EMPLOYMENT TRIBUNALS

Claimant: Mr. J. Woodcock

Respondent: Network Rail Infrastructure Ltd

Heard at: London Central
On: 26-29 February, 1, 4-7 March 2024.
Discussion 11-13 March.

Before: Employment Judge Goodman
Ms D. Keyms
Mr I. McLoughlin

Representation
Claimant: Andrew Mc Phail, counsel
Respondent: Jesse Crozier, counsel

RESERVED JUDGMENT

1. The unfair dismissal claim fails
2. The sex discrimination claim fails
3. The disability discrimination claims fail
4. The wrongful dismissal claim fails
5. The claim for breach of contract as to wages fails

REASONS

1. This claim is about the claimant being suspended and, much later dismissed, for unwanted conduct and harassment of another employee.

2. The claims the tribunal is asked to decide are unfair dismissal, sex discrimination, discrimination because of something arising from disability and failing to make reasonable adjustment for disability, wrongful dismissal (failing to pay notice) and unauthorised deductions from wages (alternatively breach of contract) for paying only basic rate pay during the suspension from work.

3. The tribunal must decide whether the sex discrimination claims are out of time, and whether the claimant was disabled – the respondent's case is that the claimant was not impaired as claimed by depression and anxiety, but by addiction to alcohol.

4. The full agreed list of issues is appended to this judgment.

Conduct of the Hearing.

5. The hearing was in person. It was not recorded because no hearing room with recording facilities was available.

6. The name of the person harassed appears as MB. The parties drew to the tribunal's attention that she was not a witness nor a party to proceedings, and that some of the material in the documents bundle concerned her private life, in particular sexual relations with another person not a party to proceedings. The tribunal has ordered this partial anonymisation so as to balance the principle of open justice with her Convention right to privacy. The private matters have little relevance to the claims made, though it was necessary to mention them in the context of why the respondent's investigator limited the private documents she would consider. Identifying her by name would not assist public understanding of the process by which decisions on the claims have been made.

7. After hearing evidence, we read written submissions from each party and then heard oral submissions on points arising before adjourning to consider decisions on liability, Polkey, and contribution, with the intention of holding a remedy hearing the following week if required. The schedule of loss, which includes loss of a defined benefit pension scheme, aggravated damages, and grossing up, exceeds £3 million.

Evidence

8. The tribunal heard evidence from:

Joshua Woodcock, claimant, with a witness statement of 391 paragraphs, in addition to a statement about the impact of disability of 104 paragraphs
Colin Ademosu, RMT trade union representative at the suspension meeting, attended under a witness order
Dean Stanley, RMT trade union representative, familiar with some early events, also attended under a witness order
Andrew Graham, RMT trade union representative at a grievance hearing, who assisted the claimant during the suspension, and represented him at the hearing at which the claimant was dismissed
Mark Kinsey, RMT trade union representative during the claimant's appeal against dismissal
Michael Woodcock, the claimant's father, gave evidence about his health from time to time and about the mortgage issue
David Flannagan, the claimant's second line manager, was the claimant's welfare manager from his suspension on 7 April 2021 until on 12 April 2022
Anthony Harmes, Infrastructure Maintenance Manager, took over from Mark Le Juge de Segrais (who has not given evidence) in December 2021 as the claimant's suspension manager
Andrew Dutton, Operations Manager on Maintenance Programmes, succeeded Dave Flannigan as welfare manger from 12 April 2022 until dismissal on 27 May 2022
Michael Groves, Project Manager, heard the claimant's second grievance (about the lack of progress in his grievance about MB)
Matthew Swancott, Project Operations Interface Manager, heard the claimant's appeal against the decisions made about his second grievance

Thomas White Senior Network Delivery Manager, heard the claimant's appeal against the decisions made on his first grievance
James Arnold. Operations Manager, Mid-Wales, investigated the disciplinary matter that resulted in dismissal
Mark Howells, Senior Asset Engineer (Drainage and Lineside, Western route) made the decision to dismiss
Craig Green, Principal Engineer, heard the claimant's appeal against dismissal.

9. The tribunal read a witness statement of **Brittany Ferguson**, Project Manager, who investigated the claimant's grievance about MB, and MB's grievance about the claimant. She left the respondent's employment at the end of 2021. She did not attend the hearing. We did not give the statement much weight on controversial matters; we were interested in what she left out.

10. There was a hearing bundle of 3,227 pages (including a 34 page index) and a supplementary bundle of 685 pages. Further documents handed in during the hearing were the claimant's hard copy of appendix 6 to the disciplinary investigation report (as other copies, electronic and paper, were hard to read), his Help to Buy loan application, the HR record of an earlier disciplinary investigation of the claimant between August to October 2020, and a list of prescriptions.

11. We were handed some recent email correspondence between the respondent and MB about the Help to Buy application; we refused permission to recall the claimant to deal with this on grounds that he and his father had already been questioned about the application and we did not require further evidence from him.

Findings of Fact

12. The respondent is a non-departmental public body of the Department of Transport, a company without shareholders. It is responsible for track and signalling on UK railways.

13. The claimant had been employed by the respondent from the 21 September 2016, when he joined, at the age of 21 as an apprentice. In June 2019 he was placed at Paddington in S&T (signalling and telecommunications) and eight months later became a Team Leader.

14. During training he had formed a friendship with a female colleague, MB, and when both moved from Yorkshire to Paddington in September 2019, they agreed to share accommodation to save cost. All the evidence pointed to their being friends, but not in any romantic relationship: the claimant referred to her as his girlfriend; MB denied anything more than friendship.

15. We have no formal evidence about the gender composition of the workforce. We noted however that all the HR personnel connected with this case were women, and all the managers (save Brittany Ferguson) were men. However, a count of the large group of managers asked in March 2022 if they would investigate the grievances shows roughly a third of that group are identifiably women. We know that two of the claimant's contemporaries on the apprentice course, MB and her friend Jenna Thomas, are women, but the numerous other employees involved in the events we have to review are men. We also know that MB was the only woman in her depot. Given that trackside

work involves hard hats and boots, all weather work outdoors, and unsocial shifts, it would not be surprising if men predominated in the workforce.

The mortgage

16. The claimant decided it would make sense to buy a flat rather than rent. He paid a deposit for a new build studio flat under construction by Barretts in December 2019. He applied to the Halifax for a mortgage loan. He was the sole borrower. At some point in early 2020 MB signed an undated form for the Halifax stating that she would have no interest in the property. She also signed, in April 2020, an application for a Help to Buy equity loan for the purchase of the flat, a government scheme to promote the sale of new property, as did the claimant. The tribunal was told by the claimant's father that this was to meet the affordability criteria for such loans, on the basis that MB, though not an owner, nor a borrower, would contribute to the outgoings. The purchase was due to complete by mid-2020 but due to building delays and lockdown the purchase did not complete until December 2020, when the claimant moved in.

17. MB did not move in. She had moved out of their shared rented accommodation in October 2020.

The Claimant's 2020 Suspension

18. In August 2020 one of the claimant's team members, a man called Ioan Mogos, alleged the claimant had bullied him. The claimant was suspended pending investigation. The respondent interviewed 12 named and one anonymous witness in their investigation. In the HR summary report it was noted that the team member had wanted to change teams in February 2020 and had complained to managers. Several witnesses said the claimant regularly talked over the team member and two said the claimant had no respect for Mr Mogos and it "seemed personal". At a hearing in November 2020, the hearing manager learned that he had been promoted Team Leader after only 8 months and had not had any management training. She decided that the behaviour did not amount to misconduct, but he must go on a mandatory course on leadership skills. He was also to have a mentor for six months. This solution suggested to us that it was felt there was substance in the allegation but training rather than discipline was the answer. He returned to work on the 5th December 2020.

19. We do not know whether during this suspension he did or did not have 4 weekly suspension reviews (as policy requires).

20. As reported by MB, and by the claimant, the effect of suspension was to make him anxious and to alter his behaviour. His concerned father arranged for him to see a psychologist in November 2020. The psychologist recorded that he was drinking alcohol to excess - 1 to 5 pints of lager a night.

MB moves out

21. On MB's later account to the police, after being suspended in August 2020 the claimant, had gone to stay with his father in Shrewsbury, returning to the flat occasionally and without warning. She said he began to behave oddly towards her, checking her shift schedule, asking when she was going out or leaving, and coming back to the flat without notice. In October 2020 she left, going to live at the house she was buying in Huddersfield, as she 'needed some space'. She left behind a number of her belongings. Some of the claimant's belongings were left with her mother. She described the claimant's behaviour

then as obsessive, sending her numerous messages, and in November 2020 she blocked him on messenger, text and Snapchat. He started to use WhatsApp instead, and she blocked that at the end of December 2020. From time to time he sent presents to her house. When from January 2021 he started to send increasing numbers of emails, instead of WhatsApp messages, she tried to block his emails, but without success.

22. In December 2020 the claimant was moving into his new flat and the question of getting MB's belongings to her became more acute. The claimant wanted to meet MB but she did not want to meet him. Arrangements for her stepfather to collect her belongings, and return some of his, broke down when the claimant took objection to him.

23. The claimant also received a call or calls from MB's boyfriend, DB, (not an employee of the respondent), which he described as threatening, and he reported that to the police. On 29th December 2020, in the early hours, he spoke to his supervisor, and at 4:00 a.m. confirmed in an e-mail that he had been threatened and had gone to the police. He said that "the police have advised that MB should be *removed from her current job role* as there is a high risk of myself and her coming into contact through work" (emphasis added).

24. Towards the end of January 2021, Abdullah Sikandary, the second line manager who had been copied in to this by the claimant , inquired of the police about progress and was told that investigations had not been concluded.

The Unwanted Conduct

25. From January 2021 the claimant sent MB a sequence of emails which were disclosed to the respondent by MB after she lodged a grievance about him in March 2021.

26. On the 12th January 2021 the claimant emailed MB that he could not carry on with life as it was at the moment. She had caused him "so much irreparable damage, pain and hurt", which she seemed to have no interest in. MB wrote to the claimant n reply: "this is the last e-mail I'm going to send to you, this has become ridiculous now." She had told him months ago why she felt the way she did about him, and asked for space which he would not give. She had tried to distance herself but he "chose to go out of your way to find other ways to keep harassing me so I'm not doing it anymore. I will drop your things off to your depot and I'd like you to drop mine off at my depot so that we both have our things back. I refuse to be made to feel like crap for having to want space, I gave you so many chances to change and you didn't".

27. The claimant responded on 13 January 2021 complaining that she doesn't have any "effing respect for me and my health is an ****** joke to you. Well I hope you can live with the fact that you have fucked my life up, you've ruined me as a person and ruined my year. You've led me to contemplate my life on so many occasions... i hope you could live with that. I ain't going to be around for much longer. I have hit rock bottom and i have had enough... It was too much for you to just send me a simple reply to ask if there is any hope of ever fixing things... Thank you again for ruining my life. At least you don't have to worry about seeing me anymore, you don't have to worry about organising returning what you owe me I ain't going to be around to accept it from you. I am done with life. Goodbye M."

28. A few days later, on 18 January the claimant sent her a bonsai tree with a card saying he wanted it to grow in his memory. MB understood this to mean he was contemplating suicide.

29. On 25th January, concerned about his mental health, MB wrote to the claimant asking him to give her space and not contact her. He should not put himself down as he was a good person. He needed to speak to someone for support. He did not need to worry about anything in her personal life, as it was hers not his. They needed to move on.

30. On 28th January he said he would pop around at 12 to collect stuff and if she was not in, he would go round to her mother's. "If none of you are in I'll keep trying every few days and hopefully be able to get my things returned". He said later that day: "I ultimately started to fall in love with you and pictured my life always involving you hence why I have found all this so hard.... i expected too much from you, left you feeling uncomfortable. Sorry i'm a shit friend and you now hate me... i will always respect and love you".

31. On 3rd February 2021 MB (who did not want to meet him) told the claimant she would post his belongings by recorded delivery; she asked him to do the same with hers. If he did this, she would pay half the cleaning bill. She did not need to return things he had given her. In a reference to the loan paperwork, she said if he needed her name off the agreement now she was not a tenant she would sign a letter to say so, but would not respond to any other communication, and if there was anything else he must go through a solicitor. In a reference to him saying she was damaging his reputation, she said she was not talking to other people, except her friend Jenna (a mutual friend). She did not want a friendship with him as he had not respected her wishes. He must not speak to her family. She asked him not to contact her except for the mortgage letter he wanted her to sign.

32. On 6th February he emailed saying she was making demands that he do things on her terms, rather than sorting things out mutually. She should start to take responsibility for the fact that she was having a negative effect on his life and mental health. If she would not discuss things with him that weekend, he would "explore other options to resolve everything". "I am not going to accept being made to feel like the world's biggest cunt any longer. You know the effects you were having on me, you know what things annoy me and make things worse for me yet you continue to do them. Nothing I have done deserves to be treated the way you have. There is nothing I have done to make you feel uncomfortable to the point you need to portray me as an abusive controlling person that you are scared of seeing. If you are that scared of seeing me then you probably should find a different job so you don't have to run the risk of ever seeing me. I do not appreciate or tolerate being characterised by you. Nor do I appreciate you labelling me the way that you are doing". It was not viable to post things. They needed to have a conversation to clear the air.

33. The tribunal comments that MB will have read in this (1) that he blamed her for his poor state of mind, and (2) that he insisted on seeing her rather than dealing with property and the loan by third parties and post.

34. He replied to her 25 January email on 8 February: "I had a complete

breakdown this morning at work because of you, the whole situation between us and how things have been handled. The e-mail you sent me completely broke me, ..horrible thing you've ever sent me. There was no consideration towards me, no care in the world for how it might affect me... it was completely selfish and purely done to undermine me, guilt trip me and mess with my emotions".

35. According to the claimant, the police advised him to bring a civil action if he was concerned about not getting his property back. On 8 February he commenced a county court claim for just over £800 for various items, including the value of the gifts he had sent after she moved out. This was served; however on 4th March 2021 he withdrew the claim.

36. On 18th February he accused her of fucking with his life, and turning people against him. Anyone would side with her and he would be the one to suffer and lose out.

37. On 23rd February he sent her a long electronic card which in essence apologises for previous behaviour and asks for a second chance.

38. On 24th February he sent 5 emails. MB was doing a charity run, appealing on Just Giving for donations to Mind, a mental health charity. He sent a message explaining that he was going to pay £1 for every mile, later that evening he added a one liner: "don't worry I will ensure this will be honoured", but in the small hours of the next day (copied to her friend Jenna Thomas) he said it was ironic she was supporting a mental health charity "whilst both doing everything you can to affect someone else's mental health", perhaps she should add that to her story (on JustGiving) that she could not be bothered to help her best friend who was massively suffering. If she wanted to help she could have a conversation with him, without even getting out of bed, "or does a charity promise make up for ruining someone's life". It was ironic that she would not talk to him, he would be sure to add it "to my list of parting notes, at least you'll hit the headlines 'run for charity to make up for ruining someon' i can see it already".

39. In between these emails, late in the evening of 24 February he had written suggesting suicide once more: he could not face life any more and would not be contactable "so don't waste your time getting other people to look put for me it simply wont happen or be possible". She could collect her stuff from her flat, and he was sending her keys but she must not let other people have them.

40. On 2nd March he wrote, subject line "I'm coming to see you", that now he was off painkilling medication (for a bout of shingles) he would be driving again and coming to see her. "In the first instance i will attempt to see you when i believe you are at work, it is then your choice if you want to make a scene or cause further issues with regards this at work. Failing that, i will be spending some time at my brothers soon, I'll be making regular trips to yours until such time you are available and entertained sorting out what we need to. When doing so i will also bring with me the rest of your belongings so that you can finally have them. If you continue to make this difficult me returning them, then i will simply just dump them outside your house and it will then be your responsibility". He also needed to get his new flat keys off her (he had recently posted these to her, unasked) and she was not to post them.

41. In a statement MB made on 4th March (see below) she said that he had

sent her a bonsai tree he wanted her to grow in his memory, as well as the emails suggesting he was no longer alive, that he would be coming to see her at work and it was her choice whether to make a scene, that he said he would come to her house, that he wanted his gifts back and was trying to take her to court, that he had sent her his house and car keys with a suicide letter that everything was in her name, now wanted these to be returned, but wouldn't allow her to post them or give them to anyone else, as he wanted to meet her, which she would not do. Arrangements to collect belongings had broken down because he wanted to see her in person, rather through a third party or by post. She had posted a parcel of gifts to him, he said he had not received it, then he said he had received it and sent her a photo of the parcel, and now he said it had not arrived. He kept contacting her on his work phone which she had now blocked. On emails, she had sent only three, all asking him not to contact her. His to her could be pages long, or she could get as many as 15 a day. Because of the frequent suggestions of suicide she had spoken to his mother to get him help, and to the army (both were applying to join the reserves), but now she had to report it to the police and work.

The Two Grievances: MB and the claimant

42. On receiving the 2 March "coming to see you email", with the claimant saying he would come to her workplace, MB telephoned her team leader, Mark Le Juge de Segrais, in tears. He took a statement from her (see above) and forwarded it to HR on 4 March to open a grievance case. He reported in summary to HR that MB complained of the claimant's conduct, that he was sometimes threatening and sometimes nice, he often sent her gifts, he had said he was going to sign over his house and car to her. She had now involved the police, and had a crime reference.

43. On 12 March the claimant lodged a grievance about MB with Paul Drabwell, his mentor. He referred to earlier discussions about difficulties between him and his "ex partner" MB. He had contacted his team leader, John O'Neill, who told him to "just get over it". His grievance was that he was being character assigned (sic) by a fellow employee, receiving threats to harm or kill by a former employee, being blackmailed by an employee, and no longer feeling safe due to how MB had portrayed him to her work colleagues, and that he been directly threatened by some of them.

44. On 16th March Abdullah Sikandary, the second line manager, said that his concerns had been noted and an HR case had been raised to formally look at the points. He also queried whether the police matter (the DB threat) that the claimant had reported in December was still being investigated. The claimant replied that he preferred to resolve things informally. As a result, an HR case was not opened.

45. On 13 March the RMT representative had proposed to the claimant and MB that they provide an opportunity for mediation between their members. This came to nothing, probably because MB had made it clear she did not want to talk to the claimant - she just wanted him not to contact her. Then on 18 March MB received a curious e-mail from a Sandra Britain (e-mail address) but signed Sandra Button. This person purported to be a mental health counsellor (spelt *Councilor*) and asked MB for her side of the dispute, saying she was counselling the claimant but the claimant was not aware that she was making this inquiry. She was not available for a telephone call for at least a month, and she should e-

mail in reply. Apart from the professional unlikelihood of a counsellor making this inquiry behind her patient's back, there are other unusual spelling errors, for example she is signed off as "BABCP *accreditated* CBT t*heropist*". MB sent this to her engineer Mark le Juge de Segrais, and also mentions it in her police statement. She believed it was an attempt by the claimant to make contact. The tribunal tends to agree.

46. On 22 March 2021 the claimant had a prearranged welfare meeting with Paul Drabwell, Mark le Juge de Segrais, and Dave Flannigan. There is dispute about what happened at that meeting. In our finding, after some preliminary discussion, the claimant was told that MB had made a formal grievance against him. He was devastated. He left the meeting for about half an hour. When he was persuaded to return, he was told that he should not contact her. We do *not* accept (as the claimant asserts) that he then said that he needed to contact her about the mortgage. Because the claimant was so upset, it was decided he was unfit for safety critical work. He was to move from trackside duties to daytime office work at Ealing, and on 26 March a referral was made to OH for a report on his mental health.

47. Later that day he sent a formal grievance to Paul Drabwell, saying: "as discussed earlier I do wish my complaints against MB to be upheld and dealt with as a formal grievance." He listed "harassment, bullying, meaning threatening intimidating abusive and insulting, unwanted conduct, unacceptable behaviour by spreading malicious rumours, creating a degrading intimidating and hostile environment in the workplace, victimisation, and breach of Network Rail values about care of people, respect, kindness and empathy". There was no detail of the behaviour said to amount to harassment, bullying, unwanted conduct and so on. However, late that evening he sent another e-mail referring to a voice recording he had given Paul Drabwell of a conversation with Terry Whitfield, team leader at Westbourne Park (where MB worked), "within which he makes a statement saying, "stop or I will report you as well myself". The claimant deduced from this that MB had discussed him with work colleagues, which added to the "victimisation and hostile environment that she is creating for me". He wanted reassurance that they would put measures in place "to mitigate from MB discussing matters surrounding this case... with other people from within the company". An HR case was now opened for his grievance.

Appointing a Grievance Investigation Manager

48. On 24 March Penny Hunt of HR sent an email to a very long list of people trained to conduct investigations asking for a volunteer to investigate these grievances which she described as follows:

> "we have a grievance that has been raised by a female employee about constant unwanted contact by a male employee, in breach of our harassment policy. Our male employee on finding out that the grievance had been raised against him, has raised a counter grievance. It has also come to light that a further female employee has also received unwanted contact from our male employee".

She wanted one manager with time to investigate both grievances. It was noted that the second female employee had not yet raised a grievance but they would open a disciplinary case on it.

49. The tribunal notes that no disciplinary case was ever opened on this unnamed second female employee. Any findings made about her were based on hearsay evidence that the claimant had behaved to this second employee in a controlling way. There is no other information about this second female employee.

50. Brittany Ferguson, a project manager, responded promptly and was appointed to investigate.

Suspension

51. On 31 March the claimant sent MB another email:

> "when you are ready please can we talk to clear the air and get an understanding? I've got loads that I would like to say and I'm sure you do as well. Also I would like to finally sort out getting you the rest of your stuff back and also speak to you briefly about my mortgage and what to do with that as there are some complications with it and I do have to speak to you. You signed a contract and that does mean we now have to resolve that, I would like to it sooner rather than later as it is something else that is adding to my anxiety right now".

The tribunal notes that this communication was not just about the mortgage (as the claimant asserts, several times, in his witness statement). MB had asked him to send her any paper she needed to sign. He sent no paper. He has not followed this up. Neither then nor now he has been able to say what it was he needed to explain or get her to do. Nor has any step been taken, whether by him or through a third party. She was not a borrower nor did she have any equity in the flat. She had made it clear she did not want to see him. We concluded that the mention of a mortgage issue he had to speak to her about was a ruse to make her meet him.

52. MB must have taken this email to the respondent, because on 7th April the claimant was called to a meeting and told by Mark le Juge de Segrais that he was being suspended for contacting MB. This was confirmed in writing that day. The letter said:

> "you are suspended from work until further notice pending investigation into an allegation of gross misconduct as follows: unwanted contact and harassment".

He was told suspension was neutral, he was not to return to work, the suspension would be kept under review and would be no longer than is necessary and would not normally exceed four weeks. If it lasted longer he would be informed of the reasons for delay. During suspension he would be paid basic salary in the normal way; depending on the outcome, he might be reimbursed earnings he lost during the period. He must not communicate with other employees, contractors or customers unless authorised to do so. He could carry on with his university coursework but not discuss the case with others on the course. A welfare manager, Dave Flannigan was being appointed.

> "You are specifically reminded to not contact MB by any means. You must not approach or contact her whilst at university".

The disciplinary procedure was enclosed. He was asked to send in any relevant documents. He could access the workplace or computer network under supervision. The letter concluded by saying that this may be an unsettling and difficult time, and he was reminded the availability of the confidential counselling service, Validium.

53. That evening Mark Le Juge de Segrais emailed the claimant: "as per our meeting on 22/3/2021. This is a follow up e-mail and what we discussed, that you are not to contact MB by any means". He said the e-mail was delayed because he had been unwell the previous week.

Disciplinary Policy -Suspension

54. The respondent has a Disciplinary Policy. The contract of employment states that this policy is non-contractual.

55. The Policy provides for suspension at paragraph 2.5:

> "in certain circumstances, such as in cases where gross misconduct is suspected, all where it is considered that the employees presence work involves a risk to safety, the public, railway infrastructure, Network Rail, railway employees or themselves, consideration will be given to a brief period of suspension from duty, with pay, while an investigation is carried out".

It goes on that where there is no disciplinary action taken, the employee will be reimbursed additional earnings lost as result of suspension.

56. In addition, "such suspension will be reviewed periodically, so that so that it is not unnecessarily protracted but will not normally last for more than four weeks. If suspension extends beyond four weeks, the employee and their representative will be advised as to the reason for the delay".

57. As will be seen, this provision (2.5.2) for regular reviews went unheeded for the rest of 2021.

Stalking Protection Order

58. On 7 April MB made a statement to the police about the claimant's behaviour. On 26 May 2021 at Uxbridge magistrates court an order was made under the Stalking Protection Act 2019 prohibiting the claimant from contacting MB except through solicitors, physically approaching her, harassing or pestering her or taking images of her. The claimant says he had been sent a file of papers about the police application for an order, that he attended the hearing, that he had advice from a solicitor present in the court, and that he had not objected to the order being made. The evidence about these proceedings does not bear out the claimant's later assertion to the respondent that the magistrates did not consider him a risk to MB.

Grievance Investigation- MB

59. On 7 April also, MB was invited to a grievance investigation meeting which took place on 21 April 2021. Brittany Ferguson asked about work-related events that had led to the grievance, saying she could not get involved in personal details outside work. MB explained that she had not really seen the claimant since they had fallen out, though they sometimes bumped into each other on

track. She had involved the respondent because the claimant was threatening he was going to come to work, that she would have to face him or he would make a scene. “I knew that if he turned up then it would cause issues 'cause my guys wouldn't let you anywhere near me”. The emails were from personal accounts, although until blocked he had messaged her from his work phone to hers. There followed questions y Ms Ferguson which seem aimed at the claimant’s grievance issues, although MB did not know of his grievance at the time. Asked about Jenna Thomas, her friend, MB said that “she advised him to lay back, but he didn't listen. It got nasty between them and they stopped talking”. It had remained personal. She was then asked who else she had spoken to. She replied that it was her two team leaders, Terry Whitfield and Yusef Mehmet, and her engineer, Mark Le Juge de Segrais. She described an episode when the claimant was ringing repeatedly from a no-caller ID, and “emailing me every 5 minutes”. She had passed the phone to Terry Whitfield, who said it was not right that he should keep calling her at work, and he had answered the call, and asked the claimant what hewanted, which was the return of the house and car keys that he had posted her. Terry Whitfield had then told the claimant to leave her alone and stop calling. She described the call as “calm and (Terry Whitfield) didn't swear”. Next she was asked about contact with her stepfather and it was explained that he was trying to collect her belongings. She showed some messages between them. The claimant had taken objection to the stepfather calling him mate. He had sent her text about her stepfather being at his door: “every time until you are there to collect them, if you aren't you will come back till you are”, after he had failed to make an arranged meeting. He had responded “cool” with a thumbs up emoji. Finally, she was asked about a call from Yusef Mehmet to the claimant. MB said it was before they had fallen out, in July 2020, and wax about a rumour at another depot which Yusef Mehmet thought concerned the claimant. She described their conversation as “calm”. Miss Ferguson noted this was a similar account to the claimant’s, but he had said the call was in October.

60. Two other points should be noted about this interview. First, it does not follow the standard HR template used for the claimant’s later interview. The HR file shows that HR told her not to worry about using the standard template, just to upload the notes she had. Second, the tone at the conclusion was relatively sympathetic with an apology for distress caused, and MB being asked if she minded other witnesses being interviewed. MB sent Brittany Ferguson a copy of her police statement, which she was told would be placed on file but not used, and a copy of the 3rd of March “coming to see you” e-mail.

Grievance Investigation - claimant

61. Next day the claimant was invited to a grievance investigation meeting on the 4th May, but he was pronounced unfit for work by an occupational health report and it did not take place until the 1st July.

62. In the meantime, the claimant (28th June) asked to be sent information about MB's grievance against him,2 as he doubted he would have time to get her his evidence before the meeting. He also asked for an immediate review of his suspension, which should have been reviewed on a four weekly basis. He also considered the suspension manager, Mark Le Juge de Segrais, was biassed, being MB’s manager, and disputed that he could be suspended when they were carrying out a grievance, not a disciplinary, investigation. He also made specific points about data protection breaches, including that Mark Le Juge de Segrais

had told him about MB's grievance, and MB had disclosed confidential information in a civil court case (this must mean the magistrates' order). MB was accused of bringing personal issues into the workplace, coming to his property in working hours with colleagues, discussing details of the grievance with work colleagues which compromised a fair investigation. He asked to call three additional witnesses and to submit further evidence, including two extracts from the statement MB had made to the police. Brittany Ferguson replied that the suspension would not be lifted because he was suspended for suspected gross misconduct, and the grievance investigation would help inform disciplinary decisions. She would not share information which did not sit in his grievance case. There was nothing currently on his grievance file to share. She would not discuss data protection breaches at the 1st July hearing. She accepted the email as evidence, and she would schedule interviews with the proposed witnesses. She would not however accept "snips of police statements", as she would not be looking into anything it was being dealt with by the police. "My responsibility is to determine the risk of personal events transferring to the workplace. I do not wish to receive any evidence more information that is purely of a personal nature." There would not be a suspension review at 1st July hearing.

63. Brittany Ferguson conducted the meeting on the 1st July in two halves, first to cover the claimant's grievance, second the allegations made against him. As with MB, she opened by saying that she was looking at work-related events, not personal events, though she was aware of them. She would 'not tolerate attempts to sway her opinion that she was only looking at allegations specific to the workplace or had the risk of transferring into the workplace'.

64. The claimant mentioned a call from Yusef Mehmet (when on night shift) about a relationship between Yusef and MB, which he described as threatening. He confirmed that it was probably not November, as he had said, but before October, while he and MB were still sharing a flat. He had recorded the call. (In his witness statement for the tribunal however the claimant placed the threatening calls to February 2021). Previously friendly colleagues now blanked him, he said. In March 2021 he had tried to contact MB (at work) on something not involving work, and she had handed the phone to Terry Whitfield who was "aggressive". He was then asked what MB had done to blackmail him. His answers were not very clear. He had deduced that she had told others he was controlling. He felt controlled, that he could not make his own decisions. He could not send Ms Ferguson any emails and texts, as he had had some issues with his laptop. Asked how he felt, he said that the actions from Terry and Yusef had left him feeling on edge, especially Yusef. Brittany Ferguson asked why, when both he and his union representative had said several times that it was all about personal matters, he had raised a work grievance. He said he wanted to ensure that no personal issues were brought to work. He had arranged for Dean Stanley, a team member, to contact MB's team if there was an operational need. Finally, the claimant mentioned that MB had said she would come to collect personal belongings, and had turned up with Yusef, who he did not want in the flat. Nor did he want to come to the depot to collect stuff as MB suggested.

65. Brittany Ferguson asked for additional evidence soon as possible, but as far as the tribunal can tell he did not send her the emails, and he did not send her recordings of any calls with Terry Whitfield and Yusef Mehmet.

Lack of Suspension Review

66. Also on 28th June, when the claimant raised suspension with Brittany Ferguson, Andrew Graham, the claimant's RMT representative, complained too that contrary to the respondent's policy there had not been a four week or more suspension review, and he asked for suspension to be lifted. He sent this to Abdullah Sikandary, who asked HR for information, and chased it up ten days later when he got back from holiday. Abdullah Sikandary eventually had a reply from Katarina Goodwin in HR that she had tried to call the suspending manager (Mark Le Juge de Segrais) without success, and that her understanding was that as the claimant had submitted a sick note, the system had replaced suspension with sickness as the reason for absence, implying that was why there had been no review.

67. In fact nothing was done about suspension review, even to respond to the claimant and his representative's messages about this, until 20 August, when he was told that he would be suspended until the "necessary process" had taken place. Once the grievance process was completed – believed to be imminent - there would be a review.

68. Unfortunately it took a long time for the process to be completed. During July 2021, Brittany Ferguson interviewed nine witnesses, some of them twice. She sent a draft report to HR later in July, and following some further interviews, her final report went to Katarina Goodwin on 8 August 2021. Other than an HR note early in September asking an assistant to check a document, nothing else happened until 3rd November 2021, when the claimant was told that none of his allegations against MB were upheld. On the same date MB was told that her grievance *was* upheld. As far as is known, neither the claimant nor MB was sent any supporting documents or explanation for the findings.

69. Why it took so long is obscure. Brittany Ferguson's witness statement is entirely silent on this. It was later said to the claimant that this was because of ill health on her part in August, and the absence of a relevant employer relations advisor later. In oral evidence it was said that Ms Ferguson had been absent "about three months", but we were given no dates for the absence of either of these people, even though this would have been available from the respondent's personnel records.

70. One of the documents the claimant did not see was Brittany Ferguson's report of her findings and conclusions on MB's grievance A troubling feature of Ms Ferguson's report is that in her conclusions about the allegation that he had made numerous attempts to contact MB during working hours, she added:

> "the case with MB does not appear to be the first instance of harassment type behaviour towards a woman within the workplace. My findings lead me to believe that this behaviour stems from strong, potentially romantic feelings for these women of which is difficult for Josh Woodcock to control. My findings lead me to believe that Josh Woodcock's harassment type behaviours have escalated from the first instance to this one. These findings make it clear that this behaviour is commonly exhibited by Josh Woodcock in the workplace, they therefore also lead me to believe that there is potential for this behaviour to escalate further putting at risk the well-being of other female colleagues".

However, her note of the evidence of this reads: "Mark le Juge de Segrais

advised as part of his witness statement that John O'Neill confirmed that he could share that Josh Woodcock was involved in another incident with a woman he worked with. The incident involved constant, unwanted contact of which the woman was advised to cut off contact with Josh". The hearing bundle before the tribunal had a witness statement from John O'Neill which said a woman had been troubled by social media contact from the claimant and been told (not by him) to block him. The complaint was not discussed with the claimant. In Mark le Juge de Segrais's statement it simply said: "there was another time that this happened with a woman from S&T, I don't know her name or if she is still around. He did a similar thing to what is happening right now to his girl. It was a similar issue whereby he was having feelings for this girl and she didn't want anything. She wasn't too happy with him constantly trying to keep in contact with her. Someone had a conversation with Josh and it ended". He had asked the claimant's manager (John O'Neill) whether he could raise this with Katarina Goodwin (HR).

71. The tribunal records this troubling feature because it is clear that the only evidence was gossip; there was no first hand account from anyone, and the claimant had not been asked about it. Despite that, Brittany Ferguson had in effect concluded that the claimant was a predator who might repeat his conduct with other women in the workplace.

72. Elsewhere in her conclusions Brittany Ferguson recorded the impact of the claimant's actions on MB's mental health, of which he seemed entirely unaware. MB would rather leave her job then come into contact with him, other witnesses had confirmed the effect on her, and there was a lot of corroborative evidence of MB wanting to withdraw, and the claimant maintaining constant unwanted contact, even after he had been instructed not to.

73. Her final comment was that the evidence and witness statements supported the allegations of numerous acts of gross misconduct. Two of the acts of gross misconduct were regarding harassment and victimisation "of which are sever" (sic).

<u>Second Grievance – about inaction</u>

74. It is possible that the grievance outcomes would not have been delivered to the claimant and MB even by 3rd November had the claimant not presented a second grievance, on 6th October 2021, complaining about the handling of his grievance, the handling of MB's grievance, and his prolonged suspension. Michael Groves was asked to investigate. He wrote to the claimant, (not until 9th December 2021), introducing himself.A hearing took place on 11th January 2022.

<u>Appeal about the First Grievance</u>

75. By that date the claimant had now had the outcome to his grievance, and he appealed the outcome on the 12 November 2021. As he did not know the reasons for not upholding his grievance, it was a very short appeal letter. He could only say that he did not think it had been investigated fully or taken seriously, and there was a complaint that he had not had information about Brittany Ferguson's grievance investigation. He complained of a breach of 2.54 of the Grievance Policy, that "the employee will be provided with a copy of the notes, including any witness statements prior to the grievance hearing". This appeal was allocated to Thomas White, who proposed various meeting dates, and when the claimant did not reply, appointed 26 January 2022 for hearing.

76. The claimant received the witness statements prepared by Brittany Ferguson, and her final report, on 7 January 2022, when Thomas White sent them in readiness for the appeal meeting. As far as we could see however, he was not sent any of the emails MB had sent the respondent–it could of course be argued the claimant had sent them, so he knew what it was about. The claimant could now see Ms Ferguson's findings.

Suspension Review

77. Immediately following the claimant's appeal against the grievance outcome, on 13th November 2021 his father, concerned about his son's deteriorating health, contacted the respondent at a more senior level about the prolonged suspension.

78. In addition, the claimant himself wrote to Dave Flanigan a few days later saying he was in crisis, having been "constantly given false promises of imminent updates", none of which had transpired. He had missed a number of training courses. The company was unfairly favouring a female member of staff and discriminating against him. He had been willing to look at alternative working arrangements while the process was concluded but had not had an explanation why this request had not been taken forward, as this would remove concern about contact between himself and MB. The mention of alternative work cocerns an application he had made on 6th October for a vacancy at Basingstoke, where he had been told verbally following interview that he had the job, but had never had anything in writing.

79. Graham Smith (his Ealing manager) asked HR about the claimant's father's approach, and why the claimant could not be moved to Reading on an interim basis. Dave Flannigan sent the claimant's email to Katarina Goodwin (HR), Graham Smith and Abdullah Sikandary. Katarina Goodwin asked them to include Mark Le Juge de Segrais in a welfare review meeting: "so everybody has the full story and we act united". She said the length of suspension was not just down to the respondent but also the claimant postponing the hearing because of ill health. It was in place to conduct a fair and objective investigation. He had not originally been suspended, and only when he disregarded the instruction not to contact MB there no option but to suspend. After the meeting she repeated this, adding it was not a good idea to bring the claimant back to the workplace "for the few remaining weeks of the process", not just based on his previous pattern behaviour, and "the serious concerns raised in Brittany's report", and him only being suspended because of his breach of instruction not to contact MB.

80. The claimant asks us to note a suggestion that Katerina Goodwin was biassed against him. At the end of October an HR assistant had mentioned that she had seen the claimant in a television programme about Paddington and Katerina Goodwin had replied: "I'm very familiar with this person, having had the pleasure of meeting him several times last time he was accused of bullying and harassment of his colleagues" (a reference we assume to the August 2020 allegation of bullying Ioan Mogos; the claimant said in December 2021 that Ms Goodwin had told him in November 2020 he had been" very lucky to get off"). She went on: "I am also very aware of the details of the order that police placed him under" (the stalking order). We have been told that any sarcastic tone should be discounted by English not being Ms Goodwin's first language.

81. Whether because he had appealed, or because of the father's

intervention (escalated by him on 25 November) or perhaps because of a long email from the claimant on 3 December complaining that the HR assurances to his union that he had been sent information were false, that there had been no progress in 8 months, and furthermore he had still not heard about his grievance appeal, there was now a change of personnel handling his case. On 15 December 2021 Anthony Harmes was appointed suspension manager in place of Mark Le Juge de Segrais. Susie Orton was now the responsible HR person, in place of Katarina Goodwin.

82. The various processes now began to move.

83. Michael Groves wrote on 9 December 2021 that he would hear the second grievance on 11 January 2022, though after that hearing the claimant wrote with more detail about grievance handling. This included allegations of prejudgment by HR hand selecting managers, and that MB had been persuaded to raise a grievance, Penny Hunt had suggested gender was a factor, and had selected an investigation manager by gender. He asked for the appeal and the disciplinary investigation to be put on hold until it was resolved.

84. Thomas White wrote to him on 10 December 2021 about the appeal against the first grievance. The claimant wrote amplifying the appeal grounds on the 19th January, now that he had seen the statements and investigation report. He complained of his own grievance being viewed as retaliation for MB's. He said nothing about the 'second female' finding. The appeal hearing was held on 26 January 2022.

85. Then in the new year, James Arnold wrote on 14 January 2022 saying he would be conducting a disciplinary investigation, although in the event the claimant was too unwell to engage, and at Dave Flannagan's suggestion it was agreed that he would answer written questions instead.

86. At some point the claimant had made a subject access request, because we can see him discussing some of this material at meetings with Michael Groves and Thomas White.

Suspension Reviews

87. The claimant got his first suspension review letter on 23rd December and a few days later had an occupational health assessment. Anthony Harmes spoke to him, and felt considerable sympathy, but did not lift the suspension. He thought there would have to be strong grounds to overturn the original suspension decision because of the "gravitas" of the conduct alleged. In his view, Graham Smith, who was responsible for West Ealing and Reading, not Paddington, was not as close to the allegations as others, and if he had known more about it he would have retracted the proposal to return the claimant to work on an interim basis. Nor had Anthony Harmes seen the occupational health reports (which recommended that symptoms would resolve if work issues are dealt with and the claimant returned to work). We learned in cross examination that Mr Harmes had been unaware of the May 2021 court order, which was on the HR file, but had not been mentioned by the claimant. He also did not know that the claimant had not contacted MB since that order.

88. The claimant approached Anthony Harmes again in March 2022 asking for

the suspension to be lifted. It is a long email. Nowhere does he mention that there had been a court order, or that he had not been in contact with MB during his suspension. Mr Harmes replied that he had been suspended due to unwanted conduct and harassment, pending disciplinary investigation which had not yet concluded. He was "not condoning the time frames but until the allegation is proved or disproved I cannot reinstate you back to work". They had a duty of care to MB as well as him. The tone is sympathetic, but the result unchanged.

89. The position was the same when they had a further telephone discussion on 29th April 2022. Anthony Harmes explained "he needs to get his disciplinary hearing concluded before I can change the suspension status".

The Second Grievance Outcome

90. Michael Groves prepared a draft report on the second grievance, discussed it with the claimant and his union representative on 4th March, and sent a final version on 9 March 2022. He partially upheld all five points made by the claimant. Some of the language used by HR (Penny Hunt) could have been misconstrued, but he doubted it had an impact on the eventual decision because the grievance manager would base that on information she had collected. It was important that the reasons for delay were communicated, and they had not been. On the handling of MB's grievance, there were reasons why the details of the charges in the letter to him were different to MB's, because there had already been a meeting with MB by the time he had his letter. There was no evidence of hand selection of a grievance manager. He should been given notes prior to his initial meeting. The suspension had not been properly handled. The suspension manager had not opened an HR case and seems to have thought (wrongly) he should not contact the claimant while he was off sick, but things had improved since the suspension manager was changed in December 2021. On whether the claimant was right that he had not been told not to contact MB at the meeting on the 22nd of March, he noted only that there was no written record. He recommended training for the previous suspension manager, and that records should be made of conversations prior to suspensions being imposed. On whether MB had been encouraged to lodge a grievance, there was a "complex scenario". Given that MB said she had tried to resolve it, other options had been exhausted. The claimant should have been informed that there was going to be delay giving him an outcome to the grievance, and a process should be started to stop this happening again. He did not receive witness statements before his own interview because they did not yet exist. There was no breach of confidentiality of the process. On the allegation of collusion between HR and members of the delivery unit, there was no evidence that the latter had been involved in decision making. On the police statement, it should not have been accepted, and he should have been told it was on file. (The tribunal understands the claimant would have seen this as part of the magistrates' court proceedings, though he may not have known that the respondent had it). Michael Groves did not agree that the questions asked of witnesses were biassed. He recognised that delays in grievance management and suspension had impacted on the claimant's mental health; he had a welfare manager with whom he was in frequent contact, and access to the employee assistance help line. On concerns around career progression, it was noted he had still been able to attend university while suspended from work.

91. The claimant appealed this decision on 18 March. Matt Swancott was

appointed and held a meeting on 23 May 2022, which is just before the claimant was dismissed. Matt Swancott only had documents relating to the second grievance, not to any other. The claimant made a number of allegations about the conduct of HR in the handling of his grievance leading to an unfair outcome.

92. Although not part of the appeal, the claimant was asked to expand on his allegations of threatening calls from Network Rail employees. He replied that recently (April 2022) he had been with a group of friends at a pub near the university where he and MB studied and had been informed by her friends that she was on the premises and he should leave immediately or they would call the police. The tribunal has seen the detailed e-mail recording the claimant's account at the time. It seemed to us that the reference to calling the police relates to the Stalking Protection Order, and to call it a threat is an exaggeration. The claimant has represented that this episode was effectively in the workplace, because the reason he was in the vicinity was because he was attending a course with the support of the respondent.

93. He got the outcome to the appeal about the second grievance on 22 June 2022 – none of his appeal succeeded. He was reassured that action had been taken to re-educate various individuals, even if he was not given the precise detail because it was confidential. In addition, to make up for past delay, Network Rail had arranged so far as possible to have his second grievance, his grievance appeal and the investigation hearings running concurrently, to end his period of uncertainty. On the thoroughness of the investigation of the second grievance, it was pointed out that he had reviewed significant amounts of further information, that Brittany Ferguson had left, that there was overlap with Tom White's process and points had been addressed there. He was also raising points that had not been before the original grievance manager. As for errors and delays, Michael Groves had already addressed these. It was not necessary to carry out an investigation before deciding to suspend as it was not a disciplinary action. He had been suspended because of the seriousness of the allegations on the duration of the treatment to which he had already subjected MB. The grievance process followed was the same as that used for anyone else. The same went for suspension - currently eight people were suspended on Western route. Many detailed points were dealt with individually, often the answer was that these had already been replied to by another.

Grievance Appeal Outcome

94. Meanwhile Thomas White had sent his decision on the appeal against the first grievance on 15 March. He said the grievance had been thoroughly investigated; it was delayed because Ms Ferguson had been ill. She had rightly concluded that MB was not responsible for the actions of others. He did not think it important that Ms Ferguson had characterised his grievance as retaliation for MB's grievance, and so victimisation of MB, as the matter had gone no further. Mr. White did not mention the conclusion about the second female, but the claimant had not raised this either at the hearing or on paper. (He had been asked at the hearing to send in emails about the matters he complained of, but he did not). He did think MB should have been interviewed about the effect on the claimant, and as \ms Ferguson was no longer there, he did this himself on 21 April, before deciding on 25 April that he could not uphold the appeal on this point either.

Disciplinary investigation

95. Having set out the progress of the various appeals and grievances, we return to the allegation of gross misconduct which James Arnold was appointed to investigate.

96. The letter inviting the claimant to an investigation interview states that it is an investigation into bullying, harassment and unacceptable behaviour (1) –(3). For all three the details of these charges are:

> "(a) suggestions indicating bringing personal issues into the workplace if not resolved.
> (b) Numerous attempts to make contact with MB during working hours".

There is a fourth charge, victimisation, which is that he instigated a grievance against MB the day after she raised a grievance against him. Allegation (5) is that he impacted on her mental health, and on that of other witnesses involved. Point (6) consists of two new matters: firstly, he had booked a five star hotel near Westminster bridge out of scope of the expenses policy when he only lived a short distance away and did not have authorisation, secondly that he had impersonated Jusef Mehmet and asked control to shut a line which had the potential to cause disruption to the railway.

97. Following David Flannigan's intervention (at the claimant's request, because he felt too stressed to attend a meeting) James Arnold drafted some questions for the claimant to answer.

98. The claimant's first answer (was he aware of the allegations made against him? was that he was not aware of the allegations. He said they had not been explained to him, before or now.

99. In answer to specific questions, he dwelt on the source of the evidence (whether messages came on work phones or emails or personal phones and emails), on the use of material from a police statement; on why he said he would come to see her; and not being aware of the effect of his actions on her and others, and intrusion into his mental health. Reviewing the detail, asked why he was contacting MB so consistently, he answered only that he was unaware that he had done so on his *work* phone. In answer to a question why he considered it appropriate to e-mail saying he was coming to see her at work on 2nd March 2021, and that it was her choice whether she wanted to make a scene, he said this was a personal e-mail, outside Network Rail's jurisdiction. Also, he was on codeine at the time, and muddled. MB had said on other occasions she would come to his property while at work or had asked him to come to work to drop things off for her, and, accusing her of wrongdoing, that on one occasion she had come to his property with a colleague in a Network Rail van, using Network Rail fuel, to collect belongings. On the bonsai tree episode, he said that this came from the police statement and was confidential. MB should not have shared it with the respondent, as it was being dealt with by civil court proceedings. Also, Brittany Ferguson had said she would not use a police statement. Network Rail should not be involved in personal events between individuals. They should not be questioning him about past occurrences of ill health either. He had not tried to bully MB; he could not say how she would perceive his behaviour. He made similar comments about the harassment allegation. Asked why on some occasions he sent upwards of 15 emails a day to MB, he said he could not comment on communication on a personal basis between himself and MB. He

gave the same answer to why he continued to message her when she did not reply, and why he continued to message her when she asked him to leave her alone (25th January 2021). Asked why MB said he became angry when she had removed him from her calendar, he said this was factually incorrect and slanderous. It was not for her to determine his feelings (that is, say he was angry). In any case it was a personal matter, on third party software, outside Network Rail's remit. Asked whether it was acceptable to tell MB that he was going to turn up at her place of work to discuss personal matters, he answered that MB had said she only wanted to resolve personal issues during her working hours, and it was she who had said she would turn up at his property and had turned up there during working hours. He could not comment on her feelings, when he had said he was coming to her place of work, and if her feelings about him coming to see her at work would impact on her safety critical job, he responded that that was a matter for *her* team, and it was *her* responsibility.

100. On the allegation of victimisation of MB, he had raised the formal grievance because there was no informal resolution available in March 2021. He mentioned the "threats of violence and threats to his property" by people acting on MB's behalf which she had "made numerous reports to the police". It was also wrong that Network Rail were using MB's statement to police when he had not been allowed to raise this at his interview. In any case, MB's grievance was itself retaliatory. She had only made it when he withdrew the county court claim against her, and knew she was safe. He could not comment on the impact of his actions on the mental health of MB and others, that was for them to say.

101. On the allegation of booking an expensive hotel when he lived 4 miles away, he said it was within scope of the expenses policy when he was attending university for Network Rail. Others had done the same without being disciplined.

102. On the hoax call, he denied impersonating Yusef Mehmet to call the Paddington signaller about a "jumper" (potential suicide on the line).

103. On an allegation of breach of terms of suspension by making contact with various managers, he explained it was because he could not get an answer about his suspension and was looking for updates.

104. He concluded that he did not expect a fair outcome. He and MB worked in areas with minimal contact, so there was no risk of issues transferring into workplace or escalating. Suspension had been imposed as a punishment for not following a management instruction. There had been early judgement by management on the relative guilt of the various allegations.

105. James Arnold arranged for Dave Flannigan and John O'Neill to listen to the recording of the hoax call (21st May 2021). John O'Neil had no doubt it was the claimant. Dave Flannigan was less sure, but the caller had many of the claimant's tricks of speech. It was generally agreed that the call was unlikely to be from a member of the public because, quite apart from it being made from the shift phone for E&P Westbourne Park (so implicating Yusef Mehmet), it showed significant knowledge of railway technicality.

106. James Arnold prepared his report, dated 7 April 2022. He went into detail about the various emails. He also used the witness statements prepared by Brittany Ferguson in the grievance investigation. He took legal advice on whether

contact with MB outside work could be investigated by Network Rail and was told: “if there is sufficient connection to workplace then NR would have a duty of care towards A and a decision will have to be made about whether to invoke the disciplinary procedure. Even if the harassment had occurred solely outside of work, it would still be important to consider whether there could be workplace implications stop for example, could a be scared to work with B, or could there be any other foreseeable workplace implications for as a result of having rejected the harassment”, and if “it starts to impact on the workplace... internal action by NR then becomes justifiable”.

107. He concluded that there was evidence of gross misconduct of bullying and harassment and poor conduct towards MB, grouping (1) – (3) together as before. He rejected allegation (4) (grievance as victimisation of MB), recognising that the claimant had intended to raise a grievance 9 days before being told that MB had raised a grievance against him. On allegation (5), he concluded that MB’s mental health had been affected. On hotel booking, he considered it an isolated incident, and in any event the claimant had been ‘counselled’ by his line manager following an informal discussion. This allegation was rejected was rejected. On the hoax call, he believed the claimant had made it, and out the evidence in detail. On breach of suspension terms (7), he accepted the claimant’s explanations of why he had contacted particular individuals, and against the background of the claimant not being provided with updates, he rejected the allegation.

108. As points of *contentio*n, he noted the reliance on personal communication outside Network Rail, and that the police were investigating allegations (1)-(3) (he seems to have been unaware of the Stalking Protection Order). He also recommended investigation, if not already done, of the threatening phone calls to the claimant, of MB using a Network Rail vehicle to collect property from his address, Brittany Ferguson telling the claimant she could not investigate matters being investigated by the police, and John O'Neill telling the claimant to “man up and deal with it” when he raised concern about his mental health.

109. There were 19 appendices to the report. They included Brittany Ferguson’s investigation report into MB’s grievance, so Mark Howells (the disciplinary hearing manager) will have been able to read about the second female allegation. Appendix 6 contained the claimant’s emails to MB.

The Dismissal

110. On 22 April 2022 Mark Howells sent the claimant an invitation to a disciplinary hearing on 16 May 2022. The charges he had to answer were allegations (1) – (3), as in James Arnold’s report, plus impacting the mental health of MB. He was warned that if misconduct was found, the penalty could be a warning or dismissal with notice. If gross misconduct was found, he could be dismissed without notice.

111. The claimant was sent the entire report and appendices, but there is a factual issue as to what emails were in appendix 6. The enclosures were printed off by Mark Howells and attached in hard copy. The version of appendix 6 the claimant got was only three pages. The electronic version has 8 pages. This meant that a number of the emails relied on were not visible to the claimant - for example the whole of the electronic moon pig card. Only when he appealed

against the dismissal did he get an electronic copy and could see the full evidence available to the respondent.

112. Mr Howells carried out a preliminary review of the evidence he had been given. We were taken to a number of handwritten notes he made in preparation for the hearing. It was clear that he reached a preliminary view on a number of the charges, but wanted to have the claimant's input before making the decision. Mark Howells did not have any occupational health reports.

113. The claimant was the only witness at the hearing. At the outset of the hearing he was told that Michael Groves proposed to uphold allegations 1-3 as gross misconduct. The allegation of a retaliatory grievance was not being proceeded with. He proposed to uphold the allegation that he had an adverse impact on MB's mental health, but not the health of others. He also proposed to uphold the hoax call allegation, but not the hotel booking. Nor was he proposing to uphold the allegation of contacting people while on suspension. He then heard the claimant and his trade union representative. On coming to the place of work, he said MB had asked the claimant to drop her belongings off at work. It was pointed out several pages of the claimant's witness statement (the one discussing his own grievance about MB) were missing. It was also pointed out, correcting an assumption made by James Arnold, that the claimant was moved to light office duties because of his health, not because of MB's grievance. The claimant said a lot of the contact with MB had been initiated by her. The claimant disputed the legal advice that the respondent's disciplinary proceedings could extend to his personal emails. He also referred to the Stalking Protection Order (as far as we can see, his first reference to it) having followed a public hearing where it was "found that he wasn't a danger to anyone" nor, he said, the court had found, was there a risk of personal issues interfering with work. The claimant then made a number of points about the investigation process and the need for informal resolution rather than a grievance. Asked about MB's mental health, he said the respondent's managers had been unhelpful about his own mental health, and perhaps they had treated MB similarly.

114. After a break, they moved on to the hoax call. The claimant said he was in Wales, as shown by a post on Facebook. The union representative said there should have been a level one safety investigation, and there hadn't.

115. On the other investigations recommended by James Arnold, Mark Howells said that Matt Swancott would deal with the threatening phone calls and the effect on the claimant's mental health, Mark Howells would need more information about the allegation that MB used a Network Rail vehicle to attend his home, that the police report had not been used to support disciplinary action. John O'Neill have been put on the list for a course -Great People Manager - to address his unsympathetic "man up and deal with it" remark. Before ending, Mark Howells expressed disappointment that the claimant had not provided his additional material before the hearing (such as the missing pages from his grievance witness statement). He asked for these to be supplied by the 17 May.

116. At a reconvened hearing on the 27 May, Mark Howells read from a script he had written. He upheld allegations (1) – (3) by reference to the emails in appendix 6 and 7, with a number of quotations from them. MB had made it clear she did not want contact, so his conduct, for example sending her 23 emails and making four phone calls on the 9 March 2021 was unwanted. He quoted from the

other accusatory emails to MB, 13 January 2021, 18th February 2021 and her personal statement about the bonsai tree, that he had sent her the house and car keys with a suicide letter saying everything was in her name, then trying to take her to court for gifts he wanted back. He stated that although much of this took place outside the workplace, MB, who held a safety critical role, was scared to meet him at work. This was "understandable". Personal matters had also affected the claimant at work, for example, his "complete breakdown" on the 8 February, or getting Dean to perform tasks for him requiring contact with MB's depot. Jenna Thomas's evidence showed that he was contacting MB at work. He had called her anonymously on multiple occasions on the day that she handed her phone to Terry Whitfield, who asked him to stop. While he appreciated they had been attempting a collection of her belongings, his e-mail of the 3 March was threatening, and transitioned into the workplace. He was satisfied that this amounted to gross misconduct, and he should be dismissed without notice.

117. For the rest, he also accepted MB's evidence about the impact on her mental health, quoting from her 4 March work statement: "constant messaging... his behaviour is erratic and it puts me on edge all the time. The constant emails telling me one minute how I'd ruined his life and driven him to want to kill himself to the next within a matter of minutes telling me he didn't mean it and I'm a good person. It's taking over my life and I cannot do it anymore". Had that been the only allegation this would have merited a final written warning.

118. He did not uphold allegation (6) about emergency calls: although he thought it more likely than not that he was making the call, there should have been a set level one safety investigation at the time.

119. The dismissal took effect immediately. He had the right to appeal. A letter followed confirming this.

Appeal against Dismissal

120. The claimant did appeal. It was handled by Craig Green, who sent him all the materials with an invitation letter, so the claimant did now have the full version of appendix 6. The claimant responded asking Craig Green to step aside as not being independent but he did not say why. There was also correspondence about what the claimant's grounds for appeal were, as the letter of appeal was not specific, and later, on what the numerous witnesses the claimant proposed to call, would say. This was never specified by the claimant or his representative.

121. The appeal meeting, initially scheduled for 5 July 2022, was rescheduled four times because the trade union representative (Mark Kinsey, replacing Andrew Graham) was not available. There was a hearing on the 20 September 2022. The claimant had still not specified the grounds of appeal or what the witnesses would say. The claimant called four witnesses and prepared a written statement. That hearing lasted 5 hours. It resumed on the 18 of October, for a further six hours. There was to be a final hearing on the 24 November 2022, but when a few days before the claimant said he was not available as he had mistaken the date, asking for a new date in December, Craig Green decided to go ahead anyway.

122. The night before the third hearing, the claimant wrote Mr Green a long

letter of protest, copied to Susan Beadles and Ben Edwards, senior managers whom he had approached under the Speak Out policy. Craig Green, he said, had not adhered to the Code of his awarding body (Permanent Way Institution) and the claimant proposed to provide evidence to them of his failures. (We do not know if he followed through on this threat or what he thought the failures were). Craig Green had breached confidentiality by approaching both an external law firm, and some of the HR individuals of whom the claimant had made complaint, for example Susie Orton. He required Craig Green to inform the National Executive of the RMT, its general secretary and other senior union officials, of his breaches of policy.

123. Craig Green went ahead anyway, reviewing all the material he had. He was not confident that anything further would come out of a third meeting, when the claimant was so reluctant to set out any appeal points ahead of the meetings and the witnesses in the two previous appeal days had said little of relevance.

124. On 28th November 2022 Craig Green wrote to the claimant upholding the decision to dismiss for gross misconduct on the original grounds. He was satisfied that there had been a thorough investigation and sufficient evidence for a conclusion that he had committed acts of gross misconduct which were so serious as to call for dismissal without notice. There were no mitigating factors making the decision to dismiss unfair or unreasonable, although lesser sanctions could have been applied. He had reached his decision after two appeal sessions and hearing his five witnesses. He commented that much of this information had already been provided through the disciplinary case or the other related processes. The evidence did not call the decision into doubt.

125. By this time the claimant had already started a new job, with Balfour Beatty, on 30th August 2022. He had also approached ACAS for early conciliation, and had presented a claim to the employment tribunal on 3rd of October 2022.

126. MB was interviewed about using the respondent's vehicle to collect her belongings. She confessed. She was told this was a breach of the contract terms but it was considered there were extenuating circumstances and she was not formally disciplined.

Disability

127. We set out here our decision on the disability issue, before moving on to consider the application of the law to the other claims.

128. The claimant's case is that he had depression and anxiety at the time of the conduct for which he was dismissed. It is case also that he was disabled by depression and anxiety during the suspension and at dismissal. The respondent disputes this, asserting impairment should be excluded as due to an addiction to alcohol.

Relevant Law – Disability

129. Disability is defined in section 6 of the Equality Act 2010. A person is disabled if they have a physical or mental impairment and the impairment has a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities. Employment tribunals should assess the evidence to make

findings on: (1) whether the claimant has an impairment (2) whether the impairment has an adverse effect on his ability to carry out normal day-to-day activities and (3) whether it is substantial, meaning more than trivial - **Aderemi v London and South Eastern Railway Ltd (2013) ICR 591**. These questions are to be decided by the employment tribunal based on all the evidence – **Adeh v British Telecommunications plc (2001) l IRLR 23**, and "it is left to the good sense of the tribunal to make a decision in each case on whether the evidence available establishes that the applicant has a physical or mental impairment with the stated effects." – **McNicol v Balfour Beatty Rail Maintenance Ltd (2002) ICR 1498.**

130. The statutory Guidance on the meaning of disability says that the term mental or physical impairment must be given its ordinary meaning. The cause does not have to be established, nor must it be the result of an illness. "The underlying cause of the impairment may be hard to establish. There may be adverse effects which are both physical and mental in nature. Furthermore, effects of the physical nature may stem from an underlying mental impairment, and vice versa".

131. The test of disability is a functional one – **Ministry of Defence v Hay (2008) ICR 1247**. It must be assessed as at the time of the discriminatory acts alleged, regardless of how it develop thereafter - **All Answers Limited v W 2021 IRLR 6**. If an illness is being treated, the tribunal must look at the deduced effect, without treatment.

132. The Equality Act 2010 (Disability) Regulations 2010 provide at regulation 3 that "addiction to alcohol is to be treated as not amounting to an impairment". The 2010 Guidance on disability explains how an impairment due to a condition caused by alcohol (for example, a liver condition) is not excluded. This was recognised in **Walker v Sita Information Network Corporation Limited UKEAT/0097/12**.

133. In **J v DLA Piper LLP 2010 IRLR 936**, a tribunal could consider whether depressive symptoms were an illness or a reaction to adverse life events. The starting point should be whether there was a long term adverse effect on normal day-to-day activities; a finding there would assist in deciding whether there was an impairment.

134. On excluded conditions, we have regard to **Wood v Durham County Council UKEAT/0099/18**, where a theft was blamed on the claimant's PTSD/dissociative amnesia, rather than a "tendency to steal", another excluded condition. The burden of proving an excluded condition was on the respondent. In a summary of the law it was said: "if the alleged discrimination was a result of an excluded condition, the exclusion will apply. However, if the alleged discrimination is specifically related to the actual disability which gives rise to an excluded condition, or is more tangentially related, the exclusion may not apply. The excluded condition is not considered in a vacuum but by reference to, and in the context of, the alleged discrimination complained of". As an example, we were taken to the Upper Tribunal decision in **Mrs C v Hope Academy HS/1244/2014,** which concerns a school exclusion where regulation 4 was in play, which provides that "a tendency to physical.. abuse of other persons" was to be treated as not amounting to an impairment. The reasoning demonstrates that the conduct derived from the excluded condition should be stripped out when

considering whether the act being challenged (there, exclusion from school) was disability discrimination.

135. We all aware that anxiety can cause people to drink to allay the symptoms, but also have regard to **Patel v Oldham MBC 2010 IRLR 280**, that "'cause is not relevant to establishing an impairment, but the (statutory language) requires the establishment of a causative link between an impairment and the adverse effect".

Disability -Evidence

136. We had the claimant's statement about the impact of disability on ability to carry out normal day-to-day activities, his medical records, and six occupational health reports.

137. The claimant marks the beginning of his condition as August 2020, when he was suspended from work and so isolated and living in a one-bed studio flat during lockdown. He made some calls to the employee assistance helpline, Validium; we do not have notes of the content of the calls. His father was concerned about his mental health, and as the claimant did not want to see his GP, arranged for him to have counselling from a psychologist, Adam Lacey. There is a letter from Mr Lacey, written in 2023, though it must be based on contemporary notes. He saw the claimant for two sessions in November 2020. He had not been able to assess depression and anxiety because the claimant would not fill in questionnaires, and when the claimant missed a third session Mr Lacey had cancelled the treatment. The claimant had declared that he was drinking one to four or five pints of lager every night, and was urged to reduce his drinking.

138. In his witness statement the claimant goes back in time at this point to say that his attention had been drawn to an episode in the medical notes in September 2018. A detailed entry in hospital A&E records shows that he was taken to hospital by the police after being found by a river declaring that he wanted to kill himself. He was inebriated. He told the doctor that he drank 7 to 8 pints on non-working days. He spoke of a £5,000 debt, that his parents had divorced two years ago, that a friend had killed himself 12 months before and the claimant blamed himself for that, plus constant knee pain for which he was reluctant to take painkillers because of the effect on his work. While in hospital he had prepared videos to send, blaming his parents for messing up his life. According to the hospital note, his mother told the doctor that he was "often like this when drunk". The claimant told the doctor that when he had days off between intense shifts he "struggles during his days off due to a lack of structure to his day and mainly spends time in bed or at the pub". The claimant goes on in his witness statement to say that he experienced low mood and regular suicidal thoughts at that time (September 2018) and that these symptoms lasted approximately 12 months, suggesting that what occurred in August 2020 might be a recurrence of a previous mental health condition. On the evidence available however, the tribunal does not accept that the claimant did experience low mood and regular suicidal thoughts for a period of 12 months. There is no information about the effect on day-to-day activities at that period in his statement, and there is no evidence in any medical record or counselling record. The hospital doctors put this behaviour down to drink. The 2018 note concluded: "there was no evidence of acute mental illness at time of assessment, and it is likely that his occasional low mood will naturally improve in line with an improvement of his

environmental stressors". There was also some evidence in this note that excessive alcohol consumption was not rare.

139. Returning to late 2020, as well as the evidence of Adam Lacey, the psychologist, we have a reference by MB to the claimant binge drinking, which is likely to be about the time she was still sharing accommodation, to October 2020.

140. Then there are two suicidal calls made to Trevor Boyd (who ran the mandatory course the claimant attended as a condition of returning to work in November 2020) and Dean Stanley (a team member), who relayed the information to Paul Drabwell (his mentor or welfare manager) in December 2020 and January 2021. Both calls were made in the early hours of the morning. Paul Drabwell's notes record that the claimant was reporting anxiety and inability to sleep, and that as a mental health first aider he recommended going for walks, listening to music, and doing puzzles, though the claimant has said that he found it difficult to get out of the front door at this time. The claimant was resistant to suggestions that he see his GP about his mental health.

141. He did see his GP with an episode of shingles at the end of February 2021, and was prescribed an antiviral and painkillers. There is no mention in the medical record here of anxiety or depression symptoms.

142. There is however a GP screening call on the 16th March 2021 (so just after the had claimant lodged his aborted grievance) when the claimant complained of being stressed and anxious, which had started almost two months ago. He said then that he took alcohol twice a week, never beer, and said there was no self-harm or negative thoughts. It was suggested he see his GP who might be able to prescribe CBT. He did see his GP at the time of crisis on 22 March 2021, the day he learned of MB's grievance. He was prescribed Sertraline, an anti-depressant, and referred to the Primary Care Mental Health team for "anxiety disorder stress". Meanwhile he was signed off work with anxiety disorder from 7th April 2021. His witness statement says this was the date of his first serious panic attack; there is no information about further panic attacks.

143. On 15th May 2021 he was assessed by the Primary Care Mental Health Trust on the GP referral. The claimant described a spiral of anxiety and depression following suspension from work, relationship breakdown, moving house and lockdown. He had good days and bad, some panic attacks, and poor sleep, waking up in the night sweating a lot. The Sertraline helped. He reported drinking 6 to 7 bottles of wine a week to help him unwind and get to sleep. He was urged to cut down, as alcohol intake would negatively impact his mental health, and advised to engage with local alcohol services for support. He reported fleeting thoughts of self-harm but had no plans at the time. He was then discharged on the basis that there was no role for the team at the time and he was to ask his GP if he wanted to be referred back. The discharge letter says: "also you will consider making yourself a referral to ARCH (telephone number given) ... to receive support in addressing your high alcohol intake". ARCH is an alcohol reduction programme in his borough. There is no recommendation of counselling; this suggests the Team considered the conditions complained of were not significant depression or anxiety.

144. In July 2021 the claimant went to live with his father in Shrewsbury, and his medication was changed from Sertraline to Mirtazapine because of side

effects he reported.

145. The next snapshot of his health is an occupational health report dated 14th October 2021 recording that the claimant currently had a physical condition, requiring hospital treatment, but that he had made: “full recovery from anxiety, depression and stress relating to the pending investigative process, he has made full recovery and his GP weaned him off medications and certified him fit for work”. A psychotherapist, through Validium, had also advised he was fit to return to work. The occupational health adviser concluded: “his symptoms may be consistent with moderate depression and minimal anxiety”. There is mention of reviewing any records, so this is based on the claimant’s information. There is no mention of alcohol consumption.

146. In December 2021 the claimant attended hospital A&E with his father, following an attempted overdose with co-codamol. He described himself as depressed because of his suspension from work. He was followed up by the home intervention team. There is a note on 21 December his father called the team expressing “some concerns regarding his drinking habits”, and next day that he could not contact him. The claimant, at successive meetings with the home care team over the next few days, denied thoughts of ending his life. He was discharged on 7 January 2022. The discharge summary notes that the claimant had reported drinking alcohol occasionally. Also at this time there is an occupational health report for 29th December 2021 when he reported significant deterioration in mental well-being due to lack of management intervention. The advisor concluded the issues were not primarily medical: “he has been treated for an episode of anxiety /stress which has triggered a reactive state, that he feels has been caused by workplace issues that he has been exposed to”.

147. In January 2022 he attended hospital A&E in the small hours complaining of low mood and depression resulting in drinking on a continual basis. He said he had wanted to engage with ARCH to help with the drinking problem but had been told he must be on a six month waiting list. He was told that was not the case; he could get a referral much sooner.

148. In April 2022 he attended hospital again reporting struggling to sleep for a few weeks and asking for support with that. He had no immediate thoughts of self-harm. His mood was objectively assessed as euthymic with reactive affect (a normal range of moods, worse responding to an adverse event). He was prescribed a small dose of diazepam and asked to contact his GP for sleeping medication.

149. On 31 May 2022, a few days after dismissal, he had a consultation with a consultant psychiatrist, Dr. K. Barcza-McQueen. The claimant reported drinking alcohol every day, around 5 to 7 units per day, which he said was an improvement on the beginning of the year when he was consuming 2 to 3 bottles of wine a day. The doctor made a diagnosis of alcohol dependence, with mild to moderate depressive symptoms, secondary to alcohol use. He advised the claimant to continue taking Mirtazapine at night, but also that he could not achieve a breakthrough in his mental health without addressing his alcohol dependence. He was advised to refer himself to ARCH.

150. The claimant’s witness statement describes the effect of impairment on ability to carry out normal day-to-day activities as difficulty getting out of bed,

being tired but struggling to sleep, not eating for days on end, and losing weight. He had been a frequent user of Validium, the respondents own counselling service. He related his difficulties to suspension from work, and the isolation of lockdown, and loneliness after breaking up with MB. He said sometimes he could not leave the flat. After relating how his mental health had deteriorated during the August to December 2020 suspension, he continued to struggle with sleep, even after his return to work in January 2021, when: "I started consuming alcohol when home alone to try to manage my anxiety levels and help me sleep". At times he engaged in binge drinking. This got worse after the April 2021 suspension. Another passage describes excessive drinking as a coping mechanism in the August-September 2020 period as well. Other than the references to resorting to drink already mentioned, he does not say how much he was drinking at any time, or whether he has referred himself to ARCH.

Disability- Discussion and Conclusion

151. Having reviewed this evidence, we know that there is no formal assessment that the claimant suffered depression, at least until his suspension in April 2021. On depression alone there is only the October 2021 occupational health report which said symptoms were "consistent with" depression, rather than "diagnostic of".

152. We could conclude that he suffered some level of anxiety as a reaction to being suspended, both in August 2020, and in April 2021. We can also conclude that he was impaired in carrying out day-to-day activities, and that at least from around October 2020 this had become substantial. We need to consider whether that impairment was due to anxiety or drinking.

153. We did not conclude that there was an underlying condition which was manifest in 2018 and recurred in 2020. Both were reactions to adverse events, otherwise there is no evidence of any underlying condition liable to recur save, possibly, excessive drinking. The occupational health reports (none of which mention of alcohol consumption) also suggest an adverse reaction to events at work. In April 2021 it is recommended that there is a speedy resolution to workplace matters. In June 2021 it is noted that workplace issues should be resolved, in October 2021, the adviser recommends early meetings leading to return to work in four weeks. In November 2021 he is said to be fit for work and return "is imperative for maintaining emotional resilience". In December 2021 it is said that there is no medical resolution, and he is fit when work issues are addressed. We note that the adviser must have relied on the claimant's reported symptoms, having no access to records. Anxiety is mentioned only by the GP in March 2021; the claimant said to OH six months later that he had been weaned off all medication and was fit to return. The evidence indicates no long-term substantial impairment by anxiety.

154. What was clear to us is that the claimant was drinking to excess in September 2018, and though there is some evidence that this was a habit rather than a one-off binge, we do not know the pattern from then until autumn 2020. By this point we can say that excessive drinking, perhaps intermittent, is likely to have preceded MB's moving out; it had probably worsened when he was suspended on the bullying allegation in August 2020. From then on, our finding is that he was drinking to excess consistently. Such consistent drinking can fairly be characterised as addiction to alcohol. This is consistent with poor sleeping, and loss of memory. On poor memory, the claimant comments on it himself, but the

tribunal had also noted that when questioned about his conduct between January and March 2021 he often answered that he could not remember, or that he had been told something (the present of a bonsai tree) but did not remember it himself, on one occasion he described things as “blurry”. Taking that with the frequent changes in mood, the frequency of sending abusing or despairing emails in the evenings and small hours, or A & E attendance seeking help in the small hours, this suggests that alcohol was an important feature in his conduct at that time. Anxiety alone might cause him to send 15 emails in a day, but could not account for many other features of his conduct – mood swings, self pity, blaming others for his difficulties, abuse, insisting on seeing MB to recover property rather than making arrangements for others to collect, or starting, then withdrawing, court action, or maintaining she was responsible for threats he said others had made, without bringing grievances against those individuals. For this reason we consider that the conduct in October 2020 to March 2021 which led to the decisions to suspend and later dismiss him conduct attributable to excessive drinking is excluded. Impairment of ability to carry out day to day activities (substantial) was down to drinking, and so excluded.

155. We should also consider impairment following the April 2021 suspension, in the context of the claims of failing to make reasonable adjustments for disability during the suspension, and failing to lift the suspension before dismissal. It seems likely that he was continuing to drink to excess during this entire period. Alcohol apart, he may have been anxious because of the threat of disciplinary action, but on the claimant’s own evidence he was no longer taking an antidepressant by September 2021, and we have only the GP assessment in March 2021. He had been put on office work in May 2021 but on the claimant’s own account he was fit for more demanding work by September 2021 and then applied for a job, which he got, in Basingstoke, which indicates he was no longer impaired by any anxiety. Mental Health teams in May 2021 and January 2022 considered alcohol was the difficulty, as did the claimant in January 2022 and the psychiatrist in May 2022. If there was anxiety, it seems it have lasted around 12 months (August 2020 to August 2021), but because of the consistent excessive drinking it cannot be kown if anxiety without drink caused substantial impairment. on the day to day activity of sleep and self-care. We will consider those claims, where relevant excluding conduct related to excess alcohol consumption.

Sex Discrimination

156. The claimant's case is that he was treated less favourably, because of sex, by the suspension, the failure to lift the suspension, the length of the suspension, and the different approaches to the grievances submitted by the claimant and MB, with particular attention to nine features of the process. The other acts of discriminatory treatment alleged are not allowing him to take up the new post in Basingstoke, and the dismissal itself.

Relevant Law

157. Direct discrimination is prohibited by section 13 of the Equality Act 2010 which provides:

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

158. Section 23 provides that when making a comparison there must be "no material difference between the circumstances relating to each case". Sex is a protected characteristic. The claimant compares his treatment with that of MB, or with a hypothetical comparator.

159. Because people rarely admit to discriminating, may not intend to discriminate, and may not even be conscious that they are discriminating, the Equality Act provides a special burden of proof. Section 136 provides:

> "(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
> (3) But subsection (2) does not apply if A shows that A did not contravene the provision."

160. How this is to operate is discussed in **Igen v Wong (2005) ICR 931**. The burden of proof is on the claimant. Evidence of discrimination is unusual, and the tribunal can draw inferences from facts. If inferences tending to show discrimination can be drawn, it is for the respondent to prove that he did not discriminate, including that the treatment is "in no sense whatsoever" because of the protected characteristic. Tribunals are to bear in mind that many of the facts require to prove any explanation are in the hands of the respondent.

161. **Anya v University of Oxford (2001) ICR 847** directs tribunals to find primary facts from which they can draw inferences and then look at: "the totality of those facts (including the respondent's explanations) in order to see whether it is legitimate to infer that the actual decision complained of in the originating applications were" because of a protected characteristic. There must be facts to support the conclusion that there was discrimination, not "a mere intuitive hunch". **Laing v Manchester City Council (2006) ICR 1519**, explains how once the employee has shown less favourable treatment and all material facts, the tribunal can then move to consider the respondent's explanation. There is no need to prove positively the protected characteristic was the reason for treatment, as tribunals can draw inferences in the absence of explanation – **Network Rail Infrastructure Ltd v Griffiths-Henry (2006) IRLR 88** - but Tribunals are reminded in **Madarrassy v Nomura International Ltd 2007 ICR 867**, that the bare facts of the difference in protected characteristic and less favourable treatment is not "without more, sufficient material from which a tribunal could conclude, on balance of probabilities that the respondent" committed an act of unlawful discrimination". There must be "something more".

162. We can draw inferences from other factors, such as, statistical material, which may "put the tribunal on enquiry" – **Rihal v London Borough of Ealing (2004) ILRLR 642,** where a "sharp ethnic imbalance" should have prompted the tribunal to consider whether there was a non-racial reason for this. **McCorry v McKeith (2017) IRLR 253** noted that "reluctant, piecemeal and incomplete nature of discovery" could be a factor indicating discrimination, as can omissions and inaccuracies -**Country Style Foods Ltd v Bouzir (2011) EWCA Civ 1519.**

163. **Shamoon v Royal Ulster Constabulary (2003) ICR 337** discusses how, particularly in cases of hypothetical comparators, tribunal may usefully proceed first to examine the respondent's explanation to find out the "reason why" it acted as it did. **Glasgow City Council v Zafar 1998 ICR 120**, and **Efobji v Royal Mail Ltd 2017 IRLR 956**, reminded tribunals that the respondent's explanation must

be “adequate”, but that may not be the same thing as “reasonable and sensible”.

164. Where a decision maker’s reasoning is said to be tainted by discrimination by another (the claimant argues Brittany Ferguson discriminated in her conclusions) **Reynolds v CLFIS(UK) Ltd 2015 ICR 1010,** makes clear that in *discrimination* cases the tribunal must focus on the reasons of the actual decision maker, rather than on a composite of reasons for the acts of others in the process – addressing a set of facts where: “an act which is detrimental to a claimant is done by an employee who is innocent of any discriminatory motivation but who has been influenced by information supplied, or views expressed, by another employee whose motivation is, or is said to have been, discriminatory”. “Liability can only attach to an employer where an individual employee for whose act he is responsible has done an act which satisfies the definition of discrimination”. There could nevertheless be compensation for the detrimental act of the person without a discriminatory reason as part of remedy for an earlier discriminatory act by an employee acting in the scope of employment.

Sex discrimination - discussion and conclusion

The Suspension

165. The claimant was suspended from work after MB’s grievance, and MB was not after his. It is argued this is because of the difference in sex. The claimants submits that he was not given a clear instruction not to contact MB, and that later documents show the respondents unclear whether he was suspended to prevent him contacting her or suspended for breaching an instruction. The latter would be punishment, not a reason to suspend pending investigation. It is also suggested that the suspending manager, Mark Le Juge de Segrais, favoured MB because she was a woman, this being based on MB herself having feared that her protective colleagues would cause trouble if the claimant came to see her. Further, at the time the claimant was not working on the track but in an office, which reduced the risk of contact.

166. We have found that the claimant was told not to contact MB, and that his e-mail of 31 March 2021 was another attempt to get her to a meeting, not just about the mortgage, as the claimant suggested. We might suspect an element of punishment for disobedience, but the decision to suspend was made because he had not ceased contact with MB as requested, not because he was a man, or that a woman would not have been suspended if she had done this. There is no meaningful distinction here between suspension for failing to obey the instruction, and suspension for unwanted conduct towards MB. The failure to obey *was* unwanted conduct. He had not been suspended on 22 March when he was told instead to cease contact with her (even though at this stage the HR department already considered there might be second case of harassing a woman that could be relevant). The failure to heed the instruction demonstrated further unwanted conduct. If the positions had been reversed, we could see the same decision being made. Nor are they directly comparable. When the claimant's grievance was explored, he was clear that the object of his grievance was only MB, not those he said had threatened him. If MB was not given a similar instruction – say, not to speak disparagingly about the claimant - it was because at the time the respondent had a body of evidence (MB’s statement and the emails) indicating contact by the claimant after she had requested him to leave her alone, and no such evidence about MB organising hostility or blackmail of the claimant. Suspension itself would not prevent the claimant contacting MB by e-mail or telephone, but it might convince him that the instruction meant what it said. It would also remove the risk that MB would come into contact with him on the track

- at the time he had been moved to office work for his own health, but there was no indication that this was a long-term state of affairs. The two cases were not comparable.

Continuing the suspension

167. The evidence suggests that suspension was not reviewed by anyone until at least November 2021 - failing to act, rather than acting. The relevant manager was Mark Le Juge de Segrais. Although he is still employed we have not heard evidence from him. The finding on grievance investigation was that he did not consider he should contact the claimant or review suspension while he was off sick, (though payroll continued to pay him as suspended rather than sick, resulting in an overpayment which was written off in 2022). By August 2021 the grievance investigation had concluded but the outcome not yet delivered. No HR suspension case had been opened, so HR would not follow it up until they were asked to do so as a result of Andrew Graham's complaint; even then it was left at one unanswered call to the suspension manager. It is possible that it was not followed up because they were expecting the grievance to conclude, Brittany Ferguson having finalised her report in mid-August. In our conclusion, this undoubtedly shoddy treatment was not because of sex. If a hypothetical woman had been suspended in this set of circumstances there is no reason to think she would not have been the victim of similar incompetence. It is suggested that Katarina Goodwin took a poor view of the claimant (the 'pleasure of his company' remark), and a comment in December 2021 that she did not believe the manager who decided the 2020 case should be involved again, but that was a reference to the disciplinary interviews of the previous year, which involved alleged bullying of a man, not a woman. Again, had he been a woman she is likely to have held the same view of the 2020 investigation. It might show unfair prejudice against him, but not discriminatory prejudice. We find that continued suspension at this point was down to non-discriminatory muddle and neglect, as shown by the extraordinary delay in concluding Brittany Ferguson's outcome report, on which we have no disclosed documents or evidence.

168. The suspension was reviewed in November when the claimant and his father intervened and then by Anthony Harmes in December when appointed suspension manager. The claimant points to the forceful steer by Katarina Goodwin in the November meeting of relevant managers, she believed they should follow through on the disciplinary investigation, given Ms Ferguson's findings. He also drew our attention to the respondent's initial redaction from the relevant email of Graham Smith's suggestion of a transfer to Reading. This attempt to remove inconvenient material about why the suspension had to continue is factor we should weigh. Again, we hold that this was because there was a convincing body of evidence suggestive of gross misconduct, and misplaced optimism about timescales, not that a woman in these circumstances would have been allowed to return to work, even if there was a case for checking whether the claimant still posed a threat to MB. Mr Harmes took the view that he considered he needed strong grounds for reversing an early decision. Other suspension managers might have reviewed more closely whether the claimant was still a threat to MB. He was not told about the Stalking Protection Order, either by the claimant, in their regular conversations, or it seems by HR. That an order was in place and the claimant had not breached it might have suggested there was less risk of unwanted conduct. However, the claimant did not raise that at the time, and nothing suggests that Mr Harmes's approach to the suspension review was because the claimant was a man. Finally, on redaction and omission

of documents, this was deplorable, but more likely because the respondent was defensive about the delays getting out the grievance outcome and the failure to review and inform the claimant about the suspension, but not because the claimant was a man or making a sex discrimination claim. A woman's case would have been treated the same.

The different approach to the grievance process

169. This is about comparison of the treatment of the claimant and MB when they had both made grievances. In our finding, Brittany Ferguson was not hand-picked as investigator, she just happened to be the first person to respond to a message sent to a very large group of people of both sexes.

170. We are asked to find that Penny Hunt's e-mail was itself evidence of discrimination. We see nothing sinister in mentioning the sex of the two employees who had made grievances, nor that one was a "counter grievance", when the two grievances concerned the same relationship. It may have been wiser to say nothing about the second female complainer until there was in fact a grievance from this individual, but taken overall, we saw this as an adequate summary of the complexity of the investigation the manager might be signing up for - two linked grievances, possibly three. Later managers spotted that the pattern of lodging grievances was more complex and took no account of the second incident, though it did infect Brittany Ferguson's conclusion. Instead they relied on the witness statements she had taken.

171. Before dealing with the specifics of the various allegations of discriminatory treatment, we considered surrounding evidence on whether Brittany Ferguson or the witnesses she interviewed held stereotypical views about the behaviour of men and women. This included male witnesses calling MB a girl, the claimant being told to "man up" when he raised mental health issues with his (male) manager, the (male) suspension manager referring to him as a "grown man" at the suspension meeting, and Brittany Ferguson's comment in her witness statement: "I was conscious that we work in a male dominated environment and that these types of allegations have to be taken seriously". Of course we are aware that referring to women as girls is annoying, and can betray stereotypical attitudes to the role of women, or be used as a put down, but we had also to consider whether the term being used kindly but unthinkingly. If the word "lad" (which might be equally age inappropriate) is substituted for "girl", would that be offensive in the particular context? At most it showed her immediate colleagues were protective of a woman who felt under threat. Of "man up", this is not helpful in the context of mental health, meaning "pull yourself together", but sometimes women tell each other, no doubt ironically, to "woman up". Nevertheless it betrays the gender stereotyping by which boys are told not to cry like girls. It is not clear that it shows preferential treatment of MB when she felt threatened by the claimant, as against the claimant reporting the two calls (Yusef and DB) he considered hostile. Telling the claimant he should behave like a grown man is a way of telling him to accept responsibility, or stop being sorry for himself - he could have been told to be more grown up, and a woman might also have been told to behave like a grown up. None of these remarks is conclusive of itself, and we have to look at the picture in the round. Of more weight, in our view, was whether Brittany Ferguson was inclined to believe the allegations made about the claimant because they were made by a woman about a man. The respondent, like many construction firms, does seem to have been

male dominated, and members of the panel agreed that if the respondent wanted to improve the ratio of men to women in the workforce, especially on the track, it was legitimate that they should take care that women did not have to put up with unwanted attention from men, as women can be reluctant to work where they are in a minority and unwelcome conduct is allowed. It can also be the case that a woman manager can be more aware, from her life experience, of the effect of unwanted attention and controlling behaviour on a woman's well-being (male employees being more likely to fear physical attack) but that can mean only that she will take the conduct seriously where a man of traditional views may not appreciate why it is serious. Being alert to the importance of the complaint, if proved, does not show that she will jump to conclusions. We are aware that Ms Ferguson could not be questioned, and that we do not know if she held these attitudes. We can only judge what she did. She had numerous emails from the claimant and MB's statement about his conduct to MB. She had scant evidence about the threats to the claimant: he did not send her such evidence as he said he had, and his verbal evidence was vague and inaccurate in dates and more seriously the number of calls, which was and continued to be exaggerated. There was evidence to support the different conclusions she reached on the grievances.

172. The invitation letter sent to MB set out the specifics of her grievance, based on her statement. The later invitation to the claimant also sets out details of his grievance, including that he had named threats coming from Yusef Mehmet, Terry Whitfield and Jenna Thomas. We do not accept, as submitted, that she adopted less detail when inviting the claimant to his grievance meeting because she did not take his grievance seriously because she thought it more likely a man had harassed a woman than that a woman had arranged for other men to threaten him. She had less information at that stage. She named the witnesses she proposed to interview about his grievance and invited him to add to that list. She had not asked MB for witnesses. The claimant says that MB was told nothing about the content of his grievance, suggesting she did not intend to explore it properly with MB, but the interview notes show MB was asked about it, even if she not told that there was a grievance about her – because of the line of questions she asked if there was a grievance about her and learned about it after the meeting. As far as we can see, Ms Ferguson adopted the same procedure in both cases. She could have re- interviewed MB when she knew more about the claimant's case, but much of the claimant's complaint was about MB's colleagues being hostile to him, while at the same time making it plain that he was not complaining about them but about her. This limited what Ms Ferguson could ask her, and though she did not interview Terry Whitfield or Yusef Mehmet, she did ask other witnesses about them.

Use of police statements

173. MB's statement to the police was placed on the HR file, though according to HR it was not used. They did have a full statement already from MB. Brittany Ferguson did not tell the claimant, as he says, she would not use statements made to the police. Her response that she would not use "snips" of statements was a reply his proposal to include "extracts" from MB's statement to the police (that is, the same statement, but less of it). That is a legitimate response to a proposal to use selections from a document rather than the whole document. In our finding that was the reason for this treatment. We note that the claimant was not proposing to submit any statement he had made to the police in December 2020, when he says he reported a threatening phone call which he related to MB,

even though in January 2021 he had told his managers about reporting it to the police and had conveyed to them a suggestion, which he said came from the police, about MB's employment.

Use of Email Evidence; presentation of Email Evidence

174. There is a complaint about Brittany Ferguson saying to the claimant that her responsibility was to determine the risk of personal events transferring into the workplace and she did not wish to receive evidence or information that was purely of a personal nature. It is possible there was a misunderstanding of what was admissible, given the claimants later concern that material from a personal phone or personal e-mail address (rather than its content) was not within the scope of a workplace investigation. It is more likely that Ms Ferguson was concerned about the use of purely personal material not relevant to the workplace. The 1 July interview record shows the claimant had more than once wanted to send her some emails with intimate photographs of MB that he had been sent by another man (not an NR employee). They discussed the use of them in a passage of the interview record that she omitted from her disciplinary report.

175. It is not clear what non-work emails or texts the claimant proposed to send her. We have not been taken to any that he says should not have been excluded from the investigation. He will of course have known, if he reviewed his own emails, what he had sent to MB. He said at the time his laptop was in for repair; there is no more evidence on this; he could presumably have accessed his email account on another device.

176. We should consider whether he was in some way handicapped by not knowing which, if any, emails Ms Ferguson had seen, but we did not consider the difference in treatment (accepting emails) was because of sex. MB was clear in her own statement that she was only bringing this to work because she considered it had crossed the line into work when the claimant said he was coming to see her there and she feared trouble. Ms Ferguson was taking the same approach - that events between the two of them were only relevant when they crossed into the workplace. As it was, she established that Terry Whitfield (when at work) was telling the claimant not to contact MB at work, and that the Yusef Mehmet call was very old, while a call from MB's new partner in December was not from a Network Rail employee.

177. Next is an allegation that the claimant was required to submit a piece of evidence as an e-mail with the heading visible, rather the screenshot he offered. It is suggested that she did not do the same with MB, but there was a similar request of MB, and she did supply the email in the format required.

Scope of Investigation

178. It is the claimant's case that Brittany Ferguson narrowed the investigation, and did not interview those said to have threatened the claimant, and that this shows she did not take the claimant's grievance seriously, because of the difference in sex. She could have interviewed Terry Whitfield and Yusef Mehmet. Equally, given the claimant's reluctance to raise grievances about them and his insistence that it was about MB, not them, it was a legitimate decision. She had the claimant's account, which was general, rather than specific, and she had MB's evidence. When interviewed on the 1st July at the grievance hearing the

claimant described Terry Whitfield's one answer to his call to MB as “abrupt and aggressive”, and of Yusef Mehmet’s call, that he had said if the claimant was spreading rumours about him he would be coming to see him and it wouldn’t be a conversation. The claimant did not send her the recordings of the calls with the two men that he claimed to have. The claimant has not explained why he did not bring a grievance against those he said had threatened him. That could be because he knew that he had exaggerated or misrepresented or even could not remember much about his one conversation with each man, or the email spat with Jenna Thomas who had told him in forthright terms to stop emailing MB. Ms Ferguson may have reached the same conclusion about the threats. She did interview Jenna Thomas.

Tone of Interview

179. The tribunal was invited to find that Brittany Ferguson pre-judged the grievances, based on sex, in the way she conducted the interviews: that she showed compassion towards MB at the end of the interview, but not to the claimant, and that she took a very firm line with the claimant from the outset. The script shows that she said again she was not reviewing personal events; it was for the claimant to give his point of view of work-related events, and for her to assess the risk of personal events transferring to the workplace. She then said: “any attempt to sway my opinion of what does and does not fit his description (of what relates to a personal event transferring to the workplace) will not be tolerated”. We considered that this firm line related to the claimant’s e-mail asking to submit additional evidence (some of which she accepted but not the edited snips from MB’s police statement) the emailed photographs, and her reluctance to explore a personal relationship other than where it crossed into the workplace. Those will have reasons for the firm approach, not because he was a man and MB was a woman. It was legitimate to frame what may otherwise have become a very wide discussion of matters unrelated to work.

Inclusion of Inappropriate Material

180. We are asked to consider Brittany Ferguson's conclusion that the claimant’s behaviour towards MB might be repeated, based on the unknown second woman. The best evidence she had of this episode was from John O'Neill reporting that the claimant had, on a date unknown, sent “rude emails”, and made contact on social media with a woman colleague, and that a supervisor (not him) had advised her to block or ignore him. The matter had not been raised with the claimant, he said. We do not know when this conduct may have occurred or who the woman was.

181. As Brittany Ferguson did not raise it with the claimant on 1st July, or at any other time, yet relied on it in her conclusion about the seriousness of the claimant’s conduct, it does cause concern that there was pre-judgment here. This item was sex specific, as she makes no reference to the 2020 disciplinary episode of bullying a man. It seems to have informed her view of the seriousness of the conduct. That said, if she had left out this episode, it is the tribunal view that the claimant’s conduct towards MB, which had lasted several months despite rebuffs, and had continued after being told to stop, would still have been considered very serious of itself, especially when the claimant was (bar one comment in the section of the interview dealing with the photographs) unsympathetic and unrepentant, presenting himself as the victim of non-specific blackmail by MB.

Refusal of Alternative Employment

182. We are asked to find that the decision not to offer the claimant the alternative job in Basingstoke in October 2021 was less favourable treatment because of sex. The respondent explains that they would not offer a job to someone on suspension for gross misconduct that was still being investigated. There is no written policy to this effect. Nevertheless, the panel considers this a valid explanation, in which the claimant's sex played no part, unless it is to be viewed as a 'but for' consequence of the decision to investigate for gross misconduct, if that decision was tainted by sex. It was a decision made for the same reason as HR discouraged Graham Smith's proposal to transfer the claimant to Reading on an interim basis, and Anthony Harmes considering he was not reviewing the suspension, namely that there was an unfinished disciplinary investigation. The decision is a consequence of the suspension, not any discrimination.

Dismissal as Sex Discrimination

183. The last treatment alleged as sex discrimination is the dismissal itself. Here we are concerned to identify whether Brittany Ferguson's conclusion with regard to the unknown second woman played a part in that decision. We note that this episode played no part in James Arnold's report and recommendations. It was never challenged by the claimant, even though by January 2022 he had seen the report. There is no sign from the hearing notes or preparation notes that Mark Howells had even read it, let alone given it weight, and there were other features of Mark Howells' review of the evidence (discrepancies for example in the dates of some of the emails the claimant had sent MB), indicating that he did not check the evidence in much depth. Nothing suggested that any second female played a part in his decision, nor that he was motivated by any views about whether the conduct was more reprehensible in a man than a woman. Importantly, the evidence about the claimant's conduct towards MB was enough for the respondent to reach a decision to dismiss, absent any other episode. He was being dismissed for harassment and bullying of a colleague, not because it was related to sex or any other protected characteristic. The 2020 investigation shows that harassment and bullying of a man was also considered a disciplinary matter meriting suspension. Although the inclusion of this unwarranted conclusion (that the claimant might try again with other women) caused us concern, we concluded that the dismissal was not because of the claimant's sex, or because Brittany Ferguson or a member of HR had slanted the case because of stereotypical or unsupported assumptions about men harassing or seeking to control women (which the unwarranted conclusion could suggest). Had he behaved towards a man in the same way, the decision would have been the same.

Unfair Dismissal

Relevant Law

184. The test for unfair dismissal is set out in section 98 of the Employment Rights Act 1996. Under section 98(1) it is for the employer to show the reason (or, if more than one, the principal reason) for the dismissal, and that it is either a reason falling within subsection (2), e.g. conduct, or some other substantial reason of a kind such as to justify the dismissal of an employee holding the

position which the employee held.

185. The reason for dismissal is 'a set of facts known to the employer, or it may be beliefs held by him, which cause him to dismiss the employee'. **(Abernethy v Mott Hay and Anderson [1974] ICR 323, CA.)**

186. Under s.98(4) '… the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and shall be determined in accordance with equity and the substantial merits of the case'.

187. Tribunals must consider the reasonableness of the dismissal in accordance with s.98(4). However, tribunals have been given some guidance by the EAT in **British Home Stores v Burchell [1978] IRLR 379; [1980] ICR 303, EAT** on how to approach whether an employer acted fairly in dismissing for the reason found. There are three questions to consider:(1) did the respondent genuinely believe the claimant was guilty of the alleged misconduct? (2) did they hold that belief on reasonable grounds? (3) did they carry out a proper and adequate investigation.

188. Tribunals must bear in mind that whereas the burden of proving the reason for dismissal lies on the respondents, the second and third stages of **Burchell** are neutral as to burden of proof and the onus is not on the respondents **-Boys and Girls Welfare Society v McDonald [1996] IRLR 129, [1997] ICR 693.**

189. The fairness of the process should be viewed in the round. Prior defects can be remedied at the appeal stage - **Taylor v OCS Group (2006) ICR 1602.**

190. Finally, tribunals must decide whether it was reasonable for the respondent to dismiss the claimant for that reason. The question is whether dismissal was within the band of responses open to a reasonable employer. It is not for a tribunal to substitute its own decision.

191. The range of reasonable responses test (or, to put it another way, the need to apply the objective standards of the reasonable employer) applies as much to the question of whether an investigation into suspected misconduct was reasonable in all the circumstances as it does to other procedural and substantive aspects of the decision to dismiss a person from his employment for a conduct reason. The objective standards of the reasonable employer must be applied to all aspects of the question whether an employee was fairly and reasonably dismissed"- **Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23, CA.**

192. In reaching their decision, tribunals must also take into account the ACAS Code on Disciplinary and Grievance Procedures. By virtue of section 207 of the Trade Union and Labour Relations (Consolidation) Act 1992, the Code is admissible in evidence and if any provision of the Code appears to the tribunal to be relevant to any question arising in the proceedings, it shall be taken into account in determining that question. Paragraph 46 of the Code has some relevance on the facts of this case:

> "Where an employee raises a grievance during a disciplinary process the disciplinary process may be temporarily suspended in order to deal with the grievance. Where the grievance and disciplinary cases are related it may be appropriate to deal with both issues concurrently".

193. In this case, as well as considering whether any unfairness of process made the dismissal unfair, we are also asked to consider that consider whether the decision maker's mind was tainted by the improper motive of another in the hierarchy of decision making. In **Royal Mail Group v Jhuti 2020 ICR 731** the person who decided to dismiss was unaware that the claimant had been set up by her immediate manager, who resented that she had earlier blown the whistle on her colleagues' cheating in a reward scheme. It was held that in these circumstances the dismissal was because of a protected disclosure, even though the dismissing manager knew nothing about it.

194. The claimant also invites us to consider that in dismissing the claimant the infringed his Article 8 convention right to privacy: "everyone has the right to respect for his private and family life, his home and his correspondence. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others".

195. **In X v Y** (**2004) EWCA Civ 662**, the claimant worked for a charity promoting the personal development of young offenders, a post funded by the probation service. When it was discovered that six months earlier he had been cautioned for cottaging, and not told his employer about it, he was dismissed for gross misconduct. It was argued that the dismissal infringed the claimant's Convention right to privacy. The appeal was decided against the employee because it was held that the conduct he had accepted as criminal was in the public domain, and he did not have a reasonable expectation of privacy, so the right was not engaged at all. It was also held that the location of otherwise private activity could be relevant, for example if it was engaged in at the workplace. In **Pay v Lancashire Probation Service 2004 ICR 187** a probation officer was dismissed because he was also a director of a company that sold domination and sado-masochistic products on the Internet. It was held his activities had been in the public domain, so the right to respect for private life was not engaged, even though the employer was a public authority. It was however accepted that a public authority would not act *reasonably* under section 98 of the Employment Rights Act 1996 if it violated an employee's Convention rights. If there was an interference, the tribunal should consider whether that was justified.

196. The Human Rights Act 1998 defines public authority as "any person certain of whose functions are functions of a public nature". Whether a particular body is a public authority may depend on whether it is publicly funded, or exercises statutory powers, or takes the place of central or local government. In **Cameron and others v Network Rail infrastructure Limited 2006 EWHC 1133**, at a time when the company had shareholders, to whom it paid a dividend, it was held that "running a railway is not an activity of government", and that the company was not publicly funded and had a duty to make a profit. It was not accountable to government though it was regulated by the ORR. The factual position has now changed, as the respondent is now publicly funded, has no

shareholders and is accountable to the Department of Transport as well as the ORR. In our finding this shifts the position to one where it is a public authority, and we must consider whether the claimant's right to privacy was engaged, whether it was breached, and if so, whether that was justified.

Unfair Dismissal – Discussion and Conclusion

195. Taking first the Article 8 point on privacy, we have to consider whether the right was engaged. One relevant point is that the claimant's conduct had been the subject of a direction by the magistrates on the application of the police. Arguably the conduct was now in the public domain. Parliament had provided that conduct of this type was not a private matter but could be the subject of such orders. The claimant did not dispute the order being made. It is certainly not the case, on the evidence, that the magistrates found that he was no harm. From May at least therefore, there could be no expectation of privacy. It should be noted that although the claimant did not refer to the order until the end of the disciplinary process, he did then bring it to attention of decision makers. Another relevant point (of which the claimant has complained) is that Brittany Ferguson, conducting her investigation, was very clear that she was not interested in private matters except where they crossed into the workplace. MB had explained why she was now bringing the claimant's conduct to her employers. A reading of the claimant's emails from January to March 2021 was necessary for the respondent to understand her fears. The employer was aware, as Brittany Ferguson said, even if they did not put it in ECHR terms, that they should not trespass on private correspondence where it did not intrude into the workplace. They intervened because his actions affected another employee and the claimant's conduct had now entered the workplace when he stated he was coming to see her at the depot and she feared confrontation with her colleagues if he did. They dismissed, and upheld the dismissal, on the basis that the sanction was proportionate. If there was interference with the Convention right to privacy, before the matter reached the police, it is for the tribunal to determine whether the sanction was objectively justified, that is, balanced the right to private correspondence with appropriate disciplinary action.

196. The employers' reason for dismissing related to conduct, and so potentially fair. The employer carried out a reasonable investigation, interviewing both parties, reviewing correspondence put before them, and interviewing a large number of witnesses. The investigation provided grounds for holding that the claimant had engaged in unwanted conduct. The employer could see MB's three emails asking him to stop (quite apart from her earlier blocking of him on social media), and they could see that even when asked not to contact her, he had done so. The investigation did not provide grounds for holding that the claimant was likely to harass other women, as the grievance investigator had concluded. But the disciplinary investigator, James Arnold, while relying on the evidence she had collected, seems to have paid this particular conclusion no heed in his investigation or report.

197. It cannot be said that Brittany Ferguson concealed anything. If she represented the claimants conduct in any more serious light than it warranted (the second female) the whole report was there and others could reach their own conclusions about it. Factually it was not a **Jhuti** situation. Mr Arnold and Mr Howells could have read her report, although from his answers to cross-examination we are not sure that Mr Howells did. We can see that Mr Howells did exercise independent judgment. There were defects in the process. It took an

extraordinarily long time, and only the first three months of that was attributable to the claimant. He was rightly aggrieved by the long suspension without updates, in breach of the employer's policy and the ACAS Code. We do not consider that the long suspension by itself renders the eventual decision unfair. Looking at the other defects, it was only in January 2022 that the claimant saw Brittany Ferguson's findings. He was not provided then, or by Mr Howells (though this was not deliberate) with the complete list of emails they had taken into consideration, and did not see them until the appeal stage. Mr Howells' hearing required the claimant to dissuade him from provisional conclusions, though Mr Green gave him far more latitude. We can see that at this stage the claimant engaged with the new material and was given plenty of time and two full hearing days to make his points. Mr. Green decided not to hold a third day when the claimant said only a few days before that he could not attend a date that had been fixed by agreement much earlier. The claimant had been invited several times to explain his appeal points in writing and the relevance of his witnesses and had declined to do so, and then being given two full days to make his points and call his witnesses. We considered the opportunities to put points on appeal were adequate. If there were defects in Mr Howells' hearing, they were put right on appeal, so that taken overall the claimant had sight of all the evidence and an ample opportunity to make his points. The claimant's main difficulty, both then and in this tribunal, is that he could not accept that what he was done was wrong or serious. He simply maintained that it should not be a matter for the employer, and that in any case he was a victim as much as MB. It is hard to see that he would have got the point if he had seen the emails before the appeal stage. We considered the process was fair, when taken as a whole.

198. It is argued for the claimants that the dismissal process was flawed because Mr Arnold and Mr Howells did not take account of his mental health. Neither manager seems to have seen the occupational health reports, but Mr Arnold's process was modified to allow the claimant to give written answers given the strain he was under by now.

199. If it is suggested the claimant's ill health caused or excused the conduct for which he was dismissed, we can see that the respondent's policy lists "bullying, harassment" as examples of gross misconduct. It is not inevitable that an employer dismisses for gross misconduct. There may be mitigating circumstances. The claimant argues that neither Mr Howells nor Mr. Green took account of his mental health at the time of the conduct for which he was dismissed, or subsequently. However, it was never suggested that mental ill health was the reason for his conduct towards MB until the appeal stage, when Mr. Green concluded that mental ill health had not been responsible for the conduct. The tribunal was asked to consider as a comparator the treatment of a Mr Rahman, who gave evidence at the appeal hearing, who was suspended for seven months in 2015-16, returned to work, and partly succeeded on appeal. We do not know his offence, only that it was said that the suspension should only have lasted 8 weeks. This does not help us decide whether the claimant's sanction was appropriate or whether over long suspension was the reason for the partial success on appeal, as we do not know the offence or the appeal grounds in his case. It was also suggested that neither Mr Howells nor Mr. Green considered whether the claimant continued to pose a risk to MB, or that he might repeat the conduct, or that relocation might reduce any risk there was thought to exist. This is something that could have been considered, but even if it was, a reasonable employer was entitled to take into account that there had been a clear breach of a

policy designed to prevent bullying and harassment, and that one element of discipline is to deter other employees, showing them that this is serious. What Mr Howells and Mr. Green did take into account was that the claimant had not shown contrition or remorse, or even any recognition of the effect of his conduct on MB. There was therefore a risk, independent of any conclusion of Ms Ferguson that he would repeat the conduct, either to MB, or some other employee, of either sex.

200. If the claimant's Article 8 right is engaged, and the respondent is a public authority, the tribunal must consider whether the interference with Article 8 is justified having regard to the rights of others. We find that the sanction of dismissal for a course of unwanted conduct to a fellow employee which the claimant sought to bring into the workplace was not manifestly disproportionate and excessive. An employer has a right to act as its own disciplinary authority. The claimant had suggested to the respondent that MB should be removed from her post. He had suggested to MB that if she felt unsafe she should find another job. He had insisted on seeing her, at work, when there were other ways of arranging for her collect property and he to collect his, which he had refused. He had put her in fear of confrontation at the depot. This had become a matter for the respondent, the conduct was serious, and balancing the use of private correspondence with MB against the intrusion into the workplace, the use of the correspondence in the investigation that led to dismissal was justified.

Contribution and Conduct.

201. Had we found that the dismissal is unfair, perhaps because of process, we would have made a very substantial reduction for the claimant's contribution. He had engaged in unwanted conduct over several months. He did not dispute the facts presented to the magistrates by the police. He did not and does not seem to recognise that it was wrong to bring it into the workplace.

Polkey

202. We note that although not taken into account in this case by the employer, there had been a previous allegation of bullying, although it was decided that further training was the remedy rather than disciplinary sanction. We also see that he sent a rapid sequence of bad tempered and high-handed emails to the payroll team in December 2020 and January 2021 when there was a question of whether he had been overpaid during suspension. Had we found unfair dismissal, we would have considered it might not be long before he was dismissed for another episode of unacceptable conduct towards colleagues, especially if his drinking continued.

Wrongful Dismissal

203. A finding of wrongful dismissal requires a breach of contract. In law a contract which provides for termination on notice must be brought to an end by giving notice, or paying in lieu, unless the employee's conduct has breached the contract in such a fundamental way as to entitle the employer to bring it to an end without notice, such a breach being referred to as gross misconduct. Wrongful dismissal claims require the employment tribunal to make its own assessment of what was gross misconduct, rather than review the fairness of the employer's actions, as it does in unfair dismissal.

204. The conduct of which the claimant was found guilty was identified in the disciplinary policy, albeit a non-contractual policy, as gross misconduct. It indicates what both parties to the contract understood was the standard of conduct required in carrying out the contract of employment. In any case it can be implied that it is a

term of the contract that other employees are entitled to work without fear. In the finding of the employment tribunal, the claimant's actions between January and March 2021 were clearly unwanted conduct and harassment. That was also the view of the police and the magistrates when they made the Stalking Protection Order. It was the conduct in the context of the workplace and work relationship, rather than conduct towards a former flatmate or friend, that was relevant to the employer. It was a serious matter and it did entitle the employer to bring the contract to an end without notice.

Discrimination because of something arising from disability

205. We are asked to find that the claimant was treated unfavourably by the suspension, the failure to lift the suspension at any time before dismissal, and the dismissal itself because of something arising from his disability of anxiety and depression, contrary to section 15 of the Equality Act 2010, which provides:

> (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.

206. We have found that the conduct for which the claimant was suspended was not because of depression or anxiety, and if not natural to him, was because he was drinking regularly and to excess, an excluded condition. The suspension was not a breach of section 15. In any case, at the relevant time, April 2021, the respondent could not have known, even on inquiry, that the impairment was long term. On the claimants account, his mental health difficulty began in August or September 2020 and related to being suspended in August 2020.

207. We would also have found that suspending him was a proportionate means of achieving a legitimate aim, namely, to reduce the risk that MB would be exposed to further unwanted conduct.

208. Of the failure to lift the suspension, in our finding this was not the cause of something arising from a disability of anxiety, but because the respondent was unconscionably slow in moving on with the disciplinary process it had proposed to undertake when the grievances had been investigated. Ms Ferguson had completed her report by mid-August. Delay is explained by her sickness absence or on the absence of an employee relations assistant or both, and while that is unsatisfactory for an employer with these resources, it was not caused by the claimant's mental ill health, although of course his mental health would, in the opinion of the occupational health advisors, have benefited from return to work. The same could be said about the discrepancy between Ms Goodwin's estimate that it would take "a few weeks" to complete the process from mid-November, when dismissal did not occur until the end of May 2022. It was, to say the least, unsatisfactory, but it did not happen because of anxiety or depression, were the claimant to have been disabled by either condition.

209. We make the same finding about the dismissal. The decision makers focused firmly on the claimants conduct from January to March 2021. The dismissal was not because of anything arising from anxiety or depression.

Failure to make reasonable adjustment for disability

210. Section 20 of the Equality Act imposes a duty on an employer 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".

211. The claimant asked the tribunal to find that there were two provisions criteria or practises namely: (1) "required the claimant to stay away from work, on suspension from work, a requirement that was kept in place for a very long period of time" and (2) requiring the claimants to partake in processes relating to alleged misconduct which were excessively lengthy, extending from March 2021 to November 2022. The claimant does not say suspension of itself was a practice that should have been adjusted. The complaint is about the excessive length.

212. A provision, criterion or practice must be something which applies to employees generally, which then puts a disabled claimant at substantial disadvantage compared to non-disabled persons. In this case a question arises as to whether a lengthy suspension was a practice applied to others, and whether the length of investigation and discipline proceedings was of general application too.

213. In **Nottingham City Transport v Harvey EAT/0032/12** it was held that a one-off example of a flawed process was not a practice. There was no evidence it was a practice, or that it caused disabled people substantial disadvantage – prolonged suspension would "cause misery whoever is the victim". On appeal, it was noted if Parliament had wanted to legislate for an act of decision rather than a practice, it could say so. A one-off decision could be a practice but did not have to be. In **Ishola v Transport for London**, there was no evidence this was how things were usually done. A tribunal would need some indication the act would be repeated in the future.

214. We did not consider there was evidence that the respondent made a practice of suspending people for long periods of time, with or without updates. We do not know whether the claimant was given updates when suspended in August 2020. The only other example in the evidence was Mr Rahman who was suspended for a shorter period and returned to work before being disciplined. The respondent has a large workforce when at any one time there may be several people suspended. They have a policy which clearly provides that suspension for more than four weeks is unusual. They recognise an active trade union which can, and in this case did, intervene when suspension is prolonged. All this suggests they did not make a practice of suspending for long periods, and the claimant's long suspension was down to Mark le Juge de Segrais's failure to open an HR case, believing he should not intervene when the claimant was off sick, and then doing nothing further after the August 2021 update, until the claimant's second grievance led to a proper look at his case. The long suspension was deplorable, but nothing suggests it was more than unfortunate decisions by a single manager, and a failure by the HR department to review. It was not the respondent's practice to suspend for a long time.

215. We find the same of the investigation, which prolonged the period of suspension because the respondent believed the investigation would be concluded sooner than it was, and that the claimant should not be at work if there had been gross misconduct. It was slow for a number of reasons: the claimant put off the meeting to July because he was ill; the investigations were completed within 4-6 weeks, then the outcome stalled because the investigator was ill and an HR team member

absent, the dates are unclear and most likely the ball was dropped; then process was slower than expected because of the second grievance, then the grievance appeal, and when it reached Mr Arnold there was delay because the claimant was too unwell to attend the meeting. There was an attempt from December 2021 to speed things up. The length of the appeal process was not a practice but an accommodation for the claimant's wish to call many witnesses and not to put his case in writing. None of this suggests there was a practice of investigating slowly.

216. We conclude that the reasonable adjustments claim fails because there was no practice of suspending for long periods or taking a long time to conclude investigations. Had we done, it is not clear to us that a person with the claimant's level of anxiety (if so impaired during the suspension rather because of excessive drinking) would be at a substantial disadvantage compared with others without the disability. Most people would be made miserable by prolonged suspension for processes which seemed never-ending.

Breach of Contract – Suspension and Pay Rate during Suspension

217. The claimant's contract of employment provides (from June 2020) for payment of £51,841 per annum plus a London and SE allowance of £2,228 per annum. He would be scheduled to work 40 hours per week on days and hours which would be notified on a roster. The contract also provides that he may be required to work additional hours in every week in line with operational need. These overtime hours were paid at the ordinary basic rate. Work performed on a bank holiday was paid at double time.

218. According to the claimant, he routinely worked 60 or 80 hours per week, so earning substantially more money than his basic 40 hour salary. There was always overtime available for those who wanted it.

219. The contract provides that an employee is entitled to sick pay at full rate for 16 weeks then half pay for 16 weeks for those with up to five years service, and 26 weeks full pay and 26 half pay for those who had worked more than five years.

220. When suspended from work, an employee received basic pay as usual, but did not have the opportunity to earn overtime and premium hours.

221. The contract of employment has no express term providing for suspension. The non-contractual disciplinary policy provides:

> 2.5. Suspension
>
> 2.5.1. In certain circumstances, such as in cases where gross misconduct is suspected, or where it is considered that the employee's presence at work involves a risk to safety, the public, railway infrastructure, Network Rail, railway employees or themselves, consideration will be given to a brief period of suspension from duty, with pay, whilst an investigation is carried out. Where no disciplinary action is taken, the employee will be reimbursed any additional earnings they may have lost as a result of suspension.
>
> 2.5.2. Such suspension will be reviewed periodically, so that it is not unnecessarily protracted but will not, normally last for more than four weeks. If the suspension extends beyond four weeks, the employee and their representative will be advised as to the reason for the delay

219. While the claimant was suspended from work between 7th April 2021 and dismissal in May 2022 he received basic pay and London weighting, but lost the opportunity to work the additional hours as had been his custom. As disciplinary action

was taken at the end of the suspension, he was not reimbursed any additional earnings lost.

220. The claimant's case is that the respondent was not entitled to suspend him. They had made the power non-contractual. Therefore he must be paid damages for the period of suspension, and be paid what he would have earned but for the suspension, so including overtime and other enhanced payments for periods when he would not have ben doing office work or was not off sick (there is no argument that he would have received more than basic pay when off sick). The tribunal was referred to **William Hill v Tucker, 1998** where there was a term of the contract that the employed staff would be provided with opportunities to develop skills, and the employee, skilled in spread betting, was suspended; it was held that if the contract required the respondent to provide work to develop skills, a suspension term could not be implied - there must be an express power to suspend.

221. The respondent argues that even if there was no express term of the contract permitting suspension, it is necessary to imply one to give business efficacy to the contract. The respondent is subject to the employment protection statutes. There might be circumstances where the gross misconduct alleged might mean it was unsuitable to keep the employee at work while the due process required by the Employment Rights Act and ACAS Code on Discipline and Grievance were carried out. It is plainly, they say, necessary and obvious that a term must be implied that they may suspend an employee while they investigate the conduct. The tribunal was also taken to **Collier v Sunday Referee Publishing Company Limited 1942 KB 647**, to the effect that a contract for employment does not necessarily, or perhaps normally, oblige the master to provide the servant with work, such that there is an implied right to suspend. "Provided I pay my cook her wages she cannot complain if I choose to take all my meals out". An employer pays wages, and the employee should be available for work, the work-wage bargain. Contracts with terms such as William Hill were said to be rare.

222. This was not a contract where the employer was obliged to provide work to develop or maintain the employee's skills. A term providing for suspension could be implied The legal test is whether it is necessary to imply the term for the contract of employment to function, and obvious that the parties would have envisaged such a term. The tribunal considers that with over 40 years of unfair dismissal rights It must be obvious to the parties that a right to suspend was envisaged in cases of gross misconduct; it can also be considered necessary otherwise if there was, say, a prima facie case of fraud or interference with IT systems or the like, otherwise an employer might consider it had no alternative but to dismiss without carrying out an investigation and holding a hearing, as is consistently now regarded as good, indeed required, employment practice. It is not clear to us (other than the statement that the policy was non-contractual) why either side should have considered that the right to suspend was not part of the contract. Other parts of the suspension policy might remain not terms of the contract.

224. We were taken to a number of cases which consider an employee's right to wages during a period of suspension, and whether a term should be implied that he is entitled to wages in line with those that would be paid where he working. In a piecework case such as **Devonald v Rosser (1906) 2KB 728**, where an employer gave notice to terminate the contract because of a downturn in trade, and because there was no work, the employee was not paid in the period of notice, it was held there was an implied obligation to provide a reasonable amount of work, so he should have been paid. A similar decision was made where there the basic pay was so low as to amount to a retainer – **Bauman v Hulton Press Ltd (1952) 2All ER 1121**. In

Langston v AUEW (1974) ICR 510, where the employee had been suspended on basic pay but without overtime pay, because of industrial trouble when he would not join the trade union, and claimed the union had induced the employer to breach his contract of employment, it was held that there was no right to work, but that in a workplace where additional payments were made for night shifts and overtime, he had lost the opportunity to earn premium payments and that this was in breach of his contract of employment, as it was the employer's duty, as part of the consideration, to allocate work "in such a way as to give all a fair opportunity of enjoying the rough as well as the smooth and, in particular, of earning premium payment". The NIRC held it fell into the piecework category, This case was distinguished in **McLory v Post Office (1992) ICR 758**, where there was a contractual right to suspend on basic pay; some postmen were suspended for seven months pending investigation of a pub brawl and so lost overtime. The grounds for the distinction were that it was not clear what the contract terms as to work were, or whether he had been provided with overtime in the past, and that in the **McLory** contracts, the overtime obligations were, (as in the present case), asymmetric - if required, it had to be worked, but an employer was not obliged to provide it.

225. The tribunal concluded that it could not imply a term that if suspended an employee must be paid by reference to money he would have earned if he had continued to be rostered, or some average of earnings before suspension. The basic wage was not nothing (as in **Devonald**) and not so low as to be a mere retainer, as in **Bauman**; (in 2021 UK average full-time earnings were £38,131, when the claimant's basic wage was 20% more than that, without London weighting). We have no evidence that he was to be paid some average of his usual earnings when moved to lighter duties in the Ealing office because of his health and did not have had the opportunity to earn shift premiums or much overtime. The policy and practice was that some average would be paid if the suspicion for which the employee was suspended was held unfounded on investigation. This may have been agreed with the union – we have no evidence why the policy was non-contractual but that might explain it, as a matter where the employer would do this as an exercise of discretion, not as of contractual right. Unlike the right to suspend at all, we cannot see that this provision must be implied as a term of the contract. It is not necessary or obvious.

224. If we are wrong about the right to pay during suspension, that we must consider whether the right to suspend (express or implied) was reasonably exercised. Where the employer has a right to suspend, suspension must still be exercised with reasonable and proper cause, and not be a knee jerk reaction - **Gogay v Hertfordshire County Council 2000 IRL R 703.** In **McLory**, where there was a contractual right to suspend, the court considered whether terms could be implied that suspension must be exercised reasonably, or with prior investigation, and found that such terms were not necessary or obvious.

225, Here we do not find it necessary or obvious that there was a contractual term to carry out 4 week reviews. Rather this was a policy to guide reasonable exercise of the power to suspend. The reason for suspending was to investigate gross misconduct, and that continued even when reviews were resumed. The employer could have decided to give the claimant work at another depot, a manager *may* have decided this if shown the occupational health reports, or if they had known of the magistrates' order, but they also had reasons not to do, not anticipating the suspension would be snarled up by process.

226. If we Had found the 4 weekly reviews of suspension were contractual, implied as reasonable exercise of the right to suspend, the question arises as to what would have been different if the reviews had been made between mid - August and mid

November 2021. The evidence indicates no different outcome: the manager would have concluded (as later they did when reviews started) that they must maintain the suspension until process was concluded, because of the nature of the conduct. He would have remained suspended. Under the respondent's suspension policy, if contractual, he could only recover additional earnings if the disciplinary action concluded in his favour.

227, We add that had the various processes concluded earlier, as was practice and intention, he would have been dismissed much earlier, as there would have been no second grievance. The outcome would have been given early in September, the Arnold investigation would then have begun, any appeal from Ms Ferguson's decision could have run in parallel, and he would have been dismissed in October. The claimant would not have earned anything after dismissal, whereas he continued to earn basic pay and London weighting up to the end of May. It is unlikely the delay caused loss.

Conclusion

228. Although none of the claims succeed, we want to add a note on good practice. The claims do not succeed for the reasons given, but the panel nevertheless considered the delay from August 2021 to January 2022 was deplorable: the respondent's HR department and its managers had lost sight of the claimant. Responsibility was split between too many people who did not have access to useful material. The various processes were taken consecutively when it would have been better to run them concurrently with one decision maker who had sight of the whole matter, as ACAS suggest happen when discipline and grievance cover the same territory. The respondent tied itself in unnecessary knots trying to separate evidence of one grievance from another. There is wisdom in hindsight. It is to be hoped the respondent will consider what lessons they might learn from this unfortunate history

Employment Judge Goodman

Date 28 March 2024

JUDGMENT SENT TO THE PARTIES ON

10 April 2024

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FOR THE TRIBUNAL OFFICE

Notes

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

Recording and Transcription

Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here:

https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/

APPENDIX
AGREED LIST OF ISSUES

1 **Direct Discrimination - Sex**

1.1 Who is the correct comparator for the purposes of the Claimant's claim of direct discrimination? The Claimant relies on MB as an actual comparator. He also relies on a hypothetical comparator.

1.1.1 Did the Respondent treat the Claimant less favourably than it treated or would treat others because of sex?

The Claimant alleges that he was treated less favourably in relation to the following acts or omissions:

(a) The suspension
(b) The failure to lift the suspension
(c) The length of the suspension
(d) The different approach to the grievances submitted by the Claimant and MB, including:

(i) Penny Hunt's approach in her email to potential investigators of 24.3.21
(ii) The different approach to the invitations sent to the Claimant and Ms Bajerski
(iii) The different approach adopted with respect to police witness statements
(iv) The different approach adopted with respect to personal emails
(v) The different approach adopted with respect to format of material
(vi) The failure to interview relevant people
(vii) The approach to the interviews
(viii) The inclusion of inappropriate material
(ix) The grievance outcomes

(e) The disallowed appointment to new role
(f) The dismissal

Disability

2.1 Was the Claimant a disabled person as defined in section 6 of the Equality Act 2010 ('Equality Act 2010') at the relevant time or times, specifically:

(a) Did the Claimant suffer from a physical or mental impairment?
The Claimant alleges that he suffered from "anxiety and depression".
(b) If so, did that impairment have a substantial and long term effect on the Claimant's ability to carry out normal day to day activities, at the relevant time or times?

3 **Discrimination arising from disability (s15 EqA 2010)**

3.1 The Claimant alleges that the following acts or omissions amounted to unfavourable treatment:

(a) The suspension

(b) The failure to lift the suspension at any point thereafter prior to dismissal
(c) The dismissal

3.2 Did the Respondent discriminate against the Claimant contrary to section 15 of the Equality Act 2010? In particular:

(a) Did the Respondent treat the Claimant unfavourably with reference to the alleged acts or omissions listed at 3.1?
If the answer is yes:

(b) Did the Respondent know, or ought the Respondent reasonably to have known, at the relevant time(s), that the Claimant was a disabled person?

(c) Was the unfavourable treatment because of something arising as a consequence of the Claimant's disability?

(d) If so, was the Respondent's actions a proportionate means of achieving a legitimate aim? The Respondent will argue that the action it took was a proportionate means of achieving a legitimate aim, namely, ensuring its employees have a safe place of work, free from bullying and harassment.

4 **Failures to make reasonable adjustments**

4.1 Did the Respondent know, or ought the Respondent reasonably to have known, at the relevant time(s), that the Claimant was a disabled person?

First claim:
4.2 Did the Respondent have the following PCP: "The Respondent required me to stay away from work, on suspension from work; the requirement was kept in place for a very long period of time (from April 2021 until my dismissal in May 2022)."

4.3 Did that PCP place the Claimant at a substantial disadvantage in comparison to non-disabled persons.

4.4 Did the Respondent know, or ought the Respondent reasonably to have known, at the relevant time(s), that the Claimant was being placed at a disadvantage by the PCP?

4.5 Did the Respondent comply with the duty to make reasonable adjustments. The Claimant suggests the following matters for consideration in that regard:

> (a) "the Respondent should have not suspended me at all;
> (b) the Respondent should have undertaken regular suspension reviews (as I understand it, the Respondent failed to do that for at least the initial part of the relevant period);
> (c) the Respondent should have lifted my suspension at the first such suspension review (or at any others thereafter);
> (d) pending the outcome of the process/es, the Respondent should have retained me at work in my original post; or alternatively the office post I had occupied since my return from sick leave in February 2021; and/or
> (e) if there was a risk of unwanted contact in the office-based post or my original post, the Respondent should have placed me into another role."

Second claim
4.6 Did the Respondent have the following PCP: "The Respondent required me to partake in process/es (pertaining to alleged misconduct on my part) which were excessively lengthy (in particular the investigation in respect of MB's grievance about me, the subsequent disciplinary investigation, the subsequent disciplinary proceedings and the subsequent disciplinary appeal process (these together ran from March 2021 to November 2022)).

4.7 Did that PCP place the Claimant at a substantial disadvantage in comparison to non-disabled

persons?

4.8 Did the Respondent know, or ought the Respondent reasonably to have known, at the relevant time(s), that the Claimant was thereby being placed at a disadvantage?

4.9 Did the Respondent comply with the duty to make reasonable adjustments. The Claimant suggests the following matters for consideration in that regard:

> (a) "The Respondent should have ensured that any appropriate processes were completed far more swiftly.
> (b) Further the Respondent should at all times have kept me well appraised of the progress of the various processes and any difficulties in that regard (including explanations for any problems or delays etc) and likely timescales. The level of communication as regards the grievance investigations and outcomes and whether/when a disciplinary investigation would occur, was in my view particularly wanting."

Jurisdiction – timing (discrimination)

5.1 Have the Claimant's claims for disability and sex discrimination been brought within the relevant time period of three months starting with the acts/omissions to which the claims relate relates (allowing for any early conciliation process time limit extension)?

5.2 If not, do the alleged acts or omissions which the Claimant refers to in his claim form constitute a continuing act of discrimination, the end of which fell within the time limit?

5.3 If not, are there any grounds on which it would be just and equitable to extend time?

6 Discrimination – Remedy

6.1 What financial loss, if any, has the Claimant suffered as a result of the unlawful discrimination?

6.2 What award, if any, should be made for injury to feelings (and/or aggravated damages)? Should more than one such award be made given the different elements of discrimination?
6.3 Should any other remedy be awarded?

6.4 Did the Claimant and the Respondent comply with the ACAS Code of Practice on Discipline and Grievance?

6.5 If not, was such failure to follow the Code reasonable in all the circumstances?

6.6 If not, would it be just and equitable for the Tribunal to increase or reduce any award?

Unfair Dismissal

7.1 What was the reason or the principal reason for the Claimant's dismissal? In particular, was the reason or principal reason for the Claimant's dismissal conduct within the meaning of section 98(2)(b) of the Employment Rights Act 1996 (ERA)?

7.2 If the Employment Tribunal finds that the Respondent dismissed the Claimant, was the Claimant's dismissal fair within the meaning of section 98(4) of the ERA? In particular, did the Respondent act reasonably in treating that reason as sufficient for dismissing the Claimant?

Unfair dismissal - Remedy

8.1 What financial loss, if any, has the Claimant suffered as a result of any alleged unfair dismissal?

8.2 If the Claimant has suffered financial loss, by what percentage should any basic and/or compensation awarded be reduced (having regard to those factors set out in s122 and s123 ERA)? In particular:

(a) If the Respondent failed to follow a fair procedure, can the Respondent show that that following a fair procedure would have made no difference to the decision to dismiss the Claimant?

(b) To what extent, if at all, did the Claimant contribute to his own dismissal by way of any blameworthy conduct?

The Respondent alleges that the Claimant contributed to his dismissal by reason of his conduct towards MB, namely bullying and harassment.

(c) Has the Claimant made reasonable efforts to mitigate his losses?

8.3 Did the Respondent and the Claimant comply with the ACAS Code of Practice on Discipline and Grievance ?
If not, was such failure to follow the Code reasonable in all the circumstances? If not, would it be just and equitable for the Tribunal to increase or reduce any award?

Breach of contract - Wrongful dismissal

9.1 Has the Respondent proved that the Claimant acted in repudiatory breach of contract?

9.2 If not, what damages are due?

Breach of contract – suspension

10.1 Has the Respondent proven that, in the relevant circumstances, it was contractually entitled to suspend the Claimant? Was the suspension in breach of contract?

10.2 Was the Respondent contractually required to undertake monthly or regular reviews of the suspension? Did it fail to do so at any point?

10.3 Has the Respondent proven that, in the relevant circumstances, it was contractually entitled to keep the Claimant on suspension for the length of time it did?

10.4 Was the Respondent contractually entitled to keep the Claimant required to undertake monthly or regular reviews of the suspension? Did it fail to do so at any point?

10.5 If the Respondent acted in breach of contract, what damages are due?

Breach of contract – pay rate whilst on suspension

11.1 Whilst he was on suspension, was the Respondent contractually required to pay the Claimant at a rate of pay taking into account that some of his rostered hours would have attracted enhanced pay rates if he had been at work (such as Bank Holidays etc)?

11.2 Did it fail to do so? What damages are due?

~~**12 Breach of contract – lengthy process/es**~~
~~12.1 Was the Respondent contractually required to undertake the grievance and/or disciplinary investigations and the related disciplinary process within a reasonable timeframe and/or to take all reasonable steps to avoid unnecessary delay?~~
~~12.2 Did it fail to do so? What damages are due?~~ *Claim withdrawn 27 February 2024*

13 Unlawful deductions from wages

13.1 Should the Respondent have paid the Clamant whilst on suspension at a rate to reflect the hours he would have been rostered for (if he had not been on suspension) and which would have fallen on days/times which would have attracted increased pay rates (such as, by way of example, bank holidays and the Christmas period).

If it failed to do so, was that an unlawful deduction from wages?