EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4102606/2020

Held remotely in Glasgow on 23 and 27 to 30 September 2022

Deliberations 30 September and 13 October 2022

Employment Judge D Hoey

Members: I Ashraf and A Grant

Mr K McDonagh	**Claimant** **Represented by:** **Ms McDonagh - Claimant's wife**
Greater Glasgow Health Board	**Respondent** **Represented by:** **Ms K Henderson - Solicitor**

JUDGEMENT OF THE EMPLOYMENT TRIBUNAL

1. Of consent, and pursuant to Rule 64 of Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, the Tribunal awards the claimant the gross sum of **£186.15 (ONE HUNDRED AND EIGHTY-SIX POUNDS AND FIFTEEN PENCE)** by way of holiday pay that had accrued by the end of the claimant's employment, with the respondent being required to deduct such sums as required by law from that gross sum.

2. In terms of Section 12(3) of the Employment Rights Act 1996 the Tribunal declares that the respondent failed to provide the claimant with a written statement of particulars for the period of June 2019 until January 2020 but declines to make any award in terms of Section 12(4).

3. The Tribunal makes an award requiring the respondent to pay the claimant a sum amounting to the equivalent to 2 week's pay, namely the gross sum of

£750 (SEVEN HUNDRED AND FIFTY POUNDS), pursuant to Section 38(4) of the Employment Act 2002.

4. The remaining claims are ill founded and are dismissed.

REASONS

1. By ET1 accepted on 14 May 2020 the claimant claimed that he had been unfairly dismissed and subject to a number of discriminatory acts. The respondent disputed the claims.

2. The hearing was conducted in person with the claimant, his wife and the respondent's agent attending the entire hearing, with witnesses attending as necessary, all being able to contribute to the hearing fairly and fully.

Case management

3. The parties had worked together to focus the issues in dispute and had provided a statement of agreed facts and a list of issues. These documents were refined by the final stage of the hearing.

4. A timetable for the hearing of evidence had been agreed and the parties worked together to assist the Tribunal in achieving the overriding objective, in dealing with matters justly and fairly taking account of the issues, cost and proportionality. Robust case management allowed the hearing to conclude one day sooner than had been allocated.

Issues to be determined

5. The issues to be determined were discussed during the hearing and a list of issues was provided and was updated. The issues to be determined were as follows:

Unfair dismissal

1. Was the reason for the claimant's dismissal a potentially fair reason, namely for matters relating to conduct? (Section 98(1)(a) of the Employment Rights Act 1996)

2. Was it reasonable for the respondent to believe that the claimant was guilty of gross misconduct?

3. If so, having regard to the tests set out in ***Burchell v British Home Stores***, had the respondent carried out sufficient investigation so that at the time of dismissal they had a genuine belief based on reasonable grounds of the claimant's misconduct? It was contended that the investigation was inadequate insofar as:

    a) No-one ever checked which way the door opened, or where the claimant was coming from, in relation to the allegation that the claimant threw the door open so hard it almost hit the wall;

    b) The Management Statement of Case indicated that Mr Mullen had given a statement against the claimant;

    c) Mr Shaw's evidence about the claimant's behaviour on 14 June 2019 ought to have been further investigated by checking whether Mr Mullen would have been able to hear the claimant shouting, had he done so;

    d) The investigation team did not follow up the occupational health referral after the claimant cancelled it;

    e) The claimant did not see the CCTV footage in relation to 14 June 2019.

    f) Ms Kane did not follow up second referral to the occupational health psychiatrist.

4. Was dismissal within the band of reasonable responses?

5. Was a fair procedure followed with particular reference to any disciplinary procedures?

6. Did the respondent fail to follow the ACAS Code of Practice on Disciplinary Procedures? Alleged breaches were:

    a) Ms Houghton conducted the first investigation meeting (on 3 July 2019) with Ms Murray presenting it;

b) There were no notes of the disciplinary hearing;

c) Statements of Ms Speight and Ms Biereonwu were gathered as part of the investigation but did not form part of the Management Case, and were not shared with the claimant;

d) The occupational heath referral from the investigation was not shared with the claimant;

e) The appeal should have been held within 4 weeks but was 2 months late.

Remedy

7. If the dismissal was procedurally unfair, should the basic and/or compensatory award be reduced on the basis that the claimant suffered no prejudice as a result of any procedural failings?

8. If the dismissal was procedurally unfair, should the basic and/or compensatory award be reduced on the basis of ***Polkey v AE Dayton Services*** [1987] IRLR 503?

9. Should there be a reduction of any compensation in view of the claimant's contributory conduct?

10. Should there be any increase or decrease to the compensatory award to reflect any unreasonably failure to follow the ACAS Code of Practice?

Whistleblowing: Protected disclosures

11. Did the claimant make any of the following protected disclosures:

a) It was accepted that the letter dated 16 February 2018 was a qualifying, protected disclosure made by the claimant.

b) On 12 March 2018 it is alleged that the claimant attended a meeting in the canteen at the front of the hospital with Ms Harvey, Ms Biereonwu, Mr Blackburn and either Mr Russell and/or Mr William. The claimant alleged he disclosed health and safety concerns.

c) On 12 April 2018 the claimant attended a meeting In Ms Biereonwu's office together with Ms Biereonwu, Ms Harvey, Mr Russell and Mr Lamont. During the meeting the claimant alleges he disclosed that he was regularly covered in blood and other bodily fluids while carrying out his duties.

d) It is accepted that on 30 June 2018 the claimant made a qualifying, protected disclosure to Ms Biereonwu and a union steward, that he had still not been provided with gloves to protect him from needlestick injuries, that no risk assessment had been carried out, that he had not been provided with a list of his duties and he had not been given training on the correct procedures to be followed.

e) In January 2019 the claimant disclosed to Ms Walsh various major health and safety concerns including the lack of suitable protective gloves and the claimant's concerns about washing facilities which required him to wash blood and other contaminated fluids down drains.

f) On or around 10 May 2019 the claimant attended a meeting with Ms Biereonwu, Ms Walsh and Ms Anderson. During the meeting he disclosed that he was getting covered in blood while handling improperly bagged clinical waste, that he was required to transport improperly bagged clinical waste in lifts alongside members of the public, and that he was carrying out a two man job by himself.

g) On 16 July 2019 the claimant raised formal concerns with Professor Linda de Caestecker, Director of Public Health, by sending her an email setting out the following disclosures: that he had not been provided with appropriate equipment and PPE to undertake his role safely; that he had not been given training to deal with clinical waste or in manual handling; that there was a lack of appropriate facilities for handwashing; that there were no changing facilities for porters during shifts; that the bins break easily, leading to injury; and that porters were required to share lifts with patients when moving waste products.

12. If it was determined that any of the above protected disclosures were made to the respondent, it was accepted that these disclosures were qualifying disclosures in terms of Section 43B of the Employment Rights Act 1996.

Section 103A Employment Rights Act 1996

13. Did Ms Kane know of any of the alleged protected disclosures at paragraphs 11(a), 11(d) or 11(e) at the time that she made the decision to dismiss?

14. If yes, was the sole or principal reason for the claimant's dismissal that he made one of those protected disclosure?

Section 47B Employment Rights Act 1996

15. Did the respondent subject the claimant to any of the following alleged detriments:

    a) On 14 June 2019 **Mr Shaw** walked the claimant to his car. When he returned to the office Mr Shaw stated to Mr Mullan that the claimant had been shouting at him. The claimant considers that Ms Shaw's false statement amounts to a detriment which may have been a consequence of his having made a protected disclosure because he believes Mr Shaw disliked him because he had made a number of protected disclosures especially fraud and theft involving Mr Shaw and that Mr Shaw wished the claimant's employment to be terminated.

    b) If yes, at the time of the detriment did Mr Shaw know of the protected disclosure at paragraph 11(a)?

    c) If yes, did he subject the claimant to the detriment on the ground that he made that protected disclosure?

    d) Is this claim brought within the time limit prescribed by Section 48(3)(a) and (b)?

    e) Did **Mr Hobson** want to get rid of the claimant because or partially because he was perceived as being a nuisance because he had made the protected disclosures described above.

f) If yes, at the time of that he rejected the appeal did Mr Hobson know of the protected disclosure at paragraph 11(a)?

g) If yes, did he reject the claimant's appeal on the ground that he made that protected disclosure?

h) Did **Ms Biereonwu** subject the claimant to the following detriment? In or around March 2020 the claimant received management statement of case with Appendix missing and a timeline from Ms Biereonwu. Ms Biereonwu wished the claimant's employment to be terminated because or partially because he had made a number of protected disclosures.

i) If yes, at the time of writing the timeline did Ms Biereonwu know of any of the protected disclosures at paragraph 11?

j) If yes, did she subject the claimant to the detriment on the ground that he made one of those protected disclosures?

16. In respect of detriment, what injury to feelings should be awarded?

Wrongful dismissal

17. Has the respondent established that the claimant acted in repudiatory breach of contract such as to entitle it to summarily dismiss him?

18. If no, it was agreed that the remedy for such a claim was the equivalent of 2 week's net pay.

Disability discrimination

19. It was accepted that the claimant was a disabled person by virtue of osteoarthritis and anxiety and depression under the Equality Act 2010 at the relevant time, being 12 July to 15 November 2019 and that the respondent had knowledge or could have reasonably been expected to have knowledge of the impairments at the relevant time.

Reasonable adjustments (Sections 20 and 21 of the Equality Act 2010)

20. Has the allegation of a failure to make reasonable adjustments been brought in time in accordance with Section 123(1) of the Equality Act 2010? The alleged failure happened on 12 July 2019. If not, was it just and equitable to allow an extension of time?

21. Did the respondent apply a provision, criterion or practice ("PCP") of refusing to refer staff struggling with mental health issues for counselling or for an occupational health assessment related to their mental health?

22. It was accepted that had the respondent applied the PCP (which was denied) it would have placed the claimant at a substantial disadvantage when compared to those who are not disabled because he was suffering from anxiety and depression which were exacerbated by the disciplinary investigation process which commenced on 14 June 2019.

23. Was the respondent aware at the relevant time of the substantial disadvantage suffered?

24. It was accepted that it would have been reasonable for the respondent to tell the claimant that it would make a referral for him to receive counselling for his mental health and for an occupational health assessment to be carried out if this claim was made out, but the issue was whether such an adjustment would have alleviated the substantial disadvantage.

Harassment (Section 26, Equality Act 2010)

25. Have the allegations of harassment been brought in time in accordance with Section 123(1) of the Equality Act 2010? If not, is it just and equitable to allow an extension of time?

26. Did the respondent engage in unwanted conduct related to disability in respect of any of the following events:

    a) On 12 July 2019 Ms Ferguson carried out an interview with Ms Creighton to investigate an incident which was alleged to have occurred on 13 June 2019. As part of the investigation she asked Ms

Creighton about the claimant's behaviour and specifically asked *"Would you describe him as having lost the plot?"*

b) On 9 October 2019 at a disciplinary meeting Ms Kane stated that she was sending the claimant to a psychiatrist to get his medication checked as he forgot things. The claimant alleged he did not tell her that he was forgetful.

c) On 6 November 2019 the claimant attended a meeting with Ms Murray and Ms Houghton in order to investigate the concerns he had raised about unsafe work practices. The claimant's concerns were treated as complaints and he felt that the meeting was conducted in a hostile manner. He felt that the manner of questioning was designed to goad him.

d) On 15 November 2019 the claimant attended an occupational health and psychiatrist appointment which had been arranged by the respondent. He discovered that he had been referred not only to check his medication but also to ascertain whether he suffered from a paranoid disorder.

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

28. Should an award for injury to feelings be made?

Itemised payslips (Section 8 Employment Rights Act 1996)

29. It was accepted that the respondent failed to give the claimant a written itemised pay statement on or before the date of payment in accordance with Section 8(1) for June 2019 to January 2020 and the Tribunal should make a declaration under Section 12(3). The issue was whether the Tribunal should make an award under Section 12(4) in respect of deductions made during that period.

Unauthorised deductions (Section 13 Employment Rights Act 1996)

30. Did the respondent make unauthorised deductions from the claimant's wages between June 2019 and January 2020 in relation to his pay during suspension of £93.07 (gross) per month in respect of the non-payment of Saturday and Sunday enhancements over this period?

Written statement of particulars

31. It was accepted that the claimant did not receive a written statement in accordance with Section 4 of the Employment Rights Act 1996 in relation to his full time, permanent position. The statement ought to have reflected the fact that the claimant moved from a fixed-term contract to a permanent contract and that his hours of work changed from 15 hours per week to 37.5 hours per week. The issue was whether an award should be made in accordance with Section 38 of the Employment Act 2002.

Breach of contract

32. Did the respondent breach the claimant's contract of employment by failing to consider the claimant's grievance as part of his appeal against dismissal? It was accepted that the respondent's grievance policy was contractual.

33. The issue here was whether the claimant had any losses flowing from the breach for which he could be compensated.

Holiday pay

34. The respondent agreed to pay the claimant for 3 public holidays accrued during his suspension, the gross value of which is £186.15 (from which appropriate deductions will be made).

Case management

6. The parties had agreed productions running to 721 pages with additional documents being inserted in the course of the hearing.

7. The Tribunal heard from the claimant and his wife (who accompanied the claimant to some of the meetings) and from Ms Ferguson (Site Facilities

Manager, who was responsible for the initial investigation), Ms Murray, (Site Facilities Manager, who carried out other aspects of the investigation), Ms Haughton (HR Adviser who supported management during the process), Ms Kane, (General Manager and the dismissing officer), Mr Hobson (formerly Assistant Director of Finance, chair of appeal panel), Mr Shaw (Deputy Duty Manager, who had witnessed events relating to the claimant) and Ms Biereonwu (Site Facilities Manager who managed the claimant).

Facts

8. The Tribunal is able to make the following findings of fact which it has done from the evidence submitted to it, both orally and in writing. The Tribunal only makes findings that are necessary to determine the issues before it (and not in relation to all disputes that arose nor in relation to all the evidence led before the Tribunal). Where there was a conflict in evidence, the conflict was resolved by considering the entire evidence and making a decision as to what was more likely than not to be the case.

Background

9. The claimant was employed by the respondent as a Porter based at the Royal Alexandra Hospital, Paisley from 13 February 2017 until he was dismissed with effect from 22 January 2020 for gross misconduct.

Contract of employment

10. On 10 February 2017 the claimant was issued with a contract of employment for a part-time fixed term contract as a Porter - Facilities. All porters employed by the respondent are employed on the same job description.

11. Later in 2017 the claimant was appointed to a full time, permanent post with the respondent. The claimant had not received an up to date written statement of particulars in respect of that role.

Weekend working

12. Until May 2019 the claimant worked a shift pattern which meant that he routinely worked weekends, and as a result was paid weekend enhancements

for this work. There were a number of discussions with the claimant, Ms Biereonwu and the claimant's union representative about changing his shift pattern. Ms Anderson, acting in the capacity of the claimant's union representative, asked the respondent that they change his hours of work such that the claimant stop working weekends. On 7 May 2019 Ms Biereonwu met with the claimant, and agreed to remove the claimant's weekend working. From that date, the claimant was not to work weekends and would not therefore be entitled to any enhanced weekend payment.

Suspension

13. On 13 June 2019, there was an incident at the South Tower lifts, outside Wards 18, 19 and 20 involving the claimant, Mr Irvine (Porter), Ms Graham (Domestic) and Ms Creighton (Catering Supervisor).

14. On 14 June 2019, the claimant was suspended by Mr Mullen. Mr Shaw was in attendance. The reason for suspension was that it was alleged that the claimant had displayed threatening and aggressive behaviour towards other members of staff.

15. Mr Mullen and Mr Shaw escorted the claimant out of the hospital. The claimant did not display any aggressive or threatening behaviour to Mr Mullen. Mr Shaw accompanied the claimant to his car.

16. A suspension letter dated 14 June 2019 was issued to the claimant stating that he had been suspended following an allegation that he had displayed threatening and aggressive behaviour towards other employees. The purpose of the suspension was stated to be to allow a full investigation to take place.

17. The respondent's Disciplinary Policy and Procedure was included with the letter. That provided that *"Suspension will always be on full pay"* and gives as an example of serious misconduct, which may result in a final written warning or summary dismissal, *"violent, threatening or indecent behaviour including ill treatment of and/or behaviour of a sexual nature to patients, visitors or other employees"*.

18. The claimant remained suspended until his dismissal with effect from 22 January 2020.

19. The disciplinary policy sets out the approach to dealing with disciplinary issues. The respondent undertakes to carry out a full investigation involving the interview of witnesses. Following an investigation a disciplinary hearing may take place at which management will set out their case and may call witnesses. The policy also allows an appeal which will be held within 4 working weeks of receipt of the appeal unless otherwise agreed by both parties.

Investigation

20. An investigation into the incident was undertaken by Mrs Ferguson, Site Facilities Manager. She was provided with HR support from Ms Houghton. The investigation was undertaken in accordance with the respondent's Disciplinary Policy and Procedure.

21. The respondent interviewed Ms Creighton, Mr Shaw and the claimant on 3 July 2019 and Ms Graham and Mr Irvine on 12 July 2019. Copies of the interview notes were included within the Management Case, along with a statement from Mr Mullen.

22. **Ms Creighton** stated that she was going along the corridor and *"heard a commotion and saw a domestic between two porters"*. She said *"she looked like she was separating them, they were shouting so I walked along to see what was happening"*. She said the porter with the dark hair (whom she understood to be the claimant) was shouting and swearing. She said she asked him to keep his voice down. She asked the domestic what happened but could not concentrate because the claimant kept walking off and appearing again. She alleged the claimant shouted at her. He was swearing and she felt he was aggressive. She felt a bit intimidated and felt he *"was not in a good place".*

23. She was asked if she would describe him as *"having lost the plot"* and she said *"He was warped in my opinion he just lost it when I tried to speak to him"*.

She said the other porter walked the other way. She was scared. Upon being asked if the other porter had shouted or swore, she said: *"No. He said nothing. He just stood quietly and never said anything. He looked bewildered as if to say what's going on."*

24. **Ms Graham** said she met Mr Irvine and he asked how she was getting on with her union duties. She said fine and she was enjoying it. She asked where he had been at the last meeting which was a joke. She said, *"the next thing I knew the claimant had appeared from nowhere with his hands in the air and he was shouting 'he's one of the protected ones'*." She thought it was a joke at first but he repeated it and she believed he was not joking. She said the claimant was loud. Mr Irvine was behind her and she said: *"walk away guys"*. While Mr Irvine did not say anything, the claimant was not for letting it go. Mr Irvine did not say anything and he walked away upon being told to do so. The claimant kept saying Mr Irvine was *"protected"*. He was really angry saying *"outside"*. As the claimant came towards her, she said she put her hand on his shoulder to stop him approaching further to which the claimant said, *"get your fxx hand off me"*.

25. In response to being asked if she felt threatened, she said she felt uncomfortable and felt in a vulnerable pace, as a woman and a mother. She was not sure if she would be struck. She described the claimant as like a *"caged animal going back and forward and pointing to go outside"*. When the supervisor appeared she felt she had support. The supervisor tried to walk away with the claimant but he returned. She found it a *"horrible situation"*. She said she had got involved to prevent escalation.

26. **Mr Irvine** said he was standing outside the stairwell door talking to his colleague. He said: *"the next thing the claimant came out the door, the door got thrown open and it actually hit the wall."* He said the claimant shouted, *"don't be talking to him he's well looked after in here"*. Ms Graham had said, *"enough"* and the claimant kept walking away and then turned around and shouted *"cmon then"*. Mr Irvine believed the claimant was challenging him to a fight which Mr Irvine said he ignored. The supervisor had arrived and said, *"leave it"*. There had been previous discussions between the claimant and Mr

Irvine which the claimant had called banter. He said porters had been discussing things amongst themselves and not going to a supervisor. There had been no previous incidents or other niggles with the claimant.

27. **Mr Shaw** said he was accompanying Mr Mullen who was to suspend the claimant. Mr Mullen had explained the position to the claimant. The claimant had been asked if he wanted a union representative present but said he did not trust any of them. As the other porter had been working nearby Mr Shaw decided to escort the claimant to his car (which was down the hill). Having gone outside (and after Mr Mullen had left) Mr Shaw said the claimant began shouting at him and accused him of being a gangster. Mr Shaw said the claimant was shouting in his face and said that he would not get away with it. He said he reported it upon his return as he believed the behaviour to have been unacceptable. When asked to describe the behaviour he said he was subdued until he went out the office when his arms were outstretched and he was going round in circles shouting about the incident. He said his behaviour was unstable.

28. The **claimant** said he was coming down the corridor and saw 2 members of staff in conversation and he heard a discussion about meetings and why some staff did not attend. The claimant said he thought he was having a joke and had said that Mr Irvine did not need to attend meetings because he was *"pals with Eric"*. The claimant said Mr Irvine *"seemed to get angry and came towards"* him and the claimant said he did not mean to be malicious and walked away. He said that if he had shown threatening behaviour it was not intentional. He walked away. He said he was having fun and Mr Irvine began to shout at him. He said he had tried to report the incident.

29. Upon being asked if he had raised his voice at any time he said he can sometimes shout but as he was *"a bit deaf"* and did not mean to shout.

30. The claimant was told that there were 2 witness statements saying he was shouting and swearing who said he had walked away. The claimant said the CCTV would show he was not threatening. He said he did not remember

raising his voice. He said he could not remember swearing. He said maybe he was swearing but he could not recall.

31. The claimant was then told that 2 statements corroborated that he was swearing and shouting and swore at the catering supervisor. The claimant said he had said what he needed to say. He said it was *"really funny"* as Mr Irvine and Ms Graham know each other but he did not remember swearing, definitely not to a woman.

32. The claimant was asked what happened next, noting that there were *"statements"* that the claimant had become loud and aggressive. He said he had no recollection of that. He was asked if he remembered swearing at Mr Shaw and he could not. He said he was not angry walking down the hill.

33. Upon being asked why Mr Mullin would give a statement against him he said he did not know and believed it was a set up. He said he was looking forward to the disciplinary hearing as he wanted to bring up what has been happening over the past year. He said he felt this had become victimisation. He said Morag and Isobel could not stand him and Eric and Jim are bullies. He said he had been put in the pool and because he walked so much he could not do overtime. He said he had arthritis and was a *"bit deaf"*. The claimant said he had been to OH and his GP who said he was suffering anxiety. A discussion took place about historical issues and the claimant's location at work including his duties.

34. The claimant confirmed he normally worked Monday to Friday. He said he would sometimes work weekends and get the days off. He said he had problems with his hips and when he raised issues they were ignored.

35. The claimant explained he had been to OH about his hips due to work related issues. The claimant was told that a referral could be made to OH if that assisted him. He was told that he could refer himself to counselling if he wished and a referral would be made to OH to support the claimant.

36. The claimant disclosed he was taking anti-depressants and thyroid tablets.

37. The claimant said that he wanted to change his duties. When he had started the role he did not have gloves and sustained a needle stick injury. He said he had emailed about a year ago raising complaints and had not received a response. The claimant was told to contact his union representative if he wished to raise a grievance and they could assist him. The claimant said that he had contacted *"the whistleblowing woman"* following a call to the whistleblowing helpline. The claimant was told of the form to complete if he wished to raise a grievance.

38. The claimant said he had to wear woman's trousers and was told that the trousers were unisex. The claimant had been asked if he raised matters with his union but said he was a *"bit scared"* to take things forward. He was told to discuss matters with his trade union.

39. **Mr Mullen** said he had been asked to suspend the claimant and took Mr Shaw as his witness. He had explained the process and asked if the claimant wished a union representative present but he said he did not trust any of them. The claimant agreed to leave the premises and left without saying anything until he got out the front door when the claimant asked a few questions. Mr Mullin said he did not think it necessary for both him and Mr Shaw to escort the claimant to his case, so Mr Mullen stayed back while Mr Shaw walked him to his cr. When Mr Shaw returned, he said that the claimant had said, "*Jim, Eric and David were getting it"* but that had not been something Mr Mullen had heard.

40. A copy of the investigation notes with the Claimant were provided to him and he was afforded the opportunity to comment and amend these, which he did.

41. Notes were made of the interviews, but they were not verbatim notes.

42. The investigators did not investigate which way the door opened into the stairwell.

43. During the investigation meeting with the claimant there was discussion about his mental health and issues he was having with his hip. The respondent

suggested making a referral to occupational health, which the claimant agreed to.

Occupational health referral

44. An occupational health referral was made on 15 July 2019. The referral form states that at the investigatory meeting on 3 July 2019 the claimant stated that he suffered from depression and hyper thyroidism and is on medication for both. The referral stated that *"on the day we had concerns regarding his health and the claimant agreed on this referral."* The referral asked if the claimant was fit to contribute to the hearing and if there is support that could be offered.

45. The claimant subsequently cancelled the scheduled occupational health appointment. This was not followed up.

46. As part of the investigation, the investigators enquired as to whether CCTV footage was available of the incident on 13 June 2019. They were advised that it was not but that there was footage of the claimant leaving site on 14 June 2019 following his suspension. This footage was from a distance and had no sound. The claimant did not have an opportunity to view this.

Conclusion of investigation

47. Ms Ferguson completed her investigation and prepared a Management Case. She concluded that there was a case to answer in respect of the claimant's behaviour on 13 June 2019. This was sent to the claimant. The statement comprised a detailed background, the allegation, investigatory process with findings, conclusion and recommendations.

48. Having summarised the investigation process the report and the statements that had been taken. The report concluded that witnesses corroborated the allegation that the claimant had displayed threatening and aggressive behaviour on 13 June 2019. It noted that the claimant had denied the allegation. The report noted that while suspended the claimant had become agitated when out of the building and that there had been previous discussion with the claimant about his aggression, but no formal action had been taken.

The claimant had alleged that he had been victimised but no evidence in support of that assertion had been provided.

49. Appended to the report were copies of the claimant's suspension letter, the respondent's Disciplinary Policy and Procedures and Investigation notes of meetings with witnesses and the claimant.

50. As part of the investigation Ms Ferguson and Ms Houghton obtained statements from Ms Biereonwu and Ms Speight. They were not included in the Management Case or shared with the claimant as the individuals had no contact with the claimant at the material time. The claimant did not dispute this.

Disciplinary hearing

51. On or around 26 August 2019, the claimant was invited to a disciplinary hearing on 4 September 2019 by letter which advised the claimant of the allegation, namely that, *"on 13 June 2019 at RAH South Tower lifts, outside Wards 18, 19 and 20, you allegedly displayed threatening and aggressive behaviour towards other members of staff".* The letter advised the claimant that a possible outcome of the disciplinary hearing was dismissal and that he was entitled to be accompanied to the meeting by a Trade Union representative, colleague, friend or relative not acting in a legal capacity. The letter also advised that the claimant had the right to call witnesses at the hearing, which the claimant understood. The letter concluded by stating that if for any reason the claimant or his representative was unavailable the hearing can be rearranged to a mutually suitable time which failing the hearing could still proceed and a decision taken in the claimant's absence. The letter was signed by Ms Kane who was to chair the hearing.

52. The claimant advised that he was unavailable for this hearing, due to being on holiday, and, it was rescheduled to 9 October 2019.

Claimant's submission for the hearing

53. Prior to the hearing the claimant, with the support of his trade union representative, had finalised a statement of case which was presented to the

hearing. This referred to the allegation, timeline, background and provided the claimant's response to the case.

54. The claimant's submission noted that the claimant had a clear disciplinary record and had raised multiple work-based issues and dignity at work issues with line management on 23 October 2019, 7 May 2019, 22 May 2019, 28 May 2019 and 2 September 2019. It was alleged that those had a bearing on the claimant's mental and physical wellbeing and working environment.

55. The statement stated that the claimant had been suffering from depression and anxiety for some time and is receiving GP interventions. He had referred himself to counselling. The submission said the claimant believed this to be linked closely to his belief that there was a culture of bullying, intimidation and victimisation in the workplace. The claimant had raised concerns through the whistleblowing procedure (as he had lost faith in management dealing with them).

56. The submission stated that the claimant *"was always loud".* His work history was such that he had a hearing impairment and would raise his voice *"due to this disability"*. The claimant did not mean to shout but *"struggles to manage this level of vocalisation"*.

57. The claimant refuted that he swore as he understands the importance of not swearing in a work environment. The statement stated that during the investigation the claimant had repeatedly mentioned he had no recollection of some events. It was alleged that the claimant suffers from depression and anxiety the symptoms of which can be forgetfulness, confusion, brain fog, finding it hard to think clearly, agitation, frustration, loss of concentrating, finding it hard to cope with everyday tasks, a sense of feeling constantly on edge and irritability. It was possible for the claimant to wave his arms when he was anxious.

58. Reference was made to failures to refer the claimant for training and to make adjustments in respect of his arthritis which was affecting his knees.

59. The submission said the claimant had constantly raised issues of rostering, extended long shifts without a day off and lack of training and concerns about health and safety which appeared to have been ignored. Despite raising issues of victimisation this did not appear to have been investigated.

60. The submission noted that Mr Irvine had not been sure that the claimant swore and Ms Graham admitted to putting her hand on the claimant which appeared to inflame the situation. It was also noted that Ms Creighton had said the claimant did not appear *"to be in a good place"*. It was also noted that no referral to occupational health appeared to have been made until after 5 weeks later with the referral being incomplete.

61. It was suggested that symptoms exhibited by the claimant *"are indicative of overdosage of Nenlafaxine"* which the claimant's GP had prescribed for depression and anxiety. That dose had been prescribed prior to the events of 13 June. The claimant had subsequently had his medications rereviewed by his GP.

The disciplinary hearing

62. The hearing on 9 October 2019 was chaired by Ms Kane, with HR support from Ms McFadyen. At the hearing, the claimant was represented by his Union Representative, Mr Gaffney. The management case was presented by Ms Murray, Site Facilities Manager, in the absence of Ms Ferguson, with HR support from Ms Houghton.

63. The panel chose to hear witness evidence. Ms Graham, Mr Shaw and Mr Irvine attended and gave evidence to the panel. Ms Creighton was on sick leave so did not attend but her statement was considered.

64. The claimant relied upon his statement of case and chose not to bring any other evidence nor lead any witnesses.

65. The claimant raised issues as to his health and alleged he had raised a number of workplace issues with management that had not been addressed.

66. In relation to the events of 13 June 2019 the claimant denied shouting or swearing. He denied having been aggressive or threatening. He said the witnesses were lying.

67. Ms Kane reflected upon what had been said and decided that further investigation was needed, particularly in light of the submissions made by the claimant as to his health, and its impact upon the claimant's return to work (if that was what she decided by way of an outcome) and its impact upon the claimant's actions on the day in question. She also wished to ascertain if any of the concerns the claimant had raised were outstanding.

68. The hearing was therefore adjourned for referrals to be made for the claimant to the occupational health service to consider both the claimant's fitness for work and to see Dr Sarah Holmes, consultant psychiatrist.

69. At no time during the hearing (or otherwise) did the claimant or his trade union representative indicate or suggest that the claimant was not fit to attend the disciplinary hearing, or had not been fit to attend the investigatory interview. His health situation had been presented as mitigation, albeit the claimant maintained that he was not guilty of the conduct that was alleged.

70. Ms Kane asked Ms Murray to establish whether previous complaints and concerns raised by the claimant had been dealt with appropriately, and, to report back.

Letter following the adjourned hearing

71. This was confirmed to the claimant by letter dated 10 October 2019, which contained a summary of what was said at the disciplinary hearing, as is the respondent's standard practice. No separate notes of the disciplinary hearing were produced.

72. The letter noted that the management case had been presented and reference was made to Ms Creighton's statement and what she had said happened. Ms Graham attended the hearing and advised the panel that the claimant began to swear shout and wave his hands in an aggressive manner on 13 June. She said the claimant had asked Mr Irvine to *"step outside".* Ms

Graham had said that she felt the claimant was goading Mr Irvine into a fight and she was frightened by his behaviour and fearful. She had sought to diffuse the situation and as the claimant approached her she placed a hand on his shoulder to stop him coming closer. She believed she had a good working relationship with the claimant, but the claimant had shouted at her. She felt scared and that the claimant's behaviour on the day was *"aggressive, loud and threatening towards her and Mr Irvine".* Ms Graham had been visibly upset when recalling the events at the hearing. She said she felt threatened by the claimant's behaviour.

73. Mr Irvine attended the hearing and said the claimant approached with the door being thrown open with force hitting the wall with the claimant shouting and being aggressive. Mr Irvine had said the claimant was goading him to go outside and he walked away and kept returning. Mr Irvine had said he felt threatened by the claimant but chose to remove himself from the situation. It was a public area. Mr Irvine told the panel the claimant was shouting and swearing.

74. Mr Shaw had also attended the hearing and said upon walking the claimant to his car the claimant had been *"extremely loud and swearing"* waving his arms in an animated way. Mr Shaw had said the claimant was very abusive to him and threatened him.

75. At the meeting it was noted that there was no CCTV footage of the incident on 13 June 2019 and the footage for 14 June 2019 showed the claimant being animated waving his arms in the air.

76. The claimant's representative noted the claimant suffered from anxiety and depression and had done for many years. It was the trade union representative's view that the claimant had been over prescribed medication which could impact on his behaviour, but the claimant confirmed that this had not been something his GP had confirmed.

77. It was alleged that the claimant had raised a number of workplace issues and concerns about victimisation and did not feel these had been addressed.

78. As to the incident, the claimant denied shouting or swearing and waving his hands about. He alleged his colleagues were lying and they had fabricated events to have him dismissed. He could not understand why Ms Graham was crying when giving her evidence nor why she would lie about the events. He believed some colleagues did not like him and considered him to be a pest due to his raising workplace concerns.

79. Ms Kane noted that the claimant's recollection of events was *"vastly different"* to that of all the witnesses. She noted the claimant appeared to have no insight into his behaviour or the impact upon colleagues. She noted that Ms Graham had been genuinely upset during the hearing. She had presented as credible and the claimant had given no reason why she would fabricate events. Mr Irvine was also credible and consistent with Ms Graham

80. On 23 October 2019 the claimant emailed Ms Kane and disputed the accuracy of the letter. He said that while the witnesses were said to be credible there were irregularities on at least 4 points which were not noted and there was no mention of the points the claimant made, such as the door allegedly being slammed despite him not coming through a door and there was no mention of Mr Mullen being called to *"verify his statement".*

81. On 28 October 2019 Ms Kane replied to the claimant by email and advised that the letter was intended to be a summary of the evidence, advised the claimant to compare the letter with Mr Gaffney's notes to identify any particular areas of discrepancy and that Mr Gaffney could highlight any concerns at the reconvened hearing. She noted that Ms Murray had been tasked to identify what concerns the claimant had but the claimant had yet to send her his concerns. She also noted the importance of the claimant attending the occupational health appointment.

Occupational health input

82. The claimant had been scheduled to attend an occupational health appointment on 31 October 2019 but had cancelled the appointment. Ms Kane wrote to the claimant on 5 November noting the claimant had cancelled the appointment. She noted that 2 separate appointments had been arranged

to allow the claimant to be seen by Dr Holmes, psychiatrist and Dr Haldane, occupational health physician. The claimant was advised of the importance of attending these appointments. The appointments had been rearranged for 15 November 2019.

83. The claimant attended the appointments and met with Dr Haldane and Dr Holmes. A report dated 15 October 2019 was produced by Dr Haldane and seen by the respondent.

84. The referral document the respondent had prepared stated that the claimant had attended the hearing to consider the allegation of aggressive and threatening behaviour. It was noted that the claimant's agent had raised issues as to mitigation. The claimant had an appointment with Dr Holmes to address mental health concerns. The claimant had intimated that he felt he was unable to walk long distances and participate in heavy duties. With regard to assessing future employment his fitness to carry out his duties was to be considered (with his mental health issues being considered by Dr Holmes). The claimant had also identified a hearing impairment which the respondent had not known about.

85. Dr Haldane provided a report having consulted with the claimant. He had also spoken with Dr Holmes with whom the claimant had consulted earlier in the day. Dr Haldane was unable to say definitively if there were any concerns with the claimant's hearing but there did not appear to be concerns nor any suggestion that his communication was sub optimal. Given some physical impairments, rotation of work would be beneficial for the claimant and Dr Haldane considered the claimant to be fit for his full range of his duties. Relocation to an alternative working environment may be beneficial.

86. Dr Haldane stated that: *"I also understand that a separate referral has been made in connection with his mental health issues. He has seen my colleague Dr Holmes this morning prior to seeing me. She does not undertake a specific management referral and instead would provide a report to me. We have spoken in general terms and her verbal feedback to me allied to my own assessment would be that he has had a formally diagnosed mental health*

issue for which he is on appropriate medication and received other therapeutic input. There's been no suggestion of an overdose. I don't feel his mental health adversely impacts upon his ability to continue working and he is fit and safe to do so in the right environment. I don't think a GP report will add much. There's no evidence of a paranoid disorder."

Further investigations

87. Ms Murray interviewed Ms Walsh and Ms Biereonwu on 29 October 2019 and the claimant on 6 November 2019.

88. The claimant was represented at the meeting on 6 November by his Union Representative, Mr Gaffney.

89. Ms Murray produced an investigation report which contained copies of all the interview notes undertaken. Appended to the report were copies of the meeting notes, emails, photographs and text messages provided by the claimant, Ms Biereonwu and Ms Walsh and a timeline that Ms Biereonwu had produced.

90. Included within the investigation report was a letter which is the protected disclosure referred to at paragraph 11(a) of the List of Issues. The copy the Tribunal saw was of very poor quality.

91. The issue Ms Murray was considering was that previous complaints and concerns raised by the claimant had not been dealt with appropriately, such issues having been raised from February 2018 until September 2019. The report has a section entitled *"Findings"* which set out a summary of the investigation. The claimant had confirmed at his interview that he had never submitted a formal grievance (in the specific form known by him). He had been told by Ms Walsh that was how to progress the issue formally. The claimant did not do so.

92. At a meeting on 31 May 2019 issues as to rota and breaks had been raised and the claimant said he was happy with the outcome and wished to draw a line under the concerns he had raised.

93. The claimant had also been advised at a meeting on 3 July 2019 of the process for raising a formal grievance, if he wished to do so. He had chosen not to do so.

94. While the claimant had *produced "pages of complaints he believed had not been addressed"* when he was questioned about each of the issues individually, the claimant stated that there had been discussions about the issues and responses were given, even if the claimant did not consider the responses to be satisfactory. The claimant had been unhappy about the amount of walking required in his role but the role was not fixed and demands fluctuated. The claimant believed his department had been poorly managed and work allocation was unfair. This was despite the claimant having been moved for medical reasons based on an occupational health report. The claimant had accepted that he was not asked to work extra or complete all tasks, but he said it was human nature to do so.

95. The claimant had raised concerns about toilet and hand washing facilities but he confirmed that his trade union had advised him to seek legal advice on these matters and to those issues were not addressed. He also alleged there was a *"gang"* culture and colleagues made fun of those prepared to work but he had never raised this matter with his manager.

96. The report noted that the claimant had become increasingly frustrated culminating in him losing his temper during the meeting. Ms Murray stated that the claimant had been aggressive towards her during the meeting at which point the claimant's trade union representative interjected and requested an adjournment. The claimant had a poor recollection of discussions he had with management and believed his suggestions had not been taken seriously.

97. The claimant had also alleged that there was a lack of PPE and that the attitude of supervisors as to dealing with staff complaints was a concern for him. Reference had been made to a work-related accident but this had not been followed up as a formal record of it had not been made. He also complained about last minute rotas and the lack of manual handling training

(which had been arranged but not delivered). Finally, he raised a concern about how a service corridor was used.

98. Ms Murray's summary stated that the claimant believed he had a number of outstanding issues but had admitted to not raising the issues formally and that he had advised during the meeting on 31 May 2019 that he was *"happy to draw a line under everything".* Ms Murray concluded that Ms Walsh and Ms Biereonwu had addressed the concerns raised with them and no formal issues were outstanding. She noted that a couple of the claimant's concerns would be taken forward by management to ensure a more structured and cohesive department.

Timeline

99. Ms Biereonwu had produced a timeline from the information available to her, to assist Ms Murray in understanding the chronology of events and history of interactions with the clamant. She did so in good faith with the intention of providing a chronology. The timeline she prepared was as follows.

13.02.17 *Claimant started 13 Feb 2017 on a fixed term contract until May 2017.*

May 2017 *made permanent in the pool and applied for internal advert for bin man position.*

3.11.17 *claimant allegedly shouted at staff in ward 2. Gavin spoke to nurse in ward 3. Nurse said there was a datix but Gavin could not find one. Isobel asked for file notes but there was none. No action taken.*

22.11.17 *Gavin had an email regarding Kevin. Domestic and Supervisor spoke to Gavin about the claimant's attitude towards domestic staff. Gavin asked for statements. The claimant disagreed with the statement.*

05.11.18 *referred to OH as claimant said he had arthritis in his hips.*

03.12.18 *complaint regarding claimant just missing someone with a tug.*

Gavin was trained as tug training so would have trained the claimant.

04.12.18 *to support the claimant he was put into pool room for 6 week period.*

20.12.18 *OH report.*

23.01.19 *S and I had a meeting regarding the claimant returning to bins.*

23.01.19 *complaint from ward 29.*

25.02.19 *claimant was not happy working in the pool and was falling out with colleagues and nursing staff. To support the claimant the supervisor moved him to the theatre for 2 weeks to give everyone a break.*

There were issues in theatre with the claimant and he was moved back to the pool.

07.05.19 *meeting with claimant, Mr Shaw and myself.*

Claimant agreed to be referred to OH.

13.05.19 *Referred to OH as Union said claimant had arthritis in spine. Appointment arranged for 3 June 2019 which claimant attended.*

20.05.19 *Claimant commenced 10-6 Monday to Friday in discharge. He went to union about working 10 to 6 and to support him the next week he was 9-5 for alternating weeks. Going by rota the claimant did 9-5 for 2 weeks prior to being suspended.*

29.05.19 *Formal absence review meeting.*

06.06.19 *OH report and claimant medically fit to continue as porter. No adjustments or restrictions indicated.*

14.06.19 *claimant suspended.*

Investigation concluded

100. Ms Murray completed her further investigations on or around 18 November 2019 and availability was sought the same day for Mr Gaffney and the claimant to attend the reconvened disciplinary hearing. The claimant's trade union representative informed the respondent that the hearing could not be fixed until January 2020, as there was no union representation available until then. The claimant was provided with a copy of Ms Murray's report on 23 December 2019.

Grievance

101. On 24 December 2019 the claimant submitted a Grievance Notification Form which was stated to be a grievance *"regarding the treatment I have received during my disciplinary hearing and suspension".* He said he believed he had suffered a detriment with regard to the time taken to deal with the incident (having been suspended almost 7 months). He said he believed issues about his conduct had been *"unduly highlighted"* by management and the investigation panel. He said his mental health had been affected given the length of time he had been suspended together with the slander and lack of communication. He alleged the *"inconsistency of the investigation to others is discrimination".*

102. He alleged he had been forced to attend a psychiatrist who was concerned for his wellbeing. He said he had suffered a detriment as he had been prevented from working overtime and that *"a lot of the seven months suspension has occurred from raising concerns about health and safety".* He said he believed he had been singled out because he was a whistleblower. The claimant did not fill in the section that asked what he would consider a satisfactory outcome to be.

103. The respondent considered the terms of the grievance which related to the issues being considered as part of the disciplinary process. Consequently, the respondent chose to address the issues as part of the disciplinary process rather than as a separate grievance.

Reconvened disciplinary hearing

104. The reconvened hearing was arranged for 8 January 2020.

105. On 6 January 2020 the claimant emailed the respondent and advised that he would not attend as had not had enough time to contact and organise with his union.

106. The hearing was rearranged for 16 January 2020. The letter advised that if the claimant failed to attend a decision would be made on the information currently available (which could lead to an outcome, which could include dismissal). If the claimant had any medical evidence that suggested he was unfit to attend that was to be provided (and would be considered).

107. The letter also advised that the claimant's grievance would not be progressed at that time as it related to the ongoing disciplinary process.

108. The claimant contacted the respondent by email in advance of the re-convened hearing and advised that he expected the hearing to go ahead without him. He said that he believed *"the lies being told are having a detrimental effect on my health".*

109. The hearing went ahead on 16 January 2020 in the claimant's absence.

Outcome of hearing

110. Ms Murray presented her findings of her investigation. She had concluded that the claimant had never raised any concerns formally with his local management team and had said he was happy with management response to his informal concerns. He had been advised to lodge a formal grievance if he was unhappy and had not done so at the time.

111. Ms Kane noted that Ms Murray had described the claimant's behaviour during the meeting as loud and threatening in places. The claimant was said to have shouted in an aggressive manner and leaned across the table towards her. Ms Murray had said that the claimant had accused her of being *"out to get you"* despite Ms Murray having had no prior dealings with the claimant. Ms

Murray noted that the claimant's trade union representative removed him from the meeting to allow him to calm down.

112. Ms Kane also noted the occupational health report which stated there was no objective evidence of any hearing impairment and no suggestion that the claimant's hearing was sub optimal. The physician concluded the claimant was fit for work with a rotation of tasks being beneficial. The physician had referred to the consultant psychiatrist consultation the claimant had. There was no over-prescription of medication as had been suggested and the claimant's mental health had not adversely affected his ability to work.

113. Ms Kane considered all the evidence that had been presented with regard to the incident on 13 June together with the mitigation. Ms Kane carefully considered all the evidence and concluded that the claimant was guilty of gross misconduct. She concluded that the claimant's behaviour on 13 June 2019 was aggressive, threatening and wholly unacceptable. The respondent operated a zero-tolerance approach to violence or aggression in the workplace.

114. Ms Kane considered that the claimant's recollection was vastly different to that of his colleagues. The claimant claimed to have no recollection of shouting, swearing or threatening colleagues and did not accept his behaviour was aggressive. Ms Kane was of the view that the claimant had no insight into his behaviour or the impact it had upon colleagues. She noted that Ms Graham had been very upset during the hearing and she was fearful of the claimant on the day in question. Ms Graham was credible and there was no logical explanation or reason why she would fabricate events. Ms Kane also found Mr Irvine to be credible and his position was consistent with Ms Graham's. There was no reasonable explanation why he would also lie about the events on the day. She also noted that Ms Crichton had described the claimant's behaviour as loud threatening and aggressive and she felt intimidated.

115. Ms Kane noted that Ms Murray had concluded the issues the claimant had raised had been satisfactorily dealt with and had not been escalated by the claimant.

116. She also noted that the physician found no medical reason to support the assertion the claimant may have spoken loudly due to a hearing impairment and that there was no evidence to support the assertion made by the claimant's trade union representative that he may have been over prescribed medication.

117. Ms Kane was satisfied that the claimant's conduct on the day in question, on the evidence before her, was sufficient to amount to gross misconduct. She concluded that the claimant had been threatening and aggressive to colleagues in a public area of the building resulting in colleagues feeling intimidated.

118. Ms Kane considered what sanction should be applied. Given the nature of the claimant's conduct she concluded that dismissal was an appropriate outcome. He was accordingly summarily dismissed.

119. Ms Kane believed that the claimant's actions had resulted in trust and confidence within the employment relationship having been destroyed. She believed the claimant by his actions would not be able to continue to work for the respondent given the way he acted and the circumstances of this case.

120. Ms Kane confirmed her decision in a letter dated 17 January 2020 which set out the key points of the hearing (convened in the claimant's absence) and the reasoning for her decision. The dismissal was with effect from 22 January 2020. The claimant was given a right of appeal against the decision.

Appeal

121. The claimant appealed the decision to dismiss him in a letter dated 27 January 2020. He stated that he believed the panel treated his case differently from previous cases and with many inconsistencies he felt he had been unfairly treated and victimised. He said he believed witnesses were selective and the statements had flaws. He said the thought the incident was *"escalated to*

almost a witch hunt because I raised health and safety issues it almost become personal so much so I was made to attend a psychiatrist." He said it was a set up and people had lied and that his contract had been broken regarding health and safety and that others were still employed despite gross misconduct. He felt there had been a cherry picking of the statements.

122. The respondent acknowledged the claimant's appeal by letter dated 29 January 2020 advising the claimant that a member of the employee relations unit would be in touch.

123. At this stage the COVID19 pandemic was beginning to take hold. There was a lack of clarity as to the position and the respondent was not convening face to face meetings. There were delays as the respondent sought to agree an approach with trade unions to holding remote meetings.

124. In their letter of 20 February 2020 the respondent noted the claimant had submitted his appeal and grievance (in December). The letter stated that *"it was agreed during your telephone conversation with Employee Relations Lead that your concerns would be addressed as part of the appeal process as they are in relation to the investigation/disciplinary process."* A hearing date of 18 Mach 2020 was set out.

Claimant's statement of case for his appeal

125. The claimant subsequently submitted the claimant's statement of case for the appeal which was a detailed document with appendices. He stated that on 13 June 2019 he was heading past colleagues when he was asked a question by another member of staff about not attending a meeting. He said he mentioned favouritism which he meant as banter but his colleague took offence and *"a loud discussion took place".* He said he *"waited a distance away asking the other member of staff involved to discuss his strange actions... The staff member refused to come and speak despite threatening me. I walked away with the other member of staff".* He said that he was appealing the decision on grounds of unfair treatment, victimisation, inconsistency and lies.

126. He said it had taken 7 months to investigate the incident and there had been a witch hunt to fabricate reasons to dismiss him. *"After all at the end of the day it was a simple heated discussion between 2 male members of staff".* He said he believed he had been sacked over complaints about health and safety.

127. He noted that he had not received the correct paperwork following the meetings and that he was still waiting on replies to basic things like health and safety. He said he had not received an answer as to why those colleagues who had committed fraud were treated better than him. He believed he had been persecuted because he was a whistleblower.

128. With regard to the investigation he said it was not possible for the note taker to be typing at the same speed as people were talking especially when there was a lot being said. He found questions strange and in places contradictory. He set out his concerns at length noting ways in which statements were not consistent and argued that the statements showed the witnesses were not credible.

129. His submission then focussed on the disciplinary hearing and argued that the approach had been one sided. He noted that Mr Mullen had never given a statement that supported what Mr Shaw had said. He also noted that Mr Irvine had said Ms Graham had not touched him. He asserted Mr Irvine had exaggerated the situation. He submitted that Ms Graham told lies. He said: *"I believe she was crying because she had told so many lies she had forgotten what was the truth. Perhaps fear."* He noted that the panel had instructed him to see a psychiatrist and a doctor and he had not been given a reason for the change in reason for the referral.

130. His submission then considered Ms Murray's investigation and set out what he believed his concerns were. He said the investigation report has *"numerous lies and flaws and is in fact another witch hunt basically again designed to paint a picture of me with very little or no real factual evidence."* He said: *"the timeline is shocking another detriment and personal attack on me with lies and no proof whatsoever as to the accusation on certain dates".*

He said it appeared to go wrong from November 2018 when he refused to do the bins any longer alone. He suggested that Ms Biereonwu appeared to have a problem with the claimant. He queried why her position was accepted without question.

131. In the next section of the submission reference is made to the occupational health reports. He alleged that the psychiatrist appeared to be looking for a reason to remove him. The submission stated: *"The psychiatrist stated there is no evidence of a paranoid disorder. Surprising considering the treatment I received from the workplace".* He said his anxiety was work related and the psychiatrist had said he needed to *"get out that environment as it was detrimental to his health"*. The claimant said that the panel was hoping he was deaf *"perhaps to get rid of me again"* and suggested a hearing test would have been appropriate. He argued he had not been given clarity as to why he was to attend both meetings and believed it was more of an interrogation than an investigation. This section concluded suggesting that because the reports are of no benefit in discrediting the claimant and assist him and not the panel, they were practically ignored.

132. The submission also identified inaccuracies in the dismissal letter. For example he noted the letter stated the claimant was content with the medical referrals but he did not get written clarification on the mental health checks. He accepted he had not raised a formal grievance but could not understand why he had to *"do everything formal"*. He said it was a way of trying to make peace and draw a line under previous issues and move along. The claimant said he had never been aggressive in his life and sometimes anxiety can lead to loudness. He had never been aggressive in his life and had not mentioned anything about an overdose (as it was a union concern).

133. The claimant emphasised that he did not come through a door on the day in question and there were inconsistencies amongst the witnesses. He believed that *"the whole incident as an argument that got out of hand though I do believe my whistleblowing and health and safety issues have escalated my treatment".*

Management response to the claimant's statement of case

134. The matters raised by the claimant in his appeal and his grievance about the disciplinary process were responded to in Ms Kane's statement of case for the appeal hearing. This was a detailed submission prepared by Ms Kane that considered the points raised by the claimant and the full factual matrix.

135. The statement set out the background that led to the conclusion that the claimant had been guilty of aggressive, threatening and unacceptable behaviour towards his colleagues on 13 June 2019. The claimant had presented mitigation and shown no awareness of his behaviour despite the impact upon his colleagues.

136. The statement dealt with the issues the claimant had raised in his grievance and referred to the timeline which showed that some of the delays had been occasioned by the claimant rescheduling meetings and appointments. As the claimant had raised issues of his health it had been important to obtain medical evidence before making a final decision. Similarly, the claimant's complaints as to outstanding grievances had to be considered before a decision could be made. The claimant was aware that the separate investigation would result in delay. Further delays were caused by trying to accommodate the claimant and his union representative in meeting again.

137. The submission noted that the claimant had been referred to occupational health as a direct result of the mitigating factors presented at the original disciplinary hearing on 9 October 2019. Neither the claimant nor his trade union representative had raised any concerns and the union had said they were content with the referral.

138. Ms Kane stated that the claimant was referred to Dr Holmes, consultant psychiatrist due to the fact the claimant indicated (in his written submission) his GP may have accidently overprescribed venlafaxine medication which could have impacted on his behaviour on 13 June 2019. The reasons for the referral had been made clear at the time.

139. With regard to the assertion the claimant was prevented from working overtime, the claimant was suspended on full pay. As overtime is not guaranteed it could not be paid.

140. With regard to the argument the claimant was suspended because of raising health and safety concerns, health and safety concerns were encouraged and welcomed. His suspension was because of his behaviour and nothing else. Each case is considered on its own merits and the claimant was not singled out because of being a whistleblower but due to his aggressive and threatening behaviour.

141. With regard to his argument that he was treated differently from others, Ms Kane said he was treated in the way he was because of the facts in his case. No minutes are provided following meetings as the letters that are issued set out what happened at the meeting.

142. Ms Kane denied there was a witch hunt or that his health and safety concerns were connected in any way to the treatment he received. Ms Kane said she found the witnesses to be credible and believed what she had been told.

Appeal hearing

143. The appeal hearing was held on 29 April 2020. The respondent's disciplinary procedure states that an appeal should be held within four working weeks of receipt of the appeal unless otherwise agreed by both parties. Due to the Coronavirus pandemic, and to adhere to social distancing compliance, the appeal hearing was heard via Microsoft Teams after all parties had confirmed that they were content to proceed on that basis. No issues had been raised at the time as to the time that had taken which were due to the unique prevailing circumstances.

144. Mr Hobson, Assistant Director of Finance, chaired the panel, which also consisted of Councillor Mechan and Councillor Bamforth, Non-Executive Directors. Ms McCabe, HR Manager was in attendance as secretary for the appeal hearing. Ms Kane presented the management statement of case

supported by Ms McFadyen, HR Manager and the claimant was accompanied by his wife.

Outcome of appeal

145. Ms Kane presented the evidence that was used when deciding on the outcome at the original hearing. She said that the claimant was not known by the panel to be a whistleblower as he alleged but whistleblowing had no bearing at all on the decision. She explained the timeline and reasons for the delays in the outcome. Each of the witness statements had supported the fact the claimant displayed threatening and intimidating behaviour on 13 June. Ms Graham confirmed he was shouting and swearing. She was fearful. Ms Creighton felt intimidated. There was no reason for those witnesses to fabricate the evidence.

146. Ms Kane noted that the claimant had denied shouting, swearing or being aggressive and his colleagues had lied in an attempt to remove him. She referred to the claimant's assertion that his behaviour could have been caused by anxiety and depression and that he may have been over prescribed medication and that there were unresolved issues he had raised with management.

147. Occupational health physicians had stated there was no evidence of a hearing impairment or inability to carry out his duties nor any suggestion of overmedication. His mental health had not affected his ability to work.

148. Ms Murray had fully investigated the issues that had been raised. There was no reason to suggest the facts were in any way connected to these matters, which had been resolved. Ms Murray had said the claimant had become aggressive and threatening during the meeting and leaned over the table towards her. The trade union representative intervened to ask for a break. The claimant had alleged Ms Murray had goaded her which was denied.

149. Mr Irvine attended the appeal hearing and gave evidence. He said the claimant had burst through the door, was threatening towards him and

continued to ask the claimant to fight him. He said there were no prior issues with the claimant. The claimant alleged this was fabrication.

150. Ms Kane referred to Ms Graham's and Ms Creighton's statements which were taken into account (as they were unable to attend the appeal hearing). Both had described feeling scared and intimidated and Ms Graham thought the claimant was going to hit her.

151. Mr Shaw attended the appeal hearing and gave evidence and said the claimant had been shouting swearing and threatening him on 14 June on the way to his care.

152. The claimant said this was a minor incident used as witch hunt to fabricate reasons to dismiss him. It was a single heated discussion between 2 male staff and he had been dismissed over complaints regarding health and safety. The investigation had made a number of errors and the occupational health referral was *"an embarrassment".*

153. The claimant said he had not swung the door open as that was impossible and the evidence had been fabricated. He was 50 years old and fighting was not for him.

154. The claimant had accepted that there were no issues between him and Mr Irvine prior to this incident and the claimant had acknowledged that the emails appeared to show his concerns raised before the incident had largely been addressed.

155. Ms Kane noted that she had concluded the claimant's working relationships with his colleagues had irretrievably broken down.

156. The evidence heard was summarised in the outcome letter dated 6 May 2020.

157. The panel considered all the information that had been presented. They considered Ms Kane's reasons for the decision arrived at. The panel did not uphold the claimant's appeal.

Outcome of appeal

158. The panel concluded that the decision to dismiss was a reasonable one. They concluded that the claimant's actions on 13 June 2019 amounted to gross misconduct. There was no valid reason to doubt the credibility of the witnesses and there was no medical evidence that explained the claimant's behaviour. There had been other occasions when the claimant had demonstrated similar behaviour.

159. The panel took considered the claimant's health and safety concerns and were satisfied these had been addressed by management and Ms Murray. Whistleblowing and health and safety issues had not been a factor in the decision to dismiss the claimant.

160. The issues raised in the claimant's grievance had effectively been dealt with as part of the appeal, the issues being similar in nature. Had the matter been dealt with separately, the outcome would have been no different, the grievance would have been refused.

Whistleblowing

161. It was accepted that the claimant's letter referred to in paragraph 11(a) of the List of Issues was a qualifying protected disclosure and that the claimant made qualifying protected disclosure to Ms Biereonwu on or around 30 June 2018 as referred to at paragraph 11(d) of the List of Issues.

162. The claimant met with Ms Walsh in January 2019 where he talked about his behaviours in terms of what was raised by Mr Walker's email and he recognised his behaviours. The claimant wanted to have an informal chat rather than put anything in writing. The claimant said he had been to his doctor and everything was fine at home. The claimant was calm and rational and he took on board things about his behaviour and recognised he could be loud and how he spoke to others could be taken as offensive and he said he would take it on board. There was no mention at this meeting of the claimant having made any protected disclosures whether in relation to lack of PPE, washing facilities or risks to health and safety. The meeting had been convened to support the claimant and Ms Biereonwu.

Findings for the purpose of the wrongful dismissal claim

163. The Tribunal is able to make a positive finding of fact that the claimant was aggressive and intimidatory to his colleagues on 13 June 2019. The claimant fundamentally breached his contract of employment by his conduct on that occasion, thereby entitling the respondent to summarily dismiss him.

Disability discrimination

164. The claimant was a disabled person in terms of section 6 of the Equality Act 2010 by virtue of anxiety and depression and osteoarthritis at the relevant times and the respondent had knowledge of this.

Itemised payslips

165. It was accepted that the claimant did not receive itemised payslips for the months of June 2019 to January 2020 on or before the pay date.

166. On 16 September 2020 the claimant was sent all of the information which would usually be contained on a payslip.

Unpaid monies

167. Prior to May 2019 the claimant received enhanced payments to reflect the fact that he worked weekends. From 20 May 2019 until his suspension the claimant worked 9am-5pm or 10am-6pm, Monday to Friday. He therefore no longer received any weekend enhancement payments as weekends were no longer part of his working week.

Losses

168. The effective date of termination was 22 January 2020 when the claimant was aged 51 with 2 year's service. 1 week's pay for the claimant was £375 (gross) and £306.03 (net). The claimant received Employment Support Allowance between 22 January 2020 to 28 January 2021.

Observations on the evidence

169. Broadly speaking the Tribunal found that each of the witnesses did their best to recall events and provide credible and reliable evidence. On occasion recollections were found to be incorrect or some errors were made, and the Tribunal assessed the full factual matrix in resolving any dispute, including the documentation that was produced at the time and any oral evidence.

170. One of the issues in this case was the absence of detailed written notes following important meetings. The notes that were taken were not accurate in some respects. The Tribunal accepted that Ms Ferguson had advised the claimant at her meeting with him that the referral to occupational health would be in respect of his physical and mental health, but the notes of the meeting stated it was to do with his hip. That confused the claimant and he did not go to the meeting. The Tribunal accepted the evidence of Ms Ferguson that she had discussed the reasons for the referral, not least given the context of the discussion makes it clear that the claimant's physical and mental health required to be considered (and his hip was not a relevant issue in relation to the events under consideration) and Ms Ferguson wished to ensure up to date medical information was obtained.

171. The Tribunal also accepted the respondent's position that the claimant was offered counselling, given it had offered this before and it was part of the occupational health offering the respondent had.

Law

Unfair dismissal

172. The Tribunal has to decide whether the employer had a reason for the dismissal which was one of the potentially fair reasons for dismissal within Section 98(1) and (2) of the Employment Rights Act 1996 and whether it had a genuine belief in that reason. One of the potentially fair reasons is for matters relating to *"conduct".* The burden of proof rests on the respondent who must persuade the Tribunal that it had a genuine belief that the employee committed misconduct and that belief was the reason for dismissal.

173. Once an employer has shown a potentially fair reason for dismissal within the meaning of Section 98(2), the Tribunal must go on to decide whether the dismissal for that reason was fair or unfair which involves deciding whether the employer acted reasonably or unreasonably dismissing for the reason given in accordance with Section 98(4).

174. Section 98(4) provides that the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer): *"depends on whether in the circumstances (including the size and administrative rescores of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and shall be determined in accordance with equity and the substantial merits of the case."*

175. What a Tribunal must decide is not what it would have done but whether the employer acted reasonably: ***Grundy (Teddington) Ltd v Willis HSBC Bank Plc (formerly Midland Bank plc) v Madden*** [2000] ICR 1283. It should be recognised that different employers may reasonably react in different ways and it is unfair where the conduct or decision making fell outside the range of reasonable responses. The question is not whether a reasonable employer would dismiss but whether the decision fell within the range of responses open to a reasonable employer taking account of the fact different employers can equally reasonably reach different decisions. This applies both to the decision to dismiss and the procedure adopted.

176. Mr Justice Browne-Wilkinson in his judgement in ***Iceland Frozen Foods Ltd v Jones*** ICR 17, in the Employment Appeal Tribunal, summarised the law. The approach the Tribunal must adopt is as follows:

    i. *"The starting out should always be the words of Section 98(4) themselves.*

    ii. *In applying the section, a Tribunal must consider the reasonableness of the employer's conduct, not simply whether they (the members of the Tribunal) consider the dismissal to be fair.*

iii. *In judging the reasonableness of the employer's conduct, a Tribunal must not substitute its decision as to what was the right course to adopt.*

In many (though not all) cases there is a band of reasonable responses to the employee's conduct which in which the employer acting reasonably may take one view, another quite reasonably take another. The function of the Tribunal, as an industrial jury, is to determine whether in the circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which the reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair, it is falls outside the band it is unfair."

177. In terms of procedural fairness, the (then) House of Lords in ***Polkey v AE Dayton Services Ltd*** [1988] ICR 142 established that procedural fairness is highly relevant to the reasonableness test under Section 98(4). Where an employer fails to take appropriate procedural steps, the Tribunal is not permitted to ask in applying the reasonableness test whether it would have made any difference if the right procedure had been followed. If there is a failure to carry out a fair procedure, the dismissal will not be rendered fair because it did not affect the ultimate outcome; however, any compensation may be reduced. Lord Bridge set out in this case the procedural steps which an employer in the great majority of cases will be necessary for an employer to take to be considered to have acted reasonably in dismissing: *"in the case of misconduct, the employer will normally not act reasonably unless he investigates the complaint of misconduct fully and fairly and hears whatever the employee wishes to say in his defence or in explanation or mitigation."*

178. Where the employer relies on conduct as the fair reason for dismissal, it is for the employer to show that misconduct was the reason for dismissal. According to the Employment Appeal Tribunal in ***British Home Stores v Burchell*** [1980] ICR 303 the employer must show:

i. It believed the employee guilty of misconduct

ii. It had in mind reasonable grounds upon which to sustain that belief

iii. At the stage at which that belief was formed on those grounds it had carried out as much investigation into the matter as was reasonable in the circumstances.

iv. The employer need not have conclusive evidence of misconduct but a genuine and reasonable belief, reasonably tested. The burden of proof is on the employer to show a fair reason but the second stage of reasonableness is a neutral burden. The Tribunal must be satisfied that the employer acted fairly and reasonably in all the circumstances in dismissing for that reason, taking account of the size and resources of the employer, equity and the substantial merits of the case.

179. In ***Ilea v Gravett*** [1988] IRLR 487 the Employment Appeal Tribunal considered the ***Burchell*** principles and held that those principles require an employer to prove, on the balance of probabilities that he believed, again on the balance of probabilities, that the employee was guilty of misconduct and that in all the circumstances based upon the knowledge of and after consideration of sufficient relevant facts and factors he could reasonably do so. In relation to whether the employer could reasonably believe in the guilt, there are an infinite variety of facts that can arise. At one extreme there will be cases where the employee is virtually caught in the act and at the other extreme the issue is one of pure inference. As the scale moves more towards the latter, the matter arising from inference, the amount of investigation and inquiry will increase. It may be that after hearing the employee further investigation ought reasonably to be made. The question is whether a reasonable employer could have reached the conclusion on the available relevant evidence.

180. In that case the Employment Appeal Tribunal upheld the Tribunal which found that the employer had not investigated the matter sufficiently and therefore did not have before them all the relevant facts and factors upon which they could reasonably have reached the genuine belief they held. The sufficiency of the relevant evidence and the reasonableness of the conclusion are inextricably entwined.

181. The amount of investigation needed will vary from case to case. In ***Gray Dunn v Edwards*** EAT/324/79 Lord McDonald stated that *"it is now well settled that common sense places limits upon the degree of investigation required of an employer who is seized of information which points strongly towards the commission of a disciplinary offence which merits dismissal.*" In that case the Court found that further evidence would not have altered the outcome as the employer had shown that they would have taken the same course even if they had heard further evidence. That was a case which relied upon the now superseded ***British Labour Pump v Byrne*** [1979] IRLR 94 principle but emphasises that the amount of investigation needed will vary in each case. Thus in ***RSPB v Croucher*** [1984] IRLR 425 the Employment Appeal Tribunal held that where dishonest conduct is admitted there is very little by way of investigation needed since there is little doubt as to whether or not the misconduct occurred.

182. A Tribunal in assessing the fairness of a dismissal should avoid substituting what it considers necessary and instead consider what a reasonable employer would do, applying the statutory test, to ensure the employer had reasonable grounds to sustain the belief in the employee's guilt after as much investigation as was reasonable was carried out. In ***Ulsterbus v Henderson*** [1989] IRLR 251 the Northern Irish Court of Appeal found that a Tribunal was wrong to find that in certain circumstances a reasonable employer would carry out a quasi-judicial investigation with confrontation of witnesses and cross-examination of witnesses. In that case a careful and thorough investigation had been carried out and the appeal that took place involved a *"most meticulous review of all the evidence"* and considered whether there was any possibility that a mistake had been made. The court emphasised that the employer need only satisfy the Tribunal that they had reasonable grounds for their beliefs.

183. Where there are defects in a disciplinary procedure, these should be analysed in the context in which they occurred. The Employment Appeal Tribunal emphasised in ***Fuller v Lloyds Bank*** [1991] IRLR 336 that where there is a procedural defect, the question to be answered is whether the procedure

amounted to a fair process. A dismissal will normally be unfair where there was a defect of such seriousness that the procedure itself was unfair or where the result of the defect taken overall was unfair. In considering the procedure, a Tribunal should apply the range of reasonable responses test and not what it would have done (see ***Sainsburys v Hitt*** [2003] IRLR 23).

184. The Court in ***Babapulle v Ealing*** [2013] IRLR 854 emphasised that a finding of gross misconduct does not automatically justify dismissal as a matter of law since mitigating factors should be taken into account and the employer must act reasonably. Length of service can be taken into account (***Strouthous v London Underground*** [2004] IRLR 636).

185. In considering a claim for unfair dismissal by reason of conduct, the Tribunal is required to consider the terms of the ACAS Code of Practice on Disciplinary and Grievance matters. This sets out what a reasonable employer would normally do when considering dismissal by reason of conduct. This includes conducting the necessary investigations, inviting the employee to a meeting, conducting a fair meeting, issuing an outcome letter and allowing an appeal.

186. The reasonableness of the decision to dismiss is scrutinised at the time of the final decision to dismiss – at the conclusion of the appeal process (***West Midland v Tipton*** [1986] ICR 192). This was confirmed in ***Taylor v OCS*** [2006] IRLR 613 where the Court of Appeal emphasised that there is no rule of law that only a rehearing upon appeal is capable of curing earlier defects (and that a mere review never is). The Tribunal should consider the disciplinary process as a whole and apply the statutory test and consider the fairness of the whole disciplinary process. If there was a defect in the process, subsequent proceedings should be carefully considered. The statutory test should be considered in the round.

Discrimination claims

Burden of proof

187. The Equality Act 2010 provides for a shifting burden of proof. Section 136 so far as material provides as follows:

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

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

188. The Section goes on to make it clear that a reference to the Court includes an Employment Tribunal.

189. It is for a claimant to establish facts from which the Tribunal can reasonably conclude that there has been a contravention of the Act. If the claimant establishes those facts, the burden shifts to the respondent to show that there has been no contravention by, for example, identifying a different reason for the treatment.

190. In ***Hewage v Grampian Health Board*** [2012] IRLR 870 the Supreme Court approved guidance previously given by the Court of Appeal on how the burden of proof provision should apply. That guidance appears in ***Igen Limited v Wong*** [2005] ICR 931 and was supplemented in ***Madarassy v Nomura International plc*** [2007] ICR 867. Although the concept of the shifting burden of proof involves a two-stage process, that analysis should only be conducted once the Tribunal has heard all the evidence, including any explanation offered by the employer for the treatment in question.

191. However, if in practice the Tribunal is able to make a firm finding as to the reason why a decision or action was taken, the burden of proof provision is unlikely to be material.

192. It was confirmed by Lord Justice Mummery in the Court of Appeal that it is not always necessary to address the two-stage test sequentially (see ***Brown v London Borough of Croydon*** [2007] ICR 909). Although it would normally be good practice to apply the two-stage test, it is not an error of law for a tribunal to proceed straight to the second stage in cases where this does not prejudice the claimant. In that case, far from prejudicing the claimant, the approach had relieved him of the obligation to establish a prima facie case.

193. The Tribunal was also able to take into account the recent Employment Appeal Tribunal decisions in this regard in ***Field v Steve Pye & Co*** EAT2021-000357 and ***Klonowska v Falck*** EAT-2020-000901.

Time limits

194. The time limit for Equality Act claims appears in section 123 as follows:

> *"(1) Proceedings on a complaint within section 120 may not be brought after the end of –*
>
> *(a) the period of three months starting with the date of the act to which the complaint relates, or*
>
> *(b) such other period as the Employment Tribunal thinks just and equitable …*
>
> *(3) For the purposes of this section –*
>
> *(a) conduct extending over a period is to be treated as done at the end of the period;*
>
> *(b) failure to do something is to be treated as occurring when the person in question decided on it".*

195. A continuing course of conduct might amount to conduct extending over a period, in which case time runs from the last act in question. The case law on time limits to which we had regard included ***Hendricks –v- Commissioner of Police of the Metropolis*** [2003] IRLR 96 which deals with circumstances in which there will be an act extending over a period. In dealing with a case of alleged race and sex discrimination over a period, Mummery LJ said this at paragraph 52: *"The concepts of policy, rule, practice, scheme or regime in the authorities were given as examples of when an act extends over a period. They should not be treated as a complete and constricting statement of the indicia of "an act extending over a period."* I agree with the observation made by Sedley LJ, in his decision on the paper application for permission to appeal, that the Appeal Tribunal allowed itself to be side-tracked by focusing on whether a *"policy"* could be discerned. Instead, the focus should be on the

substance of the complaints that the Commissioner was responsible for an ongoing situation or a continuing state of affairs in which female ethnic minority officers in the Service were treated less favourably. The question is whether that is *"an act extending over a period"* as distinct from a succession of unconnected or isolated specific acts, for which time would begin to run from the date when each specific act was committed.

196. The focus in this area is on the substance of the complaints in question — as opposed to the existence of a policy or regime — to determine whether they can be said to be part of one continuing act by the employer.

197. ***Robinson v Surrey*** [2015] UKEAT 311 is authority for the proposition that separate types of discrimination claims can potentially be considered together as constituting conduct extending over a time.

198. In ***Barclays v Kapur*** [1991] ICR 208 the (then) House of Lords held that a discriminatory practice can extend over a period. The key issue is to distinguish between a continuing act and an act with continuing consequences. The court held that where an employer operates a discriminatory regime, rule, practice or principle, then such a practice will amount to an act extending over a period. Where, however, there is no such regime, rule, practice or principle in operation, an act that affects an employee will not be treated as continuing, even though that act has ramifications which extend over a period of time.

199. The Court of Appeal in ***Lyfar v Brighton and Sussex University Hospitals Trust*** [2006] EWCA Civ 1548 confirmed that the correct test in determining whether there is a continuing act of discrimination is that set out in ***Hendricks***. Thus tribunals should look at the substance of the complaints in question — as opposed to the existence of a policy or regime — and determine whether they can be said to be part of one continuing act by the employer.

200. In ***South Western Ambulance Service NHS Foundation Trust v King*** EAT 0056/19, the Employment Appeal Tribunal observed that when a claimant wishes to show that there has been *“conduct extending over a period”* if any

of the acts relied upon are not established on the facts or are found not to be discriminatory, they cannot form part of the continuing act.

201. With regard to a failure to comply with the duty to make reasonable adjustments and time limits, a difficult issue is whether a failure to make adjustments a continuing act or is it an omission. In ***Humphries v Chevler Packaging Ltd*** EAT 0224/06 the Employment Appeal Tribunal confirmed that a failure to act is an omission and that time begins to run when an employer decides not to make the reasonable adjustment.

202. The Court of Appeal provided further guidance in ***Kingston upon Hull City Council v Matuszowicz*** [2009] ICR 1170. The Court of Appeal noted that, for the purposes of claims where the employer was not deliberately failing to comply with the duty, and the omission was due to lack of diligence or competence or any reason other than conscious refusal, it is to be treated as having decided upon the omission at what is in one sense an artificial date. In the absence of evidence as to when the omission was decided upon, the legislation provides two alternatives for defining that point in Section 123. The first is when the person does an act inconsistent with doing the omitted act. The second presupposes that the person in question has carried on for a time without doing anything inconsistent with doing the omitted act, and it then requires consideration of the period within which the respondent might reasonably have been expected do the omitted act if it was to be done. In terms of the duty to make reasonable adjustments, that requires an inquiry as to when, if the employer had been acting reasonably, it would have made the reasonable adjustments. That is not at all the same as inquiring whether the employer did in fact decide upon doing it at that time.

203. Sedley LJ stated that: *'claimants and their advisers need to be prepared, once a potentially discriminatory omission has been brought to the employer's attention, to issue proceedings sooner rather than later unless an express agreement is obtained that no point will be taken on time for as long as it takes to address the alleged omission'.*

204. In determining when the period expired within which the employer might reasonably have been expected to make an adjustment, the Tribunal should have regard to the facts as they would reasonably have appeared to the claimant, including what the claimant was told by his or her employer.

205. In ***Abertawe Bro Morgannwg University Local Health Board v Morgan*** [2018] ICR 1194, the claimant brought a claim of failure to make a reasonable adjustment based on a failure to redeploy her to another role. The Tribunal considered that the Board would reasonably have been expected to have made the adjustment by 1 August 2011 and so this was when time began to run.

206. Before the Court of Appeal, the Board argued that this meant that it could not have been in breach of duty before that date, but the Court disagreed. Not all time limits are fixed by reference to the date on which a cause of action accrued. In the case of reasonable adjustments, the duty arises as soon as the employer is able to take steps which it is reasonable for it to take to avoid the relevant disadvantage. In that case, the situation arose around April 2011. However, the Court observed that if time for submitting a claim began to run at that date, the claimant might be unfairly prejudiced. He or she might reasonably believe that the employer was taking steps to address the disadvantage, when in fact the employer was doing nothing. By the time it became (or should have become) apparent to the claimant that the employer was doing nothing, the time limit for bringing proceedings might have expired. Accordingly, for the purposes of the time limit, the period within which the employer might reasonably have been expected to comply had to be determined in the light of what the claimant reasonably knew. In that case the Tribunal found that by June/July 2011 it should have been reasonably clear to the claimant that the Board was not looking for suitable alternative roles for her. Although the Tribunal was generous in finding that time did not begin to run until 1 August, it could not be said that this conclusion was not open to it.

207. Legatt LJ set out the legal principles at paragraph 14 onwards of the judgment which we apply. We have also taken into account Richardson HHJ's judgment in ***Watkins v HSBC*** [2018] IRLR 1015. That judgment makes clear that failure

to comply with the duty to make reasonable adjustments ought to be considered a continuing failure (rather than an act extending over a period) such that Section 123(3) and (4) should be applied (see paragraph 48).

208. The Tribunal has also considered and applied the reasoning of Lord Fairley who examined this issue in ***Kerr v Fife Council*** UKEATS/0022/20/SH. He emphasised the injustice of determining from the employer's point of view, for example, the period in which respondent might reasonably have been expected to make an adjustment. The claimant might not be aware that the respondent is doing nothing about a request for an adjustment, but instead claimant might be thinking that the respondent is still considering the proposal or working towards implementing the adjustment. If it were the case that the Tribunal could determine that it would have been reasonable to expect the employer to make the adjustment within one month of the request, and time should therefore run from then, the claim could be out of time before the employee appreciated that the employer was doing nothing about her request for adjustments. The same applies to the *"inconsistent act"* default under Section123(4); It must be what the employee would or should have appreciated as an inconsistent act, not what the Tribunal determines would have been an inconsistent act from the employer's perspective.

Extending the time limit

209. Section 123 of the Equality Act 2010 requires that any complaint of discrimination within the Act must be brought within three months of the date of the act to which the complaint relates, or such other period as the Tribunal thinks just and equitable.

210. When considering whether it is just and equitable to hear a claim notwithstanding that it has not been brought within the requisite three month time period, the Employment Appeal Tribunal has said in the case of ***Chohan v Derby Law Centre*** [2004] IRLR 685 that a Tribunal should have regard to the Limitation Act 1980 checklist as modified in the case of ***British Coal Corporation v Keeble*** [1997] IRLR 336 which is as follows:

a. The Tribunal should have regard to the prejudice to each party.

b. The Tribunal should have regard to all the circumstances of the case which would include:

i. Length and reason for any delay

ii. The extent to which cogency of evidence is likely to be affected

iii. The cooperation of the respondent in the provision of information requested

iv. The promptness with which the claimant acted once he knew of facts giving rise to the cause of action

v. Steps taken by the claimant to obtain advice once he knew of the possibility of taking action.

211. In ***Abertawe v Morgan*** [2018] IRLR 1050 the Court of Appeal clarified that there was no requirement to apply this or any other check list under the wide discretion afforded to Tribunals by Section 123(1). The only requirement is not to leave a significant factor out of account. Further, there is no requirement that the Tribunal must be satisfied that there was a good reason for any delay; the absence of a reason or the nature of the reason are factors to take into account. A key issue is whether a fair hearing can take place.

212. In the case of ***Robertson v Bexley Community Services*** [2003] IRLR 434 the Court of Appeal stated that time limits are exercised strictly in employment law and there is no presumption, when exercising discretion on the just and equitable question, that time should be extended. Nevertheless, this is a matter which is in the Tribunal's discretion. That has to be tempered with the comments of the Court of Appeal in ***Chief Constable of Lincolnshire v Caston*** [2010] IRLR 327 where it was observed that although time limits are to be enforced strictly, Tribunals have wide discretion.

213. In ***Rathakrishnan v Pizza Express (Restaurants) Ltd*** [2016] ICR 283 the Employment Appeal Tribunal held that in that case the balance of prejudice and potential merits of the reasonable adjustments claim were both relevant

considerations and it was wrong of the Tribunal not to weigh those factors in the balance before reaching its conclusion on whether to extend time.

214. Finally the Tribunal considered and applied the judgment of Underhill LJ in ***Lowri Beck Services v Brophy*** [2019] EWCA Civ 2490 and in particular at paragraph 14. Ultimately the Tribunal requires to make a judicial assessment from all the facts to determine whether to allow the claims to proceed and in particular assess the respective prejudice.

Impact of early conciliation on time limits

215. Section 140B of the Equality Act 2010 extends the time limit for lodging a claim to take account of ACAS early conciliation. In most cases (including the current case) a claimant is required contact ACAS prior to presenting a claim to the Tribunal (to obtain an early conciliation certificate). For the purposes of time limits, time stops running from the day following the date the matter was referred to ACAS to, and including, the date a certificate is issued by ACAS.

216. Further, and sequentially, if the certificate is received within one month of the ordinary time limit expiring, time expires one month after the date the claimant receives (or is deemed to receive) the certificate.

217. Early conciliation only applies where the claim is commenced before the statutory time limit has expired.

Reasonable adjustments

218. Section 39(5) of the Equality Act 2010 provides that a duty to make reasonable adjustments applies to an employer. Further provisions about that duty appear in Sections 20 and 21 and Schedule 8. Paragraph 20 of Schedule 8 states: *"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"*. This is considered in chapter 6 of the Code.

219. Section 20, so far as relevant, provides as follows –

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

(2) The duty comprises the following three requirements.

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

(4) The second requirement is a requirement where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled to take such steps as it is reasonable to have to take to avoid the disadvantage.

(5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.

220. Failure to comply with the duty to make reasonable adjustments is dealt with in Section 21 which, so far as relevant, provides – *"(1) A failure to comply with the first…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."*

221. The importance of a Tribunal going through each of the constituent parts of Section 20 was emphasised by the Employment Appeal Tribunal in ***Environment Agency v Rowan*** [2008] ICR 218 and reinforced in ***Royal Bank of Scotland v Ashton*** [2011] ICR 632.

222. As to whether a *"provision, criterion or practice"* ("PCP") can be identified, the Code at paragraph 6.10 says the phrase is not defined by the Act but *"should be construed widely so as to include for example any formal or informal policy, rules, practices, arrangements or qualifications including one off decisions and actions"*. The question of what will amount to a PCP was considered by the Employment Appeal Tribunal in ***Nottingham City Transport Limited v Harvey*** UKEAT/0032/12 and ***Ishola v Transport for London*** [2020] EWCA Civ 11.

223. For the duty to arise, the employee must be subjected to *"substantial disadvantage in comparison to a person who is not disabled"* and with reference to whether a disadvantage resulting from a provision, criterion or practice is substantial, Section 212(1) defines *"substantial"* as being *"more than minor or trivial"*. The question is whether the PCP has the effect of disadvantaging the disabled person more than trivially in comparison to those who do not have the disability (***Sheikholeslami v University of Edinburgh***, [2018] IRLR 1090).

224. The obligation to take such steps as it is reasonable to have to take to avoid the disadvantage is one in respect of which the Code provides considerable assistance, not least the passages beginning at paragraph 6.23 onwards. A list of factors which might be taken into account appears at paragraph 6.28 and includes the practicability of the step, the financial and other costs of making the adjustment and the extent of any disruption caused, the extent of the employer's financial or other resources and the type and size of the employer.

225. Paragraph 6.29 makes clear that ultimately the test of the reasonableness of any step is an objective one depending on the circumstances of the case. It is for the Tribunal to assess this issue. Examples of reasonable adjustments in practice appear from paragraph 6.32 onwards.

Harassment

226. In terms of section 26 of the Equality Act 2010:

(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."

227. Whether or not the conduct relied upon is related to the characteristic in question is a matter for the Tribunal to find, making a finding of fact drawing on all the evidence before it (see ***Tees Esk and Wear Valleys NHS Foundation Trust v Aslam*** EAT 0039/19). The fact that the claimant considers the conduct related to a particular characteristic is not necessarily determinative, nor is a finding about the motivation of the alleged harasser. There must be some basis from the facts found which properly leads it to the conclusion that the conduct in question is related to the particular characteristic in the manner alleged in the claim.

228. For example in ***Hartley v Foreign and Commonwealth Office Services*** [2016] ICR D17 the Employment Appeal Tribunal held that an Employment Tribunal had failed to carry out the necessary analysis to see whether comments made by the claimant's managers during a performance improvement meeting — accusing her of rudeness and apparently questioning her intelligence when she failed to understand a spreadsheet of comments concerning her performance — were related to her Asperger's syndrome. The Employment Appeal Tribunal emphasised that an Employment Tribunal considering the question posed by Section 26(1)(a) must evaluate the evidence in the round, recognising that witnesses 'will not readily volunteer' that a remark was related to a protected characteristic. The alleged harasser's knowledge or perception of the victim's protected characteristic is relevant but should not be viewed as in any way conclusive.

Likewise, the alleged harasser's perception of whether his or her conduct relates to the protected characteristic *"cannot be conclusive of that question"*.

229. At paragraph 7.10 of the Code the breadth of the words *"related to"* is noted. It gives the example of a female worker has a relationship with her male manager. On seeing her with another male colleague, the manager suspects she is having an affair. As a result, the manager makes her working life difficult by criticising her work in an offensive manner. The behaviour is not because of the sex of the female worker but because of the suspected affair, which is related to her sex. This could amount to harassment related to sex.

230. The question of whether the conduct in question *"relates to"* the protected characteristic requires a consideration of the mental processes of the putative harasser (***GMB v Henderson*** [2017] IRLR 340) bearing in mind that there should be an intense focus on the context in which the words or behaviour took place (see ***Bakkali v Greater Manchester*** [2018] IRLR 906).

231. Section 26(4) of the Act provides that:

> *"(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;*
>
> *(c) the other circumstances of the case;*
>
> *(d) whether it is reasonable for the conduct to have that effect."*

232. The terms of the statute are reasonably clear, but guidance was given by the Court of Appeal in ***Pemberton v Inwood*** [2018] IRLR 542 in which the following was stated by Lord Justice Underhill:

> *"In order to decide whether any conduct falling within sub-paragraph 10 (1)(a) of Section 26 Equality Act 2010 has either of the proscribed effects under sub-paragraph (1)(b), a Tribunal must consider both (by reason of sub-section 4(a)) whether the putative victim perceives themselves to have suffered the effect in question (the subjective question) and (by reason of sub-section 4(c)) whether it was reasonable for the conduct to be regarded as having that effect*

(the objective question). It must also take into account all the other circumstances (subsection 4(b)).”

233. The Code states (at paragraph 7.18) that in deciding whether or not conduct has the relevant effects account must be taken of the claimant’s perception and personal circumstances (which includes their mental health and the environment) and whether it is reasonable for conduct to have that effect. In assessing reasonableness an objective test must be applied. Thus something is not likely to be considered to be reasonable if a claimant is hypersensitive or other people are unlikely to be offended.

234. Further as Underhill LJ stated above when deciding whether the conduct has the relevant effects (of violating the claimant’s dignity or creating the relevant environment) the claimant’s perception and all the circumstances must be taken into account and whether it is reasonable for the conduct to have the effect (***Lindsay v LSE*** [2014] IRLR 218). Elias LJ in ***Land Registry v Grant*** [2011] IRLR 748 focused on the words *“intimidating, hostile, degrading, humiliating and offensive”* and said *“Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upset being caught”*.

235. Chapter 7 of the Code contains useful guidance in applying the law in this area and we have had regard to that guidance.

Itemised payslips

236. In terms of Section 8 of the Employment Rights Act 1996 a worker has the right to be given a written itemised pay statement at or before the time payment of salary is made. A worker whose employer does not do so has the right to raise a reference to the Employment Tribunal. Where such a complaint is well founded the Tribunal can make a declaration that there has been a failure and where the Tribunal finds there were unnotified deductions made from the pay of the worker during the period 13 weeks immediately preceding the date of the reference the Tribunal may order the employer to pay to the worker a sum not exceeding the aggregate of the unnotified deductions (Section 12(4).

Written statement of particulars

237. In terms of Section 38 of the Employment Act 2002 where an employer has failed to issue an employee with an up to date written statement of particulars a Tribunal can award 2 week's pay where the employer has breached obligations set out in Schedule 5 to the Employment Act 2002 (which includes its obligation to pay holiday pay). Where a Tribunal considers it just to so, a sum equivalent to 4 week's pay can be awarded.

Breach of contract and wrongful dismissal

238. Under the Employment Tribunals Extension of Jurisdiction (Scotland) Order 1994 a Tribunal can award a claimant damages for breach of contract where the claim arises or is outstanding on termination of employment. The cap of the award that a Tribunal can make is currently £25,000.

239. For claims of breach of contract for notice pay, such as in this case, where an employee has been dismissed by reason of breach of contract for gross misconduct, the Tribunal requires to make findings from the evidence it has heard to determine whether or not the claimant was as a matter of fact in breach of contract such that the respondent was entitled to terminate the contract summarily. If the employer did not have grounds that entitled it to dismiss the employee summarily, notice pay can be awarded (subject to the rules as to mitigation).

240. In ***British Heart Foundation v Roy*** UKEAT/49/15 the Employment Appeal Tribunal (Mr Langstaff, President, as he then was) noted, at paragraph 6: *"Whereas the focus in unfair dismissal is on the employer's reasons for the dismissal and it does not matter what the Employment Tribunal thinks objectively probably occurred, or whether in fact the misconduct actually happened, it is different when one turns to the question either of contributory fault for the purposes of compensation for unfair dismissal or for wrongful dismissal, There the question is indeed whether the misconduct actually occurred."*

Submissions

241. Both parties produced written submissions and the parties were able to comment upon each other submissions and answer questions from the Tribunal. The Tribunal deals with the parties submissions as relevant below, but does not repeat them in detail. The parties' full submissions were taken into account in reaching a unanimous decision.

Discussion and decision

242. The Tribunal was able to reach a unanimous decision in respect of each of the issues, which it considered in turn in light of the evidence presented and the parties' submissions.

Unfair dismissal

Was the reason for the claimant's dismissal conduct?

243. The Tribunal is satisfied that the claimant was dismissed for having displayed threatening and aggressive behaviour towards other members of staff on 13 June 2019. This was a potentially fair reason, being matters relating to conduct. While the claimant alleged that the disclosures he had made were connected to the reason for this dismissal, the Tribunal was satisfied from the evidence presented, that the decision to dismiss him was solely because of their view of the claimant's conduct.

Was it reasonable for the respondent to believe that the claimant was guilty of gross misconduct?

244. The Tribunal carefully considered the evidence that was presented. A number of different witness statements had been obtained. Furthermore the author of some of those statements gave oral evidence to both the dismissing officer and the appeal panel. The evidence that was presented was broadly consistent in supporting the conclusion that the claimant had been aggressive and threatening on 13 June 2019.

245. The disciplining manager determined the claimant's behaviour to include threats of violence, to be threatening and to include ill treatment of other

employees. As the respondent's agent submitted, in determining that the claimant's behaviour amounted to gross misconduct the respondent took account of the fact that:

a. the claimant was shouting and swearing at three of his colleagues in a public area within the hospital to which patients and visitors had access;

b. Ms Graham was frightened by the claimant's outburst and was fearful that he would hit her;

c. the claimant goaded one of his colleagues, Mr Irvine, to fight him and repeatedly invited him to step outside with him. Mr Irvine reported feeling threatened by the claimant;

d. Ms Creighton reported that the claimant's behaviour was aggressive and that she felt intimidated by his behaviour;

e. the claimant's behaviour was unprovoked;

f. there was no history of bad feeling between the claimant and his colleagues and no reason as to why his colleagues would make up the allegations.

246. Further, despite significant evidence to the contrary, and being given numerous opportunities to say otherwise, the claimant maintained throughout the disciplinary process that his behaviour was not aggressive or threatening. Rather, he alleged that Mr Irvine was aggressive towards him, despite there being no evidence to support this.

247. The Tribunal carefully considered the evidence the respondent had at the time, which included the claimant's statements and his assertions that the witness statements were not credible and inconsistent. The Tribunal concluded that the respondent acted reasonably in concluding that the claimant was guilty of misconduct from all the information before it.

248. While the claimant maintained he had not acted inappropriately at all during the interaction with his colleagues, the other witnesses were all clear that the

claimant had been aggressive and intimidating. The fact that there are inconsistencies in witness statements does not necessarily suggest the witnesses were not telling the truth (and can sometimes show in fact the witnesses were doing their best to recall matters as they remembered).

249. The key allegation was that the claimant was aggressive and intimidatory and this was a matter the witnesses agreed upon. There was no reason the claimant could provide that supported his assertion they were all fabricating their position and had set out to have him dismissed. The respondent was careful to consider the claimant's position and sought to carefully consider what the witnesses said and identify whether or not the allegation had been made out. The evidence was properly tested.

250. While there were some aspects of the statements that were inconsistent, these were not material with regard to the final conclusion. Thus the suggestion that the claimant had burst through a door was not considered material by the respondent as the issue was whether or not the claimant was aggressive and intimidating during the verbal discussion. Had the issue with the door been material that would have been a matter to have been followed up. While some employers may have investigated that matter, an equally reasonable employer would not and would focus on what was alleged to have happened during the interaction that was the focus of the allegation.

251. Ms Kane was careful to ensure she had the full factual matrix before her before she made a final decision. It was for that reason that she sought medical input and asked Ms Murray to investigate the complaints the claimant had raised. The decision was not taken until the full information had been obtained and the claimant was given the final opportunity to present his position. She was careful to appraise herself of the full facts before reaching a conclusion.

252. From the facts before the respondent at the time, the Tribunal concluded that the respondent did reasonably believe in the guilt of the claimant.

Did the respondent genuinely believe that the employee was guilty of misconduct?

253. The Tribunal was satisfied that the respondent genuinely believed in the guilt of the claimant. The dismissing manager took her time to ensure she had the full factual matrix before her prior to making her decision. Had the claimant's belief (that Ms Kane wished the claimant dismissed irrespective of the evidence) been correct, it would have been more likely than not that Ms Kane would have dismissed the claimant without seeking the additional information she did. She took time and care to obtain and consider the matters before her.

254. The Tribunal found Ms Kane to be clear and her evidence was accepted by the Tribunal. She considered all the information that had been presented to her, wishing to be fully informed. While the claimant disputed the evidence, and while there were some inconsistencies, Ms Kane genuinely believed in the claimant's guilt. That was replicated at the appeal stage. The respondent genuinely believed the claimant was guilty of misconduct.

Did the respondent have in its mind reasonable grounds to sustain a belief of guilt?

255. The Tribunal considered the evidence the respondent had obtained. The allegation the claimant faced was that on 13 June 2019 he had been aggressive and intimidatory towards colleagues. The respondent had undertaken a detailed and thorough investigation to determine what had happened during the exchange. It had met with witnesses and sought the claimant's position. Witnesses were heard at the dismissal and appeal meetings and additional investigation was carried out in relation to points the claimant had raised.

256. The Tribunal must not apply its view and instead consider whether the respondent, from the information before it, had reasonable grounds to sustain a belief in the claimant's guilt, avoiding a counsel of perfection. On the facts of this case the Tribunal concluded that there were reasonable grounds for the respondent to sustain their belief in the claimant's guilt.

257. As the respondent's agent submitted, the respondent based its belief as to the claimant's guilt on the evidence given by three staff members who directly

witnessed the claimant's behaviour on 13 June 2019. All three were interviewed as part of the disciplinary investigation and their interview notes included within the management case. The evidence they gave was broadly consistent. They all (fairly) described the claimant's behaviour as aggressive and intimidatory.

258. Two of the witnesses, Ms Graham and Mr Irvine, gave evidence at the disciplinary hearing. Only Mr Irvine was available to attend the appeal hearing but the appeal chair, Mr Hobson, gave evidence that the panel found him to be credible and reliable.

259. The respondent's agent noted that none of the witnesses had anything to gain by portraying the claimant in a bad light and there was no suggestion that any of them had a particular issue with the claimant, something the claimant accepted during both the disciplinary process and in his evidence.

260. There were inconsistencies but the Tribunal was satisfied these were not such as to result in the basis for upholding the belief as being unreasonable. The evidence presented to the respondent was compelling and broadly clear. There was no reasonable basis asserted by the claimant to support his assertion of fabrication by each of the witnesses.

261. From the information before the respondent, the respondent had a reasonable basis to support its belief in the claimant's guilt.

Was a reasonable investigation carried out?

262. The issue here is whether the investigation that took place fell within the range of responses open to a reasonable employer. The Tribunal accepts the respondent's submission that the investigation was thorough. Thus when issues as to the claimant's health were raised during the investigatory interview (on behalf of the claimant), the respondent offered to make an occupational health referral, which it did. While the claimant believed this was for his hip, it was more likely than not to be a referral for both his physical and mental issues. The claimant did not attend the appointment. The respondent was given no reason as to why the claimant cancelled the appointment and

at no time did either the claimant or his representative suggest to the respondent that the claimant was not fit to engage in the disciplinary process.

263. At the disciplinary hearing on 9 October 2019 the respondent ensured that Ms Graham, Mr Irvine and Mr Shaw attended to give evidence and could be cross examined by the claimant. The witnesses attendance meant that Ms Kane had the opportunity first hand, to test and consider the credibility of both the claimant and his colleagues.

264. The claimant and his trade union representative had been given the opportunity to call any witnesses and lead any evidence they wished. They were able to comment upon the material that was provided and supplement it as they wished and present the claimant's response.

265. In light of the position put forward by the claimant at the disciplinary hearing, the disciplinary hearing was adjourned to allow further information to be sought. The claimant was referred to a Occupational Health physician to obtain information as to his physical fitness (including to inform where the claimant could work if he was to return to work), and to a psychiatrist to explore whether his mental health, including whether his behaviour was caused by medication, as suggested by the claimant's representative. Separately, Ms Murray was tasked with investigating whether concerns previously raised by the claimant had been dealt with appropriately.

266. Only once this additional information was obtained, and Ms Kane was satisfied that she had appropriate responses to the claimant's mitigation, was the disciplinary hearing reconvened.

267. The claimant failed to attend the reconvened hearing so it was rescheduled. The claimant confirmed that he would not be attending the rescheduled hearing and understood it would proceed in his absence. He was offered the opportunity to submit medical evidence to show he was unfit to attend but failed to do so and the hearing was then reconvened.

268. In advance of the appeal the claimant was provided with a lengthy Management Statement of Case which included a response to his appeal and

grievance and he submitted his Statement of Case. Witnesses were again called to the appeal and the claimant advised of his right to call witnesses, or bring additional information, which he chose not to do.

269. In short the claimant was told in advance what the specific allegations were and given the opportunity to present his response to them. The issues the claimant raised during the disciplinary process were taken into account and the respondent reasonably appraised itself as to the factual position, both in respect of the complaints the claimant said he made and the medical position. The claimant was given written reasons for the decision and an appeal hearing was held which considered the reasonableness of the decision, with the claimant having the chance to attend and present any evidence he wished. A reasonable investigation had been undertaken.

270. The Tribunal considered the specific challenges to the investigation in turn.

i. *No-one ever checked which way the door opened, or where the claimant was coming from, in relation to the allegation that the claimant threw the door open so hard it almost hit the wall;*

271. The issue as to the door was not a material issue *vis a vis* the allegation the claimant faced. The focus of the enquiry was on the claimant's behaviour once in the corridor and his interaction with colleagues. How he entered the corridor was not material. The failure to investigate the issues the claimant raised in this regard did not render the investigation unreasonable or unfair.

ii. *The Management Statement of Case indicated that Mr Mullen had given a statement against the claimant;*

272. The respondent's agent noted that each of the witnesses confirmed that they understood that Mr Mullen had not given a statement against the claimant even if the claimant was told otherwise during his initial meeting. Ms Kane and Mr Hobson confirmed that their decisions were based solely on the events of 13 June 2019, such that any misunderstanding about Mr Mullen's statement (which pertained to conduct the following day) did not influence the disciplinary and appeal decisions reached.

273. It was not clear why a suggestion had been made that the respondent had a number of statements supporting an assertion of wrongdoing on the claimant's part on 14 June, aside from Mr Shaw' s statement. Nevertheless this was not a material consideration in respect of the investigation of the events of 13 June 2019 and did not materially affect the investigation in relation to that allegation. The failure to be accurate with regard to the information the respondent had about events on 14 June 2019 did not impact upon the fairness of events the preceding day.

iii. Mr Shaw's evidence about the claimant's behaviour on 14 June 2019 ought to have been further investigated by checking whether Mr Mullen would have been able to hear the claimant shouting, had he done so;

274. The respondent's agent submitted that the decisions to dismiss, and reject the appeal, were based solely on the events of 13 June 2019. Mr Shaw's evidence was only of significance (in conjunction with Ms Murray's evidence of the claimant's behaviour at the meeting on 6 November 2019) insofar as forming a view that there was a risk of the claimant repeating similar behaviour. Mr Shaw attended the disciplinary and appeal hearings allowing the panels, and claimant, to test his evidence and form their own view on credibility. In any event at no time was this alleged issue raised during either the disciplinary or appeal stages.

275. The respondent's submission in this regard have merit. The key question was the claimant's conduct on 13 May 2019. The panel found Mr Shaw to be credible. While some reasonable employers may have asked Mr Mullin about what he heard and for his view on what Mr Shaw said, an equally reasonable employer would not do so, given the focus of the hearing and the very limited relevance of Mr Shaw's evidence. Further, even if Mr Mullin had heard nothing, that did not mean that Mr Shaw was wrong in what he said given the distance between the individuals when Mr Shaw said the claimant became aggressive. Mr Shaw's evidence was of limited relevance to the events of 13 June 2019 and the approach taken was not unreasonable.

iv. The investigation team did not follow up the occupational health referral after the claimant cancelled it

276. The respondent argued that the claimant cancelled the referral himself and there was no reasonable basis for the respondent to follow it up. The respondent did not act unreasonably in not following the matter up particularly when viewed in context. The claimant at no stage suggested that he was unable to fully and properly participate in the disciplinary process. He had already raised concerns as to the time matters were taking. The Tribunal considered that the respondent acted reasonably in their approach and in seeking information about the claimants medical position. Further information was obtained prior to dismissal and taken into account. The failure to follow up the occupational health referral following the cancellation by the claimant did not render the approach taken to be unreasonable. By the dismissal stage the respondent had obtained and considered all the relevant information with regard to the claimant's health that he wished to raise. The respondent had acted fairly and reasonably in that regard.

v. The claimant did not see sight of the CCTV footage in relation to 14 June 2019.

277. The respondent's agent noted that the CCTV footage related to events on 14 June 2019, which was not the allegation that led to dismissal. The claimant was not therefore prejudiced as a result of not being shown the CCTV for events on the following day. The claimant did not dispute that he would on occasion wave his hands and be animated and there was no suggestion by him that the CCTV would show anything other than that. Ultimately the events of 14 June 2019 were of limited relevance with regard to the investigation for the events of 13 June 2019 where there was no CCTV evidence. This had no material impact upon the fairness of the dismissal.

vi. Ms Kane did not follow up second referral to the psychiatrist.

278. The respondent's agent noted that neither Ms Kane, nor the claimant, was aware that a report by Dr Holmes existed until a subject access request was made by the claimant, in anticipation of the Tribunal hearing. Ms Kane

believed that the report dated 15 November 2019 from Dr Haldane, which contained a summary of the advice from Dr Holmes, was all of the advice she was to receive from Dr Holmes. This was a reasonable conclusion, given that the report stated that Dr Holmes would produce a report to Dr Haldane (not to her), and in the absence of any suggestion by the claimant that a further report was to be excepted, or should be chased up.

279. The Tribunal considered this carefully and concluded that it was reasonable for Ms Kane to accept what the occupational health consultant had said. Dr Haldane had been clear in stating that he had spoken to Dr Holmes and that he would receive the report from Dr Holmes with whom he had spoken. There was no suggestion that anything Dr Holmes said would have made any material difference to the outcome, given the claimant's position.

Lack of verbatim notes

280. Finally the Tribunal considered whether the failure to produce verbatim notes of each meeting impacted upon the fairness of the process. The approach the respondent adopted of failing to have detailed minutes of important discussions undoubtedly had an impact upon the claimant. While the key points were communicated to the claimant (whether by letter or summaries), the absence of clear minutes created unnecessary issues in this case. The Tribunal was satisfied from the information presented during the disciplinary process that the claimant understood the key issues and what had been carried out. The lack of clear minutes, by itself, did not render the investigation or procedure unreasonable. The approach that was taken fell within the range of responses open to a reasonable employer but it was a matter that could easily have been avoided. A reasonable note was taken and included in correspondence the claimant received. The ACAS Code was followed.

Did the respondent's decision to dismiss fall within the band of reasonable responses?

281. The question for the Tribunal is whether the respondent's decision to dismiss the claimant, from the information before it, fell within the range of options open to a reasonable employer. The question is whether the respondent acted

fairly and reasonably in all the circumstances, taking account of size, resources, equity and the merits of the case.

282. The respondent submitted that the respondent found that the claimant had acted in an aggressive and threatening way towards three colleagues in a public area of the hospital. He had shouted, sworn and challenged Mr Irvine to go outside and fight. He had caused Ms Graham to believe he might hit her and all three witnesses reported feeling intimidated. The claimant refused to acknowledge his behaviour, denying it had ever happened, and showed no contrition or regret. The respondent had no reason to believe that he would not act in a similar way again. In fact, the evidence of his behaviour towards Ms Murray during the investigation, and towards Mr Shaw on 14 June 2019, although not material to the allegation under consideration, did suggest repetition was possible.

283. It was submitted that a reasonable employer would be entitled to take the view that this behaviour of an employee working in a hospital, constituted gross misconduct. Accordingly, dismissal was the fair. Ultimately, both the disciplining and appeal managers concluded that given the claimant's failure to take any responsibility for his actions or to reflect on his behaviours, to not dismiss the claimant posed too great a risk of the claimant acting in a similar way again, without any insight. This was not a risk that either manager was prepared to take. This decision fell within the band of reasonable responses.

284. The Tribunal carefully considered all the material before the respondent at the time. The Tribunal was satisfied that the decision to dismiss the claimant because of his conduct on 13 June 2019 was a decision that fell within the range of responses open to a reasonable employer. Some equally reasonable employers may not have dismissed but equally reasonable employers could have dismissed on the facts.

285. The respondent reached a reasonable conclusion from the information before it. The evidence supported the allegation that the claimant had acted in an aggressive and intimidatory way. While the claimant disputed these facts, the evidence that was taken by the respondent at the investigation stage, then at

the disciplinary hearing and again at the appeal stage, all supported the key part of the allegation. The claimant was unable to provide a reasonable basis to support his assertion that those witnesses were fabricating and colluding against him.

286. The conduct in question was serious, The respondent operated a zero tolerance to such behaviour in the workplace. The incident occurred in a public part of the hospital. The conduct amounted to gross misconduct.

287. Such conduct does not by itself justify summary dismissal and was not considered to be so by the respondent who reasonably considered alternatives and reasonably concluded that the trust and confidence required for the employment relationship to continue had been destroyed. The claimant had been aggressive and intimidatory towards colleagues. He had shown no insight into his behaviour nor how others were affected by it. The respondent reasonably concluded that he was guilty of conduct that could justify dismissal.

Inconsistency arguments

288. The Tribunal considered whether or not the decision to dismiss was unfair because it was inconsistent with how it treated other staff. The Tribunal was satisfied that this argument was not sustainable. From the information presented to the Tribunal, the other situations referred to by the claimant were not directly comparable to that of the claimant's situation. There was no evidence the circumstances of other cases were sufficiently similar to the claimant's case. The Tribunal was unable to make any findings as to the treatment of others given the limited information that was before it and the fact the other situations were not directly comparable to the current facts. The respondent's witnesses believed that the individuals referred to by the claimant were, in any event, facing different situations to that facing the claimant such that any comparison as to the outcome would be unfair.

Summary

289. The respondent had a zero-tolerance policy towards violence in the workplace. The respondent carried out a reasonable investigation and

reached a reasonable and fair conclusion in all the circumstances, with the claimant having been given the chance to present his response (and lead any witnesses he wished) at both a disciplinary hearing and appeal hearing. Those panels genuinely considered the information that was presented to them and reached a reasonable conclusion from the information before them.

290. The decision to dismiss was fair in all the circumstances.

Was the decision to dismiss procedurally fair?

291. The band of reasonable responses test also applies to the procedural steps taken by the employer. The Tribunal should consider whether the procedure that led to the dismissal was fair and reasonable in all the circumstances, or in other words a procedure that a reasonable employer in the same circumstances could have followed.

292. The claimant identified 5 alleged procedural failings and the Tribunal considered these in turn.

(a) Ms Houghton conducted the first investigation meeting with Ms Murray presenting it

293. The respondent's agent submitted that Ms Houghton was HR support to both Ms Ferguson and Ms Murray. This did not breach either the disciplinary policy or the ACAS Code. No challenge was raised to this during the process, or unfairness alleged as a consequence. The Tribunal found no issue with Ms Houghton's approach nor HR generally in this case. The respondent acted fairly and reasonably with regard to the HR support it used during this case.

(b) There were no notes of the disciplinary hearing

294. The respondent's agent noted that there is no requirement to provide a minute of the hearing in either the ACAS Code of Practice or the respondent's own disciplinary policy. The claimant was provided with a very detailed 4 page outcome letter after each hearing setting out the evidence heard. If the claimant wished to dispute the content of the outcome letter he could have

done so at the reconvened disciplinary hearing, as he was invited to do by Ms Kane. He chose not to attend this, thereby losing the opportunity to do so.

295. As indicated above the Tribunal considered the respondent's policy to be a hindrance but it did not render the approach taken to be unreasonable or unfair. The key points were noted and the claimant had the opportunity to comment upon the notes (which he did on occasion). The Tribunal was satisfied the ACAS Code was followed.

(c) Statements from Ms Speight and Ms Biereonwu, gathered as part of the investigation, did not form part of the Management Case, and were not shared with the claimant

296. The respondent's agent noted that Ms Ferguson gave evidence that statements were taken from Ms Biereonwu and Ms Speight, but as neither witness could speak to the events of 13 June, they were not included in the Management Case. The claimant has not suggested that these witnesses did in fact have something of relevance to say. Nor is it being suggested that Ms Kane saw statements which he did not. It was therefore submitted that the fact these statements were taken, but discounted as irrelevant, did not disadvantage the claimant in any way.

297. Counsel of perfection would have required the respondent to produce every statement obtained as part of the investigation. In this case, however, there was no prejudice caused to the claimant at all as a result of not providing information which would have been neutral. There was no suggestion such statements supported the claimant or respondent's case. The failure to provide further information did not render the investigation or procedure unreasonable or unfair.

(d) The occupational health referral from the investigation was not shared with the claimant

298. The respondent's agent argued that the Tribunal should accept the respondent's evidence that it was clear from the discussion at the investigation meeting that the purpose of the referral was to seek advice on

the claimant's mental health. In any event, the claimant did not suggest at either the investigation or disciplinary hearing that he was unfit to attend either meeting due to his mental health. Further, advice was sought from a psychiatrist at the disciplinary hearing and considered at the disciplinary stage. It was therefore submitted that any confusion around the purpose of the appointment did not prejudice the claimant.

299. The Tribunal upheld the respondent's submissions in this regard. The respondent sought to obtain full details as to the claimant's physical and mental health. There had been no suggestion that the claimant was unable to participate in the process or that the information obtained was incorrect. They key issue was no the referral but the reports, which were known to the claimant. While some reasonable employers would have shared the referral, an equally reasonable employer would have acted as the respondent did. This failure did not render the procedure unfair.

(e) The appeal should have been held within 4 weeks but was 2 months late

300. The respondent's agent noted that Mr Hobson gave evidence that the there was a delay in hearing the appeal due to discussions with unions as to how to manage cases in the unfolding Covid pandemic. It is submitted that this was a reasonable explanation. Further the claimant had not alleged any prejudice as a result.

301. The Tribunal carefully considered this issue. It was regrettable that there were delays particularly given the clear terms of the disciplinary policy. Nevertheless, the pandemic was at an early stage and society at large (and the NHS in particular) were clearly taking steps to ascertain what might happen and ensure safety was paramount. On the facts of this case the procedure followed by the respondent, and the delay that was occasioned, was not unreasonable. The failure to follow the policy in this regard did not render the approach taken unfair or unreasonable. The context in which these events occurred was important and relevant. The approach was reasonable.

Mr Hobson's level of seniority

302. A further issue the Tribunal considered was Mr Hobson's level of seniority and the decision that he chair the panel. While he was not an Executive Director he was Assistant Director. The Tribunal was satisfied that it was fair and reasonable for him to have conduct the appeal hearing given the prevailing circumstances. In other words, the decision not to have a Director convene the appeal (but someone at Mr Hobson's level) did not render the dismissal unfair. In all the circumstances of this case given the prevailing circumstances, the respondent acted fairly and reasonably in their approach. Mr Hobson and the panel fairly considered and reviewed the decision that was taken and reached a decision that was open to them and that was fair.

Taking a step back

303. The Tribunal took a step back to consider the dismissal generally taking account of the size and resources of the respondent and equity and substantial merits of the case. The Tribunal having taken a step back was satisfied that the approach the respondent took in terms of the procedure and in terms of the decision to dismiss, was fair and reasonable in all the circumstances, taking account of the size, resources, equity and merits of the case. It was a procedure and decision that a reasonable employer in the circumstances of this case could have followed and taken.

304. In all the circumstances the Tribunal finds that the claimant's dismissal was fair. The dismissal and the procedure undertaken fell within the range of responses open to a reasonable employer. This claim is ill founded.

Whistleblowing

Did the claimant make the protected disclosures relied upon?

305. It was accepted that the letter dated 16 February 2018 was a qualifying, protected disclosure (paragraph 11(a)) made and that the claimant made qualifying, protected disclosures to Ms Biereonwu as set out at paragraph 11(d).

306. The burden of proof for showing that the remainder of the disclosures were made rested with the claimant. There required to be evidence before the Tribunal to allow a finding to be made in respect of the remaining disclosures.

307. In terms of the disclosure at 11(b), the respondent's agent noted that Ms Biereonwu gave evidence that she had no recollection of attending a meeting on 12 March 2018 in the canteen and the claimant produced no evidence that this meeting did in fact happen or that the alleged disclosures were made at that meeting.

308. The Tribunal considered all the evidence provided and found that this disclosure had not been made out. There was no evidence that the meeting of 12 April 2018 had taken place or that the claimant had disclosed the information set out.

309. In terms of the disclosures at 11(c), the respondent's agent submitted that Ms Biereonwu gave evidence that she did not have a meeting with the claimant on 12 April 2018 in her office, as she was on annual leave that day and the claimant produced no evidence that this meeting did in fact happen or that the alleged disclosures were made at that meeting.

310. The Tribunal considered all the evidence in relation to this disclosure and accepted the respondent's submissions. There was no evidence that the meeting of 12 April 2018 had taken place. The fact Ms Biereonwu was on leave suggested that the meeting had not taken place.

311. In terms of the disclosures at 11(e), the respondent submitted that the notes of the interview with Ms Walsh that had been relied upon record that Ms Walsh did meet with the claimant. He "talked about his behaviours in terms of what was raised by Mr Walker's email and he recognised his behaviours". Later on: "he took on things about his behaviour and recognised he could be loud and how he spoke to others could be taken as offensive and he said he would take it on board". There is no mention of the claimant having made any protected disclosures at this meeting. The claimant produced no evidence that the alleged disclosures were made at that meeting.

312. The Tribunal was satisfied that this disclosure had not been established in evidence. While the claimant had a discussion with Ms Walsh, the discussion was to support the claimant and discuss his behaviours rather than a discussion about the matters alleged.

313. In terms of the disclosures at 11(f), the respondent's agent noted that Ms Biereonwu gave evidence that no such meeting happened on 10 May 2019. This is backed up by the timeline which makes no reference to this meeting. The claimant produced no evidence that this meeting did in fact happen or that the alleged disclosures were made at that meeting.

314. The Tribunal upheld the respondent's submissions Ms Biereonwu was clear that no meeting had taken place on 10 May 2019. The disclosure had not been established in evidence.

315. In terms of the disclosure at 11(g) the respondent's agent argued that the claimant produced no evidence of any disclosures being made.

316. The Tribunal considered the evidence and found nothing to support the assertion that the claimant had made the disclosures relied upon. This had not been established in evidence. The Tribunal considered the evidence before it and held there was no basis to find the disclosure had been made.

Did Ms Kane know of any of the alleged protected disclosures at paragraphs 11(a), 11(d) or 11(e) at the time she made the decision to dismiss?

317. The respondent's agent submitted that in respect of the disclosure 11(a) Ms Kane gave evidence that whilst a copy of the letter was within Ms Murray's investigation report, she did not recall seeing it. It was submitted that this was not unreasonable given the number of appendices attached to Ms Murray's report, the poor quality of the letter attached and the fact that her attention was not drawn to it by the claimant.

318. The Tribunal considered that as the letter was within the report this was something about which Ms Kane was aware. She was therefore aware of it.

319. In terms of the disclosures at 11(d) and (e) the respondent's agent submitted that Ms Kane's evidence was that she was unaware of these. There was no reason why she would mislead the Tribunal.

320. The Tribunal considered the evidence and found that Ms Kane was not aware of the disclosure the claimant made on 30 June 2018. That had been a disclosure at a meeting on 30 June 2018 to Ms Biereonwu and a trade union steward about gloves. This was not something that had been communicated to Ms Kane (and the claimant provided no evidence to suggest Ms Kane knew of this). Ms Kane was unaware of the disclosure.

321. With regard to the disclosure at 11(e), the disclosures had been made by the claimant to Ms Walsh. There was no evidence that the discussion the claimant had with Ms Walsh had been communicated to Ms Kane (and the claimant provided no evidence to this effect).

If yes, was the reason or principal reason for the claimant's dismissal that he made one of those protected disclosures?

322. The respondent's agent submitted that the reason for dismissal was conduct, specifically the claimant's aggressive and threatening conduct on 13 June 2019. The alleged protected disclosures played no part in Ms Kane's decision to dismiss the claimant. This issue was considered specifically by the appeal panel and they too concluded that Ms Kane's decision was based solely on events of 13 June.

323. The respondent's agent submitted that the claimant provided no basis on which to challenge that evidence and has not established a *prima facie* case that the reason for dismissal was that he had made one of the identified protected disclosures. Rather, the claimant's evidence was that he did not know why Ms Kane had dismissed him, he just did not believe it was because of the events of 13 June 2019.

324. The Tribunal considered the evidence. The Tribunal was satisfied that the reason for the dismissal was in no sense whatsoever connected to or influenced by any of the disclosures upon which the claimant relies. The sole

reason for the claimant's dismissal was Ms Kane's conclusion as to the claimant's conduct on 13 June 2019.

325. The Tribunal found Ms Kane's evidence cogent, clear and compelling and accepted it. She took care to consider what happened on the day in question. She examined the evidence and undertook a full assessment of the surrounding circumstances. She ensured that issues the claimant raised had been considered. Ms Murray's investigation established that any concerns the claimant had raised had been concluded, even if not to the claimant's satisfaction. Ms Kane was satisfied there was no basis for the witnesses to fabricate what they saw on 13 June 2019 and accepted the evidence she had obtained.

326. The appeal panel carefully assessed the evidence before the respondent. The appeal panel was satisfied the only reason for the claimant's dismissal was the respondent's view as to the claimant's conduct on 13 June 2019.

327. The claim that the claimant was dismissed because of having made a protected disclosure is ill founded and is dismissed.

Detriment

Did Mr Shaw subject the claimant to the alleged detriment?

328. The claimant alleges that Mr Shaw lied about the claimant's aggressive outburst towards him on 14 June 2019, whilst Mr Shaw walked the claimant to his car, and that this was a detriment. The respondent's agent argued that Mr Shaw's evidence was consistent with the evidence he gave at his investigation interview, at the disciplinary hearing and the appeal. Ms Ferguson, Ms Kane and Mr Hobson all heard Mr Shaw's evidence first-hand and deemed him to be a credible witness.

329. The Tribunal considered the claimant's assertion. Having assessed the evidence the claimant was satisfied that Mr Shaw was correct in his recollection and his evidence was preferred to that of the claimant.

330. The Tribunal considered the claimant's suggestion that Mr Shaw fabricated the evidence but did not accept it. Mr Shaw sought to recall matters accurately. Even if Mr Mullen did not hear or see anything, that did not mean that the interaction had not taken place given the distance involved. The evidence Mr Shaw gave as to the claimant's interaction was consistent with how the claimant had acted in other situations with other colleagues (in entirely unconnected events). There was no way Mr Shaw would know of those events.

331. On the balance of probability, the Tribunal found that the detriment relied upon by the claimant in this claim had not been established in evidence.

If yes, at the time of the alleged detriment did Mr Shaw know of the protected disclosure at paragraph 11(a)?

332. Even if the detriment had been established, the Tribunal would have dismissed the claim as Mr Shaw had not seen the letter relied upon in support of the claim. Mr Shaw did not know of the disclosure relied upon by the claimant and it could not, in any way, have influenced his decisions.

If yes, did he subject the claimant to the detriment on the ground that he made that protected disclosure?

333. If the Tribunal was wrong in the foregoing, the Tribunal would have found that the disclosure made by the claimant was entirely unconnected to the reason why Mr Shaw acted. The Tribunal would have upheld the respondent' submission that as the claimant had stated in his evidence, the claimant believed Mr Shaw gave evidence against him because the claimant reported fraud and stealing. That was entirely unrelated to the protected disclosure at paragraph 11(a).

Is this claim brought within the time limit

334. As the claim had not been made out on the facts, it was not necessary to consider the time bar issue.

Did Mr Hobson subject the claimant to the alleged detriment?

335. The claimant alleged that Mr Hobson rejected the claimant's appeal against dismissal and that this was a detriment. The respondent argued that dismissal of the appeal was not a detriment.

336. The Tribunal was satisfied that refusing an appeal was a detriment. It was treatment that the claimant did not like and it was reasonable for him not to like the fact his appeal was not successful.

If yes, at the time that he rejected the appeal did Mr Hobson know of the protected disclosure at paragraph 11(a)?

337. The respondent's agent argued that Mr Hobson gave evidence that whilst a copy of the letter was within the management statement of case, he could hardly read it. It is therefore submitted that whilst aware of the letter, Mr Hobson was unaware of the alleged disclosures made within it.

338. The Tribunal considered this and concluded that Mr Hobson was aware of the terms of the letter. While it was difficult to read, the Tribunal was satisfied that Mr Hobson was aware as to what the letter said and was therefore aware of the disclosure within it.

If yes did he reject the claimant's appeal on the ground that he made that protected disclosure?

339. The respondent's agent argued that Mr Hobson's evidence was that he made the decision to reject the claimant's appeal based on the evidence read and heard in relation to the events of 13 June 2019, alone. No health and safety concerns which the claimant raised played any role.

340. The Tribunal accepted Mr Hobson's evidence in full. Mr Hobson was clear that the panel carefully considered the evidence that was before Ms Kane and assessed whether or not it was reasonable for her dismiss the claimant. The panel were satisfied it was reasonable for her to do so. The panel was satisfied that the concerns the claimant had raised had played no part whatsoever in the decision to dismiss and refused the appeal. The refusal of

the appeal was in no sense whatsoever connected to any disclosure. It was solely on the basis that Ms Kane's decision was reasonable from the information before her at the time. This claim is accordingly ill founded.

Did Ms Biereonwu subject the claimant to the alleged detriment?

341. The claimant alleged that Ms Biereonwu supplied misinformation within a timeline which created an impression that he was a troublemaker. The respondent's agent submitted that Ms Biereonwu gave evidence that the timeline was produced as a factual record of her interactions with the claimant based on contemporaneous emails and documents. It was submitted that the timeline does not contain misinformation and in any event there was no intention on Ms Biereonwu's part to mislead. The Tribunal has heard evidence from Ms Murray, Ms Kane and Mr Hobson, each of whom read the timeline, that it was immaterial in terms of the impression they formed of the claimant, and that it did not create an impression of him as a troublemaker, as alleged. It was submitted that the claimant was not subjected to the alleged detriment.

342. The Tribunal considered the terms of the timeline. While the claimant considered that the timeline was inaccurate and portrayed him as a troublemaker the Tribunal found that this was not an accurate assessment of it from the evidence. The timeline was broadly accurate. It set out what Ms Biereonwu had discovered from material to which she had access.

343. The timeline was not accurate in suggesting that the occupational health report had made *"no recommendations"* since certain recommendations had in fact been made, but the report had said that the claimant was fit to carry out his duties. It was broadly accurate as a summary and the Tribunal accepted Ms Biereonwu's evidence in this regard, even if the details could have been set out in a better and more detailed way. It was intended as an aide memoire only.

344. The detriment relied upon by the claimant was that the timeline was created to form an unfavourable impression of the claimant. That had not been established on the evidence. The timeline was broadly accurate and was created to provide a summary of key facts. The Tribunal accepted Ms

Biereonwu's evidence that she sought to set out the position as she had understood it from the papers she had obtained and that she had not sought to unfairly or adversely misrepresent thew position. She had made errors but looking at the full facts, the allegation is not upheld. The claimant was not subjected to the detriment alleged.

If yes, at the time of the alleged detriment did Ms Biereonwu know of any of the protected disclosures at paragraph 11?

345. The respondent's agent submitted that Ms Biereonwu accepted that she knew of the disclosures made at the meeting on 30 June 2018 (11(d)) but denied any knowledge of the other alleged disclosures. The claimant produced no evidence to challenge this evidence. This was accepted by the Tribunal from the evidence before it.

If yes did she subject the claimant to the detriment on the ground that he made any of those protected disclosures?

346. Ms Biereonwu gave evidence that the way in which she completed the timeline as in no way influenced by the claimant having made any of the alleged protected disclosures. The Tribunal accepted that evidence.

347. The Tribunal found Ms Biereonwu to be credible and accepted her evidence that the reason why she created the timeline in the way she did was solely to provide a summary of key interactions the claimant had. None of the disclosures the claimant had alleged was in any sense whatsoever connected to the way in which she created the timeline and this claim is ill founded.

Wrongful dismissal

Has the respondent established that the claimant acted in repudiatory breach of contract such as to entitle it to summarily dismiss him?

348. The respondent argued that the evidence before the Tribunal was such that the Tribunal is able to assess objectively what occurred and find that the claimant was guilty of a fundamental breach of contract entitling the respondent to summarily dismiss him.

349. The Tribunal assessed the evidence it had heard. The Tribunal was able to make a positive finding in fact that the claimant was guilty of conduct going to the root of the contract, thereby entitling the respondent to summarily dismiss him. That claim is ill founded.

Disability discrimination

350. It was accepted that the claimant was a disabled person by virtue of anxiety and depression and osteoarthritis at the relevant time, 12 July to 15 November 2019 and that the respondent had knowledge of these impairments at the relevant time.

Reasonable adjustments

Has the allegation of a failure to make reasonable adjustments been brought in time in accordance with Section 123(1) of the Equality Act 2010?

351. The act occurred on 12 July 2019.The claim should have been brought within 3 months of the alleged failure, namely by 19 October 2019. In fact the claim was not lodged until 14 May 2020. The claim was therefore 7 months out of time.

Is it just and equitable to extend time?

352. The respondent's agent argued that it is for the claimant to convince the Tribunal that it is just and equitable to extend time and in the absence of evidence as to why he did not lodge his claim in time.

353. The Tribunal took into account that the claimant had the benefit of a trade union and at some point did take legal advice (as he spoke to the Legal Service Agency) and had spoken to ACAS. The claimant gave no explanation as to why he lodged his claim when he did. It was likely that his claim was lodged when it was because the focus for the claimant was in relation to his job and keeping his job and it was more likely than not that his dismissal precipitated the claimant's decision to raise an Employment Tribunal claim (at which stage he decided to include the earlier matters).

354. On balance the Tribunal would not have been satisfied from the information before it that it was just and equitable to extend the time limit. While the claimant was impaired, there was no reason presented to the Tribunal to explain why it would be just to extend the time limit. The claimant had the benefit of advice. Time limits exist for a reason and on the facts before the Tribunal it is not just and equitable to extend the time limit.

Did the respondent apply a provision, criterion or practice ("PCP") of refusing to refer staff struggling with mental health issues for counselling or for an occupational health assessment related to their mental health?

355. The Tribunal decided that it would consider the merits of the claim, even although it had been lodged out of time and it was not just and equitable to extend the time limit.

356. The Tribunal first considered whether the PCP relied upon had been established in evidence. The Tribunal was clear that the PCP had not been established in evidence. There was no evidence at all to indicate that the respondent operated a practice of refusing to refer staff struggling with mental health issues for counselling. In fact the respondent's position was that staff who required counselling were able to utilise the counselling facility provided by the respondent. The respondent's position in this regard was clear (and was specifically referred to in the referral form). The Tribunal accepted the respondent's evidence in this regard. Even although referrals can be made by management and it is quicker for staff to refer themselves, that did not mean there was a practice of the respondent refusing to make referrals. There was no evidence of the respondent refusing to make any referrals.

357. The respondent did not apply a PCP of refusing to refer staff struggling with mental health issues for an occupational health assessment related to their mental health. As the respondent's agent noted, two occupational health referrals seeking advice in relation to the claimant's mental health were made by the respondent, the first on 15 July 2019 by Ms Ferguson and the second by Ms Kane. The facts of the case do not support the claimant's assertion that there was such a PCP or that it was applied in this case.

358. The claim fails as the PCP had not been established.

Did the PCP place the claimant at a substantial disadvantage when compared to those who are not disabled because he was suffering from anxiety and depression which were exacerbated by the disciplinary investigation process which commenced on 14 June 2019?

359. It was accepted that had such a PCP been applied it would have placed the claimant at a substantial disadvantage.

Was the respondent aware at the relevant time of the substantial disadvantage suffered?

360. Has it been necessary to do so, the Tribunal would have upheld the respondent's agent's submission that the respondent was not aware at the time of the alleged substantial disadvantage, namely that the claimant's anxiety and depression were being exacerbated by the disciplinary process. At no time did either the claimant or his representative assert that the claimant's mental health was deteriorating to the extent that he was unable to participate in the disciplinary process. Further, the report from Dr Haldane dated 15 November 2019 stated that the claimant's mental health did not adversely impact upon his ability to continue working and he was fit and safe to work. There was no basis for the respondent knowing that the claimant was being put to the relevant substantial disadvantage as a result of the PCP.

Would it have been reasonable for the respondent to tell the claimant that it would make a referral for him to receive counselling for his mental health and for an Occupational Health assessment to be carried out?

361. It was accepted that such an adjustment would have been reasonable had the other elements of this claim been established.

Would such adjustment have alleviated the substantial disadvantage?

362. Had it been necessary to do the Tribunal would have accepted the respondent's agent's submission that the alleged adjustment would not have alleviated the disadvantage relied upon. An occupational health referral was

made for the claimant at the investigation stage but he chose not to attend. Further, the claimant gave evidence that he did access counselling. Thus the step alleged, referring the claimant to counselling, would have made no difference and not have alleviated any disadvantage.

Harassment

Have the allegations of harassment been brought in time in accordance with Section 123(1) of the Equality Act 2010?

363. In order to assess whether or not the claims were brought in time it is necessary first to determine which of the acts have been established since acts which are not unlawful cannot be used to extend the time. Having considered the matters below, the Tribunal has found that none of the claims had been established on the facts and accordingly it is not necessary to consider the time bar point.

Did the respondent engage in unwanted conduct related to the claimant's disability in respect of the following events?

On 12 July 2019 Ms Ferguson carried out an interview with Ms Creighton to investigate an incident which was alleged to have occurred on 13 June 2019. As part of the investigation she asked Ms Creighton about the claimant's behaviour and asked "Would you describe him as having lost the plot?"

364. The claimant believed this conduct was related to his disability because he had disclosed that he suffered from anxiety and depression. He believed that this comment was made because Ms Ferguson was aware that he suffered from mental health issues.

365. The respondent accepted this question was asked of Ms Creighton but denied that it was related to disability (or the claimant's anxiety and depression). Ms Ferguson was unaware that the claimant suffered from anxiety and depression when she interviewed Ms Creighton. She only learned of it when she interviewed the claimant, which was after she interviewed Ms Creighton. That was not challenged. Further it was argued that Ms Ferguson framed the question to describe the claimant's behaviour, not his mental state.

366. The Tribunal accepted that the conduct was unwanted as the claimant did not want to hear that his behaviour had been described in such a manner. The issue was whether the conduct was *"related to disability"* (and not related to the claimant's disability). The Tribunal accepted Ms Ferguson's evidence that she was unaware of the claimant's disability. However, conduct can relate to disability even where a disability is unknown provided the conduct is related to disability. The Tribunal analysed the evidence and context and viewed the matter objectively taking account of the intention of the author of the statement and how the claimant viewed it. Looking at matters objectively the Tribunal concluded on the facts of this case that the conduct was not related to disability from the facts before this Tribunal given the specific context.

367. The phrase was used to describe the behaviour and was in no sense whatsoever related to disability given the context. Ms Ferguson was not aware of the claimant's behaviour and asked the question using the phrase to denote inappropriate behaviour (and not behaviour specifically related to someone with a disability or disability in general). It was to describe someone acting inappropriately. The conduct was not related to disability on the facts.

On 9 October 2019 at a disciplinary meeting Ms Kane stated that she was sending the claimant to a psychiatrist to get his medication checked as he forgot things.

368. The claimant argued that he did not tell her that he was forgetful and he believed the conduct was related to disability because he had disclosed his depression and anxiety and felt the respondent used this knowledge to undermine his credibility.

369. The respondent's agent pointed out that Ms Kane had taken the information from the claimant's Statement of Case given to her by the claimant's representative and she made the referral to support the claimant, not undermine his credibility.

370. The Tribunal accepted Ms Kane's evidence that she had taken the information from the claimant's submission. While the claimant said he had not read the statement his representative had prepared, it did refer to forgetfulness. Further the purpose in making the referral and in referring to this issue was to

support the claimant and was in no sense whatsoever to undermine the claimant.

371. The Tribunal was not satisfied this was unwanted conduct related to disability. The claimant's agent had explained the conduct may have been due to medication and the step was taken because of what the claimant's agent had said in the submission. It was necessary to check this. Doing so was not unwanted conduct given it was done to support the claimant, to ensure the full facts were before the respondent prior to making a decision.

On 6 November 2019 the claimant attended a meeting with Ms Murray and Ms Houghton to investigate the concerns he had raised about unsafe work practices. The claimant's concerns were treated as complaints and he felt that the meeting was conducted in a hostile manner. He felt that the manner of questioning was designed to goad him. The claimant became stressed and took a break from the meeting with the intention of going home. His wife and union representative persuaded him to return to the meeting room and try again. Ms Murray asked him if he was ok and if he wanted to continue and he confirmed that he did. The claimant's dismissal letter dated 17 January 2020 stated that he had jumped across the table to Ms Murray. During the appeal hearing in April 2020 Ms Murray admitted that she did not report the alleged incident to anyone.

372. The claimant believed this allegation of aggressive behaviour was related to his disability because he had disclosed that he suffered from anxiety and depression and he believed Ms Murray was using this information to make him feel paranoid.

373. The respondent's agent denied Ms Murray goaded the claimant during the meeting on 6 November 2019. Ms Murray was trying to understand what the claimant was saying as he was describing something which was out with normal procedure. The claimant was accompanied by an experienced trade union official. Had Ms Murray been acting out of line, he would have stepped in and stopped her, which he did not. Ms Murray denied she was using knowledge of the claimant's anxiety and depression to make him feel paranoid.

374. The Tribunal was not satisfied Ms Murray was seeking to goad the claimant or that she acted in any way inappropriately during the meeting. Ms Murray was seeking to understand what the claimant was saying and sought more and specific information. The claimant was unhappy and frustrated at being asked the questions, but the questions were not inappropriate, and they were not asked in an inappropriate way. The Tribunal was satisfied that Ms Murray did not raise the issue as to the claimant's conduct to make him paranoid. She chose not to report the matter at the time, but it was a relevant matter given it was her experience of how the claimant reacted to the discussion and her observations of the claimant's behaviour. It was, in the Tribunal's view on the balance of probability, a fact as to how the claimant conducted himself.

375. The conduct relied upon had not been established. The conduct which occurred was not unwanted conduct related to disability. It was an attempt to understand what had happened and she was reporting how the claimant had reacted at the meeting he had.

On 15 November 2019 the claimant attended an Occupational Health and Psychiatrist appointment which had been arranged by the respondent. He discovered that he had been referred not only to check his medication but also to ascertain whether he suffered from a paranoid disorder.

376. The claimant believes this conduct was related to his disability because he does not believe that the respondent would have suggested that he may be suffering from a paranoid disorder if they had not known that he suffered from anxiety and depression. The claimant believed the respondent was trying to use his poor mental health to undermine his credibility.

377. The respondent accepted Ms Kane asked the psychiatrist whether the claimant suffered from a paranoid disorder. Ms Kane was seeking information to ascertain whether the claimant's mental health condition may provide mitigation for his behaviour on 13 June 2019. This was to support him, not undermine his credibility, as alleged.

378. The respondent's submissions have merit. The Tribunal found that Ms Kane wished to ensure she had the full factual matrix before her prior to making her

decision. That included a view of a specialist psychiatrist as to the claimant's mental health given the issues that had arisen. It was appropriate for her to ask about whether or not paranoia was an issue. She did not act inappropriately. The questions were not asked in any way to undermine the claimant's credibility as was alleged. The conduct was not unwanted conduct related to disability. It was an attempt to obtain the full factual matrix before making a decision. It supported the claimant's position in that the respondent sought a medical basis to support what had been submitted to the respondent. It was accordingly not unwanted conduct related to disability.

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

379. The respondent's agent submitted that none of the events had any such purpose or effect. It was argued that these issues had not been raised during the disciplinary hearing (at which he was represented) or appeal hearing nor in his grievance. Had the claimant believed that any of the alleged incidents of harassment had the alleged effect, he would have raised these matters at the time. The fact he did not showed they did not have the alleged effects.

380. While the Tribunal was satisfied the conduct relied upon was not unwanted conduct related to disability, the Tribunal considered the issues for each act given the submissions that had been made and the facts before the Tribunal.

381. Firstly, with regard to the meeting of 12 July 2019, had that conduct been related to disability, the Tribunal would have found, on balance, that it did have the effect of violating the claimant's dignity or creating an intimidating, offensive or degrading environment for him. The claimant was clearly unhappy when he learned of the phrase and believed that it related to his disability (even if, in fact, it did not).

382. However, the Tribunal would have been satisfied from an objective assessment that it would not have been reasonable for the claimant to have believed the conduct to have the proscribed effects. This was a question asked outwith the claimant's presence and was related to a description of

behaviour by someone. It was not related to disability but a phrase to describe someone who acts in an inappropriate manner. It is a phrase that is inelegant but well known and understood to relate to behaviour (and not disability) and was so used in the context, when objectively viewed. This claim had not been made out from the facts before this Tribunal.

383. Secondly with regard to the meeting on 9 October 2019 and Ms Kane's referral, Ms Kane did not have the purpose of violating the claimant's dignity nor of creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. Had that conduct been related to disability, the Tribunal would have found, on balance, that it did not have the effect. There was no evidence the claimant was unhappy about his mental health being assessed at the time (and it has been accepted that it was something that should have been done).

384. Even if the claimant had established that the conduct had the relevant effects, the Tribunal would have found that it was not reasonable for it to be so regarded. It was entirely reasonable (and necessary) for Ms Kane to obtain the full factual matrix and position in relation to the claimant's physical and mental health. It was reasonable for her to rely upon the submission of the claimant's union representative. This claim has not been established.

385. Thirdly with regard to the meeting on 6 November 2019 the Tribunal was satisfied that the facts had not been established. Ms Murray had not goaded the claimant (or acted in any inappropriate way) and she reported what she had found. Her approach was entirely reasonable. It did not have its purpose to violate the claimant's dignity nor of creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. Even if it had that effect the Tribunal would have found that it was not reasonable for it to be so regarded. Ms Murry's approach was entirely reasonable This claim has not been established.

386. Finally, with regard to the occupational health referral, the Tribunal found this did not have its purpose to violate the claimant's dignity nor of creating an intimidating, hostile, degrading, humiliating or offensive environment for the

claimant. The Tribunal would have found, on balance, that it did not have the effect. There was no evidence the claimant was unhappy about his mental health being assessed and was something that was relevant and necessary. It would not reasonably have been regarded as having the proscribed effects given the respondent's desire to secure as much information to support the claimant's position as it could. This claim has not been established.

Itemised pay slips (section 8 Employment Rights Act 1996)

387. The respondent accepted that it failed to give the claimant a written itemised pay statement for June 2019 until January 2020 and that a declaration under Section 12(3) of the Employment Rights Act 1996 should be made. The issue was whether an award should also be made in terms of Section 12(4).

388. The respondent's agent argued no award should be made. Section 12(4) provides that where the Tribunal finds that any unnotified deductions have been made from the pay of the worker during the period of 13 weeks immediately preceding the date of the application for the reference, the Tribunal *may* order the employer to pay a sum not exceeding the aggregate of the unnotified deductions so made. The date of the application for the reference in the claimant's case is the date his Tribunal application was lodged, namely 14 May 2020. The 13 week period prior to this date began on 13 February 2020. The claim is that payslips were not given to the claimant for the period June 2019 to January 2020 which falls outwith the relevant 13 week period.

389. In any event it was submitted that it would be disproportionate to make an award in the circumstances for the following reasons:

    a. The breach was not deliberate – the respondent had a system in place to ensure employees receive pay slips, and a mistake was made on this occasion.

    b. The claimant had not raised the issue of not receiving payslips during the period of his suspension such that the respondent was unaware of the oversight and so was not in a position to remedy it. If the matter

had been brought to the respondent's attention during this period then it would have been promptly addressed.

c. The effect of the breach was minor (evidenced by the claimant's failure to raise the issue) and there was no hardship occasioned.

d. Any deductions made were all lawfully and appropriately made.

e. There was no evidence of any embarrassment, anxiety or inconvenience.

f. No award need be made as a deterrent. The respondent understood its obligations and any failing in this instance was an inadvertent error.

g. On 16 September 2020 the claimant was sent all of the information which would usually be contained.

390. The Tribunal makes a declaration that the respondent failed to comply with its obligations with regard to issuing the claimant with an itemised pay statement for the period June 2019 to January 2020.

391. With regard to making a financial award, the Tribunal finds that the respondent's submissions have merit and upholds them. Given the date of the failure and date the claim was raised, a financial award would not be appropriate. There were no unnotified deductions in the 13 week period prior to the claim being made. In any event, it is not just to make any financial award with regard to the breach which on this occasion arose as a result of an oversight. The Tribunal is satisfied that it was an oversight and the respondent would have immediately remedied the matter had the claimant raised it. The fact the claimant did not raise the matter with the respondent was evidence of the fact that the failure to provide the statement was a procedural error by the respondent without any material impact upon the claimant. The claimant was given all the information he sought and had not in any way been prejudiced by the failure. In all the circumstances it is just to make no financial award.

Unauthorised deductions

Did the respondent make unauthorised deductions from the claimant's wages between June 2019 and January 2020 in relation to his pay during suspension

392. The issue here was whether or not the claimant had the contractual right to be paid in respect of Saturday and Sunday working. The respondent accepted the claimant was entitled to *"full pay"* during suspension. The issue is what was properly payable to the claimant had he been in work, rather than suspended. It is a question of fact as to what had been agreed about the claimant's work pattern, prior to his suspension.

393. The respondent accepted that until May 2019 the claimant worked a shift pattern which meant that he routinely worked weekends, and as a result was paid weekend enhancements for this work. It was argued this changed.

394. The respondent's agent argued that the evidence showed there were a number of discussions with the claimant, Ms Biereonwu and the claimant's union representative about changing his shift pattern. On 7 May 2019 Ms Biereonwu met with the claimant to discuss this and agreed, as an outcome of that meeting, to remove the claimant's weekend working. There followed some discussion as to whether the claimant would work 9am-5pm or 10am-6pm, Monday-Friday and in which department. It was clear that on either pattern, there was no expectation the claimant work weekends.

395. In light of the claimant's claim to have arthritis, Ms Biereonwu referred him to OHS. Ms Biereonwu gave evidence that, but for his suspension, she would have met with the claimant to discuss an appropriate rota, in light of the occupational health report. She did not have an opportunity to do so because of the claimant's suspension. However, whatever rota the claimant would have been put on, Ms Biereonwu is clear he would not have been asked to work weekends, as he had made it clear that he did not wish to work weekends. He was not contractually required to work weekends.

396. It was submitted that prior to the claimant's suspension, it was agreed that he would no longer work weekends. Had the claimant been at work, he would not have worked weekends and so he was not entitled to weekend payments.

397. The Tribunal found that the claimant had agreed to vary his work pattern and that as a result he was no longer contractually required to work weekends. As a consequence he was not entitled to such enhancements and the sums the claimant received by way of wages were the sums properly payable to him, and there was no unlawful deduction from his wages.

Written statement of particulars

398. The respondent conceded that the claimant had not received a statement of changes from the respondent when he took up a full time, permanent position such that section 4 of the Employment Rights Act 1996 was breached. It was accepted that the statement ought to have reflected the fact that the claimant moved from a fixed-term contract to a permanent contract and that his hours of work changed from 15 hours per week to 37.5 hours per week. The only issue was whether an award in accordance with section 38 of the Employment Act 2002 be made. Failure to provide a written statement does not, by itself, give rise to a financial remedy.

399. It was submitted by the respondent that the claimant ought not to be awarded any compensation. The respondent's agent noted that Section 38(5) states that if the claimant is successful in one his Schedule 5 claims the Tribunal must make an award of a minimum of 2 weeks' pay, unless there are exceptional circumstances which would make such an award unjust or inequitable.

400. The respondent's agent argued there were exceptional circumstances which justify no award being made namely that the claimant was issued with a full contract when he commenced employment, the changes made were very minor, there was no dubiety on the claimant's part as to what the changes were, the claimant signed a notification of change in relation to the changes, confirming his agreement to them and the claimant never raised any issue

about not getting a Section 4 statement until he raised his claim, 3 years after the change was made.

401. The claimant submitted that he had sought the statement and it had not been provided to him.

402. The Tribunal was not satisfied that there are exceptional circumstances present in this case justifying no award. The respondent was under a legal obligation to provide the claimant with a written statement of particulars. There was no reason given why this was not provided to the claimant. The purpose of a written statement is to ensure clarity exists as to the relevant terms and conditions – since they are committed to writing and both parties can rely upon them. The fact changes made were minor or that the claimant knew the terms did not alter the importance of issuing the statement. The respondent conceded a statement had not been provided and the Tribunal had the discretion to make an award of 2 or 4 week's pay.

403. The Tribunal finds that the respondent failed to comply with its obligation to provide the claimant with a written statement of particulars (which was accepted by the respondent). The Tribunal has decided to award 2 week's pay, the respondent having failed to comply with its obligations under Schedule 5 (such as the failure to pay the claimant holiday pay due to him). It was not just and equitable to award 4 week's pay from the facts before the Tribunal.

Breach of contract

Did the respondent breach the claimant's contract of employment by failing to consider the claimant's grievance as part of his appeal against dismissal?

404. The respondent accepted that the grievance policy was contractual but argued there was no breach since the issues were considered during the appeal and this was not challenged by the claimant. The claimant argued that the grievance was not considered and in particular the psychiatrist's comments *"could have been looked into more".*

405. The Tribunal was satisfied that the grievance had been considered during the appeal process. The terms of the grievance in essence were about the matters falling within the remit of the appeal. Ms Kane fully addressed the issues in her response for the appeal. The correspondence prior to the appeal hearing confirmed that the issues would be considered as part of the appeal. The respondent failed to explicitly address the matters in their appeal outcome letter and focussed exclusively on the dismissal but the Tribunal accepted the evidence of Mr Hobson that the appeal panel did consider the matters raised by the claimant in his grievance and the appeal letter dealt with the issues implicitly, the matters being very similar to the issues arising in the grievance.

Does the claimant have any losses flowing from this breach for which he can be compensated? If yes, what is the value of this?

406. If the Tribunal was wrong in its conclusion as to the contract not having been breached as a result of the way in which the respondent dealt with the grievance, the Tribunal would have upheld the respondent's submission that there were no losses that arose as a result of the breach. The remedy for a breach of contract is damages, a sum of money to compensate for the loss sustained. The purpose of an award of damages is to place the claimant in the same position as if the contract had been performed. Mr Hobson gave uncontested evidence that even if the grievance had been considered as a separate grievance, rather than as part of the disciplinary appeal, the panel would still have rejected his appeal. The panel did consider the grievance the claimant had raised (and the points Ms Kane set out in her response to each of the grievance issues). The grievance would have been rejected. The Tribunal accepted that evidence. There was no loss flowing from any breach of contract (and no such loss had been established by the claimant in evidence). The claim fails.

Holiday pay

407. The respondent confirmed that the claimant was due to be paid the sum of £186.15 in respect of unpaid holiday pay which is the gross sum, from which

the respondent should make such deductions as required by law. The respondent confirmed that a consent judgment can be issued in this regard.

Summary

408. Of consent, and pursuant to rule 64 of Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 the Tribunal awards the claimant the gross sum of £186.15 by way of holiday pay that had accrued by the end of the claimant's employment, with the respondent being required to deduct such sums as required by law from that gross sum.

409. The Tribunal unanimously concluded that in terms of Section 12(3) of the Employment Rights Act 1996 the respondent failed to provide the claimant with a written statement of particulars for the period of June 2019 until January 2020 but declined to make any award in terms of Section 12(4) and makes an award requiring the respondent to pay the claimant 2 week's pay, namely the gross sum of £750 pursuant to Section 38(4) of the Employment Act 2002.

410. The remaining claims are ill founded and are dismissed.

Observations

411. The Tribunal found that the respondent's policy of not having proper detailed minutes of important meetings, such as disciplinary meetings, was unhelpful. This created uncertainty for both parties and is something that the respondent may wish to consider in reviewing its approach to achieve best practice.

412. Finally the Tribunal wishes to formally record its thanks to the claimant's wife and the respondent's agent for working hard together to assist the Tribunal in complying with the overriding objective. It was much appreciated.

Employment Judge: David Hoey
Date of Judgment: 24 October 2022
Entered in register: 26 October 2022
and copied to parties