EMPLOYMENT TRIBUNALS

Claimant: Mr M Strutt

Respondent: Royal Mail Group Limited

Heard at: Reading **On:** 2, 3, 4 & 5 June & (in chambers) 6 & 18 June & 7 August 2025

Before: Employment Judge Anstis
Ms C M Baggs
Mr J Appleton

Representation:
Claimant: Ms A Loutfi (counsel)
Respondent: Mr S Peacock (solicitor)

RESERVED JUDGMENT

1. The claimant was unfairly dismissed.

2. The claimant's claim of disability discrimination is dismissed.

REASONS

A. INTRODUCTION

Introduction

1. The claimant was employed by the respondent as a postman (his terminology) or operational postal grade (OPG) (the respondent's terminology).

2. He worked at, or from, the Woking delivery office from 27 November 2017 until his dismissal which took immediate effect on 2 October 2020.

3. The claimant is, to use his expression, profoundly Deaf. This is accepted by the respondent to be a disability.

4. In early 2020, the claimant raised a bullying and harassment grievance against a colleague. The complaints we are dealing with in this claim arise out of the respondent's handling of that grievance, and its subsequent decision to dismiss the claimant for gross misconduct. There are complaints of a failure to make reasonable adjustments (in particular in relation to the use of BSL interpreters) during the grievance and subsequent disciplinary procedure, and a complaint of unfair dismissal and discrimination arising from disability in respect of his dismissal.

5. The claimant's grievance was partially upheld but it is the respondent's position that in pursing this grievance the claimant disclosed confidential material to a colleague, was dishonest and conspired with that colleague. The respondent says that the claimant was therefore dismissed for a reason related to his conduct. As regards the question of adjustments, in general it is the respondent's position that while it had the requirements alleged by the claimant its actions did not put the claimant at a substantial disadvantage in comparison with a person who is not disabled, or if they did, the respondent did not and could not reasonably be expected to know that the claimant was put at that disadvantage.

6. The parties have agreed a list of issues for the purposes of this hearing which is set out in the appendix at the end of these reasons. The claim of a failure to make reasonable adjustments proceeds under the provisions in relation to auxiliary aids (s20(5) Equality Act 2010 – the "third requirement") rather than the more familiar "first requirement" requiring the establishment of a provision, criterion or practice. No time limit issues arise.

BSL

7. Many of the matters we are to decide depend on BSL (British Sign Language) being the claimant's first language, and on differences between BSL as a language in its own right and written or spoken English.

8. We will need to consider that in detail in relation to the claims the claimant brings, but by way of general introduction Mr Peacock agreed that we could take judicial notice of the way in which the Equal Treatment Bench Book refers to BSL. That is, not just use it as a guide to us for the purposes of the hearing but also as a correct statement of the nature of BSL and its use by those who are, like the claimant, profoundly deaf (or Deaf).

9. The Equal Treatment Bench Book says:

> *"BSL is the indigenous language of people in Great Britain who were born deaf, or who became deaf early in life. It has its own syntax and grammar. Do not assume that someone who uses BSL can read documents, as English may not be their first language. Although some deaf people are fully bilingual in BSL and spoken English, others are*

not. Most deaf people can read and write English to some extent, but may have difficulty with complex grammar and less common words.

There is no universal sign language. There are many different national sign languages … there is even regional variation within BSL, rather like regional dialects in spoken English …"

and

"Structure of BSL:

- *BSL is an entirely different language with a different structure. Many ordinary words and concepts will have no direct translation.*
- *Avoid jargon and keep spoken sentences simple. Be prepared to give the interpreter different or more explicit explanations of certain words and concepts, so that they can be translated.*
- *It is useful to provide the interpreter with a list of jargon and key concepts (eg "mitigation", "settlement") in advance.*
- *Do not be surprised if the interpretation takes longer or less time than what was said in English. That is because of the differences in how the languages work. The Advocate's Gateway gives these examples:*
  - *"Did you open the window?" – there are different signs for opening a casement window and a sash window.*
  - *"Did you use the stairs?" – there are different signs for going upstairs and going downstairs.*
  - *"Did he have a weapon?" – there is no general word for "weapon", only separate words for "knife", "gun" etc"*

10. In general these principles are accepted by the respondent, but with reservations about the extent to which they actually affected the claimant in the circumstances at issue in this case.

B. THE HEARING

Introduction

11. This hearing has proceeded in person.

12. The claimant has been represented by Ms Loutfi of counsel, who we understand was only instructed shortly before the hearing. The respondent was represented by its solicitor, Mr Peacock. We are grateful to both

advocates for the professional and helpful manner in which they conducted themselves during the hearing, and also for accommodating within the hearing some personal appointments that the employment judge had.

13. It was agreed at this stage that we would be considering matters of liability only, but to include any question of a Polkey deduction or contributory fault.

14. Once we had established proper protocols for the use of the interpreters and had read into the case, the claimant gave his evidence on the afternoon of Monday 2 June and for the whole of Tuesday 3 June. Ms Loutfi was then able to conduct her cross-examination of the respondent's witnesses during Wednesday 4 June. The parties exchanged written submissions on the morning of Thursday 5 June with further oral submissions given in the afternoon of Thursday 5 June. The tribunal took Friday 6 June and Wednesday 18 June for deliberation in chambers.

Use of BSL during the hearing

15. The Equal Treatment Bench Book gives guidance on the use of BSL interpreters at an employment tribunal hearing. We had read to ourselves this guidance prior to the hearing. Two BSL interpreters had been booked and attended throughout the hearing to interpret in court. The claimant had himself booked a separate interpreter for his discussions with counsel.

16. The arrangement of the parties and interpreters in the hearing room was carried out under the direction of the interpreters and the claimant, and was different depending on whether the claimant or others were giving evidence. Breaks were taken every hour. We are grateful to the interpreters for their assistance and were satisfied that with their assistance the claimant was able to fully participate in the hearing.

17. The claimant's witness statement had been prepared for him under his instruction and checked back with him by his preferred BSL interpreter.

18. We note the caution in the Equal Treatment Bench Book that *"Deaf people may appear to be blunter or more demonstrative than hearing people, and demonstrative gestures should not be misinterpreted as over-theatrical or as signs of rudeness."*

After the hearing

19. We discussed with the parties at the hearing whether rather than reserving our judgment and providing written reasons as we would normally have done, we should arrange a further hearing for us to give oral reasons, at which BSL interpreters could attend and interpret the reasons for the claimant. The parties agreed that this would be appropriate and so we arranged a separate hearing on 7 August 2025 for us to give these oral reasons. For reasons that have been explained to the parties it was not possible to proceed that day.

Following some delay in relisting, we rearranged the hearing to take place on 1 December 2025.

20. It is a matter of considerable regret that owing to further difficulties with BSL interpreter booking we could not proceed on that day, and the hearing had to be vacated at very short notice. I understand that the claimant has already been in correspondence with tribunal administration about some of these difficulties, and I do consider it highly unsatisfactory that we have had to abandon those two hearings owing to difficulties in the provision of interpreters.

21. The hearing was concluded in June 2025 and a judgment is now long overdue. Given the problems we have had with arranging two hearings for the judgment to be delivered with oral reasons, I have reluctantly taken the decision that the interests of justice are now best served by the reasons being provided in writing, despite the difficulties that may cause the claimant, so as to avoid further delay.

C. THE FACTS - INTRODUCTION

Introduction

22. It is not in dispute that the claimant was "*born profoundly Deaf*". The claimant says "*I was not educated in an accessible way, as a result I have a reading and writing age of a 9-year-old, what this means is written information is not clearly accessible for me, I misunderstand context and meaning of sentences and phases. My language in English continues to still be my biggest barrier as I cannot fully read and write.*"

23. Quite how far these difficulties affected the claimant in relation to the grievance and disciplinary process is in dispute, but we do not think it is in dispute that the claimant can read and write English to some degree but in consequence of being born profoundly Deaf the claimant has substantial limitations on not just spoken English but also written English. Again, while the precise scope of the claimant's abilities are in dispute, it is not in dispute that in some circumstances and in some conditions the claimant is to some extent able to lip read. In general this seems to require familiar situations and familiar people who he considers he is able to lip read. For instance, it does not seem to be in dispute that the claimant was able to understand basic work instructions given to him by his delivery office manager, Clyde McHardy. Quite how far this extends was in dispute, but we do not think it is in dispute that there may be a distinction between being able to get by with written English and/or lip reading in familiar situations with familiar people and being fully able to express yourself and communicate in unfamiliar or uncomfortable situations.

24. It is also the case that the claimant had a personal budget that he was able to draw on for particular purposes, including face to face BSL interpretation,

although again the scope of this and in particular how possible it was during the early stages of the Covid-19 pandemic for him to access face to face BSL interpretation was in dispute.

D. THE FACTS – PART 1 – THE GRIEVANCE PROCESS

First steps

25. The claimant says that he generally had good working relationships with colleagues at work, but by the end of 2019 he had concerns about working with Laura McManus. He asked for, and was provided with, the respondent's form H1, used for a "bullying and harassment complaint".

26. The claimant completed the form and submitted it on 1 February 2020. In this he identified himself as deaf and asked for communications to be sent via the delivery office manager Clyde McHardy. The scope of his complaint at this stage is not relevant to our decision, but we note that from the start it was the claimant's position that he was not the only person who had concerns about working with Laura McManus. In his witness statement he says "*other colleagues who I had van shared with informed me there were several complaints about this person*". He also says "*when I completed this form the only person to know about this was my DOM Clyde*".

27. The claimant's complaint was acknowledged on 12 February 2020. He was notified that his complaint had been assigned to Anna Walsh, an "Independent Casework Manager" employed by the respondent, who would be in contact with him.

28. A matter that the claimant found aggravating (although not part of his claim to the tribunal) was consistent reference in the respondent's standard-form letters to the possibility of accessing a telephone support helpline which was, of course, completely inaccessible to him. Whatever the outcome of this case is the respondent may wish to reflect on whether its standard-form letters are appropriate in cases of this nature.

29. As the claimant had directed in his form, Mrs Walsh communicated initially with Clyde McHardy about the complaint. Mrs Walsh immediately identified with Mr McHardy a need for a BSL interpreter to be present at any meeting she had with the claimant, and the following week, when she contacted the claimant directly (by email) she asked whether he had a preferred interpreter who she should request. The claimant replied "*I don't have any prefer BSL Interpreter … please booking anyone …*".

30. We see in that some indication of the claimant's difficulties with communicating in written English. While his meaning in this instance is clear, the way in which he has phrased this suggests some difficulties with communication in written English.

31. An interpreter was booked. The claimant was given the name of the booked interpreter alongside his invitation to a meeting with Mrs Walsh to take place on 4 March 2020. The invitation informed him of his right to be accompanied by a work colleague or trade union representative. It also says "*The Bullying and Harassment policy expects that all employees will maintain confidentiality both during the process and after it ends.*" There is a further reference to the telephone helpline.

32. The bullying and harassment policy contains an extensive section headed "confidentiality" as follows:

> *"Confidentiality is an important part of this policy. Everyone involved in the bullying and harassment complaint process - whether making a complaint or involved in an investigation - is responsible for maintaining the high level of confidentiality required.*
>
> *Guidelines for confidentiality*
>
> *All those involved in the bullying and harassment complaint process need to consider the following:*
>
> - *Subject to the requirements of this process, everything said or referred to during investigation interviews should be treated in confidence. All parties will not discuss or share information from such interviews with any other party as this could prejudice the investigation*
> - *To thoroughly investigate the complaint, information from interviews may be put to others as part of the investigation. Information from interviews may also be disclosed to others (e.g. Employment Tribunals, external legal bodies, etc.)*
> - *The complainant and respondent will have access to all relevant information affecting their case, unless the Investigating Manager decides there is a genuine fear of intimidation or reprisal or where a specific legitimate request for anonymity has been made by a witness, documents provided will be anonymised.*
> - *The complainant and the respondent will be made aware in writing that if they have any concerns or questions regarding confidentiality they should contact the investigator*
> - *Any breach of confidentiality may result in action under the Conduct Policy. Where an Investigating Manager becomes aware of a breach in confidentiality, they should contact a Senior HR manager."*

33. The respondent placed particular emphasis on confidentiality during the bullying and harassment procedure, and this was one of the matters that (on the respondent's case) eventually led to the claimant's dismissal. While we can understand that any organisation would be sensitive about such matters the respondent's repeated insistence on this appeared unusual in our experience. We also noted during the course of argument recent public scandals in which it was only through people speaking to each other that the full extent of any wrongdoing became apparent, suggesting that confidentiality of such matters was not necessarily entirely positive or helpful. The respondent's position was that the requirement of confidentiality was primarily to prevent a risk of reprisals in circumstances where the respondent was a labour-intensive organisation in which individuals would be required to work closely together. The way it was put in the respondent's grounds of resistance is "*It is important for the integrity of the Bullying and Harassment process that confidentiality is maintained at all times. One consequence is complainants and witnesses will not be prepared to come forwards if they think what they say will be conveyed to others.*"

34. We also note at this point that an apparently absolute insistence on confidentiality seems to sit uneasily with some of the practical realities of such complaints. For instance, Mrs Walsh accepted that there was and could be no requirement of confidentiality prior to the submission of a complaint, so that employees could (and perhaps did) discuss matters prior to submission of a complaint. For her it was only after submission of the complaint that the respondent could insist on confidentiality. There were, also, of necessity, exceptions to this requirement of confidentiality that did not seem to be documented. For instance, an individual was entitled to be accompanied by a work colleague at a hearing. If so, the person accompanying them would have to have hear in full the matters being discussed. But it went further than that. We heard that in the course of this or related matters a trade union representative effectively delegated the task of accompanying someone at a meeting to someone else without any criticism by the respondent, so it appeared that complete confidentiality could be waived not just by the respondent but also by the trade union. We will need to consider exactly what the respondent's rules and requirements were, but it is clear from what we have said above that if it was to be absolute confidentiality between the complainant and the respondent that could never be achieved and would in practice often be deviated from.

35. The claimant says in his witness statement that he took from the fact that he could be accompanied by a work colleague in the meeting that he could also "*communicated with my work colleague about my matters, such as talking to Paula*". Communicating with Paula was what later led to his dismissal.

The first harassment investigation interview – 4 March 2020

36. The booked interpreter was ill and did not attend the meeting on 4 March 2020. The lack of an interpreter at that meeting is not something the claimant complains about in his claim. The claimant says in his witness statement "*meeting conducted with Anna Walsh via pen and paper as the interpreter did not turn up and the meeting was postponed*" and that:

> "*during this meeting Anna then spoke to Paula in front of me on the phone … This gave me the impression that Paula was part of the process and it was okay to speak with her. After her conversation with Paula, Anna typed on her laptop 'monkey noises' and even visually showed me a monkey gesture of hands under the armpits as I did not understand what she typed, to tell me this is what Paula had said. Anna then continued to type and tell me that she told Paula what she needed to do with her complaint and send to Sheffield* [the respondent's HR office] *she also said that it would be good to see both our complaints together.*"

37. Mrs Walsh accepts that in this meeting the claimant told her that Ms Wells also wanted to make a complaint about Laura McManus, that the claimant called Ms Wells during the meeting on his phone and that she (Mrs Walsh) then spoke to Ms Wells. It was at this point for the first time that the allegation that Ms McManus had been making "monkey noises" in respect of the claimant first emerged. Mrs Walsh says:

> *"During this time Martin showed me text messages that he sent to his colleagues and messages he received from his colleagues. Without the aid of an interpreter I explained the process to Martin – typing some things on my laptop for Martin to read and also by lip-reading."*

38. She goes on to say that she had discussions with the claimant about the procedure to be followed, apparently with the claimant's full participation.

39. It is not clear how Mrs Walsh having a conversation with Ms McManus in the claimant's presence measured up against the respondent's requirements for confidentiality in the proceedings.

40. There are no notes of this meeting.

41. The meeting was rescheduled for 16 March 2020.

The second harassment investigation interview

42. The rescheduled meeting took place on 16 March 2020 with a BSL interpreter. While it is not part of the claimant's claim that the interpreter was inadequate on that occasion, the claimant says "*I was not confident the interpreter understood me. I had not met them before*". The substance of the meeting is not material for the purposes of the claimant's claim, except that Mrs Walsh wants us to note that:

> *"During the meeting, it was explained to Martin that everything said or referred to in the interview should be treated in confidence and should not be discussed or shared with any other party as it could prejudice the investigation. At the end of the interview, Martin was reminded that it was important he did not discuss the content of the interview with anyone and again that the whole process was confidential.*
>
> *During the meeting Martin did not say at any point he would require longer to go through documentation or that he had any issues understanding written English, and I had no indication that this was the case, especially given Martin had demonstrated a good understanding of what I had said and written down for him on my laptop in our first meeting on 4 March."*

43. In turn the claimant points out that at a point in the meeting:

> *"I talk about communicating with Peter and Paula via text message, at no point does Anna than warn me through an interpreter that I should not be doing that."*

The first failure to make reasonable adjustments claim – 9(a)

44. The claimant's first claim arises immediately after this meeting. Mrs Walsh sent him a copy of the meeting notes. The letter accompanying those notes is cited below in full:

> *"As discussed at your meeting on the above case, I have prepared a copy of the notes, which are attached for your attention.*
>
> *In accordance with the Bullying and Harassment Procedure, you are asked to read these notes carefully, and to amend any part you feel does not reflect what was discussed during the meeting. Please initial each amendment, adding your full signature and date at the end of the final page. Once complete please return them to me in the enclosed addressed envelope by 20 March 2020. On receipt I will consider your amendments and advise you if they are not accepted.*
>
> *The second of the two copies enclosed is for you to keep.*
>
> *If the signed notes are not returned within three days of you receiving them it will be assumed that they are accepted as a true record of the meeting and the investigation will proceed on that basis. However, signed notes are always preferable and therefore could I please urge you to sign and return your notes.*
>
> *The Bullying and Harassment policy expects that all employees will maintain confidentiality both during the process and after it ends. Once again, may I remind you that you must not discuss or share information*

regarding this case with any other parties, as this could affect the outcome.

If you require further advice or guidance on the process, then please contact me."

45. The claimant's complaint is that "*the Claimant was provided with interview notes/documents and interview notes on 17 March 2020 by Anna Walsh and only given three days to respond. The Claimant could not read or understand the notes and needed more time to get support.*"

46. A number of the claimant's other complaints of a failure to make reasonable adjustments are in similar terms: being given insufficient time to review documents or notes, given his need for support to do so.

47. Mr Peacock's response to this and the similar points in his closing submissions was to accept that the respondent had a requirement that notes or other materials were reviewed within the specified period of time (and it appears this in each case this was the standard time specified in the standard letters the various individuals were working to) but that in most if not all cases the claimant had in fact replied in time, had never asked for extra time or suggested that he had a problem and if he had done so he would have been given extra time (there was in fact at least one occasion on which extra time had been given).

48. Whatever the rights and wrongs of this argument, it did not seem to match the statutory language in respect of a failure to meet reasonable adjustments, which as Ms Loutfi pointed out is an "*anticipatory duty*" – that is, it arises when the statutory conditions are met, regardless of whether any specific request is made by the claimant or not.

49. Mr Peacock accepted this as a general principle, and reframed his submissions as being that (except for one point) the claimant was not in fact put at a substantial disadvantage by these requirements and if he was the respondent did not know and could not reasonably be expected to know that he was put at that disadvantage.

50. We will consider this in more detail in our discussion and conclusions, against the individual claims that are made.

51. In respect of these notes it is correct to say, as Mrs Walsh does, that "*Martin returned the notes to me with amendments in red. The amendments to the notes were made within two days and they were comprehensive.*" The claimant returned his amended notes to Mrs Walsh by email, and said in his email "*I have look through your letter and amend those words in red and also I have print page 11 and I have sign it as today date in separate attached.*" As with the previous email we have referenced, the message is clear despite what appear to be difficulties with its precise expression.

52. It was shortly after this that the first national lockdown for Covid-19 started.

Further progress on the bullying and harassment investigation

53. On 17 April 2020 the claimant wrote an email to Mrs Walsh chasing on progress in her investigation. He wrote:

> *"Hi Anna,*
>
> *I wonder if you are still investigating cos I hvn't heard from you.*
>
> *Around 4 weeks ago that Clyde told me that you were suppose to interview Laura but cancelled due to lockdown on same day...*
>
> *What is update?*
>
> *I am feel uncomfortable at moment cos I saw Laura is happy mood for the last 4 weeks..*
>
> *Both Paula and myself still in distressed to see Laura is still friendly chat with all manager including Clyde..??*
>
> *She could try nicely with them after been told about complaint had been made??*
>
> *I was told that my mate Peter had been in touch with you and he feel uncomfortable with loads of your question on his statement will be shown to Laura and she would stirrings on him later as we know what Laura is like ... I was told that kirs is fear to gv you her statement because she had mental health and don't want gv you her experience or witness cos Laura is dangerous female .... as told that Laura had been like that before I join Royal mail...*
>
> *Take care and look after yourself from virus..."*

54. Mrs Walsh replied almost immediately, saying:

> *"I am continuing with the investigation. It is really difficult when I cannot see people in person as I have been instructed to work from home. Getting to speak to each person is taking much longer than it would do normally.*
>
> *I cannot tell you anymore at this stage."*

55. Shortly after that Mrs Walsh wrote a further email to the claimant saying:

> *"Martin*
>
> *You should not be discussing this case with Paula or anyone else.*

You could be seen to be interfering with the investigation.

Please refer to my letter of 16 March 2020.

The Bullying and Harassment policy expects that all employees will maintain confidentiality both during - the process and after it ends. Once again, may I remind you that you must not discuss or share information regarding this case with any other parties, as this could affect the outcome."

56. While the claimant has at various points complained of ambiguity or lack of understanding in respect of the respondent's various confidentiality restrictions, he did in his evidence confirm that he had understood this as a clear instruction not to discuss his case with Paula, although he said he was not sure what "*any other parties*" meant.

The second failure to make reasonable adjustments claim – 9(b) – 1 May 2020

57. On 1 May 2020 Anna Walsh wrote to the claimant in the following terms (the emphasis is in the original document):

"Martin

I have now concluded the meeting and information gathering stage of my investigation into the above complaint and in line with the Bullying & Harassment procedure, I have enclosed for your attention the material arising during the course of the investigation, including all witness statements relevant to the investigation.

This information has been shared with you in strictest confidence. The Bullying & Harassment policy states that all employees must maintain confidentiality both during the process and after its conclusion. Therefore you must not discuss or share any of this information with any other parties, furthermore you must not contact either directly or through any third party any individual in relation to the statements provided.

Failure to comply with the above may lead to you being subject to separate action under Royal Mails Conduct Code up to and including dismissal.

The Royal Mail Group Bullying & Harassment Policy gives the investigating manager discretion to anonymise all or parts of the relevant documentation where they consider there is a legitimate reason for doing so.

Should you wish to comment on the content of the enclosed, you have five working days from receipt of this letter to notify me in writing. I would be happy to receive your comments by email or post.

Any comments you do raise will be given due consideration prior to me reaching a final decision on the outcome of this complaint. In the absence of any response from you within five working days, (Friday, 8 May), I will progress to reaching a conclusion on this complaint.

If you require further advice or guidance on the process, then please contact me."

58. The package of documents included 25 pages of witness statements.

59. The claim of a failure to make reasonable adjustments in respect of this is "*the claimant was provided with witness statements on 1 May 2020 by Anna Walsh and only given three or five days to respond. The claimant could not read or understand the notes and needed more time to get support.*"

The first disclosure to Paula Watts

60. By the end of the hearing it was clear that the claimant had on two occasions shared material relating to the investigation into his grievance with Paula Watts. This only became clear during the hearing, and it appears that at times the respondent acted as if there was only one disclosure. The claimant's witness statement only refers to one disclosure: the second disclosure.

61. The claimant said in his oral evidence that he could not fully understand the witness statements he had been provided with. He could not access sign language support from his usual providers of this support because of restrictions and a lack of availability of face to face interpretation during periods of Covid-19 lockdown. He had asked his daughter for help, but her position was that this was something she could not get involved with.

62. In those circumstances, he decided to draw on help from Ms Watts, who was a work colleague and who had her own reasons for complaining about Ms McManus. Ms Watts was someone he knew well and considered that he could lip read from well. He sent her a message to see if he could visit her, but this could not happen and he decided to drop round the witness statements to her marked-up with post-it notes in areas where he could not understand, apparently in the hope that she could produce simplified written English explanations for him.

63. Ms Watts provided these explanations, and her partner delivered those explanations and returned the witness statements to the claimant the next day. Unbeknownst to the claimant, while in possession of the witness statements she had taken photographs of them, and on 3 May 2020 had sent on (via WhatsApp) to another colleague, Kira Jenkins, an extract from Mr McHardy's investigatory interview in which he spoke of having "*talked to her* [Ms McManus] *about being a deputy manager to build her confidence*". When that communication was eventually discovered it would become the prompt

for the disciplinary action against the claimant, but that did not happen until several months later.

The third failure to make reasonable adjustments claim - the statement from Laura McManus

64. On 4 May 2020 Ms Walsh sent the claimant a statement (or some notes, as she described it) that she had received from Ms McManus. This was subject to similar confidentiality restrictions to the other statements.

The claimant's response to the statements

65. On 6 May 2020 the claimant replied to Ms Walsh saying:

> *"Thanks for two emails on Friday from other staffs statements and Monday from Laura McManus...*
>
> *Sorry didn't reply on that day due to over workloads (4 hours overtime on Monday) and yesterday was 2 hours overtime... due to covid-19 no more vanshare...etc...*
>
> *Anyway I was surprised to see Peter and Grace have my support and give you evidence and I was not away that Grace had seen Laura did do monkey noise behind my back...so do Paula too which told you first.... I don't know if more staffs had seen it behind me during my time due to my deafness....*
>
> *I find it very offensive and horrible by Laura...*
>
> *I am email you on my morning break.. .am on day off tomorrow and I was trying get BSL interpreter from my local at my house to talk you and will be difficult due to social distances due to covid-19 and will type on each staffs statement tomorrow morning and try hv chat line with you maybe FaceTime on my iphone??? or ask my daughter to do interpreter and I was hope you could think of something with Skype or FaceTime or sign live... cos I hv ATW agree with DWP to cover cost of interpreter etc...*
>
> *Anyway I am sure you hv act as professional act and I dismay that most of Laura statement are not relevant to my complaint etc...*
>
> *Why she ask you to come pub to drink etc... she is cheek and try to maliplaute with you for upset due to suspense.... well it is her faults...*
>
> *I must return to work as my time break is over.."*

66. We can see there the claimant doing his best to reply in writing to Ms Walsh's communications, but identifying that "*I was trying to get BSL interpreter … to talk you*".

67. Ms Walsh's reply was:

> *"If your daughter could help you to put your response to me in writing that would be best and that is what fits the process. A written response is all I need please."*

68. On 11 May 2020 the claimant wrote to Ms Walsh with his response to the various statements he had been provided with. He said:

> *"have trying my best to type it myself and I am sure that you will understand and amend english on my statement in correct grammer"*

69. The claimant sent two pages of observations and comments on the witnesses and their statements. During the hearing Ms Loutfi suggested that these were no more than comments on the individuals making the statements and did not engage with the content of the statements themselves. That is incorrect. While most of this is the claimant's observations on the witnesses themselves he does mention the contents of their statements as well. For instance, he says in one instance "*I was surprised to read that …*". The comments are clearly written by the claimant.

70. Later that day the claimant writes to Ms Walsh with the name of someone else he says she should interview, but she says "*… the investigation has finished. I will not be interviewing anyone else as I believe I have enough evidence to make decisions for each allegation. I am waiting for Laura's response to the documents and I will then send you and Laura my decision."*

The fourth failure to make reasonable adjustments claim – the investigation outcome

71. The fourth failure to make reasonable adjustments claim is based on the following alleged PCP: "*the claimant received the outcome to his bullying and harassment complaint on 14 May 2020. The claimant could not read or understand the report, and particularly the terms 'uphold' and 'not uphold'*".

72. It is correct to say that the claimant received the outcome to his bullying and harassment complaint on 14 May 2020. Ms Walsh sent him a letter dated 12 May 2020, which included the following:

> *"I have now completed my investigations into your complaint in accordance with the Bullying and Harassment Procedure.*
>
> *Following the investigation, I have to advise you that your complaint has been partly upheld. A copy of my summary report is attached for your information ...*
>
> *The Bullying and Harassment policy expects that all employees will maintain confidentiality both during the process and after it ends."*

73. The letter also informs the claimant of his right to appeal against the decision, but nothing in this case depends on an appeal or on the substance of the findings during the grievance process. It is, however, somewhat instructive that when the original findings were explained to the claimant in more detail during the appeal process he said that he was actually content with the original decision. The eventual report of the appeal officer records:

> *"At the* [appeal] *interview Mr Strutt was explained the original report and out come of the Bullying and Harassment he did not understand the original report as due to the covid 19 restraints he had not been able to get an interpreter to explain the decision to him … Mr Strutt withdrew the new evidence and accepted the original outcome …*
>
> *This would not have come to appeal had we not been in covid 19 situation as this could have been explained to Mr Strutt face to face with an interpreter."*

74. We also note the terms in which the claimant submitted his appeal (on 25 May 2020):

> *"I got letter from Anna Walsh on 14/5/20.*
>
> *She explain me how to appeal etc. and I am unable to phone you due to my deafness.*
>
> *I wish to make appeal to this …*
>
> *I require BSL interpreter as it is my first language."*

75. The "summary report" is a detailed document spanning nine pages and addressing nine separate allegations, with each section in relation to an individual allegation concluding that it was either "upheld" or "not upheld". For the purposes of this hearing there is no complaint as to the findings or the scope of Ms Walsh's investigation, but the report itself seems to exemplify the potential for confusion with some of the language used. Reading the conclusions under each discussion of the allegations shows four as "upheld" and five as "not upheld". Thus it is expressed at the start of the recommendations section that "*5 of the 9 allegations have not been upheld*", although the final paragraph of the summary report says "*three of the allegations have been upheld*".

The second disclosure to Paula Watts

76. The claimant explained in his witness statement what he did on receipt of the report:

> *"… I took the decision paperwork to … Clyde McHardy as I needed to understand what it meant, he just said to me do I want to appeal. I walked away unsure still as I had no support. Clyde then told AW about*

> *my want to appeal and I got an email from her on 19th May 2020 stating that if I disagreed with her decision I have a right to appeal. I was still very lost about what it all meant."*

77. In search of some kind of understanding of what the report meant, the claimant went for a second time to Ms Watts, arranging to meet her outside her flat, where he spent some time with her trying to understand the report by lip reading her explanations. During the various disciplinary investigations that followed the claimant maintained that during this time Ms Watts had never had the report on her own and did not take a photographs of it. This was correct. The photography had happened on the first occasion when he had left the witness statements with her.

78. The claimant's appeal proceeded, but as previously noted nothing depends on that and nothing relevant to the claimant's claims occurred until mid-August, about three months after the summary report had been delivered to the claimant.

E. THE FACTS – PART 2 – THE DISCIPLINARY PROCESS

The fifth failure to make reasonable adjustments claim – the initial disciplinary meeting

79. Peter Hanham was the Delivery Office Manager at a neighbouring delivery office.

80. On 11 August 2020 it came to his attention that Paula Watts had shared with Kira Jenkins the extract from Clyde McHardy's investigation interview taken as part of the claimant's grievance procedure (as described above).

81. Mr Hanham does not explain in his witness statement how this came to his attention, but in oral evidence he said that it had come to him from a "whistleblower" connected with the trade union.

82. It came as something of a surprise to us that Mr Hanham considered this to be so serious as to require action the following day, and it was equally surprising that he seemed to have the authority as Delivery Office Manager to make arrangements to attend the Woking office the following day for the purpose of initiating an investigation and suspending the claimant (possibly also suspending others involved).

83. Mr Hanham says this in his witness statement:

> *"... I became aware of an allegation that an OPG, Kira Jenkins, had received details of confidential witness interviews via social media from another OPG, Paula Watts. The witness statements related to a bullying and harassment case that Martin had made against another OPG, Laura McManus.*

In light of the potential serious nature of this allegation, I needed to carry out an initial discussion meeting with Martin to establish how Paula had come to be in receipt of these documents.

Prior to this, I did not know Martin and I had not had any dealings with him. I arranged to attend his office, Woking, as soon as possible to carry out the initial discussion. I was only made aware by the Delivery Office Manager that Martin was profoundly deaf shortly before attending. However, the Delivery Office Manager informed me that Martin was able to understand some lip reading and written information but that a BSL interpreter would be required for formal interviews.

I understand that Martin has presented a Tribunal claim against the business and he has claimed that the business failed to make reasonable adjustments for him during the initial discussion and fact finding stages of the disciplinary case.

...

I met with Martin for the first time on 12 August 2020 to carry out the informal initial discussion meeting. Due to the short notice of the meeting no interpreters had been available. Martin's union representative … also attended the meeting.

It was important that the meeting went ahead as soon as possible because of the serious nature of the allegation that had been made against Martin and the fact I needed to understand if precautionary measures (such as precautionary suspension) were required. In a case concerning possible breaches of confidentiality it is likely that precautionary action is required to prevent any further breaches. As such I decided to carry out the meeting by providing Martin some written questions.

When Martin attended the discussion I explained to him verbally why I was there and I explained I had some written questions. Martin lip read from me and indicated that he understood what I was saying by nodding. Martin also nodded to confirm he understood the written questions and proceeded to write down his answers ...

Martin read the questions I had prepared for him and answered them in writing ... Martin's initial comments are handwritten under each question. I understand that Martin later had the questions translated to him on 9 September 2020 and further comments were added at that point but this was only after my involvement in the case, I did not see the comments at the time. Based on his initial responses Martin had confirmed he understood his bulling and harassment case documents were confidential, and he had shared witness statements with Paula Watts.

> *I provided Martin with a written statement that confirmed he was being sent home and would be invited to a further fact-finding meeting with an interpreter present …*
>
> *At no point during the initial discussion meeting did Martin give me any indication that he was unhappy to proceed without an interpreter or he had difficulty reading any of the written questions."*

84. The meeting was described by the respondent as being a "*seeking an explanation*" meeting.

85. The claimant says this:

> *"I was asked to go to a meeting room with* [my union representative] *and meet someone called Peter Hanham. I have never met him before. There was not interpreter, and I was not sure what it was about. I thought maybe just to talk to me about my appeal. It is embarrassing as a Deaf person to say no I can't read …"*

86. The respondent has produced the document Mr Hanham used in an attempt to communicate with the claimant, and the claimant's responses. The claimant says in his responses to that document both that he understood the material in relation to his bullying and harassment complaint should remain confidential and that he has allowed Paula Watts to "*access … witness statements*", but that he was not aware of her having photographed and subsequently shared them. The document concludes by saying that the claimant is being sent home on full pay (this is said not to be a suspension but it is difficult to see it as being anything other than that) pending a meeting to be arranged with a BSL interpreter present.

87. The PCP that is said to require adjustment is "*The Claimant attended a fact finding meeting on 12 August 2020 without an appropriate interpreter and pressured into answering questions he did not understand.*"

88. In oral closing submissions Mr Peacock accepted that the claimant was placed at a disadvantage in this meeting due to his disability. This was, in fact, the only element of the claim of failure to make reasonable adjustments where the respondent accepted that the claimant had been put at a disadvantage due to his disability. Mr Peacock's position was, however, that the adjustment sought (the provision of a BSL interpreter) was not a reasonable adjustment as the meeting needed to happen when it did and a BSL interpreter could not be found at such short notice (effectively overnight).

89. Following this first meeting Mr Hanham wrote to the claimant saying:

> *"Following our discussion on 12/08/2020 concerning sever breach off the confidentiality act. I would like to invite you to a fact-finding meeting.*

> *The meeting will take place with at 11:00 on 18/08/2020 at Woking Delivery Office …*
>
> *I have … arranged a full signer for you who will accompany in the meeting on 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."*

The sixth failure to make reasonable adjustments claim – the second disciplinary meeting (18 August 2020)

90. Mr Hanham had arranged for a BSL interpreter to attend the disciplinary meeting. The claim of a failure to make reasonable adjustments that arises from this is based on the following PCP: "*The Claimant attended a fact finding meeting on 18 August 2020 but the interpreter was not a native interpreter (i.e. had a different local dialect).*" It is not in dispute that the interpreter was from Plymouth, and therefore may have used a different BSL dialect to what the claimant was used to in Surrey.

91. Mr Hanham notes in his witness statement the following matters from this hearing:

> *"Martin explained that when he had received witness statements in respect of his bullying and harassment case, he was aware that the paperwork was subject to GDPR, it was confidential and circulating the information could result in dismissal.*
>
> *Martin stated that he had shared the bullying and harassment decision report with Paula because he was unsure of some of the terminology, and Anna Walsh … had told him that when the case concluded he could share the information with a social worker for example.*
>
> *Martin also stated that Anna had stated it was ok for him to show Paula the case paperwork because there were words in it he could not understand."*

92. As regards the first point, the claimant has consistently said that he understood the material was to be kept confidential. He said that he had difficulty in understanding what the written word "parties" that appears in some of the confidentiality warnings meant, but he has also always accepted that he was told not to share it with Paula.

93. As regards the second point, the claimant has always been clear that he did in fact share documents with Ms Watts.

94. On the second half of the second point and the third point, these were to form the basis of the allegation that the claimant had been dishonest in the disciplinary process. We note for now that it has always been accepted by the

respondent that the claimant would need to share the written materials with someone else in order to properly understand them. Ms Walsh had, effectively, endorsed the idea of the claimant sharing the material with his daughter, and even in an ideal scenario it was accepted that he would have to share the materials with a BSL interpreter. The claimant's position was that any note to the effect that Ms Walsh had given explicit permission for him to share the materials with Ms Watts was a misinterpretation caused by the difficulties with the interpreter.

95. Neither the claimant or his union representative made any complaint about the interpreter or their dialect during the meeting.

96. On 20 August 2020 the claimant wrote to Mr Hanham following that meeting, with his email including the following:

> *"Today I have look up emails of Anna Walsh and as I mend you that I have a right to access to Special helper with writing due to my English 2nd language as BSL is my first language as show in EA 2010 … as a 'reasonable adjustment' or allow for my need helper etc …*
>
> *There is email date 6th May 2020 that I ask Anna Walsh about my daughter to write for me due to Covid-19 lockdown which BSL interpreter is unable to help due to strict with Government Laws to stay home which I spoken to Sight for Surrey and they told me 'sorry we cannot help with no staffs at centre at present'.*
>
> *So I spoke to Anna about my daughter situation and Anna accept then, BUT I had 2nd thought about this is a private matter and I don't feel it right for my daughter to know what is going on in Royal Mail Office. and all office has been lockdown at the time. So I thought maybe it best to see Paula to see the letter of means of word and English to understand before I write to Anna on 11th May 2020 to response to her report etc. Because She is my reliable witness …*
>
> *I am NOT use my daughter to read those statements as I feel it not right so alternative to see Paula as she is good lipread for me."*

97. The claimant also sent Mr Hanham a copy of the email from Ms Walsh where she had suggested that the claimant's daughter could assist him.

98. The following day the claimant wrote again objecting to the notes of the meeting that he had been sent. He said, "*I cannot sign your document because the words is wrong which I never says*". The claimant provided an amended version of the notes to Mr Hanham on 26 August 2020.

99. On 25 August 2020 the claimant wrote to Mr Hanham in the following terms:

> *"I am writing to you because I feel that at work, I lack the correct support in terms of interpreter provision. I feel that we would benefit from a second meeting with an interpreter booked to hopefully resolve my issue. At the proposed meeting I would like my union rep present but I would also like to bring a third party 'deaf support e.g. social worker or similar that can help reinforce issues Deaf people face. As I do feel there is a lack of Deaf awareness from both my union rep and management. Normally we communicate through email, however as a Deaf person my first and preferred language is British Sign language hence the reason why I need a interpreter to fully understand communications. I also feel the second meeting would be beneficial to help me fully understand the issues with the aid of an interpreter before I sign important documents.*
>
> *…*
>
> *I have had support from a BSL interpreter in writing this letter."*

100. Thus the claimant was, effectively, requesting a second go at the investigation meeting that had taken place on 18 August 2020. Mr Hanham replied, saying (amongst other things):

> *"I have read the comments you have made and will add these to the case file and will consider them when making my final decision as to whether there is a charge or charges under the conduct code Procedure.*
>
> *Should the case be taken to the next level it is then at this point where you will have a further opportunity to represent yourself with the assistance off an interpreter & CWU representative."*

The "case summary report"

101. Mr Hanham prepared a "case summary report" dated 27 August 2020. Mr Hanham's conclusions are not entirely clear, but he identifies that "*Martin clearly states that he did show Paula all the documentation from the Bullying & Harassment case*", "*Martin states that at no point did he leave Paula unattended with the case paperwork, so it does raise questions as to whether he is telling the truth or not*", "*I believe beyond reasonable doubt that Martin has been Dishonest in his mitigation and lied about Anna Walsh* [giving him permission to share the material with Ms Watts]" and "*during my investigation there was potentially evidence to show that Martin Strutt & Paula Watts had been in Collusion prior to both submitting H1 Bullying and Harassment form's against Laura McManus to the Gateway Team. I believe* [another Delivery Office Manager] *may have hard evidence to support my claim.*"

102. This is the first time that questions of "collusion" have been raised and it seems surprising that during his fact finding Mr Hanham did not attempt

himself to find out or identify what evidence the other delivery office manager had concerning this, but as Mr Hanham also mentions "*I wrote to Martin explaining that should the case move to the next step then at this point he will have a further opportunity to represent himself with the assistance of an Interpreter.*"

The seventh failure to make reasonable adjustments claim – the conduct meeting

103. On 1 September 2020 the claimant was invited to a "formal conduct meeting", in the following terms:

> *"Following the conclusion off your Fact-Finding case … on 27th August 2020 concerning allegations off Gross Misconduct in relation to a Server Breach of General Data Protection Act 2018, you are now being invited to a formal conduct meeting to discuss the allegations.*
>
> *Please attend a format conduct meeting with me to consider the conduct notification(s) listed below.*
>
> *1. Gross Misconduct*
>
> *2. Dishonesty*
>
> *3. Collusion*
>
> *The meeting will take place with me at 09:00 on 4th September 2020 …*
>
> *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 contact this person before the day. I will also arrange the appropriate interpreter from sign solutions to be present on the day.*
>
> *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 a summary of the findings of the investigation and copies of relevant witness statements and other documents which may be used at the formal conduct meeting. I have also enclosed a guide that explains what to expect at the meeting.*
>
> *You should be aware that … these formal notification(s) are being considered as gross misconduct."*

104. The "summary of the findings" must be a reference to Mr Hanham's "case summary report". If the claimant was to understand the disciplinary charges

against him he would have had to do so by reference to that report, since they are only described in generic terms in the invitation letter. There is mention of a breach of the "General Data Protection Act 2018", gross misconduct, dishonest and collusion, but a clear description of what those offences are said to be is missing. Some information might be gleaned from the case summary report, but even that is rather lacking. For instance, as set out above, the "collusion" is only identified as having been collusion with Ms Watts prior to submission of the bullying and harassment form, but at this stage nothing more is known of what evidence the other delivery office manager has of this.

105. Simon Foster, Operations Manager for HCS West, was to hear the conduct meeting. While a witness statement was submitted in Mr Foster's name (along with an email suggesting he had approved it) Mr Foster did not attend to give evidence. He no longer worked for the respondent and it appears they had lost contact with him. We will take his witness statement as a basic guide to the written documents he refers to, but in circumstances where he has not attended to give evidence we can attach very little weight to the witness statement in respect of any disputed matter.

106. The conduct meeting took place on 8 September 2020. For the first time the claimant's preferred BSL interpreter was present, although for the purposes of his claim of a failure to make reasonable adjustments the claimant says:

> *"she* [the interpreter] *was only made available during the meeting and the claimant was not given time with the interpreter to prepare his case. The Claimant avers that because of this he did not understand the seriousness of the charges."*

107. The claimant puts it this way in his witness statement:

> *"I received a letter for this meeting on the 1st Sept. I was not given enough time to be able to consult with a rep with an interpreter, review any policies to ensure I attended this meeting fully informed … Also when the interpreter arrived, she was not informed about the context of the meeting and was not aware of the information to enable her to do her job accurately."*

108. The notes of the meeting record the following exchanges at the start of the meeting:

> *"SF Good morning MS, I have asked you in for this interview to go through allegations of gross misconduct in relation to a severe breach of general data protection act 2018 including collusion and dishonesty.*
>
> *There are 3 potential outcomes to this investigation*

- *There is no case to answer and this case will be closed*
- *There is a case to answer but the penalty is short of dismissal*
- *The charge is dismissal*

DO you understand this?

MS Yes

SF I will not be going through all the interview questions as they were very thorough and detailed, but I do have a few points to add …

109. A couple of points arise from this. First, the claimant is recorded here as acknowledging that dismissal is a possible outcome of the meeting, and second we see that despite the claimant's desire to revisit the earlier interview with Mr Hanham and Mr Hanham's indication that he can raise any necessary points at this stage of the procedure, Mr Foster's view is that he will not be revisiting the "*very through and detailed*" questions asked by Mr Hanham at the earlier stage. The claimant comments on this in his witness statement:

> *"SF comment 'I will not be going through all the interview questions as they were very thorough' this was not true and why I refused to sign the documents from PH as there was miss interpretation, and he did not acknowledge that this was a potential issue with the invitation notes as he chose not to go through them …"*

110. Mr Foster moves on:

"SF Do you understand the seriousness of sharing confidential information with another college, namely Miss P. Watts?

MS Yes

SF You have admitted to showing Miss Watts the documentation, what was the documentation you showed her?

MS The report of the decision, the witness statement I have received from Anna the ICM.

SF It states in the fact finding that you went to Miss Watts flat, why did you go there? And at what time?

MS I needed help to understand the English the documents, ICM said I could use my daughter but wasn't appropriate to use my daughter as its confidential and was embarrassed so I had no access to interrupters or social workers due to CV19 and I

couldn't get any help as I couldn't contact my CWU rep as he wouldn't understand me

- *Sight for Surrey was closed due to lockdown, so I made the decision*

- *I can lip read her well so that is why I asked her and the other 5 witnesses so I thought as she knew the background and thought she could help.*

- *I didn't understand the upheld/not upheld and she said it was wrong, and I asked my daughter what it meant, and she said.*

- *Meant Laura would be let of the situation and returning to the office, Paula said manager Clive said there was no declaration from Paula.*

SF So, you definitely showed Paula the documentation?

MS Yes, I did as BSL is my first language and English is my second language.

…

SF In the fact finding you stated that although you showed Miss Watts the documentation you never gave it over to her, is this correct and accurate?

MS No

SF If this is true, can you explain to me how it was possible for Miss Watts to take photos of the documentation?

MS I have no idea

- *I have no idea how she got the paperwork, I didn't let her take it.*

- *They showed me a witness statement from AW and PW, so the photo (2nd) I am unsure which he showed me at the end of the meeting and not sure where photo came from an who took it and how it got there. Peter didn't explain.*

SF Did you at any point allow Miss Watts to take photos? It is very serious and important you tell the truth here MS?

MS No

SF I need a logical explanation MS to how you didn't pass Miss Watts the documentation or allow her to take a photo, and yet she has managed to take a photo and post it on a social media platform, please explain?

MS Not sure

SF Do you understand the seriousness of the breach here and sharing confidential paperwork with another college?

MS Yes, I understand

- *I feel all the deaf supports, this one the deaf support was all closed and I had no where to go as they were all closed*
- *AW gave me a phone number, but I cannot access a photo number.*
- *Peter gave me the email for signed solutions, which I tried to contact them but haven't had any response, so he contacted disabled helpline and they gave me a phone number, but I am deaf.*
- *They contact me finally (signed solutions), asked me lots of questions and what help I needed (MS shows paperwork, its only for F2F support and not video support as cannot access it)*
- *24th of August they told me to download information which is fine, and I got connected and first time got VRS as it's a new solution and got help.*
- *I can only use it for personal use and not for work. They are applying for service for work help and not just personal use.*
- *This will be able to support me moving me forward and not many people are BSL aware.*
- *ACAS will also provide help with advocate support to work with my CWU rep. People do not understand my understanding off English is basic, but help wasn't available.*
- *This is why I spoke to PW as I had a timeframe to respond to AW with.*

SF In the fact finding you stated that Independent Case Manager (ICM) Anna Walsh gave you direct permission to share the information, is this correct?

MS She said it was OK to share with my daughter which I was embarrassed so I shared with PW and was misunderstood and thought I could share with PW Social Worker has said not to use my daughter as it is not appropriate."

111. In later additions to the notes of the meeting, the claimant said "*because AW gave permission to show my daughter, I thought it was ok to show PW*", and in a follow-up letter he said "*I genuinely felt that I had Anna Walsh's permission to speak to Paula Watts therefore I approached Paula Watts in good faith and trust to help me understand all the paperwork I had*". He went on to say "*I honestly have not colluded against Laura with anyone. I have been honest in all the interviews and if there is the slight belief I have been dishonest then this is due to communication barriers cause by my Deafness as a result of misinterpretation and lost in translation has occurred.*"

112. So far as the involvement of Ms Watts is concerned, the claimant is in this meeting saying what he has said to the tribunal: he consulted Paula Watts about the witness statement and the report, on the basis that he felt she was the only person he could turn to for an explanation of the documents. The only point that is not clear is on the question of how she then obtained photographs of the witness statement. The claimant told us in tribunal that this was because he left the witness statement with her, but he does not say that to Mr Foster. As for the question of whether the claimant had consent to do so, the claimant said he thought that this consent arose from the fact that he had been allowed to discuss it with his daughter.

113. On the question of collusion, Mr Foster says "*My last question here is why should I not believe that you and Miss Watts colluded together when you visited her flat and then submitted a H1 Bullying & Harassment form against an OPG Laura McManus?*"

114. This question betrays some of the confusion that there has been about the respondent's allegation of collusion. For Mr Foster, the collusion arose prior to the claimant submitting his H1 form. The H1 form was submitted way in advance of the period when the claimant shared the investigation material with Ms Watts. That is obvious, since it was the H1 form that prompted the investigation in the first place. Mr Foster also seems to have started from the point that there has been collusion and that it is for the claimant to somehow disprove it, but the respondent has at that point put forward no evidence of collusion prior to the claimant submitting his H1 form. In her evidence to the tribunal Ms Walsh was clear that discussions between colleagues prior to a complaint were not caught by the respondent's requirements that proceedings under the bullying and harassment policy were to be kept confidential. The

most we had was that another delivery manager had evidence of such collusion, but there is nothing to suggest Mr Foster had established what that evidence was, or shared it with the claimant. What the alleged collusion prior to submission of the claimant's bullying and harassment complaint and why it was a disciplinary matter remained unclear to us even at the conclusion of the hearing.

115. The claimant's response to this was:

> *"I know there has been situations between PW and Laura, but I haven't been privy to that, I have my own issues with Laura, and I spoke to PW and she mentioned that other people had issues with her as well.*
>
> *I made my own decision to put a complaint In against LM and Paula chose to put her own complaint in."*

116. The interpreter is recorded as saying (whether in her own right or interpreting what the claimant said is not clear, but this does seem to sum up the claimant's position):

> *"Don't know anyone in the case, with CV19 everything down via email/text, as far as MS, made it clear was showing documents from PW to show PW to get clarification.*
>
> *Only involvement in the whole case showing confidential information in the whole cases and not sharing anything else.*
>
> *Cannot see where collusion or dishonesty has come from*
>
> *He only showed what he received as he needed clarification, and what he showed her didn't involve any other information and just his information therefore all personal information*
>
> *Timescales of the case, lots of points around getting to interrupt which obviously with CV19 cannot be done over night and makes timescales very tight …"*

117. Thus the claimant's position was that he had shared confidential material with Ms Watts, but "*he only showed what he received as he needed clarification*" and he "*cannot see where collusion or dishonesty has come from*".

118. Mr Foster concluded the hearing by saying he would "*interview any witnesses as discussed today*", and that he viewed this as an "*exceptionally serious case*". The claimant continued on suspension, *"… as I need to ensure that the investigation is remained unhampered and this can only be done with the employee suspended at home …*".

The decision meeting

119. The claimant was invited by Mr Foster to a "decision meeting" to take place on 2 October 2020. The letter said:

> *"Following our meeting on Tuesday 8th September 2020 concerning allegations of gross misconduct in relation to a severe breach of general data protection act 2018. 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."*

120. Mr Foster's "decision report" prepared for the meeting included the following:

> *"Throughout the initial investigation between Mr Strutt and Mr Hanham it is dear that Mr Strutt has explained that he didn't fully understand the policy at RMG and therefore thought he could share the information with people he felt would support him ...*
>
> *Based upon the evidence gathered by Mr Hanham he believed that Mr Strutt was in breach of general data protection act 2018 and colluded with the other OPG Miss Watts to create a case - against an OPG Laura McManus as well as dishonest around the being told by ICM Anna Walsh that he could share the B&H paperwork with he's colleagues."*

121. As regards the allegation of dishonesty, Mr Foster found:

> *"it is in my belief that Mr Strutt knowingly disregarded* [the confidentiality instruction] *from Anna Walsh and shared the information with Miss Watts who also had her own grievance against the OPG that Mr Strutt put a B&H against.*
>
> *When questioned this Mr Strutt changed, he's story and explained he misunderstood this, which on the balance of probability I do not believe as the BSL interrupter would have explained this to him clearly."*

122. On the question of sharing confidential material, Mr Foster found:

> *"This is linked to the point above and Mr Strutt has admitted during this investigation that he had gone to Miss Watts property outside of work to ask for advice on the decision report which is against RMG policy which he was told in the meeting with Anna Walsh.*
>
> *In terms of the paperwork being shared by Miss Watts, Mr Strutt denies allowing this and has gone on record during the investigation that he now believes Miss Watts has breached he's trust after he showed her the paperwork. On the balance of probability, it is highly unlikely that Mr Strutt would not have seen Miss Watts take photos of the paperwork to send via social media as he admitted he was standing next to her whilst she was reading the explanations from the case.*

> *Therefore, based upon this evidence it is clear that Mr Strutt passed the paperwork over to Miss Watts which is in itself a breach of data protection, as well as a breach of the process with he's B&H and sharing this information. On the balance of probability, it is highly unlikely that Mr Strutt did not see Miss Watts take her phone out and take pictures of the paperwork."*

123. It appears from this that Mr Foster considered the breach of confidentiality to be in respect of the "decision report", but there has never been any suggestion that any photographs were taken by Ms Watts of the "decision report". The photograph that had led to all of this was a photograph taken of one part of one witness statement. It might be said that it does not make things any better for the claimant if he had breached confidentiality twice rather than once, but there does seem to be some confusion in Mr Foster's conclusion that the claimant must have seen Ms Watts taking photographs of a document (the decision report) of which no photographs exist.

124. As for "collusion", Mr Foster says:

> *"Mr Strutt explained that during this meeting Miss Watts told him who else had issues with Laura (OPG both Miss Watts and Mr Strutt have put cases against) and in my opinion I believe that Miss Watts and Mr Strutt discussed their issues with Laura, and Miss Watts even gave Mr Strutt the name of 3x other individuals (Mr Strutt admitted this) that had issues with Laura which in my opinion proves that they discussed their own issues with Laura and colluded against her and conspired to build a case against her. It became apparent during the investigation that Mr Strutt has been to Miss Watts private residence previously as well which shows this wasn't just a random act like Miss Watts explained of Mr Strutt turning up to her property but more likely pre planned."*

125. That may well be true so far as it goes, but it neglects the point that the disciplinary charge appears to have been of collusion prior to the claimant submitting his complaint, not of collusion during that complaint.

126. We also have some difficulty with the overall characterisation of this conversation as being "*collusion*", or as Mr Foster goes on to say "*conspir*[ing] *to build a case*". If this is about the claimant breaching confidentiality by discussing the evidence in his case with Ms Watts it seems to add little to the allegation of a breach of confidentiality that the claimant was originally facing. We will discuss this in more detail in our discussion and conclusions, but the allegation of "collusion" or "conspiracy" seems to suggest more: the development of false or otherwise manipulated allegations against Ms McManus, and as yet we have seen no indication of that occurring.

127. Mr Foster specifically recognised and addressed the possible effect of the claimant's disability during this process by asking himself the question "*Has*

Mr Strutt's disability by being deaf hindered his understanding around RMG policy?" His answer to that question is:

> *"In my opinion throughout this whole investigation the interviewing managers, whether it be ICM Anna Walsh, Mr Hanham or myself have always been completely supportive of Mr Strutt's disability and offered a BSL interrupter. I understand that Mr Strutt explained that the reason he shared the paperwork with Miss Watts was due to the CV19 pandemic as all he's support groups such as BSL interrupters were shut for business, but this is not entirely true as it Anna Walsh the ICM got Mr Strutt an BSL interrupter throughout the B&H case and I believe Mr Strutt chose to speak to Miss Watts about the case although instructed not to by Anna Walsh and the BSL interrupter also highlighting this to Mr Strutt in sign language he still ignored this and spoke to Miss Watts. Through this whole investigation Mr Strutt explained that due to he's deafness. English isn't he's first language and sign language is he's first language, but considering he had a BSL interrupter with him during the B&S case with Anna Walsh this would not have been an issue."*

128. Mr Foster's conclusion was:

> *"Concluding to the above points of this decision report, after careful consideration I believe that Mr Strutt has knowingly shared confidential information with another colleague to support he's own agenda and although he was explained he could not share this information he purposely arranged to meet Miss Watts outside of work hours to discuss the case and show her Mr Strutt's decision paperwork and even discussed the names of 3x other individuals that had issues with Laura.*
>
> *None of the investigations that Mr Strutt have been involved in have been hampered by he's disability due to all investigating managers booking BLS interrupters throughout the whole process and also extending the times given to Mr Strutt to go through the notes and ensure he is given a fair timescale to return the notes.*
>
> *Overall, in my opinion Mr Strutt and Miss Watts have worked together where they both submitted grievances at similar times and even after Mr Strutt was given clear instructions, he still chose to share the paperwork."*

129. Mr Foster's conclusion was that "*the only appropriate charge here is Dismissal without notice*".

F. THE FACTS – PART 4 – THE CLAIMANT'S APPEAL

The claimant's appeal

130. On 2 October 2020 the claimant submitted his appeal, with the grounds of appeal being "*the penalty is too severe in view of the mitigation offered*".

131. Julie Forde was allocated to here the claimant's appeal. She invited him to an appeal meeting to take place on 23 October 2020, for which she had booked a BSL interpreter. The location of the meeting was moved to accommodate the claimant's preferred interpreter.

The appeal meeting

132. The claimant was accompanied by his union representative in his appeal meeting. The notes record the meeting as taking three hours. Ms Forde said that Ms Watts had been dismissed too as a result of the disclosure she had made and that she had been allocated to hear Ms Watts's appeal as well as the claimant's. In the course of her appeal with Ms Forde Ms Watts told Ms Forde that the claimant had come to her home for advice on the grievance report.

133. In her meeting with the claimant Ms Forde says:

> *"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."*

134. In the meeting the claimant gives his fullest explanation yet of what happened (it is recorded as a single paragraph in the notes so that is how we have cited it):

> *"… we were in a lockdown and I had no access to my union rep, so I felt a bit stuck. I tried to contact my social worker at Sight for Surrey. And they are the deaf services team and I have used their services for the last 40 years and they are based in Leatherhead. So, I tried to do a video contact with them and to explain I needed to meet with someone to explain this document and I needed some support. They said they could only do video and I can't understand them on video, and I couldn't get help face to face. So, they said sorry all their workers are at home and the Centre and outreach service was closed since March. I needed to see someone to support me with the document as it was such a large document and they said sorry they couldn't. They said they could only help via email and I couldn't do that. And all the documents had words I didn't understand or agree with and I thought I might have to challenge. And so, I emailed Anna Walsh about the documents and said I don't understand and I didn't understand what part upheld meant. So, I said to Anna I wanted to see her and talk to her and she said she couldn't, and it had to be someone else in the process and I didn't understand why because I would have been happy*

with Anna and an interpreter. So, I couldn't get access to an interpreter. I couldn't get access to my union … as I couldn't get access to an interpreter. So, I felt I was in a bad situation due to Covid. Anna said maybe try to write English or to ask my daughter to help and Anna said that was okay. So, I have an email from Anna to say it was okay to share it with my daughter and ask her for help. And I had second thoughts because social workers were always telling me off for using my family members rather than professionals and I felt uncomfortable showing the problems I had at work to my daughter. So, then I felt stuck and I felt I couldn't get any support from interpreters and social workers face to face. So, I thought because Anna had said it was okay to speak to my daughter I knew there was one person who knew about the case. And the background. So I thought it would be okay because Paula knew the case and she knew about all the people involved in the case she knew more than me and actually Paula gave me information that I shared with Anna she gave the 4 names of the people to me that I gave to Anna and when I was there Anna phoned Paula but there was no interpreter. I don't know what they talked about. That was an informal meeting that was on March 16 that gave me an impression that Paula was involved with me because she knew the background. And because the letter said I needed to sign it in 10 days and I couldn't get the support so then I thought what should I do. I decided to walk around to Paula's flat because she lives around the comer and I texted her to say I was coming so I showed her the document and said I didn't understand the three upheld and 4 not upheld I didn't understand that and Paula agreed for me to leave the document with her and she could explain it to me when she had read through it. Normally when I receive a document I give it to a professional and normally I leave it with them rather than sitting there while they go through the document. And that is usually my experience when people support me I highlight points I don't understand and I leave the documents with them and that it what I did with Paula. I even put some sticky notes on there for any points for her to explain to me so then I went back later. We were outside her flat because of Covid so I said it looks as though nothing has happened. I don't understand upheld or not upheld and she explained that upheld meant they agreed and not upheld they don't agree. And I wasn't sure when I spoke to Paula I was still confused and afterwards I asked my daughter what upheld and not upheld meant and she explained guilty or not guilty. That made sense because I know what guilty or not guilty meant. If it is just saying guilty of this and not guilty of that I would have understood."

135. There is a conflation in this between the two occasions the claimant has sought advice from Ms Watts. Ms Forde goes some way towards untangling this by specifically asking the claimant what documents he showed to Ms Watts, and the claimant is noted as replying "*The case report. And with it was the witness statements*". She goes on to ask whether the claimant left the

witness statements with Ms Watts. The claimant says that he did. Ms Forde then identifies that the witness statements were not provided to the claimant at the same time as the case report. The claimant's trade union rep says that the claimant did not understand the interpreter from Plymouth, and says "*there are two out of the three where we believe Simon is wrong in his conclusion and on that basis we feel dismissal was far too harsh a penalty.*" That is presumably a reference to the findings that the claimant has been dishonest and colluded.

136. In further discussions the claimant said he had spoken to Ms Watts about his problems with Ms McManus in January 2020.

137. In her witness statement Ms Forde provides the following summary of the meeting:

> *"Martin explained that the reason why he had showed Paula the Bullying and Harassment documents was because he needed to understand the decision document and he was unable to obtain the support required due to the pandemic. Martin stated that Anna Walsh had said it was alright to speak to his daughter about the case and so on that basis he thought he could speak to Paula about it and that he was unaware that Paula had taken copies of the witness statements in the case.*
>
> *Martin stated that he was not provided with the support that he required during the conduct process, such as not having an interpreter in his informal meeting with Peter Hanham on 12 August and not being given enough time with interpreters. Martin also stated that one of the interpreters that had been used had a different dialect to him which resulted in some misunderstanding."*

138. Ms Forde describes making multiple further enquiries before making her decision, which she described to us as being a very difficult one. She provided her notes of these further enquiries to the claimant for his comments.

139. On 30 November 2020 Ms Forde wrote to the claimant saying "*my decision is that you have been treated fairly and reasonably and therefore I believe that the original decision of dismissal is appropriate in this case.*" Her decision was accompanied by a "*Conduct Appeal Decision Document*" explaining her rationale.

140. On the question of showing materials to Ms Watts, Ms Forde points out that the claimant had shown the witness statements to Ms Watts before there had been any suggestion from him or Ms Walsh of obtaining assistance from his daughter, which is what he later said he had taken as authorisation to speak to Ms Watts. She pointed out the multiple times the claimant had been told to keep this material confidential. Ms Forde accepted that "*Martin did not appear to understand that he was required to put his response to the further*

investigations in writing." She went on to say "*I also acknowledge his written standard of English is poor.*"

141. Ms Forde finds that:

> *"I know that Martin and Paula had been speaking about his complaint and that Paula had put in her own complaint against Laura in May 2020 shortly after Martin shared the details of the investigations with her. This complaint was not investigated because the behaviours complained about were out of time. It was Martin who insisted that Anna speak to Paula about her issues with Laura early on in the investigation process. Leading me to conclude that Martin and Paula were already speaking about the complaint against Laura prior to or at the point Martin made his own complaint against Laura. There is also evidence that Martin and Paula were discussing the case during the investigation.*
>
> *I have concluded that Martin and Paula colluded in agreeing a version of events to fit the situation."*

142. Ms Forde finds that Mr Hanham should have taken further steps to see if any support was available for the claimant in his initial meeting with him, but says "*I do not believe the lack of a signer at this initial stage has impacted overall on this case.*"

143. Ms Forde appears to accept that there had been difficulties in understanding with the interpreter from Plymouth, but that this could have been corrected by the claimant amending the notes of the hearing when they were provided to him.

144. She says:

> *"Another point considered as part of this appeal. I noted the wording of the conduct notification could have been more specific. The original notification was, Gross Misconduct, Dishonesty and Collusion.*
>
> *However, the invite to the formal conduct interview clearly stated that the allegation of gross misconduct related to a severe breach of General Data Protection Act 2018. This was also confirmed at the beginning of the formal conduct interview. Therefore, I am satisfied that Martin knew what the conduct notifications related to."*

145. In her conclusions, Ms Forde finds that "*Martin shared confidential Bullying and Harassment information with a colleague despite being told this is prohibited on a number of occasions.*" That is a point that has never been disputed by the claimant.

146. On the question of dishonesty, Ms Forde finds:

> *"The evidence supports that Martin was dishonest in manufacturing a scenario to explain how his colleague Paula came to see one of the Bullying and Harassment documents. Martin would have known this explanation was inaccurate because it happened after the breach of confidentiality. Throughout the process Martin has continued with this false scenario despite other evidence confirming it is not the case. Therefore, the notification of dishonesty is proven."*

147. And on collusion:

> *"The evidence supports that Martin colluded with Paula in relation to making complaints about a colleague Laura. Martin and Paula were discussing the complaints about and Paula raised her own written complaint about Laura shortly after Martin had shared the investigations into the complaint he made against Laura with Paula. The evidence to supports that Martin and Paula were discussing the case against Laura over a period of time. I think that Martin shared the witness evidence with Paula to aid her case against Laura. Therefore, the notification of collusion is proven."*

148. Finally:

> *"This has been a difficult decision to make and I have given very careful consideration to all Martin's mitigation: however, I do not believe that it is sufficient to detract away from the decision that his dismissal from Royal Mail is the appropriate penalty."*

G. THE LAW

Reasonable adjustments

149. Second 21 of the Equality Act 2010 provides that:

> *"(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."*

150. Section 20 addresses the "*first, second or third requirement*", and it is the third requirement that applies for the purposes of this claim. That is set out in section 20(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."*

151. "Substantial" in this context means "*more than minor or trivial*" (s212(1)).

152. Although not discussed in argument, we note that an "auxiliary aid" can include an "auxiliary service" (s20(11)) and provision of a sign language interpreter is given as a specific example of this at para 6.13 of the EHRC Code of Practice.

153. In his closing submissions, Mr Peacock made much of the idea that the claimant had not at any point asked for the adjustments he now contends for. That is largely true, but it was not clear what relevance that may have to his claim for reasonable adjustments. As Ms Loutfi pointed out, the duty to make reasonable adjustments is an "anticipatory duty" and there is no obligation on a claimant to request the adjustment nor is there any penalty in the Equality Act 2010 if they do not request the adjustment they later make a claim in respect of.

154. On further discussion Mr Peacock identified two possible legal consequences of the claimant not having requested adjustments, both of which the respondent relied on. First, he said that it showed (except in respect of the meeting at which there was no BSL interpreter at all – the first meeting with Mr Hanham) that the claimant was not at any point at a "substantial disadvantage" because of his disability. If he had been, he would have requested at the time the adjustment he now complained about. The second point relied upon by the respondent in consequence of this is relates to the respondent's knowledge of the claimant's disability and its consequences. That is addressed at para 20(1) of Schedule 8 to the Equality Act 2010:

> *"A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know … 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."*

155. At every point the respondent and its relevant employees knew that the claimant had a disability, so the only way in which this section could help the respondent is if it or they "*did not know, and could not reasonably be expected to know … that* [the claimant was] *likely to be placed at the disadvantage referred to in the … third requirement.*"

Discrimination arising from disability

156. Discrimination arising from disability is addressed by s15(1) of the Equality Act 2010:

> *"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.

157. As Mr Peacock says in his submissions, the first element of this requires us to identify whether the claimant's disability caused, had the consequence of or resulted in "something" and did the employer treat the claimant unfavourably because of that "something" (Basildon & Thurrock NHS Foundation Trust v Weerasinghe UKEAT/0397/14).

158. Ms Loutfi refers us to Baldeh v Churches Housing Association of Dudley and District UKEAT/0290/18 as authority for the proposition that "*there can be discrimination arising from disability where the something arising from disability had a material influence on the unfavourable treatment, even if the unfavourable treatment would have occurred in any event for entirely non-discriminatory reasons*".

159. The requirement for knowledge in this case is simply for knowledge (or constructive knowledge) of the disability, not that the "something" was a consequence of the disability (s15(2), Pnaiser v NHS England [2016] IRLR 170).

160. The employer's justification under s15(1)(b) requires the unfavourable treatment to be both an appropriate means of achieving the legitimate aim and a reasonably necessary means of doing so (Homer v Chief Constable of West Yorkshire [2012] UKSC 15, and is to be determined by the tribunal on an objective basis. There is no "*range of reasonable responses*" (Hardy & Hansons plc v Lax [2005] EWCA Civ 846). The tribunal must balance the reasonable needs of the business against the discriminatory effect of the employer's actions on the employee (Land Registry v Houghton UKEAT/0149/14). The tribunal will need to consider whether the employer's aim or aims could reasonably have been achieved by less discriminatory methods (Allonby v Accrington & Rossendale College [2001] IRLR 364).

The burden of proof in discrimination cases

161. We adopt Ms Loutfi's submission in respect of the burden of proof in discrimination cases:

> *"Section 136 EqA and guidance in Igen Ltd v Wong [2005] IRLR, CA provide that the Claimant must, on a balance of probabilities, prove facts from which a Tribunal could conclude, in the absence of an explanation by the Respondent, that the Respondent has committed an act of unlawful discrimination. The Tribunal will make inferences from its primary findings of fact, taking into account evidence from the Respondent. (Laing v Manchester City Council [2006] IRLR 748, EAT; Madarassy v Nomura International plc [2007] IRLR 246, CA). If the Claimant does establish a prima facie case, then the burden of proof moves to the Respondent to show on a balance of probabilities that the*

Claimant's treatment was not discriminatory in a way that is more than trivial (Nagarajan v London Regional Transport [1999] IRLR 573, HL)."

Unfair dismissal

162. Section 98 of the Employment Rights Act 1996 addresses unfair dismissal:

> *"(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) ...*
>
> *(2) A reason falls within this subsection if it:*
>
> *…*
>
> *(b) it 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."*

163. A conduct dismissal will be subject to the principles outlined in BHS v Burchell [1978] IRLR 379. That is, the employer or decision maker must have a genuine belief that the employer is guilty of the misconduct, it must hold that belief on reasonable grounds and after carrying out as much investigation as is reasonable. Each element of this (and the decision on the appropriate sanction) is subject to a range of reasonable responses that are open to the employer (Iceland Frozen Foods Ltd v Jones [1983] ICR 17). It is not for the tribunal to substitute its views as to the correct approach for that of the employer (see Mundangepfupfu v Penning Care NHS Foundation Trust UKEAT/0109/15). As Ms Loutfi puts it, "*different decisions will be taken by different employers*".

Polkey and contributory fault

164. The parties have agreed that in this decision (ostensibly limited to liability matters) should also address questions of a Polkey deduction and contributory fault. We were only addressed by the parties on this in relation to its consequences for unfair dismissal, as to which the following applies.

165. The Bath Publishing Remedies Handbook says this about a Polkey deduction:

> *"A 'Polkey' deduction is the phrase used in unfair dismissal cases to describe the reduction in any award for future loss to reflect the chance that the individual would have been dismissed fairly in any event (Polkey v AE Dayton Services Ltd [1987] IRLR 50 (HL)).*
>
> *This may take the form of a percentage reduction, or it may take the form of a tribunal making a finding that the individual would have been dismissed fairly after a further period of employment (for example a period in which a fair procedure would have been completed). Alternatively, a combination of the two approaches could be used, but not in the same period of loss (as confirmed in Zebrowski v Concentric Birmingham Ltd UKEAT/0245/16). The question for the tribunal is whether the particular employer (as opposed to a hypothetical reasonable employer) would have dismissed the claimant in any event had the unfairness not occurred ...*
>
> *The tribunal must assess any Polkey deduction in two respects:*
>
> *1) If a fair process had occurred, would it have affected when the claimant would have been dismissed? and*
>
> *2) What is the percentage chance that a fair process would still have resulted in the claimant's dismissal?"*

166. Deductions for contributory fault (in an unfair dismissal claim) are addressed differently depending on whether was are looking at the basic award or compensatory award. For the basic award, section 122(2) of the Employment Rights Act 1996 applies:

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

167. And in respect of the compensatory award, s123(6) applies:

> *"Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the*

amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding."

168. The tribunal must beware the risk of engaging in some sort of double reduction in the compensatory award for the same fault under both Polkey and s122(2) and s123(6) (Rao v Civil Aviation Authority [1994] ICR 495 & Wilkinson v Driver and Vehicle Standards Agency [2022] EAT 23).

H. DISCUSSION AND CONCLUSIONS

Introduction

169. We will address the claimant's claims broadly in chronological order: starting with the claims of a failure to make reasonable adjustments and ending with the claims in relation to his dismissal.

170. Before doing so, we note that one striking feature of this hearing has been that both parties took a noticeably stronger line in their closing submissions than they had done in cross-examination. For the claimant, Ms Loutfi's position in closing submissions was that the allegations of collusion and dishonesty had in some way been invented or at least developed in an attempt to ensure that there was a reason for the claimant's dismissal that did not relate to his disability. That position was never put to any of the respondent's witnesses. For the respondent, Mr Peacock in his closing submissions suggested that the claimant had been exaggerating the effects of his disability in an attempt to avoid the consequences of his misconduct. This was not put to the claimant in cross-examination. We will consider the significance of both these points where necessary in our discussion and conclusions.

171. On the question of reasonable adjustments, much of what we will need to determine is highly fact-sensitive in circumstances where it is common ground that the claimant could understand and communicate to some extent in written English, with the dispute and the question of adjustments relating to the degree to which he could satisfactorily communicate in written English in any particular situation or in respect of any particular material.

Reasonable adjustments

The first failure to make reasonable adjustments claim – 9(a) – initial interview notes

172. This is: "*the Claimant was provided with interview notes/documents and interview notes on 17 March 2020 by Anna Walsh and only given three days to respond. The Claimant could not read or understand the notes and needed more time to get support.*"

173. The respondent accept that the first sentence of this occurred: the claimant was provided with interview notes on 17 March 2020 and given only three

days to respond. The respondent's position is that this PCP did not put the claimant at a disadvantage (he in fact returned the notes amended within two days) and that if it did the respondent could not have been expected to know that this requirement put him at any disadvantage.

174. In her submissions Ms Loutfi says *"… it would have been reasonable in all the circumstances for AW to signpost the PCP as flexible for C given the anticipated difficulties with his understanding the documents and complying with the deadline. AW knew the extent of C's English language and communication / comprehension issues (having met twice with C, including without an interpreter on 4 March) and could not have sent the original deadline without being aware that C would struggle to comply with this written directive."*

175. The claimant says this in his witness statement:

> *"When I received the notes of this meeting, with a letter on page 126, I was given three days to check and return, as Anna had met me and knew I needed an interpreter support this was unrealistic, as she had found it is not easier to find an interpreter."*

176. On this point we find that the claimant has not demonstrated that the requirement to respond to the notes within three days has put him at a disadvantage. He does not describe that disadvantage in his witness evidence, and he was in fact able to comply with the deadline, providing his response early. There was no failure to make reasonable adjustments on this point.

The second, third and fourth failure to make reasonable adjustments claim – 9(b), (c), (d) – 1, 11 & 14 May 2020

177. The second, third and fourth claims of a failure to make reasonable adjustments involve very similar issues. They are, respectively:

177.1. *"the claimant was provided with witness statements on 1 May 2020 by Anna Walsh and only given three or five days to respond. The claimant could not read or understand the notes and needed more time to get support."*

177.2. *"The Claimant received an investigation statement from Laura McManus on 11 May 2020. The Claimant could not read or understand the statement."*

177.3. *"The Claimant received the outcome to his bullying and harassment complaint on 14 May 2020. The Claimant could not read or understand the report, and particularly the terms 'uphold' and 'not uphold'."*

178. These, of course, led to the matters for which the claimant was eventually disciplined.

179. On this, Mr Peacock says:

> *"C was asked to provide any comments on the B&H investigation material within 5 working days. He did not ask for an extension of time, which would have been given had he done so.*
>
> *He asked Mrs Walsh if he could seek support from his daughter. She agreed. He did not then go back to Mrs Walsh to make any request for further support. Had he done so, it would have been arranged.*
>
> *He was able to email Mrs Walsh on 11 May 2020 with comments on the B&H investigation material and sent to her a separate document with comments on each of the individuals who had been interviewed.*
>
> *Accordingly, there was no failure to make a reasonable adjustment."*

180. He relies on similar points in relation to 9(c) and 9(d).

181. The claimant's statement is much clearer about difficulties with these documents than it is with the earlier notes. He says:

> *"May 2nd I received the witness statements, I was given only till the Friday 8th May to respond, with no access to support, and being in the middle of lockdown, lone working and overtime as the parcel demand increased, it felt like an impossible thing to get help in time and respond with informed answers.*
>
> *May 3rd 2020– I was confused about what the statements said, I was shocked to see that others like Paula, had seen the 'monkey noises' I was not comfortable to talk to my daughter, Paula was the only person I could seek help from and I can lipread her.*
>
> *4th May 2020- … I get Laura's statement and only 5 days to respond, on the 6th of May I receive the hard copy in the post. There was no adjustment given to seek interpreting support, or any options to raise an issue about responding. In this case I did have some points that I disagreed with, but because I had limited time, I was not able to respond to this statement … no reply.*
>
> *6th May 2020 … I manage to email Anna, in this email I disclose my shock about monkey noises being done behind my back. Which was distressing for me. In this email I also say I am trying to get an interpreter and even suggested my daughter as I was not sure what to do, she could see I was struggling to respond to the statements myself. Her response was short to use my daughter, she gave no support from RM of how I could respond to these statements ...*

12 May 2020 … I received the decision letter and again only given 10 days to respond and was only provided with a number again to seek support.

12 May 2020 … Aw said I needed to respond in 10 days, and that my daughter was acceptable to use as an interpreter, when this is not appropriate or fair."

182. In this period the claimant wrote to Ms Walsh to express some of his difficulties. On 6 May 2020 he said:

"Thanks for two emails on Friday from other staffs statements and Monday from Laura McManus...

Sorry didn't reply on that day due to over workloads (4 hours overtime on Monday) and yesterday was 2 hours overtime... due to covid-19 no more vanshare ... etc ...

…

I am email you on my morning break.. .am on day off tomorrow and I was trying get BSL interpreter from my local at my house to talk you and will be difficult due to social distances due to covid-19 and will type on each staffs statement tomorrow morning and try hv chat line with you maybe FaceTime on my iphone??? or ask my daughter to do interpreter and I was hope you could think of something with Skype or FaceTime or signlive... cos I hv ATW agree with DWP to cover cost of interpreter etc ..."

183. So in this the claimant is saying that he had not replied in time because he was overworking, not because of any difficulty in understanding the materials. He talks of trying to get hold of a BSL interpreter "*to talk* [to] *you*" rather than to understand the materials he had been presented with, or alternatively using "*ask my daughter to do interpreter*".

184. We have seen before that Ms Walsh's response was "*If your daughter could help you to put your response to me in writing that would be best and that is what fits the process. A written response is all I need please.*"

185. So Ms Walsh was picking up on the idea that the claimant wanted to talk to her, and telling the claimant that his response to the various statements should be in writing, rather than by talking to her through a BSL interpreter.

186. Ms Loutfi says that *"… it would have been reasonable in all the circumstances for AW to signpost the PCP as flexible for C given the anticipated difficulties with his understanding the documents and complying with the deadline and/or to meet with C at his request to discuss the precise issues he was facing"*.

187. On 11 May 2020 the claimant gave his response to the witness statements, saying "*I have trying my best to type it myself and I am sure that you will understand and amend english on my statement in correct grammer.*" As previously noted he provided what appears to be a full commentary on the witnesses and their statements.

188. Overall this presents a complex picture. The claimant's position that he did not understand the documents and was driven to consult Ms Watts in an effort to understand them was never really challenged in cross-examination by Mr Peacock, and the most extreme point of the respondent's position – that the consultation was in fact a disreputable attempt at collusion that the claimant subsequently attempted to cover by a false reference to limitations supposedly arising from his disability – was certainly never put to him or suggested at any point by the respondent during the claimant's evidence.

189. The claimant described to us at some length the difficulties he found himself in, and why he felt it necessary to go to Ms Watts. We find on the balance of probabilities that the PCPs alleged at paras 9(b)-(d) did put the claimant at a disadvantage as a result of his disability, for the reasons set out against each PCP.

190. But at least in the context of reasonable adjustments, the question then becomes whether Ms Walsh ought reasonably to have known that the claimant was put at a disadvantage. It is clear from the claimant's communications with her that his written English was not perfect, although as Ms Walsh said that would not necessarily be unusual or a symptom of a disability in respect of the respondent's workforce more generally. The claimant was communicating with her in written English, sufficient at every point to get his point across. His communications around this time appeared to be addressing the matters that Ms Walsh wanted him to address, and his reference to wanting to engage a BSL interpreter was to engaging an interpreter to speak to Ms Walsh, not to interpret the written materials for him so, not without some hesitation, we have concluded in respect of these three matters that while they put him at a disadvantage the respondent did not have and could not reasonably be expected to know that the claimant was at that disadvantage because of his disability.

The fifth failure to make reasonable adjustments claim – the initial disciplinary meeting

191. The fifth failure to make reasonable adjustments is said to arise from the following PCP: "*The Claimant attended a fact finding meeting on 12 August 2020 without an appropriate interpreter and pressured into answering questions he did not understand.*"

192. This relates to the claimant's first meeting with Mr Hanham – the so-called "seeking an explanation" meeting.

193. Mr Peacock accepts that the claimant was put at a disadvantage in this meeting, but says:

> *"Mr Hanham needed to act quickly in view of what he understood was the potential seriousness of the matter, and the fact he needed to act consistently with Paula Watts. He was unable to arrange a BSL interpreter at short notice. He therefore sought guidance from the Delivery Office Manager, Clyde McHardy, as to C's capability to attend a 'Seeking an Explanation' meeting."*

194. Should Mr Hanham have realised that the claimant was put at a disadvantage by attending the meeting "*without an appropriate interpreter*"? Mr Hanham says:

> *"When Martin attended the discussion I explained to him verbally why I was there and I explained I had some written questions. Martin lip read from me and indicated that he understood what I was saying by nodding. Martin also nodded to confirm he understood the written questions and proceeded to write down his answers ...*
>
> *Martin read the questions I had prepared for him and answered them in writing … Martin's initial comments are handwritten under each question. I understand that Martin later had the questions translated to him on 9 September 2020 and further comments were added at that point but this was only after my involvement in the case, I did not see the comments at the time. Based on his initial responses Martin had confirmed he understood his bulling and harassment case documents were confidential, and he had shared witness statements with Paula Watts.*
>
> *I provided Martin with a written statement that confirmed he was being sent home and would be invited to a further fact-finding meeting with an interpreter present ...*
>
> *At no point during the initial discussion meeting did Martin give me any indication that he was unhappy to proceed without an interpreter or he had difficulty reading any of the written questions."*

195. The claimant says:

> *"I was asked to a go to a meeting room with … someone called Peter Hanham, I have never met him before. There was not interpreter, and I was not sure what it was about, I thought maybe just to talk to me about my appeal. It is embarrassing as a Deaf person to say no I can't read, and because I felt it wasn't something important, you can see on page166 my reason when I finally had this question interpreted to me on the 9th Sept 2020."*

196. We see in this something that often arises in claims of this nature: "*it is embarrassing as a Deaf person to say no I can't read*". That leads on to the respondent's points about the claimant not asking for adjustments, but on the question of whether the respondent should have realised that the claimant was put at a disadvantage it does raise the point that the claimant may well have given Mr Hanham the impression that his abilities were better than they were. Of course, employers should be aware of a possible tendency on the part of employees to underplay the effect of their disability, but in these circumstances it is difficult to see how Mr Hanham should have realised that the claimant was in difficulties in circumstances where the claimant himself was reluctant to admit the full extent of his difficulties. At the point of the meeting Mr Hanham could not reasonably have been expected to know that the way in which he proceeded was putting the claimant in difficulties.

The sixth failure to make reasonable adjustments claim – the second disciplinary meeting (18 August 2020)

197. The sixth failure to make reasonable adjustments claim is that "*The Claimant attended a fact finding meeting on 18 August 2020 but the interpreter was not a native interpreter (i.e. had a different local dialect).*"

198. It is correct to say that the BSL interpreter at this meeting had a different local dialect to the claimant. We do not think this is quite the same as saying she "*was not a native interpreter*", which seems to us to be a separate concept to the question of dialect. We accept that the provision of an interpreter who the claimant could not fully communicate with would put him at a substantial disadvantage at that meeting in comparison with someone who was not deaf. The difficulty is whether the respondent could reasonably be expected to know that the claimant was likely to be placed at a disadvantage due to the interpreter being from a different area and using a different dialect.

199. This brings us back to Mr Peacock's point about whether the respondent should have appreciated that there was a problem despite the claimant's lack of protest – but we do not see and it has not been suggested by the claimant how they could have been aware of this difficulty in the absence of any protest by him. There was no failure to make reasonable adjustments on this point as the respondent could not reasonably have been expected to know that the claimant would be placed at the disadvantage concerned.

The seventh failure to make reasonable adjustments claim – the conduct meeting

200. The seventh failure to make a reasonable adjustment is said to be "*Although a suitable interpreter was provided at the meeting on 8 September 2020, she was only made available during the meeting and the Claimant was not given time with the interpreter to prepare his case. The Claimant avers that because of this he did not understand the seriousness of the charges.*"

201. The disadvantage said to arise here is that the claimant did not understand the seriousness of the charges. The claimant puts the point somewhat differently in his witness statement:

> *"I received a letter for this meeting on the 1st Sept. I was not given enough time to be able to consult with a rep with an interpreter, review any policies to ensure I attended this meeting fully informed. I was given 7 days. Also, when the interpreter arrived, she was not informed about the context of the meeting and was not aware of the information to enable her to do her job accurately."*

202. The claimant covers the meeting in question across four paragraphs of his witness statement. While he makes various points in relation to the meeting he does not at any point say that not being given time with the interpreter prior to the meeting meant that he did not understand the seriousness of the charges.

203. What evidence there was as to whether the claimant understood the seriousness of the charges is not mentioned in Ms Loutfi's closing submissions, which simply say "*it would have been reasonable … to have given C time to meet with* [the interpreter] *in advance of the conduct interview and allow C enough time to make his case through WW at the meeting*".

204. The claimant has not demonstrated that he suffered the disadvantage claimed, so this claim of a failure to make reasonable adjustments does not succeed.

Dismissal

Introduction

205. It is the claimant's position that his dismissal was both an act of discrimination arising from a disability and unfair.

Discrimination arising from disability

206. The claimant says that what arose from his disability was that "*he failed to understand that he should keep his bullying and harassment case confidential and the potential consequences of failing to do so*".

207. So the question becomes (i) whether the claimant failed to understand that he should keep his bullying and harassment case confidential and the potential consequences of failing to do so, (ii) if so, whether that was a matter arising from the claimant's disability and, if so, (iii) whether the claimant was dismissed (in whole or in part) for that.

208. An immediate problem with this is that we do not think that they claimant has ever said that he failed to understand that he should keep his bullying and

harassment case confidential nor that he failed to understand the consequences of failing to do so.

209. In his witness statement he makes two points that might allude to this. He refers to Ms Walsh's email of 17 April 2020 which says:

> *"You should not be discussing this case with Paula or anyone else.*
>
> *You could be seen to be interfering with the investigation.*
>
> *Please refer to my letter of 16 March 2020.*
>
> *The Bullying and Harassment policy expects that all employees will maintain confidentiality both during - the process and after it ends. Once again, may I remind you that you must not discuss or share information regarding this case with any other parties, as this could affect the outcome."*

210. The claimant says this about that email in his witness statement. It was:

> *"an email I did not understand as what does 'parties' mean and she said to not discuss with Paula, what did that mean? I was very confused at this point; the country was under lockdown as a result I had not means to access the usual social work support and Anna did not offer any interpreting support to ensure I understood her warning."*

211. The subsequent email from Ms Walsh (1 May 2020) said:

> *"I have now concluded the meeting and information gathering stage of my investigation into the above complaint and in line with the Bullying & Harassment procedure, I have enclosed for your attention the material arising during the course of the investigation, including all witness statements relevant to the investigation.*
>
> *This information has been shared with you in strictest confidence. The Bullying & Harassment policy states that all employees must maintain confidentiality both during the process and after its conclusion. Therefore you must not discuss or share any of this information with any other parties, furthermore you must not contact either directly or through any third party any individual in relation to the statements provided.*
>
> *Failure to comply with the above may lead to you being subject to separate action under Royal Mails Conduct Code up to and including dismissal."*

212. Of this he says:

> *"Again it was not clear about what does 'parties' mean? It says "employees must maintain confidentiality" what does this again mean confidentially from who and what?"*

213. We accept that the lack of literacy in written English that was a consequence of the claimant's disability was likely to mean that he struggled with unusual language such as a reference to "*parties*", and while he queries in his statement what "*do not discuss with Paula*" meant there has never been any suggestion that he did not understand the basic instruction not to discuss the matter with her. At the start of his cross-examination Mr Peacock took the claimant through a number of instructions he had been given to keep matters in relation to his complaint confidential, and the claimant agreed that he had been told that and understood it. The claimant agreed with Mr Peacock's suggestion that "*you are in no doubt how important confidential was*" (in reference to one of those confidentiality warnings).

214. We also note that on being confronted by the respondent with his supposed misconduct the claimant has never said that he did not understand that he should keep his bullying and harassment case confidential, nor that it would be a serious matter if he did not do so. His position was that he had been given permission to share it with Ms Watts – either expressly or by implication when he had been given permission for his daughter to help him. The fact that he understood that permission was needed suggests that he knew it otherwise had to be kept confidential and it was a serious matter if it was not.

215. Much of the discussion during the hearing was to the effect that the claimant may have had no choice but to consult with Ms Watts given the lack of literacy in written English that was a consequence of his disability and the lack of BSL interpretation either provided by the respondent or by his usual agency during Covid-19 lockdowns – but his claim of discrimination arising from disability is not about that. It is about whether he appreciated in the first place that the material should have been kept confidential. He did understand that, so his claim of discrimination arising from disability cannot succeed.

Unfair dismissal – the reason for dismissal

216. As Ms Loutfi says in her closing submissions, "*the factual matrix surrounding C's dismissal is complex*".

217. The first question that arises on an unfair dismissal case is whether the respondent has shown the reason for dismissal and whether that reason is a potentially fair reason.

218. We do not understand it to be disputed by the claimant that the reason for his dismissal was a reason relating to his conduct. The points made by Ms Loutfi in her closing submissions go to the procedure adopted by the respondent and quite how substantial the respondent could properly have considered that misconduct to be. It is clear to us that the respondent has shown that his

dismissal was for a reason related to his conduct, and that this is a potentially fair reason for dismissal.

219. Having said that, it is our finding that the respondent's decision to dismiss the claimant in these circumstances was unfair, and there are multiple reasons for this.

Unfair dismissal – the disciplinary allegations

220. We will start with the question of the allegations the claimant had to answer to. We consider that the respondent has never been sufficiently clear about what allegations are, and that this has had practical consequences for the disciplinary process.

221. Setting aside the question of the claimant's understanding in the absence of proper BSL interpretation, even the written documentation is never clear about what the allegations were, and this in turn has caused confusion not just with the claimant but also with the respondent's disciplinary and appeal officers.

222. The allegations have been formally described in the following ways:

222.1. In the "*invitation to a fact-finding meeting*" (date unclear – between 12-18 August 2020):

> *"… server breach off the confidentiality act."*

222.2. In the "*precautionary suspension*" letter (probably 18 August 2020):

> *"alleged severe breach General Data Protection Regulation 2018."*

222.3. In the notes of the fact-finding meeting (18 August 2020):

> *"… a severe breach off the confidentiality act which in turn is a direct act off gross misconduct ..."*

222.4. In follow up to the fact-finding meeting (27 August 2020):

> *"… a Severe Breach of General Data Protection Act 2018 …"*

222.5. In the invitation to a formal conduct meeting (1 September 2020):

> *"… allegations off Gross Misconduct in relation to a Server Breach of General Data Protection Act 2018 ....*
>
> *1. Gross Misconduct*
>
> *2. Dishonesty*
>
> *3. Collusion"*

222.6. In the introduction to the "gross misconduct interview" (8 September 2020):

> *"… gross misconduct in relation to a severe breach of general data protection act 2018 including collusion and dishonesty."*

222.7. In the invitation to a decision meeting (25 September 2020):

> *"… allegations of gross misconduct in relation to a severe breach of general data protection act 2018."*

222.8. In the decision letter (undated, probably 2 October 2020):

> *"1. Dishonesty*
>
> *2. Breach of data protection Act and sharing information via social media*
>
> *3. Collusion with Miss Watt's"*

223. It is not necessary for a respondent to be entirely consistent in the allegations, and there will be many occasions in which the allegations will very properly change during the course of an investigation or other process, but what this serves to illustrate is that at least so far as the formal notifications are concerned the respondent has never been clear about exactly what it is that the claimant has done that is wrong.

224. That is particularly clear with the allegations of "*dishonesty*" and "*collusion*", which are never described other than by those single words (except for "*collusion with Miss Watt's*" in the outcome letter). But it is not just that. We have recounted in our fact finding apparent confusion that arose as to what material and when the claimant had shared with Ms Watts. To some extent this arises from the respondent not being direct or clear about what the actual allegation in this respect was, instead preferring to refer to it in general terms as a "*breach of general data protection act 2018*" or similar words. It is hardly to his credit that he did the thing the respondent considered to be misconduct twice, rather than once as they seemed to think, but it has never been spelled out exactly what the claimant shared with Ms Watts, despite the respondent having known of this and having the material in its hands right from the start. It is clear that that has led to confusion and to some extent the later allegations of dishonesty and collusion. It also seems to have led to a conclusion that the claimant had "*shared information via social media*", when there had never been any allegation that, nor any basis on which the respondent could have formed the view that the claimant had "*shared information via social media*". It was Ms Watts, not the claimant, who "*shared information via social media*".

225. This may not matter if the original investigation report (which was provided to the claimant) had been clear about what the allegations were, but it was not. The "case summary report" prepared by Mr Hanham includes the following:

> *"Martins clearly states that he did show Paula all the documentation from the Bullying & Harassment … outside her flat ...*
>
> *Martin states that he was not present nor saw Paula take any photo's off Witness statements but under-the grounds off probability he would of either been present or allowed Paula to take the documents out off his sight to enable her to this Martin states that "at no point did he leave Paula unattended with" the case paperwork, so it does raise questions as to weather he is telling the truth or not."*

226. In this section we see not just a lack of clarity about the allegation of sharing material with Ms Watts but the result of the investigator being unclear about what the allegation was. The first section relates to the claimant's disclosure of the investigation report, and the second section conflates the first incident (the claimant dropping off the witness statements) with the second (his sharing of the investigation report). The investigator's confusion on this point leads them to question whether the claimant is being truthful.

227. The dishonestly allegation appears in the decision report as "*Dishonesty around having permission from ICM Anna Walsh to share B&H notes*". That is somewhat clear, but in her appeal report Ms Forde puts it in a rather different way:

> "*The evidence supports that Martin was dishonest in manufacturing a scenario to explain how his colleague Paula came to see one of the Bullying and Harassment documents. Martin would have known this explanation was inaccurate because it happened after the breach of confidentiality. Throughout the process Martin has continued with this false scenario despite other evidence confirming it is not the case. Therefore, the notification of dishonesty is proven.*"

228. Finally, collusion is described in the investigation report in the following way: "*during my investigation there was potentially evidence to show that Martin Strutt & Paula Watts had been in Collusion prior to both submitting H1 Bullying and Harassment form's against Laura McManus to the Gateway Team. I believe* [another Delivery Office Manager] *my have hard evidence to support my claim.*" So there was said to be collusion between the claimant and Ms Watts, which occurred "*prior to both submitting H1 Bullying and Harassment form's*", but what that collusion was is not specified.

229. The lack of clarity as to the "collusion" allegation is particularly striking and seems to have had significant effects in this case. As previously noted, in his investigation report Mr Hanham simply states that there was "*potentially*

evidence" to suggest collusion, and points to another manager having "*hard evidence to support my claim*".

230. We note that Ms Forde herself addressed the question of clarity of the allegations during her appeal. She says "*I noted the wording of the conduct notification could have been more specific. The original notification was, Gross Misconduct, Dishonesty and Collusion.*" Her answer to that is "*the invite to the formal conduct interview clearly stated that the allegation of gross misconduct related to a severe breach of General Data Protection Act 2018. This was also confirmed at the beginning of the formal conduct interview.*" But that ignores the two problems that we have found: that it was not clear what particular "*breach of the General Data Protection Act 2018*" was being considered, and there is no mention in her conclusion of the two allegations that we have found to be particularly unclear: dishonesty and collusion.

Unfair dismissal – the investigation

231. The lack of clarity around the allegations feeds into a number of ways in which we find the respondent's investigation to be inadequate, even taking into account the work done by Ms Forde during the appeal.

232. A difficult problem for the respondent in this respect is the interface between Mr Hanham's investigation and Mr Foster's disciplinary hearing.

233. First, even by the time Ms Forde had completed her work on the appeal there remained a lack of clarity as to what the claimant had disclosed to Ms Watts and when and under what circumstances he had disclosed it. Setting aside the question of permission, we have yet to find an aspect of this where the claimant was asked a clear question about it but gave a false answer. The problem was that clear questions were not asked. The respondent never properly got to the bottom of exactly what the claimant had disclosed when and under what circumstances.

234. One reason for that seems to be the disconnect between the work of Mr Hanham and Mr Foster. When the claimant told Mr Hanham "*I lack the correct support in terms of interpreter provision*" and "*I feel that we would benefit from a second meeting with an interpreter booked*". Mr Hanham said "*should the case be taken to the next level it is then at this point where you will have a further opportunity to represent yourself with the assistance off an interpreter & CWU representative.*" But we then see that Mr Foster says he will not be revisiting the "*very thorough and detailed*" questions asked by Mr Hanham. So the claimant never got the opportunity he had sought for a further meeting with Mr Hanham, and Mr Foster was not willing to offer the equivalent himself, despite what Mr Hanham said about the claimant "*having a further opportunity to represent yourself*".

235. By the point of writing to Mr Hanham (which post-dates all but the last claim of a failure to make reasonable adjustments) the claimant had identified

problems with the interpretation during the investigation process, but Mr Foster was not willing to revisit any of that. As we have said, this, building on the confusion about the allegations, led to further confusion as to what the claimant had actually done which was never resolved even by the time Ms Forde's appeal was complete.

Conclusions on unfair dismissal

236. Thus the claimant's dismissal was unfair as a result of a number of related factors. First, the disciplinary allegations were insufficiently clear. Second, the respondent never properly investigated what it was that the claimant had shared with Ms Watts and when it had been shared, and did not fully explore with the claimant the allegations of dishonesty and collusion. The respondent did not carry out as much investigation as was reasonable into the claimant's alleged misconduct. Finally, due to the lack of a sufficient investigation the respondent had no reasonable grounds from which to conclude that the claimant had acted in collusion with Ms Watts.

Polkey and contributory fault

237. We are then asked to address questions of Polkey and contributory fault.

238. While we have been critical of the respondent's processes and the clarity of the allegations and investigation, there is at the heart of this claim no doubt that the claimant did something that he had been told not to do and knew he should not do – that is, share material from the investigation with Ms Watts. In fact, he did so twice, a point that only emerged with any clarity during this hearing.

239. That is something that the respondent could properly have regarded as at least being misconduct. As previously noted, however, we have to beware the risks of double counting and improperly making a Polkey and contributory fault deduction for essentially the same conduct.

240. Looking first at a Polkey deduction, we have to assess what would have happened had this employer acted in a fair manner. If the respondent had acted fairly, they would have discovered that the claimant had twice acted in breach of its confidentiality rules. They would also have found no basis for any allegations of dishonesty or collusion.

241. In assessing what might happen next, we note that the respondent took a strong line on such breaches of confidentiality, but also that the claimant had some mitigation based on the circumstances he found himself in. In those circumstances we find that it would have taken the respondent a further four weeks to conclude a fair procedure (essentially by agreeing to the claimant's request to re-do his investigation interview with a suitable interpreter), following which there is a 75% chance that the respondent, acting fairly, would have decided to dismiss the claimant.

242. We must then consider the question of a further reduction for contributory fault.

243. The difficulty we have at this point is that the claimant's contributory fault is essentially the same matter that we have taken into account in our Polkey deduction – he had committed misconduct that could have resulted in a fair dismissal. It seems to us that in those circumstances to make any reduction from either the basic or compensatory award would be to penalise the claimant twice for the same conduct. In Wilkinson v Driver and Vehicle Standards Agency [2022] EAT 23 Lord Fairley said:

> *"it is … necessary to avoid any element of double-counting of the same factors in a way which is unfairly detrimental to the Claimant"*

244. We consider that to impose both a Polkey and contributory fault deduction for the same behaviour would, in this case, be double-counting. It would be making deductions for the same thing. Both a deduction from the basic award and compensatory award are only to be made to the extent we consider it "*just and equitable*" and in those circumstances we will not make a deduction for contributory fault from either award. The Polkey deduction is sufficient to give a "just and equitable" result.

Remedy hearing

245. Given that this decision has been provided in writing rather that at a hearing there has been no opportunity to discuss arrangements for a remedy hearing. I invite the parties to agree orders for preparation for a remedy hearing and submit any agreed orders on or before 19 December 2025, along with dates to avoid for any hearing in the period February – August 2026 inclusive.

Approved by Employment Judge Anstis
1 December 2025

JUDGMENT SENT TO THE PARTIES ON

2 December 2025

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FOR THE TRIBUNAL OFFICE

Notes

All judgments (apart from judgments under Rule 51) and any written reasons for the judgments are published, in full, online at *https://www.gov.uk/employment-tribunal-decisions* shortly after a copy has been sent to the claimants and respondents.

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

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

APPENDIX – LIST OF ISSUES

Unfair dismissal

1. Did the Respondent have a potentially fair reason for dismissing the Claimant?

    a. The Respondent avers the reason for the Claimant's dismissal was conduct in line with s.98 (2)(b) Employment Rights Act 1996

2. If so, did the Respondent have a genuine and reasonable belief of the Claimant's misconduct?

3. If so, were the reasonable grounds upon which to justify that belief?

4. If so, did the Respondent carry out such investigation as was reasonable in all the circumstances of the case?

5. If so, did the decision to dismiss the Claimant fall within the range of reasonable responses open to a reasonable employer in the circumstances?

6. If not, did the Claimant contribute to his dismissal through his conduct?

7. If the dismissal is found to be procedurally unfair, would the Claimant have been fairly dismissed in any event had a fair procedure been followed?

Disability discrimination – failure to make reasonable adjustments

8. Did the Respondent require the Claimant to attend interviews and review documentation in respect of both his bullying and harassment case and conduct case?

9. If so, did the requirement(s), but for the provision of an auxiliary aid, put the Claimant at a substantial disadvantage in relation to persons who are not disabled? The Claimant avers he was put to the following disadvantages:

    a. The Claimant was provided with interview notes/documents and interview notes on 17 March 2020 by Anna Walsh and only given three days to respond. The Claimant could not read or understand the notes and needed more time to get support.

    b. The Claimant was provided with witness statements on 1 May 2020 by Anna Walsh and only given three or five days to respond. The Claimant could not read or understand the notes and needed more time to get support.

    c. The Claimant received an investigation statement from Laura McManus on 11 May 2020. The Claimant could not read or understand the statement.

    d. The Claimant received the outcome to his bullying and harassment complaint on 14 May 2020. The Claimant could not read or understand the report, and particularly the terms 'uphold' and 'not uphold'.

    e. The Claimant attended a fact finding meeting on 12 August 2020 without an appropriate interpreter and pressured into answering questions he did not understand.

    f. The Claimant attended a fact finding meeting on 18 August 2020 but the interpreter was not a native interpreter (i.e. had a different local dialect).

g. Although a suitable interpreter was provided at the meeting on 8 September 2020, she was only made available during the meeting and the Claimant was not given time with the interpreter to prepare his case. The Claimant avers that because of this he did not understand the seriousness of the charges.

10. If so, did the Respondent know or ought to have known that the Claimant was put to the above disadvantages?

11. If so, did the Respondent take such steps to provide the auxiliary aid?

a. In respect of 9 a-d, The Claimant avers that he should have been provided with a suitable interpreter to go through the documents with him and given more time and support.

b. In respect of 9 e and f, the Claimant should have been provided with a suitable interpreter, sharing the same dialect as the Claimant.

c. In respect of 9 g, the Claimant should have been provided with an suitable interpreter in advance of the formal conduct interview to assist him in preparing his case and understanding the charges against him.

Disability discrimination - discrimination arising from disability

12. Did the Respondent dismiss the Claimant because of something arising from the Claimant's disability? The Claimant was dismissed for breaching GDPR, dishonesty and collusion in that he shared confidential information relating to a bullying and harassment case despite being told this was prohibited.

13. If so, what was the something arising from the Claimant's disability? The Claimant avers that as a consequence of his disability he failed to understand that he should keep his bullying and harassment case confidential and the potential consequences of failing to do so.

14. If so, was the Respondent's treatment of the Claimant a proportionate means of achieving a legitimate aim?