THE INDUSTRIAL TRIBUNALS

CASE REF: 17607/20

CLAIMANT: **Anthony McCann**

RESPONDENT: **Department for Communities**

JUDGMENT

The unanimous judgment of the tribunal is that the claimant was fairly dismissed on the grounds of gross misconduct. The claimant was not discriminated against contrary to the Disability Discrimination Act 1995 and his claim of disability discrimination is therefore dismissed.

CONSTITUTION OF TRIBUNAL

Employment Judge: **Employment Judge Sturgeon**

Members: **Mr A Barron**
Mr B Heaney

APPEARANCES:

The claimant represented himself.

The respondent was represented by Mr Christopher Summers, Barrister-at-Law, instructed by Ms J McCroskery, Solicitor, of the Departmental Solicitor's Office.

THE CLAIM

1. The claimant presented a claim for unfair dismissal and disability discrimination, to the Industrial Tribunal, on 14 January 2020. In his claim form, the claimant asserted that he was disabled for the purposes of the Disability Discrimination Act 1995 by reason of PTSD and tinnitus.

2. The claimant contended that his dismissal was unfair and that he had been subject to direct disability discrimination, disability discrimination by reason of a failure to make reasonable adjustments, harassment and victimisation.

3. In its response, dated 6 November 2020, the respondent resisted all of the claimant's claims.

4. The respondent argued that the claimant was fairly dismissed for gross misconduct. The respondent contended that a reasonable investigation was carried out, that the claimant was given the opportunity to put his case at the disciplinary interview and that the appeal was fairly carried out. The respondent further contended that no ***Polkey*** reduction should be applied to this case given that it was the respondent's contention that the dismissal was fair.

5. The respondent also disputed that the claimant had been less favourably treated for the purposes of the Disability Discrimination Act 1995.

THE ISSUES

6. The parties prepared an agreed statement of legal and factual issues for determination by the tribunal. The agreed legal and factual issues were as follows:-

Legal Issues

(i) Is the claimant a disabled person in accordance with Section 1 as supplemented by Schedule 1 of the Disability Discrimination Act 1995?

(ii) If the claimant is a disabled person, did the respondent directly discriminate against the claimant by subjecting him to less favourable treatment on the grounds of his disability?

(iii) Who is the claimant's comparator?

(iv) Was the claimant fairly dismissed for gross misconduct?

(v) Did those who took the decision to dismiss genuinely believe that the claimant was guilty of the misconduct alleged, was that belief based on reasonable grounds following a reasonable investigation and was the penalty of dismissal within the band of reasonable responses for a reasonable employer in the circumstances?

(vi) In the event that any procedural defects rendered the decision to dismiss unfair, should a ***Polkey*** reduction be applied on the basis that if a proper procedure had been followed the clamant would have been dismissed in any event.

(vii) What remedy, if any, is the claimant entitled to?

(viii) Has the claimant made sufficient effort to mitigate his loss?

(ix) Did the respondent directly discriminate against the claimant on the grounds of his disability (PTSD) during the meeting at which the claimant was suspended by intimidating him with knowledge of the claimant's alleged disability?

(x) Did the respondent directly discriminate against the claimant by failing to respond to a grievance raised by the claimant in relation to Mr Sturgeon's behaviour subsequent to the meeting referred to at (ix) above?

(xi) Did the respondent victimise the claimant per the Disability Discrimination Act in how his grievance was conducted?

(xii) Did the respondent fail to make a reasonable adjustment in relation to the claimant's alleged PTSD by refusing to allow him to record his disciplinary hearing?

(xiii) Did the respondent fail to make a reasonable adjustment in the manner he was brought to the suspension meeting by (a) giving him no prior warning and (b) having a manager approach him and tap him on the back.

(xiv) Did the respondent harass the claimant on the grounds of his alleged disability (PTSD) during suspension meeting due to the alleged behaviour of Mr Sturgeon during the meeting and by Ms McAllister allegedly locking the door?

Factual Issues

(i) Was payroll number 1182279 associated with the Claimant's smart card which he used to access various Departmental computer systems?

(ii) Did the Claimant access the benefits records of Ms Forgione 315 times?

(iii) Did the Claimant access the benefits records of Mr O'Shea 44 times?

(iv) What was the reason(s) for the Claimant accessing the benefits records of Ms Forgione and Mr O'Shea?

(v) Was the access in pursuit of a legitimate purpose?

(vi) Was the access authorised by the Respondent?

(vii) Was the access (including the number of incidents of access) proportionate?

(viii) Did the Claimant submit a fraud report in respect of the two individuals named above?

(ix) Once the Claimant submitted such a report was there a legitimate need for him to access the benefit records or any information in respect of the investigation?

(x) What, if any, influence did the Respondent have on the police investigation and the decision to arrest the Claimant after the initial report to the police by the Respondent?

(xi) Did the Respondent make the decision that the PSNI should arrest the Claimant and accordingly send them to the Claimant's house in order that the arrest could be effected?

(xii) Was the Claimant invited to a meeting as part of the investigation of the allegations against him?

(xiii) Was the Claimant presented with the evidence acquired by the Respondent as part of its investigation?

(xiv) Was the Claimant given the opportunity to respond to the allegations made against him and to make representations in respect of the evidence gathered by the Respondent?

(xv) Was the Claimant aware or ought he to have been aware of the policies involving accessing the data of the two individuals named above?

(xvi) Did the actions of the Claimant and the two complaints received in relation to his actions have the potential to cause reputational damage to the Respondent?

(xvii) Was the suspension of the Claimant carried out in line with policy?

(xviii) Was the suspension of the Claimant a proportionate and reasonable decision?

(xix) Who is the Claimant's comparator?

(xx) What less favourable treatment did the Claimant receive as against that received by his comparator?

(xxi) Did the Respondent simply favour the evidence of the two individuals named above over the Claimant without any further evidence?

(xxii) Was the investigation disciplinary, and dismissal process carried out in accordance with established policy and procedures?

(xxiii) Is there any evidence of bias by any servants and agents of the Respondent in their treatment of the Claimant, the investigation or disciplinary process?

PROCEDURE AND SOURCES OF EVIDENCE

7. This case had been case managed on 26 March 2021 and 10 August 2021 and detailed directions had been given in relation to the interlocutory

procedure and the witness statement procedure.

8. At the outset of the hearing, the tribunal enquired from the parties as to whether any reasonable adjustments/special arrangements were required from any witnesses at the hearing. The respondent requested that Ms Crawford be permitted to give her evidence remotely as she was shielding due to Covid-19. With no objection from the claimant, the tribunal acceded to this request.

9. The claimant also asked for regular breaks throughout the case. This was granted.

10. At the substantive hearing, each witness swore or affirmed and then adopted their previously exchanged witness statement as their entire evidence in chief before moving on to cross examination and brief re-examination.

11. The claimant gave evidence on his own behalf.

12. On behalf of the respondent, the tribunal heard evidence from the following individuals:-

    i. Martin Sturgeon – Senior Manager within Universal Credit Operational Control Centre who suspended the claimant;

    ii. Grainne McAllister – Deputy Principal within Universal Credit Operational Control Centre who attended the claimant's suspension meeting;

    iii. Caroline Crawford – officer in Department for Communities responsible for audit trail requests;

    iv. David Malcolm – Deputy Secretary within Department for Economy;

    v. Eleanor Cusick – Deputy Principal within Department of Finance;

    vi. Margaret Toner - Deputy Principal within Department of Finance and individual who carried out the disciplinary hearing;

    vii. Gillian Burns - Deputy Principal within Department for Communities and dismissal officer;

    viii. Anne Breen – Director of Learning and Development and Appeal Officer in this case;

    ix. Michael Cooke –Director of Employee Relations, NICS.

13. The tribunal also received a bundle of documents containing the claimant's witness statement, all of the respondent's witness statements, all pleadings in the case and all discovery exchanged between the parties.

14. The panel read the witness statements on the first morning of the hearing.

15. The tribunal heard evidence on Tuesday 11, Wednesday 12 and Thursday 13 January 2022. Oral submissions were heard on Friday 14 January 2022. The tribunal also received written submissions from the respondent's representative.

RELEVANT LAW

Unfair Dismissal

16. The Employment Rights (NI) Order 1996 provides as follows:-

> ***"The right***
>
> *126.—(1) An employee has the right not to be unfairly dismissed by his employer.*
>
> *(2) Paragraph (1) has effect subject to the following provisions of this Part (in particular Articles 140 to 144).*
>
> *…*
>
> ***Fairness***
>
> ***General***
>
> *"130(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –*
>
> *(a) the reason (or, if more than one, the principal reason) for the dismissal and*
>
> *(b) that it is either a reason falling within paragraph (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.*
>
> *(2) a reason falls within this paragraph if it –*
>
> *(c) relates to the conduct of the employee,*
>
> *(4) where the employer has fulfilled the requirements of paragraph (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –*
>
> *(a) depends on whether in the circumstances (including the size and administrative resources of the employer's*

undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and

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

…

(6) Paragraph (4) is subject to Articles 130A to 139

…

Basic award reductions

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…

(2) Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly.

…

Compensatory Award

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(1) Subject to the provisions of this Article and Articles 158, 158A, 160 and 161, the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.

…

(6) Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.

17. Both parties referred the tribunal to the case of ***British Home Stores v Burchell UKEAT/108/78.*** The test to be applied in the case of an alleged misconduct dismissal is known as the "*Burchell Test"* or the *"band of reasonable responses"* test. In the context of a misconduct case, Arnold J made the following comments:-

"What the Tribunal have to decide every time is, broadly expressed, whether the employer who discharged the employee on the ground of the misconduct in question …….. entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. That is really stating shortly and compendiously what is in fact more than one element. First of all, it must be established by the employer the fact of that belief; that the employer did believe it. Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief. And thirdly, we think, that the employer, at the stage at which he formed that belief on those grounds, at any rate at the final stage at which he formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case. It is the employer who manages to discharge the onus of demonstrating those three matters, we think, who must not be examined further. It is not relevant, as we think, that the Tribunal would themselves have shared that view in those circumstances. It is not relevant, as we think, for the Tribunal to examine the quality of the material which the employer had before them, for instance to see whether it was the sort of material, objectively considered, which would lead to a certain conclusion on the balance of probabilities, or whether it was the sort of material which would lead to the same conclusion only upon the basis of being "sure", as it is now said more normally in a criminal context, or, to use the more old fashioned term such as to put the matter beyond reasonable doubt. The test, and the test all the way through is reasonableness; and certainly, as it seems to us, a conclusion on the balance of probabilities will in any surmisable circumstance be a reasonable conclusion."

"Polkey" Deduction

18. The House of Lords held in ***Polkey v Dayton Services Ltd [1987] 3 ALL England ER 974*** that if a dismissal is procedurally defective, then that dismissal is unfair but the tribunal has a discretion to reduce any compensatory award by any percentage up to 100% if the employer can satisfy the tribunal that following the procedures correctly would have made no difference to the outcome.

Disability

Definition of Disability

19. The Disability Discrimination Act 1995, as amended ('the 1995 Act'), provides:-

    (i) Section 1 of the 1995 Act:-

        "(1) Subject to the provisions of Schedule 1, a person has a disability for the purpose of this Act if he has a physical

or mental impairment which has a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities.

(2) In this Act 'disabled person' means a person who has a disability.

(3) Guidance

A1 The Secretary of State may issue guidance about matters to be taken into account in determining whether a person is a disabled person.

(1) Without prejudice to the generality of sub-section A(1) the Secretary of State may, in particular, issue guidance about the matters to be taken into account in determining –

(a) whether an impairment has a substantial adverse effect on a person's ability to carry out normal day-to-day activities; or

(b) whether such an impairment has a long-term effect."

(ii) Schedule 1 of the 1995 Act:-

"2(1) The effect of an impairment is a long-term effect if –

(a) it has lasted at least 12 months;

(b) the period for which it lasts is likely to be at least 12 months; or

(c) it is likely to last for the rest of the life of the person affected.

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

...

4(1) An impairment is to be taken to affect the ability of the person concerned to carry out normal day-to-day activities only if it affects one of the following –

(a) mobility;

(b) manual dexterity;

(c) physical co-ordination;

(d) continence;

(e) ability to lift, carry or otherwise move everyday objects;

(f) speech, hearing or eyesight;

(g) memory or ability to concentrate, learn or understand; or

(h) perception of the risk of physical danger.

(i) taking part in normal social interaction; or

(j) forming social relationships

…

6(1) An impairment which would be likely to have a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities, but for the fact the measures have been taken to treat or correct it, is to be treated as having that effect.

(2) In sub-paragraph (1) 'measures' include, in particular, medical treatment ... ."

20. The uncontroversial decision of ***Goodwin v The Patent Office [1999] ICR 302*** establishes that the tribunal's approach in determining whether a person has a disability is to consider:

a. Whether the person has a physical or mental impairment;

b. Whether the impairment affects the person's ability to carry out normal day-to-day activities;

c. The effect on such activities must be 'substantial';

d. The effects must be 'long term'.

21. The Equality Commission Disability Code of Practice – Employment and Occupation (as amended) states:

"<u>What does 'impairment' cover?</u>

It covers physical or mental impairments; this includes sensory impairments, such as those affecting sight or hearing.

<u>Are all mental impairments covered?</u>

The term 'mental impairment' is intended to cover a wide range of impairments relating to mental functioning, including what are often known as learning disabilities.

What is a 'substantial' adverse effect?

A substantial adverse effect is something which is more than a minor or trivial effect. The requirement that an effect must be substantial reflects the general understanding of disability as a limitation going beyond the normal differences in ability which might exist among people." (Emphasis added)

Meaning of Discrimination

22. Section 3A of the 1995 Act:-

"(1) For the purposes of this Part a person discriminates against a disabled person if –

…

(2) For the purpose of this Part a person also discriminates against a disabled person if he fails to comply with the duty to make reasonable adjustments imposed on him in relation to the disabled person.

…

(5) A person directly discriminates against a disabled person if, on the grounds of the disabled person's disability, he treats the disabled person less favourably than he treats or would treat a person not having that particular disability whose relevant circumstances including his abilities are the same as, or not materially different from, those of the disabled person.

(6) If, in a case falling within sub-section (1), a person is under a duty to make reasonable adjustments in relation to a disabled person but fails to comply with that duty, his treatment of that cannot be justified under sub-section (3) unless it would have been justified even if he had complied with that duty".

Duty to Make Reasonable Adjustments

23. Section 4A of the 1995 Act:-

"(1) Where –

(a) a provision, criterion or practice applied by or on behalf of an employer, or

(b) any physical feature or premises occupied by the employer, places the disabled person concerned at a substantial disadvantage in comparison with persons

who are not disabled, it is the duty of the employer to take such steps as it is reasonable, in all the circumstances of the case, for him to have to take in order to provision, criterion or practice, or feature, having that effect.

(2) In sub-section (1) 'the disabled person concerned' means –

...

(b) in any other case, a disabled person who is –

...

(ii) an employee of the employer concerned;

(3) Nothing in this section imposes any duty on an employer in relation to a disabled person if the employer does not know, and could not reasonably be expected to know –

...

(b) in any case, that person has a disability and is likely to be affected in the way mentioned in sub-section (1)."

24. The EAT provided guidance to tribunals on how they should approach the issue of reasonable adjustments in the well established case of ***Environment Agency v Rowan [2008] IRLR 20.*** The EAT stated, at paragraph 27, that:

"In our opinion an Employment Tribunal considering a claim that an employer has discriminated against an employee pursuant to Section 3A(2) of the Act by failing to comply with the Section 4A duty must identify:

(a) the provision, criterion or practice applied by or on behalf of an employer, or

(b) the physical feature of premises occupied by the employer,

(c) the identity of non-disabled comparators (where appropriate) and

(d) the nature and extent of the substantial disadvantage suffered by the Claimant. …

In our opinion an Employment Tribunal cannot properly make findings of a failure to make reasonable adjustments under Sections 3A(2) and 4A(1)without going through that process. Unless the Employment

Tribunal has identified the four matters we have set out above it cannot go on to judge if any proposed adjustment is reasonable. It is simply unable to say what adjustments were reasonable to prevent the provision, criterion or practice, or feature, placing the disabled person concerned at a substantial disadvantage".

25. PCPs are not defined in legislation and so it is left to the judgement of individual courts and tribunals to see whether conduct fits the description of a PCP. Langstaff P in ***Nottingham City Transport Ltd v Harvey [2013] EqLR 4, [2013] All ER (D) 267 (Feb), EAT*** held that a *'practice connotes something which occurs more than on a one-off occasion and … has an element of repetition about it.'*

Knowledge

26. As per Section 4A (3) of the DDA above (paragraph 23), the duty to make reasonable adjustments is triggered only if the employer knows that the relevant person is disabled and that the disability is likely to put him at a substantial disadvantage in comparison with non-disabled persons. Knowledge is not limited to actual knowledge but extends to constructive knowledge – namely, what the employer ought reasonably to have known.

27. In ***Lamb v The Garrard Academy EAT/0042/18*** – Simler J held at paragraph 15:

"Knowledge of disability, whether actual or constructive, must be knowledge of the following three matters:

(i) the impairment (whether mental or physical);

(ii) that it is of sufficient long-standing or likely to last 12 months at least;

(iii) that it sufficiently interfered with the individual's day to day activities to amount to a disability".

Harassment on grounds of disability

28. Section 3B of the DDA sets out the definition of harassment on the grounds of disability:-

"Meaning of "harassment"

(1) For the purposes of this Part, a person subjects a disabled person to harassment where, for a reason which relates to the disabled person's disability, he engages in unwanted conduct which has the purpose or effect of –

(a) violating the disabled person's dignity, or

(b) creating an intimidating, hostile, degrading, humiliating or offensive environment for him.

(2) Conduct shall be regarded as having the effect referred to in paragraph (a) or (b) of subsection (1) only if, having regard to all the circumstances, including in particular the perception of the disabled person, it should reasonably be considered as having that effect."

29. It is clear that there is no requirement for a comparator in cases of harassment. The tribunal must focus on the treatment of the claimant and not on any comparison with the treatment of a comparator.

Victimisation

30. Section 55 of the Disability Discrimination Act 1995 (as amended) provides, so far as is relevant to these proceedings:-

"(1) "… a person ("A") discriminates against another person ("B") if

(a) he treats B less favourably that he treats or would treat other persons whose circumstances are the same as Bs; and

(b) he does so for a reason mentioned in sub section (2).

(2) The reasons are that –

(a) B has

(i) brought proceedings against A or any other person under this Act; or

(ii) given evidence or information in connection with such proceedings brought by any person; or

(iii) otherwise done anything under this Act in relation to A or any other person; or

(iv) alleged that A or any other person who has contravened this Act or

(b) A believes or suspects that B has done or intends to do any of those things.

Burden of Proof

31. "17A Enforcement, remedies and procedure.

(1) A complaint by any person that another person—

(a) has discriminated against him, or subjected him to harassment, in a way which is unlawful under this Part, or

(b) is, by virtue of section 57 or 58, to be treated as having done so, may be presented to an industrial tribunal.

....

1(C) Where, in the hearing of a complaint under sub-section (1), the complainant proves facts on which the Tribunal could, apart from this sub-section, conclude in the absence of an adequate explanation that the respondent is acting in a way which is unlawful under this Part, the Tribunal shall uphold the complaint unless the respondent proves that he did not so act."

32. In ***McCorry and Others (as the Committee of Ardoyne Association v McKeith [2017] NICA IRLR 253*** the Northern Ireland Court of Appeal summarised the relevant law regarding the passing of the burden of proof:

"39

The approach to the shifting burden of proof was considered by the Court of Appeal in England and Wales in ***Igen Ltd v Wong*** **[2005] IRLR 258***. It was stated that the statutory amendments required a two-stage process. The first stage required the complainant to prove facts from which the tribunal could, apart from the section, conclude, in the absence of an adequate explanation, that the employer had committed, or was to be treated as having committed, the unlawful act of discrimination against the employee. The second stage, which only came into effect on proof of those facts, required the employer to prove that he did not commit or was not to be treated as having committed the unlawful act, if the complaint is not to be upheld.*

40

The issue was revisited by the Court of Appeal in England and Wales in ***Madarassy v Nomura International plc*** **[2007] IRLR 246** *which set out the position as follows (italics added):*

'56. The Court in ***Igen v Wong*** *expressly rejected the argument that it was sufficient for the complainant simply to prove facts from which the tribunal could conclude that the respondent "could have" committed an unlawful act of discrimination.* The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that on the balance of probabilities, the respondent had committed an unlawful act of discrimination.

57. "Could conclude" [in the Act] must mean that "a reasonable tribunal could properly conclude" from all the evidence before it. This would include evidence adduced by the complainant in support of the allegations of sex discrimination, such as evidence of a difference in status, a difference in treatment and the reason for the differential treatment. It would also include evidence adduced by the respondent contesting the complaint. Subject only to the statutory "absence of an adequate explanation" at this stage (which I shall discuss later), the tribunal would need to consider all the evidence relevant to the discrimination complaint; for example, evidence as to whether the act complained of occurred at all, evidence as to the actual comparators relied on by the complaint to prove less favourable treatment; evidence as to whether the comparisons being made by the complainant were of like with like as required by [the Act]; and available evidence of the reasons for the differential treatment.

58. The absence of an adequate explanation for differential treatment of the complainant is not, however, relevant to whether there is a prima facie case of discrimination by the respondent. The absence of an adequate explanation only becomes relevant if a prima facie case is proved by the complainant. The consideration of the tribunal then moves to the second stage. The burden is on the respondent to prove that he has not committed an act of unlawful discrimination. He may prove this by an adequate non-discriminatory explanation of the treatment of the complainant. If he does not, the tribunal must uphold the discrimination claim."

RELEVANT BACKGROUND

33. The claimant had two periods of employment with the Department for Communities. The first period commenced on 17 October 1994 and ended with his resignation on 7 November 1997. The second period commenced on 27 April 1998 and ended on 11 March 2020 following his dismissal for gross misconduct. At the time of his dismissal, the claimant was employed as a Quality Assurance Checker at Executive Officer 2 level within the Operational Control Centre of Universal Credit.

34. On 6 September 2019, the claimant was suspended on full pay whilst an investigation was carried out, by the respondent, into a possible breach of conduct in relation to breach of procedures and multiple unauthorised accesses to departmental computer systems. While this investigation was carried out, the claimant was assured that, *"Suspension at this point is not a disciplinary penalty."*

35. The decision to suspend arose following a complaint from a member of the public on 1 August 2019. The allegation from the member of the public was that the claimant, who she had previously been in a relationship with, had accessed her personal data and had been constantly sending her messages and emails mentioning information he had gathered from her confidential Universal Credit (UC) claim.

36. Following receipt of this complaint, the Benefits Security Unit, within the Department for Communities (DFC), carried out enquiries and forwarded an investigation report to Employee Relations, within NICS HR. The findings of this investigation indicated that the claimant's smartcard, which is used to access the benefit system, had been used to access his former partner's account *"for 92 dates between 26 November 2018 and 16 August 2019. On most dates, there were multiple accesses throughout the day…."*

37. The investigation report also confirmed that initial checks, using the claimant's payroll number 2340984, produced no results. However, it was confirmed that the claimant's smartcard, which was issued when he had been employed in the Child Maintenance Service, had been allocated when he was paid under a different payroll number, 1182279. The smartcard in the claimant's possession, at the relevant time, was still registered with his previous 1182279 number. The Benefits Security Team were able to identify the exact nature of the access and what the claimant would have been able to view. On each date, the smartcard accessed the member of the public's Customer Information System ("CIS") account and the claimant would have been able to view her personal details including her name, address, contact details, relationships, other interested systems and her complete benefit award information.

38. On 3 September 2019, the Benefit Security Unit informed the respondent that a further complaint had been received from the original member of the public's new partner who alleged his information had also been accessed by the claimant.

39. The claimant was suspended from work on Friday 6 September 2019 by his manager, Mr Martin Sturgeon. Also present at the suspension meeting was Grainne Mc Allister, Deputy Principal in Operational Control Centre.

40. The claimant subsequently raised an informal complaint regarding the manner with which the suspension meeting was dealt with. This complaint was considered by David Malcolm, Director of Universal Credit Operations at the relevant time, who concluded, on 9 December 2019, that the claimant's complaints were unfounded.

41. The claimant also raised a formal grievance into the manner with which the suspension was dealt with. By email of 8 October 2020, the claimant's grievance was not upheld.

42. A disciplinary meeting was held on 4 February 2020. By the time of the

disciplinary meeting, investigations had uncovered that there had been 315 accesses to the claimant's former partner's information through the respondent's computer systems and a further 44 accesses to her new partner's information. The charges put to the claimant, in a letter dated 16 January 2020, were as follows:

- *"It is alleged that from 19/2/2019 to 05/09/2019, you made 315 unauthorised accesses to a customer's account on various Departmental computer systems, without legitimate business reason.*

- *It is alleged that from 21/03/19 to 30/08/19, you made 44 unauthorised accesses to another customer's account, on various Departmental computer systems, without legitimate business reason."*

43. The claimant attended the disciplinary meeting, which was conducted by Ms Toner, and was given the opportunity to answer the allegations. While the claimant accepted that he had accessed the accounts of his former partner and her new partner, he denied doing so 315 times (in the case of his partner) or 44 times (in the case of his former partner's new partner).

44. The decision to discipline the claimant, or not, was taken by the Disciplinary Decision Officer, Mrs Burns. Mrs Burns made this decision after having considered a report prepared for her by Ms Toner. On 11 March 2022, a decision letter was issued to the claimant by the Disciplinary Decision Officer, Mrs Burns, who decided that the claimant should be dismissed with immediate effect. The reasons for the decision were as follows:-

"……

- *the extent of the unauthorised accesses on the Departmental Computer Systems in relation to your former partner (315 times);*

- *the extent of the unauthorised accesses on Departmental Computer Systems in relation to your former partner's new partner (44 accesses);*

- *that you were fully aware of the procedures and guidance for access to computer records;*

- *that you were fully aware of the consequences of a breach of procedures and guidance; and*

- *the potential reputational damage to the Department demonstrated by the fact that two complaints had been received from members of the public and the absence of any legitimate business reason for the accesses."*

45. The claimant submitted an appeal to the decision on 16 March 2020. An appeal meeting was arranged for 22 April 2020. However, due to restrictions

caused by the Covid 19 Pandemic, it was not possible to hold that meeting and the claimant was given the opportunity to make written submissions instead. The claimant accepted this alternative and duly forwarded submissions on 2 April 2020 alongside 22 additional pieces of what he purported was supporting evidence.

46. After considering the further information and submissions of the claimant, the Appeal Officer, Ms Breen, issued her decision on 16 June 2020. Ms Breen upheld the original decision to dismiss the claimant.

RELEVANT FINDINGS OF FACT

47. Having considered the evidence given by all the witnesses and the content of relevant documents, referred to by the parties, along with the submissions of both parties, the tribunal found the following relevant facts proven on the balance of probabilities. This judgment records only those findings of fact necessary for determination of the issues.

48. The tribunal accepts that the claimant attended with his GP, on 11 August 2010, and that his GP confirmed that the claimant developed significant stress related issues, in February 1998, in the aftermath of a bomb attack on his place of work. The tribunal also accepts the evidence of the GP letter that the claimant's symptoms were consistent with the disorder of post traumatic stress disorder (PTSD) and tinnitus.

49. The tribunal further accepts the unchallenged medical evidence, from the claimant, that he suffers from hearing loss in his left ear.

Suspension meeting on 6 September 2019

50. There is no dispute between the parties that the claimant was suspended on 6th September 2019. Present at the suspension meeting were the claimant, his manager, Martin Sturgeon, and the Deputy Principal in the Operational Control Centre, Grainne McAllister.

51. There is a dispute between the parties as to whether or not the door of the room was locked during the suspension meeting. The claimant alleged that when he was brought into the suspension meeting, Ms McAllister locked the door of the room when he sat down. Both Ms McAllister and Mr Sturgeon deny this allegation and both adamantly say that the door was not locked. Indeed Ms McAllister stated, in evidence, that she didn't even know there was a lock on the door.

52. The tribunal has taken into consideration the following factors:-

    i. in a telephone call made to Eleanor Cusick on 9 September 2019, three days after the suspension meeting, the claimant made a number of complaints about how the suspension was handled. The

tribunal notes that the locking of the door was not mentioned during the phone call;

ii. the claimant also makes no complaint about the locked door either at his disciplinary hearing or his appeal hearing.

53. The tribunal therefore finds, on the balance of probabilities, that the door was not locked. The tribunal considers that, if this had been an issue for the claimant, he would have raised it either on the telephone with Ms Cusick at the disciplinary hearing or at the appeal hearing. The claimant did not do so.

54. There is no dispute between the parties that the claimant thanked both Martin Sturgeon and Grainne McAllister for the sensitive way in which they both handled the meeting.

The Investigation

55. The investigation into the alleged misconduct of the claimant was carried out by the Benefits Security Unit (BSU). Their investigation consisted of an investigation into accesses made by the claimant to his former partner's account, his former partner's new partner account, a customer feedback stencil outlining the complaint from his former partner's new partner, a signed acknowledgment of receipt of OAA1 form by the claimant, copies of the claimant's system access log from February 2019 to August 2019 and a summary of all the systems accesses by the claimant. One of the claimant's complaints with regard to his dismissal was that he was never invited to an investigation interview by BSU during their investigation.

56. The explanation proffered by the respondent, which the tribunal accepts, for no investigatory interview, was that the enquiries and evidence from the Benefits Security Unit, within their investigation, was of such a nature (being technical evidence based on accesses to the system) that an investigatory interview was not necessary. The tribunal is therefore satisfied that an investigatory meeting with the claimant would have added no more weight to the evidence provided by the Benefits Security Unit and thus an investigatory interview was not required and it was reasonable of the respondent not to have such an interview.

57. The tribunal also finds that an investigatory interview is not a mandatory requirement under the disciplinary policy as paragraph 5.5, of the policy itself, makes it clear that an interview is not obligatory by stating that *"staff **may** (tribunal's emphasis) be required … which **may** (tribunal's emphasis) include attending an interview."*

The Disciplinary Hearing

58. It is common case that the claimant was invited to a disciplinary hearing, by letter of 16 January 2020, to answer the charges set out at paragraph 42 above. There is no dispute between the parties that the claimant asked to record the meeting but that this request was declined. The disciplinary hearing

took place on 4th February 2020. As set out at paragraph 43 above, Ms Toner conducted the disciplinary hearing. Her role was to carry out the disciplinary hearing and thereafter prepare a file, with recommendations, in order for Ms Burns to make a decision.

59. The minutes of the disciplinary hearing were contained within the tribunal bundle. The tribunal is satisfied, from these minutes, that the claimant was able to properly answer the allegations put to him by the respondent.

60. The following issues were raised by the claimant at the disciplinary hearing:-

- ***Issue of the user ID number***

61. The claimant advanced a case that the evidence used to dismiss him for the unauthorised accesses was flawed. The claimant's case was that the user ID attributed to the alleged unauthorised access was terminated, that it didn't relate to him and that the evidence should not have been used to dismiss him.

62. While Ms Toner had the benefit of the report from the Benefits Security Unit, and emails from Caroline Crawford explaining the issue with the claimant's payroll number, at the disciplinary hearing, the respondent took further steps to investigate and satisfy herself on this matter. She took the step of contacting Benefits Security Unit herself who confirmed that the claimant had two payroll numbers during his time of employment with the respondent – payroll number 2340984, which was the claimant's current payroll number, and payroll number 1182279, which was issued whenever the claimant worked in Child Maintenance Service. Benefits Security Unit also confirmed that an operator ID, for any staff member, is the claimant's payroll number prefixed with the number 9. The tribunal accepts that the claimant, during his time of employment with the respondent, therefore had two operator IDs - 92340984 and 91182279.

63. The tribunal is therefore satisfied, and so finds, that Ms Toner was reasonable in concluding that the claimant accessed the accounts of his former partner and her new partner using smartcard operator ID 91182279.

- ***Legitimate business reason***

64. As part of his case, the claimant also argued that, in relation to the charges put to him for accessing a customer's account (see paragraph 42 above) he was not provided with any sensible explanation or definition, from Ms Toner, as to the meaning of *"legitimate business reason"* to allow him to explain why he had accessed the accounts of his former partner and her new partner. In his witness statement, the claimant pursued the argument that this was an example of the respondent not following fair procedure in relation to his dismissal.

65. Having examined the minutes of the disciplinary hearing, and the evidence of

Ms Toner, and having considered the contemporaneous minutes of the meeting between the claimant and Ms Toner, the tribunal finds that Ms Toner did provide the claimant with a reasonable explanation as to the meaning of *"legitimate business reason"* – that, in the context of the claimant's work, it meant a customer wishing to make a claim or report a change of circumstances to his claim therefore requiring the claimant, as an operator, to access the customer's account. The tribunal therefore rejects the claimant's evidence that he was not provided with a proper explanation and the tribunal finds that the claimant was provided with a reasonable explanation. The tribunal is therefore satisfied that the claimant was given the opportunity to comment and put forward an explanation to the charges against him.

66. At the disciplinary hearing, the claimant accepted that he had accessed the accounts of his former partner and her new partner. The claimant advanced the argument that his reasons for accessing his former partner's and her new partner's account was in order to cut and paste a form of wording, in those accounts, which he wanted to use in other cases. Ms Burns concluded at the disciplinary that this was not a "*legitimate business reason"* to access both his former partner and her new partner's account. Before making a conclusion on this point, Ms Burns contacted Mr Sturgeon, the claimant's line manager to establish the merits of cutting and pasting a form of words. The tribunal accepts the unchallenged evidence of the respondent that Mr Sturgeon confirmed to Ms Burns that the checking history required, in the claimant's job, is very basic and that there would be little benefit in copying and pasting from one case to another. The tribunal is satisfied that Ms Burns, before making a conclusion on the disciplinary outcome, took reasonable steps to further consider the explanation proffered by the claimant.

- ***Family and Friends Policy***

67. It is common case between the parties that the respondent has a "Family and Friends Policy" which was contained within the agreed tribunal bundle and to which the tribunal was referred. The policy provides guidance for staff dealing with benefit claims for members of their family and friends. The background to this guidance states that :

> *"This guidance contains instructions for staff that they must never access their own, or any of their friends or families details on any computer system. Nor should staff look at or access customer/staff records or official information that they have no business purpose to look at – this is called browsing and is a criminal act,……"*

68. The definition of a family member includes a partner and the guide further states that *"this definition will apply even if that family member is estranged from the member of staff."*

69. Furthermore, a friend was defined as *"a person (other than a relative) with whom one is on mutual terms of affection; an ally; an associate; a colleague, a helper, a sympathiser, or a person with whom a member of staff has social contact.*

70. It is not disputed that the claimant signed this policy on 13 February 2018 confirming that he had "*read a copy of the guidance for staff dealing with benefit claims for family and friends as an appointee."*

71. At his disciplinary hearing, the claimant argued that because he had been in a relationship with his former partner for only 18 months and because they were no longer in contact, the policy didn't apply. At the disciplinary hearing, the tribunal is satisfied that Ms Toner, as part of her investigation, explored with the claimant whether or not the family and friends policy applied to him. The tribunal finds that it was reasonable of the respondent to adopt the position, on the clear terms of the policy as set out above at paragraphs 67-70, that the policy did apply to claimant.

- ***Not provided with complaints from members of the public***

72. At the disciplinary hearing, the claimant complained that he had not received a copy of the complaints made by the two members of the public (i.e.his partner and former partner) in advance of his disciplinary hearing. The claimant advanced the case, at tribunal, that this was a feature of the case rendering his dismissal unfair. The tribunal accepts the respondent's position that there was no need for the claimant to ever see these complaints. The complaints made by the members of the public sparked an investigation which uncovered that the claimant had been making unauthorised accesses to two people's accounts – that was the charge levied against the claimant, which he admitted to under cross-examination, for which he was ultimately dismissed. The tribunal agrees with the respondent and finds that the claimant was never charged with sending inappropriate or threatening messages to members of the public which was the basis of the complaints from members of the public. On that basis, the tribunal finds that there was no need for the claimant to see the complaints from the members of the public, that it was reasonable of the respondent to adopt that position and the respondent's actions didn't render the dismissal unfair.

- ***The disciplinary penalty***

73. There is no dispute between the parties that, having carried out the disciplinary hearing, Ms Toner referred the matter to Ms Gillian Burns, the decision-maker, who gave consideration to all of the information available to her. Having reviewed the case forwarded to her, Ms Burns dismissed the claimant by letter dated 11 March 2020. The disciplinary letter specifically stated:-

> *"I have given careful consideration to all of the information available to me and have decided that your behaviour amounts to gross misconduct on the basis that from 19 February 2019 to 5 September 2019, you made 315 unauthorised accesses to a customer's account on various Departmental computer systems without legitimate business reason. In addition from 21 March 2019 to 30 August 2019, you made*

44 unauthorised accesses to another customer's account, on various Departmental computer systems without legitimate business reason."

74. Ms Burns concluded that the reasons for the claimant's dismissal were as follows:-

- *"the extent of the unauthorised accesses on Departmental computer systems in relation to your former partner (315 accesses);*
- *the extent that the unauthorised accesses on Departmental computer systems in relation to your former partner's new partner (44 accesses);*
- *that you were fully aware of the procedures and guidance relating to accessing customer's records;*
- *that you were fully aware of the consequences of a breach of procedure and guidance;*
- *the potential reputational damage to the Department (two complaints were received);*
- *the absence of any business reason for the accesses."*

75. In considering the appropriate sanction for the claimant, the tribunal is satisfied, from all the evidence, that the respondent took into account the claimant's length of service and previous disciplinary record as well as considering the claimant's health issues which he raised.

The Appeal

76. The claimant appealed the dismissal, on 2 April 2020, on the following grounds:-

- the correctness of procedure;
- evidence used;
- fairness of the dismissal;
- appropriateness of the penalty.

77. The claimant's appeal was scheduled for 22 April 2020. However, due to the national lockdown, in the spring of 2020, arising from Covid-19, the claimant elected to submit a written statement along with copies of the information that he wished to present at the hearing rather than having an in-person hearing. Under the extraordinary circumstances of that time, the tribunal finds that it was reasonable of the respondent to conduct the appeal in this manner.

78. By letter of 16 June 2020, Ms Breen issued a letter upholding the decision to dismiss the claimant. The tribunal is satisfied that Ms Breen took into consideration all matters raised by the claimant, in his appeal letter, and gave due consideration to the four areas outlined above.

79. At the appeal hearing, the tribunal finds Ms Breen made additional enquiries and satisfied herself regarding the two payroll numbers attributable to the claimant and that she also sought clarification from Finance branch to determine when the claimant's user ID changed.

80. The tribunal also finds that Ms Breen made reasonable enquiries and satisfied herself with regard to the claimant's argument, at appeal, that the audit data recording accesses (i.e the times of accesses made by the claimant to the account of his former partner and her new partner) were incorrect as they showed accesses at times outside working hours.

81. The claimant argued that the accesses could not have been made by him if they were outside working hours. Ms Breen sought clarification from Caroline Crawford, on this point, who explained, by email of 17 April 2020, why some accesses appeared on the system outside of working hours. Ms Crawford explained that when an access was made, it created a ping to the system. She further explained that the pings could reach the system after the access and so the timing of the pings, while they represented an access, they did not represent the precise times of the access. The tribunal accepts this unchallenged evidence of the respondent.

82. As part of his appeal, the claimant also complained that Ms Burns had a conflict of interest during the investigation and that she was biased in every role she played. The claimant complained that Ms Burns was initially appointed to deal with his grievance submitted on 14 November 2019, that she was the point of contact during his suspension and that she was the decision officer in his disciplinary case. The tribunal is satisfied that Ms Breen reasonably considered this issue, as part of her appeal, and came to the reasonable conclusion that there was no conflict in Ms Burns being initially appointed to deal with the claimant's grievance, which he submitted on 14 November 2019, but that she passed the matter to Robert Stewart given that she was aware that there was a disciplinary investigation underway which would ultimately be referred to her.

83. The claimant also complained to the tribunal that no mitigating factors were taken into account at the appeal hearing. However, in terms of the claimant's appeal to Ms Breen, a *"failure to consider mitigating factors"* was not part of the terms of appeal submitted by the claimant. That said, the appropriateness of the penalty was a factor considered by Ms Breen. The tribunal is satisfied that Ms Breen considered the appropriate level of penalty taking into account the charges put to the claimant and the extent of the accesses under consideration.

CONCLUSIONS

UNFAIR DISMISSAL CLAIM

84. In respect of the claimant's unfair dismissal claim, the tribunal concludes as follows:

85. The respondent has shown the reason for the dismissal – namely gross misconduct, a potentially fair reason under the Employment Rights (NI) Order 1996. The respondent was presented with an investigation report which indicated that the claimant had accessed the accounts of the two complainants for no legitimate business reason. Under the Family and Friends policy, this was identified as serious misconduct – a potentially fair reason for dismissal under article 130(2) of the Employment Rights (NI) Order 1996.

Was there an actual belief by the respondent in the alleged misconduct by the claimant?

86. As per the findings of fact, the respondent had a genuine belief in the claimant's misconduct. The respondent considered all the evidence before it (i.e. the report from the Benefit Security Unit, the investigation by Ms Crawford, the disciplinary hearing by Ms Toner and the submissions of the claimant at the disciplinary hearing), to form the genuine belief that the claimant was guilty of the misconduct in respect of those charges which Ms Burns ultimately upheld in her decision letter of 11 March 2020.

87. The tribunal also concludes that Ms Breen carried out a conscientious appeal to form a genuine belief in the claimant's guilt.

Did the respondent have reasonable grounds on which to sustain this belief ?

88. As per the finding of fact above, at paragraph 66, the claimant himself accepted that he had accessed the accounts of the two complainants. The claimant also accepted that he had read a copy of the guidance for staff dealing with benefit claims for family and friends. The claimant confirmed that he had signed this document on 13 February 2018. This guidance document confirms that there are no acceptable situations when staff may use Benefit or CIS computer systems to obtain information for any purpose other than their official business. The claimant did not demonstrate that accessing the accounts of the two complainants was for a legitimate business reason and so the claimant was in breach of the family and friends policy. The tribunal therefore concludes that there was a reasonable basis for the respondent's belief that the claimant was guilty of accessing the accounts of his former partner and her new partner.

Did the respondent carry out as much investigation as was reasonable in the circumstances?

89. As per the finding of fact, at paragraph 56 above, the tribunal was satisfied that, given the report submitted by the Benefit Security Unit, there was no need for an investigation meeting with the claimant. The tribunal was further satisfied that both the disciplinary hearing and the appeal hearing were carried out in a careful and considered approach by the respondent. The tribunal therefore concludes that the amount of investigation carried out by the

respondent in relation to these matters was reasonable in all the circumstances.

Was the dismissal within the band of reasonable responses?

90. The tribunal concludes that the respondent acted reasonably and that the decision to dismiss the claimant was within the band of reasonable responses in all the circumstances. The decision to dismiss was also in accordance with equity and the substantial merits of the case. The tribunal concludes that none of the matters relied upon by the claimant have led to unfairness to him which rendered it inequitable or contrary to the equity or the substantial merits of the case for the respondent to have dismissed him.

91. The claim of unfair dismissal is therefore dismissed in its entirety.

DISABILITY CLAIM

Was the Claimant a Disabled Person for the Purposes of the 1995 Act?

92. The claimant relies upon the conditions of post-traumatic stress disorder (PTSD), tinnitus and partial deafness as the disabilities from which he suffers. The tribunal has noted the content of the medical evidence submitted on behalf of the claimant to advance his claim of disability.

93. However, the claimant's witness statement does not set out any evidence, in a clear fashion, as to how the claimant meets the test, for disability, laid down in the 1995 Act. In particular, his evidence did not address the effects of his conditions of PTSD, tinnitus or left ear partial deafness on his day to day activities.

94. The tribunal, therefore, in these circumstances is placed in a very difficult position. The claimant, who is a litigant in person, clearly believes that he has long term conditions which amount to physical or mental impairments. The tribunal is left to consider what can be distilled from the medical notes and records provided in the bundle.

95. On the basis of the available evidence, the tribunal concluded that the claimant's PTSD, on the balance of probabilities, amounted to a mental impairment while his tinnitus and partial deafness amounted to a physical impairment.

96. The tribunal then had to consider whether or not the claimant's PTSD, tinnitus and left ear partial deafness had a substantial impact on the claimant's day to day activities, or that such impact had lasted, or is expected to last, 12 months or more. The claimant did not adduce any evidence to the tribunal to allow it to consider this. In the circumstances, the tribunal concluded that it could not be satisfied, on the evidence before it, that the claimant's conditions of PTSD, tinnitus or left ear partial deafness amounted to disabilities, within the meaning of the Disability Discrimination Act 1995, which had a substantial and adverse effect on his ability to carry out day to day activities. Indeed, the

tribunal had the benefit of observing the claimant, throughout five days of hearing, and the tribunal observed no difficulties nor did the claimant indicate that he had any difficulty in his ability to hear at the hearing.

The Claimant's Disability Discrimination Claim

97. Given that the tribunal determined that the claimant does not have a disability for the purposes of the Disability Discrimination Act 1995, the claimant's claim for disability discrimination fails. However, if the tribunal had concluded that the claimant was disabled, for the purposes of the Disability Discrimination Act 1995, the tribunal, for the sake of completeness, considered the claimant's claims of disability discrimination and finds as follows:-

Knowledge of Disability

98. From the medical evidence provided by the claimant, the extent of the respondent's knowledge was that the claimant had medical conditions, namely PTSD, tinnitus and partial deafness. However, knowledge of a medical condition does not constitute knowledge of a disability, as the definition of disability requires more than having a medical condition.

99. Moreover, the claimant did not adduce evidence that the respondent had constructive knowledge that the claimant's disability was likely to place the claimant at a substantial disadvantage in comparison with non-disabled persons. Accordingly, had the tribunal found that the claimant had a disability, given the tribunal's finding that the respondent did not have either actual or constructive knowledge of the claimant's disability, his claim of direct disability discrimination and failure to make reasonable adjustments is dismissed.

Direct Discrimination on Grounds of Disability

100. Even if the tribunal found that the claim did have a disability and that the respondent had knowledge of it, to the extent that the claimant alleged direct discrimination, this tribunal then considered the claimant's claim of direct discrimination.

101. The claimant's claim of direct disability discrimination was summarised at a CMPH on 10 August 2021 as made up of two allegations:

(i) The conduct of Mr Sturgeon at the suspension meeting on 6 September 2019 – the claimant alleged that Mr Sturgeon intimidated him with knowledge of his disability
(ii) The failure of the respondent to deal with a complaint and grievance raised by the claimant in relation to Mr Sturgeon's behaviour subsequent to the suspension.

102. These allegations were elaborated on further within the claimant's witness statement. At the submissions hearing, however, the claimant sought to further argue for the first time that further acts of direct disability discrimination by the respondent were:

(i) the period of time for which he was suspended (September 2019 until March 2020); and

(ii) his belief that his arrest by the PSNI, in November 2019 was at the request of the respondent.

103. These further allegations had not formed part of the claimant's direct disability claim before, they were not in his witness statement, and the respondent's witnesses were not cross-examined on this point. We have therefore disregarded these two further allegations as they were not part of the case before us.

104. At the hearing, the claimant relied upon Mr Sturgeon as his comparator for his direct disability claim. However, at submissions, the claimant indicated that he was now relying upon a hypothetical comparator i.e. someone who did not have the claimant's disability but was subjected to the acts the claimant alleges at 99 above. However, regardless of who the claimant chose as his comparator (i.e. either Mr Sturgeon or a hypothetical comparator), the claimant did not pursue this aspect of his case in his witness statement nor did the claimant provide any evidence to suggest that any difference in treatment was on the grounds of the claimant's alleged disability. Accordingly, this tribunal cannot conclude that the claimant has proven facts from which the tribunal conclude, in the absence of an adequate explanation, that the respondent has committed an unlawful act of disability discrimination against the claimant per ***Igen*** and ***Madarassy***. Accordingly, the claimant's claim in this respect fails and is dismissed.

Failure to Make Reasonable Adjustments

105. Within his witness statement, the claimant alleges that there was a failure by the respondent to make reasonable adjustments by not permitting him to record the disciplinary hearing and the manner with which the claimant was brought to the suspension meeting. However, neither in his replies to a request for particulars nor in his witness statement did the claimant identify any PCP to which he was subject. In any event, it is the role of the tribunal to identify the relevant PCP(s) being applied by the employer. For the purposes of this claim, the tribunal concludes that the only possible relevant PCP applied by the respondent was its decision not to allow the claimant to record his disciplinary hearing. As per the findings of fact, there was no dispute between the parties that the claimant had asked for the disciplinary hearing to be recorded but that this request was refused by the respondent. However, the tribunal does not find that this is a relevant PCP for the purposes of the 1995 Act as, according to Langstaff P in ***Nottingham City Transport Ltd v Harvey [2013] EqLR 4, [2013] All ER (D) 267 (Feb), EAT***, a *'practice connotes something which occurs more than on a one-off occasion and … has an element of repetition about it.'*

106. Even if the tribunal had found that a PCP applied, in line with the decision in ***Rowan***, the next issue for this tribunal was to determine whether or not this

PCP put the claimant at a substantial disadvantage compared to someone without a disability.

107. The claimant did not adduce evidence of any substantial disadvantage that he was placed at compared to a non-disabled person in relation to this PCP. Accordingly, the tribunal concludes that the claimant has failed to establish that he was both subject to a PCP and that he was placed at any substantial disadvantage.

108. The tribunal further concludes that even if the respondent had the requisite knowledge of the claimant's disability, in the absence of any evidence adduced to demonstrate any substantial disadvantage, the claimant has not established that the respondent was under any duty to make reasonable adjustments and therefore the claimant's claim, in respect of discrimination by an alleged failure to make a reasonable adjustment, is also dismissed.

Harassment on the Grounds of Disability

109. The claimant alleged, in his witness statement, that the grounds of his harassment claim were the locking of the doors by Ms McAllister and Mr Sturgeon at the meeting on 6 September 2019 and the behaviour of Mr Sturgeon during this meeting.

110. However, as per the finding of fact above, at paragraph 53, the door of the meeting room was not locked. On that basis, the tribunal concludes that the claimant was not harassed on the grounds of disability

111. Within his witness statement, the claimant also refers to the actions of Mr Sturgeon, at the suspension meeting, as being an act of harassment. However, the claimant has provided no further detail on what those actions were. Indeed, as per the finding of fact, at paragraph 54, the claimant actually thanked Mr Sturgeon and Ms McAllister, at the end of the suspension meeting, for the sensitive way in which they handled the meeting. The tribunal concludes this action to be at odds with someone who felt harassed,

112. Accordingly, the tribunal, in considering all the evidence before it, concludes that the claimant has not proved facts from which a tribunal could conclude, in the absence of an adequate explanation, that for a reason which related to the claimant's disability, either Ms McAllister or Mr Sturgeon, engaged in unwanted conduct which violated the claimant's dignity, or created an intimidating, hostile, degrading, humiliating or offensive environment for him. Accordingly, the claimant's claim of unlawful harassment contrary to the 1995 Act has not been proven and is dismissed.

Victimisation

113. The basis of the claimant's victimisation claim is set out within his witness statement. The claimant alleged that he was victimised in how a grievance he submitted, on 14 November 2019, was conducted. He argued that Ms Burns should never have been allocated his grievance given that she was also

involved in his disciplinary case. He also argued, within his witness statement, that Mr Sturgeon and Ms Cusick were permitted by Ms Burns to play central roles within his disciplinary even though his grievance involved Mr Sturgeon. The claimant further argued that Mr Malcolm didn't fairly deal with his informal complaint about the suspension meeting, that he should never have dealt with that complaint at all and that Mr Malcolm had refused to allocate his grievance to anyone to deal with.

114. However, the claimant did not adduce any evidence, in relation to this aspect of his claim, and the tribunal is at a loss as to being able to understand what the basis of the claimant's victimisation claim is. The claimant has not set out what he is relying on as his protected act, who his comparator is for the purposes of his victimisation claim nor has he demonstrated any detriment. Accordingly, the claimant's claim of victimisation, contrary to the 1995 Act, has not been proven and is dismissed.

SUMMARY

115. In summary, the tribunal concludes as follows:

(i) the claimant was fairly dismissed on the grounds of gross misconduct;

(ii) the claimant does not have a disability for the purposes of the Disability Discrimination Act 1995;

(iii) the claimant was not less favourably treated on the grounds of disability;

(iv) the claimant has not established that the respondent was under any duty to make reasonable adjustments;

(v) the claimant was not subjected to harassment for the purposes of the Disability Discrimination Act 1995;

(vi) the claimant was not subjected to victimisation for the purposes of the Disability Discrimination Act 1995.

116. For all of the reasons set out above, all of the claimant's claims are dismissed.

Employment Judge:

Date and place of hearing: 10-14 January 2022, Belfast.

This judgment was entered in the register and issued to the parties on: