**EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: 4100913/2022 Hearing at Edinburgh on 16, 17 and 18 January and 6 February 2023**

**Employment Judge: M A Macleod**
**Tribunal Member: L Brown**
**Tribunal Member: A Matheson**

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| **Barry Hewitson** | **Claimant**<br>**In Person** |
| **3663 Transport Limited** | **Respondent**<br>**Represented by**<br>**Mr S Britton**<br>**Solicitor** |

**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

**The unanimous Judgment of the Employment Tribunal is that the claimant's claims all fail, and are dismissed.**

**REASONS**

1. The claimant presented a claim to the Employment Tribunal on 5 February 2022 in which he complained that he had been unfairly dismissed by the respondent and subjected to discrimination on the grounds of disability.

2. The respondent submitted an ET3 in which they resisted all claims made by the claimant.

3. A Hearing was listed to take place on 16 to 19 January 2023. A further date, for submissions, was then arranged and listed for 6 February 2023, by Cloud Video Platform.

4. The claimant appeared on his own behalf. Mr Britton, solicitor, appeared for the respondent.

5. A Joint Bundle of Productions was produced to the Tribunal by the parties, and relied upon in the course of the Hearing.

6. The claimant gave evidence on his own account.

7. The respondent called as witnesses:

- John McAndie, Transport Manager;
- Laura Fletcher, Human Resources Business Adviser;
- John McCluskey, Head of Operations, Oban and Glasgow Depots;
- Craig Hogg, formerly Director of Fleet Support; and
- Martin Cook, Business Unit Director, Manchester, Liverpool, Wakefield and Nottingham Depots.

8. The evidence in chief of each of the witnesses was taken by way of witness statement, and each witness was then subject to cross-examination.

9. The respondent drafted a List of Issues for agreement with the claimant, in advance of the Hearing, but the parties were unable to reach a final agreement on its terms.

10. The issues for determination are set out below in the Decision section, but it is appropriate to define the claims made at this stage.

11. At a Preliminary Hearing on 6 April 2022, Employment Judge Wiseman sought to define the claims which were before the Tribunal and which the

claimant was seeking to pursue, and in her Note following that Hearing (31Aff) she set out the terms of the discussion. It is helpful to record what was said in that Note, at paragraph 6:

"The claimant brings the following claims:

(i) a complaint of automatically unfair dismissal in terms of section 103A Employment Rights Act 1996 (dismissal because of making a protected disclosure);

(ii) a complaint of being subjected to detriment because of making a protected disclosure in terms of section 47B Employment Rights Act (***the respondent identified this complaint as not having been in the first complaint form and maintained that if it is to proceed there will need to be an application to amend the claim, and time for the respondent to respond to it***). The detriments were said to be (i) an extended suspension; (ii) an unfair investigation where the respondent failed to look into issues raised by the claimant and failed to investigate his grievance and (iii) harassment;

(iii) a complaint of failure to make reasonable adjustments in terms of section 20 Equality Act. The claimant will say the provision, criterion or practice in place was the requirement in the contract to work a minimum of 48 hours per week and having no set hours per day. This placed him at a substantial disadvantage because of his disability and it would have been reasonable to grant his request for a maximum 45 hours per week, with a 9 hour shift pattern. (***The respondent will say this claim has not been pled in either claim form, although it was acknowledged the claimant had, at the back of the second claim form, made a reply to the Response, in which he had detailed the claim.***);

(iv) a complaint of harassment in terms of section 26 Equality Act. The respondent has, in the List of Issues, set out the alleged acts of unwanted conduct at paragraph 7.1.1 – 7.1.8. The claimant, in addition to this, wished to add badgering him to look at the CCTV.

(***The respondent identified this additional matter as not having been in the first claim form***);

(v) a complaint of victimisation in terms of section 27 Equality Act. The claimant will say the protected act was his request for reasonable adjustments and because he raised this his manager embarked on a mission to find something for which he could be disciplined or dismissed."

12. Following that Preliminary Hearing, the claimant was required to provide further particulars of his claim, and sought to do so (32). Employment Judge Jones then issued a Note following a Preliminary Hearing on 2 August 2022 (32A), in which she noted the terms of the claimant's further particulars but required further specification of him, which he then sought to provide (33).

13. The result of this protracted exercise was that the claimant sought to amend his claim, by email of 24 August 2022 (which was not produced within the bundle but was available in the Tribunal's administration file). The claimant's request was to amend his claim, but including "a claim that my dismissal was an act of disability discrimination, under section 15 of the equality act 2010". The unfavourable treatment complained of was his suspension, the flawed handling of the disciplinary investigation and his dismissal.

14. This became an issue of some importance during the Hearing because on the first day, the claimant suggested that dismissal was a discriminatory act and that his claim incorporated such a complaint, whereas Mr Britton insisted that the Tribunal had made clear that no such claim is currently before it.

15. On consulting the Tribunal file, the Employment Judge was able to identify that this matter had, as Mr Britton said, been fully addressed and dealt with by the Tribunal, by letter dated 29 August 2022. As a result, on the second morning of the Hearing, the Employment Judge confirmed

that the matter had been addressed, and read to parties the following extract from the Tribunal's letter of 29 August 2022:

*"…The issue of whether the claimant was also alleging that his dismissal was an act of disability discrimination was first raised at a preliminary hearing on 6 April. The claimant was required to clarify if he sought to advance such a claim and if so, the type of discrimination alleged to have occurred. On 5 May, the claimant wrote to the Tribunal indicating that he did seek to advance such a claim but did not set out the type of discrimination alleged..*

*At a preliminary hearing on 2 August the claimant sought to argue that a claim of disability discrimination already formed part of his claim. The respondent did not accept the claimant's position and was of the view that an amendment application would be required. Parties were advised to set out their respective positions in this regard and having considered the position, the EJ directed that the claimant's claim did not include a claim that his dismissal was an act of disability discrimination and that should he seek to advance such a claim he would be required to seek leave to amend his claim. The claimant was also advised that should he seek such an amendment he was required to set out the statutory basis of the alleged discriminatory treatment and why the application to amend should be granted.*

*The claimant sent an email on 18 August making reference to a claim that his of (sic) disability discrimination being 'on the grounds of refusal to make a reasonable adjustment'. No further detail of the alleged discriminatory treatment was provided. By letter dated 22 August, the claimant was then required to set out the specific wording of the amendment he sought to make, including the statutory provision relied upon. The claimant replied on 24 August stating 'the specific wording of my amendment application is I wish to include a claim that my dismissal was an act of disability discrimination, under section 15 of the equality act 2010. The unfavourable treatment I complaint of was my suspension the highly flawed handling of the disciplinary investigation and my dismissal'.*

*The respondent then wrote indicating that there was still insufficient information for the tribunal to consider the claimant's amendment application, that this was the first occasion on which any reference had been made to a claim in terms of section 15 and that in any event the application was opposed.*

***Having considered the claimant's application and the respondent's comments, the EJ refuses the application. The claimant has been given a number of opportunities to make an application to amend his claim. Despite this the amendment sought is still unclear. Further, the claimant has not at any previous stage suggested that his dismissal amounted to discrimination arising from a disability. The claimant has separately claimed that he was dismissed because he had made protected disclosures. The claim the claimant seeks to advance is not sufficiently specified. While it is appreciated that the claimant is unrepresented, his (sic) is not unfamiliar with tribunal processes and procedures. In so far as the amendment application could be said to properly specified, it does not set out an essential aspect of the claim, that is what the something arising from the claimant's disability is alleged to have been. Given the lack of clarity of the claim the claimant seeks to advance, the fact he has been given a number of opportunities to properly specify an amendment application, that he also alleges his dismissal was because he made protected disclosures, and taking into account the factors set out in Selkent Bus Company Ltd v Moore [1996] ICR 836 the application is refused."*** (Tribunal's emphasis)

16. The Employment Judge explained, therefore, that the claimant's assertion that he had a claim before the Tribunal that his dismissal was a discriminatory act was without foundation. It was understood that he does have a claim that the respondent failed to make a number of reasonable adjustments but that that does not, nor could, give rise to a complaint that the dismissal was an act of discrimination. The claimant accepted this when it was presented to him, though it did not appear to prevent him from attempting to present evidence to that effect throughout the Hearing.

17. In the absence of an agreed List of Issues, the Tribunal was required to take consideration of the draft List provided by the respondent. Reference will be made to that List of Issues in the Discussion and Decision section below.

18. Based on the evidence led and the information provided, the Tribunal was able to find the following facts admitted or proved.

**Findings in Fact**

19. The claimant, whose date of birth is 30 April 1977, commenced employment with the respondent on 13 September 2021 as an HGV Delivery Driver.

20. The respondent is a vehicle transport company, known as “Bidfood”, a wholly owned subsidiary of BFS Group Limited. BFS Group Limited is a wholesale food distribution business with distribution hubs and regional depots throughout the United Kingdom. The claimant was employed and based at the respondent’s Edinburgh depot.

21. The claimant is, and was at the material time, a disabled person within the meaning of section 6 of the Equality Act 2010. The respondent admitted this in their grounds of resistance, though they did not admit that at the material time they know or ought reasonably to have known that he was suffering from such a disability. The disability relied upon by the claimant was that of depression and anxiety.

22. The claimant’s contract of employment (76ff) provided that he reported to the Transport Manager, who, in the Edinburgh depot, was Mr John McAndie. His working hours were said, in clause 7 (77) to be 48 hours per week, Sunday to Saturday, any 5 out of 7 days. The claimant signed his contract on 29 September 2021 (83).

23. On 24 November 2021, Joanne Horne, a Team Manager based at the Edinburgh depot, met with the claimant to discuss 2 “at fault accidents” which had taken place on 29 October and 18 November 2021. She noted (116) that *“Barry’s number of CV accidents are now becoming*

*concerning, if any further accidents occur this may lead to disciplinary action being taken. Barry is currently within his probationary period these incidents may be taken into consideration when reviewing. A discussion has taken place between Barry and myself that if he needs any extra support to let me know."*

24. Drivers employed by the respondent are due to have probationary review meetings in weeks 3, 7 and 11 of their employment. Mr McAndie, the claimant's Transport Manager, should have conducted those meetings, but acknowledged that due to pressure of business he had not done so. In any event, following the meeting which the claimant had had with Ms Horne, Mr McAndie found a letter from the claimant on his desk on the morning of 25 November 2021 (122), though the letter was dated 24 November.

25. In the letter, the claimant stated:

*"As discussed at welfare meeting, I suffer from a mental health disability namely anxiety.*

*My condition is long term and treated with Fluoxetine prescribed by the doctor.*

*Since I started with Bidfood back in September, I have worked very hard to get myself up to speed with the job and although at times I have found it difficult, I feel that I am finally getting there.*

*I really enjoy my job in the most part but have found my anxiety gets on top of me on the particularly busy days or on days where the planning is not quite right.*

*When this happens, I find myself panicking about the day ahead. I feel on these days that the hours expected of me are affecting my mental health, putting me under excessive stress and anxiety.*

*It is for this reason I would as a disabled person like to request a reasonable adjustment be made to allow me to cope better with the*

*workload and the job and would ask management to give me the support, I need to still be a useful and productive member of staff.*

*I feel due to our struggle to get drivers to stick at the job, I can still be useful even if not able to do a ten hour plus day.*

*My suggestion would be a cap of a nine-hour day which would mean I can still fulfil a 45 hour per week and still be able to manage fifteen familiar deliveries per day.*

*I look forward to hearing from you in regard to how we can go forward as a productive team.*

*Barry Hewitson"*

26. Mr McAndie forwarded a copy of the letter to Jen McIntyre, of Human Resources, (123) but was not able to speak with her. He was anxious about the letter and wanted to meet with the claimant for his probationary review, so he asked the claimant to attend a meeting with him. He did not give the claimant notice of the meeting in writing because he wanted to have the discussion as soon as possible.

27. At the meeting, which took place on 30 November 2021, Mr McAndie extended the claimant's probationary period, on the basis that he was not at the level expected of him. So far as targets or improvements were concerned, Mr McAndie noted in the record of the meeting (124) that he should have no further accidents as that may lead to disciplinary action, no further infringements as that may lead to disciplinary action, and that the claimant must improve his performance in order to reduce his "credits". The reference to "credits" is a reference to issues which arise where a driver has been guilty of conduct which has caused loss to the company, such as delivering items to the wrong address (119) or leaving packaged food items in a customer's food bin without permission (117).

28. The claimant told Mr McAndie that he was struggling to manage shifts which went beyond 9 hours, and asked for a cap of a 9 hour working day. Mr McAndie told the claimant that he should make a flexible working

request to the respondent, although the request was made on the basis of the claimant's disability of anxiety and depression. Mr McAndie was aware that in the previous 2 weeks, the claimant's weekly hours were 43, but considered that his request should be addressed by HR rather than by himself. As a result, he suggested that the claimant put in a written request for this purpose.

29. In evidence before the Tribunal, Mr McAndie acknowledged that he had used the incorrect terminology as it was not a flexible working request, but a request for reasonable adjustments, which the claimant was making.

30. After the meeting, Mr McAndie spoke to Jen McIntyre, who advised him of the error in his terminology. She informed him that it would be necessary to investigate whether it would be appropriate to make reasonable adjustments and that Laura Fletcher, HR Business Adviser, would be in touch to progress this matter.

31. The claimant sent an email to the respondent's HR Services email address on the evening of 30 November, following his meeting with Mr McAndie (125). In that email, he said that he thought his manager was not grasping the connection between him not meeting his standards of work and his disability. He also referred to Mr McAndie's suggestion that he should make a flexible working request; that Mr McAndie had told him that because he was on probation, such a request may not be successful; that he had asked if the claimant had told the respondent about his disability at interview, and that he had questioned whether the DVLA was aware that he took medication. He said he would welcome any input which would resolve the issue.

32. On 1 December 2021, Ms McIntyre sent an email to Laura Fletcher (126) in which she asked her to pick up "the attached" with Mr McAndie (that is, the claimant's letter of 24 November). She went on: *"I think, in the first instance that we should hold an exploratory welfare meeting with the employee to better understand his condition and how we can*

*support/what reasonable adjustments we should consider. I do have concerns based on his letter and feel strongly that we should refer to OH for a medical perspective too."*

33. "OH" is a reference to the respondent's Occupational Health department.

34. Ms Fletcher spoke to Mr McAndie about the claimant's request, and kept a contemporaneous note of her call (134D). She discussed what reasonable adjustments could be considered, the need to refer to OH, raised the possibility that the number of days he worked per week could be reduced, advised that they would need to understand fully the nature of his condition and the impact on the role, and what would happen after he had worked 9 hours on any occasion. She noted that his average hours were below that level at that moment.

35. In order to establish the background to the claimant's request, Mr McAndie carried out some investigation into the claimant's working hours. He noted that the claimant's average working hours were less than 45 per week, and then looked into the claimant's daily working hours. At this point, he believed that there may be some "tachograph issues".

36. Each driver requires to record his hours by way of a tachograph, which is fitted to his vehicle. The tachograph is registered against the individual driver, and can be used to demonstrate the level of working hours which the driver has been working over a period of time. Mr McAndie suspected that the claimant had been working when his tachograph had been set to "break", which may amount to an act of misconduct.

37. The claimant sent a letter to Mr McAndie, via Joanne Horne, as he did not have Mr McAndie's email address (127). Ms Horne passed on the letter with the email, dated 2 December 2021 (130). The letter set out a number of points, including the following (128):

*"Can I request you add this note to my probation review document. There is a couple of things I would like noted. I feel I should have been given advance notice of the probationary review meeting, along with information*

*on what issues were going to be raised, this so as to give me a proper chance to respond and offer any explanation. The meeting was a surprise to me as my understanding is all employees are on a 2-year probation.*

*…You mentioned I am not a team player, which baffled me and to improve on this I feel I need you to explain what you mean, can you give some examples and explain where I went wrong and how to improve.*

*You raised an issue which had never been mentioned to me before, this was you feel I have a high credit issue, I believe that there is no accurate way to record or measure this and that there are far too many contributing factors to a potential credit, for it to be used as a guide to measure how a driver is performing throughout their probation… This measurement came out of the blue at the meeting, and I feel hard done by when it was used as a factor in extending my probation…*

*Both my incidents/accidents occurred I feel on two separate days, where I felt my workload was unmanageable for me, causing me high levels of anxiety. Through experience I have gained over the last ten or so weeks I now realise that I am not able to manage the workload of more than a nine-hour shift (equivalent of 14-15 drops) without it affecting my anxiety levels and so at my welfare meeting last week I asked for a 'reasonable adjustment' to be made.*

*At the probation review meeting you told me, I had to reword my letter as Bidfood called it a request for flexible working. I have written to human resource mentioning a flexible working arrangement, but I have highlighted to them it is a request for a 'reasonable adjustment' under the equality act 2010."*

38. Mr McAndie considered that the letter amounted to a request to add it to the probationary review report. He did so, and did not consider that he required to take any further steps at that time.

39. Following his concerns about the tachograph records relating to the claimant, Mr McAndie contacted Ms Fletcher on 6 December 2021 to

advise that he wished to suspend the claimant. Ms Fletcher's note of that call is produced (134B). He told her that it was due to tachograph offences. She noted that he said *"Been looking into his hour and it's become apparent that he's been coming back to depot putting vehicle on break and carrying out other work, optic – colours tell you activities. Needs a period of other work, tips vehicle whilst on break, then goes out moves and parks up, comes back into depot, goes home but time spent he manually enters that next orning. If he had to take a break he would need to take another 15mins on the road. Tomorrow will view CCTV.*

*Want to suspend pending a full investigation, gross misconduct – falsification of tachograph – 6th December. John will get him in for meeting, say that he has received his letter requesting reduced hours, has been reviewing his hours and it's come to his attention the following allegation. Any initial comments. Suspension script…"*

40. At 3pm that afternoon, Mr McAndie met with the claimant, in the presence of Ms Horne who took notes (135). The claimant was accompanied by Tam McClelland. It was noted that Mr McAndie said that *"I went to have a look regarding your hours. I've realised that I need to investigate your tachograph. I need to suspend due to potential falsification of tachograph records."*

41. He explained that this had come out due to his looking at his working days. He went on to advise that his suspension would be on full pay, and that it was a neutral act. The claimant said *"So this is on the back of my letters"*, but Mr McAndie said that was not the case, but that it was due to his query on working days. The claimant said, a number of times, that he was not aware of the detail of the allegations, but Mr McAndie repeated that it was related to potential falsification of tachograph records.

42. The claimant and his witness both signed and dated the handwritten note, as did Mr McAndie and Ms Horne (139).

43. Mr McAndie followed up the meeting with a letter confirming the claimant's suspension (142). The letter stated that *"I am writing to confirm*

*that you are suspended on full pay pending an investigation into the allegations of gross misconduct, namely falsification of tachograph records from 6th December 2021."*

44. In fact, the investigation related to falsification of tachograph records alleged to have taken place prior to 6 December 2021, which led to the claimant's suspension. This was an error on the part of Mr McAndie.

45. The claimant wrote to Ms Fletcher on 9 December 2021 (143) to state that he did not consider that he had been given adequate reasons for his suspension, nor that his manager had properly considered alternatives to suspension. He suggested that his manager was *"now desperately looking for any potential wrong doing by myself, which I assure you has not occurred."* He went on to say that he would wait until after the suspension was dealt with before raising a grievance, on the basis that his manager had failed to make a reasonable adjustment under the Equality Act 2010.

46. He said that having spoken to ACAS it would be a good idea for a reasonable adjustment to be put in place, that is, for him to be given advance warning of the charges against him and evidence relied on, and that he be given a representative who would be a mental health support for him at any hearing.

47. Ms Fletcher responded on 10 December 2021 (144) to advise that he would be allowed to have a representative with him at the investigation meeting, and pointed him towards the Employee Assistance Programme to provide free, confidential advice and support for him.

48. The claimant was unhappy but wished to proceed. However, he indicated to Ms Fletcher that he was starting the process of early conciliation through ACAS (145). He was then invited to attend an investigatory hearing with Mr McAndie on 16 December 2021, by letter dated 13 December 2021 (149). The allegation was "alleged gross misconduct, namely falsification of tachograph records". He was advised that these were extremely serious allegations which, if upheld, could lead to his

dismissal. He was also told that he could bring a Bidfood employee or a recognised Union representative as a witness to the hearing.

49. Prior to the investigatory hearing, the claimant submitted a grievance letter by email dated 14 December 2021 (151ff). He complained that he had been treated "inhumanely" and that a suspension extending to a week was an extremely poor way to treat staff in general, let alone one suffering from mental health issues.

50. Essentially, he complained that Mr McAndie was reviewing his working hours very closely as "an attempt to dig up some dirt on me". He suggested that Mr McAndie was himself guilty of tachograph falsification, whereas the claimant was "one hundred percent innocent".

51. On 15 December 2021, Ms Fletcher responded by email (155), to which she attached a letter dated the same day (156). She advised him that in terms of the respondent's Grievance Procedure, a complaint about the disciplinary action being taken should await the outcome of that action. She suggested that he could raise his concerns about the process in the course of his investigatory hearing.

52. She went on to confirm that Mr McAndie had been replaced by John McCluskey as the investigatory manager, given that the claimant had now raised a grievance against Mr McAndie. As a result, the investigatory hearing fixed for 16 December 2021 was to be rearranged.

53. Finally, Ms Fletcher stated: *"I also wanted to acknowledge your letter dated 24th November 2021 in which you made a request for a reasonable adjustment to your role. John McAndie was in the process of reviewing your request when the allegation for which you are currently suspended from work came to light. As a result, the need has been to prioritise the investigation at the moment due to the severity of the allegation, and will look to return to your request when this matter has been concluded."*

54. The rearranged investigatory hearing was due to take place on 22 December 2021, but required to be postponed (159) due to a member of

the claimant's household having tested positive for Covid-19. It was discussed whether or not the hearing could take place remotely by Zoom, but given that there would be a need to view CCTV footage, this would not be practically possible.

55. Following receipt of this letter, the claimant emailed Ms Fletcher on 23 December 2021 (160). He requested a copy of the respondent's data protection policy, as he did not consider that the privacy notice issued to him with his contract covered the company's policy on using CCTV footage for disciplinary purposes.

56. He also asked for evidence of the signage relating to CCTV in the area where the images were taken, together with a full written explanation as to why his data (CCTV footage) was looked at, as it was his understanding that it could only be looked at for security purposes, and he had not given permission for it to be used for any other purpose.

57. Ms Fletcher was on holiday until 4 January 2022 (and confirmed this to the claimant) (160A), but responded on 5 January 2022 (162) in the following terms:

*"I have attached the CCTV Standard which details the purposes for capturing CCTV, location of cameras (including signage), storage and retention and access to images. Access to the CCTV system and stored images is restricted to competent, authorised and trained Bidfood employees only and a CCTV internal viewing record must be completed when images are accessed. John has completed CCTV internal viewing records for the occasions he has viewed the footage as part of the investigation that is ongoing and is therefore complying with our internal processes. After viewing your tachograph records, there was reason to view the CCTV footage for further clarification due to potential issues around driver safety. I believe this only forms part of the investigation and will be discussed with you on Friday in your investigation meeting where you will also have the opportunity to view the footage.*

*I have also attached the Data Protection Standard and the Privacy Notice. Both of these documents detail CCTV footage as personal data and explain how and why they are processed. All of the above documents can be located on the Hub, and accessed by all employees from the first day of employment.*

*I have also attached for you a copy of your signed contract, please refer to section 21 – Data Protection Policy in which it details the following:*

*'We comply with the General Data Protection Regulation (GDPR)('the Regulation') to the extent that it obtains, records or uses any information (which is 'data' for the purposes of the Regulation) about you. the Regulation defines 'data processing' in such a way that by obtaining, recording and using information about you, we will be 'data processing' in relation to such information. The information will include the contents of any job application form, CV and references together with HR records, appraisals and other records made about you during the performance of your employment under this contract.*

*It is a term of this contract that you agree to us processing any data that we obtain about you as a result of your being our employee. You also agree to us processing 'sensitive personal data' (as defined in the Regulation) about you. You agree to data being transferred outside the European Union where authorised by our Data Protection Officer and adequate levels of protection are guaranteed by the recipient.'*

*With regard to signage on site, I mentioned that this is covered in the CCTV Standard, but have also asked the site to provide photographs of the signage. John is back in work today from annual leave so I have asked him to arrange photographs to be sent to me and I will forward these on as soon as I have them."*

58. Ms Fletcher sent to the claimant photographs of the signage on 6 January 2022 (163ff).

59. The investigatory hearing took place on 7 January 2022. The hearing was chaired by Mr McCluskey, with Ms Fletcher in attendance to take notes (169ff). The claimant attended and was accompanied by his partner, Linda Hiddleston.

60. Mr McCluskey explained his role, and asked the claimant if he was happy to proceed, to which he replied “Yes we spoke on telephone”. When told by Mr McCluskey that his role was simply to investigate the allegations and not the grievance, the claimant replied “Not what I was told by HR”.

61. Mr McCluskey then proceeded to ask the claimant some questions. He confirmed that Alex Horne had carried out the classroom training which he had done on induction, and that the induction had equipped him with the tools and skills needed to do his job. The questions proceeded:

*“JM: I might ask similar questions. Would you say you’re familiar with tachograph and how to operate your tachograph?*

*BH: I’m not an expert but aware as any other driver*

*JM: Did tachograph legislation come up in induction?*

*BH: Yes.*

*JM: So it was covered?*

*BH: Yes.*

*JM: Would you know what the following modes are – Drive, Other work, Break and rest?*

*BH: Yes.*

*JM: Are you aware of the importance of ensuring that each mode is accurate and a reflection of the work that you are carrying out at that time?*

*BH: Yes.”*

62. Mr McCluskey went on to ask the claimant about his understanding of what he was permitted to do when he had placed the tachograph on "break" mode. The claimant replied that he would require to have a break. When he was asked if he was allowed to work through a break, the claimant said "I'm not commenting on that". He did agree that the purpose of a break is to allow the driver to have rest and recuperation.

63. When Mr McCluskey indicated that he wished to go through the OPTAC tachograph software, and in particular 17 November 2021, the claimant asked why this had been raised. A conversation followed in which the claimant persisted in challenging Mr McCluskey about why he was not investigating the grievance as well as the disciplinary allegation. He confirmed that anything which was part of the investigation and linked to the grievance would be investigated by him. The claimant eventually agreed to continue.

64. Mr McCluskey then took the claimant through the OPTAC record for 17 November 2021 and asked the claimant about the times recorded. When asked what he was doing when his tachograph was on a break, he said he was doing whatever he wanted as he was on a break.

65. The following exchange is then recorded:

*"JM: Do you mind if I show you a still photograph from CCTV?*

*BH: I don't want to see it, it's illegal. I've already stated that.*

*JM: So you don't want to look at CCTV?*

*BH: No I don't want to touch it.*

*JM: Ok for the notes, Barry does not want to see the CCTV image.*

*BH: I don't agree with it being used as evidence at all.*

*LF: I will note but is there any reason why you don't want it being used?*

*BH: It's being used by John McAndie as a reason to get rid of me. You can't trawl CCTV images. He's discriminated against me.*

*LF: Part of John's investigation will be to go and speak to John McAndie about the reasons why CCTV has been viewed…"*

66. An adjournment was granted shortly afterwards at the request of the claimant's partner, who said on resumption that the claimant suffered from very bad anxiety and this was affecting him. She advised that the claimant considered this to be a witch hunt.

67. Mr McCluskey sought to respond to these comments, and then offered the claimant the opportunity to view the CCTV images, which the claimant agreed to do. He was shown a still photograph from 17 November 2021 from 15.01 and 15.02, and said that in the first one it looked like he was pulling trolleys (and confirmed that it was him), and on the second image that he was in the warehouse, on private property and not on the roads. When asked if he was working, he replied *"No I was pulling trolleys. I'm on private property, not saying I'm working."* When asked if he was on rest at this point, he replied that he was, as he was not driving nor on the road.

68. With regard to the second date, 25 November, images were shown to him and he confirmed that he could be resting on a cage, or could be doing anything. When asked if it looked like he could be working, he said he was not prepared to comment.

69. The claimant once more raised his concern about the use of CCTV images: *"I want to know why you were looking at CCTV based on manual entries. Trainer told us and it's been noted by others, the trainer has said not to do manual entries. It's illegal to say that."* Mr McCluskey advised that he would look into that.

70. The hearing continued with further reviews of OPTAC entries. The claimant asserted at one point that when a driver is not on the road but on private property, the tachograph rules do not apply. He refused to give the

name of any supervisor that had told him this as he "wouldn't wrong anyone else".

71. At the conclusion of the hearing, the notes were signed by Mr McCluskey and Ms Fletcher, and sent to the claimant (195), who was advised that if he did not provide confirmation by 13 January that the notes were a true reflection of the hearing, it would be considered acceptance of the terms of the notes.

72. The photographs which were shown to the claimant were produced at 183-186.

73. The claimant returned the notes with amendments made in his own writing by email dated 12 January (211).

74. On that date, he also submitted a letter to Mr McCluskey headed "Information rights concern" (209). In that letter, the claimant said:

*"…it is my understanding CCTV footage should be managed by one person and not be accessible by as HR letter states:*

*'Access to the CCTV system and stored images is restricted to competent, authorised and trained Bidfood employees only and a CCTV internal viewing record must be completed when images are accessed.'*

*…The reason you gave me for accessing the CCTV images was*

*'Excessive use of manual entries' I do not accept under data protection this is a valid reason for anyone to access CCTV footage, which the examples show are clearly trolled through looking for any reason to discipline me by John McAndie, due to him not wanting to look into my reasonable adjustments request under the 2010 equality act.*

*It is my opinion the signage at the Newbridge branch is inadequate as evidenced by the photos sent to me by HR.*

*I understand that before reporting my concern to the Information Commissioner's Office (ICO) I should give you the chance to deal with it…"*

75. A further investigatory hearing took place on 18 January 2022, but prior to that, the claimant, on the same day, emailed Ms Fletcher (224) to add a complaint of harassment to his grievance. The nature of the harassment appeared to relate to further investigations being carried out into the disciplinary allegations, and a refusal to look into his grievance. He said that he would attend the investigatory hearing that day under objection claiming harassment and disability discrimination, and that he would not be making further comment on the CCTV or any new evidence which had come to light. He described the treatment he had received as "abhorrent".

76. Ms Fletcher acknowledged receipt of his email (225) and encouraged him to attend the investigatory hearing and to participate in order to set forth his version of events.

77. Mr McCluskey chaired the Hearing, with Ms Fletcher again in attendance to take notes (226ff). The claimant attended and was not accompanied on this occasion.

78. Mr McCluskey advised that he wished to discuss further dates relating to the claimant's tachograph activity on return to depot. The claimant maintained that he did not wish to see the information. He continued to protest through the Hearing that he believed he was being discriminated against and harassed, and that his grievance should be addressed before the disciplinary issues. When Mr McCluskey took him through the further information he wanted to address with him, the claimant eventually responded by saying that "I'm not prepared to wait any longer. I'm not playing ball anymore." It was recorded that as Mr McCluskey sought to ask him further questions, he simply said "No, no, no, no, no", talking over Mr McCluskey. He went on to say, in response to Mr McCluskey attempting to discuss the next relevant date, "Don't care. Stop harassing me."

79. Following the Hearing, the claimant made a short comment on the notes in an email dated 21 January 2022 (233). He went on to point out that his letter complaining about the use of his data had not yet had a response. He asked for a copy of the CCTV maintenance log for the previous 2 years and the CCTV access request date for the previous 6 months at the Newbridge site.

80. He referred to the Standard which states that images should only be retained for a period of 31 days only (unless a longer period of retention is necessary for legitimate or operational requirements). He asked: *"Can you explain to me why in the meeting notes John McCluskey is desperate to show me CCTV footage of a date he states is the 18th November although I note that your cover letter states the dates were 24th November the 22nd of November and the 28th of October. I refused to look at the images due to my legal rights and feeling I was being harassed…*

*Can you give me a legitimate or operational requirement for why you are storing data for longer than the 31 days the policy states…*

81. The claimant went on to make further complaints about both Mr McAndie and Mr McCluskey, repeating his allegation that the latter trolled CCTV footage, in his opinion illegally, trying to back up Mr McAndie. He accused him of harassment as he continually asked him if he would view the CCTV images, despite being told that he was not willing to do so.

82. In his evidence before the Tribunal, Mr McCluskey explained in detail to the Tribunal why the respondent had such concerns about the claimant's tachograph recording. He was invited by the claimant, in cross-examination, to explain what was wrong on any of the pages which were produced from the OPTAC record. He was happy to do so, and referred the Tribunal to the record on p189.

83. The record related to the claimant's tachograph record for 18 November 2021. On the top left hand side of the page there was a key to the symbols used below. The first was a red circle, which denotes driving time; the second was a symbol of two crossed hammers, denoting other

work; the third is a yellow box, on which no entry is made on that date; and the fourth denotes a period of rest.

84. Below that key, there is a time line which shows blocks of different activities according to colour. Red shows driving time, green shows rest and blue shows other work. If the vehicle is stopped, the tachograph automatically records other work rather than driving. In order to show rest, the tachograph has to be switched to break mode.

85. In a column on the left hand side beneath the time line, timings are recorded against the particular symbols.

86. Mr McCluskey went on to explain that, on this date, the focus was on the end of the day. The large block of red at 1626 to 1709 showed the driver returning his vehicle to the depot. The next block was green, showing rest from 1709 to 1728. Then a minute is recorded as other work, followed by a minute driving. Thereafter 1730 to 1751 is shown as other work.

87. Mr McCluskey concluded from that that there was no time shown on the tachograph to allow for the claimant unloading his vehicle, emptying cages, complying with the debrief process and completing the other tasks necessary to conclude a day's work. The reason why he considered it to be problematic was that the one minute's drive at 1729 to 1730 was clearly evidence that the claimant had driven from the loading bay to the parking space, and from that he concluded that the claimant had placed his vehicle on break at 1709 and had continued to work by unloading his vehicle and carrying out his end of shift tasks. This is known as "tipping on break".

88. Mr McCluskey went on to explain that the claimant had worked more than 9 hours on that day, and therefore required to take a total of 45 minutes' break. He took a break after 1700 but in Mr McCluskey's view he merely did that to comply with the requirement to show a sufficient break during his shift, and continued to work in breach of the tachograph rules. He made a manual entry to show other work after that in order to cover the fact that he had worked during his break. This would also have the effect

of shortening his working day, in that if he had to have his break as well as carrying out the other work before parking up his vehicle, he would have had to wait longer and not unload the vehicle and complete the other tasks during his break.

89. The Tribunal found this to be an extremely helpful and clear explanation of why that particular OPTAC report demonstrated that the claimant had been guilty of tachograph falsification. Interestingly, the claimant himself, after hearing Mr McCluskey's explanation, appeared to be impressed: he observed that this was an "excellent explanation – you are well versed in this?" He did go on to suggest that he had not broken the law nor done anything wrong here, but Mr McCluskey was unmoved.

90. The respondent provided a response to the information rights concerns which the claimant had raised, by letter dated 21 January 2022 (236). Ms Fletcher addressed the particular concerns raised by the claimant as follows:

1. *"It is correct that access to CCTV images is restricted to competent, authorised and trained Bidfood employees. The Bidfood employees who have had access to your CCTV images, including John McAndie and John McCluskey are competent, authorised and trained (having completed both an online data protection module and undertaken separate CCTV training).*

2. *Falsification of tachograph records is a crime. The Bidfood CCTV Standard says: 'Bidfood's use of closed circuit television (CCTV) is for following purposes:*

    - *Site security*
    - *The prevention, identification and reduction of crime and stock loss*
    - *Safety and security of its employees/visitors*
    - *Management of claims*

- *Health and Safety training*
- *Warehouse Operative evaluation*
- *Driver evaluation (via vehicle cameras)*

3. *The signage at Bidfood's Edinburgh Depot (Newbridge), including at the Employee entrance, indicates clearly that CCTV is in operation.*

4. *Bidfood's Employee Privacy Notice says: 'We may collect, store and use different categories of personal information about you including:…information captured on security systems including CCTV and key card entry systems, time and attendance systems'…"*

91. In paragraph 5 of the letter Ms Fletcher set out the information held on the claimant's personal file, tachograph records and training documents, which had been provided to him on 5 January 2022.

92. She concluded by expressing the hope that the response addressed the claimant's concerns, but that if he wished to do so he could refer his letter of 12 January and that response to the ICO as was his right to do so.

93. On 21 January 2022, the claimant emailed Ms Fletcher (239):

*"Hello Laura*

*Thankyou for your email earlier, I have given it a lot of thought and do not want to work for a company that treats people they (sic) way I have been treated, it is for this reason I am tendering my resignation.*

*I invite you to please continue the investigation into alleged gross misconduct and let it reach a conclusion, and then investigate my grievance concerns.*

*It is my opinion health comes before money and it is for this reason I am resigning. I will be following this up at an employment tribunal, as I still stand by my assertion you have discriminated with severe prejudice against me. My claim will change to one of constructive dismissal on the*

*grounds of disability discrimination, failure ot make a reasonable adjustment and harassment.*

*I believe having gone through my three months probation I now have to give a leaving date of the 21st of February 2022, one calendar month from now. I understand I may still be dismissed for gross misconduct on the back of the investigation and accept that no notice is given for gross misconduct. As I am still employed till the 21st of February at present, I remain available for any disciplinary action/meeting."*

94. The respondent invited the claimant to a disciplinary hearing on 28 January 2022, by letter dated 21 January (240), in which the allegation to be addressed was *"Alleged gross misconduct namely falsification of tachograph records. In further detail it is alleged that you worked through your tachograph break on 17th November 2021 and 25th November 2021, as well as the following dates which you have refused to comment on – 22nd November 2021, 18th November 2021, 24th November 2021 and 28th October 2021."*

95. Attached to the letter were a large number of documents, including copies of the CCTV viewing records, OPTAC reports for the relevant dates, details of his complaints about the CCTV footage and images and statements by a number of individuals, namely John McAndie, John Whyte, Alex Horne, Andrew Innes, Craig Purves and John Tait.

96. The claimant acknowledged the invitation but indicated that he could not face the individuals concerned in person (242). He requested that the meeting should take place through laptop, or at a neutral venue. Ms Fletcher responded on the same date (25 January 2022) (243) advising that the meeting would take place in person but that he could attend by Zoom if he preferred.

97. Mr McCluskey prepared an investigation report, which was dated 26 January 2022, and recommended that the allegations and information be placed before a disciplinary officer for consideration.

98. The disciplinary hearing took place on 28 January 2022. The hearing was chaired by Craig Hogg, then Director of Fleet Support, with Joanne Horne taking notes (304) and Andrea Blackman present as HR representative. The claimant attended by Zoom.

99. The claimant complained at the outset that there were too many people there, and after had an explanation as to the respective roles taken by each, said that *"I understand but I object, but I'm happy to go on."*

100. Mr McCluskey, presenting officer, read from the investigation report. After an adjournment, the claimant complained that Ms Horne was present, as she was part of his grievance. Mr McCluskey continued to read, though noted at one point that the claimant had disappeared from the screen at which he was sitting. The claimant said that he did not want to listen but just to be told when Mr McCluskey had finished.

101. He went on to intimate that he was disabled, and asked if the company accepted this. Mr Hogg said that he had no knowledge of this. The claimant asserted that *"Equality Act 2010 states if disabled you get protection for disciplinary".* He then said that if the respondent did not comment on the Equality Act (though in precisely what regard it is not clear) he could not continue. He repeated his concern that the hearing could not proceed unless the respondent agreed that the Equality Act protected him.

102. After a number of fruitless exchanges, the claimant said *"I'm done let's call it quits".* Ms Blackman suggested that they could adjourn until 1pm, to which the claimant agreed. When they resumed, the claimant had sent a link which he said demonstrated his point about the Equality Act. The link, from a website whose details were not provided, stated that "The Equality Act 2010 protects you and covers areas including… dismissal or redundancy, discipline and grievances".

103. The claimant went on to say that *"All we are doing is going round in circles, it's for a court of law to decide".* He indicated that the hearing was

biased, that he had all the evidence he needed, and that it should be ended at that point.

104. At no stage in the disciplinary hearing did the claimant suggest that he required to have any breaks, or any support, based on his disability, nor that he was not fit to attend and participate in the hearing due to his disability.

105. The meeting continued notwithstanding the claimant's stated attitude. He raised a number of questions which he considered to be relevant to his case, and in particular his concerns about the actions of others such as John McAndie, and the use of CCTV footage. He complained that *"Your usage of CCTV is illegal you will be hung for it but I understand your position."*

106. At approximately 1.45pm the claimant left the meeting without further warning.

107. On 5 February 2022, the claimant presented his first claim to the Employment Tribunal.

108. Mr Hogg considered it appropriate to invite him to resume the hearing on 8 February 2022 (317).

109. The claimant disagreed with the respondent's analysis of the state of the hearing in an email on 7 February 2022, in which he said (322):

*"The meeting was not adjourned, both sides did not agree on the relevance of evidence and as there could be no agreement you wanted to push on with the agenda you had with full support from the chair and the HR representative. I told you all there was no point continuing but you all insisted on going on and on. When the chair started answering questions for you, when I pointed out flaws in your investigation, I pointed out the bais and left the meeting, telling you I was done and inviting the chair to make any decision he wanted.*

*I fully expected the conclusion of the meeting early last week.*

*Please go ahead draw whatever conclusions you want. I will appeal any decision against me and after that appeal we will finally be done with this nightmare you have caused…."*

110. He sent a further email on 8 February at 0115 hours to say that *"I will not be attending your kangaroo court tomorrow, as the process has proven to be a farce from the start."*

111. The hearing reconvened on 8 February 2022, with Mr McCluskey presenting, Mr Hogg chairing, and Ms McIntyre present as the HR representative. Joanne Horne took notes (325). The claimant did not attend.

112. Following the meeting, Mr Hogg took some time to consider the information which had been presented to him. On 17 February 2022, he wrote to the claimant to confirm the outcome of the disciplinary hearing (385). He concluded that he had reasonable belief that the claimant worked through his breaks and falsified his tachograph records on 4 occasions, which constituted gross misconduct. In his absence, he made the decision to dismiss the claimant due to gross misconduct.

113. He advised the claimant of his right to appeal against the decision.

114. The claimant did submit an appeal against dismissal on 18 February 2022 (390). The basis of the appeal was essentially set out in 4 broad points:

    1. John McAndie used "an illegal bullying tactic" to get rid of drivers he did not like; the reason he wanted to get rid of the claimant, he said, was because he asked for a reasonable adjustment to be made which he said he was not prepared to do, and the implications of which he did not understand;

    2. The CCTV footage was used illegally;

    3. Prior to the disciplinary hearing, the claimant had asked if the respondent accepted his disability status, but they refused to answer before and during the hearing. He asserted that the Equality Act

2010 provided people with disabilities extra protection in terms of work evaluation and discipline; and

4. Mr Hogg stated at the disciplinary hearing that shunters did not require to use tachograph cards; if so, he queried why the law would apply to one group (such as himself) and not to others, like the shunters. He pointed out that he was not accused of an offence on the public highway.

115. The appeal hearing took place before Martin Cook on 14 March 2022. The claimant attended by Teams from his home, and Mr Cook was accompanied by Lisa Lambie, who took notes (444ff). Mr Cook went through the claimant's appeal letter with him. At the conclusion of the meeting Mr Cook considered it necessary to interview a number of individuals in order to investigate the points made by the claimant in his appeal. He spoke to Chris Shand (455), who explained why a manual correction required to be made to the claimant's tachograph record, and why this was not a matter for concern; John McAndie (462), who confirmed why he had gone into the claimant's hours, and why he had then investigated the matters which he had; Joanne Horne (459), who confirmed that she could not recall any mention of reasonable adjustments or disability in their conversation on 24 November 2021; Malcolm McGuiness (453), who conducted a return to work meeting with the claimant and could not recall any reference to disability or reasonable adjustments; and John McCluskey (473), who advised that he did not investigate the claimant's request for reasonable adjustments, though he was aware of it, but was clear in his view that the claimant had committed acts of gross misconduct with the tachograph record.

116. Mr Cook issued his decision by letter dated 28 April 2022 (437). He explained why it had taken him time to reach his decision, then set out the details of his own investigation. He sought to respond to the main points of the claimant's appeal, and then confirmed that his decision was to uphold the decision to dismiss him for gross misconduct. That concluded the appeal, and the decision was therefore final.

**Submissions**

117. Parties made submissions to the Tribunal. Those submissions were taken fully into account by the Tribunal in our deliberations, and are referred to in the course of our decision below.

**The Relevant Law**

118. Section 43A of the Employment Rights Act 1996 ("ERA") provides:

*"In this Act a 'protected disclosure' means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H."*

119. A qualifying disclosure is defined in section 43B as *"any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following:*

*a. That a criminal offence has been committed, is being committed or is likely to be committed;*
*b. That a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject;*
*c. That a miscarriage of justice has occurred, is occurring or is likely to occur;*
*d. That the health or safety of any individual has been, is being or is likely to be endangered;*
*e. That the environment has been, is being or is likely to be damaged; or*
*f. That information tending to show any matter falling within any one of the preceding paragraphs has been, or is likely to be deliberately concealed."*

120. Section 47B prohibits a worker who has made a protected disclosure from being subjected to any detriment by any act, or any deliberate failure to

act, by his employer done on the ground that the worker made a protected disclosure.

121. Helpful guidance is provided in the decision of **Blackbay Ventures Ltd (t/a Chemistree) v Gahir [2014] IRLR 416** at paragraph 98:

*"It may be helpful if we suggest the approach that should be taken by employment tribunals considering claims by employees for victimisation for having made protected disclosures.*

*1. Each disclosure should be identified by reference to date and content.*

*2. The alleged failure or likely failure to comply with a legal obligation, or matter giving rise to the health and safety of an individual having been or likely to be endangered or as the case may be should be identified.*

*3. The basis upon which the disclosure is said to be protected and qualifying should be addressed.*

*4. Each failure or likely failure should be separately identified.*

*5. Save in obvious cases if a breach of a legal obligation is asserted, the source of the obligation should be identified and capable of verification by reference for example to statute or regulation. It is not sufficient as here for the employment tribunal to simply lump together a number of complaints, some which may be culpable, but others of which may simply have been references to a check list of legal requirements or do not amount to disclosure of information tending to show breaches of legal obligations. Unless the employment tribunal undertakes this exercise it is impossible to know which failures or likely failures were regarded as culpable and which attracted the act or omission said to be the detriment suffered. If the employment tribunal adopts a rolled up approach it may not be possible to identify the date when the act or deliberate failure to act occurred as logically that date could not be earlier than the latest of act or deliberate failure to act relied upon and it will not be possible for the*

*Appeal Tribunal to understand whether, how or why the detriment suffered was as a result of any particular disclosure; it is of course proper for an employment tribunal to have regard to the cumulative effect of a no of complaints providing always have been identified as protected disclosures.*

*6. The employment tribunal should then determine whether or not the claimant had the reasonable belief referred to in s43B(1) and under the 'old law' whether each disclosure was made in good faith and under the 'new' law whether it was made in the public interest.*

*7. Where it is alleged that the claimant has suffered a detriment, short of dismissal it is necessary to identify the detriment in question and where relevant the date of the act or deliberate failure to act relied upon by the claimant. This is particularly important in the case of deliberate failures to act because unless the date of a deliberate failure to act can be ascertained by direct evidence the failure of the respondent to act is deemed to take place when the period expired within which he might reasonably have been expected to do the failed act.*

*8. The employment tribunal under the 'old law; should then determine whether or not the claimant acted in good faith and under the 'new' law whether the disclosure was made in the public interest."*

122. With regard to the claimant's claim that he was subjected to a detriment or detriments as a result of having made a protected disclosure or disclosures, Section 103A of ERA provides: *"An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure."*

123. Section 47B(1) of ERA provides: *"A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by*

*his employer done on the ground that the worker has made a protected disclosure."*

124. Section 20 of the 2010 Act sets out requirements which form part of the duty to make reasonable adjustments, and a person on whom that duty is imposed is to be known as A. The relevant sub-section for the purposes of this case is sub-section (3): *"The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage."*

125. Section 21 of the Equality Act 2010 provides as follows:

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

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

**Discussion and Decision**

126. It is necessary to establish the issues for determination in this case before proceeding to set out the decision of this Tribunal.

127. As has been noted above, the List of Issues helpfully produced by the respondent has not been agreed. However, it appears to us to be an accurate reflection of the claims which have been made, and so we consider that it is appropriate to approach the decision based upon these issues.

128. We would observe that during the course of the Hearing the respondent's representative appeared to have a serious concern that the Tribunal, in asking particular questions, was seeking to expand upon the claims made by the claimant, despite assurances to the contrary by the Employment Judge. The difficulty with his approach, however, was that there were

matters which arose under the claimant's complaint of disability discrimination that were broader than he appeared to accept, and as a result, it was necessary to explore with the claimant what his position was about some of these matters.

129. One point which is worth making at this stage, however, is that it was plainly of concern to the respondent that the Tribunal should not make any findings to the effect that the respondent had failed to make reasonable adjustments in respect of the claimant's disability in relation to the manner in which the disciplinary process was handled, or that the respondent failed to take account of the claimant's disability in relation to deciding what sanction should be applied. In his submission, when invited to respond to the claimant's own submission, Mr Britton stated that "the respondent would not be happy" if findings to this effect were made by the Tribunal. We were and are well aware of that concern, but the reality is that the claimant, an unrepresented party, requires to be given a degree of latitude in order that his claims may be heard, and he did make certain criticisms of the process which were relevant to his harassment claim under section 26 of the Equality Act 2010. It was necessary for the Tribunal to hear all evidence which may be relevant to the issues before us in order to ensure that the claimant's case was fully ventilated.

130. It was agreed during the course of the evidence in this case that the Hearing would be restricted to liability only, and that remedy would be determined if required at a separate Hearing. The issues have been adjusted accordingly.

131. In any event, and taking full account of the exchanges which are noted at the start of this Judgment about the claimant's attempt to include an allegation that his dismissal was an act of disability discrimination, we have concluded that the issues to be determined are as follows:

**1. Was the reason, or principal reason, for dismissal the claimant's conduct?**

**2. If not, was the claimant automatically unfairly dismissed on the grounds of having made a protected disclosure or protected disclosures?**

**3. Did the claimant make one or more qualifying disclosures as defined in section 43B of the Employment Rights Act 1996? The claimant relies upon his disclosure of "the illegal use of CCTV".**

**a. What did the claimant say or write? When? To whom?**

**b. Did he disclose information?**

**c. Did he believe that the disclosure of information was made in the public interest?**

**d. Was that belief reasonable?**

**e. Did he believe that it tended to show that:**

**i. a criminal offence had been, was being or was likely to be committed; and/or**

**ii. a person had failed, was failing or was likely to fail to comply with any legal obligation?**

**f. Was that belief reasonable?**

**g. If the claimant made a qualifying disclosure or disclosures, was it made to his employer?**

**4. Did the respondent subject the claimant to a detriment or detriments as a result of having made a protected disclosure or protected disclosures?**

**5. Did the respondent know, or ought they reasonably to have known, that the claimant had a disability? If so, from what date?**

**6. Did the respondent apply a provision, criterion or practice (PCP) to the claimant?**

7. **Did the PCP put the claimant at a substantial disadvantage compared to a person without the claimant's disability?**

8. **Did the respondent know, or ought they reasonably to have known, that the claimant was likely to be placed at such disadvantage?**

9. **What steps could have been taken to avoid the disadvantage?**

10. **Was it reasonable for the respondent to have taken those steps, and when?**

11. **Did the respondent fail to take those steps?**

12. **Did the respondent do the following things:**

    a. **Refuse to answer any emails or give an official response to the claimant's request for a reasonable adjustment? (John McAndie)**

    b. **Suspend the claimant on 6 December 2021?**

    c. **Delay the investigation hearing and refuse to allow it to be carried out by Zoom or other remote means? (John McCluskey)**

    d. **Refuse to listen to the claimant's defence? (John McCluskey)**

    e. **Fail to investigate issues? (John McCluskey)**

    f. **Look through CCTV footage in order to find something for which they could discipline the claimant? (John McAndie and John McCluskey)**

    g. **Fail to record or provide proof of the records of CCTV usage to the claimant? (John McAndie and John McCluskey)**

    h. **Use old CCTV footage outwith the terms of company policy? (John McAndie and John McCluskey)**

    i. **Badger the claimant to look at CCTV footage or images?**

**13. If so, was that unwanted conduct?**

**14. Did it relate to disability?**

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

**16. Did the claimant do a protected act, namely request a reasonable adjustment?**

**17. Did the respondent subject the claimant to a detriment, by his manager?**

**18. If so, was it because he did a protected act?**

132. We have adjusted the precise terms of the draft List of Issues to attempt to clarify and make them more concise, but essentially these are the issues proposed by the respondent with which we agree.

133. We take the issues in turn.

**1. Was the reason, or principal reason, for dismissal the claimant's conduct?**

**2. If not, was the claimant automatically unfairly dismissed on the grounds of having made a protected disclosure or protected disclosures?**

134. Since both of these issues relate to the dismissal, we address them together.

135. We observe, however, that the claimant's claim does not include a complaint that his dismissal was an act of disability discrimination. That matter has been resolved and dealt with, and the claimant accepted the terms of the Tribunal's determination on that matter when it was raised in the course of the Hearing.

136. In deciding what the reason for dismissal in this case was, we require to consider the allegation which was before Mr Hogg, the dismissing officer, when he heard the disciplinary hearing in respect of the claimant. The allegation was, put short, that the claimant had been guilty, on a number of occasions, of falsifying his tachograph information. That the respondent regarded this as a serious matter is beyond doubt. Mr McAndie and Mr McCluskey both readily saw this as potentially very serious, given their knowledge and experience of the importance of accurate tachograph recording.

137. They conveyed to the Tribunal the importance – not disputed by the claimant – that tachograph information should be accurate at all times, given the priority of ensuring that drivers do not work excessive hours and thus place themselves or others at risk due to tiredness. Tachograph recording is carried out for a number of reasons, but primacy is given to the need to ensure that the health and safety of drivers and other road users is not endangered by excessive hours.

138. Mr Hogg approached this matter in a very straightforward way. He did not read the material before him prior to the disciplinary hearing, so as to avoid reaching any premature conclusions. In our judgment, he cannot be criticised for that approach, so long as there is evidence that during and following the hearing he was able to grasp the detail of the allegations, the information presented both in support of and in defence of those allegations and the claimant's position on each of the points raised.

139. We take care not to approach this question on the basis of fairness under section 94 of the Employment Rights Act 1996, since the claimant lacked the necessary minimum qualifying period on which to base a claim of "ordinary" unfair dismissal. The issue before us is what the reason, or principal reason if more than one, for dismissal was in this case.

140. In our judgment, the reason for dismissal was clearly that the claimant was found by Mr Hogg, based on the comprehensive evidence provided to him by Mr McCluskey in his investigation, to have falsified his

tachograph information. Mr McCluskey's evidence on the interpretation of the OPTAC records was of considerable assistance and impressed itself forcibly upon the minds of the Tribunal. Mr Hogg was readily persuaded that the claimant had been seeking to manipulate the tachograph information for reasons which, while never explained fully, appeared to suggest that he was trying to shorten his working day by engaging in work during his break.

141. It was very telling, in our judgment, that the claimant's approach during the investigation and the disciplinary hearing was to challenge the processes being followed and to argue at each stage with decisions being taken by the respondent. What was missing from the claimant's approach was a direct and clear denial of the allegations, or an explanation given by him for the discrepancies in the information provided. He was prepared to accept that Mr McCluskey's explanation, in response to one of his own questions in cross-examination, was an excellent one, and while he sought to provide alternative explanations for the evidence of the OPTAC report, these were comprehensively dealt with by Mr McCluskey.

142. In addition, we noted that in the first set of dates upon which this Hearing took place, the claimant was insistent, as he was in the internal processes, that the tachograph rules did not apply to him when he was not on a public highway. However, when the Hearing resumed, he confirmed that he had done some further research and had accepted that what Mr McCluskey had said was correct, namely that if a driver uses the tachograph on the public highway at any point during the day, the rules still applied even when he had taken his vehicle on to the respondent's premises. This gave rise to some concern on our part about the claimant's insistence that the respondent was wrong not only in this matter but in a number of other matters, and led us to conclude that we had to treat the claimant's statements with a degree of caution.

143. We were therefore left in no doubt that the reason for the claimant's dismissal – and we have found that there was only one – was that he had been found to have falsified his tachograph records. That this attracted

the sanction of dismissal was entirely reasonable, in our judgment, given the importance of maintaining accurate records, both internally for the protection of drivers and externally to satisfy regulatory scrutiny by the DVLA and others.

144. We found it quite understandable that the respondent did not accept the claimant's protestations nor his criticisms of the processes followed. The claimant took an extraordinarily combative and uncooperative stance throughout the internal processes, culminating in conduct which can only be described as obstructive in the disciplinary hearing. We address this further below.

145. It is necessary then to address the question of whether the reason for the claimant's dismissal was, as the claimant sought to argue, that he had made protected disclosures to the respondent.

146. We require to address the question of whether or not the claimant actually did make any protected disclosures below, but in essence, he was suggesting that the reason for his dismissal was that he had advised the respondent that their use of the CCTV footage or images was illegal, and that having done so, they were determined to see him removed from their employment.

147. In our view, the claimant's position on this was very unclear and confused.

148. Firstly, in his questioning of Mr Hogg, the claimant did not put to Mr Hogg the suggestion that his dismissal was caused by having made protected disclosures, but did suggest to him that the decision was reached because he had requested reasonable adjustments in respect of his disability. That latter suggestion does not, as has been established, form part of his claim before this Tribunal, but it was an indication of his position that he did not put to Mr Hogg that the disclosures formed part of the reason for his dismissal. The Employment Judge put this to Mr Hogg to ensure that the matter was complete, and Mr Hogg denied it without

hesitation. We accepted Mr Hogg to be a credible and straightforward witness, and were prepared to believe his evidence on this point.

149. Secondly, the claimant clearly believed that Mr McAndie was at the root of his dismissal, and was motivated not by any protected disclosure, which on any view was not made to him or while he was involved in the process, but by the fact that he had requested reasonable adjustments which he did not want to grant him. Since the concerns which led to the claimant's dismissal arose from the suspicions aroused in Mr McAndie about the tachograph recording by the claimant, which suspicions were confirmed by Mr McCluskey and established by Mr Hogg, the disclosures allegedly raised by the claimant about the illegal use of CCTV equipment, footage or images were background material which did not in any way influence the progress of the investigation into the allegations raised by Mr McAndie.

150. Thirdly, the claimant's allegations about the "illegal" use of CCTV were unclear, were investigated and were responded to openly by the respondent. In the response to the allegations, Ms Fletcher set out her explanation and invited the claimant to escalate the matter to the ICO should he choose to do so. There is simply no evidence that the raising of the allegations had any impact upon the disciplinary process at all.

151. It is our judgment that regardless of any protected disclosures about the use of CCTV footage, the respondent would have dismissed the claimant owing to their concerns about the seriousness of his actions in falsifying the tachograph information.

152. It is impossible to avoid the conclusion that the claimant's actions in criticising the respondent for having relied upon CCTV images were an attempt to distract them from the central issue in the case, which was the subject of their investigation.

153. Accordingly, we have concluded that the claimant was not dismissed for any reason relating to protected disclosures which he raised with the respondent, and that it played no part in the decision to dismiss him. Not

only did Mr Hogg quite credibly deny that this was the case, there was a considerable body of evidence leading to the decision to dismiss on the grounds of gross misconduct, which the Tribunal was readily able to accept as the true basis for the dismissal.

**3. Did the claimant make one or more qualifying disclosures as defined in section 43B of the Employment Rights Act 1996? The claimant relies upon his disclosure of "the illegal use of CCTV".**

**a. What did the claimant say or write? When? To whom?**

**b. Did he disclose information?**

**c. Did he believe that the disclosure of information was made in the public interest?**

**d. Was that belief reasonable?**

**e. Did he believe that it tended to show that:**

**i. a criminal offence had been, was being or was likely to be committed; and/or**

**ii. a person had failed, was failing or was likely to fail to comply with any legal obligation?**

**f. Was that belief reasonable?**

**g. If the claimant made a qualifying disclosure or disclosures, was it made to his employer?**

**4. Did the respondent subject the claimant to a detriment or detriments as a result of having made a protected disclosure or protected disclosures?**

154. Again, we take these issues together.

155. The claimant's position was that he raised with the respondent their illegal use of CCTV facilities in an email to the respondent in January 2022. We

take this to be a reference to his email to John McCluskey on 12 January 2022 (209).

156. Essentially, the points made by the claimant can be summarised as follows:

- He understood that CCTV footage should be managed by one person and not be accessible by [others];
- Excessive use of manual entries was not an acceptable reason under “data protection” to access CCTV footage;
- The examples were clearly trolled (perhaps meaning “trawled”) through by Mr McAndie looking for a reason to discipline him;
- Signage at the Newbridge branch is inadequate.

157. Considering the first of these points, this was a simple statement of his understanding of who should have access to CCTV footage. It did not amount to the disclosure of information, but a statement of principle he understood to apply. In our judgment, this was not a protected disclosure.

158. The second point amounted to an assertion that the fact that there may have been excessive use of manual entries should not have permitted the respondent to have access to CCTV images. It is, in our view, possible to view this as a disclosure of information, that there was an inappropriate basis for the viewing of CCTV footage held by the respondent. The basis for saying it was inappropriate appears to be that the claimant considered that there was a breach of data protection principles, or regulations, though he did not expand upon that.

159. The third point, in our judgment, is not a qualifying disclosure on any measure, but an allegation that, in his case, his line manager acted in such a way as to demonstrate a pre-determined view that he should be dismissed. Leaving aside any question about whether this could be reasonably believed to be in the public interest, there is no information

disclosed by the claimant here. He did not know whether or not this was Mr McAndie's motivation, but suspected it was so and made an allegation accordingly. In our judgment, this does not amount to a qualifying disclosure.

160. The fourth point is that signage at the Newbridge branch was inadequate, in the claimant's opinion. Again, this is not a disclosure of information, but the expression of a view and, at its highest, an allegation by him that the signage shown on the photographs was not adequate, though what he meant by that remains unclear from the terms of his email.

161. Of the points made in that email, then, only one amounts, in our judgment, to the disclosure of information, and that related to whether there was justification, on data protection grounds, in scrutinising the CCTV footage given the allegation that there had been excessive use of manual entries. It should be said that we do not accept that that was the reason why the respondent scrutinised the footage; the reason was that they believed that the claimant had falsified his tachograph, and had worked while it was set to break. This was a serious offence, and the claimant has never denied that.

162. The difficulty in assessing whether the claimant had a reasonable belief that the disclosure of such information was in the public interest is that he was not clear on why he maintained that it was wrong of the respondent to view this footage. He does not point to any particular legal provision which they are said to have breached. The claimant was prone, in this case, to use legal terms in rather a vague way, as if to suggest that his arguments carried greater weight as a result. However, it appears to us that, whatever he meant by this, he could not reasonably believe that this disclosure was in the public interest. In our judgment, we would go further and state that he made this disclosure for his own personal reasons, to try to prevent the respondent relying upon evidence which, ultimately, confirmed their suspicions.

163. The respondent's own CCTV policies confirm that the use of CCTV is for, among other things, the prevention, identification and reduction of crime, and the safety and security of its employees. They argue that falsification of tachograph records is a crime, and that the safety of their employees relies upon them complying with the rules relating to working time and rest breaks.

164. There is no basis, in our judgment, for the claimant's assertion that the use of CCTV footage in these circumstances, in his disciplinary case, could be a matter which was in the public interest. In our view, he had no regard for the public interest. This was a matter which concerned him, and he was seeking to prevent the respondent relying upon CCTV footage in order to avoid the consequences which would come upon him as a result.

165. It was plainly made known to employees that CCTV cameras were in operation in the depot, the signs making clear where they were, and employees were advised that information captured on security systems including CCTV could be relied upon (236).

166. As a result, not only were we forced to conclude that this was not a disclosure in the public interest, but also that the claimant did not identify a breach of any legal obligation by the respondent nor any criminal offence by them in so doing.

167. The claimant did maintain that the footage should not have been stored beyond 31 days in terms of the respondent's own CCTV standard. Again, however, that is not quite accurate. The CCTV standard stated (111) that *"Images are retained for a period of 31 days only (unless a longer period of retention is necessary for legitimate or operational requirements)."* It was not a blanket prohibition on the retention of such images for more than 31 days; such images could be retained for longer for legitimate or operational requirements. In our judgment, the investigation of a disciplinary offence, which may amount to a breach of the law, amounts to a legitimate requirement. The claimant has not been able to point to

any breach of a legal obligation committed by the respondent in retaining the images for the purpose of the investigation.

168. It is of note, in our view, that the claimant was informed by the respondent that if he were unhappy with their stance, he could raise the matter with the ICO. There was no evidence before us to indicate that he had done so, or that if he had, the ICO had been critical of the respondent's actions.

169. It is our conclusion, therefore, that the claimant did not make a protected disclosure at any stage in relation to the respondent's use of CCTV footage.

170. As a result, the claimant's claim that he suffered detriments as a result of having made a protected disclosure must fail.

**5. Did the respondent know, or ought they reasonably to have known, that the claimant had a disability? If so, from what date?**

171. The claimant's condition of depression and anxiety is accepted by the respondent to be a disability within the meaning of section 6 of the Equality Act 2010. However, the respondent does not accept that at the material time, when the claimant sought a reasonable adjustment, namely a cap on his daily hours, they knew or ought reasonably to have known that the claimant was a disabled person.

172. The claimant has, throughout these proceedings, expressed himself with great certainty that the respondent knew or should have known that he was a disabled person.

173. He referred to his letter to Mr McAndie on 24 November 2021, in which he stated (122) that *"I suffer from a mental health disability namely anxiety. My condition is long term and treated with Fluoxetine prescribed by the doctor."* He went on to describe the effect of long hours upon him, *"affecting my mental health, putting me under excessive stress and anxiety."*

174. He emailed HR on 30 November (125) and stated that he was *"a long term disabled person on medication".*

175. Ms McIntyre, in HR, emailed Laura Fletcher on 1 December 2021 to say that she had concerns based on his letter, and felt strongly that he should be referred to OH for a medical perspective.

176. Accordingly, at that point, the respondent had no medical report from the claimant. However, shortly thereafter, a Statement of Fitness for Work was provided by him (134) in which his GP indicated that he was suffering from anxiety and depression, and that he would be fit for work subject to reduced hours to help with his current symptoms, for a month; in addition, a letter was provided by his GP (133) stating that he *"suffers from severe symptoms of anxiety and finds that these are exacerbated by wearing a mask/face-covering."* That letter from the GP appeared to have been directed at persuading the respondent to allow the claimant not to wear a face mask, rather than supporting his request for reduced hours.

177. At that stage, when he submitted his request for a reasonable adjustment, then, the respondent did not know that the claimant was suffering from a disability, though they acknowledged the need to refer him to OH, doubtless to obtain a view from them as to whether or not he met the statutory test.

178. According to a note by Ms Fletcher, to which she spoke in evidence, the claimant told her that he had suffered (from this condition) for 7 months, and had been on medication for that period (134B).

179. The question, therefore, for the Tribunal to determine is whether, at that point in early December 2021, the respondent ought reasonably to have known that the claimant was suffering from a mental or physical impairment which had a substantial, adverse, long-term effect on his ability to carry out normal day-to-day activities.

180. For a condition to be “substantial”, it must be more than trivial. For it to be long-term, it must have lasted for more than 12 months, or be likely to do so.

181. This is a finely-balanced issue. We heard no evidence about the effect of his condition upon his ability to carry out normal day-to-day activities, other than the claimant’s own statements about the effect of longer hours upon him due to his condition and the GP’s comments about him wearing a mask in the workplace. There is no doubt that the respondent was made aware that the claimant had been diagnosed with severe anxiety, and had told the respondent that he had suffered from that condition for 7 months; and that the GP suggested reducing his hours for a period of one month, in the first instance, to help improve the situation.

182. The respondent’s position is that there was insufficient information available to them at that point to allow them to conclude that the claimant was suffering from a disability within the statutory meaning. We are not unsympathetic with that position, but it is our conclusion, with some hesitation, that there was sufficient information to allow them to act as if he did have a disability, and that indeed they did so. They took on board his application for reasonable adjustments, and determined that the next step would be to refer him to OH for a medical assessment.

183. The reason for our hesitation is the uncertainty surrounding the likely duration of his condition. On the evidence we have, and the respondent had at the time, the condition had not lasted for 12 months, but for 7; and the GP was suggesting measures which may improve matters within a month or so. However, since those measures were not put in place by the respondent, for reasons which we shall address below, it is our conclusion that the respondent ought reasonably to have been aware that on the evidence the claimant was suffering from a significant mental health condition, namely anxiety and depression, and that it had lasted 7 months to date notwithstanding the prescription of Fluoxetine. In our judgment, given the need, according to the GP, to make reasonable adjustments for the claimant, by reducing his hours, the respondent could

reasonably be taken to have understood that this significant condition was likely to continue unless further action was taken, and could have anticipated that the condition would last longer than 12 months.

184. Two points require to be made at this stage: firstly, the claimant's own insistence that he was suffering from a disability would not, of itself, be sufficient to justify this finding, but the addition of medical evidence persuaded the Tribunal of this conclusion; and secondly, the claimant made a number of assertions about his medical condition and the way in which the respondent should have handled that in the disciplinary process.

185. We make the following points about these assertions:

- It was no part of the claimant's claim that he was discriminated against in relation to his dismissal, nor that dismissal was a discriminatory act;

- It was no part of the claimant's claim that they should have made reasonable adjustments for the claimant in the disciplinary process or in the decision to dismiss him; the reasonable adjustment relied upon in this case was the request for reduction or capping of his daily hours, not that the respondent should have made adjustments to the investigation or disciplinary hearings;

- The Tribunal was deeply unimpressed with the claimant's questioning of senior managers Mr Hogg and Mr Cook, when he put to them both that his behaviour in the disciplinary and appeal hearings was so egregious that it should have been obvious to them that he was suffering from a mental health disability. There is no proper basis for such a suggestion, and in any event, it was of no relevance to the claims as pled. Neither Mr Cook nor Mr Hogg professed themselves to have any medical knowledge, and it is grossly unfair to allege that

they should have known he was unwell due to the manner in which he behaved during the hearings;

- In any event, it appeared to us that notwithstanding the claimant's illness, he conducted himself in an obstructive and unpleasant manner during hearings, despite being treated with great patience and a degree of sympathy by the managers. It would hardly be surprising if a manager were to interpret such behaviour not as a symptom of a disability but, in this case, simply obstructive and unpleasant conduct designed to distract and deflect managers from their central task of deciding whether an employee was guilty of gross misconduct;

- Finally, the claimant accepted that he did not raise his mental health as a reason for his behaviour during the hearings, nor did he seek any specific adjustments during those hearing as a result of his disability.

186. While these are not matters which are, strictly speaking, before the Tribunal, we address them for the avoidance of doubt and to deal with issues which were plainly important to the claimant, notwithstanding that they did not form part of the claim. At the same time, we considered it important to allow the claimant to express himself on these points, however misguidedly he did so, since he had presented a claim for harassment under section 26 of the Equality Act 2010 which does raise some issues about the conduct of the hearings.

187. Nevertheless, we have concluded that the respondent ought reasonably to have known that the claimant was disabled at the point when he requested the reasonable adjustments, by early December 2021 when the Statement of Fitness for Work and the GP letter were available, namely on 3 December.

**6. Did the respondent apply a provision, criterion or practice (PCP) to the claimant?**

7. **Did the PCP put the claimant at a substantial disadvantage compared to a person without the claimant's disability?**

8. **Did the respondent know, or ought they reasonably to have known, that the claimant was likely to be placed at such disadvantage?**

9. **What steps could have been taken to avoid the disadvantage?**

10. **Was it reasonable for the respondent to have taken those steps, and when?**

11. **Did the respondent fail to take those steps?**

188. The claimant asserted that the PCP applied to him was that he had to work days sometimes exceeding 11 hours, and the requirement in his contract to work a minimum of 48 hours per week without set hours per day.

189. The respondent accepted that the varying length of working days may amount to a PCP, but did not admit that that placed the claimant at a substantial disadvantage compared with others not suffering from his disability. A 48 hour week was not regularly applied in practice, but it was accepted by the respondent that the fluctuating hours each day may amount to a PCP.

190. The respondent's position was that there was no clear evidence from the claimant as to the substantial disadvantage he alleged, other than that he said that the hours did not suit him due to his anxiety. In his letter of 24 November 2021, the claimant said that if he had particularly busy days or days when the planning was not quite right, he would find himself panicking about the day ahead; the hours expected of him would put him under excessive stress and anxiety.

191. The difficulty for the Tribunal in determining whether the claimant was placed at a substantial disadvantage by the PCP is that there was very little evidence available about this. The claimant, as the respondent

submitted, said little about it in his evidence, and there was no medical information made available to assist the Tribunal on this point. Further, the question of substantial disadvantage was not resolved by the respondent, who had received the request for reasonable adjustments but did not take action on it on the basis that it was superseded by the claimant's suspension. His absence from the workplace meant that there was no need at that point to determine whether or not the adjustments should be put in place, and there is no doubt that before agreeing to do so, they would have sought their own medical advice from OH.

192. However, on the basis that we accept that the claimant told the respondent in November 2021 that the uncertainty and length of the hours to be worked created in him a degree of anxiety, we considered whether or not the adjustment would have dealt with the disadvantage to the claimant. It may have done so, but given the severity of his anxiety, it was never clear to us whether or not the difficulties which he experienced at work were truly caused by the length or uncertainty of his working days, or by other aspects of his work. An OH assessment would have clarified that matter, and also established whether or not it would have been reasonable for the respondent to have made those adjustments.

193. Where the claimant's claim falters, in this respect, is at the point of addressing the question of whether the respondent failed to make the reasonable adjustment. It is true that the respondent did not agree to his request; however, nor did they reject it. An employer must be given reasonable time to consider and put in place an adjustment, having taken advice as to its suitability and likely effectiveness. The purpose of an adjustment is to enable the claimant to attend work and carry out that work without disadvantage caused by a disability. He requested the adjustment on 24 November 2021 – though his letter was not seen by the respondent until 25 November – and he was suspended from duty on 6 December (142) pending an investigation into gross misconduct. He did not return to work thereafter.

194. On the evidence before us, we do not conclude that the respondent failed to make a reasonable adjustment by placing a cap on the claimant's hours per day. Rather, they received a request from him to this effect, and were in the process of beginning to consider it when events overtook them and Mr McAndie decided to suspend the claimant. Since that removed him from duty, there was no immediate concern about ensuring his ability to attend work at that stage. It would be grossly unjust, in our judgment, to hold that the respondent had failed to make a reasonable adjustment, when the evidence does not ultimately convince us that it can be found that it would have been a reasonable adjustment, nor that it would have dealt with any disadvantage accruing to the claimant as a result of the application of the PCP. The respondent, as we have found, did not refuse to put in place such an adjustment, but simply never reached the point of requiring to make a decision about it as it was overtaken by other events.

195. Accordingly, we do not find that the respondent failed to make a reasonable adjustment in respect of the claimant, and that claim must fail.

**12. Did the respondent do the following things:**

***a.*** **Refuse to answer any emails or give an official response to the claimant's request for a reasonable adjustment? (John McAndie)**

***b.*** **Suspend the claimant on 6 December 2021?**

***c.*** **Delay the investigation hearing and refuse to allow it to be carried out by Zoom or other remote means? (John McCluskey)**

***d.*** **Refuse to listen to the claimant's defence? (John McCluskey)**

***e.*** **Fail to investigate issues? (John McCluskey)**

***f.*** **Look through CCTV footage in order to find something for which they could discipline the claimant? (John McAndie and John McCluskey)**

***g.*** **Fail to record or provide proof of the records of CCTV usage to the claimant? (John McAndie and John McCluskey)**

***h.*** **Use old CCTV footage outwith the terms of company policy? (John McAndie and John McCluskey)**

***i.*** **Badger the claimant to look at CCTV footage or images?**

**13. If so, was that unwanted conduct?**

**14. Did it relate to disability?**

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

196. The claimant complained that a number of acts or omissions on the part of the respondent amounted to acts of harassment under section 26 of the Equality Act 2010, on the grounds of disability.

197. We considered each of the alleged acts in turn.

198. We take the view that Mr McAndie did not refuse to answer emails from the claimant. Mr McAndie emerged from his evidence as a straightforward witness, and a manager who was comfortable dealing with the transport requirements of his job. He was less comfortable addressing a request for reasonable adjustments. He clearly labelled the request wrongly, and misunderstood it as a flexible working request. However, he acted appropriately, in our judgment, by passing the matter to HR to deal with, regarding that as a technical issue to be dealt with by those who were specialist in the field. There was no suggestion that he refused to answer emails from the claimant. We concluded that he regarded that matter as out of his hands, and being dealt with by HR, and so did not believe he had to correspond directly with the claimant until further instructed.

199. As to the allegation that he refused to give an official response to the claimant's request for a reasonable adjustment, we do not find that he did this, either. He handed the matter over to HR and considered that they would take the matter forward. It was clear from his evidence that he regarded himself as having discharged his obligations at that point. There was no refusal to give an official response; he simply placed the matter in the hands of HR.

200. Mr McAndie could have communicated more effectively with the claimant about these matters, but any failure on his part was, in our judgment, inadvertent, and certainly did not amount to a refusal to act on the request.

201. The claimant persistently alleged before us that Mr McAndie's motivation was to find a reason to dismiss him from the organisation; that he was "desperate" to do so. We found this an entirely baseless allegation. There is no reason for us to accept that Mr McAndie was determined from the outset to dismiss the claimant. It was not within his control to do so, in any event. He was the claimant's line manager, and was initially charged with investigating the concerns which he had uncovered relating to the claimant's tachograph records. He was replaced by Mr McCluskey when the claimant raised a grievance against him, and took no further part in the decision making process, other than to be interviewed by Mr Cook as part of his appeal. We could find no evidence that Mr McAndie was doing other than his job in investigating the concerns which he had about the claimant's tachograph records, concerns which, in our view, were amply justified by the subsequent investigation and decisions taken in this case.

202. The next act of which the claimant complained was his suspension on 6 December 2021. The respondent did suspend the claimant on that date.

203. The claimant complained that Mr McCluskey delayed the investigation meeting and refused to allow it to take place over Zoom. It is correct that Mr McCluskey was not willing to allow the investigation meeting to take place over Zoom, on the basis that he wanted to be able to show the

claimant CCTV footage. There was a short delay as a result. It is correct to say that there was no CCTV footage available to show the claimant, though images from the CCTV were shown as still photographs.

204. The claimant complained that Mr McCluskey refused to listen to the claimant's defence. It appears that this is a reference to two possible points, though it is not entirely clear. Firstly, the claimant persistently objected to the use of CCTV footage, or images, as inappropriate; and secondly, he kept insisting that the respondent confirmed whether or not they regarded him as disabled within the meaning of the Equality Act 2010.

205. In our judgment, neither of these amounted to defences. They were issues which the claimant was raising as objections to the evidence being relied upon, and to mitigate any findings against him. He regularly suggested that the Equality Act protected staff from disciplinary matters. He took that from a document whose provenance was unclear. What he appeared to suggest (though it did not form part of his claim) was that since he had a disability, that should have prevented or constrained the respondent from taking disciplinary action against him. We found this rather an extraordinary suggestion. It was unclear whether he meant that his disability played a part in his wrongdoing – that because he was disabled, his judgement or his honesty was somehow diminished, and that that therefore amounted to a defence to any allegations laid against him – or that if the respondent found him guilty of the allegations, his disability should provide them with sufficient mitigation that no penalty should be applied. Neither of these was enunciated either in the investigatory, disciplinary or appeal hearings, other than by the claimant saying that he was protected by the Equality Act as a disabled person.

206. In our judgment, these statements did not amount to a defence to the allegations. Indeed, it was not possible to discern any defence to the allegations presented by the claimant. He approached the process by seeking to undermine any justification that the respondent might have in taking action against him; but he did not, so far as can be established

from the notes of the meetings, deny that he had been guilty of falsifying his tachograph records. He suggested a number of explanations for what could have been shown there but at no stage did he explicitly say that he had not done what was alleged.

207. In any event, and leaving that point aside, we concluded that the respondent, in the form of Mr McCluskey not only did not refuse to listen to the claimant's defence, but also and further attempted to give the claimant an opportunity to defend himself.

208. It was our assessment that the claimant became so taken up with the assertion of wrongdoing on the part of the respondent that he failed properly to address the allegations made against him. He acted in a way that could only be interpreted as an extended attempt to deflect attention away from his own actions, and to impress upon his former employers his superior understanding of different aspects of the law.

209. His next criticism was that John McCluskey did not investigate issues, which is understood to mean that he failed to take up the claimant's persistent demand that he take into account the grievance which he had lodged. Mr McCluskey did investigate the allegations in relation to the use of the claimant's tachograph, which was the task he was given when appointed as the investigating officer. In his further particulars, the claimant stated (36): *"ACAS COP seems to say if a grievance is raised the disciplinary should be halted until the grievance is investigated."*

210. The ACAS Code of Practice on Disciplinary and Grievance Procedures (2015) provides, at paragraph 46: *"Where an employee raises a grievance during a disciplinary process the disciplinary process may be temporarily suspended in order to deal with the grievance. Where the grievance and disciplinary cases are related it may be appropriate to deal with both issues concurrently."*

211. Mr McCluskey did not fail to deal with the claimant's grievance. He was not responsible primarily for handling the grievance, but he indicated on more than one occasion in the investigation hearing that if anything came

up which was relevant to his investigation related to the grievance (which he had not seen) then he would investigate it (213).

212. That gave the claimant the opportunity to raise aspects of his grievance which he considered to be related to the disciplinary issues during the course of the hearing with Mr McCluskey. He did not take that opportunity, as, once more, he was determined to present this an unsatisfactory aspect of the process rather than to resolve the issue in the manner opened up by Mr McCluskey.

213. As a result, we simply did not accept that Mr McCluskey failed to investigate issues, in relation to his handling of the disciplinary investigation.

214. The claimant complained that Mr McAndie and Mr McCluskey looked through CCTV footage for something to discipline the claimant for; and that they continued with the investigation despite the footage no longer being available.

215. In our judgment, this is a baseless accusation. We have already indicated that we found Mr McAndie to be a straightforward witness, and accepted his explanation that he went to check the claimant's tachograph records in order to establish what hours he was actually working prior to full consideration of his application for reasonable adjustments; that raised suspicions in his mind, from which he carried out further investigations, including viewing CCTV footage and images to see if they clarified what the claimant was doing at particular times and dates. Mr McAndie was plainly not motivated to try to have the claimant disciplined, and in any event the matter was not to be decided by him, particularly once the grievance had been raised and he required to be replaced as the investigation manager.

216. Mr McCluskey was an impressive witness. His grasp and understanding of the tachograph system was detailed and of great assistance to the Tribunal, and he was able to explain his concerns about the evidence without hesitation or uncertainty. He treated the claimant with respect

during questioning, and answered each question with assurance. He said that he viewed the CCTV footage as secondary evidence, which could help the claimant to explain why he had done what he did. It seemed to us that Mr McCluskey wished to conduct a full and comprehensive investigation, and he proceeded where the facts took him.

217. In his cross-examination of Mr McCluskey the claimant did not challenge him about having deliberately looked at the CCTV footage with a view to finding material on which to discipline the claimant. In fact, when he raised the fact that during the investigation meeting he (the claimant) had said that it was a “witch hunt”, he did it with a view to persuading Mr McCluskey that that was evidence that he was suffering from an illness.

218. We were not persuaded that either Mr McAndie or Mr McCluskey were acting in bad faith when they conducted the investigation into the claimant’s conduct. Mr McCluskey’s comprehensive explanation of what he had done wrong demonstrated that they were justified in carrying out that investigation. It is of importance to note that neither of them took any decisions about the claimant’s employment, but simply started and presented the investigation to the disciplinary hearing.

219. The claimant then complained that Mr McAndie and Mr McCluskey failed to record or provide proof of the records of CCTV usage to the claimant. In our judgment, there was no evidence about this to allow us to conclude that this was in any way relevant to their investigation. Once again, it appeared to us to be an attempt by the claimant to draw attention to what he saw as failures in the respondent’s processes, in order to deflect their focus from the allegations made against him. There was, in our view, no requirement for them to answer the claimant’s questions about the process. Nothing which the respondent did prevented the claimant from engaging with the evidence which was produced in the investigation and, if he had one, from presenting a defence to the allegations.

220. Mr McAndie and Mr McCluskey used old footage outwith the terms of company policy. We have addressed this point above, but essentially we considered that retaining the still images as part of the investigation material was a legitimate purpose for which the respondent's policy permitted that material beyond 31 days.

221. Finally, the claimant complained that the respondent, presumably Mr McCluskey, badgered him to look at the CCTV images.

222. We do not accept that this was what happened. In fact, Mr McCluskey was pressing the claimant to consider the evidence so that he could provide an explanation about what was shown, in the context of the other information which had been presented. Mr McCluskey asked the claimant to look at a number of images which were available as part of the evidence in the investigation, and each time the claimant simply refused to do so. In our judgment, Mr McCluskey did not badger the claimant, but urged him to engage with the process and the evidence available.

223. Throughout the process, the claimant sought to argue that the times and dates shown on the images may have been wrong. He requested maintenance records going back two years in order to be satisfied that the system had been properly checked and correctly calibrated. However, in our judgment, there is no reason why the respondent should accede to such a request. There was no evidence whatsoever that the timings and dates on the images were incorrect: indeed, they tallied with the OPTAC reports. The claimant was speculating and his request amounted to a fishing exercise. The respondent was quite entitled to view the information on the images as sound and reliable.

224. We have found that the respondent did suspend the claimant on 6 December 2021, and that they may not have provided the comprehensive proof which the claimant wanted to see about the provenance of the CCTV system. The other complaints are not found to have happened as alleged.

225. The next question to address about these two matters were whether they amounted to unwanted conduct.

226. Suspending the claimant was plainly unwanted conduct; it was a decision which angered him. Not providing the claimant with the proof of the records of the CCTV system (that is, the maintenance records, training records etc) was also unwanted conduct, in that the claimant wanted a large amount of material from the respondent about the CCTV system and they did not provide it to him

227. Having established that these were examples of unwanted conduct, the next question is whether or not they were related to the claimant's disability.

228. In our judgment, the claimant has entirely failed to demonstrate that the decision to suspend him, taken by Mr McAndie was related to disability. Mr McAndie reviewed the claimant's working hours in consequence of his request for reasonable adjustments. The decision to suspend him was taken not because he had requested reasonable adjustments but because the information on the system about his working hours gave rise to suspicions that he was falsifying his tachograph records. That decision was unrelated to his disability.

229. He has also failed to demonstrate that Mr McCluskey's response to his request for maintenance and other records relating to the CCTV system was related to his disability. Mr McCluskey took no view on whether or not the claimant was a disabled person within the meaning of the 2010 Act. It played no part in his consideration of the requests the claimant was making. In our view Mr McCluskey's response was entirely justified, and was unrelated to the claimant's disability.

230. In any event, we did not consider that either suspending the claimant or failing to provide him with the proof relating to the CCTV system which he wanted could amount to conduct with the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. The decisions which

were taken were justified on the part of the respondent; there was no evidence whatsoever that either decision was taken with the purpose of creating such an environment for the claimant or violating his dignity; and there is no basis for suggesting that it had that effect.

231. That the claimant was angered by the respondent's actions does not mean that their actions amounted to harassment on the grounds of disability. They acted appropriately at each stage of the investigation in order to focus on the relevant matters arising. Suspending the claimant was an indication to him that they took a serious view of falsifying tachograph records. Had they not suspended him, he may well have had cause to complain that he had no warning that his employment might be ended. Suspension is a neutral act within the respondent's disciplinary policy, and was imposed on full pay.

232. In our judgment, the respondent, and Mr McAndie and Mr McCluskey, did not harass the claimant on the grounds of disability under section 26 of the Equality Act 2010, and therefore that claim is dismissed.

**16. Did the claimant do a protected act, namely request a reasonable adjustment?**

**17. Did the respondent subject the claimant to a detriment, by his manager?**

**18. If so, was it because he did a protected act?**

233. The respondent accepts that the claimant did 2 protected acts, in the letters of 24 November and 14 December 2021, by asking on each occasion for a reasonable adjustment to be put in place in respect of his disability.

234. Essentially, the 2 detriments which the claimant complains of under this heading were that Mr McAndie embarked on a mission to find something for which he could be disciplined or dismissed; and that the respondent conducted an entirely flawed investigation following the submission of a grievance, ignoring the ACAS Code of Practice.

235. We have made clear earlier in this Judgment that we do not accept the claimant's allegation that Mr McAndie embarked on some kind of mission to find something for which he could disciplined or dismissed. The claimant has failed to demonstrate that Mr McAndie reacted in any way inappropriately to his request for reasonable adjustments, and there is simply no evidence that he sought to act in a malicious manner so as to ensure that the claimant would be disciplined or dismissed. Mr McAndie was removed from the investigation at an early stage and therefore had little or no influence over the outcome.

236. Further, we do not accept that the investigation was flawed in the way the claimant asserts. Mr McCluskey did not have the grievance available to him, but indicated to the claimant that any issues arising from the grievance which were considered relevant to the investigation could be raised and taken into account. That was, in our judgment, an entirely reasonable approach to take. In any event, we do not accept that the respondent ignored, or breached, the ACAS Code of Practice.

237. Finally, and in any event, we are not persuaded that either Mr McAndie or Mr McCluskey was motivated by the claimant's request for a reasonable adjustment to take these actions. Their actions were entirely justified by the information which became available to them about the claimant's use of the tachograph, and in our judgment, they were unrelated to the claimant's request for reasonable adjustments.

238. It is therefore our conclusion that the claimant's claims must all fail, and are dismissed.

Employment Judge: Murdo Macleod
Date of Judgment: 17 February 2023
Entered in register: 21 February 2023
and copied to parties