is that the conduct was "gross misconduct", there should be analysis by the employer of whether mitigating factors meant that the decision should be something other than dismissal. Such factors might include the employee's long service, the consequences of dismissal for the employee and any previous unblemished record. The Tribunal should look to consider whether the Respondent took such factors into account and, if not, why not.

275. A final written warning (or any written warning) is something that can potentially be taken into account by a reasonable employer when deciding whether to dismiss.

276. In Wincanton Group plc v Stone [2013] IRLR 178, at para 37 Langstaff P gave the following summary of the law on warnings in misconduct cases:

> We can summarise our view of the law as it stands, for the benefit of Tribunals who may later have to consider the relevance of an earlier warning. A Tribunal must always begin by remembering that it is considering a question of dismissal to which section 98, and in particular section 98(4), applies. Thus the focus, as we have indicated, is upon the reasonableness or otherwise of the employer's act in treating conduct as a reason for the dismissal. If a Tribunal is not satisfied that the first warning was issued for an oblique motive or was manifestly inappropriate or, put another way, was not issued in good faith nor with prima facie grounds for making it, then the earlier warning will be valid. If it is so satisfied, the earlier warning will not be valid and cannot and should not be relied upon subsequently. Where the earlier warning is valid, then:

(1) The Tribunal should take into account the fact of that warning.

(2) A Tribunal should take into account the fact of any proceedings that may affect the validity of that warning. That will usually be an internal appeal. This case is one in which the internal appeal procedures were exhausted, but an Employment Tribunal was to consider the underlying principles appropriate to the warning. An employer aware of the fact that the validity of a warning is being challenged in other proceedings may be expected to take account of that fact too, and a Tribunal is entitled to give that such weight as it sees appropriate.

(3) It will be going behind a warning to hold that it should not have been issued or issued, for instance, as a final written warning where some lesser category of warning would have been appropriate, unless the Tribunal is satisfied as to the invalidity of the warning.

(4) It is not to go behind a warning to take into account the factual circumstances giving rise to the warning. There may be a considerable difference between the circumstances giving rise to the first warning and those now being considered. Just as a degree of similarity will tend in favour of a more severe penalty, so a degree of dissimilarity may, in appropriate circumstances, tend the other way. There may be some particular feature related to the conduct or to the individual that may contextualise the earlier warning. An employer, and therefore Tribunal should be alert to give proper value to all those matters.

(5) Nor is it wrong for a Tribunal to take account of the employers' treatment of similar matters relating to others in the employer's employment, since the treatment of the employees concerned may show that a more serious or a less serious view has been taken by the employer since the warning was given of circumstances of the sort giving rise to the warning, providing, of course, that was taken prior to the dismissal that falls for consideration.

(6) A Tribunal must always remember that it is the employer's act that is to be considered in the light of section 98(4) and that a final written warning always implies, subject only to the individual terms of a contract, that any misconduct of whatever nature will often and usually be met with dismissal, and it is likely to be by way of exception that that will not occur.

277. In Bandara v BBC 2016 WL 06639476, the EAT confirmed (having considered both Wincanton and also the Court of Appeal's review in Davies v Sandwell Metropolitan Borough Council [2013] IRLR 374) that a tribunal assessing an unfair dismissal claim can, in an appropriate case, decide that the sanction of final written warning for a prior incident was a manifestly inappropriate sanction. A tribunal should only take that step if it there is something that is drawn to the tribunal's attention which enables it to conclude that the sanction plainly ought not to have been imposed, and this requires more than simply deciding that the sanction of final written warning had been outside the band of reasonable responses.

278. Subject to the comments above, where a final written warning is live, then the issue of whether the decision to dismiss was fair or unfair requires consideration (as per Section 98(4)) of whether, in the particular case, it was reasonable for the employer

to treat the conduct reason, taken together with the circumstance of the final written warning, as sufficient to dismiss the claimant.

279. If we do decide that there has been any unfairness at the original stage at which the dismissal decision was made, then we might potentially decide that that had been cured as a result of what had happened during the appeal process. That depends on all the circumstances of the case; it depends upon the nature of the unfairness of the first stage and it depends on the nature of what happens at the second stage, at the appeal stage and it depends on the equity and substantial merits of the case. We take into account the guidance in Taylor v OCS Group [2006] IRLR 61.

280. The ACAS Code of Practice on Disciplinary and Grievance Procedures must be taken into account by the Employment Tribunal if it is relevant to a question arising during the proceedings (see section 207(2) of the Trade Union and Labour Relations (Consolidation) Act 1992).

281. In considering unfair dismissal arguments, we must take care not to conflate tests for whether a dismissal was a breach of the Equality Act with tests for whether the dismissal was unfair contrary to the Employment Rights Act.

Analysis and Conclusions

282. In our analysis, we will first decide the disability issues, and then tackle the other issues in approximately chronological order.

Disability – section 3 of the list of issues

Long Covid

283. The phrase "long covid" is not precisely defined, medically. Where an individual, on separate occasions, became infected with the virus, and was severely affected each time for some days, or a small number of weeks, but was healthy in between, the definition of disability would not be met. Each separate bout of infection would be a different impairment, none of which had long-term effects.

284. The phrase "long covid" refers to something different. Namely, where an infection occurs and – regardless of whether the person continues to test positive for the virus or not – the effects do not clear up after some days, or a small number of weeks, but rather continue for longer than that.

285. On the assumption that the effects on day to day activities are sufficient to meet the statutory test (that is, they are not trivial), the standard test for the "long-term" requirement is applied. That is, the test is met if the effects last for at least 12 months, but the test can be met sooner than that if there is a point in time at which it becomes "likely" that they will last for 12 months.

286. In the Claimant's case, the waters are muddied slightly by the fact that the Claimant alleges both (i) that he had 4 separate covid infections and (ii) that he was experiencing symptoms of "long covid".

287. The weight of the evidence is in the Claimant's favour, and the Respondent has not undermined or contradicted any of that evidence. The Respondent's own OH adviser was content that the Claimant had had symptoms of, and absences because of, the effects of Covid over a long period of time. Similarly, the Claimant's GP referred him for a hospital assessment, and the telephone assessment was that further investigation was required.

288. Applying the questions in section 3.2 of the list of issues to long covid, we are satisfied that by no later than December 2021, the Claimant had had recurring effects of "Long Covid" for 12 months. This condition met all the requirements of the definitions in EQA by no later than December 2021.

Anxiety and Depression

289. We discussed the medical evidence and impact statement in detail in the findings of fact.

290. We reject the Respondent's submission that we should make a distinction between the medical evidence or fit notes which refer to "anxiety" and those which refer to "depression" and treat them each in isolation. Although the December 2022 OH report refers to "depression" in its analysis, and although the January 2023 fit note refers to "stress at work, anxiety" and although other items are vaguer, in their references to "mental health", we are satisfied that all the medical evidence relating to mental health conditions is referring to the same impairment, and that the label (if label is required) of "anxiety and depression" sufficiently captures what is being referenced.

291. What caused the onset of this impairment is not something we need to address in deciding if it meets the definition of disability, subject only to the fact that where someone exhibits particular symptoms, we do have to analyse whether those symptoms were caused by an impairment, as opposed to being purely a reaction to a life event.

292. The Claimant's opinion is that the onset of his symptoms in March 2020 is linked to a particular incident which occurred at work in around March 2020. However, even if that was a trigger point – and we make no decision about that, and do not have expert evidence on that point – we are satisfied that the Claimant has demonstrated that there were effects on day to day activities caused by the Claimant's mental health, and we are satisfied those effects were caused by an impairment.

293. Addressing the questions in 3.2 of the list of issues, we are satisfied that there came a time, by no later than some date in 2021, when the Claimant's "anxiety and depression" satisfied all parts of the definition of disability, including the long-term requirement.

Nerve compression

294. We are satisfied that all elements of the definition of disability, including the long-term requirement, had been met by the time, in June 2020, the Claimant was assessed by OH.

Failure to make reasonable adjustments. Section 6 the list of issues

295. The Respondent did have a requirement that its employees were required to work their contracted hours. That is subject to the facts that there were sick pay provisions for employees who were too ill to work, and the possibility of part-time, rather than full-time, work existed.

296. The specific PCP in the list of issues is:

> Insisting on the claimant fulfilling his contracted hours in his contractual role

297. The alleged disadvantage is "*he was required to work when ill*". The Claimant has not proven that the Respondent required him to work when ill. The OH report mentioned various sickness absences. The Claimant has not proven that there were other occasions when he ought to have been on sick leave, but the Respondent refused to allow that to happen.

298. We do accept that, for any person, if their sick pay entitlement has expired, or is about to expire, there might be an economic reason for attending work, even if they did not necessarily feel well enough to do so. However, the Claimant has not provided evidence of such dates when he had to do that. In any event, that would be a disadvantage caused by a different PCP to the one actually pleaded; it would be a disadvantage caused by a PCP along the lines of "entitlement to full pay when off sick was limited to a specified maximum period".

299. To the extent that the implication of the suggested disadvantage is that, within a shift, when well enough to work for parts of the shift, the Respondent failed to allow him to refrain from working for other parts of the shift when he was unwell, the Claimant provided no evidence of any particular dates and times of such a thing occurring, and no evidence of having been refused any request to leave his work station on the grounds of feeling too ill to carry on working.

300. It seems fairly obvious that the Claimant's disabilities probably did cause some disadvantages to him in connection with his work during his shift. However, the reasons that it is important for a claimant to specify, and then prove, some specific

disadvantage include that the employer has a defence if it did not know, and could not reasonably have been expected to know, about the specific disadvantage.

301. We are not persuaded, on the evidence presented, that the Respondent did, in fact, insist on the Claimant working when he was not well enough to work, or that, in general, it had a policy or practice of insisting on employees working when sick.

302. The Claimant's suggestion for a step that it was reasonable for the Respondent to have had to take is "*granting flexibility in relation to the claimant's working arrangements as requested*".

303. It would not have been a reasonable adjustment for the Respondent to have had to grant unlimited flexibility. That is, it would not have been a reasonable adjustment for the Respondent to have had to allow the Claimant the unfettered right to decide when, during a particular shift, he would work and when he would not work.

304. The December 2022 OH report suggested (our emphasis):

> Capacity for Work:
>
> Mr Adulla is fit for full duties. **The only adjustment needed at present to his duties is to allow him to take short rests of a few minutes if he is excessively fatigue if this can be accommodated**. This allows him to continue with his work, though it may take him a bit longer to complete his duty. No aspect of his work is likely to harm his long-term health.
>
> Current Outlook
>
> Mr Abdulla's back problem is no longer impacting on his work and he is steadily recovering from long-Covid. He is likely to be able to give regular and effective service long-term, though in the short term there may be some absence due to his ongoing through improving long-Covid.

305. We are satisfied that the Respondent did not fail to provide the adjustment we have highlighted in bold in that report. On the Claimant's own account, in the meeting of 18 March 2023, on 4 February 2023, he had been given permission by his section manager to have a break. Similarly, his own account of 8 July 2022 was that a manager gave him permission to go to his car. We are satisfied that when the Claimant was challenged about being away from his point of duty, it was not after a few minutes, but when the manager believed – whether rightly or wrongly – that he had been away much longer than that. For example, on 4 February, it was believed that (having had a rest break from 17.40 to 18.45) the Claimant had been away from his point of duty from around 19.45 to 20.15 before he was challenged. Such a long break before there was a challenge is not consistent with the Respondent failing to allow micro breaks.

306. The complaint alleging failure to make reasonable adjustments fails.

307. The Claimant did not base his case before us on a theory that the events of 4 February 2023 amounted to a failure to make reasonable adjustments. However, if it were hypothetically true that, by challenging him about his absence after 30 minutes, the Respondent was failing to make a reasonable adjustment, then that is something that was clear to the Claimant on 4 February. There was no early conciliation after that date, and the claim form was presented just under 6 months later, on 2 August 2023.

<u>8 July 2022. Sections 7 and 4 of the list of issues</u>

308. The specific 3 word phrase set out in the list of issues was not used.

309. There was reference to lying. The word “liar” was used.

310. That was unwanted conduct. In particular, in context, the implication of the word “disgusting” was that the Claimant’s actions were disgusting. In his oral evidence to the Tribunal, Mr Moore suggested that he had been deliberately using a strong word to the Claimant to try to make it apparent how serious the issue was.

311. We are not satisfied that the comments made to the Claimant had the purpose of seeking to violate his dignity, or to create an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant.

312. The Claimant has argued that his dignity was violated by the language “lying is disgusting behaviour” being used by Mr Moore in front of Mr Santos. Our assessment is that “disgusting” is a very strong word. We also note that Ms Hemmens decided that it was a word which ought not to have been used, and that she recommended coaching for Mr Moore because of it.

313. In light of the analysis in the preceding paragraphs, for the harassment allegation to succeed, we would have to decide that the words used did have the effect referred to in section 26(1)(b) EQA, and also that it was related to race.

314. Taking the facts as a whole, there are no facts from which we could reasonably conclude that the conduct was related to race. We are satisfied that Mr Moore actually did believe that the Claimant had lied that day when asked questions by managers. Regardless of whether he was right or wrong about that, there are no facts which suggest that he might have formed a different opinion, or used different words to express that opinion, if the Claimant’s race was different.

315. Thus the complaint of harassment related to race fails.

316. For similar reasons, the complaint of direct discrimination also fails. There is no actual comparator. A hypothetical comparator would be an employee of a different race, who was doing the same job as the Claimant, and who had the Claimant’s shift pattern, including start time that day, who had had the same interactions with

a manager in the car park, and the same interaction with Mr Moore earlier in the day, and answering “going to the toilet”, and who had been the subject of a report from Chris Brown. There are no facts from which we could properly decide that the hypothetical comparator would have been treated differently.

Harassment related to disability. Section 8 of the list of issues

317. As per the findings of fact, Mr Dewitt did not ask if it was the Claimant’s grandma’s badge.

318. The actual conduct was that Mr Dewitt asked for the Claimant’s car number plate to be read out over the Tannoy, with a request for the owner to come to reception. That may have been unwanted conduct, but, even if it was, the only purpose was that set out in the findings of fact. Mr Dewitt wanted to know who owned the car which was in the disabled parking space without a blue badge being displayed.

319. We are not satisfied that the Claimant’s perception was that this (a) violated Claimant's dignity or (b) created an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant. However, if that was the Claimant’s perception, it was wholly unreasonable for him to have that perception.

320. In terms of Mr Dewitt asking to inspect the badge, his purpose was to make sure that the parking space was only used by those who were entitled to use it.

321. We are willing to assume, for the sake of discussion, that the Claimant’s perception was that this (a) violated Claimant's dignity or (b) created an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant. However, it would not be reasonable to treat Mr Dewitt’s actions as having that effect. Anyone who uses a disabled parking space provided by their employer must expect that they will be required to prove their entitlement to use it. People who actually were entitled to use the space – and that included the Claimant – would be worse off if the employer did not make any checks to prevent non-badge holders using the space.

322. The complaint of harassment related to disability fails.

Unfair Dismissal

323. In relation to the initial decision to dismiss the Claimant, we are satisfied that it was Mr Smart’s sole decision to dismiss the Claimant. He was not merely carrying out someone else’s orders.

324. We are also satisfied that the reason for his decision to dismiss is that set out in the letter and rationale. In particular,

324.1 He genuinely believed that the Claimant (i) had altered the leave form after Mr Sandhu had signed it and (ii) had done so dishonestly

324.2 He decided that (i) the Claimant had a current "suspended dismissal" and (ii) that should be taken into account when deciding on the sanction for the alteration of the leave form

325. In terms of whether he had reasonable grounds for the belief that the Claimant had altered the leave form, we must not substitute our own opinions for his. He had Mr Lowerson's report [Bundle 269] and the leave form itself [Bundle 257]. He did not have an account from the Claimant, but he did consider both possible arguments that the Claimant might have given. The arguments were mutually exclusive, but Mr Smart addressed each of them in his thought processes, and ruled out each one.

325.1 In terms of any argument that the form had not been altered after Mr Sandhu had signed it, Mr Smart was satisfied (as per the bullet point at top of [Bundle 326]) that he could see the alteration from 4 hours to 10 hours, and that this corroborated Mr Lowerson's evidence as a first hand witness that when the form was signed by Mr Sandhu it was for 4 hours. The panel has seen the form, and it was not unreasonable for Mr Smart to conclude that there was a visible alteration from 4 to 10.

325.2 In terms of any argument that someone else, not the Claimant, altered the form, Mr Smart observed that the Claimant had left the shift, on the Sunday, at 8pm. It was reasonable for him to decide that that showed that the Claimant must have been aware that Staff Resourcing had received a version of the form which included the Sunday absence.

325.3 He also considered whether anyone else had a motive to alter the form, and decided that they did not. It was reasonable for him to decide that.

326. In terms of the sanction, we accept that, as per his oral evidence, Mr Smart's opinion was that any type of dishonesty was a serious issue taking into account that the Respondent's business handles potentially valuable items in transit between customers. It was not unreasonable for him to conclude that.

327. It was also not unreasonable for him to decide to take into account the October 2021 Gallacher decision. There is no suggestion that the previous warning was manifestly unreasonable. The Claimant had had the right to appeal it, and had chosen not to. It was not unreasonable for Mr Smart to conclude that there was sufficient similarity between the conduct described by Mr Gallacher's letter, and that which he had decided had been committed by the Claimant in December 2022.

328. In terms of the procedure followed by the employer before Mr Smart's decision, we note that:

328.1 Mr Lowerson gave the Claimant several opportunities to meet to discuss. One informal and three formal.

328.2 Mr Smart had evidence that the Claimant had received three formal invitations.

328.3 Mr Smart had also given the Claimant four opportunities to meet him.

328.4 For the first of those, the proposed 31 March meeting, Mr Smart had evidence that the Claimant had signed for the letter. That letter had included the evidence that he wanted to discuss, including Mr Lowerson's report and the leave form.

329. All of the steps mentioned in the previous paragraph were reasonable and appropriate.

330. There were also some defects:

330.1 Mr Smart was aware that his second and third letters had not been collected.

330.2 The Claimant had used his email address to correspond with the Respondent. Mr Smart made no attempt to obtain that email address from Human Resources or from the Claimant's line manager.

330.3 Mr Smart did not obtain the Claimant's phone number, or attempt to phone him.

330.4 The letters did not specify that the meetings would go ahead in the Claimant's absence.

330.5 Mr Smart ought to have been aware, from Mr Lowerson's letters to the Claimant, that, in January, the Claimant had been off sick.

330.6 Although Mr Lowerson was a witness to Mr Sandhu's signing of the form, it was actually Mr Sandhu that had signed it. Mr Smart did not contact Mr Sandhu to see if Mr Sandhu's recollection matched Mr Lowerson's and/or if Mr Sandhu agreed with the views attributed to him by Mr Lowerson and/or whether it was possible that, later in the shift, in the absence of Mr Lowerson, the Claimant had come back to Mr Sandhu to ask for the form to be altered to have an additional 6 hours approved.

331. To decide whether the dismissal was fair or unfair, we have to take into account the procedure as a whole. The procedure included a right of appeal, and the Claimant exercised that right.

332. Ms Tebbutt carried out a thorough investigation. She met the Claimant and gave him the opportunity to raise any points that he wanted to raise. She had obtained Mr Sandhu's account before the interview with the Claimant, and sent it to him in advance, and allowed him to comment on it. She looked for any further evidence

that might either support, on the one hand, Mr Sandhu's and Mr Lowerson's account, or, on the other hand, the Claimant's account.

333. It was not unreasonable for Ms Tebbutt to conclude that Mr Pathan was also at the meeting in December. She had his email account that stated that he was there. While the Claimant did not name Mr Pathan, the Claimant had said that some union representative had been there, and the Claimant could not remember who that had been.

334. Like Mr Smart, Ms Tebbutt also decided that the Claimant had altered the form, and had done so dishonestly; in addition to the evidence that Mr Smart had had, she also had Mr Sandhu's and Mr Pathan's emails. We accept that, as she stated on oath, she did decide that (i) there were three people telling a similar story, and (ii) that it was unlikely that a union representative would conspire with management to make up a false allegation of fraud against a union member. She had reasonable grounds for her belief that the Claimant had committed the conduct in question.

335. Her decision about whether to take the October 2021 warning into account included checking whether Mr Gallacher was sufficiently senior to have given it, and she decided that he was. We also accept her account that she would have been likely to decide that the December 2022 issue was serious enough to merit dismissal in its own right, even without the existing warning.

336. Her decision that dismissal was appropriate was not outside the band of responses which a reasonable employer could adopt.

337. As part of the process, she investigated the Claimant's claims to have been off sick in 2023. She checked with Human Resources and also gave the Claimant the chance to supply evidence.

338. In terms of the employer's process as a whole, including the part of it conducted by Ms Tebbutt.

338.1 To the extent that the Claimant argues that Mr Lowerson should not have investigated, because he was one of the witnesses, we do not agree. Mr Lowerson prepared a report which someone else (Mr Smart) was going to take into account as part of the decision making process. It was not unreasonable for the employer to give that role to Mr Lowerson. The Claimant did not object to that role either when Mr Lowerson contacted him or when Mr Smart contacted him. He raised no objection after he received Mr Lowerson's report which each of Mr Lowerson and Mr Smart sent to him.

338.2 To the extent that the Claimant argues that he was off sick, it was not unreasonable for Ms Tebbutt to decide that that only applied until the Claimant returned to work on 4 February. The Claimant himself told her that he returned

that day and was suspended afterwards. He failed to supply evidence of any fit note for any period later than 31 January. Further, as she pointed out to him, even if his claim to have a fit note for the month of February was correct, Mr Smart had written to him on 24 March for a meeting on 31 March.

338.3 To the extent that the Claimant argues that any meetings should have been deferred until after his return from sick leave, it is not clear if Mr Lowerson did receive the Claimant's 15 January 2023 email and it is not clear why, if he did, he did not refer to it. However, as per the previous sub-paragraph, even though Mr Lowerson pressed ahead in January, during the period covered by a fit note, after that the Claimant, of his own initiative, could have contacted Mr Lowerson to say he was now ready to meet. Even failing that, he could have met Mr Smart.

338.4 The Respondent did not have the Claimant's 31 March attempt to email Mr Smart. However, even apart from the fact that it is the Claimant's fault, not the Respondent's, that the email was incorrectly addressed, the email only refers to "unforeseen circumstances". That phrase is inconsistent with an argument that the reason the Claimant could not meet on 31 March is that he was ill, and that it was an on-going illness which the Claimant had been reporting during February and March. Further, the Claimant's email requested new dates, but then he did not collect the letters from the delivery office, even after receiving the red cards informing him that there were letters for him.

339. Any defects in the process up to the date of Mr Smart's decision were cured by the thorough investigation and decision-making performed by Ms Tebbutt. The procedure as a whole was not so unreasonable that no reasonable employer would have adopted it. On the contrary, it was consistent with ACAS guidelines and with the Respondent's own procedures. By the time of Ms Tebbutt's decision, the Claimant had had the opportunity to be heard.

340. For these reasons, the dismissal was not unfair.

<u>Disability Discrimination. Section 5 of the list of issues</u>

341. From 4 February 2023 onwards, the Claimant was not absent from work because of anything arising in consequence of his disabilities.

342. He was absent from work for the reasons mentioned in the findings of fact, being sent home on 4 February, not turning up for the next few days, being suspended on 10 February.

343. He was not on sick leave at all, and so the need to decide whether sickness absence was because of disability does not arise. Apparently, a friend or representative (Hayden) notified the manager investigating the 4 February 2023

incident that the Claimant had been too ill to attend a particular meeting; however, that was prior to 18 March, and he did attend on 18 March.

344. Further, he was fit to attend the meeting with Mr Williams about the Bullying and Harassment appeal in February, and to correspond with Mr Williams about that appeal.

345. Neither the dismissal, nor the decision to reject his appeal, was because of something arising in consequence of his disability.

346. Thus the complaint that his dismissal was disability discrimination within the definition in section 15 EQA fails and is dismissed.

347. For completeness, although the list of issues was clarified on Day 1, we are able to make a decision on whether the dismissal was less favourable treatment because of disability. We are satisfied that Mr Smart's and Ms Tebbutt's decisions were, in no sense whatsoever, motivated by any of the Claimant's disabilities, either consciously or unconsciously. The reason that the Claimant was dismissed was because each of them believed that he had fraudulently amended a leave form so that he could take time off in December that would not have been authorised had he requested it. On the Claimant's own account, the time off was so that he could get his car fixed, and was not connected to his health.

Time Limits

348. The complaints about the dismissal are in time, as the claim form was presented less than 3 months after the effective date of termination.

349. For the allegations against Mr Moore and Mr Dewitt, these were not part of an act which continued after the specific dates of the alleged incidents. Our decision, contrary to the Claimant's argument at the June 2024 preliminary hearing, is that managers had not got together to try to dismiss the Claimant, and the events of June/July 2022 were completely separate to the allegations about December 2022 which led to his dismissal.

350. For the allegations against Mr Moore and Mr Dewitt, the claim form was submitted slightly more than a year after the events in question. Given the dates of early conciliation:

350.1 The time limit for complaints about 8 July 2022 expired on 14 December 2022, and the claim was therefore more than 7 months out of time.

350.2 The time limit for complaints about Mr Dewitt's asking about the blue badge had probably expired before early conciliation commenced. However, at the latest, it also expired on 14 December 2022, and the claim was therefore – at the least - more than 7 months out of time.

351. Although we will not necessarily assume that there is prejudice to a respondent in the absence of a specific explanation from the respondent about the prejudice, it is not the case that time limits are extended unless there is a good reason not to extend them. Put another way, the Claimant has the onus of demonstrating that it would be just and equitable to extend.

352. The Claimant's explanation for the timings of (i) early conciliation and (ii) presentation of claim form is extremely vague. He has stated on oath, and we have relied on his word for it, that the union did both things. His opinion is that they did so without input from him because they could see that he had been discriminated against. He does not know the details of any person he spoke to in order to ask them to present the claim, or to whom he gave details of what should go into the claim form. He states that he had no control over the contents of the claim form, or the timing of it. He does not know why they did not complete the part of the form which gives name and address of representatives.

353. It is likely that whoever commenced early conciliation on 7 October 2022 had an understanding of EQA time limits, because that was the last day to start early conciliation for an incident occurring on 8 July 2022. There is no explanation whatsoever for why the claim form was not presented by 14 December 2022. It would be pure speculation as to whether that was a conscious decision, or an oversight. If it was a conscious decision, it would be pure speculation as to whether that was because the person making the decision wrongly thought that the claim would still be in time if submitted at a later date, or of it was because it had been decided that no claim would be presented.

354. The Claimant had all the information that he needed to present a claim by 14 December 2022 for the allegations against Mr Moore and Mr Dewitt. He had received Ms Hemmens' report and lodged an appeal. As per [Bundle 252], he had contacted the union to say that he was unhappy with the assistance that he had received. As per [Bundle 253], the Branch Secretary wrote to the Respondent on the Claimant's behalf on 21 November 2022 asking the Respondent to contact the Claimant in relation to the appeal against Ms Hemmens' decisions. Thus the union also had all the required information necessary to present a claim by 14 December 2022. During the Claimant's subsequent correspondence and meeting [Bundle 286] about the appeal, the union was not acting on the Claimant's behalf.

355. It does not seem to us that the Claimant has an adequate explanation for the delay in presenting the claim form for the allegations against Mr Moore and Mr Dewitt. However, the lack of a good explanation is only one of the factors to be taken into account, and can be outweighed by other factors.

356. In this case, for the allegations against Mr Moore and Mr Dewitt, they are entirely based on recollections of oral discussions. We take into account that the complaints were made reasonably promptly, and so written details of the

allegations, and of the responses of Mr Moore and Mr Dewitt could be collated well within 3 months of 8 July. We take into account that the Respondent's written response to both sets of allegations had been prepared by 14 October 2022. However, no claim was presented within 2022, even one that was slightly late.

357. By the time the claim was eventually presented, considerably late, memories would have further faded. The Respondent, and the individuals accused of harassment and discrimination, were disadvantaged by the delay.

358. It would not be just and equitable to extend the time limits for the complaints relating to Mr Moore's and Mr Dewitt's alleged acts and omissions.

359. We decided that there was no failure to make reasonable adjustments. There was no failure to allow the Claimant "micro breaks" of a few minutes. However, if we are wrong about that, then the failure to make reasonable adjustment was completely separate to the allegations about dismissal. There was no continuing act after 4 February 2023, and the Claimant was off work during the time after 4 February 2023.

360. For the complaint about failure to make reasonable adjustments, the Claimant has again not provided any evidence of what instructions he gave to the union to present such a complaint, or when. In the claim form, other than ticking the box for disability discrimination, the closest reference to failure to make reasonable adjustments is "Failure to comply with own company policy and procedures". Our assessment is that that refers to something else, namely the allegation that the dismissal process was unfair because the Claimant did not meet Mr Lowerson or Mr Smart prior to the dismissal.

361. Our decision was that, in fact, the Respondent had not failed to allow micro-breaks. However, if the Claimant disputes that, either on the basis of the 10 April 2022 attendance warning, or on the basis of management's challenges to him on 8 July 2022, or on the basis of alleged Tannoy announcements in August 2022, or on the basis of the challenge to him on 4 February 2023, then he had all the information that he needed to bring the claim by – at the latest – 4 February 2023. If – contrary to this panel's decision – those events did show that the Respondent was refusing to allow micro-breaks then the Claimant knew that they were refusing to allow micro-breaks then accordance with section 123(4)(a), the time limit clock began to run from (at the very latest) 4 February 2023, and it expired on 3 May 2023. So the claim form was submitted 3 months after the time limit expired.

362. The prejudice to the Respondent would be that it would need to collate significant evidence from the Claimant's immediate supervisors during his shifts about what breaks had been requested and, when, and which had been approved, and which refused, and the reasons for refusals. This would be relying on memories of events from a significant time earlier (the Claimant having been off work for 6 months by

the time the claim was presented. Even in the claim form presented on 2 August 2024 there was no mention of failure to be flexible about breaks, and/or failure to allow microbreaks. The earliest that the allegation was made was orally to EJ Bunting in February 2024, so more than 12 months after the Claimant's last shift.

363. Given the prejudice to the Respondent, it would not be just and equitable to extend the time limit for the failure to make reasonable adjustments complaint either.

364. Thus we do not extend time for the reasonable adjustments complaint, or those about Mr Moore or Mr Dewitt, and those complaints are out of time (and thus outside the Tribunal's jurisdiction).

Employment Judge Quill

Approved by Date: 17 March 2025

REASONS SENT TO THE PARTIES ON

19 March 2025

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FOR EMPLOYMENT TRIBUNALS