EMPLOYMENT TRIBUNALS

Claimant	**Respondent**
Mr L Trivett	East Riding of Yorkshire Council

Heard at: **Hull** **On: 22, 23, 24, 25 February 2021**

Before: **Employment Judge Davies**
Ms J Lancaster
Mr K Lannaman

Appearances
For the Claimant: **In person**
For the Respondent: **Mr P Starcevic (counsel)**

RESERVED JUDGMENT

1. The complaints of unfair dismissal, failure to make reasonable adjustments for disability, disability-related harassment and unfavourable treatment because of something arising in consequence of disability are not well-founded and are dismissed.

REASONS

Introduction

1. These were complaints of unfair dismissal, failure to make reasonable adjustments for disability, disability-related harassment and unfavourable treatment because of something arising in consequence of disability brought by the Claimant, Mr L Trivett, against his former employer, East Riding of Yorkshire Council. The Claimant represented himself, and the Respondent was represented by Mr Starcevic, counsel.

2. There was an agreed file of documents and everybody had a copy. We admitted a small number of additional documents by agreement during the course of the hearing.

3. The Tribunal heard evidence from the Claimant and from Mr S Brackenbury, Mr P Tripp, Mr G Robinson, Mr A Harper, Mr N Lemmon, Mr S Roberts, Mr N Robson, Mr J Abbott and Ms E MacRae for the Respondent.

The Claims and Issues

4. The Respondent admitted that at all relevant times the Claimant had a disability within s 6 Equality Act 2010 by virtue of COPD. It admitted that he had a disability by virtue of depression from September 2019 onwards, but that admission was made on the basis of the expert report, which approached the question on an incorrect basis (see below). We agreed at the outset that the Tribunal would need to make a finding about this.

5. The Claimant confirmed at the start of the hearing that he said he had been treated unfavourably because of two things that arose in consequence of his disability: (1) making mileage claims for the wrong date because of problems with memory and concentration; and (2) excessive use of the internet as a form of escapism.

6. The issues for the Tribunal to decide were therefore:

Disability

6.1 At the relevant time did the Claimant have a disability by virtue of depression:
- 6.1.1 Did he have a mental impairment?
- 6.1.2 Did it have a substantial adverse effect on his ability to carry out day-to-day activities or would it have done without medical treatment?
- 6.1.3 Were the effects long-term, i.e. had they lasted 12 months, or were they likely to last 12 months or to recur?

Unfavourable treatment

6.2 Did the Respondent treat the Claimant unfavourably by subjecting him to an investigation, starting a disciplinary process and dismissing him?

6.3 If so, was it because of something arising in consequence of a disability (depression), namely:
- 6.3.1 making mileage claims for the wrong date because of problems with memory and concentration; and /or
- 6.3.2 excessive use of the internet as a form of escapism?

6.4 Was the treatment a proportionate means of achieving a legitimate aim, namely maintaining trust in the honesty and good conduct of managers and employees?

6.5 At the relevant time, did the Respondent know or could it reasonably have been expected to know that the Claimant had the disability?

Unfair dismissal

6.6 What was the reason for the Claimant's dismissal? Did the Respondent have a genuine belief that he committed misconduct?

6.7 If the reason was misconduct, did the Respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss him, having regard in particular to whether:
- 6.7.1 there were reasonable grounds for that belief;
- 6.7.2 at the time the belief was formed the Respondent had carried out a reasonable investigation;
- 6.7.3 the Respondent otherwise acted in a procedurally fair manner;

6.7.4 dismissal was within the range of reasonable responses?

Time limits

6.8 Were the discrimination claims relating to things other than dismissal brought within the three-month time limit in s 123 Equality Act 2010?

6.9 If not, is it just and equitable to extend time for bringing them?

Harassment

6.10 Did the Respondent subject the Claimant to unwanted conduct by Mr Brackenbury approaching him every time he was late in October and November 2019 and shouting at him as set out at paragraphs 13 to 15 of the Claimant's further particulars of claim?

6.11 Did the conduct relate to disability, i.e. his COPD?

6.12 If so, did it have the purpose of violating his dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him?

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

Reasonable adjustments

6.14 Did the Respondent's PCP of requiring the Claimant to attend work at 7:30am put the Claimant at a substantial disadvantage in comparison with persons who are not disabled because his COPD meant that he would sometimes be late?

6.15 Did the Respondent take such steps as it was reasonable to take to avoid the disadvantage? The Claimant says it should have allowed him to attend work late in October and November 2019, as it had done previously.

The Facts

The parties and the policies

7. The Claimant, Mr L Trivett, worked for the Respondent, East Riding of Yorkshire Council and its predecessors, from 1986. From November 2013 onwards he was Grounds Supervisor Technical. He led teams of staff across the Council area and was on the Depot Security rota and other out of hours rotas.

8. The Respondent had comprehensive Grievance and Disciplinary Policies. It had a Business Car User Scheme, to recompense employees whose posts required them to use their private vehicle to perform their job. Users were entitled to a business car user allowance if they undertook a minimum of 5000 paid business miles per year. This allowance consisted of about £80 per month plus the Council's standard mileage rate. The allocation of allowance was to be reviewed annually based on a three-year average mileage.

9. The Respondent also had a Staff Travel, Accommodation, Subsistence and Expenses Policy. Under that policy employees were to be reimbursed at the appropriate rate for travel by private car. In addition, to encourage car sharing, employees were reimbursed 5p per mile for carrying passengers. The Policy required employees to maintain an official record of their journeys, giving full

details, the reason for the journey and the names of any official passengers. The Policy made clear that normal home to work mileage should be deducted from mileage claims, where employees did not attend their workplace at all, or made a business journey on the way.

10. Falsifying expenses claims was expressly defined as gross misconduct in the Disciplinary Procedure.

Disability

11. The Claimant has COPD, a medical condition that often results in breathlessness, especially when carrying out any physical exertion. The Respondent accepted that he met the definition of disability in the Equality Act 2010 at all relevant times as a result of that condition. The Tribunal agreed. One of the effects of the COPD was that taking a shower might cause the Claimant to experience breathlessness and need to use his inhalers. If that happened, it would take a little time for him to use the inhalers and recover.

12. In approximately 2010, the Claimant had an episode of poor mental health. He experienced low mood, irritability, fatigue, sleeping excessively, lack of motivation and excessive tearfulness. He was referred to Occupational Health by his manager and received counselling that led to a full recovery from his mental health difficulties. Two or three years later he had a further period of poor mental health, when he started to see the same symptoms. He requested a further Occupational Health referral, which took place. He received more counselling and thought that he had paid privately for some sessions as well. He made a full recovery over a period of months.

13. He experienced a further deterioration in his mental health in 2019. During that year he experienced a number of difficult life events. In March 2019 his mother passed away after a difficult period of illness. The following day, his father was the victim of a fraud and had his savings stolen. The Claimant had to deal with the arrangements for his mother's funeral and the issues arising from his father's having been the victim of fraud. By around July 2019, the Claimant noticed that his mental health was deteriorating beyond the normal grieving process he would have expected. He had developed low mood, feelings of exhaustion, tearfulness, social withdrawal, loss of interest, lack of motivation, irritability, loss of concentration and some symptoms of anxiety. In August 2019 his wife was made redundant from her job of 20 years. The Claimant's mental state declined further and he experienced some suicidal thoughts in September 2019.

14. In October 2019 he was offered the opportunity of a referral to Occupational Health (see further below) but he declined. He was referred to Occupational Health at the end of November 2019 and was seen by them in December 2019. By that stage he had already consulted his GP. The GP thought that he was suffering from anxiety with depression and started him on citalopram and CBT. He has remained on that medication, at an increased dose, since.

15. His condition adversely affected his daily activities. Starting in about July 2019, but more markedly from about September 2019 onwards, he struggled to concentrate and remember things. For example, he might forget to take his mobile phone with him or lock the house; or forget to do specific tasks at work, or make mistakes doing those tasks. He also stopped seeing his friends and socialising, for example watching football. He struggled interacting with people, even his wife. He struggled sleeping and was anxious, tearful and sensitive to criticism.

16. Dr P Vandenabeele, Consultant Forensic Psychiatrist, prepared an expert report for these proceedings. He was provided with an incomplete set of the Claimant's GP records. He noted that the Claimant had been prescribed antidepressant medication in 2014, 2015 and 2016 (although he noted that this medication can be used for other indications.) Dr Vandenabeele had seen detailed entries for the period September 2019 to September 2020. Based on the information available to him, Dr Vandenabeele concluded that the Claimant has a history of mental health difficulties characterised by symptoms associated with depressive disorders. During the first half of 2019 he developed difficulties with his mental health, which emerged against a background of stressful life events. These mental health difficulties were characterised by the presence of low mood and symptoms indicative of a depressive disorder. The doctor concluded that the Claimant developed a moderate depressive illness gradually during the first six months of 2019 and that it had fully developed by around September 2019. The Claimant did not seek help from his GP until the end of November 2019. The depressive disorder had persisted until the time of Dr Vandenabeele's examination (December 2020 and January 2021) although with some improvement. His expert view was that the Claimant had been suffering from a mental impairment that had a substantial effect on his day-to-day activities from September 2019 onwards.

17. Dr Vandenabeele concluded, on balance, that the Claimant was more likely than not experiencing difficulties with undertaking his work as a result of his mental health difficulties. The issues were caused by impaired concentration (which might manifest by him struggling with administrative tasks, recalling information, or making mistakes), lack of motivation, a tendency to isolate himself, and irritability. The doctor confirmed that it was outside his area of expertise to determine the cause or motivation for alleged false mileage claims. The Claimant's account that his concentration was impaired as a result of his depressive disorder was very plausible, and it was not uncommon for people experiencing depressive disorders to wrongly undertake tasks that they have previously successfully conducted because of concentration impairments or cognitive difficulties. However, it was outside the area of a psychiatrist to determine whether or not alleged falsification was the product of concentration disturbance. Dr Vandenabeele also expressed the view that it was possible that lack of motivation and difficulties concentrating on aspects of his work may have resulted in the Claimant engaging in activities such as accessing personal Internet sites as a form of passing the time and possibly appearing to be busy.

18. The Tribunal accepted in the light of that evidence that one effect of the Claimant's depression in September 2019 onwards was that he was using the internet for personal use at work as a form of "escapism." Another effect was that he found it difficult to concentrate and carry out tasks he had previously performed.

Events giving rise to the unfair dismissal claim

19. At the time of the events with which the Tribunal was concerned, the Claimant's direct line manager was Mr A Harper, Operations Manager, Street Scene Services. He reported to Mr S Brackenbury, Service Manager, Teams Projects and Grounds Technical. Mr Brackenbury reported, in turn, to Mr A Height.

20. Although Mr Harper was his line manager, the Claimant tended to go directly to Mr Brackenbury, and it seemed to the Tribunal that many respects it was in practice Mr Brackenbury who line managed the Claimant.

21. During September 2019 issues arose with one of the employees the Claimant managed, Mr Fish. The Claimant thought he should have been dismissed. That did not happen. The Claimant and Mr Brackenbury exchanged emails about that.

22. On 8 October 2019, the Claimant emailed the Respondent's HR team to complain that one of his managers had threatened him with demotion through the back door. It appears that the Claimant and Mr Brackenbury had had an exchange of words because the Claimant had been raising issues and blind-copying a number of senior managers into his emails. Mr Brackenbury had asked the Claimant to raise any issues he had with his own line manager, Mr Harper, and not to copy more senior managers in. The Claimant says that in the course of this discussion Mr Brackenbury threatened him with demotion. Mr Brackenbury disagrees. The Tribunal does not need to resolve that but there was clearly a deterioration in their relationship.

23. The HR advice was that if the Claimant did not feel able to discuss his concerns with his line manager, he could raise them with a more senior manager and on 9 October 2019, evidently acting on that advice, the Claimant emailed Mr Height to discuss what he described as threats made by one of his managers. The same day, Mr Brackenbury emailed the Claimant to apologise for the previous day's events. He said that things were said in haste by both of them and he apologised for his part.

24. There were evidently further issues with Mr Fish at the end of October 2019. On 28 October 2019 Claimant emailed Mr Brackenbury about it. He said that he had been suffering with stress for months and having to deal with this member of staff was not helping. The stress was now affecting the Claimant's personal health. The Claimant added that he felt isolated and said that his workload was getting to the point of overload. He felt that more needed to be done to support him through this difficult time. Mr Brackenbury replied the next day, 29 October 2019. Mr Brackenbury said that he was concerned about the difficulty the Claimant was having coping with his workload. He proposed to refer the

Claimant to Occupational Health, with his consent; remove Mr Fish from his supervision on an interim basis; and carry out a full review of the Claimant's role to assess his current workload.

25. The Claimant replied the same day. Rather than thanking Mr Brackenbury for the proposed actions, he said that he felt like Mr Brackenbury was saying he was not coping with work. He referred to issues in his personal life that had hit him hard and set out his complaints about Mr Fish. He went on, "I don't want referring to Occupational Health thank you. If I want counselling I'll organise this myself." He added that he "just needed some help now and again." Mr Brackenbury replied to say that he had noted the comments made but would continue with the measures he had put in place. He said that he would look at all aspects of the Claimant's role to ensure that his duties were in line with his job profile.

26. On 30 October 2019 emails were exchanged about a fencing contract. There was a meeting to be attended. The Claimant asked Mr Brackenbury if he wanted to attend and Mr Brackenbury said that he was okay for the Claimant to attend. The Claimant replied to say that he did not want to attend and did not feel comfortable dealing with contracts. On 4 November 2019 Mr Brackenbury replied to say that he was really busy and it would be really helpful if the Claimant attended the meeting. All he had to do was advise the colleague what he needed and report back. In the event Mr Brackenbury arranged for someone else to attend the meeting and he himself provided the required information. Mr Brackenbury and the Claimant also exchanged emails on 4 November 2019 about staffing issues in the Claimant's team. Mr Brackenbury told the Claimant to arrange an interview for one member of staff and organise recruiting a replacement for him. The Claimant replied to say that he had not done this in the past and did not feel he could do so. Mr Brackenbury replied to say that they would discuss this at their regular meeting on Friday but in the meantime the Claimant needed to find the paperwork for the recruitment. This was part of the Supervisor's role. If the Claimant did not know what to do he should ask HR. The Claimant asked whether Mr Brackenbury was setting him up to fail. Mr Brackenbury then emailed, "It's your job. Read your job profile. Stop sending emails…"

27. Mr Brackenbury sent a further email to the Claimant saying that in response to the Claimant telling him he had stress due to his high workload, Mr Brackenbury was carrying out a full review of his job. In the interim, one part of his role had been moved to Mr Robinson's area. Therefore, he would not be required to attend the associated meetings while the review was being carried on. He also expected the Claimant to appoint and recruit new staff within his team "otherwise we will have problems!" The Claimant replied disagreeing with Mr Brackenbury's email. He said that he had told him that a combination of personal issues and workload were creating stress. The majority of the work stress was down to Mr Fish. On top of this Mr Brackenbury was now trying to give him work that he had not done before. He said that he had found Mr Brackenbury unhelpful and uncaring and that Mr Brackenbury had made his mental health worse. He asked

what, “we will have problems” meant. He said that emails with no sign off or name were a form of harassment that he was very unhappy about.

28. Mr Brackenbury replied to say that the Claimant had told him that his duties were getting harder, with no-one to share his workload. He had compared his duties with those of other supervisors. Mr Brackenbury thought he was being helpful in agreeing to undertake a review of the Claimant’s current workload. The Claimant had refused two reasonable management requests that day: to attend the fencing contract meeting and to prepare a recruitment exercise. Mr Brackenbury had made alternative arrangements on this occasion, but that would not be acceptable in future. These duties were in the Claimant’s job outline and he expected him to carry them out. The reference to “problems” was to the consequences of failing to fill vacant roles. Mr Brackenbury said that he was disappointed by the tone of the Claimant’s email. He would raise it with Mr Height, because he was concerned by the Claimant’s casual use of the phrase harassment. The Claimant responded, expressing the view that Mr Brackenbury’s email was totally unfair and reiterating that he had told him about the difficulties in his personal life and the impact of that on him. Mr Brackenbury replied on 5 November 2019 agreeing that things needed to change and informing the Claimant that he had raised his concerns with Mr Height, who was also fully aware of his personal issues. The Claimant responded to say that this did not make him feel any better. He was worried about what plans were being made about him and his future.

29. Both the Claimant and Mr Brackenbury emailed Mr Height. The Claimant suggested that Mr Brackenbury was now adding to his workload and giving him more work to do, and he complained about the tone and content of Mr Brackenbury’s emails. The Claimant also emailed Mr Robinson and Mr Brackenbury about Mr Fish. He understood that Mr Fish had been removed from his supervision, but he wanted to know what the “real reasons” were and the implications of this for his role. Mr Brackenbury emailed Mr Height to say that he had been inundated with emails from the Claimant that day. The latest one, accusing him of harassment, was one step too far. He said that the Claimant had refused two simple management requests that day. He went on:

> … Lee is unreliable, displays poor judgment, he is rude and abrupt and generally someone that you cannot trust. I am sorry but I cannot continue with Lee on my team. I’ve always accepted that he is a difficult character to manage and I’ve done my best to make sure he regularly attends work. However, his poor attitude is taking its toll on me as I have to deal with him on a daily basis. And as you probably know he’s getting worse, hard to believe, but he is!
> I’m now at the point that I have to consider the pressure that Lee’s mood swings are having on me. I’m at the point where I need help. I have a difficult job to do at the best of times. Whatever you can do to sort this situation would be really appreciated.

30. Mr Brackenbury’s evidence to the Tribunal was that he had returned from annual leave to a heavy workload. He needed the Claimant to help him with the fencing and recruitment tasks. They were within his capability and job role. He was not

being asked to carry out a contracts or procurement role, just to provide information about what was required in practical terms. The tone of the emails went downhill because Mr Brackenbury was at the end of his tether. He felt that he would ask the Claimant to do things and he would just get replies that were rude and abrupt. He asked for the Claimant to be moved to another team. He needed a supervisor who could do the job he needed to be done.

31. The Tribunal accepted that evidence about how Mr Brackenbury felt. It seemed to us that the Claimant asked for help in his first email on 28 October 2019, but then simply challenged the sensible steps Mr Brackenbury identified to deal with the issues raised. Further, he was being asked to perform reasonable tasks within his remit and he was refusing to do so, perhaps in part because of his disability. In the process he was causing more work, not less, for Mr Brackenbury.

32. It was clear from Mr Brackenbury's email that he originally intended to carry out the Claimant's workload review, but his evidence was that he spoke to his Group Manager, Mr Height, who requested that Mr Robinson, Service Manager for Waste Collection, carry it out. This was because the Claimant had complained that his workload and support compared unfavourably to that of other supervisors, and Mr Robinson was well-placed to make a comparison. Also, Mr Height was aware that the Claimant had some issues with Mr Brackenbury, so felt Mr Robinson would be impartial. The Tribunal accepted that evidence. It was consistent with the fact that the Claimant had emailed Mr Height with concerns about Mr Brackenbury on 4 November 2019. Mr Robinson was based at the same depot as the Claimant.

33. In his witness statement, Mr Robinson said that he contacted Mr Brackenbury for a full list of the Claimant's roles and responsibilities. He met with the Claimant on 12 November 2020 to discuss his workload. They went through a list of questions line by line and attributed times spent to each part of the role. He sent the information to the Claimant so that he could add anything else he thought of, and send it back. The Claimant did so, and the notes of the meeting were signed on 13 November 2019. From the information obtained, he was concerned that the time attributed to the different aspects of the role was excessive and added up to more than the Claimant's contractual hours. He requested IT, phone and systems logs to assist with the profiling of the work, and discussed his concerns with Mr Height.

34. In cross-examination, his evidence was a little different. He started by saying that he was tasked with carrying out a workload review to find out what the Claimant's workload was and what help might be required. When he added up all the times the Claimant gave him about how long he spent doing tasks each week, it came to more than 60 hours per week. That did not add up. He was based at the same depot as the Claimant and was aware of the times he worked. His day was 7:30am to 4pm. That did not match the information the Claimant had given him.

35. He went on to say that Mr Brackenbury had provided him with the questions to ask the Claimant. The Tribunal noted that those questions were primarily about the Claimant's workload tasks and time spent on them, but the last few included questions about whether the Claimant made mileage claims in accordance with the relevant policy, and whether he was aware of the policy on personal use of the internet. Mr Robinson was asked why those questions were asked and was not able to give a cogent answer. It was put to him that he already knew about CCTV footage (see below) and the Claimant's personal internet usage before the review meeting. He said that he did not know about CCTV, but accepted that he did know about the Claimant's internet use. This was because he had asked IT for a systems report before carrying out the workload review meeting, because it would be relevant to it. Mr Height had authorised a systems report being provided. Mr Robinson said that the workload review quickly moved away from how busy the Claimant was, to concerns about mileage and internet use. When that happened, it became confidential and he did not discuss it with Mr Brackenbury.

36. Mr Brackenbury had not told the Tribunal in his witness statement or cross-examination that he wrote the questions for the workload review meeting. In his oral evidence he said that his only role in the review was to provide information to Mr Robinson about the Claimant's role, duties, time in the office and so on. He was not involved in the review. Mr Height instructed Mr Robinson to carry it out. Mr Brackenbury was asked whether he gave a remit for the review and he said that the remit was to go through the Claimant's job role and see if he was overworked. He did not mention writing the list of questions. Mr Robinson's evidence about the list of questions came after Mr Brackenbury's evidence, so he was not specifically asked about it.

37. In the light of that evidence, the Tribunal found that there were clearly already concerns about whether the Claimant might be in breach of Council policies before the workload review meeting took place, because Mr Robinson had already seen the systems report. That is why the list of questions included questions about the internet and mileage policies. The Tribunal found that Mr Robinson, Mr Brackenbury and Mr Height were aware of those concerns and that there was inevitably a level of discussion between them about those concerns before the workload review meeting took place. Mr Robinson asked Mr Height to authorise the printout of a systems report and he did so. The report showed that the Claimant had spent very substantial amounts of work time accessing non work-related internet sites. The Claimant was complaining that he was overworked but Mr Robinson was aware from working in the same depot that the Claimant worked his working hours from 7:30am to 4pm. It is inconceivable that Mr Robinson did not speak to Mr Height about these matters, at least in brief, before conducting the review meeting. We were satisfied that he also spoke to Mr Brackenbury about them. That explains why the last few questions were included and why Mr Robinson said that he stopped speaking to Mr Brackenbury about these matters once he was formally conducting a disciplinary investigation and the matter became confidential.

38. The Tribunal noted that the Claimant was not put on notice that there were already concerns before he was asked at the workload review meeting whether he knew about the mileage and internet policies. However, while that was in some respects unsatisfactory because Mr Robinson was not being straightforward with him, it is important to acknowledge that the Claimant was not trapped into giving incriminating information as a result. The Respondent already had the incriminating information about internet use.

39. After the meeting Mr Robinson carried out further investigations because the Claimant's account of the time he spent on each of his workload tasks exceeded his weekly hours, and because Mr Robinson was aware of the hours the Claimant worked. He asked for a review to be carried out of CCTV for random dates in October and compared with the Claimant's mileage claims.

40. These investigations revealed that the Claimant had made 14 mileage claims in October 2019. For two of those days, the CCTV showed that the Claimant's car had not left the depot at all between his arrival at work and his going home at the end of the day. On one day he had claimed 15 miles for a trip to carry out site inspections, but the CCTV showed that his car was absent for only 18 minutes. On one day he had claimed for two journeys when the CCTV showed that he had only made one. Mr Robinson obtained information about all of the Claimant's mileage claims since March 2017.

41. Further, the IT systems report showed that on 18 and 29 October 2019 the Claimant had carried out extensive personal use of the internet throughout the working day, viewing travel, holiday and other sites. On any view, this usage fell substantially outside what was permitted under the relevant policy, namely 30 minutes' personal use per day during the lunch hour.

42. Mr Robinson reported his preliminary concerns to Mr Height and the situation was reviewed by Mr Tripp. Mr Tripp authorised a disciplinary investigation and appointed Mr Robinson as the investigator.

43. The Claimant was therefore asked to attend a disciplinary investigation meeting conducted by Mr Robinson. The invitation letter dated 26 November 2019 identified three allegations. One of those related to attempting to access inappropriate websites. We make clear at the outset that this allegation was not upheld. The site in question was a pop-up that opened through no fault of the Claimant and there is no suggestion of such wrongdoing on his part. The other two allegations related to excessive personal use of internet and falsification of mileage claims.

44. By this time the Claimant had submitted his November mileage claims. After receiving the letter inviting him to a disciplinary investigation, he accessed the expenses system on two occasions and deleted three of the claims he had submitted.

45. The investigation meeting took place on 5 December 2019. A full note was kept, which the Tribunal saw. We found in general terms that it showed Mr Robinson taking care to go through the evidence and allegations in detail with the Claimant.

46. During the meeting, the Claimant's explanation for the mileage claims that were inconsistent with the CCTV footage was that he had made the journeys in question, and had simply claimed for the wrong date. He said that he used to put journeys regularly in his diary, but since his mother had died he was not as good at keeping records. He appeared to accept at one stage that he had not been subtracting his home to work mileage for claims when he had done a trip on the way to work or had not attended work at all. He said that he had deleted three claims for November after receiving the invitation letter because he could not remember the details of the journeys and had no record of them, and he thought it was better to be safe than sorry. He said that he was mentally tired and exhausted and was making mistakes.

47. Mr Robinson asked the Claimant what his mileage was on his personal car. The Claimant said that he did not know but estimated around 17,000 miles. He confirmed that he had had the car from new since March 2017. Mr Robinson explained that the Claimant had claimed 14,594 miles since April 2017. Mr Robinson estimated that the Claimant had 224 working days per year. The Claimant's round trip from home to work and back was 5 miles. Mr Robinson therefore estimated the number of miles the Claimant would have driven travelling to and from work since April 2017. Adding that to the 14,594 miles claimed since April 2017, he said that the Claimant would have done 17,177 miles just driving to and from work and on the trips for which he had claimed. The Claimant said that he hardly used his personal car for anything but work, that he had made mistakes over the last couple of months and that he was renowned for keeping good records.

48. Turning to his internet use, the Claimant accepted that he had accessed personal websites during working hours, but said that Mr Robinson's estimate of the time spent doing so was excessive because he might have left a website open but still been working. The Claimant also explained that he had been using the internet as a get out and a release, and that he had been struggling emotionally. He spoke about being on antidepressants and seeing a mental health nurse and counsellor.

49. Mr Robinson made clear to the Claimant during the investigation meeting how important it was whether the mileage on his car was only 17,000, because it gave rise to the question whether this was just mistakes for a couple of months or was long-standing. Later the same day Mr Robinson emailed the Claimant and asked for a screenshot of his odometer. The Claimant sent the following reply:

> I will but at the moment I feel too physically and mentally sick, feels like I'm sending you my own death warrant. Only 16,000 miles, but I must say again I do not use my car on evenings, weekends etc. So my mileage is 99.0% work.

50. The Claimant was signed off work on 6 December 2019, and in fact he did not return to work after that. He was referred to Occupational Health at that stage.

51. On 11 December 2019, Mr Robinson asked him again for a screenshot of his odometer and again he did not provide one. Mr Harper carried out a home visit because of the Claimant's sickness absence on 8 January 2020. He too asked the Claimant to confirm his mileage and the Claimant refused.

52. Mr Robinson prepared an investigation report for Mr Tripp. He recommended that disciplinary action be taken against the Claimant in respect of his mileage claims and internet use. Mr Tripp authorised disciplinary proceedings and confirmed that he would chair the disciplinary hearing. That eventually took place on 6 March 2020.

53. By that stage, Occupational Health had prepared two reports. On 20 February 2020 they summarised the Claimant's current state of health and made recommendations for his return to work. They said that he was planning to return to work in April.

54. On 20 February 2020, the Claimant also raised a grievance. In outline terms, his grievance was that his mental health had not been taken seriously and that he had not been supported. He said that errors with mileage claims were normal for someone suffering from anxiety and depression, as was using the internet for escapism. A decision was made to deal with the grievance alongside the disciplinary process because of the obvious overlap between the two. Mr Tripp dealt with them both at the hearing on 6 March 2020 and in his outcome letter.

55. At the disciplinary hearing Mr Robinson went in detail through the evidence and what had been said at the investigation meeting. The Claimant gave his explanations. When discussing his internet use, he made the point that he might have left the pages open, so his use was more like 1 ¼ hours in a day, not four or five. Mr Tripp's evidence to the Tribunal was that he accepted that. The Claimant discussed his mental health and provided information about that. Mr Tripp asked him about it. The Claimant said that symptoms had started in July with tiredness. He had experienced stress at a later date and was really bad in September. They discussed the Claimant's mileage claims. Mr Tripp pointed out that his claims had been fairly steady over three years. He was not far off 5000 miles per year or 15,000 miles in just under three years. The Claimant said that as far as he was concerned he had done 99% of the miles claimed, but he could not always remember accurately when he did them. Towards the end of the hearing, Mr Tripp asked the Claimant why he had not provided a screenshot of his mileage. The Claimant first said that he thought it was an invasion of his privacy, then referred to legal advice. Mr Tripp made clear that if the mileage was 20,000 or 22,000 or something it would have provided a complete answer

and they probably would not even be there. The fact that he had not provided it raised the question. Mr Tripp pressed the Claimant about this.

56. The Tribunal understood that after the hearing the Claimant provided a screenshot of his odometer. The date of the email seemed to be 5 March 2019 at 23:05 hours. We assumed that must have been a mistake because the lengthy discussion at the disciplinary hearing was on the basis that the screenshot had not been provided. In any event, it was clear that Mr Tripp had the screenshot by the time he reached his decision. The screenshot showed a mileage of 16,904 at the beginning of March 2019.

57. Mr Tripp gave his decision on 17 March 2019 and subsequently confirmed it in writing. He concluded that the Claimant had made excessive personal use of the internet during working hours. He did not accept that this was escapism because of the Claimant's mental health, but he concluded that this was misconduct not gross misconduct and he would not have dismissed the Claimant for it. However, he concluded that the Claimant had committed gross misconduct by falsely claiming mileage over a sustained period. He explained that in reaching that decision he took into account that four of the claims made in October 2019 were inconsistent with the CCTV footage; that the Claimant deleted three claims in November after being notified of the disciplinary investigation; the email sent immediately after the investigation meeting, saying that the mileage was only 16,000 and that the Claimant felt like he was signing his own death warrant; the Claimant's refusal to provide a screenshot of his mileage when asked; and the calculation of the Claimant's claimed and expected miles as against his actual mileage. Mr Tripp checked and carried out his own calculations. The Claimant had claimed 14,594 miles since April 2017 and his claims had been consistent over three years. Taking into account annual leave, weekends and average sickness he had 220 working days per year. His round trip from work to home and back was 5 miles, so he would have driven around 2930 miles to and from work which he was not entitled to claim for. His expected home to work mileage plus his claimed business miles therefore amounted to 17,524. The screenshot, provided three months after the event, showed a total mileage on the vehicle of 16,904. Mr Tripp did not accept that the Claimant's mental state was a contributory factor in his mileage claims because he had made the same level of claims over three years and the total claimed plus his expected home to work mileage exceeded the mileage on the clock, even without allowing for any other personal mileage. Mr Tripp considered the Claimant's mitigation and grievance in detail but he concluded that the Claimant had falsely claimed mileage over a sustained period and that this was gross misconduct. He took into account the Claimant's long service but concluded that trust had been destroyed and the Claimant should be summarily dismissed. The Tribunal had no hesitation in accepting that the reasons Mr Tripp dismissed the Claimant were the reasons carefully set out in his decision letter at the time.

58. The Claimant appealed against his dismissal in a letter dated 3 April 2020. He provided detailed information about his mental health and complained about the way he had been treated. He said that he had been subject to harassment. He

made the point that what had started as a workload review had turned into a disciplinary process and said that he felt persecuted by this. As for the allegations against him, he repeated the same point about his internet use - that it was a form of escapism related to his mental health - and the same points about his mileage - that he had made mistakes when he was ill and that there was no evidence it was malicious or deliberate. He pointed out that Mr Harper had signed off his claims and he said that the value of the mistaken claims was only around £100.

59. The appeal was dealt with by Mr Abbott, Head of Housing, Transportation and Public Protection. A hearing was held online on 13 August 2020. There was unavoidable delay in arranging it because of the pandemic. The appeal was a review, not a rehearing. Nonetheless, the detailed notes show that Mr Abbott went through the appeal in great detail. The Claimant went through his appeal at some length and then answered questions about it. Then Mr Tripp went through the management case and answered questions about that. The Claimant did not put forward additional evidence or provide any different explanation for his actions.

60. Mr Abbott dismissed the appeal in a letter dated 21 August 2020. He concluded that Mr Tripp's decision was reasonable. Mr Abbott did accept that it was possible to regard the Claimant's use of the internet as a form of escapism related to his mental ill-health and he accepted that as mitigation. However, he agreed with Mr Tripp's decision that mileage had been wrongly claimed over an extended period; the Claimant held a supervisory position of responsibility; he had failed to assist the investigation; and there had been a breach of trust so that dismissal was reasonable, even though the Claimant had 34 years' service. The Tribunal found that Mr Abbott's reasons for dismissing the appeal were the reasons he set out in his outcome letter on 21 August 2020.

Further findings relevant to the unfavourable treatment claim

61. For the purposes of the Claimant's complaint that his dismissal was unfavourable treatment because of something arising in consequence of disability, the Tribunal itself must decide whether the Claimant made a handful of mistakes in his mileage claims in around October 2019 because of his mental ill-health, or whether he had been wrongly claiming mileage to which he was not entitled over an extended period before that, in which case it was not caused by his mental ill-health.

62. The Tribunal found that the Claimant had been wrongly claiming mileage to which he was not entitled over an extended period, which pre-dated his mental ill-health.

63. There was no dispute that on four occasions in October 2019 the Claimant had made claims for dates on which the CCTV footage showed that the journeys could not have been made. The Claimant said that he had made the journeys but forgotten the dates, because of his mental state at that time. The Tribunal accepted that he might have made mistakes on that occasion for that reason.

However, we had no hesitation in finding that this was not just a case of those mistakes, but was much more extensive.

64. The Claimant said that things had gone wrong in early 2019 after his mother died. Before that he was fastidious about record-keeping but after that his record-keeping was not so good. However, he did not produce any evidence of records kept prior to 2019, and when we asked him about it, he mentioned sometimes writing trips in his diary, sometimes making a note on his hand and so on. He did not describe any system of record keeping, let alone a fastidious one. We found that he did not keep comprehensive records of his trips before or after 2019.

65. The Claimant had claimed 14,594 miles since 1 April 2017. His monthly claims were fairly consistent, normally between about 350 and 550, but occasionally more or less than that. He said that this was to be expected, because his journeys had not changed. He was always claiming for journeys he had made, it was just that he forgot the dates of some journeys in late 2019.

66. The difficulty with that, was the evidence suggesting that his total claimed mileage together with his expected home to work mileage was more than the total mileage on his vehicle. If he had been claiming consistently throughout three years and the vehicle had not even driven the miles claimed plus his home to work mileage, that pointed to an extended period of incorrect claims.

67. The Tribunal was quite satisfied that the total claimed miles plus expected home to work mileage was significantly more than the mileage on the vehicle. We find that the mileage on the vehicle at the time of the investigatory meeting in December 2019 was around 16,000 miles. The only plausible explanation for the email the Claimant sent on 5 December 2019, when he got home from that meeting, was that he had checked the mileage and was informing Mr Robinson that it was 1000 miles less than he had estimated. His evidence to the Tribunal was that he did not check the mileage (despite the fact he had driven home in the vehicle), he was just making another guess and he did not know what he was doing because of the state of his mental health. That evidence was wholly implausible. It would make no sense whatsoever for him to estimate the mileage as 17,000 in the meeting and then make a further *estimate* of 16,000, which made matters worse for him not better. In any event, the wording of the email itself is only consistent with his having checked the mileage. He refers to it as “only” 16,000 and talks about signing his own death warrant. That can only mean that he has checked the mileage, found out that it is much lower than his claimed miles together with his home to work mileage, and understood the serious implications of that. In addition, as described above, the Claimant refused to provide a screenshot of his odometer for three months. If the odometer reading had supported his case it would have provided an answer to the concern and we have no doubt he would have provided it. The failure to do so points to an attempt to conceal the true position. The difficulty, of course, is that he had already revealed the true position in the email he sent straight after the

disciplinary investigation meeting. Therefore, the Tribunal was quite satisfied that the mileage in December 2019 was around 16,000.

68. Furthermore, the Tribunal also found the Claimant's evidence that he almost never used his car for personal use, and that he and his wife always used her car, implausible. He accepted that his vehicle, a Vauxhall Mokka, was a large vehicle suitable for his size and mobility. His wife's vehicle, a small Citroen C1, was not. His evidence about this seemed to the Tribunal to be rehearsed and unconvincing. We found that he must have used his own vehicle for some personal use.

69. The Tribunal also noted that shortly before the disciplinary investigation meeting, but after he knew that his mileage was being looked at, the Claimant emailed Mr Harper to ask him what he should be doing about his home to work mileage if he made a trip straight from home. The Claimant had been doing his job for six years. The mileage expenses policy was clear and straightforward. The Claimant should have known by December 2019 how to deal with home to work mileage in those circumstances, if he had been properly making mileage claims.

70. In his evidence to the Tribunal, the Claimant suggested for the first time that the shortfall in miles on his vehicle could be accounted for by rounding errors. The mileage system rounded up if the mileage was above .5. However, he accepted that it rounded down if it was below .5. Rounding up and rounding down would be expected broadly speaking to cancel each other out. In the absence of any specific, detailed evidence from the Claimant the Tribunal was wholly unpersuaded that rounding errors accounted for the shortfall.

71. The Claimant also suggested that he relied on the AA route planner to calculate his mileage for him and that this might account for any shortfall. He did not provide any actual evidence that the AA route planner overestimated the routes for which he had claimed; this was just speculation. Many expenses systems rely on the AA route planner, which is regarded as very accurate. In the absence of any specific, detailed evidence from the Claimant, we were again wholly unpersuaded that reliance on the AA route planner accounted for any shortfall.

72. The Claimant gave evidence that there had been occasions on which other people had given him a lift to work. He described three episodes, each of which lasted a week at most. That would reduce his expected home to work mileage by 75 miles. There would still be a very substantial shortfall between the 16,000 miles his vehicle had done in December 2019 and his total claimed mileage and expected home to work mileage at that date, even without allowing for any personal mileage.

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73. The obvious explanation for that substantial shortfall is that the Claimant had been making inaccurate mileage claims for a sustained period that pre-dated his episode of mental ill health in September 2019. The Tribunal found for all these reasons that this was the explanation. It follows that the conduct for which the Claimant was dismissed did not arise in consequence of his disability.

Further findings relevant to the reasonable adjustments and harassment complaints

74. The complaints of failure to make reasonable adjustments for disability and disability-related harassment are linked to the Claimant's COPD.

75. The starting point is that the Claimant says he told Mr Brackenbury that he might be late for work sometimes because of his COPD if he had an episode of breathlessness (for example because he took a shower) and needed to use his inhalers and then recover. He says that Mr Brackenbury agreed that it was fine for him to come in a bit late.

76. Mr Brackenbury's evidence was that the Claimant did tell him that he might sometimes be a bit late because of his COPD and that Mr Brackenbury told him that this was not a problem, but that if he was going to be late he should let Mr Brackenbury or Mr Harper know so that they could put support in for his team. There was no formal discussion or agreement, he just told the Claimant to make sure he let him or Mr Harper know. Mr Brackenbury told the Tribunal that his understanding was that this was the policy anyway: if somebody was going to be late they should let their manager know.

77. The Tribunal accepted Mr Brackenbury's version of events about this. It seemed to the Tribunal that he was very much someone who expected the rules to be followed and who would have expected a manager to be told if somebody was going to be late, as a matter of common courtesy if nothing else. In addition, the evidence before the Tribunal suggested that the Claimant was regularly late for work for reasons unrelated to his COPD and that this was nothing new. The Tribunal found Mr Robson's evidence that he used to manage the Claimant many years ago, that the Claimant was always late for work then and that this was not something new in September or October 2019, convincing. Given that there were more general concerns about the Claimant's timekeeping, it was unlikely that Mr Brackenbury would have agreed that he could simply arrive late on days his COPD was an issue, rather than saying that it was fine to do so but he must let a manager know. Furthermore, the Claimant's evidence about the agreement was inconsistent. He was wholly unclear about when he reached the agreement with Mr Brackenbury; his evidence varied from a couple of years before September 2019 to a few weeks before that date. He was also inconsistent about what was said. When cross-examined he accepted that he had not argued with Mr Brackenbury that it was illogical for him to have to tell him or Mr Harper if he was going to be late, but when cross-examining Mr Brackenbury he returned to the position that he had said that. Finally, we noted the Claimant's evidence that he might have a queue of people waiting at his desk when he arrived, needing his input. That would explain the importance of him letting somebody know if he was going to be late – so that somebody could deal with those people.

78. Mr Harper's evidence was that he did not know any agreement had been reached. The Tribunal accepted that. It was clear that Mr Brackenbury never told Mr Harper about the agreement. That was because it was not a formal agreement in that sense, and Mr Brackenbury was simply requiring the Claimant to do what was expected in any event. He said, "It's just courtesy, that's what I would expect. It has to be orderly and managed."

79. Therefore, the position was that the Claimant let Mr Brackenbury know that he might sometimes be late because of his COPD. Mr Brackenbury confirmed that this was not a problem, but told the Claimant he should let him or Mr Harper know if that were the case. The Claimant accepted that this did not give him a general licence to be late.

80. The Claimant's complaint to the Tribunal was that the agreement was withdrawn by Mr Brackenbury, and Mr Brackenbury started "having a go" at him about being late. In fact, what appears to have happened is that the Claimant was arriving late for work without letting any manager know and Mr Brackenbury was therefore asking him why he was late on occasions when Mr Brackenbury happened to be present at the depot. That is not the same as the agreement being withdrawn.

81. In any event, the Claimant says that Mr Brackenbury harassed him in relation to his disability-related lateness on these occasions. His evidence about this was somewhat inconsistent too: in his grievance he described one incident when Mr Brackenbury did so; at his disciplinary hearing he referred to two incidents; and by the time of the Tribunal proceedings he referred to four incidents. In cross-examination the Claimant said that on one occasion Mr Brackenbury was in the car park with Mr Height when he arrived late, and Mr Brackenbury aggressively challenged him about it. On one occasion Mr Brackenbury was looking out for him from an upstairs window, and by the time the Claimant had made it into the foyer Mr Brackenbury had come down to confront him about his lateness. On at least two occasions Mr Brackenbury had asked him why he was late in the office in front of other people and had shouted and screamed at him about it. One of those two occasions was 22 November 2019, which was the Claimant's wife's birthday. The Claimant said that he told Mr Brackenbury that he was late on that occasion because his wife had been opening some presents and celebrating her birthday. He did not apologise for being late. He accepted that he raised his voice on that occasion.

82. Mr Brackenbury accepted that if he was present at the depot and the Claimant came in late without letting anybody know in advance he did ask him why he was late. If he was in the open plan office talking to somebody else, he did ask the Claimant in front of other people. He said that he did not raise his voice. He casually asked the Claimant, out of interest or concern. If the Claimant had said that this had anything to do with his COPD or a medical condition, he would have suggested they talk privately.

83. The Tribunal heard evidence from Mr Lemmon, Mr Robson and Mr Roberts, all of whom worked at close quarters in the same open plan office and all of whom had overheard conversations about the Claimant's lateness on particular occasions. They had different roles and different personalities, but each of them gave clear and convincing evidence that was in marked contrast with the Claimant's. Each of them said that it was the Claimant who was aggressive, shouting and swearing and that Mr Brackenbury did not behave in that way. In particular:

    83.1 Mr Lemmon said that he had been present on two occasions when Mr Brackenbury had asked the Claimant why he was late for work and the Claimant had shouted at Mr Brackenbury. He remembered one specifically. It was not the Claimant's wife's birthday. Mr Lemmon was sitting at his desk talking to Mr Brackenbury when the Claimant came in and went past. After Mr Lemmon had finished, Mr Brackenbury turned to the Claimant and quietly asked him why he was late. The Claimant was "not very happy being asked." Mr Brackenbury wanted to talk somewhere else but the Claimant was not keen. He was raising issues about why he was late, shouting at Mr Brackenbury. Mr Lemmon slunk back in his chair. Mr Brackenbury did not shout. The Claimant had shouted at Mr Brackenbury on more than this occasion.

    83.2 Mr Roberts also remembered two occasions when the Claimant had shouted at Mr Brackenbury. Neither was the Claimant's wife's birthday. One was 25 October 2019. Mr Brackenbury was talking to Mr Lemmon and Mr Roberts. The Claimant came in and said to Mr Brackenbury, "Checking up on me again?" Mr Brackenbury said, "I'm not checking up on you, I'm discussing work with [Mr Lemmon] and [Mr Robson.]" The Claimant subjected him to a tirade of abuse, swearing at him and accusing him of always checking up on him. Mr Roberts said that it was clearly preying on the Claimant's mind, not Mr Brackenbury's. It was a one-sided incident – the Claimant was shouting but Mr Brackenbury did not respond. The Claimant was agitated and they did discuss the Claimant's behaviour with the Claimant afterwards, saying that it was not out of character for him.

    83.3 Mr Robson said that the Claimant was late for work many times. His desk was opposite Mr Robson's. Mr Brackenbury sometimes asked him for a word upstairs. Sometimes he would say why, and sometimes the Claimant would say, "Is it because I'm late again?" The Claimant's response to Mr Brackenbury after being asked to go upstairs was to raise his voice and become aggressive. This was nothing new regarding lateness in October or November 2019. There was no change in the 12 months leading up to then, and indeed Mr Robson said that the Claimant had had a problem with punctuality for his whole career. This had been the case when Mr Robson was his supervisor 20 years ago and nothing had changed.

84. Bearing in mind this evidence, the Tribunal found that Mr Brackenbury did sometimes ask the Claimant why he was late, on occasions when Mr Brackenbury happened to be at the depot and the Claimant had not phoned

ahead. He was not checking up on him. It was the Claimant who had this preying on his mind, not Mr Brackenbury. Mr Brackenbury did sometimes ask the Claimant why he was late in the open plan office in front of other people on occasion. He did not shout. The Claimant did get angry, shout and swear at Mr Brackenbury. If Mr Brackenbury then suggested going upstairs, the Claimant did not want to. Sometimes rather than ask why he was late, Mr Brackenbury asked the Claimant to go upstairs, and it was the Claimant who asked if this was about his late arrival. None of the witnesses referred to hearing the Claimant say on any occasion that the reason for his lateness was related to his COPD and the Tribunal found that, contrary to the Claimant's case, this was not said on any of those occasions.

85. Given our findings about these incidents in the office, the Tribunal also found that, if Mr Brackenbury did ask the Claimant about lateness in the car park or the foyer, he did not shout or raise his voice on those occasions either.

86. The incident about which the Claimant had the clearest recollection, which appeared to be the most recent, was his wife's birthday. We noted that this was during the period when his mental health was poor and was about 10 days after the workload review meeting. On the Claimant's own case, he was late because he was spending time with his wife on her birthday, not because of his COPD; he did not let anybody know he was going to be late; and when Mr Brackenbury asked him about it, rather than apologise for being late, he was belligerent in telling him that it was his wife's birthday. That incident led Mr Brackenbury to ask the Claimant to come to the depot first each day, rather than calling in elsewhere.

Legal principles

87. So far as unfair dismissal is concerned, the Employment Rights Act 1996 provides so far as material as follows.

> **98 General**
> (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –
> (a) the reason (or, if more than one, the principal reason) for the dismissal, and
> (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
> (2) A reason falls within this subsection if it –
> …
> (b) relates to the conduct of the employee,
> …
> …
> (4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –
> (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

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

…

88. It is well-established that in a claim for unfair dismissal based on a dismissal for misconduct, the issues to be determined having regard to s 98 are: did the employer have a genuine belief in misconduct; was that belief based on reasonable grounds; and when the belief was formed had the employer carried out such investigation as was reasonable in all the circumstances: see *British Home Stores Ltd v Burchell* [1980] ICR 303. The burden of proof has of course changed since that decision: *Boys and Girls' Welfare Society v McDonald* [1996] IRLR 129.

89. Furthermore, the question for the Tribunal is whether dismissal was within the range of reasonable responses open to the employer. The range of reasonable responses test applies to all aspects of the decision to dismiss including the procedure followed: see *Foley v Post Office; HSBC v Madden* [2000] ICR 1293 *Sainsbury's Supermarkets v Hitt* [2003] IRLR 23.

90. We emphasise, therefore, that with respect to the unfair dismissal claim, it is not for the Tribunal to substitute its view for that of the Respondent. The Tribunal's role is not to decide whether the Claimant was guilty of the conduct alleged, but to consider whether the Respondent believed that he was, based on reasonable grounds and following a reasonable investigation. The ACAS Code of Practice on Disciplinary and Grievance Procedures is relevant and the Tribunal has had regard to it.

91. Claims of disability discrimination are governed by the Equality Act 2010. The time limit for bringing a claim is dealt with by s 123. The case of *Matuszowicz v Kingston upon Hull City Council* [2009] IRLR 1170, CA is particularly relevant if the claim is about failure to make reasonable adjustments. The burden of proof is dealt with by s 136, and the Tribunal had regard to it. The Equality and Human Rights Commission's Code of Practice on Employment is relevant to discrimination claims and the Tribunal considered its provisions.

92. Disability is defined in section 6 and schedule 1. A person has a disability if he has a mental impairment that has a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities. The effect of an impairment is long-term if it has lasted for at least 12 months or is likely to do so. If an impairment ceases to have a substantial adverse effect, it is to be treated as continuing to have that effect if the effect is likely to recur.

93. Discrimination arising from disability, failure to make reasonable adjustments for disability, and disability-related harassment are governed by s 15, s 20-21 and schedules 1 and 8, and s 26 of the Equality Act 2010 respectively. Those sections provide, so far as relevant:

15 Discrimination arising from disability

(1) A person (A) discriminates against a disabled person (B) if –

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

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

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

…

20 Duty to make adjustments

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

21 Failure to comply with duty

(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.
(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.
…

26 Harassment

(1) A person (A) harasses another (B) if –
(a) A engages in unwanted conduct related to a relevant protected characteristic, and
(b) the conduct has the purpose or effect of –
(i) violating B's dignity, or
(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

…
(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account –
(a) the perception of B;
(b) the other circumstances of the case;
(c) whether it is reasonable for the conduct to have that effect.

94. Under s 15, if there is unfavourable treatment, it must be done because of something arising in consequence of the person's disability. There are two elements. First, there must be something arising in consequence of the disability; secondly, the unfavourable treatment must be because of that something. While the words "arising in consequence of" may give some scope for a wider causal connection than the words "because of", the difference (if any) will be small. The unfavourable treatment will be "because of" the something, if the something is a significant influence on the unfavourable treatment; a cause which is not the main or sole cause but is nonetheless an effective cause of the unfavourable treatment: *Charlesworth v Dransfields Engineering Services Ltd* [2017] UKEAT 0197_16_1201.

95. It is a defence for the employer to show that the unfavourable treatment is a proportionate means of achieving a legitimate aim. The employer must show that it has a legitimate aim, and that the means of achieving it are both appropriate and reasonably necessary. Consideration should be given to whether there is non-discriminatory alternative. A balance must be struck between the discriminatory effect and the need for the treatment: see *Homer v Chief Constable of West Yorkshire Police* [2012] UKSC 15, SC. The EHRC Code advises that a legitimate aim is one that is legal, not itself discriminatory, and one that represents a real, objective consideration: paragraph 4.28.

96. In a complaint of failure to make reasonable adjustments, the Tribunal should identify the PCP, and the nature and extent of the substantial disadvantage. It must identify with precision the step the employer is said to have failed to take: see *Environment Agency v Rowan* [2008] ICR 218 EAT; *HM Prison Service v Johnson* [2007] IRLR 951 EAT. The question of what is reasonable is an objective question for the Tribunal to decide: see *Smith v Churchills Stairlifts plc* [2006] ICR 524, CA. Paragraph 6.28 of the EHRC Code provides helpful guidance.

97. In a harassment complaint, the unwanted conduct must relate to the protected characteristic. "Related to" means something broader than "because of". It is a question of fact for the Tribunal to decide. The perceptions and knowledge of the alleged harasser are relevant but not conclusive: see most recently *Tees, Esk and Wear Valley NHS Foundation Trust v Aslam* [2020] IRLR 495.

Application of the Law to the Facts

98. Applying those principles to the detailed findings of fact, the Tribunal's conclusions on the issues were as follows. In many respects the claims turn on the detailed findings of fact, so the conclusions can be more briefly stated.

Disability

99. The Claimant was disabled at all material times because of COPD.

100. He was disabled from at the latest September 2019 onwards because of depression. Doctor Vandenabeele concluded that this impairment should be regarded as long-term because it had persisted from September 2019 at the latest until January 2021. However, that is not the test the Tribunal must apply. The question for the Tribunal is whether at the time of the events the Claimant is complaining about in these proceedings, the substantial adverse effects of his mental impairment had lasted 12 months, were likely to last 12 months, or were likely to recur.

101. The Tribunal found that as of September 2019, that test was satisfied. We find that the Claimant had a mental impairment in the form of a depressive order, which started around March 2019 and developed over time. We accept on the basis of the Claimant's undisputed evidence and that of Dr Vandenabeele that it had the adverse effects on his ability to do normal day to day activities relating to concentrating and interacting with others, that he described. Those effects were more than minor or trivial. They had not lasted 12 months by September 2019. On the Claimant's account, adverse effects of a depressive disorder with a more

than minor impact on his ability to do day to day activities started in about July 2019. They had lasted about three months by September 2019. However, on the evidence before the Tribunal, those effects were likely to recur, in the sense that that could well happen. We accept that the Claimant had experienced two prior episodes of depression within the last nine years. He had been referred to OH and accessed counselling. His medical records suggest a history of being on anti-depressant medication at least in 2014, 2015 and 2016. Past history is the best indicator of what might happen in the future. Based on the Claimant's past history, as of September 2019, it could well happen that, if the effects of his depression stopped on this occasion, they would recur in future.

Unfavourable treatment because of something arising in consequence of disability

102. There is no dispute that the Respondent subjected the Claimant to an investigation, started a disciplinary process and dismissed him and that this was unfavourable treatment. Further, we have found that the Claimant was disabled because of depression at the relevant time. The key issue is therefore whether the unfavourable treatment was because of something arising in consequence of his disability.

103. Part of the reason the Claimant was investigated and subjected to a disciplinary process was his excessive personal use of the internet in October 2019 during work time. For the reasons explained above, the Tribunal accepted that that was something arising in consequence of his disability. However, the Claimant was not dismissed because of his excessive personal use of the internet. Mr Tripp made clear that he did not dismiss him for this; he was dismissed because of his mileage claims. Mr Abbott accepted that the internet use was linked to the Claimant's disability, and he upheld Mr Tripp's decision about this. To the extent that the Claimant was investigated and subjected to a disciplinary process because of his excessive internet use, the Tribunal considered that the Respondent's treatment of him was justified. It was a proportionate means of achieving the legitimate aim of maintaining trust in the honesty and good conduct of managers. Given the very extensive personal use of the internet during work time that was suggested by the IT systems report, it was reasonably necessary for the Respondent to investigate that with the Claimant, and to consider whether a disciplinary sanction was required. In the course of the process, the Claimant explained the link with his disability. Mr Tripp decided not to dismiss the Claimant for his internet use. Mr Abbott accepted at the appeal stage this this aspect of his conduct was linked to his disability. As a result, no disciplinary sanction was imposed relating to internet use. But the Respondent was justified in investigating this matter and including it in the disciplinary process. There was no less discriminatory step it could reasonably have taken to address the conduct.

104. However, as explained in detail above, the other part of the Claimant's conduct – making incorrect mileage claims – did not arise in consequence of his disability. It was conduct that pre-dated the disability. This was the conduct for which he was dismissed. He was not dismissed because he got the dates wrong for a

handful of claims in October 2019. He was dismissed because he had overclaimed his mileage over an extended period to such an extent that, even if he had not driven a single mile outside work, the mileage on his clock was still around 1000 miles less than the mileage he had claimed for and the mileage for his home to work journey. By subjecting the Claimant to an investigation about this, starting a disciplinary process and dismissing him the Respondent was therefore not treating him unfavourably because of something arising in consequence of his disability.

105. For these reasons, the complaint of unfavourable treatment because of something arising in consequence of disability does not succeed. It is not necessary to consider the other issues relating to this complaint.

Unfair dismissal

106. The Tribunal accepted that Mr Tripp's reasons for dismissing the Claimant and Mr Abbott's for dismissing his appeal were the reasons set out in their outcome letters at the time. Both genuinely believed that the Claimant had committed misconduct, namely falsely claiming mileage over a sustained period.

107. The next issue is therefore whether the Respondent acted reasonably in all the circumstances in dismissing the Claimant for that reason. The Tribunal found that it did. As set out in the findings of fact above, Mr Robinson carried out a reasonable investigation; Mr Tripp had reasonable grounds for believing the Claimant had committed the misconduct, which he explored extensively at the disciplinary hearing; and Mr Abbott carried out a thorough review at the appeal hearing and came to the same conclusion. The dismissal was not discriminatory, as explained above.

108. The Claimant's main criticism was that this was a "honey trap." Compromising evidence about internet use was available to Mr Robinson before the workload review meeting, but he did not tell the Claimant about it and he asked him whether he knew about the internet use policy. That, together with the fact that Mr Robinson had had some discussions about these concerns with Mr Height and Mr Brackenbury before the review meeting, and that Mr Brackenbury had emailed Mr Height in the terms he did, and asked him to "sort the situation" on 5 November 2019, make the Claimant suspect that he was set up and that his dismissal was a foregone conclusion.

109. However, the difficulty with the Claimant's argument is that, regardless of why it went looking, having obtained an IT systems report and reviewed CCTV footage, what the Respondent found was evidence of potential gross misconduct. It was that evidence that formed the basis of a disciplinary investigation, disciplinary hearing and appeal hearing. Nothing that he said at the workload review meeting was used against him in the disciplinary process and nothing that he said in that meeting was used to trap him. A separate disciplinary investigation meeting was held, at which the evidence and concerns about internet use and mileage claims were provided to the Claimant and discussed with him. It was the content of that meeting that formed the basis of Mr Robinson's recommendation that this should

proceed to a disciplinary hearing. There was nothing to suggest that Mr Tripp was aware of the email Mr Brackenbury sent to Mr Height, nor that Mr Tripp was under any pressure to dismiss the Claimant nor that his decision was a foregone conclusion. The thorough consideration of all matters at the disciplinary hearing and the careful explanation of his reasoning in the outcome letter were wholly inconsistent with that.

110. The fact that there were already concerns about possible misconduct by the Claimant before the workload review meeting, and that he was not told about them before or during that meeting, do not make his dismissal unfair in those circumstances. The fundamental point is that there *was* evidence of potentially incorrect mileage claims and excessive internet use, and that was what led ultimately to his dismissal.

111. The Claimant was also concerned about the fact that Mr Robinson conducted both the workload review meeting and the disciplinary investigation meeting. The Tribunal did not consider that there was anything unreasonable in Mr Robinson conducting both meetings. He was a manager of suitable seniority. Nothing in the workload review meeting gave rise to any conflict or lack of impartiality that made it difficult for Mr Robinson to investigate fairly. He clearly did so. Importantly, somebody else conducted the disciplinary hearing.

112. The Tribunal considered that dismissal was well within the range of reasonable responses in the circumstances, even though the Claimant had 34 years' service with the Respondent. If misconduct is sufficiently serious, an employee with long service and a clean disciplinary record can still be fairly dismissed. Here, Mr Tripp had reasonably concluded that the Claimant had been falsely claiming mileage over a sustained period. He was a supervisor. Mr Tripp took into account his long service and proceeded on the basis that he had a clean disciplinary record. But he concluded that trust had been destroyed. The Tribunal was satisfied that his decision to dismiss was within the range of reasonable responses in those circumstances.

Time limits

113. The claims of harassment and failure to make reasonable adjustments relate to the period October and November 2019. The Claimant went off sick on 6 December 2019 and never in fact returned to work. He did raise concerns about these matters to an extent in his grievance. He started early conciliation on 1 June 2020, his certificate was issued on 1 July 2020 and his claim was presented on 9 July 2020.

114. It seemed to the Tribunal that these claims were not brought within the Tribunal time limit. There was not conduct extending over a period that ended on or after 2 March 2020, which would have meant the claims were brought in time. The conduct complained of stopped when the Claimant went off sick and the clock started ticking for the purposes of the time limit by then at the latest.

115. However, the Tribunal concluded that it was just and equitable to extend time for bringing these claims. The Claimant did have poor mental health at the time and was off work sick. He was dealing with the ongoing disciplinary process and grievance, which partly referred to these particular events. Importantly, the Respondent was able to call evidence at the Tribunal and deal with the complaints, so the prejudice to the Respondent if time is extended is limited.

Harassment

116. As explained in detail in the findings of fact, the Respondent did not subject the Claimant to the unwanted conduct of which he complained. Mr Brackenbury did not shout at him at all. On the occasions that were witnessed by Mr Lemmon, Mr Roberts and Mr Robson, the Claimant did not suggest that he was late because of COPD. The Claimant was not required to explain his medical condition over and over again and did not do so. On some occasions it was the Claimant who brought the subject up, asking Mr Brackenbury if he was checking up on him or asking him if he wanted to speak to him because he was late again.

117. Although we have rejected the Claimant's account of what happened, Mr Brackenbury did ask the Claimant why he was late on some occasions when he was present at the depot in October and November of 2019 and the Claimant arrived late. The Tribunal concluded that this was unwanted conduct. It put the Claimant at a disadvantage. However, we were quite satisfied that it did not relate to disability. It related to the fact that the Claimant repeatedly arrived late for work for a range of reasons and without letting anybody know that he was going to be late. He should have let somebody know regardless of the reason, and Mr Brackenbury had reiterated that, when he told the Claimant that it was fine for him to be late if his COPD delayed him, but that he should let somebody know.

118. Even if the unwanted conduct had related to disability, the Tribunal had real doubts about whether it had the proscribed purpose or effect. We were quite satisfied that Mr Brackenbury did not ask the Claimant why he was late with the purpose of violating his dignity or creating a hostile or offensive environment. He asked because he was concerned as a line manager to know why one of the supervisors was arriving late for work without letting anybody know. We also had real doubts about whether it had that effect. We noted, of course, that the Claimant was suffering with depression at this time. Nonetheless, it was frequently the Claimant who brought the subject up, not Mr Brackenbury. It was "preying on his mind." On some occasions when Mr Brackenbury asked the Claimant for a word upstairs, it was the Claimant who asked if it was because he was late. Mr Brackenbury spoke quietly, it was the Claimant who shouted and drew attention to the issue. There was no evidence of any occasion when the Claimant said the reason was his COPD in front of anybody else. The Claimant was late for reasons other than his COPD. Most notably on his wife's birthday he was late, and he shouted and swore at Mr Brackenbury when he asked him about it. That gives rise to a real doubt about whether it was reasonable for the conduct to have the effect on the Claimant and whether in all the circumstances

it did have that effect. However, the claim of harassment fails at an earlier stage, because there was no unwanted conduct related to disability.

Reasonable adjustments

119. The Respondent's PCP of requiring the Claimant to attend work at 7:30am did put him at a substantial disadvantage in comparison with persons who are not disabled because his COPD meant that he would sometimes be late. The Tribunal was satisfied that the Claimant had an issue with punctuality in any event, but that his COPD did make it somewhat more likely that he would be late and that this meant he was more likely to be exposed to some form of sanction or process.

120. The question is therefore what steps it was reasonable for the Respondent to have to take to avoid the disadvantage, and whether it took them.

121. The Tribunal found that a reasonable step was for the Claimant to be allowed to arrive late if his COPD delayed him, but that he should let a manager know if that happened. That would avoid the disadvantage, by allowing the Claimant to be late for work because of COPD without that giving rise to any risk of sanction or attendance process as a result. We did not consider that it was a reasonable step for the Claimant simply to be allowed to arrive late without telling anybody or providing any explanation. As he himself said, he might have a queue of people waiting at his desk when he arrived, and it was reasonable for the Respondent to say that he should let a manager know so that arrangements could be made for those people to be dealt with. The fact that there was a general issue with the Claimant's punctuality added further weight to that.

122. The Respondent took that step. Mr Brackenbury told the Claimant that it was fine for him to be late because of COPD but that he should let Mr Harper or Mr Brackenbury know. That did not change. No agreement was withdrawn. The issue was that the Claimant regularly arrived late without letting anybody know or providing an explanation, and in circumstances where the explanation was not always COPD.

123. The complaint of failure to make reasonable adjustments for disability therefore does not succeed.

Employment Judge Davies
17 March 2021