



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr D Bailey

**Respondent:** Design & Technical Services (UK) Ltd

**Heard at:** Manchester (by CVP)

**On:** 4, 5 and 6 October 2022  
and in chambers on 27 January  
2023

**Before:** Employment Judge McDonald  
Ms A Berkeley-Hill  
Mr T D Wilson

## REPRESENTATION:

**Claimant:** Mr A Bailey (Claimant's father)

**Respondent:** Miss L Quigley (Counsel)

# JUDGMENT

The unanimous judgment of the Tribunal is as follows:

1. The claimant's claim that he was subjected to discrimination arising from disability in breach of section 15 of the Equality Act 2010 is dismissed on withdrawal.
2. The claimant's claim that he was subjected to disability related harassment in breach of section 26 of the Equality Act 2010 is dismissed on withdrawal.
3. The claimant's application to amend his claim to add a complaint that the respondent failed to make reasonable adjustments as required by sections 20 and 21 of the Equality Act 2010 is granted. However, that claim fails and is dismissed because the claimant was not a disabled person at the relevant time.
4. The claimant's claim that he was unfairly dismissed succeeds.
5. However, we do not award the claimant any compensation for unfair dismissal because:

- a. any basic award or compensatory award is reduced by 100% for contributory fault on the part of the claimant; and
  - b. by reason of the principle in **Polkey v A E Dayton Services Limited [1987] ICR 142**, it was 100% inevitable that the claimant would have been fairly dismissed on the same date as his actual dismissal had a fair procedure been followed.
6. The claimant's claim that he was wrongfully dismissed fails.
  7. The remedy hearing listed for 21 April 2023 is cancelled.

# REASONS

## Introduction

1. By a claim form dated 6 May 2021 the claimant brought a claim of unfair dismissal, wrongful dismissal and disability discrimination. The claim arose out of the claimant's dismissal by the respondent for gross misconduct on 19 March 2021.
2. The claimant was represented by his father, Mr Andrew Bailey. The respondent was represented by Miss Louise Quigley of counsel. In this Judgment we refer to Mr Andrew Bailey as "Mr Bailey" and to Mr Daniel Bailey as "the claimant".
3. We heard the case over three days on 4-6 October 2022. On the first day, the Tribunal attended at the Tribunal building in person but all the other participants joined by CVP. On the second and third days the hearing was wholly by CVP. The Tribunal met in chambers to deliberate on its decision on 27 January 2023.

## The Issues

4. The respondent had provided a List of Issues with input from the claimant. However, that List of Issues did not include full details of all the required elements of the disability discrimination claims. After an initial discussion with the Tribunal at the start of the hearing, Mr Bailey and Miss Quigley were able to further discuss the List of Issues while we read the witness statements and relevant documents in the Bundle on the morning of the first day of the hearing. Following those discussions, Mr Bailey confirmed that the claimant was withdrawing his claims of discrimination arising from disability and the claim of disability related harassment.
5. The draft List of Issues at the start of the hearing included a claim of a failure to make reasonable adjustments in breach of sections 20 and 21 of the Equality Act 2010 ("the 2010 Act"). The provision, criteria or practice ("PCP") relied on was the practice by the respondent of contacting the mental health team through associated Occupational Health department within the respondent's private health scheme for other employees to obtain assistance. The claimant stated that such assistance was not made available to him.

6. During our initial discussions, Mr Bailey clarified that the specific PCP to which a reasonable adjustment was sought was the requirement to attend the investigation meeting held on 10 March 2021 without support. The reasonable adjustment was to provide support at the meeting, removing the disadvantage to the claimant as a disabled person of attending that meeting by himself.

7. When we reconvened after the Tribunal's reading time on the first day Miss Quigley confirmed that the respondent's position was that this was an application to amend by the claimant so that permission from the Tribunal was required. Having discussed with the parties it was agreed that we would hear the evidence in the case and that the parties would make submissions about the application to amend as part of their overall submissions about the case at the end of the evidence.

8. We decided to grant the application to amend for the reasons set out below.

9. The final List of Issues is in the Annex to this Judgment.

### **Reasons for granting the claimant's application to amend**

10. We have decided to grant the claimant permission to amend his claim to add a claim of a failure to make a reasonable adjustment to a PCP of not allowing employees to be represented at investigation meetings. In reaching our decision we have taken into account the oral submissions and written submissions made by each party. We took into account the principles set out in **Selkent Bus Company Limited v Moore [1996] IRLR 661** which require the Tribunal to take into account all the circumstances and balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it. We also took into account the more recent guidance in the case of **Vaughan v Modality Partnership [2021] ICR 535, EAT**. That case stresses that a Tribunal should focus on the real, practical consequences for the parties of allowing or refusing the amendments.

11. When it comes to the timing and manner of the application to amend, it was made late in the day at the start of this final hearing. We accept Miss Quigley's submission that there have been opportunities for the claimant to put forward this reasonable adjustment claim at earlier stages in these proceedings. There was a case management hearing in September 2021 and Mr Bailey provided further particulars of the claimant's claim on 18 October 2021. The preliminary hearing identified the possibility of a reasonable adjustment claim and the further particulars (page 84) confirm that one is being brought. No PCP is identified in the further particulars but we find that it is clear from them that the claimant is saying that the respondent failed to take into account his alleged disability in carrying out the disciplinary proceedings against him and in its decision to dismiss. It is clear to us from the respondent's amended grounds of resistance filed on 7 January 2022 (pages 89-100 in the red lines version) that the respondent was aware that the reasonable adjustments claim being brought related to a failure to make adjustments to the process which led to the claimant's dismissal. We do acknowledge, however, that in the grounds of resistance the respondent makes it clear that the PCP has not been identified nor the relevant reasonable adjustment. We acknowledge Miss Quigley's point that the attachment to the claimant's claim form had been professionally drafted but note that the further particulars and conduct of the matter,

at least from the case management preliminary hearing onwards, was by Mr Bailey who is not a professional legal representative.

12. In terms of prejudice to the respondent, it seems to us clear that it was aware of the nature of the case being brought against it at the latest in October 2021 when the further particulars were filed even if the specific PCP had not been identified as being the one alleged to have been applied at the investigation/welfare meeting on 10 March 2021.

13. In terms of practical prejudice, we had to hear evidence about what happened at that investigation/welfare meeting to decide the claimant's unfair dismissal claim. Miss Quigley did not suggest for the respondent that there was significant practical prejudice to the respondent in terms of evidence or witnesses it was prevented from calling by the late application to amend. In terms of practical prejudice to the respondent, therefore, we find that it is minimal at best.

14. In terms of the balance of injustice and hardship more generally, there is clearly a prejudice to the respondent in having to face a claim of a failure to make a reasonable adjustment which it would not have to if we refused the amendment. The flipside of that is that there would be prejudice to the claimant if we refuse the application to amend because he would not be able to pursue that claim. On balance we think that prejudice to the claimant would be the greater than that to the respondent because he would be denied the opportunity to put forward one of the central points he is seeking to make, which is that he was a disabled person and that the process which led to his dismissal (and in particular the meeting on 10 March 2021) did not sufficiently take that into account. Taking that into account alongside the minimal practical prejudice to the respondent we take the view that the balance in this case falls in favour of granting the amendment which is why we have done so.

## **Evidence and Submissions**

### Witnesses

15. We heard evidence from the claimant in support of his case. For the respondent we heard evidence from Mrs Glynis Lamb ("Mrs Lamb"), the respondent's Commercial Manager, and from Emma Christian ("Miss Christian"). Miss Christian is employed by Napthens LLP, as a People Consultant within the People Projects Team. That Team provides HR services to clients including implementing grievance or disciplinary processes. In this case, she heard the claimant's appeal against dismissal. We did not hear evidence from the dismissing officer, Carl Marshall, who is no longer employed by the respondent.

16. Each witness had prepared a written witness statement. The claimant was cross examined by Miss Quigley and answered questions from the Tribunal. Mrs Lamb and Miss Christian were cross examined by Mr Bailey and answered questions from the Tribunal.

17. We heard the claimant's evidence on the afternoon of the first day and on the morning of the second day. We heard Mrs Lamb's evidence on the second day of the hearing. We heard Miss Christian's evidence on the third day of the hearing.

18. The claimant in giving evidence did at times become distressed and we allowed additional breaks in order to allow him to compose himself and continue giving his evidence. We also had concerns that the claimant was at times finding it difficult to follow questions when being cross-examined. In his evidence he said that he was not the best at reading. Given those concerns, we asked Mr Bailey as his representative to confirm the extent of any such difficulties. He explained that the claimant finds it difficult when under duress to understand matters, particularly written materials. We took that into account in assessing the reliability in making our findings of fact.

19. The parties had agreed a bundle of documents ("the Bundle") which included 351 pages. References in this Judgment to page numbers are to pages in the Bundle.

20. On the afternoon of day 2 of the hearing the respondent sought permission to add 2 documents to the Bundle. They consisted of typed notes of 2 interviews carried out in April 2021 by Miss Christian in dealing with the claimant's appeal against dismissal. Those interviews were with Denis White ("Mr White"), Technical Manager, and Carl Marshall ("Mr Marshall"), After Sales Manager, and dealt with the question of what personal use of company vehicles was permitted.

21. Mr Bailey objected to the inclusion of the statements. He said that what Mr Marshall and Mr White said about permitted use of company vehicles was misleading. That assertion was based on his own knowledge of the respondent's practices from his involvement with the company up to his retirement. He submitted that Mr White and Mr Marshall should be called to give evidence so they could be cross-examined. We treated that as an application for witness orders in relation to them. There was also a suggestion that Mr Bailey should himself give evidence.

22. While accepting that the documents should have been included in the Bundle, we decided it was in accordance with the overriding objective to admit them. They were added as pp.221A-221F of the Bundle. We decided it was not in accordance with the overriding objective to grant Mr Bailey's application that Mr Marshall and Mr White be called to give evidence. Nor did we agree to the suggestion that Mr Bailey give evidence.

23. We gave oral reasons for our decisions on the morning of Day 3 and do not repeat them in full here. In summary, we found that the prejudice to the claimant of including the documents was limited. The disputed content related to use of company vehicles, one of the original grounds for dismissal. However, the appeal outcome in this case downgraded the sanction for (mis)use of the company vehicle to a final written warning so that the reason for the claimant's dismissal was misuse of the company fuel card. In addition, the contents of the statements were, we found, accurately summarised in Miss Christian's appeal outcome letter date 16 April 2021 (pp.222-225). All the additional documents did was confirm that her findings accurately reflected what she had been told by Mr White and Mr Marshall. Miss Christian could be cross examined about that by Mr Bailey. We found that the existence of any dispute about the respondent's approach to company vehicle use in practice (as opposed to the approach set out in its written policy) was apparent at least from the point when the Bundle including that appeal outcome letter was being prepared and agreed. Mr Bailey could have chosen to give evidence and/or to have

applied for witness orders in relation to Mr White and Mr Marshall at that point but had not. Allowing Mr Bailey's applications would have led to a delay in proceedings which was prejudicial to the respondent.

24. The evidential documents included video footage of the disciplinary hearing on 18 March 2021. A transcript of that meeting based on the video was at pages 193-199. Mr Bailey submitted that the Tribunal should watch the video footage itself because the transcript could not accurately capture the behaviour of the participants towards each other. We accepted that submission and watched the video at the start of Day 3 of the hearing. We have taken its contents into account in making our findings of fact.

### Submissions

25. At the end of the oral evidence on day three we heard oral submissions from Miss Quigley for the respondent and from Mr Bailey. Because we needed to reserve our decision we gave directions that the parties could also provide written submissions. We have taken into account both the written and oral submissions in reaching our decisions.

### **Relevant Law**

#### The unfair dismissal claim

##### *The right not to be unfairly dismissed*

26. S.94 Employment Rights Act 1996 ("ERA") gives an employee a right not to be unfairly dismissed by their employer. To qualify for that right an employee usually needs two years' continuous service at the time they are dismissed, which the claimant had in this case.

27. In determining whether a dismissal is unfair, it is for the employer to show that the reason (or if more than one the principal reason) for dismissal is one of the potentially fair reasons set out in s.98(2) of ERA or some other substantial reason justifying dismissal.

28. If the employer shows a potentially fair reason for dismissal then whether the dismissal is fair (having regard to that reason) will depend on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as sufficient reason for dismissing the employee. That "shall be determined in accordance with equity and substantial merits of the case" (s.98(4) ERA).

29. In this case the respondent said the reason for dismissal was (mis)conduct. Conduct is a potentially fair reason for dismissal under s.98(2).

##### *Fairness in misconduct dismissal cases*

30. In a misconduct case the correct approach under section 98(4) was helpfully summarised by Elias LJ in **Turner v East Midlands Trains Limited [2013] ICR 525** in paragraphs 16-22. Conduct dismissals can be analysed using the test which originated in **British Home Stores v Burchell [1980] ICR 303**, a decision of the

Employment Appeal Tribunal which was subsequently approved in a number of decisions of the Court of Appeal. Since **Burchell** was decided the burden on the employer to show fairness has been removed by legislation. There is now no burden on either party to prove fairness or unfairness respectively.

31. The "Burchell test" involves a consideration of three aspects of the employer's conduct. Firstly, did the employer carry out an investigation into the matter that was reasonable in the circumstances of the case? Secondly, did the employer believe that the employee was guilty of the misconduct complained of? Thirdly, did the employer have reasonable grounds for that belief?

32. If a genuine belief is established, the band of reasonable responses test applies to all aspects of the dismissal process including the procedure adopted and whether the investigation was fair and appropriate: **Sainsburys Supermarkets Ltd v Hitt [2003] IRLR 23**. The focus must be on the fairness of the investigation, dismissal and appeal, and not on whether the employee has suffered an injustice. The Tribunal must not substitute its own decision for that of the employer but instead ask whether the employer's actions and decisions fell within that band.

33. The circumstances relevant to assessing whether an employer acted reasonably in its investigations include the gravity of the allegations, and the potential effect on the employee: **A v B [2003] IRLR 405**.

34. A fair investigation requires the employer to follow a reasonably fair procedure. By section 207(2) of the Trade Union and Labour Relations (Consolidation) Act 1992 Tribunals must take into account any relevant parts of the ACAS Code of Practice on Disciplinary and Grievance Procedures 2015 ("the ACAS Code").

35. The appeal is to be treated as part and parcel of the dismissal process: **Taylor v OCS Group Ltd [2006] IRLR 613**. **Taylor** confirmed that there is no rule of law that only an appeal by way of rehearing is capable of curing earlier defects in disciplinary proceedings and that a mere review never was. The question whether the defects of a first hearing had been cured at a second hearing did not depend on how the appeal was categorised. If the first hearing is defective the appeal would have to be comprehensive if the whole process and the dismissal was to be found to be fair,

36. If the three parts of the **Burchell** test are met, the Employment Tribunal must then go on to decide whether the decision to dismiss the employee (instead of imposing a lesser sanction) was within the band of reasonable responses, or whether that band fell short of encompassing termination of employment.

37. In a case where an employer purports to dismiss for a first offence because it is gross misconduct, the Tribunal must decide whether the employer had reasonable grounds for treating the misconduct as gross misconduct: see paragraphs 29 and 30 of **Burdett v Aviva Employment Services Ltd UKEAT/0439/13**. Generally gross misconduct will require either deliberate wrongdoing or gross negligence. Even then the Tribunal must consider whether the employer acted reasonably in going on to decide that dismissal was the appropriate punishment. An assumption that gross misconduct must always mean dismissal is not appropriate as there may be

mitigating factors: **Britobabapulle v Ealing Hospital NHS Trust [2013] IRLR 854 (paragraph 38)**.

Compensation for unfair dismissal

38. S.118(1) ERA says that:

**“Where a tribunal makes an award of compensation for unfair dismissal under section 112(4) or 117(3)(a) the award shall consist of—**

**(a) a basic award (calculated in accordance with sections 119 to 122 and 126, and**

**(b) a compensatory award (calculated in accordance with sections 123, 124, 124A and 126).”**

39. The basic award is calculated based on a week’s pay, length of service and the age of the claimant.

40. The compensatory award is "such amount as the tribunal considers just and equitable in all the circumstances, having regard to the loss sustained by the claimant in consequence of the dismissal" (s.123(1) ERA).

41. A just and equitable reduction can be made to the compensatory award where the unfairly dismissed employee could have been dismissed at a later date or if a proper procedure had been followed (the so-called **Polkey** reduction named after the House of Lords decision in **Polkey v A E Dayton Services Ltd [1988] 1 AC 344, [1988] ICR 142**). The reduction is usually made on a percentage basis, reflecting the chance that the employee would have been fairly dismissed even had there not been an unfair dismissal.

42. The ERA also provides for a reduction in compensation where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the claimant. In those circumstances the Tribunal shall reduce the compensatory award by such proportion as it considers just and equitable having regard to that finding (s.123(6) ERA).

43. The case law confirms that the question for the Tribunal is whether the claimant was culpable or blameworthy, by which is meant “deserving of blame” (**Sanha v Facilicom Cleaning Services Limited UKEAT/0250/18/VP**). **Sanha** confirmed that that may potentially apply to conduct that is merely foolish, and at least to some conduct that is unreasonable - it does not have to involve conduct in breach of the contract of employment.

44. If the Tribunal finds that the claimant did contribute to the dismissal then it must make a reduction to the compensatory award, although the amount of reduction is for it to decide on a just and equitable basis. The Employment Appeal Tribunal in the case of **Hollier v Plysu Limited [1983] IRLR 260** provided guidance, suggesting that broadly a reduction should be as follows:

- Where the claimant is wholly to blame there should be a 100% reduction in the compensatory award;



- Where they are largely to blame, a 75% reduction;
- Where the employer and the employee are equally to blame, a 50% reduction;
- Where the claimant is slightly to blame, a 25% reduction.

45. In **Dee v Suffolk County Council EAT 0180/18** the EAT confirmed that a Tribunal is permitted to make both a **Polkey** reduction to a compensatory award and a reduction for contributory conduct. It said that after deciding the appropriate reductions the tribunal should "stand back" and look at the matter as a whole, avoiding double counting and ensuring that the result is just and equitable.

46. Where the Tribunal considers that any conduct of the claimant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly (s122(2) ERA). That also requires a finding of culpable or blameworthy conduct (**Sanha**). It is very likely, but not inevitable, that what a Tribunal concludes is a just and equitable basis for the reduction of the compensatory award will also have the same or a similar effect in respect of the basic award, but it does not have to do so (**Steen v ASP Packaging Ltd [2014] ICR 56, EAT**).

#### Wrongful dismissal

47. When it comes to wrongful dismissal the Tribunal is not concerned with the reasonableness of the employer's decision to dismiss, but the factual question, was the employee guilty of conduct so serious as to amount to a repudiatory breach of the contract of employment entitling the employer to summarily terminate the contract? (**Enable Care & Home Support Ltd v Mrs J A Pearson UKEAT/0366/09/SM**).

48. Although the Tribunal has to come to its own view about the claimant's conduct for the purposes of a wrongful dismissal claim, it must take care not to take those findings into account in deciding whether the dismissal was unfair. The Court of Appeal has suggested that, as a general rule, it might be better practice for a Tribunal to keep its findings of facts relevant to the employer's decision to dismiss separate from its findings of facts that are only relevant to other issues (**London Ambulance Service NHS Trust v Small 2009 IRLR 563, CA**).

49. The burden of proving that the claimant was guilty of repudiatory conduct lies with the respondent. However, a Tribunal should only fall back on the burden of proof where it cannot on the evidence before it rationally decide one way or another on the evidence before it (the EAT in **Hovis Limited v Mr W Louton EA-2020-000973-LA** reviewed the authorities on this point).

50. When dishonesty is in question the fact-finding tribunal must first ascertain (subjectively) the actual state of the individual's knowledge or belief as to the facts. When once his actual state of mind as to knowledge or belief as to facts is established, the question whether his conduct was honest or dishonest is to be determined by the fact-finder by applying the (objective) standards of ordinary decent

people. There is no requirement that the person must appreciate that what they have done is, by those standards, dishonest. (**Ivey v Genting Casinos (UK) Ltd t/a Crockfords [2017] UKSC 67**).

The disability discrimination claim

51. The claimant says that the respondent failed to make reasonable adjustments to the way it carried out its investigatory meeting into his alleged misconduct. He says that at the relevant time he was a disabled person for the purposes of s.6 of the Equality Act 2010.

The meaning of a “Disabled person”

52. Section 6 of the 2010 Act, so far as is relevant, provides:

“(1) A person (P) has a disability if –

- (a) P has a physical or mental impairment, and
- (b) The impairment has substantial long-term adverse effect on P’s ability to carry out normal day-to-day activities.  
...”

*Adverse Effect*

53. Section 212(2) of the 2010 Act provides that an effect is “substantial” if it is more than minor or trivial.

54. Paragraph 2 of Schedule 1 to the 2010 Act defines “long-term” in this context. It provides:

“(1) The effect of an impairment is long-term if –

- (a) it has lasted for at least 12 months,
- (b) it is likely to last for at least 12 months,
- (c) it is likely to last for the rest of the life of the person affected.

(2) If an impairment ceases to have a substantial adverse effect on a person’s ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur...”

55. For paragraph 2(1)(a) of Schedule 1 to the 2010 Act to apply, the effect of an impairment must have lasted for at least 12 months at the time when the alleged discriminatory act (or acts) took place (**Tesco Stores v Tennant UKEAT/0167/19**).

56. The likelihood of recurrence within the meaning of paragraph 2(2) of Schedule 1 to the 2010 Act is to be assessed as at the time of the alleged discriminatory act (or acts) took place: see (**McDougall v Richmond Adult Community College [2008] ICR 431, Court of Appeal**). The same applies to the assessment of whether the effect of the impairment is likely to last for 12 months under paragraph 2(1)(b) of Schedule 1 (**Singapore Airlines Ltd v Casado-Guijarro [2013] 9 WLUK 65, EAT**).

57. In cases to which paragraph 2(1)(b) of Schedule 1 of the 2010 Act applies the correct question for the Tribunal is whether viewed at the time and without the benefit of hindsight, the substantial adverse effects of the impairment were likely to last at least 12 months. That is a decision to be reached having regard to all the contemporaneous evidence, not just that before the employer. In reaching that decision the Tribunal is not concerned with the actual or constructive knowledge of the employer (**Lawson v Virgin Atlantic Airways Limited UKEAT/0192/19/VP**). However, it is an error law for a Tribunal to take into account subsequent events in making that assessment.

58. “Likely” in this context means something that “could well happen” and is not synonymous with an event that is probable: (**SCA Packaging Ltd v Boyle [2009] ICR 1056, Supreme Court**).

59. An impairment is to be treated as having a substantial adverse effect on the ability of an employee to carry out normal day-to-day activities if measures are taken to treat or correct it and, but for such measures, it would be likely to have the prescribed effect: see para 5 of Schedule 1 to the 2010 Act. This is usually referred to as the “deduced effect”.

60. The Secretary of State’s Guidance on Matters to Be Taken into Account in Determining Questions Relating to the Definition of Disability (2011) (“the Guidance”) <http://odi.dwp.gov.uk/docs/wor/new/ea-guide.pdf> gives guidance to help a Tribunal decide whether an impairment has a substantial effect on normal day to day activities. At paragraph D.2 and D.3 of the Guidance it explains what “normal day to day activities” means:

**“D.2. The Act does not define what is to be regarded as a ‘normal day-to-day activity’.** It is not possible to provide an exhaustive list of day-to-day activities, although guidance on this matter is given here and illustrative examples of when it would, and would not, be reasonable to regard an impairment as having a substantial adverse effect on the ability to carry out normal day-to-day activities are shown in the Appendix.

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

61. When assessing whether the effect of the impairment is substantial the Tribunal has to bear in mind the words of section 212(1) of the 2010 Act which confirm that it means more than minor or trivial. The 2010 Act does not create a spectrum running smoothly from those matters that are clearly of substantial effect to those matters that are clearly trivial. Unless a matter can be classed as within the heading “trivial” or “insubstantial” it must be treated as substantial (**Aderemi v London and South-Eastern Railway Ltd [2013] ICR 591**).

62. The Guidance recognises that “Environmental effects” (including stress: see para B11) may have an impact on how an impairment affects a person’s ability to carry out normal day-to-day activities. It says that “Consideration should be given to the level and nature of any environmental effect. Account should be taken of whether it is within such a range and of such a type that most people would be able to carry out an activity without an adverse effect” (para D20).

### *Impairment*

63. Since 2005 when para 1(1) of Schedule 1 of the Disability Discrimination Act 1995 was repealed, there is no longer a requirement for a mental impairment to be a “clinically well-recognised illness”.

64. It will not always be essential for a tribunal to identify a specific ‘impairment’ if the existence of one can be established from the evidence of an adverse effect on the claimant’s abilities (**J v DLA Piper UK LLP 2010 ICR 1052, EAT**).

65. An impairment (certainly a mental impairment) can be something that results from an illness as opposed to itself being the illness. It can thus be cause or effect and there is no need to identify the cause of the impairment. (**College of Ripon and York St John v Hobbs [2002] EWCA Civ 1074**).

66. The significance of the absence of an apparent cause (e.g. a clinically diagnosed medical illness) for an impairment is evidential, not legal: “Where an individual presents as if disabled, but there is no recognised cause of that disability, it is open to a Tribunal to conclude that he does not genuinely suffer from it. That is a judgment made on the whole of the evidence” (**Walker v Sita Information Networking Computing Ltd EAT 0092/12**).

### Relevant evidence and correct approach

67. The burden of proving disability is on the claimant.

68. The definition of disability requires a Tribunal to decide four questions (**Goodwin v Patent Office [1999] ICR 302**):

- a. Does the claimant have an impairment which is either mental or physical?
- b. Does the impairment affect the claimant’s ability to carry out normal day-to-day activities?
- c. Is that adverse effect substantial?
- d. Is the adverse effect long-term?

69. These four questions should be posed sequentially and not together – (**Wigginton v Cowie and ors t/a Baxter International (A Partnership) EAT 0322/09**). It is good practice for Tribunals to state their conclusions separately on each of the questions. However, in reaching those conclusions, Tribunals should not feel compelled to proceed by rigid consecutive stages. Specifically, in cases where the existence of an impairment is disputed it would make sense for a Tribunal to start

by making findings about whether the claimant's ability to carry out normal day-to-day activities is adversely affected on a long-term basis and then to consider the question of impairment in the light of those findings. (**J v DLA Piper UK LLP [2010] ICR 1052, EAT**).

Failure to make reasonable adjustments

70. Section 39(5) of the 2010 Act provides that a duty to make reasonable adjustments applies to an employer.

71. That duty appears in Section 20 as having three requirements, and the requirement of relevance in this case is the first requirement in Section 20(3)

72. Section 20(3) provides as follows:-

**“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”.**

73. The importance of a Tribunal going through each of the constituent parts of that provision was emphasised by the EAT in **The Royal Bank of Scotland – v- Ashton [2011] ICR 632** (approved by the Court of Appeal in **Newham Sixth Form College v Sanders [2014]**). A Tribunal must identify:

- a) the provision, criterion or practice applied by or on behalf of an employer, or
- b) the physical feature of premises occupied by the employer,
- c) the identity of non-disabled comparators (where appropriate) and
- d) the nature and extent of the substantial disadvantage suffered by the Claimant. It should be borne in mind that identification of the substantial disadvantage suffered by the Claimant may involve a consideration of the cumulative effect of both the ‘provision, criterion or practice applied by or on behalf of an employer’ and the, ‘physical feature of premises’ so it would be necessary to look at the overall picture.

The EAT added that although it will not always be necessary to identify all four of the above, (a) and (d) must certainly be identified in every case.

74. 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 Equality and Human Rights Commission’s Statutory Code of Practice on Employment and the Equality Act 2010 (“the EHRC Code”) provides considerable assistance. 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. Paragraph 6.29 of the EHRC Code makes clear that ultimately the test of the reasonableness of any step is an objective one depending on the

circumstances of the case. Examples of reasonable adjustments in practice appear from paragraph 6.32 onwards

75. As to whether a disadvantage resulting from a provision, criterion or practice is substantial, Section 212(1) of the 2010 Act defines “substantial” as being “more than minor or trivial”.
76. Paragraph 20(1) of Schedule 8 to the 2010 Act (so far as relevant) provides that:
- “a person is not subject to the duty to make reasonable adjustments if he or she does not know, and could not reasonably be expected to know:**
- (a)....;
- (b).....that an [employee] has a disability and is likely to be placed at a disadvantage by [the employer’s provision, criterion or practice (PCP), the physical features of the workplace, or a failure to provide an auxiliary aid]”**
77. The employer’s knowledge can be actual or “constructive”. A Tribunal should approach this aspect of a reasonable adjustments claim by considering two questions:
- first, did the employer know both that the employee was disabled and that the disability was liable to disadvantage the employee substantially?
  - if not, ought the employer to have known both that the employee was disabled and that the disability was liable to disadvantage the employee substantially? **Secretary of State for Work and Pensions v Alam 2010 ICR 665, EAT, and McCubbin v Perth and Kinross Council EATS 0025/13.**

Uplift in compensation for failure to comply with the ACAS Code

78. S.207A of the Trade Union and Labour Relations (Consolidation) Act 1992 (“s.207A”), states at subsection (2):

**‘If, in the case of proceedings to which this section applies, it appears to the employment tribunal that**

**(a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,**

**(b) the employer has failed to comply with that Code in relation to that matter, and**

**(c) that failure was unreasonable,**

**the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25 per cent.’**

79. In this case the uplift potentially applies to all the claims brought by the claimant, i.e. unfair dismissal, wrongful dismissal and unlawful discrimination by a failure to make reasonable adjustments.

80. In **Acetrip v Dogra UKEAT/0016/20/VP (18 March 2019)** HHJ Auerbach in the EAT said at para 103:

“There is, inevitably it seems to me, a punitive element to an adjustment award under these provisions, because the Tribunal is not simply compensating a claimant for some additional readily identifiable or quantifiable loss that he has suffered. The adjustment is bound, to a degree, to be reflective of what the Tribunal considers to be the seriousness and degree of the failure to comply with the ACAS Code on the employer’s part.”

81. In **Slade and anor v Biggs and ors 2022 IRLR 216**, the EAT confirmed that the discretion given to a Tribunal by s.207A is very broad, both as to whether there should be an uplift at all, and as to the amount of any uplift. While the top of the range of 25% should undoubtedly be applied only to the most serious cases, the statute does not state that such cases should necessarily have to be classified, additionally, as exceptional.

### **Findings of Fact**

82. We make the following findings of fact based on the evidence we heard and read.

#### Background Facts

83. The respondent supplies CNC machine tools to the manufacturing sector. It has a team of engineers which provides its clients with maintenance services for the machine tools it supplies. The claimant was employed as a Machine Tool Services Engineer from 19 September 2011 until his summary dismissal on 19 March 2021.

84. The respondent is a relatively small company with around 25-30 employees. Mr Andrew Bailey, the claimant’s father and representative at this Tribunal, was a shareholder, company secretary and director of the respondent until his retirement in January 2021.

85. Following Mr Bailey’s resignation, Mr Gary Sanderson (“Mr Sanderson”) was the respondent’s sole director. Mr Marshall was the claimant’s line manager from 2021, having been promoted from his role as a service engineer. Mr White did not have direct line management responsibilities for the claimant.

86. Mrs Lamb’s role as the Commercial Manager included monitoring and reporting responsibilities relating to the company’s day to day finances, payroll, expenses and company vehicles. Prior to her appointment as Commercial Manager in 2021, Mrs Lamb had been the respondent’s Office Manager since 2015. The respondent did not have an internal HR function, so Mrs Lamb carried out that role from 2015 onwards. She had dealt with 2 or 3 disciplinary hearings in the past alongside Mr Bailey. Mrs Lamb did not have HR qualifications and we find that at the time of the events giving rise to this claim she relied on Napthens to provide HR

advice. We find that the claimant and Mrs Lamb had a good relationship prior to the events giving rise to this case.

87. The claimant's duties involved travelling to client sites to provide maintenance services. The claimant spent the majority of his time working away from home, sometimes traveling significant distances to attend client sites and spending overnight in hotels.

#### Use and misuse of company vehicles and company fuel card

88. The claimant was provided with a work van and a company fuel card. He did not have his own car.

#### *Use of company vehicles*

89. The Bundle included relevant extracts from the respondent's Company Handbook ("the Handbook") (pp.147-179). Section 29 of the Handbook deals with company vehicles. Para. 29.2.1 states that company vehicles are for company use only. Para 29.9.5 states that "[company] vehicles may only be used on legitimate company business or where permitted for normal social and domestic activities."

90. The claimant's case was that in practice the respondent allowed personal use both for short local journeys, e.g. to the tip, and for longer journeys. He gave the example of one employee who had had a towbar fitted to a company vehicle. The position was investigated by Miss Christian in considering the claimant's appeal against dismissal.

91. We find the position in practice was as set out in Miss Christian's appeal outcome letter dated 16 April 2021. The respondent did "turn a blind eye" to occasional personal use of company vehicles. The respondent considered it reasonable for employees staying away overnight for work to use their company vehicle to go to a local supermarket or restaurant. Employees were also allowed to use the vehicles for short, purely personal trips such as taking items to the local recycling centre or their child to rugby practice. Permission was not required for these short journeys as long as they were not regular, were local journeys and the fuel was paid for by the employee. Permission was required for longer personal journeys. Such journeys were not common. There was no formal process for seeking permission-an employee would speak to their manager who would raise it with a company director. One example was of an employee who was given permission to use their company vehicle to travel to meet their partner at a holiday location and then return to work in that vehicle the following Monday. We find that, as with shorter journeys, the fuel for any such journeys would be paid by the employee concerned.

#### *Use of the company fuel card*

92. Para 7.2 of the Handbook stated that the fuel card was to be used for business mileage and that "fuel cards must not be used for personal use". We find the claimant clearly understood that was the case.

93. Use of the fuel card required a "dual authentication" process. That meant that when using it to pay for fuel, the employee had to both input a PIN number and confirm the registration number of the vehicle. We accept the claimant's evidence



that he had changed his personal payment card's PIN number so it was the same as the PIN for the company fuel card. We find, however, that he did not have to follow a "dual authentication" process when paying for fuel on his personal payment card.

*Disciplinary Rules*

94. In relation to misconduct the handbook states (so far as potentially relevant to this case):

27.5 Misconduct

27.5.1 The following are examples of matters that will normally be regarded as misconduct and will be dealt with under our Disciplinary Procedure:

27.5.1.1 .....

27.5.1.4 Damage to, or unauthorised use of, our property;.....

.....

This list is intended as a guide and is not exhaustive."

95. In relation to gross misconduct the handbook states (so far as relevant to this case):

27.6 Gross misconduct

27.6.1 Gross misconduct is a serious breach of contract and includes misconduct which, in our opinion, is likely to prejudice our business or reputation or irreparably damage the working relationship and trust between us. Gross misconduct will be dealt with under our Disciplinary Procedure and will normally lead to dismissal without notice or pay in lieu of notice (summary dismissal).

27.6.2 The following are examples of matters that are normally regarded as gross misconduct:

27.6.2.1 Theft, or unauthorised removal of our property or the property of a colleague, contractor, customer or member of the public;

27.6.2.2 Fraud, forgery or other dishonesty, including fabrication of expense claims and time sheets;

27.6.2.3 ....;

27.6.2.5 Serious misuse of our property or name;

27.6.2.6 .....

27.6.2.9 ....Serious or repeated misuse of the Company fuel or hotel card;

27.6.2.10

27.6.2.14 Repeated or serious breach of the Company Vehicle policy;

.....This list is intended as a guide and is not exhaustive.”

96. The Handbook sets out the disciplinary procedure to be followed and its purpose at section 27.8:

27.8 What is covered by the procedure?

27.8.1 This procedure is used to deal with misconduct. It does not apply to cases involving genuine sickness absence, proposed redundancies or poor performance. In those cases reference should be made to the appropriate policy or procedure elsewhere in this Staff Handbook.

27.8.2 Minor conduct issues can often be resolved informally between you and your line manager. These discussions should be held in private and without undue delay whenever there is cause for concern. Where appropriate, a note of any such informal discussions may be placed on your personnel file but will be ignored for the purposes of any future capability hearings. In some cases an informal verbal warning may be given, which will not form part of your disciplinary records. Formal steps will be taken under this procedure if the matter is not resolved, or if informal discussion is not appropriate (for example, because of the seriousness of the allegation).

27.8.3 You will not normally be dismissed for a first act of misconduct, unless we decide it amounts to gross misconduct or you have not yet completed your probationary period.

27.8.4 If you have difficulty at any stage of the procedure because of a disability, you should discuss the situation with your line manager as soon as possible.

97. The handbook deals with investigations at section 27.10:

27.10 Investigations

27.10.1 The purpose of an investigation is for us to establish a fair and balanced view of the facts relating to any disciplinary allegations against you, before deciding whether to proceed with a disciplinary hearing. The amount of investigation required will depend on the nature of the allegations and will vary from case to case. It may involve interviewing and taking statements from you and any witnesses, and/or reviewing relevant documents.

27.10.2 Investigative interviews are solely for the purpose of fact-finding and no decision on disciplinary action will be taken until after a disciplinary hearing has been held.

- 27.10.3 You do not normally have the right to bring a companion to an investigative interview. However, we may allow you to bring a companion if it helps you to overcome any disability, or any difficulty in understanding English.
- 27.10.4 You must co-operate fully and promptly in any investigation. This will include informing us of the names of any relevant witnesses, disclosing any relevant documents to us and attending investigative interviews if required.

Relevant events prior to 19 February 2021

98. COVID19 led to a downturn in the respondent's business but there was still a requirement (albeit a reduced one) for its engineers to carry out servicing work. The respondent placed some of its engineers on furlough from March 2020. The claimant was not furloughed at that point. He continued to travel to client sites to carry out maintenance services.

99. From November 2020 the respondent decided to put employees on flexible furlough. The claimant was placed on flexible furlough from December 2020. We find that work for engineers on flexible furlough was allocated on a day-to-day basis. We accept the claimant's evidence that that meant he would not know whether he was working or on furlough on a particular day until he had a phone call with the respondent's Service co-ordination team on the morning of that day to see if there was work for him.

100. On 6 January 2021 the Third National Lockdown was announced. That meant that people in England were only able to go out for essential reasons with exercise outdoors being allowed only once a day. Although in December 2020 the claimant worked more days than he was furloughed, his number of furlough days increased to 10 in January 2021 and 13 in February 2021 (p.230). We have set out at paras 167-171 below our findings about the impact of this on the claimant's state of mind. In summary, we accept the claimant found the situation very stressful. He was, to use his words, "stuck" in his flat. The situation was made worse by the fact that his sister was living with him and using the living room of the flat as an office to work from. In practice that meant the claimant was confined to his bedroom during the day.

101. We find that the claimant did raise with Mr Marshall the difficulties he was experiencing because of flexible furlough and the lack of structure resulting from it. We did not hear evidence from Mr Marshall. Based on the claimant's Disability Impact Statement (p.237, para 3) and the appeal letter (p. 208-212) we find that the claimant was speaking to Mr Marshall regularly during this period, with the focus of those calls being on the claimant emphasising his willingness to work. When it comes to raising any mental health issues with Mr Marshall, we find that he spoke to Mr Marshall (in his own words at the appeal hearing) "a couple of time" about those issues. Specifically, we find that the claimant did so during a phone call towards the end of January 2021, telling Mr Marshall that he was concerned about a lack of work and that he had become anxious, was not sleeping and that the situation was affecting his mental health. We do not find that the claimant followed up that conversation with Mr Marshall between then and the meeting on 10 March 2021. There was no evidence that Mr Marshall discussed that conversation with Mrs Lamb.

102. We accept Mrs Lamb's evidence in cross examination and at para 12 of her witness statement that the claimant did not approach her about the struggles he was experiencing being on flexible furlough at this time. Although Mrs Lamb at paragraph 29 of her witness statement confirmed that she was aware that the claimant was "struggling" whilst on furlough from December 2020, we find she only became aware of that on or around 8 March 2021 after the claimant spoke to Luke Smith. It is accepted that the claimant did not visit his GP or provide medical evidence (such as a sick note) to evidence mental health issues until after his dismissal on 19 March 2021.

Events on 19 February 2021 – the Birmingham journey

103. The incident which led to the claimant's dismissal happened on 19 February 2021. The claimant was furloughed on that day. The third national lockdown was still in force. That meant that the claimant should not have left his home except for essential reasons or to take exercise on one occasion. It is accepted that what the claimant did do was to leave his home and use the company vehicle for a 220-mile round trip from home to and from Birmingham. The purpose of the journey was to pick up some golf clubs which he had been offered for free. There was not enough fuel in the van for the round trip so the claimant bought £50 worth of fuel in Solihull. He used the company fuel card to pay for it. His evidence is that he did so inadvertently, his head being "all over the place" at the time. We set out at paras 172-174 below our additional findings about this incident relevant to deciding the claimant's wrongful dismissal claim.

Events from 20 February 2021 to 10 March 2021 – Hollygate, Luke Smith and Mrs Lamb identifying the potential misuse of the fuel card

104. On 22 February 2021 the claimant was due to return to a client site called Hollygate for the second day of a 2 day job. While en-route to the site he was contacted by the respondent and re-assigned to a different job. We accept the respondent's case that the reason for this was that the client concerned had raised issues with the claimant's work and requested that he not be assigned to work their site in future.

105. On or around the 25 February 2021, Mrs Lamb had during her weekly fuel receipt checks noticed from the report dated 24 February 2021 that the claimant had used his company fuel card on 19 February 2021. She had noticed that he had used it on a date when he was furloughed and had used it in Solihull, 110 miles or so away from his home. She decided that she should raise the matter with Mr Sanderson.

106. The claimant had a telephone conference meeting about the Hollygate issue with Mr White and Mrs Lamb on the 1 March 2021. The meeting was due to be by Skype but was switched to telephone when Skype didn't work. It was explained to the claimant that the client had asked that he not return to the Hollygate site. He was also told that the respondent would be investigating the circumstances. He was not given any details about what the client had said at that point. Jumping forward slightly, at the end of the welfare/investigatory meeting on 10 March 2021 Mr Marshall confirmed that that investigation was concluded and no action would be taken (p.181).

107. The use of the company vehicle and fuel card on 19 February 2021 was not raised with the claimant during the 1 March meeting. At that point, Mrs Lamb had spoken to Mr White but not had a chance to discuss it with Mr Sanderson because he was not at work. That meant there had been no decision on how the respondent should approach the issue.

108. The claimant did not suggest in his evidence that he raised any mental health issues during the telephone meeting on 1 March 2021

109. On Saturday, 6 March 2021 the claimant rang Luke Smith, a friend of his who was also an engineer for the respondent. The claimant was in tears. He shared with Mr Smith that he was struggling with the flexible furlough situation because of the isolation and lack of work. He felt that other engineers were being assigned work when he was not. He shared with Mr Smith how tired the situation was making him feel and his feelings of worthlessness. He asked Mr Smith for advice. We find Mr Smith advised the claimant to speak to Mr Marshall and/or Mrs Lamb about how he was feeling.

110. The claimant did not do so prior to the meeting on 10 March 2021. However, on or around 8 March 2021 Mr Smith approached Mrs Lamb about his phonecall with the claimant. On balance, it seems to us probable that would have been on Monday 8 March 2021, the next working day. He told her that the claimant had been in tears, had raised mental health issues resulting from his being furloughed and raised concerns about lack of money because of furlough. Mrs Lamb decided she should meet with the claimant to discuss his wellbeing.

111. Mrs Lamb spoke to Mr Sanderson on the morning of Monday, 8 March 2021. There was concern that the claimant having used the company vehicle while on furlough was a breach of the furlough scheme rules. It was agreed with Mr Sanderson and Mr White that Mrs Lamb would ask the claimant why he had gone to Birmingham and about his use of the fuel card. She took advice from Napthens. Her unchallenged evidence was that she was told she could raise the issue with him. She understood she could do so in the wellbeing meeting she was intending to have with him.

112. The claimant was working on-site on 8 and 9 March 2021. We find that Mr White phoned him on 9 March 2021 to attend a face-to-face welfare meeting with Mr Marshall and Mrs Lamb on 10 March 2021. We find he was not told it was an investigatory meeting. On balance, we find that he was also not told in advance about the fuel card/company vehicle issue. He was not offered the opportunity to bring anyone along with him to the meeting. He did not ask to bring anyone along.

#### The welfare/investigatory meeting on 10 March 2021

113. Our findings about what happened at the meeting on 10 March 2021 are based in part on Mrs Lamb's notes of that meeting (pp.181-182). The claimant at para 18 of his witness statement said that from his recollection, the notes were not a fair reflection and balanced summary of the meeting. The only specific criticism he made was that the notes failed to mention that the respondent had offered to help him with his "anxiety and mental condition". The difficulty for the claimant was that he was not able to give evidence about what happened at that hearing. His position

since 15 March 2021 (p.187) including at the disciplinary hearing on 18 March 2021 and at the Tribunal, was that he could not remember what he was asked and said at that meeting.

114. Written statements from Mrs Lamb and Mr Marshall taken in April 2021 during the appeal process confirm the accuracy of the meeting notes (pp.183-184). We did not find the contents of Mrs Lamb's April statement entirely convincing. In particular, we found it implausible given the matters discussed at the meeting that it ended on "a joyful note". Based on Mrs Lamb's cross-examination evidence, we find that the notes of the meeting were not a complete record of what happened at that meeting. In particular, Mrs Lamb in cross examination accepted that at points during the meeting the claimant was crying and upset, something not referenced in the notes.

115. For the avoidance of doubt, we do not find there was any attempt by Mrs Lamb to mislead by deliberate omission from the notes. It does seem to us, however, that the notes of the meeting were focussed on the disciplinary aspects of the meeting than on the welfare aspects, reflected in the use of the heading "Investigation Meeting".

116. Although we found Mr Marshall's description of events in his witness statement from 14 April 2021 more plausible than Mrs Lamb's, we have in reaching our findings about the meeting taken into account that he did not give evidence at the Tribunal, so Mr Bailey did not have an opportunity to cross-examine him.

117. We find that the meeting on 10 March 2021 was led by Mrs Lamb. Mr Marshall was in attendance but did not take an active part other than to confirm at the end of the meeting that no further action would be taken in relation to the Hollygate matter.

118. We find that the meeting was neither formal nor very structured. It lasted about 30-40 minutes. There was nothing at the start to suggest it was an investigatory meeting into a potential disciplinary matter.

119. There was an initial discussion about the conversation the claimant had with Mr Smith on 6 March 2021. The claimant explained that he was struggling because of furlough. He explained the position with his sister living in the flat. When discussing his struggles, the claimant was upset to the extent that he was crying. We find that it was agreed that because working helped the claimant, he would be rostered further work on Thursday and Friday of that week. Mrs Lamb accepted that this action point was not reflected in her meeting notes. She also accepted that the respondent did not take steps beyond rostering further work to address the claimant's struggles, e.g. by referring the claimant to an occupational health provider or for mental health support.

120. We find that the claimant's mood fluctuated during the meeting. Mrs Lamb described him as being at times "jovial" and this was not challenged. He made a comment about looking forward to being able to play golf when lockdown restrictions were eased from 29 March 2021. Mrs Lamb picked him up on this, saying that he would not be able to use the company vehicle to go and play golf if he was still

furloughed. The claimant responded by saying that he could if it was after 15.00 because by that time he would know he was not needed to work that day.

121. This led to Mrs Lamb asking the claimant whether he had been to Birmingham on 19 February 2021. He confirmed that he had been and confirmed that the purpose of the journey was to pick up some free golf clubs. The claimant also confirmed that he had used the company vehicle card to pay for £50 of fuel because he did not have enough in the tank to make the journey home. Mrs Lamb asked him why he had not paid for the fuel himself. We find that she showed the claimant weekly report showing the fuel card entry for the purchase in Sollihul.

122. We find that the claimant did acknowledge that he should not have used the fuel card and find that he said twice that he hoped no one would notice. The claimant's appeal letter disputed he had said that. On balance we prefer Mrs Lamb's evidence on this point. There was no evidence of ill-will between Mrs Lamb and the claimant nor any explanation put forward as to why she would lie about the claimant having said what he did. Mr Marhsall's written statement during the appeal process corroborates Mrs Lamb's version of events. In contrast, the claimant's position fluctuated in later meetings between saying that he did not remember saying he hoped no-one would notice to denying it was the sort of thing he would have said to denying categorically that he said so (in the appeal letter).

123. Mrs Lamb explained that there were criteria to be followed by employees on furlough which included not using company property and there was a brief discussion about whether there would be an investigation by HMRC into a potential breach of the furlough scheme rules. Mrs Lamb said she did not know.

124. Mrs Lamb then said she would need to talk to Napthens about matters and would get back to the claimant as soon as possible. She did not mention the possibility of disciplinary action and the claimant did not ask.

125. It is a central part of the claimant's case that because of his mental state at the meeting he was not aware of the answers he was giving. We do accept that the claimant felt "ambushed" by the switch to discussing his use of the company vehicle and fuel card. He had had no notice of that issue. We accept that his mood during the meeting was up and down. However, we also accept Mrs Lamb's evidence that the claimant appeared to understand the questions he was asked at the meeting about the use of the vehicle and fuel card and was not confused in his answers. We accept her evidence that he was not tearful or upset when he was answering those questions, in contrast to the earlier part of the meeting when they discussed his phonecall with Mr Smith. We accept Mrs Lamb's evidence that the claimant during that part of the meeting talked flippantly about hoping no-one would notice. We find that the claimant was not aware of the potential seriousness of his actions on 19 February 2021 during that meeting.

126. After Mr Marshall confirmed that the Hollygate investigation was closed, the claimant went back to work. We find that the meeting ended on a positive note. We find that was because the claimant was unaware that given what he had said the potential (and most likely) next step was a disciplinary hearing.

Events from 12 to 18 March 2021 leading up to the disciplinary hearing

127. On 12 March 2021 Mrs Lamb sent the claimant a letter inviting him to a disciplinary hearing on 18 March 2021 to be chaired by Mr Marshall and attended by Mr White and Mrs Lamb (who is referred to as “HR Manager”)(pp.185-186). We find the letter had been drafted by Napthens on the respondent’s behalf. It said the meeting was to consider allegations of gross misconduct and give the claimant an opportunity to state reasons for his behaviour on 19 February 2021 and put forward any mitigating circumstances. In summary, the allegations arising from the 19 February 2021 were of serious breach of the company vehicle policy; serious misuse of the company fuel card; theft; dishonesty and an irretrievable breakdown in trust and confidence as a consequence of those allegations. The allegation of dishonesty was said to arise from the claimant using the company vehicle and fuel card knowing that he should not but “hoping to get away with it”.

128. The claimant was given until 17 March 2021 to provide copies of any documents he wanted considered at the hearing and was informed of his right to be accompanied at the meeting. The claimant did not provide copies of any documents he wanted considered.

129. On 15 March 2021 the claimant emailed Mrs Lamb (p.187) in response to the invitation letter. He said he was struggling to write “through the tears”, was very upset and confused at the welfare meeting on 10 March 2021 and had no recollection of the questions he was asked, with the questions about van usage being “hazy to say the least”. He said the respondent’s letter had added to the stress he was already feeling and asked it to help and assist him and “not to further punish me”. He said that if he had used the fuel card incorrectly that was clearly his error, that he was “not thinking clearly” and would expect the respondent to take the money out of his next pay. He said he would accept he should not use the van for personal use.

130. The email does not expressly say that the claimant is not well enough to attend the disciplinary hearing. It does say that “[the claimant] is not sure this is the right time to have a further meeting” and asks the respondent to “use this email as a request for help”. However, it goes on to say that if the respondent does decide to continue with the process the claimant would “of course” attend and asks that a colleague, Dan Savage, attend with him. The claimant concludes the email with a request that the respondent acknowledge his request for help. He had not, at that point, approached his GP about mental health issues.

131. Mrs Lamb responded the following day by email. She expressed concern that the disciplinary invitation had caused the claimant upset and stress and said that that was not the intention. She reiterated the purpose of the meeting and acknowledged the claimant’s confirmation that he would be attending with Dan Savage. There was no direct response to the claimant’s request for help beyond the email saying that the respondent considered a swift resolution to the disciplinary process would “minimise any stress caused by this process.” Mrs Lamb acknowledged in her cross-examination evidence that there might have been steps the respondent could have taken to help the claimant, for example referring him to a private health insurance provider. She said she did not do so because the claimant did not ring her up to pursue that issue with her.



132. We find that Mr Marshall was chosen to conduct the hearing because he was the claimant's line manager. Mr Bailey suggested that either Mr White or Mr Andy Guy could have conducted the hearing instead. Mr White was not the claimant's line manager and was in Spain when the disciplinary hearing took place. Mr Guy was also not the claimant's line manager. We did not hear evidence about Mr Marshall's experience of conducting such hearings. Given he was recently promoted we find on balance that his experience in that regard was likely to be limited.

The disciplinary hearing on 18 March 2021 and the decision to dismiss

133. Our findings about the disciplinary hearing take into account the witness evidence we heard, the video of the hearing we watched and the transcript in the Bundle (pp.193-198). The meeting was attended in person by the claimant, Mr Savage, Mr Marshall and Mrs Lamb. Mr White attended by video link from Spain. Mr Marshall led the meeting with Mrs Lamb taking notes. The meeting lasted around half an hour in total, with a break of around 10 minutes around halfway through which Mrs Lamb suggested because the claimant was upset.

134. Dealing first with the way the meeting was conducted. Mr Bailey suggested that the questioning was aggressive and intimidating. In his written submissions (para 15.5) he said it amounted to bullying and an abuse of power. We do not accept that. We find that Mr Marshall was neither aggressive nor intimidating in his questioning or in the way he conducted the meeting. We accept that the claimant was upset during the meeting. Mr Marshall on more than one occasion stopped to check whether the claimant was OK to carry on. He also checked back with the claimant whether he understood what was happening (at 12:25 in the transcript), went back over what had been said to confirm the claimant's position and asked if he had anything to add (28:45). We accept that there was a degree of repetition in the questions asked by Mr Marshall.

135. The context of the meeting was the claimant's admission that he had used the company vehicle and the fuel card when he should not have. At the disciplinary hearing the claimant referred to his as a "rash decision", an "error of judgment" and on more than one occasion said that he "wasn't thinking clearly" and that he had "done something stupid". He confirmed that the policy was that the fuel card should not have been used and apologised for doing so. In relation to use of the company vehicle he said that he thought the policy was that you could not use it [for personal use].

136. When asked about having said at the meeting on 10 March 2021 that he "hoped no one would notice" the claimant said that he did not remember saying that. When asked when he was going to tell the respondent about his use of the vehicle and fuel the claimant said that he didn't know and had been "pretty bad" during the week in question.

137. Mr Marshall asked the claimant about the stress he was under and when it had started. The claimant confirmed that he was feeling stressed and confused. He said that he had not intended to do what he did intentionally to annoy people. He said he had been feeling stressed since Christmas and "in a low place" with not working really affecting him. He said that he should have seen someone about it but instead had just carried on and "got on with it". Asked by Mr Marshall if he had

sought medical help, the claimant said he would not know where to start. He had spoken to friends but did not know what to do. Mr Marshall asked the claimant whether he would like the respondent to help and the claimant said that if the respondent knew what to do then, yes – that he could do with something because he couldn't go on feeling low all the time.

138. At the end of the meeting, Mr Marshall confirmed that he would adjourn to make his decision and that that would be communicated to the claimant within the following 7 days. He then checked that the claimant was in a fit state to drive home.

139. We accept Miss Quigley's submission that the claimant did not at the disciplinary hearing make any suggestion that the respondent had a custom and practice of allowing limited personal use of company vehicles including for longer trips with permission.

140. Mr Marshall confirmed his decision to summarily dismiss the claimant for gross misconduct in a letter dated 19 March 2023 (pp.202-204) ("the dismissal letter"). We find that Mrs Lamb took advice from Napthens about the wording of that letter.

141. Mr Marshall found serious misuse of the company vehicle by the claimant. He decided that the length of the journey made (220 miles) and the fact that the claimant had made prior arrangements to collect golf clubs contradicted the claimant's suggestion that the journey was a "rash decision". He found the claimant was aware of the respondent's Company Vehicle Policy which expressly stated that the vehicle should not be used for personal use.

142. Mr Marshall also found serious misuse of the fuel card by the claimant. He found the claimant was aware that the fuel card should only be used for business purposes. He rejected the claimant's suggestion that he had used the fuel card in error, noting that the claimant had made no attempt to notify the respondent about the "error". He noted that the claimant had said twice at the "investigation meeting" on 10 March 2021 that he hoped no one would notice him using the fuel card. He noted that the claimant now said he could not remember saying that. However, he found the claimant had used the fuel card and made a conscious decision not to report that in the hope he would get away with that.

143. Because he found that the claimant had knowingly used the company vehicle and fuel card in circumstances when he should not have, Mr Marshall also found the claimant had intended to steal from the company by making personal use of the vehicle and fuel card and not reporting that use and had been dishonest. He decided that the respondent could no longer have trust and confidence in the claimant and that although the current incident had been a one-off it was "highly likely to occur in future". We find that decision was based on Mr Marshall's view that the claimant had "hoped to get away" with using the vehicle and fuel card in the way he had.

144. The dismissal letter said that Mr Marshall had taken into account the claimant's apology; his offer to repay the fuel card money; and the fact that he had no outstanding warnings on his personal file. Mr Marshall acknowledged that the claimant had said he had been suffering from stress but noted that he had had no time off work; had not been diagnosed with stress; and had not sought help or

treatment. However, Mr Marshall's conclusion was that these factors did not outweigh his findings about the claimant's conduct and confirmed the decision to summarily dismiss the claimant.

#### The claimant's appeal against dismissal

145. The dismissal letter informed the claimant of his right to appeal to Mr Sanderson, Director of the respondent, by 26 March 2021. On 26 March 2021 the claimant lodged an appeal via a letter on his behalf from Rowberry's solicitors (pp.202-207). In summary, the letter alleged that the respondent had dismissed the claimant unfairly by failing to follow a proper disciplinary process; failing to comply with the ACAS Code; had made a decision on incorrect facts and had imposed an unfair sanction, singling the claimant out unfairly and failing to take into account as mitigating factors his length of service and state of mental health.

146. The appeal letter alleged that the respondent was aware of the claimant's mental health issues of anxiety and depression and that the claimant had "reached out" to Mr Marshall about this towards the end of January 2021. It criticised the welfare/investigation meeting on 10 March 2021 stating that the claimant had been "blindsided" by the questions about the company vehicle and fuel card usage. It denied that the claimant said at the meeting on 10 March 2021 that he hoped his actions would go unnoticed and that he hoped "no-one would check".

147. The appeal letter also criticised the disciplinary hearing on 18 March 2021 as not being independent (because Mr Marshall and Mrs Lamb had also both been involved in the "investigation meeting" on 10 March 2021) and said that the claimant had been "constantly bullied and badgered" at the hearing. As to the decision to dismiss, it suggested that the decision was pre-meditated and consistent with the claimant having been marginalised since Mr Bailey left the respondent. It described the disciplinary process as a "sham" to remove the claimant from office.

148. The letter said that the use of the vehicle and fuel card on 19 February 2021 had been inadvertent and due to the claimant's state of mind and that any admissions at the meeting on 10 March 2021 had been obtained "by deceit" and even then misrepresented. It submitted that there had been markedly little weight given to mitigating factors, including the claimant's length of service, contrition and mental health issues. There was a suggestion that the respondent was responsible for causing the claimant personal injury by failing in its duty of care towards him when it should have referred him to the mental health team at its occupational health provider because it was aware of his mental health issues.

149. The appeal letter raised for the first time the issue that personal use of company vehicles for personal use was "generally accepted". It also suggested that if the claimant had inadvertently used the fuel card inappropriately "he was not alone in doing so".

150. Mrs Lamb responded on 31 March 2021 inviting the claimant to an appeal hearing on 8 April 2021. The appeal letter suggested that Mr Sanderson should not hear the appeal because he was not an "impartial person". It did not explain why that was the case and the respondent did not accept Mr Sanderson was not impartial. However, the respondent confirmed that the appeal would be heard by Miss

Christian and explained who she was. The letter confirmed the claimant could be accompanied at the appeal hearing.

### The Appeal Hearing

151. The appeal hearing was rearranged at the claimant's request and took place by video on 13 April 2021. He had by that point spoken to his parents about his mental health. He had also seen his GP on 22 March 2021 who had prescribed Sertraline. He did not ask to be accompanied at the hearing.

152. The appeal hearing was recorded and the transcript of that recording was in the Bundle (pp.215-221). The meeting was attended by the claimant and Miss Christian and lasted around half an hour. Miss Christian had seen the notes of the meeting on 10 March 2021 and disciplinary hearing as well as the dismissal letter and appeal letter. We find she had not seen the claimant's email of 15 March 2021 in which he requested help nor the full transcript of the disciplinary hearing recording at pp.193-199 (because that was not produced until March 2022 as part of these proceedings).

153. At the start of the meeting the claimant confirmed he was happy to proceed without being accompanied. We find that although the claimant was stressed and at times upset during the appeal meeting, he was able to fully participate in it. He started by explaining that he had been struggling with his mental health and that he had spoken to Mr Marshall "a couple of times" about this. He explained to Miss Christian that he was struggling because he was at home and his sister was working from his flat which meant that during lockdown he was not leaving his bedroom because he had nowhere to go. Later in the meeting he confirmed that he had now seen his GP. He did not mention being on medication nor suggest that he had been diagnosed as having anxiety or depression. He confirmed that he had expected the respondent to help him with his mental health issues at and after the meeting on 10 March 2021.

154. Discussion turned to use of the company vehicle and the claimant elaborated on the point made in the appeal letter about the company allowing some personal use of company vehicles. He gave examples of employees having tow bars fitted to their vehicles but was unwilling to give names for fear of getting those employees into trouble. He also suggested that as he understood it, it was not a breach of furlough rules if he used the company vehicle after 2 p.m. on Friday because that would not have been within his usual working hours. He said at one point that he was not thinking of going as far as he did but his mind was not in the right place.

155. When it came to use of the fuel card the claimant said that he had not meant to use the fuel card. When asked why he had not alerted the company once he realised that he had used the fuel card the claimant said that he had not realised until the matter was raised at the meeting on 10 March 2021. In essence his defence was that he was not really thinking and had simply acted on instinct when he had used his fuel card. He suggested that was because when he used the company vehicle he would usually use the fuel card. He did not have a clear response when Miss Christian put to him that on this occasion he was using the company vehicle for a purely personal trip. The claimant did not suggest that others used the fuel card for personal use.

156. When it came to whether or not he had said that he hoped no-one would notice his use of the fuel card, the claimant said he “never said that in the meeting”. Miss Christian pointed out that at the disciplinary hearing what he had said was he could not recall saying that. She pointed out the difference between saying that he had definitely not made the comment versus saying that he could not recall making it. The claimant's response was that he would not have said that and would never have said that, and he “didn't understand where that came from”.

157. The claimant reiterated the point made in his appeal letter that the welfare meeting had been called for his wellbeing and that it had then been used to investigate a matter when he was struggling.

158. In summary we find that Miss Christian carried out a thorough appeal hearing giving the claimant an opportunity to elaborate on the points in his appeal letter. From the transcript of the hearing, it is clear that the claimant was able to put his case, though we accept that he was at times during that meeting upset.

#### 16 April 2021 - The Appeal Outcome

159. Following the appeal hearing Miss Christian gathered further evidence before reaching her decision. She spoke to Mr White and Mr Marshall regarding the respondent's approach to personal use of the company vehicles. As we have summarised at paragraph 91 above, she found that in practice short personal trips using the company vehicle were allowed and that longer trips were allowed with permission. In answer to Miss Christian's question, Mr White said that had the claimant asked for permission for the trip to Birmingham it would not have been granted, in particular because it was undertaken in contravention of lockdown rules and when the claimant was furloughed. Mr White's view was that use of company property while furloughed would be “frowned on” by HMRC.

160. Miss Christian also obtained statements from Mrs Lamb and Mr Marshall about the welfare/investigation meeting on 10 March 2021. They confirmed that the claimant had made the comment about hoping that no-one would notice at that meeting.

161. Miss Christian set out her decision in an appeal outcome letter dated 16 April 2021. She decided to uphold the original decision to terminate his employment on the grounds of misconduct. However, she downgraded the sanction for serious misuse of a company vehicle from gross misconduct to serious misconduct for which the claimant would receive a first and final written warning for a period of 12 months. In doing so, she took into account the struggles that the claimant had experienced during the lockdown period when on flexible furlough. She accepted his explanation that in making the journey to Birmingham he wanted to get out of his flat because his sister was staying with him. She took into account how the claimant was feeling at the time the journey was undertaken; his awareness of other staff members being allowed to use a vehicle; and the claimant's belief that because he was using it outside of working hours the furlough rules did not apply.

162. When it came to serious misuse of the company fuel card, Miss Christian did uphold the findings of gross misconduct justifying summary dismissal. She noted that the claimant had admitted using the company fuel card in order to pay for fuel in

the company vehicle. She noted the claimant's explanation that he was not thinking straight at the time and paid with the fuel card out of habit. When it came to whether the claimant had at the meeting on 10 March 2021 said that he hoped the use of the fuel card would go unnoticed, Miss Christian explained that she had obtained statements from Mrs Lamb and Mr Marshall about what was said at the meeting. She said that without further evidence to suggest why she could not rely on those statements it was reasonable to conclude that the claimant had indeed made the comment about hoping no one would find out. She took into account the claimant's position that he had been blindsided by the questions in the meeting and the suggestion that the respondent's own disciplinary process in the Handbook had not been followed. She noted the Handbook stated that the amount of investigation required "will depend on the nature of the allegations and will vary from case to case". She concluded that while the investigation into the matter might seem brief, given that the claimant had admitted to using the fuel card and had the intention of not paying for the fuel, there was little further investigation that could be carried out.

163. Miss Christian noted that the same two people were present at the investigation and disciplinary hearings. She noted that the ACAS guidance states that two separate individuals should conduct each stage of the disciplinary process in order for it to be impartial and fair. She concluded that it was Mrs Lamb who had conducted the investigation/welfare meeting and led the questioning during that meeting, whereas at the disciplinary hearing Mrs Lamb was there purely as HR support and notetaker with the decision to terminate the employment being made by Mr Marshall. On that basis she did not uphold the claimant's appeal point that the investigation was unfair or failed to comply with the ACAS Code or the company's Handbook.

164. Miss Christian considered the claimant's mitigation and in particular his statement that he was not thinking straight when he used the company fuel card to pay for fuel for the trip. Miss Christian noted that the claimant confirmed in answer to her question that when using the van for personal journeys he would top up the fuel using his own payment card. She decided that it was reasonable to conclude that whilst it might be habit for the claimant to use the company fuel card when using the company vehicle (because most trips would be for work purposes) that was not invariably the case. There were occasions when he would use his personal card when using the company vehicle. She also found that use of the company vehicle required the input of a PIN number and that it was reasonable to conclude that he would have become aware he was using the incorrect card at the point where he had to input the PIN. We find that this is actually factually incorrect because the claimant had changed his PIN number on his personal card to be the same as the pin number on his fuel card. The claimant does not seem to have made that point at any of the hearings, however. Given her finding that the claimant had said at the investigation/welfare meeting that he hoped no-one would notice [his use of the company fuel card] Miss Christian concluded that the claimant was aware that he had used the company's fuel card to fund a personal journey using the respondent's finances. She therefore upheld the finding of gross misconduct on the basis that there was serious misuse of the company fuel card by the claimant for the purpose of personal gain.

165. Miss Christian found that the allegation of theft and dishonesty, again relying on her finding that the claimant had made a comment at the meeting on 10 March

2021 that he hoped to get away with it. Miss Christian upheld the finding that there was an irreparable breach of the trust and confidence between an employer and employee. She was satisfied, even taking into account the mitigation evidence of length of service and the stress the claimant was under, that that did not mitigate the claimant's intention to defraud the company of the fuel card payment as evidenced by his comment at the investigation/welfare meeting. She noted that the respondent placed an enhanced level of trust in its mobile engineers given that they work away on sites so that physical oversight of their actions on a day-to-day basis was not possible. She found that a serious breach such as the use of the fuel card for personal fuel irreparably damaged that enhanced trust. She therefore upheld the decision to summarily dismiss

166. The letter concluded by confirming that the decision was final and there was no further right of appeal under the respondent's disciplinary process.

Findings relating to whether the claimant was a disabled person at the relevant time

167. The question of whether the claimant was a disabled person when the alleged act of discrimination took place is still in dispute. The alleged act of discrimination in this case took place on 10 March 2021 when the claimant alleges that the failure by the respondent to allow him to be accompanied at the investigation/welfare meeting was a failure to make a reasonable adjustment.

168. Our findings of fact in relation to this issue take into account the evidence we heard at the Tribunal and the relevant documentary evidence including in particular the claimant's disability impact statement (pp.237-241). As the law makes clear, we have to decide whether the claimant was a disabled person based on the evidence available at the time. That means that we do not take into account the evidence of what happened from 22 March 2021 onwards, which is when the claimant first contacted his GP about his mental health issues. We also cannot take into account the claimant's demeanour during cross examination at the Tribunal.

169. We find that the claimant struggled with the impact of being on flexible furlough. We find that from December 2020 the claimant was struggling to sleep and was also experiencing some low mood. Our focus must be on what the claimant was not able to do. However, we record that in terms of what the claimant was able to do there is no suggestion that when he was at work he was unable to concentrate sufficiently to carry out his duties.

170. It is difficult to assess the impact on normal day-to-day activities such as social activities because during the relevant period after 10 March 2021 the country was in lockdown. When it comes to social activities, however, we note that the claimant was at the meeting on 10 March 2021 looking forward to being able to play golf again when restrictions on outdoor sports were due to be lifted as at 29 March 2021. When it comes to the impact on the claimant's concentration, we note that he was able on 19 February 2021 not only to arrange to pick up golf clubs in Birmingham but also to drive a 220 mile round trip to do so. We accept that the claimant's work involved driving sometimes for long periods, but we find that there was no evidence that the claimant's concentration was impacted during the relevant period. It is clear that the claimant did experience low mood, evidenced in particular by his ringing Luke Smith in tears on 8 March 2021. We note that the claimant was

upset at the meeting on 10 March 2021 before discussion turned to use of the fuel card and the company vehicle. We find therefore that the claimant was experiencing low mood to the extent of being tearful and upset as at 10 March 2021.

171. There is no medical evidence of an “impairment” in the sense of a medical diagnosis at 10 March 2021. The claimant in his email to Mrs Lamb on 15 March 2021 describing what happened on 10 March 2021 refers to his “clearly feeling stressed as a result of being on furlough for many weeks with a reduced income, bills to pay and a lack of structure due to lack of work”.

#### Findings relating to the wrongful dismissal claim

172. On the balance of probabilities, we find that the claimant did knowingly use the company fuel card to pay for fuel on his trip to Birmingham on 19 February 2021. When paying for the fuel the claimant would have had both to enter the PIN number for the card and also give the registration number for the vehicle. Had he been using his personal fuel card he would not have had to have taken that second step. We accepted the claimant's evidence that he had changed the PIN number on his personal card so that it was the same as the PIN number on his fuel card. We accept that had this been a case of the claimant simply entering the PIN number for a card he could have done so inadvertently. We do not accept that that was the case when there was a second authentication step involved.

173. Although, as we have recorded above, we do find that as at 19 February 2021 the claimant was very stressed by having been stuck in his flat due to a combination of lockdown and not being given work while on flexible furlough, we do not accept that he was in such a state of mind that he was unaware of what he was doing on 19 February 2021. He had obviously made a prior arrangement to pick up the golf clubs and had also driven a significant distance. That would have required concentration and pre-meditation.

174. As stated above, we also find that the claimant did tell Mrs Lamb and Mr Marshall at the meeting on 10 March 2021 that he hoped no-one would notice that he had used the fuel card. We find that means that he was aware that he had used the personal fuel card. We find that he did not intend to bring that fact to the attention of the respondent and would not have done so had Mrs Lamb not noticed the payment. In those circumstances we do find that the claimant did deliberately use the fuel card to pay for fuel for a personal trip and this was not an inadvertent error.

### **Submissions**

#### Claimant's Submissions

175. We do not set out the parties' submissions in full but summarise them here. We have referred to them where relevant in our discussion and conclusions section below. In broad terms, Mr Bailey's central point was that the claimant was in no fit state to be interviewed alone on 10 March 2021 and that the meeting was misrepresented as being a welfare meeting when it was in fact used as an investigatory meeting. Mr Bailey's central argument is that the claimant's dismissal flowed from that meeting because it was at that meeting that the claimant was said



to have effectively admitted that he had deliberately used the fuel card and “hoped nobody would notice”. The dismissal was unfair because it started and was in essence “tainted” by that initial unfairness.

176. Mr Bailey also said that the respondent should have taken notice of the claimant's mental state at the latest from January 2021 when the claimant spoke to Mr Marshall about it and should have taken proactive steps to refer the claimant to the mental health team via its Occupational Health provider. There was no disability discrimination claim in relation to that failure of duty of care. However, it seems to us that submission is also said to be relevant to the unfair dismissal claim. The point being made was that when deciding to dismiss the claimant, the respondent failed to take into account sufficiently by way of mitigation the claimant's mental state when the incident of misconduct happened and also during the subsequent investigation and disciplinary process.

177. Mr Bailey made further specific points about the fairness of the procedure, such as the independence of those carrying it out, and we deal with those in our discussion and conclusions section below.

#### Respondent's Submissions

178. In summary Miss Quigley said that the disciplinary process viewed overall was a fair process. She submitted that the ACAS Code does not require a specific formal investigatory stage particularly in cases such as this where the claimant had admitted the misconduct. This was not therefore a case where a significant investigation was required. Overall, the process was a fair one with Miss Christian in particular having taken time after the appeal hearing to gather further evidence and in light of that downgraded one element of the initial decision to serious misconduct rather than gross misconduct. That showed that this was a fair procedure even if there were some “technical” flaws in it relating to the way the “investigation meeting” was carried out on 10 March 2021.

179. In relation to the duty of care and the claimant's mental health state the respondent's position in summary was that while it was aware that he was suffering stress due to being on flexible furlough the respondent could not (on the knowledge it had) have reasonably been expected to know that he was a disabled person such that reasonable adjustments were required

#### **Discussion and Conclusions**

180. Our conclusions are as follows:

##### Unfair Dismissal s94(1) ERA 1996

1. Was the claimant's dismissal for a potentially fair reason in accordance with section 98 (1) and s.98(2) of the ERA 1996?
  - a. The respondent avers that the claimant was dismissed by the reason of his conduct; in particular his gross misconduct.

181. We find that the respondent has established that there was in this case a potentially fair reason for dismissal, namely misconduct. The claimant admitted that

he had used the company fuel card on 19 February 2021 to pay for fuel for a personal journey. We are satisfied that that amounts to misconduct and potentially gross misconduct under the respondent's disciplinary procedure.

182. In oral and written submissions Mr Bailey did at times suggest that there was an ulterior motive for the claimant's dismissal. Mr Bailey suggested that since he had left the business the claimant had been undermined, firstly by being given less work while on flexible furlough, and subsequently by the respondent using the events on 19 February 2021 to dismiss him. We do not find that there was evidence to substantiate that allegation. The claimant himself accepted that he could trust the respondent. There was no evidence of any ill will from Mrs Lamb or Mr Marshall towards the claimant. The evidence, if anything, pointed the other way with Mrs Lamb in particular having had a good relationship with the claimant and being supportive of him prior to the events giving rise to his dismissal. The claimant has not provided sufficient evidence to undermine the respondent's case that the reason for the dismissal in this case was for a potentially fair reason, namely misconduct.

2. Was the claimant's dismissal fair having regard to section 98(4) of the ERA 1996 and therefore considering:
  - a. Whether in the circumstances (including size and administrative resource) the respondent acted reasonably in dismissing the claimant;
  - b. Equity and the substantial merits of the case; and
  - c. Whether the decision to dismiss fell within the range of reasonable responses available to the respondent.
3. In considering (2) above, and the issues of fairness, the claimant wishes the Employment Tribunal to determine whether or not:-
  - a. The respondent was reasonably able to form a reasonable belief that the claimant was guilty of any alleged misconduct on the evidence before it;
  - b. The respondent had reasonable grounds for holding that belief;
  - c. At the time it held the belief, the respondent had carried out as much investigation as was reasonable in the circumstances;
  - d. Whether, having regard to all the circumstances, the decision to dismiss the claimant fell within the band of reasonable responses available to a reasonable employer;

183. We find that the respondent did have a genuine and reasonable belief that the claimant was guilty of gross misconduct and had reasonable grounds for that belief. The alleged incident of misconduct on which the dismissal was ultimately based, i.e. using the fuel card to pay for fuel for a personal journey, was not disputed by the claimant. The primary issue for the respondent was whether the claimant had used the fuel card inadvertently or had done so knowingly in an attempt to defraud the respondent.

184. We have found that the claimant did at the welfare/investigatory meeting on 10 March 2021 say twice that he had hoped nobody would notice. The claimant's position at the disciplinary hearing was that he did not recall making those comments. As part of the appeal process Miss Christian obtained statements from Mrs Lamb and Mr Marshall who confirmed that the claimant had made those comments at the meeting on 10 March 2021. We find that both Mr Marshall and Miss Christian had reasonable grounds for their belief that the claimant had made those comments.

185. In those circumstances we find that the respondent did have reasonable grounds for its belief that the claimant had knowingly used the fuel card to pay for fuel for a personal journey on 19 February 2021. We also find that the respondent had reasonable grounds to conclude that the claimant had no intention of bringing that use of the fuel card to the respondent's attention or repaying the monies used. We find that there were reasonable grounds therefore for the respondent to conclude that the claimant had acted dishonestly with the intention of defrauding the respondent.

186. When it comes to the reasonableness of the investigation and disciplinary process, we find that the way the meeting on 10 March 2021 was conducted was not reasonable. We find that the claimant was not aware that the meeting on 10 March 2021 was an investigation of potential misconduct on his part. Although Mrs Lamb suggested that the meeting "evolved" and turned to a discussion of the trip on 19 February 2021 after the claimant discussed looking forward to playing golf on 29 March 2021, it is clear that Mrs Lamb fully intended to raise the issue at the meeting on 10 March 2021. She had taken advice on whether she could do so and had the weekly fuel report to hand to give to the claimant at the meeting.

187. We accept that the amount of investigation in a particular case will depend on the facts of the case and that in this case the facts (in terms of use of the company vehicle and the fuel card) were straightforward and admitted. However, that still left the question of why the respondent had used the fuel card of the company vehicle as a matter requiring investigation. We do think that it was unfair for the claimant not to be told that these issues would be raised at the meeting. The respondent's own Handbook's provision relating to investigation at 27.10.1 envisages the claimant being "interviewed" and a statement being taken from him. We find that envisaged a more formal process than actually took place on 10 March 2021.

188. The ACAS Guide on Discipline and Grievance at Work which supplements the ACAS Code states that when investigating a disciplinary matter an employer must "take care to deal with the employee in a fair and reasonable manner". It accepts that the nature and extent of the investigation will depend on the seriousness of the matter, and the more serious it is the more thorough the investigation should be. The Guide confirms that it is not always necessary to hold an investigatory meeting but that if a meeting is held the employee should be given advance notice of it and time to prepare.

189. We find that in this case the respondent used the 10 March 2021 meeting was an investigatory meeting for matters of factfinding and that the claimant was not given advance notice and time to prepare in the sense that he was not told that potential misconduct was to be discussed at that meeting. We find that a reasonable

employer would have given the claimant advance notice that potential misconduct was to be discussed at that meeting and made it clear that the meeting was an investigation meeting rather than being a meeting to discuss the claimant's wellbeing. That is particularly the case given that Mrs Lamb had to hand evidence which strongly suggested there had been misconduct, i.e. a record of use of the fuel card when the claimant was on furlough and so clearly not using the vehicle and fuel card for a work journey.

190. When it comes to the remainder of the disciplinary and appeal process, we find that the subsequent disciplinary and appeal hearings were conducted in a way which was within the band of reasonableness. As we have set out in our findings of fact, we did not accept Mr Bailey's submission that the disciplinary hearing was carried out in a bullying or aggressive way. We note that there is a repetition of questions, but it seems to us that that was reasonable as a way of ensuring that there was clarity as to what the claimant's case was, particular when he was upset and inconsistent in terms of what he was saying. We have considered whether it was within the band of reasonable responses to continue with the disciplinary hearing when the claimant was tearful and upset. We have decided that it was. We note that Mr Marshall on more than one occasion checked that the claimant was ok to continue and that Mrs Lamb initiated a longer break partway through the meeting. The claimant was accompanied at the meeting and there was no suggestion that his companion was prevented from taking part or participating in the meeting. Neither the claimant nor his companion asked for the meeting to be stopped or postponed (either before or during the hearing). We accept some employers may have decided to postpone the hearing to another day allow the claimant to compose himself but do not accept it was outside the band of reasonableness to continue with the hearing on that day, particularly having given the claimant a break to compose himself.

191. When it comes to the appeal hearing we find that Miss Christian conducted that in a professional and balanced way which was well within the band of reasonableness. The claimant was not accompanied but was given the opportunity to be accompanied. He confirmed at the start of the hearing that he was happy to continue by himself. From the transcript of that hearing it appears to us that he was able to fully participate and that there was nothing to suggest to Miss Christian that his state of mind was such that she should have postponed or adjourned the hearing or insisted that he be accompanied.

192. Mr Bailey criticised the lack of independence in the process and in particular the fact that the meeting on 10 March 2021 involved Mrs Lamb and Mr Marshall who were also involved in the disciplinary hearing. Paragraph 6 of the ACAS Code of Practice states that in misconduct cases where practicable different people should carry out the investigation and disciplinary hearing. Clearly, both Mr Marshall and Mrs Lamb were present at the investigation and at the disciplinary hearings. However, we accept the respondent's case that they attended in different capacities in each meeting. The investigatory/welfare meeting on 10 March 2021 was clearly led by Mrs Lamb. Mr Marshall was an observer only except for confirming at the end that there would be no further action in relation to the Hollygate matter. The Hollygate matter played no part in the subsequent disciplinary procedure. Mr Marshall led the disciplinary hearing with Mrs Lamb's role being notetaking and HR support. We accept that ideally there would be a complete separation between the investigation and disciplinary meetings. In this case, given the size of the

respondent company, we find that it was within the band of reasonableness for Mr Marshall and Mrs Lamb to be involved in both meetings. Mr Bailey suggested that the disciplinary meeting could have been led by others, such as Mr White or another manager called Mr Guy. We do not think it was outside the band of reasonableness for the disciplinary hearing to be conducted by the claimant's line manager.

193. The claimant's reasonable adjustments claim is in relation to the investigation meeting. However, even though we have found (as we explain below) that the claimant was not a disabled person at the relevant time, we have considered whether it was within the band of reasonableness for the respondent to continue with the disciplinary process despite the claimant obviously "struggling" with mental health issues. In particular, we have considered whether it was reasonable for the respondent to have continued with the disciplinary hearing in light of the contents of the claimant's email of 15 March 2021. On balance, we have decided that it was within that band of reasonableness. We do take the view that other employers might well have seen that email as a "cry for help" which would have prompted seeking an Occupational Health report or other confirmation that the claimant was sufficiently well to go ahead with the disciplinary hearing.

194. By 15 March 2021 it was clear to Mrs Lamb that the claimant was struggling given how upset he was at the meeting on 10 March 2021 and the conversation he had had with Mr Smith. However, the claimant's email of 15 March 2021 did not request a postponement of the disciplinary hearing, nor did it provide any specific medical evidence that the claimant was suffering from mental health issues more generally, rather than ones induced specifically by the stress of being on flexible furlough. That is the reason which the claimant in his email of 15 March 2021 gives for his mental health struggles. In those circumstances we find that it was within the band of reasonable responses for the respondent to take the view that it would potentially reduce the stress on the claimant if any disciplinary proceedings were conducted and concluded swiftly. In the absence of a request to postpone the hearing (either in advance or during the hearing itself) we take the view that it was not outside the band of reasonableness for the respondent to continue with the proceedings in the timescale that it did.

195. When it comes to the appeal hearing, Mr Bailey suggested that Miss Christian could not be impartial because her firm was employed by the respondent. We do not accept that. The Tribunal's experience is that it is not uncommon for smaller firms to utilise external HR expertise to carry out the appeal (and on occasion, the disciplinary) part of their disciplinary processes. There is nothing in principle unfair about that approach. Having considered the evidence of how Miss Christian carried out the appeal hearing, we are satisfied that it was done in a thoroughly professional and impartial manner.

196. We also do not consider that there was a failure to adopt a reasonable process by continuing with the appeal hearing rather than postponing it. We note that Miss Christian did not have a copy of the claimant's email of 15 March 2021 when she conducted the appeal hearing. It is clear, however, that she was very much alive to the issues of the claimant's mental health and checked with him if he was in a position to continue with the appeal hearing by himself. The claimant had at that point sought medical advice but even though Miss Christian discussed that with him he did not suggest that he was not in a position to carry on with the appeal

hearing. Mr Bailey does not, as I understand it, make any criticism of the way the appeal hearing was conducted in terms of it being bullying or aggressive in the same way as he said the disciplinary hearing was.

197. At paragraph 22 of his written submissions, Mr Bailey submitted that Miss Christian failed to examine sufficiently what happened at the welfare/investigation meeting on 10 March 2021 and failed to acknowledge that that meeting was in breach of the ACAS Code. Our reading of the transcript suggests that this was a matter explored at the appeal hearing and that Miss Christian did acknowledge the claimant's submission that that 10 March 2021 meeting was unfair. However, it does not seem to us that she addressed the issue in her appeal outcome letter.

198. Underlying a number of the points made by Mr Bailey is the submission that Miss Christian had failed to acknowledge that the claimant was a disabled person. We have set out below why we have ourselves concluded that he was not at the relevant time a disabled person. We do not find, as Mr Bailey's submissions effectively suggested, that Miss Christian ignored evidence that the claimant was a disabled person in reaching her decision and in the way she carried out the appeal hearing. There was a discussion of the stress the claimant was suffering, the fact that he had spoken to a medical practitioner and a check that he was ok to continue with the meeting unaccompanied. The claimant did not put forward medical evidence (e.g. the fact that he was on medication) at that hearing, and we find that it was within the band of reasonableness for Miss Christian to proceed with the appeal hearing as she did.

199. As to the appeal outcome, we do not accept Mr Bailey's submission that Miss Christian showed bias in having taken the interview statements made by Mr White and Mr Marshall out of context for her own purposes. Miss Christian took steps to further investigate what happened at the meeting on 10 March 2021 and it was reasonable for her to take the view that the claimant had not put forward any reason why Mrs Lamb or Mr Marshall would lie about what he said at that meeting, i.e. by saying that he hoped no-one would notice him using the fuel card. She was entitled, we find, to prefer Mrs Lamb and Mr Marshall's evidence about what had happened at the 10 March 2021, particularly given that the claimant had shifted position from saying at points that he could not recall what was said to saying at other points that he categorically denied saying he hoped nobody would notice. Her decision to uphold the dismissal based on the reasons set out in her appeal outcome letter was within the band of reasonableness.

200. In summary, when it comes to the procedure followed by the respondent, we find that it was flawed and unfair because the claimant was not informed in advance of the meeting on 10 March 2021 that it was to be an investigation meeting. In terms of the remainder of the process, we find that that was conducted in a way which was within the band of reasonableness. We also find that the conclusion reached that the claimant had been guilty of gross misconduct by using the fuel card to pay for fuel for a personal journey was within the band of reasonableness. We find that the decision to dismiss based on that was also within the band of reasonable responses. Even accepting the claimant's length of service and that he did show contrition, we find that it was within the band of reasonable responses for the respondent to conclude that the trust and confidence between it and the claimant had been irreparably undermined by his actions. That is particularly given that the nature of the

claimant's role was a mobile one requiring the respondent to trust him to abide by the respondent's rules while not under direct scrutiny because it involved him working away for significant proportion of his work. We do not say that all employers would have dismissed the claimant. Some may have given him another chance given his length of service and contrition. The question for us is whether the sanction was within the band of reasonable responses to an incident where the respondent was satisfied on the evidence that an employee had knowingly used the company fuel card to part fund a 220 mile round trip for a purely personal purpose without seeking any kind of permission to do so. We find the sanction was within that band of reasonableness.

201. We have considered whether the appeal process carried out by Miss Christian was sufficient to "cure" any defect in the investigation meeting. We have decided that it was not. Miss Christian did not address that specific issue in her outcome letter.

202. Our conclusion therefore is that the claimant was unfairly dismissed solely because of the failings in relation to the initial welfare/investigation meeting on 10 March 2021.

4. If not (and the claimant was unfairly dismissed), would any procedural unfairness have made any difference in accordance with the principles in **Polkey v AE Dayton Service Limited [1988] ICR 142?**

4.1 Should there be a **Polkey** reduction to reflect the chance the claimant would have been dismissed in any event? If so, by what percentage?

203. We deal with this issue under issue 13 below.

#### Disability – s.6(1) Equality Act 2010 (EQA 2010)

204. In deciding this issue we have first considered whether there was evidence of any substantial adverse effect on the claimant's ability to carry out normal day-to-day activities as at the relevant time (i.e. 10 March 2021) and then gone on to consider whether that adverse effect arose from an impairment. For that reason, we deal first with questions 6 and 7 on the List of Issues before turning to question 5.

6. If so, did that impairment have an adverse effect on the claimant's ability to carry out normal day-to-day activities?

7. If so, was that effect substantial?

205. Based on our findings of fact, we find that there was a substantial adverse impact on the claimant's day to day activities by the 10 March 2021. His lack of sleep and his low mood did have an impact on his ability to interact with colleagues, the prime example being his tearful conversation with Mr Smith. In accepting that the effect was "substantial" we recognise it was more than minor or trivial. We do not accept that it was so substantial that the claimant was unaware of his actions on 19 February 2021 or at the meeting on 10 March 2021.

5. Did the claimant have a physical or mental impairment?

206. On balance, we find the claimant did not have a mental impairment at the relevant time. Although we accept that a medical diagnosis is not a requirement for such a finding, there was no evidence at all of an underlying medical condition in this case until after the claimant's dismissal. We cannot take into account that evidence in deciding the position as at 10 March 2021. We accept the claimant's mental health suffered in the wake of his dismissal but that does not enable us to "read back" that into his position on 10 March 2021. Based on our findings of fact we have concluded the adverse impact on the claimant arose when he was furloughed and stuck in his flat. It was situational, rather than due to an underlying medical condition. When he was working, he was fine. That is reflected in his email of 15 March 2021 to Mrs Lamb which links his mental health situation with having been on furlough. At the meeting on 10 March 2021 the claimant himself envisaged his mood improving when lockdown restrictions were due to be eased at the end of March, allowing him to play golf again.

207. We find, therefore, that any adverse impact on the claimant's activities was not due to a mental impairment.

8. If so, was that effect long-term or likely to be long-term?

208. In case we are wrong about the absence of an impairment, we have gone on to consider the remaining questions relating to disability. When it comes to whether the adverse effect on the claimant was long term in the sense of having lasted 12 months, it had not done so by 10 March 2021, having started in December 2020 at the earliest.

209. The question then is whether it was "likely to be long term", i.e. it could well happen that it would last for 12 months. Based on the position as at 10 March 2021 we find that it was not likely that any adverse impact would last for 12 months. We have found that the adverse impact was linked to the claimant being both not working and in lockdown. Lockdown was due to be eased at the end of March, i.e. 3 weeks or so away. The claimant was looking forward to going out to play golf. He had clearly linked his struggles to not being able to leave his flat. We find that even if he was still on flexible furlough it was not likely that the adverse effect would last for 12 months if he were able to leave his flat as he could from the end of March. It was also more likely that he would be working more as lockdown was eased, diminishing the likelihood of the adverse impact continuing. Taking those together we find that it was not likely (in the sense of "could well happen") that the adverse impact would last for 12 months.

210. If we are wrong about our conclusion on "impairment" above, we find the claimant was not a disabled person because the adverse impact had not and was not likely to be long term.

Failure to make reasonable adjustments – s.20 and s.21 EQA 2010

9. Did the respondent have a duty to make reasonable adjustments?

a. Did the respondent apply a PCP to the claimant?



- b. What is the PCP relied on by the claimant? *Not allowing employees to be represented at investigation meetings?*
- c. Did the PCP put the claimant at a disadvantage in relation to a relevant matter when compared with persons who were not disabled?
- d. If so, was it a substantial disadvantage?
- e. If so, did the respondent know or reasonably ought to have known (1) that the claimant was disabled at the material time and (2) that the PCP placed or would place the claimant at a substantial disadvantage?

211. We Deal firstly with question 9(e) which is whether the respondent knew or ought reasonably to have known that the claimant was disabled at the material time. We have found the claimant was not a disabled person at the material time. If we are wrong about that, we record our findings about the respondent's knowledge of the claimant's disability.

212. We find that by 10 March 2021 Mrs Lamb and Mr Marshall were aware that the claimant was finding flexible furlough very stressful and difficult. They were aware that he had rung Mr Smith in tears, and we find that the claimant had raised with Mr Marshall during a phone call at the end of January that he was struggling with sleeping and low mood because of flexible furlough. Put in terms of the test in section 6 of the 2010 Act, we find that the respondent was aware that the claimant was experiencing an adverse effect on his normal day-to-day activities, specifically in terms of loss of sleep and being upset and tearful. We find, however, that the respondent's understanding was that that was linked to the claimant being on flexible furlough. That is what the claimant said in his email of 15 March 2021. The focus in that email and (we have found) of his conversations with Mr Smith and Mr Marshall was clearly on the impact of flexible furlough and lockdown on the claimant. It seems to us that even if at that point the respondent was aware that there was something having an impact on the claimant's day-to-day activities, there was nothing to alert it to the fact that this was down to an impairment rather than the situation the claimant found himself in. That was corroborated by the fact that the claimant himself said that he was looking forward to 29 March 2021 when he could get out and play golf when lockdown restrictions were due to be eased.

213. We find therefore that the respondent could not reasonably have been expected to know that the claimant's mental health issues were due to an "impairment" rather than the situation in which he found himself. Even if we are wrong about that then it seems to us that the respondent could not reasonably have been expected to know that any effect on the claimant's ability to carry out day-to-day activities would be long-term. It had at the point when the investigation/welfare meeting happened lasted for some three months. It was reasonable given the claimant's reference to the end of lockdown for the respondent to take the view that any impact would cease when lockdown ceased on 29 March 2021. The respondent could not reasonably be expected to know that any impact would last for longer than four months i.e. from December 2020 to the end of March 2021, and

therefore well short of the 12 months required for a “long-term” impact making the claimant a disabled person under section 6 of the 2010 Act.

214. In those circumstances we find the respondent lacked the knowledge that the claimant was a disabled person and that there was therefore no duty to make a reasonable adjustment. That claim fails on that basis.

10. Did the respondent fail to comply with this duty?

215. In light of our findings above we do not need to address this issue.

Wrongful Dismissal – contrary to s.86(1) ERA 1996

11. Was the claimant’s employment terminated in accordance with his contract of employment?

- a. The claimant was dismissed without notice in accordance with the terms of his employment contract and s.86(6) ERA 1996 following a finding of gross misconduct against him.

216. We have found that the claimant did knowingly use the company fuel card to purchase fuel for a personal journey. We find that he knew he should not use the fuel card for personal use. We find that amounted to gross misconduct justifying summary dismissal. The claim of wrongful dismissal fails.

Compensation

12. If the claimant’s claim for unfair dismissal is successful, how much compensation should he receive?

- a. Basic award;
- b. Compensatory award;
  - i. What financial losses has the claimant sustained following the dismissal?
  - ii. Has the claimant mitigated his losses?

217. The quantum of remedy was to be dealt with at a Remedy Hearing. However, in light of our findings on Polkey and our findings below that the basic award should be reduced to zero, that remedy hearing is no longer required.

13. Should any award be reduced, and if so, by how much, to reflect:-

- a. The respondent’s argument that the claimant’s dismissal would have occurred in any event at a later date; and/or
- b. Contributory fault by the claimant.

218. We have found that there was an unfair procedure in this case because the claimant was not told in advance of the meeting on 10 March 2021 that that was an investigation meeting. We bear in mind that in this case the fundamental facts of the

misconduct were established and not disputed by the claimant. He accepted that he had used the company fuel card for a personal journey during lockdown. The primary issue in dispute was whether or not that use was inadvertent or was something which the claimant did knowingly.

219. Deciding whether there should be a **Polkey** deduction inevitably involves an element of speculation. We accept that had the claimant been warned that the meeting on 10 March 2021 was an investigation meeting he might have been more cautious about what he said at that meeting. He might not therefore have said that he hoped nobody would notice. Had he not done so, the respondent would have had to decide what action to take based on what was known to it. What was known to it was that the claimant had during lockdown used a company vehicle for a 220 mile round trip to pick up some golf clubs and had paid for £50 worth of fuel on the company fuel card. We find that even absent the admission that he hoped nobody would have noticed, the respondent would have concluded that the claimant had knowingly used the fuel card because of the requirement for dual authentication. We find it would also have concluded that the claimant had undertaken the trip knowingly rather than in some kind of unthinking brain-fogged state given that he would have had to arrange to collect the golf clubs in advance and concentrated for the 220 mile journey.

220. We find, therefore, that this is a case where, had a fair procedure been followed, the respondent would still have decided to dismiss for gross misconduct at the disciplinary hearing on 18 March 2021 and that that dismissal would have been a fair dismissal. That is our decision based on the best case scenario for the claimant, i.e. that had he been warned that the meeting on 10 March 2021 was an investigation meeting he would not have said he hoped no-one would notice his use of the fuel card.

221. While finding that there was an unfair dismissal in this case, therefore, we find that any compensatory award should be reduced to zero on the basis that the claimant could have been fairly dismissed on 18 March 2021.

222. We have also decided that the claimant's conduct was "culpable and blameworthy" and that he was wholly to blame for the dismissal. We therefore find it is appropriate to reduce the compensatory and basic awards in this case by 100% and award the claimant nil compensation.

14. If the claimant's claims for disability discrimination are successful, how much compensation should he receive?

223. The claimant's claim of disability discrimination failed so no compensation is awarded.

Employment Judge McDonald  
Date: 7 March 2023

JUDGMENT AND REASONS SENT TO THE PARTIES ON  
10 March 2023

FOR THE TRIBUNAL OFFICE

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## Annex List of Issues

### Unfair Dismissal s94(1) ERA 1996

1. Was the claimant's dismissal for a potentially fair reason in accordance with section 98 (1) and s.98(2) of the ERA 1996?
  - a. The respondent avers that the claimant was dismissed by the reason of his conduct; in particular his gross misconduct.
2. Was the claimant's dismissal fair having regard to section 98(4) of the ERA 1996 and therefore considering:
  - a. Whether in the circumstances (including size and administrative resource) the respondent acted reasonably in dismissing the claimant;
  - b. Equity and the substantial merits of the case; and
  - c. Whether the decision to dismiss fell within the range of reasonable responses available to the respondent.
3. In considering (2) above, and the issues of fairness, the claimant wishes the Employment Tribunal to determine whether or not:-
  - a. The respondent was reasonably able to form a reasonable belief that the claimant was guilty of any alleged misconduct on the evidence before it;
  - b. The respondent had reasonable grounds for holding that belief;
  - c. At the time it held the belief, the respondent had carried out as much investigation as was reasonable in the circumstances;
  - d. Whether, having regard to all the circumstances, the decision to dismiss the claimant fell within the band of reasonable responses available to a reasonable employer;
4. If not (and the claimant was unfairly dismissed), would any procedural unfairness have made any difference in accordance with the principles in **Polkey v AE Dayton Service Limited [1988] ICR 142**?
  - 4.1 Should there be a **Polkey** reduction to reflect the chance the claimant would have been dismissed in any event? If so, by what percentage?

### Disability – s.6(1) Equality Act 2010 (EQA 2010)

5. Did the claimant have a physical or mental impairment?
6. If so, did that impairment have an adverse effect on the claimant's ability to carry out normal day-to-day activities?
7. If so, was that effect substantial?

8. If so, was that effect long-term or likely to be long-term?

**Failure to make reasonable adjustments – s.20 and s.21 EQA 2010**

9. Did the respondent have a duty to make reasonable adjustments?
- a. Did the respondent apply a PCP to the claimant?
  - b. What is the PCP relied on by the claimant? *Not allowing employees to be represented at investigation meetings?*
  - c. Did the PCP put the claimant at a disadvantage in relation to a relevant matter when compared with persons who were not disabled?
  - d. If so, was it a substantial disadvantage?
  - e. If so, did the respondent know or reasonably ought to have known (1) that the claimant was disabled at the material time and (2) that the PCP placed or would place the claimant at a substantial disadvantage?
10. Did the respondent fail to comply with this duty?

**Wrongful Dismissal – contrary to s.86(1) ERA 1996**

11. Was the claimant's employment terminated in accordance with his contract of employment?
- a. The claimant was dismissed without notice in accordance with the terms of his employment contract and s.86(6) ERA 1996 following a finding of gross misconduct against him.

**Compensation**

12. If the claimant's claim for unfair dismissal is successful, how much compensation should he receive?
- a. Basic award;
  - b. Compensatory award;
    - i. What financial losses has the claimant sustained following the dismissal?
    - ii. Has the claimant mitigated his losses?
13. Should any award be reduced, and if so, by how much, to reflect:-
- a. The respondent's argument that the claimant's dismissal would have occurred in any event at a later date; and/or
  - b. Contributory fault by the claimant.

14. If the claimant's claims for disability discrimination are successful, how much compensation should he receive?