EMPLOYMENT TRIBUNALS (SCOTLAND)

5 **Case No: 8000358/2023**

Held in Edinburgh by Cloud Video Platform (CVP) on 22, 23, 26, 29 January and 9 February 2024

10 **Employment Judge Sangster**
Tribunal Member Duguid
Tribunal Member Lindsay

Mr A Crawford — **Claimant**
15 **In Person**

20 **HM Revenue and Customs** — **Respondent**
Represented by
Mr R Ashmore
Solicitor

25 **JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The unanimous judgment of the Tribunal is that:

1. The claimant's complaints of discrimination arising from disability and failure to make reasonable adjustments succeed. The respondent is ordered to pay the claimant the sum of **£10,806.58,** including interest, by way of
30 compensation for injury to feelings.

2. The claimant was unfairly dismissed by the respondent. The respondent is ordered to pay the claimant the sum of **£5,068** in relation to this.

3. The claimant's complaint of direct discrimination does not succeed and is dismissed.

REASONS

Introduction

1. The claimant presented claims of unfair dismissal and disability discrimination (direct discrimination, discrimination arising from disability and failure to make reasonable adjustments).

2. The respondent asserted that the claimant had been fairly dismissed for gross misconduct and that he had not been subjected to disability discrimination.

3. The final hearing took place remotely. The claimant was accompanied and assisted by his mother during the proceedings. She asked questions of the witnesses on the claimant's behalf.

4. The parties agreed a joint bundle of documents extending to 299 pages, in advance of the hearing. A number of further documents were added, with consent, during the course of the hearing.

5. Parties also provided a statement of agreed facts.

6. The respondent led evidence from:

   a. Fraser McGowan (**FM**), Training Manager for the claimant;

   b. Damian Robson (**DR**), Line Manager to the claimant;

   c. Baljinder Hayer (**BH**), Senior Officer in Fraud Assurance and decision manager in the disciplinary proceedings related to the claimant; and

   d. Michelle Sharp (**MS**) Manager in Risk & Intelligence Services and appeal manager allocated to hear the claimant's appeal.

7. The claimant gave evidence on his own behalf.

8. Other individuals referenced in this Judgment are:

   a. Julie Hanratty (**JH**), Learning Unit Head for the respondent; and

   b. Joanne Townsend (**JT**), Internal Investigator for the respondent.

Issues to be Determined

9. The issues to be determined were agreed at a preliminary hearing held on 31 October 2023. The parties agreed at the outset of the hearing that the list set out in the note of that hearing represented the issues to be determined, subject to the following points:

   a. Prior to and during the final hearing it was conceded by the respondent that the claimant was a disabled person at the relevant times as a result of autism, dyslexia, sleep apnoea and mental health conditions (anxiety, depression and psychosis), and that the respondent had knowledge of this at the relevant times.

   b. The claimant confirmed during the course of the hearing that, whilst he had stated he was disabled as a result of mobility issues, he did not rely on this for the purposes of his claim. That was accordingly not considered.

10. The issues which remained to be determined were accordingly as follows:

   Unfair dismissal

   a. What was the principal reason for dismissal and was it a potentially fair one in accordance with sections 98(1) and (2) of the Employment Rights Act 1996 (**ERA**)? The respondent asserts that it was a reason relating to the claimant's conduct, failing which it was by reason of capability/some other substantial reason.

   b. If so, was the dismissal fair or unfair in accordance with s 98(4) ERA?

   *Direct Discrimination – s13 Equality Act 2010 (**EqA**)*

   c. Did the respondent subject the claimant to less favourable treatment by dismissing him (i.e. did the respondent treat the claimant less favourably than it would have treated others (hypothetical comparators) in not materially different circumstances)?

   d. If so, was this because the claimant was a disabled person?

Discrimination Arising from Disability – s15 EqA

e. If not conceded, did the respondent know, or could it reasonably have been expected to know, that the claimant had the disability relied upon?

f. Did the respondent subject the claimant to unfavourable treatment by dismissing him?

g. If so, was this due to something arising in consequence of his disability, namely:

    i. The respondent changing the claimant's role in September 2021, without consultation, and the claimant finding both the new role and the change difficult due to being an autistic person;

    ii. The claimant falling asleep/somnolence, which was caused by sleep apnoea and/or his medication (amisulpride) for his mental health condition;

    iii. His slower pace of work, which was caused by his dyslexia; and/or

    iv. The fact that he may not have fully explained the above to his managers, due to distrusting them, which arose in consequence of autism.

h. If so, was the treatment pursuant to a legitimate aim, namely to employ staff that were able to perform the role for the respondent and those who they held a relationship of trust and confidence.

Reasonable Adjustments – s20 & 21 EqA

i. The provision, criteria or practice ('**PCP**') relied on by the claimant is requiring Compliance Caseworkers to undertake e-learning, which involved a lot of reading.

j. Did the respondent have such a PCP(s)?

k. Did the respondent fail to provide an auxiliary aid for the claimant in the period from June 2021 onwards, namely the provision of

working/workable computer support packages to assist the claimant with his dyslexia?

l. Did any such PCP/failure to provide an auxiliary aid put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled at any relevant time (June 2021 onwards), in that:

   i. He found it difficult to understand the information in the e-learning and required longer to absorb the information as a result of his dyslexia; and/or

   ii. He found it difficult stay awake during the e-learning as a result of sleep apnoea/somnolence.

m. If so, did the respondent know or could it reasonably have been expected to know the claimant was likely to be placed at any such disadvantage?

n. If so, would the steps identified by the claimant, namely:

   i. Providing in-person training to the claimant;
   ii. allowing him a longer period of time to absorb written information; and/or
   iii. the provision of working/workable computer support packages

   have alleviated the identified disadvantage?

o. If so, would it have been reasonable for the respondent to have taken those steps at any relevant time and did they fail to do so?

Time bar/Jurisdiction

p. Was the complaint of unfair dismissal presented within the time limits stated in section 111(2) ERA? If not, was it reasonably practicable for the complaint to be presented before the end of that period of three months?

If not, was it presented within such other period as the Tribunal considers reasonable?

q. Were the complaints of disability discrimination presented within the time limits stated in s123 EqA, or such other period as the Tribunal thinks just and equitable?

Remedy

r. If the unfair dismissal complaint succeeds, is it appropriate to make an order for reinstatement/re-engagement?

s. If any of the discrimination complaints succeed, what compensation should be awarded?

Findings in Fact

11. This Judgment does not seek to address every point about which the parties have disagreed. It only deals with the points which are relevant to the issues which the Tribunal must consider in order to decide if the claim succeeds or fails. If a particular point is not mentioned, it does not mean that it has been overlooked, it simply means that it is not relevant to the issues to be determined. The relevant facts, which the Tribunal found to be admitted or proven, are set out below.

12. The claimant has autism, dyslexia, sleep apnoea, anxiety, depression and psychosis.

13. The claimant’s sleep apnoea was diagnosed in 2010. Prior to that, he had been experiencing significant heart pains and had abnormal ECG. He was told that his heart might be failing and, in the worst case scenario, that he might need a heart transplant. This caused significant worry and distress for the claimant. When the claimant was diagnosed with sleep apnoea however, and started to undertake treatment for that condition, the symptoms with his heart stopped.

14. The respondent has a disciplinary policy and procedure in place, entitled 'Upholding our Standards of Conduct'. This sets out the following examples of misconduct and gross misconduct

a. **Misconduct**

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i. failure to follow HMRC policies, working practices and local working practices;
ii. poor time keeping, lateness, unauthorised absence;
iii. aggressive or abusive behaviour;
iv. abuse of flexible working hours rules or recording of hours, leave, breaks etc.

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v. misuse of or deliberate damage to official equipment and facilities;
vi. loss of or a failure to secure official equipment outside of the workplace;
vii. breaches of our newsroom rules for commenting;

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viii. refusal to obey a reasonable management request;
ix. neglect of duties;
x. improper assistance to customers;
xi. rude, abrasive behaviour;
xii. failure to notify HMRC of being a subject of a criminal investigation or non-recordable criminal matters, for

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xiii. example receipt of a penalty notice for disorder;
xiv. breach of the health and safety rules and procedures;
xv. breaches of security;
xvi. failure to follow data security rules and procedures.

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b. **Gross Misconduct**

i. accessing or attempting to access customer information without legitimate business reason.
ii. any offence under any legislation for which HMRC is responsible including tax, national insurance, tax credits, benefits or payments;

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iii. serious negative behaviour towards others for example, violent, aggressive, threatening, abusive or offensive behaviour,

discrimination, harassment, bullying or victimisation; this may include such behaviour at work;

iv. theft or fraud;

v. unauthorised absence of more than 5 working days;

vi. deliberate falsification of records (examples may include but not restricted to: expenses, medical statements, job applications);

vii. acceptance of gifts or hospitality gifts from the public, traders and suppliers, other than the permissible exceptions;

viii. using HMRC's name or your official position for commercial gain or to further your own interest or those of others;

ix. serious breaches of any HMRC policies and procedures

x. serious misuse of technology, email and intranet

xi. serious misuse of or damage to official premises or equipment;

xii. activity likely to bring HMRC into serious disrepute;

xiii. gross negligence or gross neglect of duties or serious insubordination;

xiv. failure to notify involvement as a suspect in a criminal investigation and convictions of criminal offences relevant to HMRC's consideration of ongoing employment;

xv. the use or distribution of illegal drugs; or any other illegal activity;

xvi. incapability to perform your duties due to alcohol or illegal drugs;

xvii. Unauthorised removal of goods from a controlled warehouse;

xviii. Any private activities and financial misconduct which may bring HMRC into disrepute.

15. The claimant's employment with the respondent commenced in March 2015. He initially worked as a Debt Management & Banking Admin Officer.

16. The respondent was aware of the claimant's medical conditions. The claimant disclosed these to the respondent and they obtained an occupational health report in July 2016 and a report from the National Autistic Society, following a Workplace Assessment, in January 2017.

17. The respondent put in place adjustments for the claimant's training as a Debt Management & Banking Admin Officer. The training involved a significant amount of e-learning, over a 4 month period. The respondent arranged for the claimant to be assisted with this, on a one to one basis, as a result of his dyslexia.

18. In 2017, the claimant's manager telephoned the claimant's community psychiatric nurse, with the authorisation of the respondent's senior management, to seek to ascertain additional details about the claimant's mental health conditions. The claimant was extremely distressed when he learned the respondent had done so. He was off sick for a period of around 6 months as a result and then placed on garden leave for a significant period, before being permitted to return to work. The claimant's trust in management generally was undermined by this experience.

19. Following his return to work the claimant performed well in his role. He was told he was suitable for promotion. Compliance work was suggested to him as an area he may wish to consider, as it was recognised that he had particular strengths in analysing data and problem solving. He undertook some job shadowing and received positive feedback in relation to his potential suitability for the compliance role. Thereafter, when a position for Compliance Caseworker was advertised in 2019, prior to the covid pandemic, he applied. He understood from the advert that the training for the role would be conducted on a face to face basis. He performed well in the aptitude tests and interview and was placed on a waiting list. In May 2021, he was offered the role of Trainee Compliance Caseworker, which he accepted.

20. The claimant commenced the role of Trainee Compliance Caseworker on 26 July 2021. The initial phase of the training was to be conducted by the respondent's newly formed Central Training Unit (**CTU**). The claimant was in the first cohort to be trained by the CTU. Training for the role consisted of 9 months' training with the CTU, followed by 9 months as a trainee. Whilst the claimant had understood, when he applied for the role in 2019, that training would predominantly take place on a face to face basis, when he took up the role he was informed that the first 9 months would predominantly consist of

e-learning, self-reflection on that e-learning and completion by the claimant of a Quality Assurance Framework (QAF). The expectation was that 4.5-6 hours per day, for the first 9 months, would be spent on e-learning.

21. Adjustments were put in place to assist the claimant. He already had a software package on his computer, Read/Write Gold to assist with reading and writing, as well as a zoom reader. In addition, the claimant was afforded 100% extra time to undertake each e-learning module, so it was envisaged that his period of training with the CTU would take longer than 9 months.

22. On 18 October 2021, the claimant's line manager changed. From that point, the claimant's line manager was DR and his training manager was FM. They met with the claimant, via Teams, on 1 November 2021, to discuss his progress to date in the CTU. They also discussed the software packages in place to assist the claimant and how they interacted with the respondent's learning platform, Kallidus.

23. The claimant attended for an occupational health assessment on 9 November 2021. A report was subsequently provided to the respondent. This stated, in the introduction, that the claimant felt he was not progressing as he would have wished in his training and *'from his perspective, the greatest barrier to progress thus far has been the requirement to process substantial amount of text as part of his training, which he feels his dyslexia has made more difficult.'* The report went on to separately address the claimant's conditions of dyslexia, ASD, vision, musculoskeletal, migraine, mental health and sleep apnoea – setting out recommendations in relation to each. The report stated that the claimant would require flexibility, as his mental health issues impacted/reduced his concentration and focus. (A previous report, dated 3 August 2021, had also indicated that a flexible approach in relation to work activities and case load would be required). In relation to dyslexia, the report stated: *'Mr Crawford feels this is causing significant difficulties at present, both in reading and in writing. The diagnosis is long-standing but he has not had any recent input. I believe some assistive technology is already in use. My suggestion would be that we arrange for a contemporaneous assessment and advice upon whether any additional piece of equipment/software et*

cetera will be of benefit. In addition to this, the primary adjustment I would suggest you consider would be in the feasibility of allowing Mr Crawford greater time to undertake his training as he is likely to need longer to process the written materials.'

5 24. The 'contemporaneous assessment' referenced in the report was not arranged by the respondent.

25. On 10 November 2021, the claimant sent an email to FM & DR stating as follows: *'So my ex wife read two courses to me Monday and yesterday, what I can say is I got a better understanding with her reading it to me as she was* 10 *able to interact with me with it such I got a better understanding but not only that I was getting through a 7 hour course in about 4-5 hours so time is saved meaning I can learn more. The reasonable adjustment I am asking for is to get someone probably who doing the same stuff as me to read to me or if not someone doing ED someone else, this could be sold as development* 15 *oppurntity for the person doing it . This would replace read and write gold and would work better can you let me know your thoughts please.'*

26. JH responded to the claimant on 24 November 2021, stating that she did not consider the request reasonable, as the claimant had Read/Write Gold. She noted however that the occupational health report dated 9 November 2021 20 had suggested that the respondent should consider further assessments of the claimant's needs and indicated that there could be an Access to Work assessment or DSE assessment. DSE was subsequently arranged, but this only addressed the claimant's physical workspace, not the adjustments in place, or required, in relation to dyslexia.

25 27. On 2 December 2021, the claimant sent an email to FM and DR stating that he had tried to complete a module by undertaking the multiple choice test at the end, but had failed and was very concerned. They had a discussion on the phone in relation to this and the claimant repeatedly stated that he felt he was falling behind and struggling – particularly where detailed writing and 30 knowledge checks were required. The claimant explained that he found learning of this nature, where there is a lot of reading, particularly difficult. He

stated that he learns better from practical application or tutor led events. FM asked the claimant questions about the module he had undertaken and ascertained that he understood the content of the module, so it was the knowledge/multiple choice test which was creating the barrier to the claimant passing the module. In relation to this, FM stated to the claimant that he was *'unsure of how to resolve at this point'* and asked the claimant if he *'feels the job is right for him'*. He asked the claimant to prioritise writing up his Milestone 1 document. The claimant indicated that he was struggling with that and writing out the detail required for it. FM asked him to do so, to the best of his ability, by 4pm on 6 December 2021.

28. On 8 December 2021, FM sent an email to the claimant stating '*I have opened your Milestones section of the QAF to assess what you have entered there after I extended the deadline from Friday 3rd Dec to Monday 6th Dec. Unfortunately, there is nowhere near enough detail within the Case Study Assurance document which would allow sign off of your Milestone 1. To give you an example, other team members who have achieved Milestone 1 have entered 2000 – 4000 words in their document explaining clearly what they have learned, what they should be doing, why, what legislations they are using, time limits, etc.*' The claimant responded stating *'I think I am going to give up I really cannot do things to that level for writing, to write that level would require a long time and I do not remember stuff enough to do to that level'*

29. On 9 December 2021 DR meet with the claimant to raise a number of concerns with him in relation to the claimant's conduct. After discussing 4 of those, DR told the claimant to listen without interrupting to the remaining concerns. He outlined 16 different concerns in total during the meeting. The claimant found this to be a difficult meeting, principally due to the fact that he struggled to take in and process what DR was saying to him.

30. On 13 December 2021, FM raised concerns in relation to the claimant's capability for the role of Trainee Compliance Caseworker with his manager, JH. She recommended that capability proceedings be commenced against

the claimant. FM subsequently prepared a performance improvement plan (PIP), which represented informal performance improvement proceedings, rather than formal proceedings under the respondent's Managing Poor Performance Process.

31. FM met with the claimant on 14 January 2022, via Teams, to show him and discuss the PIP. At the meeting, FM stated to the claimant that *'he has written a PIP which we can look at just now and agree and review going forward with the aim to bring your performance up to the required standard, or FM could speak to his manager Julie Hanratty about the job role not being suitable for AC. It is up to AC what he wants to do.'* The claimant looked at the PIP prepared by FM and stated that he would not be able to achieve the requirements set out in it. It was agreed that both would speak to JH about an alternative role being identified for the claimant. The claimant felt upset and aggrieved at not being able to complete the training for the role of Compliance Caseworker. He felt that, if he had been able to find a way complete the initial period of training within the CTU, he would have been able to undertake the in-role training and, ultimately the full role of Compliance Caseworker, which he would have enjoyed.

32. The claimant and FM both contacted JH immediately following that discussion and it was agreed that steps would be taken to secure an alternative role for the claimant, which JH would progress with the respondent's HR Department. In the meantime, he would undertake generic, mandatory training. No alternative role was found, despite the claimant agreeing he would accept a demotion to move to an alternative role.

33. On 28 January 2022, FM had a meeting with the claimant to discuss concerns in relation to the claimant's conduct, namely that he had not been accessing the respondent's learning platform, Kallidus, that he had not attended for full tutorial sessions, that his flexi sheets were not accurate and that he had failed to attend certain team meetings. While FM stated at the outset of the meeting that the concerns he was raising with the claimant were separate to those raised by DR with the claimant on 9 December 2021, the concerns were

largely the same. FM showed the claimant his Kallidus log-in records, which appeared to support what he was saying to the claimant.

34. The claimant was shocked at what FM had showed him at the meeting. Whilst he understood that there were some issues with the Kallidus system which may result in discrepancies, the records appeared to show significant discrepancies, which led the claimant to question himself and think about what was actually happening during his working days. He realised, at that point, that he was falling asleep during the day. He would then wake up and simply continue working, without realising that he had missed significant periods of time. The claimant then made appointments and discussed this with his GP and specialists, to try to understand what was causing this.

35. In a meeting on 22 February 2022, regarding a proposed return to working in the office following the covid pandemic, the claimant disclosed to FM and DR that he had been having problems with sleep apnoea for a while, that he was falling asleep at his computer and struggling to stay awake during the course of the working day. He stated that he was now in discussions with his doctor and a specialist about this. He stated that he was sleeping for around 15-16 hours per day and he thought this had been happening since at least September/October 2021.

36. In a further discussion, on Monday 28 February 2022, the claimant expressed his concerns about returning to the office that Wednesday. He stated that he was concerned that he would fall asleep on the way to work on public transport, or at work. There was a discussion about whether he was fit to work at all. The claimant indicated that he was seeing his GP on Wednesday and they would make a call regarding this. FM highlighted that it was open to the claimant to self-certify prior to that. The claimant did so the following day and was subsequently certified as unfit to work by his GP for ‘excessive sleepiness – under investigation’.

37. The claimant returned to work on 17 June 2022, but commenced a further period of absence on 3 August 2022, which continued until the termination of his employment.

5 38. On 15 July 2022, DR had a further meeting with the claimant at which he discussed conduct concerns. The points raised at that meeting were largely the same as those raised by DR with the claimant on 9 December 2021, and by FM with the claimant on 28 January 2022. On 19 July 2022, DR wrote to the claimant stating that the conduct concerns had been referred by him to
10 the respondent's Expert Advice Service.

39. By letter dated 15 September 2022, the claimant was informed that BH had been appointed as a Decision Manager in relation to potential misconduct/gross misconduct issues, and that an investigation would be
15 conducted in relation to those conduct issues by JT. BH, although trained in the respondent's disciplinary processes, had not previously acted as a Decision Manager – this was her first occasion doing so.

40. On 13 September 2022, BH set out the Terms of Reference confirming the
20 allegations to be investigated, as follows:

1. *Failure to follow reasonable management requests*
    a. *Andrew has failed to carry out reasonable management requests, neglected his duties and brought his honesty into question, by*
25 *nonattendance at required training events.*
    b. *Andrew failed to carry out reasonable management request, refusing to make amendments to a formal document (Carer's Passport) and working with management in accordance with the document.*
    c. *Andrew failed to carry out reasonable management requests and*
30 *neglect of duty by repeated failure to attend/lateness to meetings.*
    d. *Andrew failed to meet reasonable management request when he was asked to not to commence a new FWH tool without direction by manager*

> e. *Failing to follow reasonable managerial requests since return to work; failing to reply to emails and provide information requested.*
>
> 2. *Falsification of data gathered to justify additional requirements, for completion of task.*
> 3. *Andrew falsified evidence in order to mislead management in relation to his progress with his IIP, and his TTP.*
> 4. *Andrew showed poor and unprofessional behaviours in an email response to his manager.*
> 5. *Repeated abuse of Flexi working hours / falsification of records (Theft of Time).*

41. JT took the following steps in her investigation:

    a. She met with FM on 3 October 2022;
    b. She met with DR on 10 November 2022;
    c. She asked questions of JH by email dated 11 November 2022;
    d. She met with the claimant on 2 December 2022; and
    e. She collated and compiled supporting evidence.

42. JT's investigation report, dated 16 December 2022, extended to 42 pages plus appendices extending to a further 590 pages. The appendices did not include any of the occupational health reports obtained by the respondent in relation to the claimant, or any other medical reports.

43. JT's conclusions were that there a case to answer in relation to allegations 1a, 1c, 1d, 2, 3, and 5, but no case to answer in relation to allegations 1b, 1e and 4. She highlighted her view that allegations 1.a and 1.c *'fall under the heading of Misconduct'*. In relation to allegation 1.d she stated that *'referring as part of an investigation into potential gross misconduct, an incident of someone completing a flexi sheet when they'd been told not to, (albeit hyperbolically presented as 'failed to meet reasonable management request') could be considered disproportionate…Although the investigating manager considers this act to be a minor indiscretion, it was a reasonable management request, which Andrew failed to meet.'*

44. In her report JT also highlighted the following:

a. The conduct of the meeting by DR on 9 December 2021, as well as 2 different managers holding 3 Manager Review Meetings (9 December 2021, 28 January 2022 and 15 July 2022) could be considered to be overbearing and intimidatory and disproportionately punitive; and
b. The presentation of the allegations was *'arguably disproportionately punitive'* and where two breaches were presented to represent the same thing they were conflated by the investigation manager into one.

45. Given the length of the investigation report and appendices, it took BH some time to read and digest this. She then wrote to the claimant on 23 January 2023, providing a copy of the investigation report and appendices, and stating that a decision meeting would be held on 8 February 2023. She stated that 10 days' notice was provided *'due to the amount of material I have sent in attachment to this letter',* namely the investigation report and appendices. She stated that the Decision Meeting was to discuss the following allegations:

1a. You neglected your duties and brought your honesty into question by non-attendance at online learning events on 11-12 January 2022 and on 2 February 2022.

1.c You neglected your duty by repeated failure to attend team meetings on 9 December 2021, 14 - 17 December 2021, 21 December 2021, 6 January 2022, 11 January 2022 and your lateness to team meetings on 21 June 2022 and 24 June 2022.

1.d You failed to meet a reasonable management request when you were asked on 28 December 2021 via Email to not commence the new FWH tool without direction by your manager and then submitted inaccurate data.

2. Between 24 September 2021 and 14 January 2022 you failed to undertake and complete the learning modules on Kallidus and bought your honesty into question by falsifying start and finish times on your manual record of said learning.

> 3. *Between 24 September 2021 and 14 January 2022 you bought your honesty into question by misleading your managers in relation to your progress with your learning, your IIP and your TTP.*
>
> 5. *You bought your honesty into question by failing to account for non-working hours, submitting falsified records and thereby abusing Flexi working hours between the dates of 11 October 2021 and 12 January 2022.*

46. The claimant was informed in the letter that the allegations *'are raised under departmental Upholding our Standards of Conduct guidance and fall under gross misconduct…in addition, I need to advise you that I consider theft of time to fall within the Cabinet Office's definition of internal fraud. If I conclude that you are guilty of internal fraud and dismissal is appropriate, your details will be included on the Cabinet Office Internal Fraud Hub database for 5 years. As that is checked as part of the recruitment process, you would in effect be banned from employment in the Civil Service for that five year period.'*

47. The Decision Meeting took place, by Teams, on 8 February 2023. BH was accompanied by a note taker. The claimant was accompanied by a trade union representative. The meeting took 63 minutes, excluding breaks.

48. At the start of the meeting, BH apologised to the claimant for the delay, due to the fact there was a lot of paperwork to read and look over. She stated she would not make a decision until after the meeting and that *'there are allegations of gross misconduct, allegations of theft of time which fall under internal fraud.'* She read allegations to the claimant. She then asked the claimant if he had had the opportunity to read the investigation report. He stated *'no, as there is far too much to look at and being due to my dyslexia'.* BH asked if he had spoken to his trade union representative about the report. He stated he had not. BH then proceeded with the meeting, asking whether the claimant had anything to add in relation to each allegation. She did not ask why the claimant had not discussed the report with his trade union, or ask if he required more time to prepare for the meeting.

49. The claimant's position at the Decision Meeting was that, in relation to allegation 1d, he didn't know how else to record his flexi time when the existing system ended. He couldn't record on paper due to his dyslexia and, due to being autistic, he couldn't think of other ways of doing so. In relation to the remaining allegations, his position was that he was falling asleep at the time of the alleged incidents, but had not admitted to himself that he was doing so and, when he awoke from periods of sleeping, he genuinely believed he had been conducting work at the time he was sleeping and completed documentation to reflect this. It wasn't a conscious decision to record incorrect data. He didn't tell his managers at the time as he hadn't recognised this himself. He stated during the meeting:

a. *'Just about me falling asleep, I was in self-denial that it was a problem. I didn't recognise that I was doing what I had been doing. It's more a case of I have made myself believe I was doing what I was meant to be doing, but I wasn't'.*

b. *I'm quite confident that I was missing and late to things due to falling asleep. I made myself believe that it was due to other things rather than for falling asleep. I wasn't consciously doing these things, I really got it into my own brain that it was something else going on and I was hiding the problem of my sleep from myself and my managers'.*

c. *I'm 95% sure I was falling asleep at the time. Because my brain was lying to itself, I'm pretty sure it was saying I had been doing this at this time. Truth is, I don't think I was. My brain had [obscured] my memory of it. The medication that I am, my memory gets very forgetful. I don't have recollection of what actually happened in that point all of time. I was probably falling asleep.*

d. *The only thing that I think may potentially impact decision-making is due to my medication making my memory very poor. I can do something five hours ago and then I have completely forgot. It is possible with the flexi sheets I have forgotten what the exact time was, so I was putting an estimated time.*

e. The doctors described it to someone that is masking and covering up things and being in denial. I can't really explain how my brain didn't recognise that I was falling asleep. The doctors said the only thing they think it could be is that I was in complete denial of everything that was going on. I couldn't or didn't want to accept the problems that I was having.

f. It is an illness that has caused the problem it is not me neglecting work time intentionally.'

50. BH considered matters following the Decision Meeting. She reached the decision that all allegations were established. She concluded that each amounted to gross misconduct. She determined that, considering all of the established allegations together, the appropriate sanction was summary dismissal and that the claimant's name should be included on the Cabinet Office's Internal Fraud Database, as he was dismissed partially for theft of time amounting to internal fraud. She noted that the claimant's doctors considered he may have narcolepsy and noted that *'the Duradiamond definition of narcolepsy is a medical condition which causes a person to fall asleep at inappropriate times and their brain cannot regulate sleeping and waking patterns normally'* She discounted the claimant's explanation provided at the disciplinary hearing in relation to each of the allegations, without investigating this further, on the basis that he had previously given different responses regarding his attendance at the training events referenced in allegation 1a, and had not informed his managers of his medical conditions at the time. She concluded that the fact the claimant had not accepted or admitted to himself that he was falling asleep meant he was dishonest with, and lying to, himself and his manager.

51. She wrote to the claimant on 2 March 2023 confirming this decision and the claimant's right of appeal.

52. The claimant was devastated to lose his job. He had enjoyed working with the respondent and was really upset that he would not be able to work for the

respondent going forward, and for any other Civil Service department for 5 years.

53. The claimant spoke to his trade union about his dismissal and how to proceed. He asked about Employment Tribunal proceedings and they indicated that he should proceed with an internal appeal in the first instance.

54. The claimant submitted an appeal on 10 March 2023. By the time of his appeal, his doctors had identified that the medication he had been taking for his mental health conditions had caused an imbalance in his hormones, and this was causing his excessive sleepiness and memory issues. Steps were being taken to seek to address this. His grounds of appeal were stated to be *'The medication I was taking at this time was causing an imbalance in my hormones which was making me fall asleep, whilst also causing memory loss. I do not feel I was being dishonest and truly believe this has been caused by my illness. I did not want to accept at the time I had an illness so was trying to get on with my work to the best of my ability. My illness is classed as a disability, and I believe it to be covered by the Equalities Act. The medication being taken is a brain suppressant and I was not thinking clearly. The information I was entering was a true reflection in my mind and to my knowledge. It was not a deliberate attempt to falsify records. My medication was affecting my memory which as a result had a direct impact on my IIP and TTP. I believed I was entering the correct information at the time and was not deliberately trying to falsify any information. This memory confusion was caused by the medication which are brain suppressants. As with previous records, I believe to be entering the correct information at the time, there was no deliberate act to falsify anything.'*

55. MS was appointed as Appeal Manager. Although trained in the respondent's disciplinary processes, she had not previously acted as an Appeal Manager. She held an appeal meeting with the claimant on 17 April 2023, which was conducted by telephone. MS was accompanied by a note taker at the hearing and the claimant was accompanied by a trade union representative.

56. At the hearing, the claimant explained that the reason he did not want to accept that he was falling asleep and having memory issues was that he thought the sleep apnoea, and potentially the significant heart symptoms which he had experienced prior to 2010, may be returning. He was in denial. His brain was refusing to accept the health issues as a way of preventing further distress, as when he had experienced these issues previously it was mentioned that he may require a heart transplant and this had been a particularly distressing time for him. To avoid the distress and worry, he refused to acknowledge the issues, telling himself there were no issues and that everything was ok at the time – it was only in hindsight that he realised, and was able to accept, that he was actually forgetting things and falling asleep at work. At the time however, his brain/ body was supressing the fact that the problems were going on, as he was scared of the potential risks that could ensue.

57. Following the appeal hearing, MS contacted BH to ask if she had any occupational health reports, or other medical records, in relation to the claimant. She indicated that she did not. MS then requested these from DR.

58. MS issued her decision on 30 June 2023. She refused the appeal, upholding BH's decision in full. In reaching that conclusion, and in response to the claimant's assertion that his illness was a disability, she placed significant reliance on the fact that the claimant had not informed his managers of the fact that he was falling asleep at work or experiencing memory loss, so they were not able to explore reasonable adjustments for him. She stated that the claimant ought to have disclosed his medical condition to his managers when they raised their concerns with him informally (on 9 December 2021, 28 January 2022 and 15 July 2022), before matters progressed to formal gross misconduct action. She also noted that he had not mentioned memory loss to the Decision Manager. She concluded that no credible explanation for the claimant's conduct had been provided.

59. The claimant received the appeal outcome on 30 June 2023, by email. Following receipt of the appeal outcome, the claimant tried to obtain advice

from his trade union, but they were not willing to provide further assistance. He spoke to Citizens Advice on/around 6 July 2023. They indicated he would have three months to raise an Employment Tribunal claim. The claimant also spoke to Acas on 6 July 2023 and started early conciliation. In discussions with them thereafter, they suggested that his claim may be out of time. The claimant went back to Citizens Advice to ask about this, as they had recently informed him that he had three months to start a claim. They confirmed that they were mistaken. Early conciliation was brought to an end on 10 July 2023. The claimant then, with assistance from his mother, prepared his claim form. This was lodged with the Tribunal on 18 July 2023.

60. At the time his employment terminated, the claimant's gross weekly salary was £540.96 and he was entitled to employer pension contributions at 27.1% of gross salary. He had however exhausted his statutory and occupational sick pay entitlements by the point his employment terminated, so did not receive any pay from 1 February 2023 onwards.

61. The claimant has not secured alternative employment since the termination of his employment with the respondent. He was initially not fit to do so. Latterly, from around November/December 2023 onwards, he was fit to seek work but conscious of the impending Employment Tribunal hearing and required to prepare for and participate in that hearing, so delayed seeking alternative employment as a result, feeling that participating in the hearing and starting a new role at the same time would be too much for him to handle.

62. The claimant has received enhanced universal credit payments since March 2023. He continues to receive these, currently in the sum of £1,042.36 per month.

Submissions

63. The respondent provided their written submission to the claimant on 2 February 2024. The claimant was able to consider this and respond to the respondent's submission when preparing his own submission. Both parties

then lodged detailed written submissions on the morning of the final day of the hearing. The Tribunal took time to read these and Mr Ashmore was then given the opportunity to respond to the claimant's submission, which he did briefly.

5 **Relevant Law**

Time Limits - Unfair Dismissal

64. The relevant time limits in relation to unfair dismissal complaints is set out in section 111(2) of the Employment Rights Act 1996 (**ERA**).

65. These provisions state that a Tribunal shall not consider a complaint unless
10 it is presented to the Tribunal before the end of three months beginning with the effective date of termination, or within such further period as the Tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.

15 66. In considering whether there is jurisdiction to hear such complaints, Tribunals accordingly required to consider the following questions:

a. Was the complaint presented within the primary three month time limit?

b. If not, was it reasonably practicable for the complaint to be presented within that period?

20 c. If not, was it presented within such further period as the Tribunal considers reasonable?

67. The question of a what is reasonably practical is a question of fact for the Tribunal. The burden of proof falls on the claimant. Whether it is reasonably practicable to submit a claim in time does not mean whether it was reasonable
25 or physically possible to do so. Rather, it is essentially a question of whether it was 'reasonably feasible' to do so (***Palmer and Saunders v Southend-on-Sea Borough Council*** [1984] IRLR 119).

68. Whether the claim was presented within a further reasonable period requires an assessment of the factual circumstances by the Tribunal, to determine whether the claim was submitted within a reasonable time after the original time limit expired (***University Hospitals Bristol NHS Foundation Trust v Williams*** UKEAT/0291/12).

Unfair Dismissal

69. S94 ERA provides that an employee has the right not to be unfairly dismissed.

70. In cases where the fact of dismissal is admitted, as it is in the present case, the first task of the Tribunal is to consider whether it has been satisfied by the respondent (the burden of proof being upon them in this regard) as to the reason for the dismissal and that it is a potentially fair reason falling within s98(1) or (2) ERA.

71. If the Tribunal is so satisfied, it should proceed to determine whether the dismissal was fair or unfair, applying the test within s98(4) ERA. The determination of that question (having regard to the reason shown by the employer):-

“(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking), the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

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

72. Where an employee has been dismissed for misconduct, ***British Home Stores v Burchell*** [1978] IRLR 379, sets out the questions to be addressed by the Tribunal when considering reasonableness as follows:

a. whether the respondent genuinely believed the individual to be guilty of misconduct;

b. whether the respondent had reasonable grounds for believing the individual was guilty of that misconduct; and

c. whether, when it formed that belief on those grounds, it had carried out as much investigation as was reasonable in the circumstances.

5 73. The Tribunal then required to consider whether the decision to dismiss fell within the range of reasonable responses available to a reasonable employer in the circumstances. In determining this, it is not for the Tribunal to decide whether it would have dismissed for that reason. That would be an error of law, as the Tribunal would have 'substituted its own view' for that of the 10 employer. Rather, the Tribunal must consider the objective standards of a reasonable employer and bear in mind that there is a range of responses to any given situation available to a reasonable employer. It is only if, applying that objective standard, the decision to dismiss (and the procedure adopted) is found to be outside that range of reasonable responses, that the dismissal 15 should be found to be unfair (***Iceland Frozen Foods Limited v Jones*** [1982] IRLR 439).

Direct Discrimination

74. Section 13(1) EqA states:

'A person (A) discriminates against another (B) if, because of a protected 20 characteristic, A treats B less favourably than A treats or would treat others.'

75. The basic question in a direct discrimination case is: what are the grounds or reasons for treatment complained of? In ***Amnesty International v Ahmed*** [2009] IRLR 884 the EAT recognised two different approaches from two House of Lords authorities - (i) in ***James v Eastleigh Borough Council*** 25 [1990] IRLR 288 and (ii) in ***Nagaragan v London Regional Transport*** [1999] IRLR 572. In some cases, such as ***James***, the grounds or reason for the treatment complained of is inherent in the act itself. In other cases, such as ***Nagaragan,*** the act complained of is not inherently discriminatory but is rendered so by discriminatory motivation, being the mental processes 30 (whether conscious or unconscious) which led the alleged discriminator to

act in the way that he or she did. The intention is irrelevant once unlawful discrimination is made out. That approach was endorsed in ***R (on the application of E) v Governing Body of the Jewish Free School and another*** [2009] UKSC 15.

5 76. The Tribunal should draw appropriate inferences from the conduct of the alleged discriminator and the surrounding circumstances (with the assistance, where necessary, of the burden of proof provisions), as explained in the Court of Appeal case of ***Anya v University of Oxford*** [2001] IRLR 377.

10 77. In ***Shamoon v Chief Constable of the RUC*** [2003] IRLR 285, a House of Lords authority, Lord Nichols said that it was not always necessary to adopt a sequential approach to the questions of whether the claimant had been treated less favourably than the comparator and, if so, why. Instead, they may wish to concentrate initially on why the claimant was treated as they 15 were, leaving the less favourable treatment issue until after they have decided on the reason why the claimant was treated as they were. What was the employer's conscious or subconscious reason for the treatment? Was it because of a protected characteristic, or was it for some other reason?

20 78. The ***EHRC: Code of Practice on Employment (2011)*** states, at paragraph 3.5 that *'The worker does not have to experience actual disadvantage (economic or otherwise) for the treatment to be less favourable. It is enough that the worker can reasonably say that they would have preferred not to have be treated differently from the way the employer treated – or would* 25 *have treated – another person.'*

79. For direct discrimination to occur, the relevant protected characteristic needs to be a cause of the less favourable treatment *'but does not need to be the only or even the main cause' (*paragraph 3.11, ***EHRC: Code of Practice on Employment (2011)****)*. The protected characteristic does 30 however require to have a '*significant influence on the outcome'* (***Nagarajan v London Regional Transport*** 1999 ICR 877).

Discrimination arising from disability

80. Section 15 EqA states:

"(1) A person (A) discriminates against a disabled person (B) if – (a) A treats B unfavourably because of something arising in consequence of B's disability, and (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

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

81. Guidance on how this section should be applied was given by the EAT in ***Pnaiser v NHS England*** [2016] IRLR 170, EAT, paragraph 31. In that case it is pointed out that 'arising in consequence of' could describe a range of causal links and there may be more than one link. It is a question of fact whether something can properly be said to arise in consequence of disability. The 'something' that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.

82. There is no need for the alleged discriminator to know that the 'something' that causes the treatment arises in consequence of disability. The requirement for knowledge is of the disability only (***City of York Council v Grosset*** [2018] ICR 1492, CA).

83. The EAT held in ***Sheikholeslami v University of Edinburgh*** [2018] IRLR 1090 that:

'the approach to s 15 Equality Act 2010 is now well established and not in dispute on this appeal. In short, this provision requires an investigation of two distinct causative issues: (i) did A treat B unfavourably because of an (identified) something? and (ii) did that something arise in consequence of B's disability? The first issue involves an examination of the putative discriminator's state of mind to determine what consciously or unconsciously

was the reason for any unfavourable treatment found. If the "something" was a more than trivial part of the reason for unfavourable treatment then stage (i) is satisfied. The second issue is a question of objective fact for an employment tribunal to decide in light of the evidence.'

5 84. The burden is on the respondent to prove objective justification. To be proportionate, a measure has to be both an appropriate means of achieving the legitimate aim and reasonably necessary in order to do so (***Homer v Chief Constable of West Yorkshire Police*** [2012] IRLR 601).

Failure to make reasonable adjustments

10 85. Section 20 EqA states:

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

15 86. The duty comprises three requirements. 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.'* The third requirement
20 is a '*requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid'.*

87. Section 21 EqA provides that a failure to comply with the first or third
25 requirement is a failure to comply with a duty to make reasonable adjustments and that A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

88. Further provisions in Schedule 8, Part 3 EqA provide that the duty is not triggered if the employer did not know, or could not reasonably be expected
30 to know that the claimant had a disability and that the provision, criteria or

practice, or failure to provide the auxiliary aid, is likely to place the claimant at the identified substantial disadvantage.

Burden of proof

89. Section 136 EqA provides:

5 *'If there are facts from which the tribunal could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned the tribunal must hold that the contravention occurred. But this provision does not apply if A shows that A did not contravene the provision.'*

90. There is accordingly a two-stage process in applying the burden of proof provisions in discrimination cases, explained in the authorities of ***Igen v Wong*** [2005] IRLR 258, and ***Madarassy v Nomura International Plc*** [2007] IRLR 246, both from the Court of Appeal. The claimant must first establish a first base or prima facie case of direct discrimination or harassment by reference to the facts made out. If the claimant does so, the burden of proof shifts to the respondent at the second stage to prove that they did not commit those unlawful acts. If the second stage is reached and the respondent's explanation is inadequate, it is necessary for the Tribunal to conclude that the complaint should be upheld. If the explanation is adequate, that conclusion is not reached.

91. In ***Madarassy***, it was held that the burden of proof does not shift to the employer simply by a claimant establishing that they have a protected characteristic and that there was a difference in treatment. Those facts only indicate the possibility of discrimination. They are not, of themselves, sufficient material on which the tribunal 'could conclude' that, on a balance of probabilities, the respondent had committed an unlawful act of discrimination. The Tribunal has, at the first stage, no regard to evidence as to the respondent's explanation for its conduct, but the Tribunal must have regard to all other evidence relevant to the question of whether the alleged unlawful act occurred, it being immaterial whether the evidence is adduced by the claimant or the respondent, or whether it supports or contradicts the

claimant's case, as explained in ***Laing v Manchester City Council*** [2006] IRLR 748***,*** an EAT authority approved by the Court of Appeal in ***Madarassy***.

Time Limits - Discrimination Complaints

92. The relevant time limits in relation to complaints of discrimination is set out in section 123(1) EqA.

93. This states that such complaints should be brought within either:

    a. the period of 3 months, starting with the date of the act to which the complaint relates; or

    b. such other period as the Tribunal thinks just and equitable.

94. Section 123(3) EqA states that conduct extending over a period is to be treated as done at the end of the period and failure to do something is to be treated as occurring when the person in question decided on it.

95. The 'just and equitable' test is a broader test than the 'reasonably practicable' test. What is just and equitable depends on all the circumstances. The burden of proof is on the claimant, as explained in ***Robertson v Bexley Community Centre*** [2003] IRLR 434, in which the Court of Appeal also said, at para 25:

    "When tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse. A tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule."

96. In ***British Coal Corporation v Keeble*** [1997] IRLR 336 the EAT indicated that task of the Tribunal, when considering whether it is just and equitable to extend time, may be illuminated by considering section 33 Limitation Act 1980. This sets out a check list of potentially relevant factors, which may provide a prompt as to the crucial findings of fact upon which the discretion is exercised, such as:

a. the length of and reasons for the delay;

b. the extent to which the cogency of the evidence is likely to be affected by the delay;

c. the extent to which the party sued had cooperated with any requests for information;

d. the promptness with which the claimant acted once they knew of the facts giving rise to the cause of action; and

e. the steps taken by the claimant to obtain appropriate professional advice once they knew of the possibility of taking action.

97. In ***London Borough of Southwark v Afolabi*** [2003] IRLR 220 the Court of Appeal confirmed that, whilst that checklist provides a useful guide for Tribunals, it does not require to be followed slavishly. In ***Abertawe Bro Morgannwg University Local Health Board v Morgan*** [2018] EWCA Civ 640, the Court of Appeal confirmed this, stating that it was plain from the language used in s123 EqA ('such other period as the Employment Tribunal thinks just and equitable') that Parliament chose to give Employment Tribunals the widest possible discretion and it would be wrong to put a gloss on the words of the provision or to interpret it as if it contains such a list.

98. In ***Adedeji v University Hospitals Birmingham NHS Foundation Trust*** [2021] EWCA Civ 23, the Court of Appeal approved the approach set out in Afolabi and Morgan and, at paragraph 37, Underhill LJ confirmed, that

'rigid adherence to a checklist can lead to a mechanistic approach to what is meant to be a very broad general discretion, and confusion may also occur where a tribunal refers to a genuinely relevant factor but uses inappropriate Keeble-derived language. The best approach for a tribunal in considering the exercise of the discretion under section 123(1)(b) is to assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time, including in particular "the length of, and the reasons for, the delay". If it checks those factors against the list in Keeble,

well and good; but I would not recommend taking it as the framework for its thinking.'

Discussion & Decision

Time Limits - Unfair Dismissal

5 99. The Tribunal considered whether the claim was presented within the primary time limit. The Tribunal noted that the effective date of termination of the claimant's employment was 2 March 2023. The relevant time limit accordingly expired on 1 June 2023.

100. Whilst the claimant engaged in early conciliation, as this was done after the
10 expiry of the primary time limit, it did not result in the extension of the primary time limit.

101. The ET1 was presented on 18 July 2023. The claim was accordingly not presented in the primary three month time limit. It was submitted 1½ months after it expired.

15 102. The Tribunal then considered whether it was reasonably practicable for the claim to have been presented within the primary time limit, i.e. between 2 March and 1 June 2023. The claimant asserted that he was unaware that any time limit had started to run in this period. He had had a discussion with his trade union representative immediately following his dismissal. He asked
20 about whether to pursue an appeal or Employment Tribunal proceedings. They indicated that he should proceed with an internal appeal, in the first instance. During that discussion, time limits were not mentioned. The trade union representative simply stated that the initial focus should be on an internal appeal. The claimant took that comment at face value, relied upon it
25 and simply focused on his appeal. It was reasonable for the claimant to do so in all the circumstances. Thereafter, aside from physically accompanying him to the appeal meeting, the claimant received little/no assistance from his trade union representative. It was reasonable for the claimant, a lay person with autism, to defer investigating the possibility of litigation, and the requisite time
30 limits for doing so, until the appeal process was concluded in these

circumstances. He had not been put on notice that there were time limits, or that these had started to run. He understood that he required to progress his internal appeal before commencing Employment Tribunal proceedings. Given that understanding, it was not reasonable to expect the claimant to investigate the possibility of raising an Employment Tribunal claim, and the time limits for doing so, prior to the appeal outcome being issued. It was accordingly not reasonably feasible or practicable for him to present his Employment Tribunal claim in the period from 2 March to 1 June 2023.

103. The Tribunal then considered whether the claim, presented on 18 July 2023, was submitted in a reasonable further period. The Tribunal noted that the claimant received the appeal outcome on 30 June 2023. For the reasons set out above, the Tribunal concluded that it was reasonable for the claimant to wait for the conclusion of the internal proceedings, before investigating his right to bring an Employment Tribunal claim. The Tribunal concluded that the claimant acted promptly following receipt of the appeal outcome, lodging his claim 18 days later: He initially sought advice from his trade union, but this was not forthcoming; he then contacted Citizen's Advice; he followed their advice to contact Acas and commence early conciliation; in discussions with Acas during that process he noted that there were time limits and any claim now lodged may be lodged outside that time limit; he then brought early conciliation to an end and commenced drafting of his ET1, with assistance from his mother; the ET1 being lodged 8 days later. The Tribunal accepted that, given he has dyslexia, it would take the claimant longer than others who do not have dyslexia to prepare that.

104. Given these findings, the Tribunal concluded that the claim was presented within such further period as was reasonable in the circumstances and it does have jurisdiction to consider the complaint of unfair dismissal.

Unfair Dismissal

105. The Tribunal referred to s98(1) ERA. It provides that the respondent must show the reason for the dismissal, or if more than one the principal reason, and that it was for one of the potentially fair reasons set out in s98(2). At this

stage the Tribunal was not considering the question of reasonableness. The Tribunal had to consider whether the respondent had established a potentially fair reason for dismissal. The reason for dismissal is the '*set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee'* (***Abernethy v Mott, Hay and Anderson*** 1974 ICR 323, CA). While the Tribunal was conscious that the respondent had instigated informal capability proceedings in relation to the claimant, the Tribunal was satisfied that BH based her decision solely on the conduct of the claimant and genuinely believed that the claimant was guilty of misconduct. The reason for dismissal was accordingly the claimant's conduct – a potentially fair reason under s98(2)(b).

106. The Tribunal then considered s98(4) ERA. The Tribunal had to determine whether the dismissal was fair or unfair, having regard to the reason as shown by the respondent. The burden of proof at this stage is neutral. The answer to that question depends on whether, in the circumstances (including the size and administrative resources of the employer's undertaking) the respondent acted reasonably in treating the reason as a sufficient reason for dismissing the employee. This should be determined in accordance with equity and the substantial merits of the case. The Tribunal was mindful of the guidance given in cases such as ***Iceland Frozen Foods Limited v Jones*** that it must not substitute its own decision, as to what the right course to adopt would have been, for that of the respondent. There is a band of reasonableness within which one employer might reasonably dismiss the employee, whereas another would quite reasonably keep the employee on. If no reasonable employer would have dismissed, then dismissal is unfair, but if a reasonable employer might reasonably have dismissed, the dismissal is fair. The range of reasonable responses test applies both to the procedure adopted by the respondent and the fairness of their decision to dismiss. In considering this matter the Tribunal considered the questions noted below and reached the undernoted conclusions.

Was there a reasonable investigation?

107. In considering this element the Tribunal was mindful of the guidance set out in ***Salford Royal NHS Foundation Trust v Roldan 2010 ICR 1457, CA***, and the case of ***A v B 2003 IRLR 405, EAT***, which is referred to within that. These cases underline that the gravity of the charges, and the potential effect on the employee, will be relevant when considering what is expected of a reasonable investigation. In this case, the respondent was aware that, if the allegations were upheld and found to have amounted to internal fraud, this would mean the claimant was unable to work in the Civil Service for a period of 5 years. This meant that a thorough investigation was warranted in the circumstances.

108. The Tribunal noted that, despite the claimant putting forward his medical conditions as a mitigating factor in relation to the allegations, this was not investigated in any way. BH instead simply considered whether the claimant had informed his managers of the medical conditions referenced at the time. She concluded that he had not, so they were not in a position to make reasonable adjustments in relation to those conditions. The Tribunal concluded that BH felt that no further investigation was required and that it did not occur to her that *she* may require to take steps to consider the implications of the claimant's medical conditions, now these had been disclosed to her and advanced as an explanation or mitigation for the claimant's conduct. This is despite the fact that BH indicated in evidence to the Tribunal that if a medical report had been produced to her, stating that the claimant's medical conditions caused or contributed to his behaviour, this may have impacted her decision. Her view however was that the onus was on the claimant to produce this, not for her to investigate that.

109. BH in fact had no medical reports in relation to the claimant when she made her decision. She stated that she was not even aware that the claimant had sleep apnoea at the time she made her decisions, but acknowledged in evidence that there was an email in the appendices to the investigation report which expressly stated this. She took no steps whatsoever to investigate the position put forward by the claimant at the Decision Meeting, as set out in paragraph 49 above, beyond looking up the definition of narcolepsy. The claimant's statements, that his behaviour was caused by, or could be

explained by, medical conditions were simply discounted, without investigation and without any proper basis for doing so. In the Tribunal's view, no reasonable employer, faced with these circumstances, would have failed to investigate these points before reaching the conclusion that the behaviour amounted to gross misconduct and the employee should be dismissed as a result - particularly when they are aware of the very significant impact that decision will have on that employee's future ability to work anywhere in the Civil Service. In the Tribunal's view, a reasonable employer, faced with these circumstances, would have:

a. Requested a report from the claimant's GP/specialists; and/or

b. Referred the claimant to Occupational Health requesting that they specifically address whether the claimant's medical conditions could have caused or contributed to his behaviour.

110. The Tribunal concluded this fundamentally undermined the fairness of the respondent's investigation. When the respondent formed the belief that the claimant was guilty of misconduct, it had not carried out as much investigation as was reasonable in the circumstances. The third element of the Burchell test was accordingly not established.

111. While the respondent had the opportunity to remedy this on appeal, it failed to do so. MS did request sight of the occupational health and other medical records in the respondent's possession, but reviewed these purely from the perspective of identifying whether the claimant's managers were aware of the fact that he was falling asleep at work, or that he was experiencing memory loss. She concluded that they did not, and they could not therefore have made reasonable adjustments for him, before matters progressed to formal gross misconduct action. This was in fact wrong, as the claimant had informed his managers that he was falling asleep at work on 22 February 2022, well before the instigation of the formal investigation in September 2022. She also concluded that the claimant had not informed BH of any issues regarding memory loss. Again, this was wrong, as set out in paragraph 49 above and as ought to have been clear to MS from reading the minutes of the Decision

Meeting, where these points are clearly stated. Fundamentally however, MS failed to take any steps to investigate whether the claimant's behaviour could have been as a result of his medical conditions, and to properly consider the implications of the explanation/mitigation provided by the claimant at the disciplinary and appeal hearings, and the additional information available to her at the time of the appeal, namely that the claimant's doctors had recently confirmed that the medication he had been taking for his mental health conditions had caused an imbalance in his hormones and this had caused excessive sleepiness and memory issues. Again, this was despite the fact that MS stated in evidence to the Tribunal that her decision may have been different if she had been provided with a medical report by the claimant stating that the claimant's medical conditions caused or contributed to his behaviour.

Did the respondent have reasonable grounds for their belief?

112. BH found that each of the allegations against the claimant was established and each amounted to gross misconduct.

113. In relation to the first three allegations (set out in paragraph 45 above), while there were reasonable grounds for BH to find these were established, as the claimant in effect admitted that he had not attended certain training events, was late to certain meetings and had used a tool to record his flexi time when he had been asked not to, there were no reasonable grounds for her to conclude that these amounted to gross misconduct. None of these allegations come close to the examples of gross misconduct stated in the respondent's disciplinary policy, as set out at paragraph 14 above. Indeed, poor timekeeping, lateness and unauthorised absence are expressly stated as examples of misconduct, as is refusal to obey a reasonable management request. In addition, the investigation report provided to BH also expressly stated that these allegations appeared to *'fall under the heading of Misconduct'* or to be *'a minor indiscretion'* (as set out in paragraph 43 above), rather than gross misconduct.

114. BH could not provide any satisfactory explanation in her evidence as to why she found that the first three allegations constituted gross misconduct, rather

than misconduct. Indeed, it appeared to the Tribunal that, when asked about this, BH did not initially appreciate that there was a difference. She then sought to backtrack from her decision, and the statement of agreed facts, and stated that she had actually found that each of the allegations constituted misconduct (rather than gross misconduct), and that she had reached the decision to dismiss the claimant due to the number of established instances of misconduct. This position was entirely contrary to the position conveyed at the time to the claimant, the position understood by the Appeal Manager and the position stated in the statement of agreed facts.

115. The Tribunal concluded that, perhaps due to inexperience or lack of specialist advice and support, BH did not, at the time she made her decision, appreciate the difference between misconduct and gross misconduct and accordingly did not apply her mind to this. Instead, she approached the hearing believing that, if the allegations were found to be established, they would amount to gross misconduct. The Tribunal reached this conclusion taking into account:

a. The terms of BH's letter send to the claimant on 23 January 2023 which, as set out at paragraph 46 above, specified that the allegations *'fall under gross misconduct'*;

b. BH's comments at the start of the Decision Meeting that *'there are allegations of gross misconduct'*,

c. BH's outcome, in which there is no reference to any consideration whether the established conduct amounts to misconduct or gross misconduct, simply a conclusion that she finds *'all 5 allegations proven under gross misconduct'*. (There were in fact 6 allegations, each of which was found to be established); and

d. BH's evidence to the Tribunal.

116. In relation to allegations 2, 3 & 5 (as set out in paragraph 45 above), again the claimant had admitted that he had not been correctly recording, or informing his managers of, his learning and flexi time, but stated that there was an explanation for this. As set out above, the respondent did not

investigate that. The Tribunal concluded that the respondent’s failure to investigate the claimant’s explanation undermined their conclusions that he did so dishonestly and deliberately, thus amounting to theft of time/internal fraud. In the absence of a full investigation of the claimant’s medical conditions, the respondent did not have reasonable grounds for their belief that the claimant’s failure to correctly record or inform his managers of his learning and flexitime was deliberate and/or dishonest, amounting to theft of time and thus constituting gross misconduct.

Was the procedure adopted reasonable?

117. The Tribunal’s findings in relation to the investigation conducted are set out above. The Tribunal concluded that the investigation conducted fell outside the band of reasonable responses open to the respondent in the circumstances.

118. The Tribunal also found that no reasonable employer would have simply proceeded with the disciplinary hearing, without asking whether the claimant wished to proceed or required further time, in circumstances were they were very conscious that the investigation report was particularly lengthy and they were expressly informed at the start of the hearing that the claimant had not read this due to his dyslexia and had not discussed this with his trade union representative. To simply proceed with the hearing, at which the claimant was repeatedly asked whether he would like to add anything to what was stated in the investigation report or provide any further information, fell outside the band of reasonable responses open to the respondent in the circumstances.

119. The Tribunal found that, other than these points, the procedure adopted by the respondent was reasonable in the circumstances. The claimant was informed of the allegations and that these were being considered by the respondent as potentially amounting to gross misconduct. The claimant was provided with a copy of the evidence compiled. The claimant was given the opportunity to respond to the allegations at the disciplinary hearing and was provided with the opportunity to appeal. He was afforded of his right to be

accompanied at all stages. The respondent followed their internal procedures.

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

120. The Tribunal then moved on to consider whether the decision to dismiss the claimant, as a result of the identified misconduct, fell within the range of reasonable responses available to a reasonable employer in the circumstances.

121. The Tribunal found that the decision to summarily dismiss the claimant as a result of the identified misconduct, without investigating the mitigation/explanation put forward by the claimant, fell outside the range of reasonable responses available to a reasonable employer in the circumstances. No reasonable employer would have dismissed in these circumstances, for the reasons set out above.

122. In addition, the Tribunal found that the conclusion that each allegation amounted to gross misconduct, and the decision to summarily dismiss him as a result, fell outside the range of reasonable responses available to a reasonable employer in the circumstances, for the reasons set out above.

Conclusions re s98(4)

123. For the reasons stated above the Tribunal conclude that the respondent acted unreasonably in treating the claimant’s conduct as a sufficient reason for dismissal. No reasonable employer would have dismissed the claimant in these circumstances. The claimant’s dismissal was accordingly unfair.

Direct Discrimination

124. The Tribunal considered the allegation of direct discrimination, considering whether the alleged treatment occurred, whether it amounted to less favourable treatment and if so, what the reason for that treatment: was it because of disability?

125. The claimant relied solely on his dismissal as an act of less favourable treatment amounting to direct disability discrimination. The Tribunal noted that it was accepted that the claimant was dismissed. The alleged treatment was accordingly established.

126. The Tribunal then considered the reason why the respondent dismissed the claimant. The Tribunal concluded that the reason for the claimant's dismissal was his conduct, not the fact that he was a disabled person. There was no basis upon which it could reasonably be inferred that the claimant was dismissed because he was a disabled person.

127. The complaint of direct discrimination accordingly does not succeed.

Discrimination Arising from Disability

128. In relation to the claims of discrimination arising from disability the Tribunal started by referring to section 15 EqA.

129. Section 15(2) states that section 15(1) will not apply if the employer did not know, and could not reasonably have been expected to know, that the claimant had the disability. As indicated above, the respondent conceded that the claimant was a disabled person at the material time, as a result of autism, dyslexia, sleep apnoea and mental health conditions, and that the respondent was aware of this at the material times.

130. The Tribunal considered section 15(1) EqA and the guidance ***Pnaiser***. The Tribunal noted that the first question to consider is whether the claimant was treated unfavourably. In determining this, no question of comparison arises. The EHRC Employment Code indicates that unfavourable treatment is treated synonymously with disadvantage. It is something about which a reasonable person would complain. Taking those into account, the Tribunal found that the claimant was dismissed and that this amounted to unfavourable treatment.

131. The next questions concern the reason for the alleged treatment. The Tribunal required to determine whether the reason for any unfavourable treatment established was something 'arising in consequence of' the claimant's disability, focussing on the respondent's conscious or unconscious thought process. If there is more than one reason, then the reason allegedly arising from disability need only be a significant (in the sense of more than trivial) influence on the unfavourable treatment, it need not be the main or sole reason. It was held in ***Pnaiser*** that the expression 'arising in consequence of' could describe a range of causal links. More than one relevant consequence of the disability may require consideration, and whether something can properly be said to arise in consequence of disability is a question of fact in each case. It is an objective question, unrelated to the subjective thought processes of the respondent, and there is no requirement that the respondent should be aware that the reason for treatment arose in consequence of disability.

132. The claimant asserted that his dismissal was due to a number of factors which arose in consequence of his disability. The Tribunal considered each in turn, to determine whether they did indeed arise in consequence of the claimant's disability, if so, whether the 'something' identified was established and, if so, whether it had a significant (more than trivial) influence on the respondent's decision to dismiss the claimant. The Tribunal's findings in relation to each are as follows:

a. **The respondent changing Mr Crawford's role in September 2021, without consultation, and Mr Crawford finding both the new role and the change difficult due to being an autistic person.** The Tribunal accepted that the claimant's role changed slightly in September 2021 when he was moved to a new team to work with FM & DR and that this was done without consultation. The Tribunal accepted that the claimant found the new role and the change difficult, due to being an autistic person. The Tribunal found however that this had no influence on the respondent's decision to dismiss the claimant.

b. **Mr Crawford falling asleep/somnolence, which was caused by sleep apnoea and/or his medication (amisulpride) for his mental health condition.** The Tribunal accepted that the claimant was falling asleep during the course of his working day and this was caused by his medication for this mental health condition, so arose in consequence of his disability. The Tribunal concluded that the fact that the claimant was falling asleep during the course of his working day and this did significantly (i.e. more than trivially) influence the respondent's decision to dismiss the claimant.

c. **His slower pace of work, which was caused by his dyslexia.** The Tribunal accepted that the claimant had a slower pace of work as a result of having dyslexia. The Tribunal found however that this had no influence on the respondent's decision to dismiss the claimant. The respondent had known about this since the claimant commenced employment with them and adjustments had been put in place as a result.

d. **The fact that he may not have fully explained the above to his managers, due to distrusting them, which arose in consequence of autism.** The Tribunal did not accept that the claimant's distrust of management arose in consequence of autism. Rather, the claimant gave evidence that his distrust of management arose from an incident in 2017. In any event, the Tribunal concluded that the claimant did not explain to management that he was falling asleep during the working day as a result of him being in denial of this, not as a result of mistrust. Once he became aware of this himself, he informed FM.

133. The Tribunal then considered justification in relation to point b) above, and whether the unfavourable treatment complained of was a proportionate means of achieving a legitimate aim, for the purposes of section 15(1)(b) EqA.

134. The legitimate aim relied upon by the respondent was '*to employ staff that were able to perform the role for the respondent and those who they held a*

relationship of trust and confidence'. The Tribunal accepted that the respondent genuinely had that aim and that it was legitimate.

135. In order to be proportionate the measure has to be both an appropriate means of achieving the legitimate aim and also reasonably necessary in order to do so (***Homer v Chief Constable of West Yorkshire Police*** [2012] IRLR 601). The Tribunal requires to balance the reasonable needs of the respondent against the discriminatory effect on the claimant (***Land Registry v Houghton and others*** UKEAT/0149/14). There is, in this context, no 'margin of discretion' or 'band of reasonable responses' afforded to respondents (***Hardys & Hansons v Lax*** [2005] IRLR 726, CA).

136. The Tribunal concluded that it was not an appropriate means of achieving the stated legitimate aim to summarily dismiss the claimant for gross misconduct, nor reasonably necessary to do so. Other measures, which did not have such a discriminatory impact on the claimant, were open to the respondent and would have achieved the legitimate aim, such as investigating whether the claimant was indeed falling asleep and in denial about this, as well as experiencing memory loss, as he asserted. If established, a more proportionate response would have been to consider whether the claimant required to take time off work to obtain treatment, or whether consideration should be given to whether the claimant was capable of undertaking his role and, if not, whether he should be dismissed on grounds of capability or offered ill health retirement.

137. The Tribunal therefore concluded that it was not reasonably necessary for the respondent to dismiss the claimant when it did and for the reasons it did and that dismissing the claimant was disproportionate way of achieving the legitimate aim pursued.

138. The claimant's dismissal accordingly amounted to discrimination arising from disability.

Reasonable Adjustments

139. The duty to make reasonable adjustments arises when an employer knows, or ought to know, that the employee had a disability *and* that the PCP, or failure to provide an auxiliary aid, is likely to place the employee at the identified substantial disadvantage.

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140. The claimant asserted that the respondent failed to provide an auxiliary aid for him, in the period from June 2021 onwards, namely the provision of working/workable computer support packages to assist him with his dyslexia. The Tribunal did not accept that the respondent failed to do so. The respondent provided Dragon and Read/Write Gold. These computer support packages were working, and the claimant confirmed to FM and DR, in a meeting on 1 November 2021 how those systems operated. He did not raise any concerns in relation to the operation of these computer packages, or highlight that these were not operating as they should. The Tribunal concluded that he would have done so, had this been the case. The Tribunal accordingly concluded that the claimant has not established that the respondent failed to provide him with an auxiliary aid.

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141. The respondent accepted that they applied the PCP asserted, namely *'requiring Compliance Caseworkers to undertake e-learning, which involved a lot of reading'.* They also accepted that the PCP placed the claimant at a substantial disadvantage, in comparison to those who do not have the same disability, as he found it difficult to absorb the information, and required longer to do so, as a result of his dyslexia, and that the respondent was aware of this.

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142. The Tribunal also accepted that the claimant was also placed at a substantial disadvantage, as he found it difficult to stay awake during the e-learning as a result of sleep apnoea/somnolence. The Tribunal concluded that the respondent knew, or ought reasonably to have known, that the claimant was likely to be placed at this disadvantage: The occupational health report instructed by the respondent in July 2016 highlighted that the claimant's *'sleep apnoea is worse when he is reading information'* and that he has *'difficulty focusing attention for sustained periods of time'.*

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143. The Tribunal considered each of the adjustments proposed by the claimant, to ascertain whether the steps proposed would have eliminated or reduced the disadvantage to the claimant and, if so, whether or it would have been reasonable for the respondent to have taken those steps. In relation to the effectiveness of the adjustments proposed, the Tribunal was mindful that there does not require to be absolute certainty, or even a good prospect, of an adjustment removing a disadvantage. Rather, a conclusion that there would have been a chance of the disadvantage experienced by the claimant being alleviated or removed is sufficient. In relation to each adjustment proposed, the Tribunal reached the following conclusions:

a. **Providing in-person training to the claimant** The Tribunal concluded that this would likely have alleviated the disadvantage experienced by the claimant: he was able to understand and absorb the information in the e-learning modules when his ex-wife read them to him and he did not fall asleep when she was doing so. He was also able to answer the questions posed by FM and demonstrate an understanding of the modules, despite being unable to pass the multiple choice test regarding that module when working on his own. The respondent may have been able to secure funding for this from Access to Work. They did not explore that option. Had they been able to do so, it would have cost nothing. It would have been practicable for them to do so and would have involved limited disruption to the respondent. The Tribunal concluded that, in these circumstances, it would have been reasonable for the respondent to have taken this step. Even if the cost was not met by Access to Work however, the Tribunal concluded that it still would have been reasonable for the respondent to provide at least some in-person training for the claimant. Given the size and resources of the respondent, the fact that they had done so for training in the past and the fact that the training was for a limited period of time, it would have been reasonable for the respondent to meet this cost.

b. **Allowing the claimant a longer period of time to absorb written information.** The Tribunal concluded that this would not have alleviated the disadvantage experienced by the claimant. The claimant was already provided with 100% extra time, despite the respondent's understanding that 25% extra time was what was normally permitted. There was no evidence before the Tribunal from which it could be concluded that the substantial disadvantages experienced by the claimant would have alleviated by allowing him more than 100% extra time

144. For the reasons set out above, the Tribunal concluded that the respondent failed in its obligation to make reasonable adjustments. It would have been reasonable for them to have provided in person training to the claimant to alleviate the substantial disadvantage suffered by the claimant as a result of their PCP of requiring Compliance Caseworkers to undertake e-learning, which involved a lot of reading.

Jurisdiction - Discrimination

145. The Tribunal considered the relevant time limits and whether the established complaints were brought within those time limit. The Tribunal concluded that the relevant time limits started to run on the following dates:

a. In relation to the complaint of failure to make reasonable adjustments, time started to run on the date JH informed the claimant that she had considered his request, but declined this, namely 24 November 2021; and

b. In relation to the complaint that his dismissal amounted to discrimination arising from disability, time started to run from the date of dismissal, namely 2 March 2023.

146. The time limit in each case expired three months later, namely on 23 February 2022 and 1 June 2023 respectively.

147. Whilst the claimant engaged in early conciliation, as this was done after the expiry of the primary time limit, it did not result in the extension of the primary time limit.

148. The Tribunal accordingly determined that the claim was not brought within the period of three months from the act complained of.

149. The Tribunal has a wide discretion to allow claims to proceed, notwithstanding the fact that they are not submitted within 3 months of the date of the act to which the complaint relates, where the Tribunal is satisfied that they are submitted within *'such other period as the employment tribunal thinks just and equitable'* (s123(1)(b) EqA).

150. The Tribunal noted that the claimant was experiencing significant unexplained sleepiness in the period up to 23 February 2023 and thereafter, sleeping up to 15-16 hours per day. He was absent from work from 1 March 2023, returning only for a short period from 17 June to 3 August 2023. Throughout this time, he was on the respondent's redeployment register and was hopeful that an alternative role would be secured for him. Latterly, there were disciplinary proceedings against him and he understood that he required to exhaust the internal proceedings before raising an Employment Tribunal claim. He only became aware that there were time limits for doing so when he was informed of this by Acas on/around 10 July 2023. His claim was then lodged on 18 July 2023.

151. The Tribunal considered these factors and the prejudice each party would suffer as a result of allowing or refusing an extension of time. The Tribunal noted that the claimant would be denied a right of recourse, if time is not extended, and that the respondent was able to respond to each of the allegations levelled against them, notwithstanding the fact that they were raised outside the requisite time period. Taking into account the prejudice which each party would suffer as a result of refusing an extension of time, and having regard to all the circumstances, the Tribunal was satisfied that the complaints were raised within such other period as was just and equitable. The Tribunal accordingly has jurisdiction to consider the complaints.

Remedy

Reinstatement/re-engagement

152. The claimant indicated in his claim form that he sought reinstatement/re-engagement as a remedy. He confirmed at the outset of the hearing that this remained the case.

153. S113 ERA states that:

'An order under this section may be-

(a) An order for reinstatement (in accordance with section 114), or

(b) An order for re-engagement (in accordance with section 115),

as the tribunal may decide.'

154. Section 116 ERA states that in exercising discretion under s113 ERA, the Tribunal shall consider the claimant's wishes, whether it is practicable for the employer to comply with an order for reinstatement/re-engagement and, where the complainant caused or contributed to some extent to the dismissal, whether it would be just and equitable to order his reinstatement or re-engagement.

155. The claimant confirmed that he wished to be reinstated/re-engaged, the first relevant factor is accordingly satisfied.

156. The second factor is practicability. The issue is one for the Tribunal to consider in the light of the circumstances of the case as a whole. This should be considered as at the date when reinstatement or re-engagement would take effect (which in most cases will mean judging the position as at the date of the hearing) and not at the time of the dismissal.

157. The Tribunal noted that the respondent's position was that reinstatement/re-engagement is not practicable, as there has been a clear breakdown in trust and confidence. The claimant also stated that he had trust issues with the respondent, and would do even if reinstated or re-engaged. As a result, the

Tribunal concluded that reinstatement/re-engagement was not practicable in all the circumstances.

Compensation for Unfair Dismissal

5 158. The Tribunal then considered compensation. The Tribunal firstly considered whether it was appropriate to make any adjustments to the basic or compensatory award, and reached the following conclusions:

Polkey

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159. Given that the Tribunal's finding that the dismissal was unfair is not restricted to procedural irregularities, a reduction in any compensation awarded on the basis of ***Polkey*** is not appropriate.

15 *Acas Code*

160. The Tribunal do not make any finding that the respondent unreasonably failed to comply with the Acas Code. No uplift in compensation is accordingly appropriate.

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Contribution

161. The respondent submitted that the claimant contributed to his dismissal and compensation should be reduced accordingly. The Tribunal required to
25 consider whether the claimant's conduct, prior to dismissal, was such that it would be just and equitable to reduce the basic award, or whether the claimant's dismissal was to any extent caused or contributed to by his actions, such that it would be appropriate to reduce the compensatory award.

30 162. The Tribunal concluded that the claimant's actions, prior to dismissal were not such that it would be just and equitable to reduce the basic award.

163. The Tribunal considered whether the claimant's dismissal was to any extent caused or contributed to by the actions of the claimant. If so, the Tribunal requires to reduce the amount of the basis and/or compensatory award by such proportion as it considers just and equitable having regard to that finding. In reaching a conclusion on this point the Tribunal must consider whether the claimant's actions were culpable or blameworthy. This requires the Tribunal to make findings in relation to what actually happened, rather than whether the respondent reasonably believed that the claimant was guilty of misconduct.

164. From the evidence before the Tribunal, the Tribunal determined that the claimant was falling asleep for up to 15-16 hours per day from September 2021 to 28 February 2022. He also experienced significant memory issues in that time. These symptoms were caused by a hormone imbalance, brought on by the medication he was taking for his mental health conditions. From September 2021 to 22 February 2022, he either did not realise that he was falling asleep, or refused to consciously accept that he was doing so, and continued to record his hours and work as if he was working throughout the day. He missed or was late to or missed some meetings as a result of falling asleep. In the circumstances, the claimant's actions were not culpable or blameworthy. No reduction should accordingly be made to any compensatory award on the basis that he caused or contributed to his dismissal.

Basic Award

165. Given the claimant's age (41), service (8 years), weekly gross remuneration (£540.96, plus employer pension contributions of 27.1%) and the applicable limit on a week's pay (£571) at the date the claimant's employment terminated, the basic award is **£4,568.**

Compensatory Award

166. The claimant's employment terminated on 2 March 2023. He had not secured alternative employment by the date of the hearing. He was initially not fit to seek employment, due to his medical conditions. Had he remained in employment he would have continued to receive nil pay, as he had exhausted his statutory and enhanced sick pay entitlements. He has accordingly not lost wages as a result of his dismissal. Latterly, he has chosen not to take any steps to secure alternative employment, despite being fit to do so. In these circumstances the Tribunal concluded that it was not just and equitable to make any award in relation to loss of earnings and make a compensatory award of **£500** for loss of statutory rights only.

Disability Discrimination

Financial Loss

167. For the reasons set out above, under 'Compensatory Award' the Tribunal concluded that the claimant has not demonstrated any financial loss as a result of the termination of his employment. It is therefore not just and equitable to make any award for financial loss.

Injury to Feelings

168. The claimant gave oral evidence in relation to injury to feelings. The Tribunal's findings in relation to this are set out at paragraphs 31 & 52 above.

169. In the circumstances, the Tribunal was satisfied that an award at the lower of the middle Vento band was appropriate, namely **£10,000**. Interest of **£806.58,** from 2 March 2023 to date (368 days @ 8%) is also payable.

Employment Judge Sangster

Employment Judge

4 March 2024

Date of Judgment

05/03/2024

Date sent to parties