



# REASONS

## Background

1. By way of background in this case the claimant was employed by the respondent, The Royal Mail latterly as an Operational Postal Worker from 15<sup>th</sup> July 2000 until 8<sup>th</sup> January 2019.
2. By a claim form presented on 6<sup>th</sup> January 2019 following a period of early conciliation from the 9<sup>th</sup> January to the 4<sup>th</sup> January 2019 the claimant brought complaints of Discrimination because of disability and the second complaint presented on the 20<sup>th</sup> May 2019 following further early conciliation from 23<sup>rd</sup> April to 20<sup>th</sup> May 2019 which brought a complaint of unfair dismissal and further allegations of Discrimination because of the protected characteristic of disability. The two claims have been consolidated to be heard together. Subsequently the claimant has withdrawn the complaints of victimisation and unlawful deductions from pay.
3. In essence the complaint is that the claimant was subject to bullying and harassment was ultimately subject to an unfair dismissal and that the respondent ought to have permitted the claimant to have left employment because of his ill health. The claimant asserts that the dismissal was because of the claimants' behavior that was considered to be gross misconduct and not because of, or arising from the claimants' disability. The respondent denies the dismissal was unfair or that they discriminated against the claimant as alleged or at all.

## **The issues**

4. The issues between the parties which potentially fall to be determined by the Tribunal are 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.
- b. If so, was the dismissal fair or unfair in accordance with ERA section 98(4), and, in particular, did the respondent in all respects act within the so-called 'band of reasonable responses'?

### *Remedy for unfair dismissal*

- c. If the claimant was unfairly dismissed and the remedy is compensation:

- i. if the dismissal was procedurally unfair, what adjustment, if any, should be made to any compensatory award to reflect the possibility that the claimant would [still have been dismissed had a fair and reasonable procedure been followed / have been dismissed in time anyway]? See: Polkey v AE Dayton Services Ltd [1987] UKHL 8; paragraph 54 of Software 2000 Ltd v Andrews [2007] ICR 825; [W Devis & Sons Ltd v Atkins [1977] 3 All ER 40; Crédit Agricole Corporate and Investment Bank v Wardle [2011] IRLR 604];
- ii. would it be just and equitable to reduce the amount of the claimant's basic award because of any blameworthy or culpable conduct before the dismissal, pursuant to ERA section 122(2); and if so to what extent?
- iii. did the claimant, by blameworthy or culpable actions, cause or contribute to dismissal to any extent; and if so, by what proportion, if at all, would it be just and equitable to reduce the amount of any compensatory award, pursuant to ERA section 123(6)?

### *Disability*

- d. The respondent concedes that the claimant was a disabled person in accordance with the Equality Act 2010 ("EQA") at all relevant times because of the following condition(s): Depression, stress and anxiety. The respondent has not identified the date from which it is conceded that the respondent had knowledge of the claimant's disability and the respondent is ordered to confirm the date from which knowledge of disability occurred within 14 days of the date of this hearing.

### *EQA, section 15: discrimination arising from disability*

- e. Did the following thing(s) arise in consequence of the claimant's disability:
  - i. The respondent's treatment of him by Mr Good and Mr Ali when instructing the claimant to remain at home and submit sick notes although ready and willing to return to work.
  - ii. The failure to investigate the claimant's grievances until the appeal stage. The claimant asserts that the failure to deal with his grievances had an effect in him due to his mental health conditions.
  - iii. The requirement that the claimant work at the Bromsgrove depot when it was acknowledged that the claimant had difficulties at that depot.
  - iv. Disciplining and then dismissing the claimant.
  - v. The failure to refer the claimant to Occupational Health before they did that delay resulted in the claimant being dismissed before the termination of his employment for ill health reasons thereby denying the claimant the contractual right to an ill health termination payment.

- f. Did the respondent treat the claimant unfavourably as detailed at (v) above?
- g. Did the respondent treat the claimant unfavourably in any of those ways ?
- h. If so, has the respondent shown that the unfavourable treatment was a proportionate means of achieving a legitimate aim? The respondent relies on the following as its legitimate aim(s):
  - i. The legitimate aim was to treat everyone in the circumstances exactly the same
  - ii. To be particularised by the respondent within 14 days.
- i. Alternatively, has the respondent shown that it did not know, and could not reasonably have been expected to know, that the claimant had the disability? The respondent shall within 14 days specify the date from which they had knowledge of the claimants disability.

*Reasonable adjustments: EQA, sections 20 & 21*

- j. Did the respondent not know and could it not reasonably have been expected to know the claimant was a disabled person at the relevant time?
- k. A “PCP” is a provision, criterion or practice. Did the respondent have the following PCP(s):
  - i. Requirement to return to a particular depot without considering an alternative location.
  - ii. Failure to apply the respondent’s RTW policy in respect of the claimant
  - iii. The requirement to work time and hours at Bromsgrove without considering an adjustment to the hours of work.
  - iv. Failure to consider an alternative line manager.
  - v. At the disciplinary investigation the claimant was not provided with any support; in particular the claimant was led to believe it was a RTW meeting.
  - vi. The requirement for the claimant to attend the investigation in person (Witnesses in the grievance investigations were permitted to be interviewed by telephone or email and the claimant was not allowed to avail himself of that practice)
  - vii. The requirement for the claimant to deal with arbitrary documentation in a short period of time
- l. Did any such PCP 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, in that:
  - i. The claimant was required to return to work at the Bromsgrove depot.
  - ii. The claimant did not have the benefit of the respondent’s return to work procedure when the claimant was ready and willing to return to work on 24 October 2018.

- iii. The claimant was not offered an alternative location to return o work to other than Bromsgrove nor offered adjusted hours of work or support.
  - iv. The requirement to work under the same line manager, given the previous history between the claimant and Mr Allen and Mr Ali.
  - v. The requirement that the claimant attend the meeting on 25 October without support and notice that the meeting was a disciplinary investigation and not a return to work interview as he had been informed.
  - vi. The requirement to attend lengthy investigation meetings in person.
  - vii. The requirement to read extensive documentation and respond to it in speedy time. [the claimant says that he had informed the respondent of the difficulty he had dealing with post and documents as a result of his condition]
- 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, were there steps that were not taken that could have been taken by the respondent to avoid any such disadvantage? The burden of proof does not lie on the claimant, however it is helpful to know what steps the claimant alleges should have been taken and they are identified as follows:
- i. As detailed in the claim form paragraphs 28 -35
- o. If so, would it have been reasonable for the respondent to have to take those steps at any relevant time?

*EQA, section 26: harassment related to disability*

- p. Did the respondent engage in conduct as follows:
- i. Mr Allen referring to the claimant as paranoid and crazy and adopting intractable positions in relation to location and holiday in order to goad and inflame the claimant.
  - ii. Mr Good and Mr Ali when ambushed at the meeting on 25 October 2018.
  - iii. As detailed in paragraph 5 of his second claim form.
- q. If so was that conduct unwanted?
- r. If so, did it relate to the protected characteristic of disability
- s. Did the conduct have the purpose or (taking into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect) the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

## **Equality Act, section 27: victimisation – the complaints were withdrawn**

### **Unauthorised deductions – the complaint was withdrawn**

#### *Breach of contract*

- t. To how much notice was the claimant entitled?
- u. Did the claimant fundamentally breach the contract of employment by an act of so-called gross misconduct?

### The Evidence

- 5. Hearing of this complaint has been conducted remotely over cloud video platform (“CVP”) due to the impact of the COVID-19 pandemic and the requirements for Social Distancing to be maintained in the hearing of the claim.
- 6. Both parties have been ably represented and we have been referred to a bundle of documents extending over some 315 pages. We have been referred to witness evidence given by the claimant Mr Hill and by Mr Parsons a former CWU representative based at Redditch and for the respondents from the Claimants’ Line Manager, from Mr Imdad Ali the Delivery Office Manager, Mr John Good the Operations Manger, Ms. Jane Mee the Area Program Manager and the Dismissal Manager and Miss Clare Tebbutt, Independent Casework Manager who conducted the appeal against the dismissal decision. Witnesses have each submitted written witness statements which have been taken as read and been subject to further examination.

### The Law

#### Unfair Dismissal

7. Section 98 Employment Rights Act 1996 provides:-

- (1) “In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –
  - a) the reason (or if more than one, the principal reason) for the dismissal; and
  - b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
- (2) A reason falls within this subsection if it –
  - (a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
  - b) relates to the conduct of the employee.”
- (4) “Where the employer has fulfilled the requirements of subsection (1) the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –
  - a) depends on whether in the circumstances (including the size and administrative resources of the employer’s undertaking) the

employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and  
b) shall be determined in accordance with equity and the substantial merits of the case.”

8. It is for the employer to show the reason for dismissal and that it was a potentially fair one. The burden is on the employer to show that it had a genuine belief in the misconduct alleged. British Home Stores v Burchell 1978 IRLR 379. The tribunal must consider whether that belief is based on reasonable grounds after having carried out a reasonable investigation but in answering these two questions the burden of proof is neutral.
9. In the words of the guidance offered in Iceland Frozen Foods v Jones 1982 IRLR 439:-
  - a. the starting point should always be the words of section 98(4) themselves
  - b. in applying the section the tribunal must consider the reasonableness of the employers conduct, not simply whether they consider the dismissal to be fair
  - c. in judging the reasonableness of the dismissal the tribunal must not substitute its decision as to what is the right course to adopt for that of the employer
  - d. in many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might take one view, another quite reasonably take another
  - e. the function of the tribunal is to determine in the particular circumstances of each case whether the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair.
  - f. The correct approach is to consider together all the circumstances of the case, both substantive and procedural, and reach a conclusion in all the circumstances.
10. The Court Of Appeal in Sainsbury's Supermarkets Ltd v Hitt 2003 IRLR 3 concluded that the band of reasonable responses test applies as much to the question of whether the investigation was reasonable in all the circumstances as it does to the reasonableness of the decision to dismiss. In A V B 2003 IRLR 405 the EAT concluded that when considering the reasonableness of an investigation it is relevant to consider the gravity of the charges and the consequences to the employee if proved. Serious allegations of criminal misbehaviour must always be the subject of the most careful and conscientious investigation.
11. The tribunal has considered the provisions of the ACAS code of practice to disciplinary and grievance procedures.
12. In this case the respondent has referred to the tape recording of a telephone conversation between the claimant and his line manager to corroborate the alleged racial abusive comments the claimant was alleged to have made. We have been referred to the European authority of Lopez-Ribalda v Spain [2020] IRLR 60 and the guidance of the Grand Chamber of the ECHR to the

national court in respect of the usage of covert recordings for the purposes of misconduct findings.

### Discrimination Arising from disability

13. The provisions of s15 of the Equality Act 2010 details that:  
**S15 Discrimination arising from disability**  
(1) A person (A) discriminates against a disabled person (B) if—  
(a) A treats B unfavourably because of something arising in consequence of B's disability, and  
(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.  
(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.
14. We have been referred to the guidance laid down by Simler P in Pnaiser v NHS England [2016] IRLR 170 and more recently by HHJ Eady QC in A Ltd v Z [2020] ICR 199
15. In this case the respondent accepts knowledge of the claimant's disability at all material times. The duty to make reasonable adjustments and the failure to comply with the duty is detailed in the provisions of s20 and 21 of the Equality Act 2010.

### Reasonable Adjustments

16. Section 20 provides where the duty to make reasonable adjustments is imposed on a person comprises three requirements:  
“(2) The duty comprises the following three requirements.  
  
(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.  
  
(4) The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.  
  
(5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.”
17. The respondent only has to make **reasonable** adjustments. Sometimes there is nothing that an employer can reasonably be expected to do to help an employee.
18. The bar is set fairly high in terms of what adjustments should be made. See comments of the House of Lords in Archibald v Fife Council:  
  
‘The duty to make adjustments may require the employer to treat a disabled person more favourably to remove the disadvantage which is attributable to the disability. This necessarily entails a measure of positive discrimination’



19. If necessary, the claimant should have been treated more favourably than other non-disabled employees.
20. Employers are under no duty to make reasonable adjustments if:
- a. They did not know and could not reasonably be expected to have known that the claimant had a disability, or
  - b. They did not know and could not reasonably be expected to have known that the claimant was likely to be placed at a substantial disadvantage as a result.
21. In considering whether or not there is a PCP established we have had regard to the recent guidance provided in *Ishola v Transport for London* [2020] IRLR 368.
22. The Equality and Human Rights Commission Employment Code of Practice talks about the duty to make reasonable adjustments in chapter 6. Tribunals must take into account any part of the Code which appears relevant.
23. The Equality and Human Rights Commission: Code of Practice on Employment (2011) at paragraph 6.19 provides [Sch 8, para 20(1)(b)] if the employer does not know the worker is disabled that:
- “For disabled workers already in employment, the employer only has a duty to make an adjustment if they know, or could reasonably be expected to know, that a worker has a disability and is, or is likely to be, placed at a substantial disadvantage. The employer must, however, do all they reasonably can be expected to do to find out whether this is the case. What is reasonable will depend on the circumstances. This is an objective assessment. When making enquiries about disability, employers should consider issues of dignity and privacy and ensure that personal information is dealt with confidentially.”*
24. Paragraph 6.23 the Code identifies what is meant by ‘reasonable steps’:

*“the duty to make reasonable adjustments requires employers to take such steps as it is reasonable to have to take, in all the circumstances of the case, in order to make adjustments. The act does not specify any particular factors that should be taken into account. What is a reasonable step for an employer to take will depend on all the circumstances of each individual case.”*

### Harassment

25. There are three essential elements of a harassment claim under S.26(1):
- a. unwanted conduct
  - b. that has the proscribed purpose or effect, and
  - c. which relates to a relevant protected characteristic.

In particular:

Section 26 Equality Act 2010 provides

- “(1) A person (A) harasses another (B) if-
- (a) A engages in unwanted conduct related to the relevant protected characteristics and

- (b) *the conduct has the purpose or effect of -*
    - (i) *violating B’s dignity, or*
    - (ii) *creating an intimidating, hostile, degrading, humiliating or offensive environment for B*
  - (2) *A also harasses B if-*
    - (a) *A engages in unwanted behaviour of a sexual nature, and*
    - (b) *the conduct has the purpose or effect referred to in subsection (1)(b).*
  - (4) *In deciding whether conduct has the effect referred to in subsection (1) (b) each of the following must be taken into account-*
    - (a) *the perception of B*
    - (b) *the other circumstances of the case*
    - (c) *whether it is reasonable for the conduct to have that effect.”*
26. The case of *Richmond Pharmacology v Dhaliwal 2009 ICR 724, EAT* expressed the view that it would be a ‘healthy discipline’ for a tribunal in any claim alleging unlawful harassment specifically to address in its reasons each of these three elements at para 10-16 summarises the approach.
27. The test of whether the conduct has the “effect” expressly requires the tribunal to have regard to s.26(4):

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

28. A threshold must be met, otherwise the language of the legislation is trivialised. *Richmond Pharmacology*, at Para 22:

*“While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase*

29. Mindful of the threshold we have had regard to the perceived effect of the conduct on the putative victim *Pemberton v Inwood* [2018] EWCA Civ 564 and whether it was reasonable for the conduct in question to be regarded as having that effect and the context in which the conduct complained of occurred.

#### Findings of fact

30. The claimant was employed by the respondent as an Operational Postal grade “OPG” employee. He was employed in accordance with the respondents’ standard conditions of employment [108 – 118] subject to variation.
31. His employment was subject to the respondent’s Conduct Policy [79 – 85] and the respondents Code of Business Standards (86 – 107).

32. The claimant was employed by the respondent from the 15<sup>th</sup> July 2006 to 8<sup>th</sup> February 2019. The respondent accepts that the claimant is the person with the disability due to the conditions of depression/anxiety in respect of which the claimant takes medication and receives counselling. The claimants' disability is accepted by the respondent.
33. Although not directly relevant to the issues that we are required to determine we have been referred at some length to the background in relation to the claimant's employment when, until 2017, he was employed to work at the respondents' Redditch Delivery Office and it is evident that the claimant's working relationship with his colleagues at the Redditch Delivery Office was not always a cordial one.
34. On the 20<sup>th</sup> February 2017 there had been an incident at work which had led to a period of unauthorized absence from 24<sup>th</sup> February and then to a period of sickness absence from 27<sup>th</sup> February to 6<sup>th</sup> April due to stress. The claimant raised a grievance [125 – 126] which was investigated by Mr Sohal a Delivery Office Manager based at Shirley that concluded that Mr Hill had been treated fairly by the respondent's and in line with their attendance policy. Notwithstanding the claimant's grievance that he considered that the Redditch Management Team didn't take account of his mental health when dealing with him and he felt intimidated and bullied, the grievance was not upheld and no further action was taken.
35. On his return to work in May on Saturday 13<sup>th</sup> May 2017 an incident occurred between the claimant and Mr Mark Harber which led to a fact-finding investigation being conducted in relation to the telephone conversation that took place between the claimant and Mr Harber concerning the following abusive language that the claimant had used to his Manager. The Investigation Manager Mr Imdad Ali meet with the claimant and his Trade Union Representative on the 23<sup>rd</sup> May 2017 [134 – 136] in which the claimant confirmed he had told his manager to "*Fuck Off*". During the fact-finding view of the claimant had explained "*I can't be fucked with all this*" Mr Ali informed the claimant that whilst appreciating his frustrations it was not appropriate to swear in the meeting, in response the claimant had apologized for his comment. A precautionary suspension from work pending the investigation had then followed and a formal disciplinary interview was conducted with Graham Dutton [142 – 214] which concluded the claimant was guilty of gross misconduct having verbally abused a Royal Mail Manager and a disciplined sanction applied was that of a 1 year suspended dismissal and compulsory transfer [147]. The disciplinary sanction had been reached in light of the mitigating factor that the claimant had been under extreme pressure due to child care issues that he was trying to resolve and the grievances Mr Hill had been pursuing that had been upheld on appeal. The letter confirming the disciplinary sanction was sent to the claimant on 12<sup>th</sup> October 2017 [147 -1450] the claimants' appeal against the Disciplinary Sanction was conducted by Mr Welch [159 – 164] which concluded the decision to award a 1 year Suspension Dismissal which had been taken, the claimant's Trade Union Representative having confirmed that the claimant accepted swearing at a Manager was unacceptable and having asked for the decision on the Disciplinary decision should be deferred until the resolution of the grievance that was outstanding.

36. The claimant appealed against his grievances and the stage 2 grievance appeal hearing and the outcome of the grievance investigation was communicated to the claimant on the 13<sup>th</sup> October 2017 [154 – 155]. The claimant's appeal in respect of his grievance was in four parts, the claimant's stage 2 grievance was upheld in particular the outcome referred to the OH Assist Report which had stated in respect of the claimant's then ongoing Mental Health issues that *"a supportive and empathetic management approach would have been of benefit"*.
37. On the 31<sup>st</sup> October 2017 the claimant appealed against the Disciplinary decision made on the 12<sup>th</sup> October which had been taken by Mr Welch. The Disciplinary Decision had confirmed the claimant's transfer from 12<sup>th</sup> October to Alcester Delivery Office, the claimant was accompanied at the Disciplinary Hearing held on the 31<sup>st</sup> October 2017 by his Trade Union Representative Mr Simon Edmunds [159 – 164] it was determined at that appeal hearing that the claimant had used abusive language towards his manager, he has shown no remorse for his actions and it was impossible for the claimant to remain at Redditch Deliver Office and that the disciplinary decision of the 1-year suspended dismissal and compulsory transfer remained in place.
38. Having been referred to the circumstances that led to the claimant's transfer to the Alcester Delivery Office we have reviewed documentation that has been provided in evidence and find nothing was before the respondent to suggest to them that the claimant's Mental Health condition caused him to be abusive. The claimant during the conduct of the Disciplinary Proceedings against him had confirmed that he had been counselled in his counselling sessions to walk away from situations when he found himself in difficulties and said that he should *"remove self from situation if I feel angry or upset"*. We conclude that the claimant was aware of the coping mechanisms which he ought to employ in situations where he became angry or upset. The claimant was aware that his behavior amounted to gross misconduct and there is nothing before the respondent to suggest that his Mental Health condition caused him to be abusive, we find that Mr Welch's decision at the appeal was one that is reasonable and balanced and that was a conclusion that was in the range of reasonable responses.
39. The claimant returned to work on the 16<sup>th</sup> December 2017 and was based at the Alcester Deliver Office where he was assigned to work out of the Bromsgrove Delivery Office where he worked for a period of 10 days from the 16 to 26 December 2017.
40. Whilst working at the Bromsgrove Delivery Office the claimant was engaged in the Christmas rush, Mr Christopher Allen was a new Cover Manager based at Alcester and as a manager new to working for Royal Mail he was assigned to work on the Delivery route assisting the claimant in Bromsgrove. In his witness evidence [ para. 16] the claimant refers to oppressive scrutiny of his work with no explanation and the claimant asserts that Mr Allen accompanied him on his delivery route on 3 days. Mr Allen's account in contrast is that he accompanied the claimant on a single da. We have found that the respondents' were not unreasonable in assigning Mr Allen to deliver on the same route as the claimant, both men were delivering the post on a route of which they had no previous experience. We have

had no evidence to suggest that Mr Allen maintained oppressive scrutiny of the claimant and we accept the account that, in delivering post on the route, they delivered to properties on opposite sides of the road or further down the route not side by side. At the relevant time the claimant was assigned from the Alcester Delivery Office to work in Bromsgrove because he was used to provide short term sickness cover as he was not then established as a permanent of the staff. Mr Christopher Allen was the cover manager at the Alcester Delivery Office which is a small delivery office with a staff of 18. Notwithstanding the fact that the claimant's reassignment as part of his Disciplinary Sanction on transfer from Redditch was a permanent transfer, the transfer to Alcester was labelled as temporary in the mistaken belief that the assignment was on a temporary period for 12 months and that he would be used to provide sickness absence as cover at the Alcester Delivery Office as required.

41. Mr Allen has given evidence that the claimant satisfactorily performed his duties whilst at work. We conclude Mr Allen was reasonable in his direction of the claimant whilst Mr Allen was at the Delivery Office Cover Manager. We have heard no evidence to suggest that the management of the claimant by Mr Allen was unreasonable or oppressive or failed to make adjustments for the claimants' Mental Health; notwithstanding this fact on the 22<sup>nd</sup> July 2018 the claimant raised a grievance at 165 in relation to Mr Allen's treatment of him.
42. The claimant over Christmas 2017 had a period of Annual Leave and Sickness absence but returned to work at the Alcester Depot on the 22 January 2018, the claimant in his evidence gives an account Chris Allen had followed him there from Bromsgrove. We accept the evidence given by Mr Allen that he was the Cover Manager for the Alcester Delivery Office from January 2018 to September 2018 and he was the claimant's Line Manager who issued reasonable directions to the claimant. We have no evidence before us to suggest Mr Allen's Management of the claimant was unreasonable or oppressive in any way other than the claimant's assertion that he "*was monitoring extremely closely and take a great deal of interest in the work I was doing*". The claimant has given an account that when on compulsory transfer from Redditch to Alcester, a relatively small Deliver Office, he was temporarily seconded to the Bromsgrove Depot in December as part of the Return to Work arrangements whilst a role was found for him at Alcester. We find that in the time when Mr Allen was allocated to deliver post on the same walk from the Bromsgrove Delivery it was to provide assistance to the Christmas rush and to orientate Mr Allen in the roles within the Delivery office and was not unreasonable. The claimant accepted in his evidence that Mr Allen was Relief/Cover Delivery Manager at Alcester at January 2018.
43. The claimant suggests that Mr Allen monitored him extremely closely and that the months were extremely difficult working there; the claimant suggest the difficulties came to a head over 3 months in relation to the claimants' assertion that he had bought extra days holiday from 5 weeks and 3 days to 6 weeks and 1 day. It is evident whilst working at Alcester in the early months of 2018 the claimant was assigned to undertake duties where he was providing short term sickness absence Cover; in that capacity the claimant was responsible for completing the indoor portion of his delivery loading his delivery trolley and sorting through new directed mail and he

would complete delivery of mail and parcels to a housing estate within walking distance of the Alcester Deliver Office.

44. On 26<sup>th</sup> March 2018 an incident occurred that led to the claimant's suspension, the claimant had apparently had a discussion with Mr Allen about his holiday entitlement and his salary sacrifices to buy additional holiday which had led to the claimant becoming agitated and upset. The claimant gives an account that during the conversation with Mr Allen he had become upset and said that Mr Allen's comment that he did not have any holiday entitlement remaining was "*further evidence of management being against me.*" In his second complaint to the tribunal presented on 30 May 2019 that Mr Allen then referred to the claimant as '*crazy and paranoid*' [40]. Mr Allen in answer to cross examination has some recollection of the discussion from March 2018 but believes he said words to the effect that that suggestion that the management were against him "*sounded paranoid*" and had not said that the claimant was paranoid. In cross examination of Mr Allen Mr Rozycki has suggested that on that occasion Mr Allen knew of the claimant's mental health problems and had called the police. We found Mr Allen was clear and categorical in his recollection that he was aware of the claimant's mental health and in January 2018 not in March he had made contact with the police as he had been concerned about the claimant's vulnerability which we find to have been a reasonable step to be taken by an employer safeguarding a vulnerable person. We are inclined to believe that in the heat of his distress the claimant may have interpreted the comment as being descriptive of his mood. We do not consider the comments to be have had the purpose of effect of creating an intimidating hostile humiliating or otherwise offensive environment for the claimant and that if perceived by the claimant to be such it was a perception that in the context was not reasonable.
45. The claimant asserts in his complaint that The incident led to a York, a cage trolley used to transport letters and parcels around the depot, being turned over and a fixture being damaged. It had been alleged that the claimant had become angry and in a fit of temper had pushed over the York and damaged his fitting which led to the claimant being suspended from work up until the 16<sup>th</sup> June 2018. Following an investigation conducted by Ricki Sault it was concluded that there was no case to answer and that the claimant was scheduled to return to work.
46. At the end of the precautionary suspension there was no permanent role for the claimant to undertake at the Alcester Delivery Office. The claimant's return to the larger Redditch Delivery Office was not feasible in light of the disciplinary sanction that led him to be transferred to Alcester in the first place, Mr Allen having spoken with the CWU representative at the Alcester to determine the best allocation to work for the claimant upon his return, it was suggested that he should work locally at the Bromsgrove Delivery Office at the end of his suspension. Mr Allen consulted with the CWU representative at Alcester about the proposed assignment to Bromsgrove for the foreseeable future. Mr Allen gives an account that he telephoned the claimant on 25 June to discuss for the first time a move to Bromsgrove on his return to work. The claimant informed Mr Allen that he did not want to go to work at Bromsgrove and that he had worked at Bromsgrove before and that it had stressed him out and that a return here would make him ill;

the claimant had not been specific about what problems he had had at Bromsgrove.

47. In response to a proposed return to work at Bromsgrove having been identified to him, the claimant was signed sick. On 28<sup>th</sup> June 2018 Mr Allen wrote to the claimant [156-157] enquiring of his health and asking for an explanation why the claimant was not well enough at the Bromsgrove Delivery Office as requested, the letter asked for the claimants' consent for an Occupational Health referral. On the 30<sup>th</sup> June [158] the claimant spoke to Mr Allen during which conversation the claimant refused to release any medical information to the respondent, directed Mr Allen to speak to Occupational Health who had records of his previous visits with them, declined to book a Doctors' appointment and the claimant refused to fill in a doctors' note as he claimed the respondents' were responsible for his health issues. The discussion concluded with the claimant allegedly calling Mr Allen a "F\*\*king Nobhead" and putting the phone down on Mr Allen. The claimant was subsequently certified unfit for work from the 18<sup>th</sup> June 2018 until February 2019 on his employment termination.

48. We note Mr Hill did not describe why it was that Bromsgrove would make him ill and he did not specify the problems he had previously had there. In the circumstances the claimant did not then return to work and his absence was treated as sick leave. The claimant did not provide medical certificates and when, Mr Hill telephoned the claimant on the 30<sup>th</sup> June the claimant had described to him as a "f \*\*king nobhead" before terminating the call the claimant had informed Mr Allen that he would not go to Bromsgrove because it was inappropriate for his medical condition which was stress and depression. Mr Allen informed his Operational Manager Nigel Morgan that he was unhappy about dealing with the claimant in the future.

49. On the 22<sup>nd</sup> July 2018 the claimant submitted what he believed to be a bullying and harassment complaint against Mr Allen [165] the complaint had been sent to the Employment Relations Team of the respondent based in Sheffield which did not notify Mr Allen of the complaint. The claimant's complaint raised a bullying and harassment complaint [165] alleging that Mr Allen, having spoken to the claimant on the 25<sup>th</sup> June to advise him that when he returned to work he would need to work at Bromsgrove, the claimant had stated that he had worked at Bromsgrove before and that it had stressed him out and that returning to Bromsgrove would make him ill. The Employment Relations Team wrote to the claimant [166 -167] informing him that the bullying and harassment report form was not an appropriate procedure to be followed and that it should be treated as a grievance. The claimant was informed that his existing open grievance had not been progressed due to the claimant's absence from work and in particular the letter informed the claimant that:

*"I am aware of your concerns going to the Bromsgrove Delivery Office and will make the Operations Manager aware as I advised on the telephone. Please note that a full reason as to why you cannot work in Bromsgrove Delivery Office will be required".*

50. In the event Mr Allen left the Alcester Office in September 2018 and had no further dealings with the claimant.

51. We have been referred to subsequent fact finding investigations into the events of March 2018 [183 -185] 29<sup>th</sup> November 2018 by Ms Stephanie Peters from the respondent's performance coach who interviewed Mr Lee Russell and Mr Nicholas Hemmings [186 – 187].
52. On the 28<sup>th</sup> November 2018 the claimant was invited to attend a Disciplinary Hearing.
53. The claimant, having submitted a Bullying Harassment Claim on the 22<sup>nd</sup> July 2018 [165], received the response from HR based in Sheffield [166] which informed him that the complaint could not be dealt with under the Harassment and Bullying Procedure as none had been identified and instead his complaints related to the matters pertaining to a grievance. The claimant's evidence, is that he put in a grievance sometime in July or August 2018. No evidence of the claimant submitting a grievance in July or August of 2018 has been produced to the tribunal and the only copy of the grievance document that we have received is that described as a Bullying and Harassment Complaint received by the respondent on the 25<sup>th</sup> July [165]. We understand that the claimant's understandable frustration that his grievances' submitted in July and August were not dealt with, however we observe that when the HR Employee Relations Team wrote to the claimant in response to his Harassment Complaint [166] they asked the claimant to provide them with information why he could not work at the Bromsgrove delivery office. Although the claimant states that he subsequently submitted a further grievance, all be it not evidence in the bundle before us, it is accepted by the respondent that a grievance was raised relating to holiday pay and about Mr Allen however that grievance was not progressed by the Human Resources Team in Sheffield.
54. In September 2018 Mr Imdad Ali became the Delivery Office Manager at Alcester and took over responsibility of Managing the claimant, the claimant at that time was absence from work and it was understood by Mr Ali that the claimant was on a temporary assignment to Alcester following the transfer from Redditch. Mr Ali in his dealing with the claimant provided the respondent with a summary document of the attendance management detailed absence report [171 -173]. The notes provide a summary of Mr Ali's contact with the claimant and the notes are a record of the events taken by Mr Ali on the days when he had contact with the claimant. We observed that on the 4<sup>th</sup> October 2018 that the claimant informed Mr Ali at a meeting with him at Alcester Delivery Office that he then hoped to return to work soon although he did not give a date and that he did not want to go to Bromsgrove as it made him "ill the last time he went there" and that he would want to have every Saturday off as he previously had. At the meeting on the 4<sup>th</sup> October Mr Ali asked the claimant if he would attend a fact finding interview with him to discuss and incident between the claimant and the previous manager Mr Allen; the claimant agreed to do so as he had not done anything wrong and he agreed to Occupational Health Service contacting the claimant to arrange a review appointment.
55. Having arranged an appointment to see Mr Allen again on the 17<sup>th</sup> October to conduct a Fact Finding Interview, when the claimant did not attend the appointment he informed Mr Ali that he did not have to attend a Fact Finding Interview for something that happened months ago. The claimant queried



why grievance had not been heard since he put one in against Christopher Allen. Mr Ali informed the claimant he was unaware of any grievance outstanding and the claimant informed him that the business should “*just leave him alone*” in response to Mr Ali explaining that Managers had to keep in touch Mr Ali reports that the claimant had become angry, swore and had cut the call off. Mr Ali had then sent a text to the claimant informing him that he would be in touch after he had received the Occupational Referral Report and that if he needed anything that he should call Mr Ali. The claimant later made a call to Mr Ali and apologized to him and informed Mr Ali that he had spoken to HR he had calmed down and that HR had confirmed that his grievance was off the system due to him being off sick.

56. We find that Mr Ali’s notes of the encounter with a claimant were measured. Mr Ali informed the claimant that he understood his situation and as long as the foul language had not been directed at him it would not be held against the claimant. We find that the observations made by Mr Ali about the use of foul language reflected similar observations that Mr Ali had made when he had been the person who had conducted a fact finding investigation with the claimant in 2017 whilst the claimant had been employed at Redditch. We conclude Mr Ali had a general dislike of use of foul language that he did not swear himself and would not tolerate foul language being directed at him.
57. On the 25<sup>th</sup> June 2018 Mr Allen had a conversation with the claimant on the telephone discussing a possible return to work at Bromsgrove. The claimant had informed Mr Allen that he would not return to Bromsgrove because it made him ill. The claimant did not specify why working at Bromsgrove would make him ill and the claimant did not in the event return to work. The claimant spoke with Mr Allen again on the 30<sup>th</sup> June when he had chased the claimant for his medical notes and the claimant described Mr Allen as an “*f\*\*king knob head*” the claimant did not return to work. Mr Allen ceased working at Alcester Delivery office in September 2018 and was replaced by Mr Imdad Ali when he became Delivery Office Manager at Alcester.
58. Mr Imdad Ali began a series of monthly meetings with the claimant to discuss his sick leave. Mr Ali having been informed of comments the claimant had made to Mr Allen and his behavior made contact with Mr Nigel Morgan the Operations Manager in September; Mr Morgan informed Mr Ali that he should leave it to him to deal with matters. Regrettably however nothing happened at the hands of Mr Morgan and when Alan Good took over as the Operations Manager and Mr Ali discussed the claimant’s absence with him, Mr Good directed the claimant to investigate the incident in June 2018 where Mr Ali had reported that the claimant calling him “*f\*\*king knob head*” and refusing to return to work at Bromsgrove. Mr Allen denied the claimant’s later assertion that the claimant had called him in “Crazy and paranoid”.
59. We find that as early as October 4<sup>th</sup> Mr Ali was discussing with the claimant the need for him to undertake a Factfinding Investigation about the so-called Chris Allen incident that occurred on 30<sup>th</sup> June. On the 16<sup>th</sup> June following the Occupational Health Referral, Occupational Health prepared a report on [175 - 176] in reviewing the claimant’s then current capacity for work the report concluded:

*“Mr Hill is planning on resuming work on the 25<sup>th</sup> October and in my opinion, he is fit for work at this time. Understandably he feels anxious about resuming and to assist him with a sustained and successful return whilst managing ongoing symptoms I recommend he have a phased return to his hours and duties, for example starting at ½ his contracted hours and a ¼ of his duties with a view to gradually increasing these over a period of 4 weeks, I leave it to you as the manager to decide if these recommendations are feasible for the organization to support.”*

*The workplace issues will not have a medical solution and need to be addressed by management with Mr Hill, I suggest that you meet with him to discuss any support you can offer him. I recommend that utilisation of a stress Risk Assessment will assist this process, the aim is to facilitate active dialogue about the issues, identifying workplace stresses and developing an Action Plan to try, where possible to mitigate them, this should be reviewed on a regular basis and Action Plan adjusted accordingly and the process should continue for as long as both parties feel when it would be beneficial.”*

60. In response to specific questions that had been asked the Occupational Health confirmed: -

*“Mr Hill tells me that he has previously worked at the Bromsgrove Delivery Office, but did not cope well for a number of reasons and he experienced increasing anxiety, returning to this office was likely to further exacerbate his anxiety.”*

We observe that the claimant did not detail to the Occupational Health what any of the supposed “numbers of reasons” were that he could not cope while at Bromsgrove.

61. In answer to the question whether the claimant was fit for further interviews as his mood is constantly changing, Occupational Health replied:

*“Mr Hill is willing to engage with work over his current work issues to try and positively move things forward, medically in my opinion he is fit to attend formal interviews but that consideration is given for representation in the meeting going at Mr Hill’s pace and regular routine breaks, or that is undertaken by correspondence. He has expressed some concerns about the timings of interviews following the incidents that occurred over 6 months ago and due to the timing lapse, he is not willing to participate with these. “*

62. Having been informed by the staff at Alcester that if Mr Hill returned they would walk out, Mr Ali spoke with Operations Manager John Good who met with staff on the 23<sup>rd</sup> October 2018 at a “Work time Listening and Learning meeting”. At the meeting staff confirmed to Mr Good that they were of the view the claimant was sometimes a little violent and some of them were afraid of working with the claimant who it was alleged threatened to smash a Managers’ head and had aggressively pushed the doors of an office when he had stormed out. At the discussion with staff it transpired that staff had raised concerns about working with the claimant.

63. On the 25<sup>th</sup> October as arranged the claimant attended the Alcester Depot to meet with Mr Ali and Mr Good, the meeting was arranged to discuss the claimant’s proposed return to work having regard to his medical condition

and the Occupational Health Referral. The meeting was an informal one which both Mr Good and Mr Ali indicated was to have an informal discussion to give the claimant a heads up on the fact that, as Mr Ali already indicated, the respondent would need to conduct a Fact Finding Investigation into Mr Allen's behavior towards Mr Allen in June 2018 which were outstanding and about his return to work generally. Mr Good informed the claimant he was not satisfied that the claimant's behaviour to his then manager Mr Allen had been investigated properly.

64. We find, in light of the concerns that the staff had raised about the claimant's behavior whilst at Alcester had been aired by the staff with Mr Good at the "Worktime listening and learning meeting" and in light of the fact that the concerns about the claimant's behavior in June had not been investigated whilst the claimant had been off sick it was reasonable to expect that the respondent's would need to complete an investigation. We find that the meeting held on the 25<sup>th</sup> October to discuss the claimant's return to work was convened to inform the claimant of their outstanding concerns and to provide him with a "Heads up" about the concerns and the respondent's need to conduct a Factfinding Investigation. We find that in light of the Occupational Health recommendations that had been seen by the respondent's, in particular by Mr Ali and Mr Good, the meeting was one that was not convened in a way which observed the opinion expressed by Occupational Health that the claimant was fit to attend formal interviews but the consideration ought to be had for representation at such meetings and the meeting going at Mr Hill's pace with regular meeting breaks, or that this was undertaken by correspondence.
65. The meeting convened on the 25<sup>th</sup> October was an informal meeting it was closer to an informal investigation meeting. Mr Good in his evidence stated that he had not seen the Occupational Health Report [175] we find however that Mr Good ought to have made enquires and ought to have read the report. The report gave advice and guidance as to how the respondent should have interactions and discussions with the claimant. Well intentioned the actions of Mr Good and Mr Ali may have been to have given the claimant an indication of the steps that would be taken to conduct a Factfinding Investigation the respondent, who were on notice of the claimant's mental health frailty and how they ought to manage. Mr Good and Mr Ali failed to make reasonable adjustments in the conduct of the informal discussion meeting by allowing the claimant to be accompanied by his Trade Union Representative or provided with a clear written notice of the meeting.
66. Whilst Mr Ali and Mr Good may have labored under the mistaken belief that an informal discussion was the best way to inform the claimant of a future Factfinding Investigation we consider it would have been reasonable for any employer who had commissioned Occupational Health Report to have read it and taken note of it and followed the guidance contained in it. We have no doubt that the respondent's approach agitated the claimant who when told of the respondent's concerns about in relation to the claimant's return to work and the need to conduct an investigation described the meeting as a "stitch up" he became aggressive and swore.
67. Nonetheless we find that the meeting was not in truth an informal Factfinding Meeting under the terms of the respondent's procedures. The meeting it was an informal one that was a precursor to a Factfinding

Meeting. The respondent was on notice of the claimant's disability and the impact of it which put the claimant at a disadvantage when compared to non-disabled employees who would have been similarly informed that Formal Factfinding Interview was to be convened at another date.

68. On the 26<sup>th</sup> October 2018 the claimant raised a grievance. We have not had sight of the grievance which the claimant states that was raised by him on the 26<sup>th</sup> October in relation to the meeting conducted with Mr Good on the 25<sup>th</sup>. Our knowledge of the claimant's grievances are informed by the evidence given to us by Clare Tebbutt, the Respondent's Appeal Manager who conducted the Claimant's appeal against his later dismissal for gross misconduct. Within the appeal hearing Ms Tebbutt during the course of the claimant's disciplinary appeal investigated matters the claimant raised about his outstanding grievances and wrote to the claimant on the 20<sup>th</sup> March 2019 in that regards [ 258 -259]. Following her investigations into the claimants' grievances Ms Tebbutt reached conclusions on what were then four outstanding grievances by the claimant, which included:

- a. grievance 8002366120 raised on the 13<sup>th</sup> July in relation to annual leave quota to
- b. grievance 8002467047 raised on the 26<sup>th</sup> October 2018 regarding a meeting held the previous day
- c. grievance 8002491566 logged on the 23<sup>rd</sup> November 2018 regarding Mr Ali withholding Mr Hall's pay
- d. the fourth grievance 8002491560 logged on the 23<sup>rd</sup> November chasing progress on his first 2 grievances.

Having left the meeting with Mr Good and Mr Ali on the 25<sup>th</sup> October the claimant did not return to work. The next contact that the claimant made with Mr Ali was on the 19<sup>th</sup> November with a Direction for change of address and next then on 23<sup>rd</sup> November 2018 to raise a query regarding his pay.

69. On the 23<sup>rd</sup> November 2018 the claimant spoke to Mr Ali. We have been referred to Mr Ali's notes of the meeting in his log in respect of the claimants' attendance management [172] the claimant informed Mr Ali that it had been 4 weeks since he had queried his pay and Mr Ali told the claimant that he had been on Annual Leave for 2 weeks and that the claimant's case was sat with Mr Good and that the last contact he had about Mr Hill's pay had been when they had a discussion on the 19<sup>th</sup> October. Despite directing Mr Hill to speak to Mr Good and Redditch about his pay the claimant began shouting and Mr Ali reports the claimant told him to "*Sort my fucking pay*" to which Mr Ali had replied "*Don't talk to me like that*" in response to which the claimant had called Mr Ali a "*fucking Raghead*" and ended the call. Mr Ali's account is that the claimant had then rang him back again, although Mr Ali had not answered the call and the claimant then sent Mr Ali a text informing him that he was bullying the claimant along with John Good.

70. In his evidence the claimant does not deny telling Mr Ali to sort it out but denies as having called Mr Ali a "*fucking rag head*".

71. We find Mr Ali's account to have been an honest and compelling one. His recorded response to foul language being used in the workplace had consistently been to disapprove of foul language being used at all and his having made plain to staff, and in particular to the claimant, that he

disapproved of the use of foul language at all and intolerant of foul and profane language being addressed to or about him personally.

72. The claimant has denied having used the offensive and Racist abuse of Mr Ali and denies calling him a “ *fucking rag head*”. In his witness statement [26] the claimant states that he became incredibly frustrated at the telephone and said:

*“My depression does manifest itself in what I admit somewhat childish outburst. I did not swear at him as such but, as I have previously said to Chris Allen, I called him “fucking knobhead”.*

The claimant remains adamant that he did not use a racist term towards him and did not call him a raghead he says:

*“He might have believed I did and he may have been looking out for a racist comment. However, I have used the childish term “knobhead” several times in the past.”*

73. Following the claimant’s telephone call with Mr Ali on the 23<sup>rd</sup> November Ms. Stephanie Peters began a Factfinding Investigation regarding numerous complaints raised not only raised by Chris Allen in respect of the claimant’s conduct in June 2018 but also by Mr Imdad Ali in respect of his behavior on 23<sup>rd</sup> November and considered concerns raised by other employees in relation to the claimant’s conduct.

74. We have heard evidence about a Factfinding Interviews with a number of witnesses between the 29<sup>th</sup> November and the 3<sup>rd</sup> December in particular –

Imdad Ali	29 <sup>th</sup> November 2018	[177 – 179]
John Payne	29 <sup>th</sup> November 2018	[180 - 182]
Lee Russell	29 <sup>th</sup> November 2018	[183 - 185]
Nicholas Hemmings	29 <sup>th</sup> November 2018	[186 – 188]
John Good	30 <sup>th</sup> November 2018	[190 – 192]
Chris Allen	3 <sup>rd</sup> December 2018	[200 - 202]

75. The respondent wrote to the claimant on 29<sup>th</sup> November writing to him to attend a conduct meeting [189] the meeting was to consider conduct notification in respect of:

- 1 Verbal abuse,
- 2 Breach of business standards

the claimant was informed that he right to be accompanied to the meeting by a Trade Union Representative or a work colleague and the meeting was to give an opportunity to explain that his actions and present any evidence or points of mitigation in relation to his case before a decision was made. The claimant did not attend on the 3<sup>rd</sup> December nor in response to invitation to attend a meeting rescheduled for 7<sup>th</sup> December [204] a third invitation to a Formal Conduct Meeting was sent to the claimant on the 6<sup>th</sup> December to invite him to meet with Stephanie Peters to investigate the conduct notification on the 12<sup>th</sup> December the claimant attended on the 12<sup>th</sup> December accompanied by his Trade Union Representative.

76. The claimant attended a Factfinding Meeting on the 12<sup>th</sup> December 2018 with Miss Peters, Performance Coach accompanied by his Trade Union

Representative [207 – 209] the claimant was sent a copy of the notes of the meeting which he annotated his comments [211 – 213] . We find that the interview was arranged in accordance with the respondent's policy and procedures and took account of the recommendations made by occupational health [176]. In his response to the enquires made at the fact finding interview the claimant referred to his grievances being ignored and to the fact of his pay being illegally stopped. As a consequence of the Factfinding Interviews the claimant was invited to a Formal Conduct Meeting by letter of the 4<sup>th</sup> January 2019 [217 -218] in particular the Conduct Notification was listed as:-

*"1. Gross misconduct in that on 30<sup>th</sup> June 2019 you allegedly you displayed aggressive behaviors by verbally abusing a Manager Chis Allen over the telephone.*

*2. Gross misconduct in that on 23<sup>rd</sup> October 2018 allegedly you displayed aggressive behavior by verbally abusing a Manager Imdad Ali over the telephone using Racist comments."*

The claimant was invited to a Disciplinary Hearing to take place on the 10<sup>th</sup> January 2019. The claimant did not attend at the scheduled formal conduct meeting and the respondents invited him to a reconvened meeting to be held on the 30<sup>th</sup> January [220]. In answering the invitation letter the claimant confirmed his intention not to attend the formal conduct meeting stating:

*"I have a tribunal case through ACAS and Gov.UK. I feel this should be our next meeting so I don't get stitched up even more."*

The claimant did not attend either of the scheduled meetings and as a result on the 2<sup>nd</sup> February 2019 the respondents Area Program Manager Miss Mee, as a Manager with sufficient authority to consider a sanction including up to a dismissal, took the disciplinary decision.

77. The claimant's Trade Union Representative Mr Lambert had confirmed that the claimant did not intend to attend a disciplinary meeting as he was scheduled to meet with ACAS and waited in the Company's response to that ACAS discussion and Miss Mee's account when she had spoken to Neil Lambert the Trade Union Representative he had informed her "he won't reply Jane, he wants his day in court".

78. Miss Mee reached a decision in respect of the claimant's disciplinary charges which she communicated to him on the 2<sup>nd</sup> February 2019 [222]. Enclosed with the letter confirming the decision to find that the claimant was guilty of misconduct resulting in him being dismissed without notice was a decision report [223 – 225]. The claimant was informed of his right to appeal against the decision to dismiss him and was referred also to the support services that were available to him via Feeling First Class. Miss Mee has confirmed that in her evidence to the tribunal and in her report that she had invited the claimant to attend a disciplinary hearing or to submit in writing his responses. Ms Mee reached her decision on the case having read through all the information before hand and having listened to a recording of the conversation between the claimant and the Mr Imdad Ali on the 23<sup>rd</sup> November 2018 which Mr Ali had recorded. In addition Miss Mee had made her own enquires, having spoken with Mr Ali to understand his perception of the comment made to him by Mr Hill. Mr Ali confirmed [216] that it was perceived by him as a Racial comment; Mr Ali described that he grew up in a very diverse Birmingham, he is a Special Constable of 11 years standing and knew the term "rag head" to be a term used for racially abusing

people of Sikh or Muslim faith and that the term is an offensive term used for a person who wears a turban. Mr Ali describes himself as a Muslim and has a fully grown beard and he felt the term used at him as a racial abuse.

79. Mr Ali confirmed to Miss Mee that he had recorded the telephone conversation and Miss Mee listened to that conversation. Ms Mee was satisfied that the reason why Mr Ali recorded the conversation with the claimant Mr Hill was because Alan Hill had informed him previously that he recorded his conversations with Mr Ali himself.

80. Miss Mee was satisfied that abusive behavior to Managers was considered to be gross misconduct and it was her belief that the claimant had been abusive and aggressive towards Chris Allen and to Imdad Ali shouting and swearing and in the case of Mr Ali making Racist comments, such that Mr Hill was no longer trusted to behave in a way that the respondent's business expected. Miss Mee considered whether a lesser penalty would be suitable in the circumstances and whether there were mitigating factors. Miss Mee was of the view that, given the history of behaviors of abusive conduct towards the managers that had led to the claimant's previous disciplinary record the incidence of the claimant's behavior towards Mr Allen and lastly in November towards Mr Ali was not acceptable. Miss Mee considered possibility of a suspended dismissal however she was not satisfied that the claimant would not repeat the behaviors in the future and was of the view that evidence was sufficient to warrant dismissal. The claimant's last day of service was the 8<sup>th</sup> February 2019.

81. We have considered that the length of time over which the disciplinary matters before Miss Mee extended, we observe that following the events in June when the claimant used abusive language to Mr Allen, the claimant had been certified unfit for work. On 4 October when Mr Ali had broached the subject of a fact finding interview the claimant had initially confirmed he would attend a meeting and it was only upon his return to work interview on 25<sup>th</sup> October 2018 that Mr Good and Mr Ali had indicated to him that there would need to be a Factfinding Interview about the events of 25<sup>th</sup> June after which the claimant had been unfit for work. The claimant having left the meeting on the 25<sup>th</sup> October had not been at work in the intervening period until the 23<sup>rd</sup> November 2018 when he spoke with Mr Ali and made the alleged abusive comments to him.

82. Mr Ali in his witness statement paragraph 23 gives an account that he informed the claimant that he was recording the conversation on 23 November because Mr Hill had said that he was recording the conversation and that he, Mr Ali had wanted his own recording of what was said, the reasoning being that in previous conversations with Mr Ali the claimant had sworn at him in the past. Mr Ali was clear that he recorded the conversation once Mr Hill had told him that he was recording the conversation himself. Mr Ali has confirmed that he is aware of Royal Mail policy [106] which sets out restriction on photography and filming on any Royal Mail Group site which makes plain that:-

*"You must not record, film or take photographs on our premises or in our vehicles without first getting permission from the Site Manager or Person in control"*

In response to questions in cross examination Mr Ali has confirmed that he recorded his conversation with the claimant in response to the claimant having informed him that he was recording and, as Site Manager in control of the site, Mr Ali gave himself permission to record the conversation. We accept the account that Mr Ali gives that the recording was not an effort to gather evidence against the claimant rather to assist Mr Ali in keeping a record of the discussion and the recording, although not of the entire conversation, had commenced when the claimant informed that Mr Ali that he was recording the conversation and he continued it to the end of the call.

83. Miss Mee has given an account that she listened to the recording of the conversation and heard that Mr Hill call Mr Imdad Ali a “f\*\*\*ing raghead” and also said “*sort my f\*\*\*ing pay*”. Having considered the accounts of the conversation given by the claimant, Mr Ali and those who listened to the recording we conclude that it is more probable than not that the claimant did in fact describe Mr Ali as an “f\*\*\*ing raghead”. Miss Mee listened to the recording and was of the belief that a racial derogatory comment had been made to a manager. Miss Mee reached her decision on disciplinary action in the claimant’s absence and in the absence of any written representations on his behalf. Miss Mee considered the claimant’s conduct amounted to that of Gross Misconduct.
84. We find, based upon the information before Miss Mee, that the conclusion that she reached was one that was fair and reasonable given that the circumstances based upon a reasonable investigation been taken at the Factfinding Interview presented to the Disciplinary Manager. We find that Miss Mee who had sight of the Occupation Health Report took the circumstances of the report into account however it did not cause her to ask for any further Occupational Health Reports before taking the Disciplinary Decision. Miss Mee was reasonable in reaching the conclusion that Mr Allen had not told the claimant that he was nuts and paranoid. There was no evidence before Miss Mee that either Mr Ali or Mr Good swore at or abused the claimant at their meeting on the 25<sup>th</sup> October. We conclude that such comments made by Mr Allen in June 2018 were comments made in response to Mr Hill’s assertion that he was trying to get rid of the claimant. We find that the claimant’s comments found by Miss Mee to have made to his Managers’ were abusive and unacceptable behavior and that the comments made to Mr Ali were Racially Abusive. We have heard no evidence to support the assertion that the claimant’s abusive behavior was something arising from his disability or that he or his trade union representative suggested that to be the case.
85. The deliberations and conclusions recorded by Miss Mee in her Decision letter, report her having considered all of the available evidence and having afforded the claimant and his trade union representative an opportunity to put forward their representations to the disciplinary concerns that were raised. We find that in the circumstances of the case the decision reached by Miss Mee was one founded on a reasonable investigation that led her to conclusions that were reasonable to reach in the circumstances.
86. Notwithstanding the fact the claimant did not attend the Disciplinary Interview in response to receiving the Disciplinary Decision the claimant raised an appeal [126 -127].



87. In accordance to the respondent's Disciplinary Procedures the appeal hearing was heard by Miss Tebbutt who is an Independent Case Work Manager who was appointed to hear the claimant's appeal. Miss Tebbutt has appeared before us and is a compelling witness, she is an experienced Appeals Manager not linked to the respondent's Managerial structure and she considered that the claimant's appeal with an independent eye. Ms Tebbutt has three years' experience as a Appeal Manager having previously been employed by the respondent for 21 years. Ms Tebbutt has confirmed that of the 65 appeals she has conducted whilst in her post, 30 per cent of the appeals have been upheld.
88. The Appeal Hearing took place on the 5<sup>th</sup> March 2019 and the claimant was represented by the Divisional Representative CWU by Mr Edwards the claimant was in attendance at the hearing [231 – 240] the notes of the meeting were sent to the claimant for his comment and he returned the notes with his notes endorsed on them on the 6<sup>th</sup> March 2019 [ 240].
89. Following the initial appeal meeting, Miss Tebbutt undertook a further investigation into the matters raised by the claimant she interviewed Mr Ali on 6<sup>th</sup> March [243 – 247]. We note in particular that Miss Tebbutt made enquiries of Mr Ali about the claimant's allegation that he had called him a "Fucking Homo" on two occasions. Mr Ali informed Miss Tebbutt [245] that he was not aware the claimant had raised a grievance against him nor that he had allegedly called Mr Hill an "f...ing homo". Mr Ali gave an account that in general the conversations were "ok" and although Mr Hill was at times frustrated and occasionally swore it was not directly at him. They had spoken about Mr Ali's children and Mr Hill's son.
90. Miss Tebbutt interviewed Mr Allen on the 8<sup>th</sup> March [248 -251] and raised enquiries with Mark Harbour and John Good [257] on the 20<sup>th</sup> March 2019 by email. Miss Tebbutt wrote again to Mr Hill on 20 March [258 – 259] inviting him to provide further information into the grievances that he had previously raised. Miss Tebbutt commissioned a further Occupational Health Report on 2<sup>2</sup> March [page 260]. The claimant in response to Miss Tebbutt request provided further information about his grievance in an undated at note [ 262 – 267].
91. In his undated note in relation to the lack of activity in progress on his grievances the claimant raised reasonable concerns. We have concern that the respondent's grievance procedure system for registration of grievances by telephone, in which a reference number is given to an employee but no written record of the nature of the grievance appears to have been maintained, is a far from satisfactory one. The claimant has reasonably and with good cause been frustrated by the administrative failure of the respondent's system. Despite our criticism of the respondent's system for registering and tracking the progress of grievances we find the delay in handling the grievance procedure was one that was caused essentially by the handling of the HR Department in Sheffield at managing the Grievance in an unsatisfactory manner. However none of the evidence before us suggest that the delay in the handling of the grievance procedure was detrimental treatment because of or arising from the claimant's disabilities.
92. In response to Miss Tebbutt's enquires Mr Good provided a response [271] to the enquires to what happened on the 26<sup>th</sup> October 2018 the feedback

that had been given to him in the Work Time Listening and learning meeting (“WTLL”).

93. Although Miss Tebbutt had asked that the claimant to authorise the release of the Occupational Health Assist Report dated 12<sup>th</sup> April 2018 in a text message [ 281 – 282], there was no doubt the claimant believed he had given permission to release of the Occupational Health information and the claimant failed to understand the data protection rules requiring his expressed authorisation and, in the absence of that authorised release of the Occupational Health report the decision on the appeal hearing was taken by Miss Tebbutt without her having had sight of the Occupational Health Report completed on the 12<sup>th</sup> April 2019 [ 287 -289].
94. Miss Tebbutt wrote to the claimant on the 17<sup>th</sup> April 2019 [291] to send the claimant details of the new evidence that she had acquired since the Appeal Hearing on 5 March in respect of the decision to terminate the claimant’s employment as well as his outstanding grievances. Miss Tebbutt asked the claimant for his comments on the additional documentation within 3 days and that in the absence of any comment from him she would continue her investigation. In absence of any comments from the claimant Miss Tebbutt reached her conclusions and wrote to him on 26<sup>th</sup> April 2019 having completed her rehearing of his disciplinary case and giving full consideration to matters put forward to the Disciplinary Appeal Hearing. On 26 April 2019 Miss Tebbutt wrote to the claimant [293] to confirm the Appeal decision in which she confirmed that she believed that the original decision of dismissal was appropriate in the case. The full report of the appeal decision was attached to the letter [294-312]. The Appeal Decision Document set out in detail the decision and the reasons for it in relation to the charges of Gross Misconduct and went on to consider the grievance and appeals [302 – 309].
95. Analysis of the appeal provided by Miss Tebbutt is methodical detailed and objective. Miss Tebbutt’s analysis details the background to the investigation and the points raised by the claimant and his Trade Union Representative Mr Edmunds at the appeal hearing.
96. Whilst accepting that the initial incident which led to the Fact finding investigation and the decision to dismiss the claimant had occurred in June 2018, in relation to Mr Hill’s abusive treatment of Mr Allen, Miss Tebbutt considered that there were mitigating reasons why a meeting had not been held promptly after the June incident. Miss Tebbutt was aware that immediately after the incident the claimant was absent from work and certified unfit for work related stress. When Mr Ali became Delivery Manager at Alcester in September 2018 he broached the claimant’s behaviour towards Mr Allen and the need to investigate it with him however Mr Hill declined to participate in the Factfinding, stating that it was adding to his stress. Mr Ali agreed to leave the matter until October when Mr Hill indicated he would be fit to return to work.
97. Miss Tebbutt, as do we, considered that it was reasonable for the respondent, at a discussion before his return to work on the 25<sup>th</sup> October, to raise with the claimant the prospect that, having received confirmation from the Occupational Health Service that the claimant was well enough to attend for an interview for them, to consider Mr Hill’s conduct. Miss Tebbutt

was satisfied that, at the time of the incident in relation to Mr Allen had arisen in June, the claimant's previous conduct award of a 12 months suspended dismissal for abusive behavior towards a Manager was still active and only expired in October 2018. Miss Tebbutt concluded that the alleged and inappropriate behavior in June 2018 took place within the lifespan of the 12 months conduct of award and it was appropriate for it to be considered.

98. Miss Tebbutt acknowledged that interviews that had been conducted about a previous case that had been dropped against the claimant, in respect of events in March 2018 had a direct bearing on the claimant's June conduct. Miss Tebbutt considered that the evidence of the claimant earlier conduct at Alcester in March 2018 was not entirely irrelevant as it gave an insight into Mr Hill's general inherent behavior towards others in the workplace. Miss Tebbutt acknowledged that whilst Miss Peter's Fact Finding Interviews had described the invitations to a formal Conduct Meeting the procedure was incorrect, the position was clarified that when Miss Mee had written to Mr Hill detailing fully the notifications at which point he was made fully aware that it had been escalated to a higher authority and that one possible outcome at that point could be his dismissal.
99. Miss Tebbutt noted that she would explore the grievances that had not been investigated and noted that within the 4 grievances that the claimant had brought, there was no record by any of the HR Advisors that took the claimant's calls that he raised any allegations that Mr Ali having called Mr Hill a "fucking homo" or that Mr Allen had called Mr Hill "crazy or paranoid". The grievances were investigated by Miss Tebbutt who was satisfied that the conduct matters the claimant had been asked to answer were not in retribution for Mr Hill having raised grievances against Mr Allen and Mr Ali's personal conduct and that there was no evidence to suggest the business were aware of those aspects of Mr Hill's grievances. Miss Tebbutt's view was that the evidence before her satisfied her that the current investigation been raised because of a general belief that Mr Hill behaviors in the workplace towards his colleagues had been inappropriate, aggressive and one occasion Racially motivated.
100. While the claimant referred to the second notification incorrectly stating that comments and verbal abuse of Mr Ali had occurred in October and Mr Ali stated it was November, it is apparent that the abuse had taken place in November. Although Mr Hill denied having called Mr Ali an "F\*\*ing Raghead", having listened to the recording although the claimant declined to listen to it, Miss Tebbutt was satisfied that Mr Hill was being untruthful in the evidence that he presented to her.
101. Miss Tebbutt considered the grievances that the claimant had raised in which the claimant asserted that the 4 grievances were outstanding and he had a medical condition of anxiety and depression and that he was pushed to breaking point.
102. The Grievances that the claimant brought were fourfold. The first grievance 8002366120 was a grievance raised with the Grievance Helpline on 13<sup>th</sup> July in respect of the claimant's assertion that he was entitled to be paid for 6 weeks Annual Leave having purchased additional leave. Having made that necessary investigations with HR Services Miss Tebbutt established that although the claimant had incorrectly been allowed to take

6 weeks leave he had not in fact purchased the additional leave. All employees being entitled to 5 weeks and 3 days leave that leave could be extended to be 6 weeks by purchasing the additional leave. Miss Tebbutt did not uphold that grievance.

103. The second grievance 8002467047 was a grievance lodged following the meeting he had with the Operations Manager Mr John Good on the 26<sup>th</sup> October at which Mr Ali was in attendance. The claimant lodged a grievance as he felt “tricked” into attending the meeting with Mr Good to discuss his behavior when he had already declined, under the advice of his CWU Rep to attend a Fact Finding on the alleged matter towards Mr Allen. Mr Hill stated he was not allowed representation at the October meeting. Miss Tebbutt, as does this tribunal, found that the meeting was a Return To Work Meeting to be a precursor to identify to the claimant the need for him to attend a Fact Finding Meeting and make him aware of concerns raised in the workplace. The meeting held was informal and not part of a formal investigation at which a CWU Representative would have been required to attend. Miss Tebbutt having considered the accounts given by Mr Good and Mr Ali concluded that Mr Good had not behaved inappropriately nor was the meeting a Fact-Finding meeting to be held against the claimant’s will. The second grievance was not upheld.
104. A third grievance was 8002491566 was logged on the 23<sup>rd</sup> November regarding Mr Ali withholding the claimant’s pay, it was the occasion of the telephone call during which Mr Hill is alleged to have been racially abusive towards Mr Ali. Miss Tebbutt considered the circumstances where, following the meeting on the 25<sup>th</sup> October, the claimant had left the meeting with Mr Good and he had remained off work but uncertified as unfit to work by his GP. Miss Tebbutt has reached the conclusion that, the absence between the 24<sup>th</sup> October and 23<sup>rd</sup> November could not properly be classed as sick leave. Although the meeting on the 25<sup>th</sup> October was to discuss, amongst other things, staff concerns about Mr Hill returning to the Alcester Depot there had been no evidence that Mr Hill had been offered any alternative work locations to which he could be assigned nor was his certified absence by his GP, the claimant having left the meeting ought to have been followed up by Local Management which was not done. Miss Tebbutt therefore upheld the claimant’s grievance and concluded that the claimant ought to have been paid for the period from the 24<sup>th</sup> October when he was confirmed by Occupational Health Service to be fit to return to work and that from the 23<sup>rd</sup> November onwards, the occasion of the allegedly racially motivated behaviors, the claimant should have been placed on precautionary suspension pending an investigation which would have been on full pay. To that extent the claimant grievance was upheld in relation to withholding pay.
105. The fourth grievance 8002491560 was raised by the claimant to chase why his previous grievances had not been dealt. It became evident to Miss Tebbutt that the grievances had not been progressed as they ought to have been by the HR Central Organization based at Sheffield and the claimants’ grievance in relation to the lack of progression of the earlier grievances was upheld.
106. Miss Tebbutt concluded however that in respect of the disciplinary matters, notwithstanding the procedural discrepancies and the claimants’

frustration as to the progress of his grievances, that did not mitigate the claimant's action with regard to his misconduct.

107. Miss Tebbutt considered the claimant's underlying Mental Health condition and the impact that may have had on Mr Hill's behaviors. Miss Tebbutt was not in receipt of the claimant's agreement to authorise the release of the most recent Occupational Health advice that had been written on 12 April 2019. Miss Tebbutt considered Mr Hill's underlying mental health and the impact that this may have had on his behaviors and even in the absence of OH advice she considered the reasonableness of making an allowance for his behaviour. Miss Tebbutt concluded there were certain behaviors were:

*"just too serious and so unacceptable that they cannot be accommodated in any way. We have a duty of care to all employees and they are not expected to attend at their place of work to be subjected to the kind of behaviours and abuse of Mr Hill levy's."*

108. Miss Tebbutt considered applying a lesser penalty for return of Mr Hill to employment without penalty and Miss Tebbutt considered the claimant's previous employment conduct record and considered that the claimant had a 12 month suspended dismissal active at the time of the June Misconduct. Miss Tebbutt considered the claimant's lack of remorse or acceptance of any wrong doing as well as his denial of his behaviors to Mr Ali. Miss Tebbutt concluded that the respondent had a duty of care to all employees' and needed to be confident that they could engage with the business free from acts of intimidation and aggression and that the business standards provided that employees should not be engage in abusive of any kind and that all employees are to conduct themselves appropriately. Miss Tebbutt concluded that standards had been breached by the claimant on 2 notified occasions in 2018 and Miss Tebbutt concluded in her report paragraph 4.8

*"I believe that in this instance it is clear that Mr Hill had not learnt from his past behaviors and that he displayed a consistent pattern of behaviors. I also note that when the previous behavior was explored in 2017 the mitigation Mr Hill now puts forward for his most recent behaviors had not yet occurred I am therefore satisfied that it is not the factors surrounding Mr Hill i.e. his grievances that prompt him to behave in the way that he does. I therefore can conclude that a regardless of circumstances this is a pattern of behavior Mr Hill exhibits that he does not take steps to control".*

Miss Tebbutt considered that the claimants' appeal was unsuccessful and the penalty of dismissal as awarded by Miss Mee that should stand.

109. We find that the conclusions reached by Miss Tebbutt were fair and founded with reasonable belief that the claimant was guilty of gross misconduct and that the disciplinary action applied that was a reasonable and appropriate one. Miss Tebbutt considered that the medical evidence available to her and it did not include the report dated the 12<sup>th</sup> April pages 287 – 289 that the claimant had not given permission to release before the decision was taken. We conclude that the circumstances of this case founded a reasonable decision to have been taken both at the disciplinary stage and at dismissal stage and at the appeal.

## Conclusions

110. We have considered the written submissions that had been submitted by counsel on behalf of both parties and listened to oral submissions that they had presented to us. We have had full regard to the law to which our attention has been drawn, and in light of the findings the fact that we have made the following conclusions are reached in answering the issues that we are required to determine.

## Unfair Dismissal

111. The parties are agreed that the principal reason for the claimant's dismissal was that he was guilty of gross misconduct. It is acknowledged by the claimant that dismissal was a potential sanction in the event that it is found he is guilty of the misconduct that is alleged. Even though the respondent maybe able to establish a potentially fair reason for his dismissal the tribunal has considered whether it was fair for the respondent to dismiss the claimant in all the circumstances of the case, including the reasonableness of its investigations.

112. Criticism has been made of the way in which the respondent has investigated the case. Miss Mee, the Discipline Manager, was hampered in her disciplinary investigation reaching a decision to terminate the claimant's employment because the claimant did not cooperate with her investigation that led ultimately to the decision to dismiss the claimant based upon the evidence before her. We find Miss Mee, in reaching her decision, considered the claimant's disciplinary record and the outcome of the investigations conducted by Miss Peters'. In considering the two issues subject to the investigation, namely Mr Hill's verbal abuse and breach of business standards at the claimants' conduct in respect of his recent comments to Chris Allen in June 2018 and to Mr Imdad Ali in November 2018, Miss Mee's findings were based upon the findings at the Fact finding Investigation taken by Miss Stephanie Peters as well as her own enquiries. Miss Peters met with the claimant on 12 December 2018 [207- 211- 214] at which the claimant was accompanied by his Trade Union Representative Mr Lambert. Unfortunately the claimant declined to attend the Disciplinary Hearing before Miss Mee on either of the two dates that were offered by Miss Mee to meet the claimant and his Trade Union Representative on the 10<sup>th</sup> January and 30<sup>th</sup> January at the Redditch Delivery Office.

113. Mr Rozycki has asserted that Miss Mee ought to have investigated the grievance and complaints that the claimant had submitted, which by the time he was invited to the Disciplinary Hearing would have amounted to four grievances. We are mindful that the claimant in his annotations to Miss Peters notes of the Fact find meeting [212] refer to his grievances in the context of suggesting that:

*"This is bad stitching Alan Hill up, so no one gets into trouble because (sic) the grievances I have put in. over half a year my grievances have been ignored"*

Whilst some criticism may be made of the Miss Mee for having failed to root out the grievances to which the claimant referred in his comments on the

Fact Finding [212] she had requested that he attend the Disciplinary Hearing. Miss Mee made it plain to the claimant and his union representative Mr Lambert that in the event he did not wish to attend the meeting he could provide written representations and that if he chose not to attend or respond in writing the disciplinary decision would be taken in his absence. Sadly neither the claimant nor his representative responded with constructive information and did not assist his case by identifying the separate grievances that he referred to. Our findings of fact note that the claimant informed the respondent in confirming that he would not attend the formal conduct meeting that he had tribunal case through ACAS. Miss Mee confirms that she did not investigate the claimant's grievances and based her Disciplinary decision upon the claimant behavior.

114. Criticism has been made of Miss Mee's having listened to the recording of the conversation the claimant had with Mr Ali on 23 November 2018 which evidenced his calling Mr Ali an "f\*\*ing raghead". Miss Mee's evidence to us is that she had taken advice from HR Services based at Sheffield and she was told by them that it was legitimate to listen to and use the voice recording. Miss Mee was satisfied that Mr Ali informed the claimant that he was recording the conversation in response to the claimant having told him that he was himself recording discussions with Mr Ali. For the reasons referred to above in our findings of fact we are led to conclude that this case is distinguished from the case on reference to the ECHR in Lopez- Ribalda v Spain [2020]IRLR60 which referred to covert recordings. We have made findings that the claimant was aware of the fact the call was being recorded and that the respondent had not undertaken a covert surveillance exercise with the purpose of discovering misconduct rather the recording was made on notice and for the purpose of recording and corroborating the first hand evidence of the manager Mr Ali.
115. In circumstances of this case we consider that the claimant had opportunity to make his representations to the Disciplinary Hearing which he chose not to do notwithstanding being advised by his Trade Union Representative. Miss Mee was an impartial Manager considering the Disciplinary charges against Mr Hill and, based upon the evidence before her, reached a conclusion that a we conclude a reasonable employer was able to do in the circumstances based upon a reasonable investigation. We do not find in these particular circumstances that Miss Mee reached the conclusion based upon a flawed investigation. We find Miss Mee reached the decision that the claimant was guilty of Gross Misconduct having considered whether there are any mitigating factors to enable her to reach a decision to determine a sanction other than to dismiss. In the circumstances of the case the Disciplinary Sanction issued that was one which we find was reasoned and was one within the range of reasonable responses.
116. Mr Rozycki for the claimant has suggested that the reliance of the respondent upon a recording of the telephone conversation was flawed in light of the guidance giving by Grand Chamber of the ECHR international Court in the case of Lopez -Ribalda v Spain [ 2020] IRLR60 in regard the usage of recordings for the purposes of misconduct findings. We are mindful that in the Lopez case the ECJ were of the view that the Covert video recording in a Supermarket to evidence suspected theft that was continued over several days to find evidence was very much more intrusive than an

audio recording undertaken with the knowledge of the claimant not with the purpose of eliciting evidence but rather in this case with corroboration of the content of a conversation with an employee who had initiated a call. Our conclusion is that the decision to terminate the claimant's employment by Miss Mee was one that was in the band of reasonable responses of a reasonable employer.

117. To the extent that some criticism may be made of Miss Mee, in her failing to investigate the claimant's grievances, the claimant chose not to provide any written response or to attend the Disciplinary Hearing. Furthermore this criticism was addressed at the Disciplinary Appeal by Miss Tebbutt.
118. The Occupational Health Reports before the respondent at dismissal and at appeal indicated that the claimant became agitated and emotional. The Reports do not go so far as to say that there would be loss of control sufficient to use racist language to Mr Ali which was deplorable and extreme.
119. In respect of the Appeal procedure adopted Mr Rozycki has suggested that the respondent did not properly correlate the claimant's disability with his conduct and how he interrelated with the respondent's Managers with him. Mr Rozycki has suggested that the claimant was given inadequate time before the Appeal Hearing to consider the documentation that had been collected and read for that Hearing. We see that the bulk of documents to which Mr Rozycki refers extended over some 45 pages, the majority of which, had been sent to the claimant in readiness for the Disciplinary Hearing which he declined to attend. At the start of the Disciplinary Appeal Hearing with Miss Tebbutt no issue was taken by the claimant or his Trade Union Representative Mr Edwards, a Divisional Representative of the CWU, to suggest that the claimant had insufficient time to prepare for the hearing, the claimant in the event had 9 days to read the papers that had been delivered to him on 26<sup>th</sup> February before the Appeal Hearing held on the 5<sup>th</sup> March.
120. We have found that Miss Tebbutt in conducting the Disciplinary Appeal Hearing effectively reheard all of the Disciplinary Charges and in her investigation she considered also the grievances that the claimant had raised. Most importantly, notwithstanding that grievances were outstanding when the claimant was dismissed by Miss Mee, Miss Tebbutt considered whether the failure to progress the grievances was sufficient mitigation in respect of Mr Hill misconduct. Miss Tebbutt had concluded that in respect of the claimant's further abuse of Mr Allen his grievance regarding his Annual Leave was submitted only after his abusive behavior towards Mr Allen. In considering whether the respondent's failure to progress the subsequent grievances was sufficient mitigation in respect of the claimant's later altercation with Mr Ali, Miss Tebbutt concluded that the lack of progress in respect of his grievances did not mitigate the Racial Abuse Mr Hall aimed at Mr Ali.
121. Miss Tebbutt at Appeal had available to her only the Occupational Health advice dated 16<sup>th</sup> October 2018 [175 – 176] as the claimant had declined to authorise the release of a later Occupational Health Report dated the 12<sup>th</sup> April 2019 [287 – 288]. The conclusion reached by Miss



Tebbutt that the claimant's underlying mental ill health, to the extent it may have impacted on his behaviors, did not mitigate the circumstances of the claimant's behaviour. The respondent considered abusive and discriminatory behaviour as in this case to be too serious to be excused by mitigation to justify a lesser penalty than dismissal. Miss Tebbutt having had regard to mitigating factors was reasonable as she considered that the claimant displayed a consistent pattern of behavior extending not only to abusive but abusive and racial discriminating behaviors that could not be tolerated. There was no evidence before the respondent nor is there is no evidence that has led us to conclude that either Mr Allen or Mr Ali provoked the claimant to provoke a response of abusive and racist conduct. We conclude that the respondents dismissal of the claimant was fair in all of the circumstances of the case and the complaints of unfair dismissal do not succeed and are dismissed.

122. The decision of the tribunal is that the reason for the claimant's dismissal was his gross misconduct. The decision to dismiss the claimants was procedurally and substantively fair. The respondent's decision to terminate the claimant's employment was a decision within the band of reasonable responses in the circumstances of the case having been reached following a fair and reasonable investigation into the claimants misconduct and having had full regard to any mitigating circumstances.

#### Discrimination rising from disability

123. The claimant asserts that the respondent's treatment of him by Mr Good and Mr Ali on instructing the claimant to remain at home and submit sicknotes, although ready and willing to return to work, was less favourable treatment because of something arising from his disability.

124. We conclude in light of our findings of fact that the claimant's pay had been reduced to half pay from 15 October 2018 and on 24 October he had reported that he was feeling better and a meeting was arranged for 25 October at which arrangements for his return to work were to be informally discussed. We have found that the respondent did not have regard to the advice given by Occupational Health on 16 October 2018 [175] and at the meeting on 25 October the respondent did not implement the recommendations made for the adjustment to the way meetings might be held with the claimant. As a result of the respondent, albeit with the best intention to have an informal chat with the claimant to forewarn him of the discussions that would have to take place, the claimant reaction was to become agitated and to leave the meeting. The respondent took no proactive steps thereafter to convene a fact finding meeting until after 23 November 2018. We find the respondent failed to take note of the Occupational Health Report of the 16<sup>th</sup> October 2018 which confirmed that the claimant was fit to return to work on a phase return to be increased gradually over 4 weeks. In conducting the informal return to work discussion to give the claimant the "heads up" in respect of the need to investigate his behavior and abuse of Mr Allen in June 2018 and concerns raised by his work colleagues did not take full account of the recommendations by Occupational Health in respect of the Management of the claimant Informal Interview [ 176 ]. We conclude that the treatment of the claimant requiring him to remain at home and submit sicknotes was less favorable treatment arising as a consequence of the claimant's disability and the respondent

had not identified a legitimate aim to treat everyone in such circumstances the same. The respondents treatment of the claimant in this respect was unfavourable.

125. The claimant has made a number of further allegations he alleges that there was a failure to investigate the claimant's grievances until the Appeal stage which the claimants' asserts had an effect on him due to his mental health conditions. In light of the Findings of Facts we can conclude that the lack of investigation into the claimant's grievances was a failure not by any of the claimant's line manager in this claim but of the respondent's HR Resource that was located in Sheffield. We conclude the failure to investigate the grievances was not as a consequence of the claimant's disability and there is nothing before the tribunal to suggest that the failure to progress the grievances arose from anything arising from the claimant's disability rather the failure of the Respondent infrastructure to ensure monitored progress of grievance complaints that are lodged centrally with the HR support service. Such unfavourable treatment of the claimant in the lack of progress of his grievances until resolved by Ms Tebbutt at Appeal in March 2019 was not because of something arising in consequence of the claimant's disability but as a consequence of HT logging and progressing the claimants grievances.
126. The claimant asserts that the requirement that he work at the Bromsgrove depot when it was acknowledged that the claimant had difficulties at the depot was something done by the respondent as a consequence of his disability. The evidence we have heard leads us to conclude that it was acknowledged that the claimant told the respondent that he would be ill if he had to return to the Bromsgrove depot notwithstanding that the respondents decision to transfer the claimant to work at the Bromsgrove Depot was as a result of there being insufficient work for the claimant in Alcester, a smaller delivery office. We conclude that the proposed transfer was not as the result of something arising from the claimant's disability but because of the lack of work for him to do at Alcester. To understand why the claimant asserted he had difficulties working at the Bromsgrove Office was a matter that the respondents' had sought to clarify however the claimant provided no such explanation. Absent any evidence to the contrary we conclude the respondent's business decision was one which was not arising from the claimant's disability.
127. The claimant asserts that the decision to discipline and then dismiss him was discrimination arising from his disability. We have considered in detailed decisions taken both by Miss Mee and Miss Tebbutt and find that their reasoning is clear and detailed in the decision documents [233 -225] [294 – 312]. The decision to terminate the claimant's employment related to his gross misconduct on the 30<sup>th</sup> June 2018 and 23<sup>rd</sup> November 2018, the claimant's misconduct was not caused by his disability and was therefore not for reasons arising from his disability. There was no evidence before the respondent nor before this tribunal to lead the respondent or this tribunal to conclude that the claimant's abusive and racist behaviour was caused by or in consequence of his disability. In any event the respondents have demonstrated that the decision to terminate the claimant's employment was a proportionate means of achieving a legitimate aim to prevent the abuse of Managers and in particular to prevent racially discriminatory behaviors.

128. The claimant has said that there was a failure to refer him to Occupational Health before they did which delay resulted in the claimant being dismissed before the termination of his employment through health reasons thereby denying the claimant the contractual right to ill health termination payment.
129. The decision to terminate the claimant's employment taken originally by Miss Mee was one taken having had regard to the only Occupational Health Report then available dated the 16<sup>th</sup> October 2018; there was nothing to suggest in that report that the claimant's condition would cause him to lose control such that he would use racist language. Although not before the respondent at the Appeal Hearing, the claimant having refused to the disclosure of the Medical Report issued by Dr Scott [287 -288 ], that report whilst acknowledging the claimant may possibly be "*become agitated and emotional*" it is short of suggesting that the claimant would be incapable of controlling his behavior. The report does not excuse the use of abusive, racist and foul language as being as a result of the claimant's mental health condition and we conclude that the decision to discipline and dismiss the claimant was not as a consequence of the claimant's disability. In any event we conclude that the respondent has a legitimate aim to observe the duty of care to all employees that they are not expected to attend their place of work to be subjected to the kind of behaviours and abuse as levied by Mr Hill and that the respondent treats employees who abuse and racially abuse other employees, in a particular mangers, in a consistent manner.
130. The claimant has sought to suggest that the delay in referring the claimant to Occupational Health resulted in the claimant being dismissed before the termination of his employment for health reasons thereby denying the claimant the contractual right to an ill health termination payment. The respondent, when Miss Mee the reached the decision to terminate the claimant's employment, had before her the Occupational Health report 16 October 2018 which confirmed the claimant's fitness to return to work. It is evident from the grievance complaint the claimant raised after his discussion with Mr Ali on 23 November 2018 that he raised a grievance in reference to the respondent's failure to pay him and Miss Tebbutt in her determination of the claimant's grievances concluded that the claimant was entitled to be paid his normal pay from 24 October 2018 when he had been fit to return to work. There has been no engagement with the clamant or his representative during the conduct investigation to suggest that the claimant was no longer fit to work for the respondent or at all. Moreover at the stage when Miss Tebbutt at Appeal asked the claimant to authorise disclosure of the most recently commissioned Occupational Health report the claimant declined to authorise its release. We conclude that the reason for the decision to terminate the claimant's employment was related to his conduct and not for reasons related to his capability to work.
131. The claimant's complaints in respect of discrimination arising from disability succeeds only in respect of the respondent's treatment of him by Mr Good and Mr Ali on instructing the claimant to remain at home and submit sick notes although ready and willing to return to work. The respondent has failed to show that the unfavorable treatment we have found was a proportionate means of achieving a legitimate aim.

132. It is accepted the claimant is a disabled person at the relevant time and that he has identified a number of provision criteria or practice ("PCP") which it is asserted the respondent applied in his case and we deal with each PCP in turn.
133. The claimant asserts that the respondent had a PCP being "**a. Requirement to return to a particular depot without considering an alternative location.**" We are satisfied that the respondent did not operate a requirement to return to a particular Depot without considering an alternative location. The respondent have demonstrated a practice of relocation of individuals, when subject to a suspended dismissal at Redditch, they had relocated the claimant case to the delivery office at Alcester. The evidence given by Mr Allen has been to the effect that when the claimant initially had been assigned to work in Bromsgrove on his return to work in June 2018 other sites were considered in the area but there were no vacancies suitable for the claimant. The claimant was surplus to the requirement at Alcester and it was not possible to return him to work to Redditch and there was work available for him at the Bromsgrove Depot as an alternative to Alcester.
134. We have found having heard evidence from Mr Allen that other sites were considered as alternative locations at which to ask the claimant to work but there were no suitable alternatives that had vacancies suitable to the claimant. We are satisfied that the respondent had sought to understand the claimant's reasons why he did not wish to return to the Bromsgrove office. The claimant declined to engage in the discussion which leads us to conclude that, had the claimant informed the respondent of the reasons why he did not wish to work at Bromsgrove, further consideration to work at an alternative location would have been undertaken. We conclude that the respondent did not operate a PCP as described by the claimant and to the extent that such PCP had operated to place the claimant at a substantial disadvantage the respondent took steps to avoid such disadvantage by seeking to understand the claimant's concern against working at Bromsgrove and the claimant did not provide any explanation for his position.
135. Linked to the first PCP is the third, that being "**c. The requirement to work time and hours at Bromsgrove without considering an adjustment to the hours of work**". The hearing has heard no evidence from the claimant to suggest such a PCP was operated by the respondent generally or that the claimant in particular sought adjusted hours to work in Bromsgrove. Mr Rozycki in particular has suggested in his oral submission to us that the respondent ought to have considered alternative hours of work. Our findings of fact are clear that after a period of precautionary suspension in March 2018 when the claimant was due to return to work in June, as there had been found to be no case to answer against the claimant, staffing levels meant that there was no available work from him at the small Alcester depot. In discussion with his trade union representative it was suggested that the claimant might return to work at the Bromsgrove depot where he had worked briefly in December 2017. The claimant had refused to work at Bromsgrove and he had been asked on 28 June 2018 to explain why he was not well enough to work in the Bromsgrove delivery office, the claimant did not explain why he would not work at Bromsgrove and there

was no reason to suggest to the respondent that it might be accommodated by a change in his working hours. We conclude that the respondent does not operate a PCP that the claimant be required to work hours and time at Bromsgrove without considering an adjustment to hours. The claimant did not engage with the respondent in respect of working at Bromsgrove or any depot other than Alcester and this complaint does not succeed.

136. The respondent organisation has a return to work policy which was adopted in respect of the claimant when he was invited to attend a meeting with Mr Good and Mr Ali on the 25<sup>th</sup> October 2018. The claimant asserts that a PCP of **“b. Failure to apply the respondent’s RTW policy in respect of the claimant.”** The respondent conducted an informal discussion with the claimant on 25<sup>th</sup> October which was intended to discuss the claimant’s return to work. The discussion was precursor to an informal factfinding discussion and to inform the claimant of matters that needed to be addressed on his return to work, with reference to his conduct towards Mr Allen on 30<sup>th</sup> June 2018 and concerns about his working at Alcester. In our findings of facts we have concluded that the respondent failed to have full regard to the advice given by Occupational Health on 16<sup>th</sup> October 2018 [175 -176], Albeit not a formal Disciplinary Hearing or Factfinding, the meeting was one which a reasonable employer ought to have considered permitting the claimant to be represented. Mr Rozycki for the claimant has described the PCP as being the application of the RTW policy without adjustment allowing the claimant to be accompanied at the RTW meeting. Notwithstanding the respondent’s best intentions, to give an informal “heads up” of the future return to work discussions and the need to conduct a fact finding investigation as we have found there was a failure to make reasonable adjustments in respect of the meeting held on the 25<sup>th</sup> October. The meeting held on the 25<sup>th</sup> October was not a lengthy investigation meeting it was a meeting that extended only over a short few minutes. Mr Hartley has suggested in his submissions that the meeting was a return to work meeting but that attempts to hold the meeting were frustrated by the claimant leaving within two minutes of the start. The PCP would seem to be conflated with the PCP identified to be **“e. At the disciplinary meeting the claimant was not provided with any support; in particular the claimant was led to believe is was a RTW meeting”**

137. Our findings are unequivocal that the requirement that the claimant attend the meeting on 25 October 2018 a quasi RTW meeting without the attendance of a trade union representative was a PCP which was applied to the claimant and which placed the claimant at a substantial disadvantage. The Occupational Health report had been produced to the respondent and they were aware of the prospective disadvantage at which the claimant might placed. The respondent ought reasonably to have taken the steps recommended by Occupational Health and did not do so. In these circumstances the respondent were aware of the recommendations of Occupational Health in respect of the conduct of meetings and had not taken any reasonable adjustments into account.

138. The claimant identifies that the respondent operated a PCP **“f. The requirement for the claimant to attend the investigation in person (Witnesses in the grievance investigations were permitted to be interviewed by telephone or email and the claimant was not allowed to avail himself of that practice)”** We have made clear the reason for the

conclusion that we have reached that the meeting on the 25<sup>th</sup> October was one at which the respondent failed to make reasonable adjustments. Our findings of fact in respect of the fact find investigation and the invitation to attend the disciplinary hearing held ultimately on 10 January 2019 is that the respondent conducted the invitation process and hearings in a way that was consistent with their policy and procedures and was consistent with the adjustments that had been suggested by occupational health. Neither the claimant nor his trade union representative on his behalf suggested that the investigations ought to have been conducted by email or telephone and that the claimant had suffered substantial disadvantage in the way in which the meetings were proposed to be held. The claimant did not engage in the disciplinary hearing nor did he accept the invitation to provide written responses if he was unable to attend a meeting in person. We conclude that the respondent did not apply the PCP as asserted by the claimant and in any event no substantial disadvantage was suffered by the claimant arising from the conduct of the respondents investigation.

139. The claimant has referred also to the operation of a PCP that: “**d. Failure to consider an alternative line manager.**” In reaching our conclusion we have reminded ourselves of the sequence of events that span a protracted period. When the claimant was working at Alcester, Mr Allen who was a relief manager covering holidays and absence and the claimant’s line manager at that time was replaced in September 2018 by Mr Imdad Ali who became the delivery Office Manager. To the extent that the claimant was working at the Alcester Delivery office his direct line manager in the relatively small office was the Delivery Office Manager. The claimant has not established that he was caused to suffer a substantial disadvantage in comparison with persons who are not disabled. In any event of findings of fact confirm that the respondent considered the possible relocation of the claimant to a nearby depot, Bromsgrove there being no nearby alternative positions available and the claimant without full explanation declined to work at the Bromsgrove depot.
140. Finally the claimant refers to the PCP that: “**g. The requirement for the claimant to deal with the arbitrary documentation in a short period of time**” In our findings of fact we have found that at each stage of the fact finding investigation and the disciplinary and appeal hearings the respondent provided the relevant documentation to the claimant and his representative in good time with opportunity to consider the documentation that was being considered. The disclosure of documentation was consistent with the respondents procedures and when the claimant or his representative asked for more time to consider the documentation it was given.
141. In respect of the claimant complaint of a failure to make reasonable adjustments we conclude that there was such failure in respect only of the failure to clearly comply with the respondent’s Return to Work Policy on and around 25 October 2018 and in respect of the conduct of the meeting on 25 October 2018 between the claimant and Mr Good and Mr Ali. Subsequently the claimant was invited to the Investigation meetings in person accompanied by Trade Union Representative the Investigation Meetings were not lengthy and the claimant was given notice of them and of the right, should he prefer, to provide written submissions setting out his account and concerns to the respondent which he declined to do.

142. We conclude that only in respect of the respondent conducting a meeting on 25<sup>th</sup> October 2018, at which was purportedly a return to work discussion designed also to give concerns raised by his work colleagues at Alcester and the need to conduct a factfinding investigation in respect of the claimant's conduct towards Mr Allen 30<sup>th</sup> June 2018, did the respondent apply a provision criteria of practice which placed the claimant at substantial disadvantage in comparison to person who are not disabled at that time. The respondent in light of the Occupational Health Report ought reasonably to have known that the claimant was likely to be placed at a disadvantage at that meeting on the 25<sup>th</sup> October by not being accompanied by a Trade Union Representative even though the meeting was an informal one that in accordance with the response with the policy did not require the claimant to be accompanied by the Trade Union Representative we conclude it would have been reasonable for the respondent to have allowed the claimant to have been given notice of the agenda for the meeting on the 25<sup>th</sup> October and to have been permitted to be accompanied by a Trade Union Representative at that time.

#### Harassment related to disability

143. The findings of fact that we have made have led us to conclude that Mr Allen did not refer to the claimant as paranoid and crazy nor did he adopt an intractable position in relation to location and holiday in order to goad or inflame the claimant.

144. Neither Mr Good nor Mr Ali at a meeting on the 25<sup>th</sup> October 2018 engaged in conduct that was related to the protective characteristic of the claimant's disability and we conclude that their conduct did not reasonably have the purpose or effect of violating the claimant's dignity creating intimidating, hostile, degrading, humiliating or offensive environment for the claimant. The claimant had been informed that the meeting of 25 October was to discuss his return to work and by implication, in light of Mr Ali's earlier discussion with the claimant in September 2018, that he would need to discuss the circumstances of his behavior towards Mr Allen on the 30<sup>th</sup> June the claimant was not ambushed at the meeting.

145. For the reasons we have detailed in our findings of fact we accept that the comments made by Mr Alen in response to the claimant's allegations about the respondents management and he acting to drive him out of the business sounded paranoid was not a description of the claimant and was not conduct that was done or said with the intention to cause or create an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. We conclude that the claimant's perception of the comments made in the context in which they were made could not reasonably be perceived to cause such harassment. Mr Allen's comments to the claimant in respect of his holiday records and his entitlement were comments made in respect of the claimant seeking information.

146. The suggestion that on 25 October 2018 the claimant was ambushed by Mr Good and Mr Ali are not well founded. Whilst the manner in which the meeting was conducted was intended to identify the arrangement for a return to work and to introduce the need to commence a fact finding investigation into the events of 30 June 2018 for the reasons we have

detailed was not undertaken in a way that made reasonable adjustments the manner of the meeting was not one that was harassment of the claimant. The meeting lasted barely two minutes and the claimant became agitated when he was made aware of the concerns of his work colleagues that would need to be discussed to consider his return to work. Mr Ali was an observer at the meeting and took no active part in it. We conclude that the discussion was convened with the intention of discussion arrangements for the claimant return to work as he had been confirmed to be fit to enter such discussions and the claimant's perception of the meeting as being harassment was not a reasonable perception in the circumstances.

147. Finally the claimant asserts that the conduct detailed in paragraph 5 of his Particulars of Claim in his second complaint [40] was harassment. The findings of fact that we have made have led us to conclude that the events of 30 June and 25 March 2018 were not acts of harassment and that the communication of objective records relating to the claimant's holiday entitlement were the reasonable communications of an employer to an employee and cannot reasonably be perceived as harassment because of the protected characteristic of disability.

#### Breach of Contract

148. The claimant was not unfairly dismissed by the claimant. The claimant was dismissed without notice as a result of his gross misconduct entitling the respondent to terminate the claimant's employment without notice.

Employment Judge Dean  
5 March 2021



