EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr R Rawnsley	**v**	Lean Engineering and Manufacturing Academy Ltd

Heard at: Birmingham

On: 15,17 & 18 November & 19 December 2016 (Tribunal only)

Before: Employment Judge Cocks
Members: Miss S P Outwin
Mr T Liburd

Appearances:
For Claimant: Ms Foley-Fisher Counsel
For Respondent: Mr R Hignett Counsel

RESERVED JUDGMENT

The judgment of the Tribunal is:

1. **The claim for unfair dismissal fails and is dismissed;**

2. **The claim for discrimination arising from disability under s.15 Equality Act 2010 fails and is dismissed.**

REASONS

There was insufficient time for the evidence, submissions and judgment to be given with oral reasons at the conclusion of the hearing. Accordingly, the representatives sent in written submissions and the tribunal deliberated and reached its reserved judgment on 19 December 2016. The delay in sending

this judgment to the parties was due to the Employment Judge being on sick leave for 6 weeks. She apologises to the parties for this delay.

Issues

1. There was no order made for an agreed list of issues. The parties agreed an amended list with the tribunal, based on the claimant's list of issues, on the morning of the hearing. They are:

Unfair Dismissal

1.1 The claimant was dismissed for misconduct.

1.2 Did the respondent;
(i) have a genuine belief in the claimant's misconduct?
(ii) have reasonable grounds for such belief?
(iii) carry out a reasonable investigation before reaching that conclusion?
(iv) did R carry out a fair procedure?

1.3 Was dismissal within the band of reasonable responses and reasonable in the circumstances?

1.4 If the tribunal concludes the claimant was unfairly dismissed, should any compensation awarded be reduced to take into account the claimant's contributory fault or the principles laid out in 'Polkey'?

1.5 Should there be any reduction to compensation under the 'Devis -v-Atkins' principle, namely for subsequently discovered misconduct?

Discrimination arising from disability

1.6 The claimant alleges that the respondent discriminated against him by failing to support him by not holding review meetings and in dismissing him.

1.7 Did the respondent have knowledge of disability at the relevant time?

1.8 Is the respondent required to have knowledge of the "something" arising from disability and did it have that knowledge?

1.9 Has the claimant been treated unfavourably because of something arising in consequence of his disability?

1.10 Can any discriminatory treatment be justified on objective

grounds i.e. is the discriminatory treatment a proportionate means of achieving a legitimate aim?

2. In discussion with the parties at the start of the Hearing the question arose as to what the claimant contends is the "something arising from disability". In other words what are the effects of his disability (depression) which the claimant says led to the behaviour for which he was disciplined and dismissed?

3. These were described to the tribunal as being: it can take the claimant a little longer to carry out tasks; irritability; standing up for himself; mood swings and erratic behaviour; and difficulties in his interaction with other people. However, the claimant stressed to us that this does not lead him to being aggressive or disrespectful.

4. The respondent accepts that the claimant was a disabled person at the relevant time but contends that the respondent did not have the requisite knowledge, nor should it have had that knowledge, of the claimant as a disabled person by reason of depression.

Relevant findings of fact

5. The tribunal heard evidence by way of written statements, supplemented orally, from the claimant and from Mr David New (Director), Ms Lynda Wood (Academy Manager), Ms Denise New (Director), Gary Redmonds (Chairman) and Ms T Leipacher (Liaison Executive) for the respondent. We make our findings of fact on the basis of the material before us taking into account contemporaneous documents where they exist and the conduct of those concerned at the time. We have resolved such conflicts of evidence as arose on balance of probabilities. We have taken into account our assessment of the credibility of witnesses and the consistency of their evidence with surrounding facts. We had an agreed bundle of documents. References in this judgment to page numbers are to the contents of that bundle.

<u>Background and the respondent's knowledge of disability</u>

6. The claimant was employed by the respondent from 25 March 2013 as a Tutor Assessor. His contract of employment is at pages 32-47. The respondent organisation has two sites, Dudley (where 9 people were employed) and Birmingham (with 13 employees). The respondent provides government funded apprentice training to mainly 16-18 year old students in engineering and manufacturing. It has to comply with safeguarding requirements, such as we see at pages 187-188d. The students are classified as children or vulnerable young people.

7. We have seen a Performance Review (p.48) from 2013 which refers to the claimant as "a valuable team member". It is clear from the respondent's evidence that the claimant's competence and ability to teach the students was well regarded by it.

8. On 20 March 2015, the claimant had a meeting with Lynda Wood. Ms Wood sent her recollection of that meeting to Mr and Mrs New by email dated the same day (50-52). Mr Rawnsley respected and liked Ms Wood. In her email, Ms Wood recorded the claimant's mood swings, changeability and her concerns about how he spoke to managers.

9. It is recorded (52);

> "Richard said if he was ever disciplined he would leave as he wouldn't take that."

Further on Ms Wood stated:

> "I said that we don't want him to leave if he is happy but moods have to change. We can't ever have another day like today as this impacts on colleagues and although we didn't allow it to it could have had an impact on learners (which I stated will never be the case). The job has only changed where it needs to. We have to believe and enjoy what we do. We all have bad days but this has to be few and far between."

10. It appears from the email that the meeting was a positive one but the claimant could have been left in no doubt that if his behaviour on that day continued it would be as Ms Wood put it "the final straw".

11. Ms Wood concluded her email:

> "While writing this account I can see that he has a lot of issues that are going on in his mind. This worries me! I wonder if he is going down again. It looks worse when you write it. Looks like depression when I read this back!"

12. The claimant has a history of bouts of depression from around 2003. When he applied for the job with the respondent, he told it about a heart condition (31e). In late summer 2015, the claimant took time off due to a horse riding accident. This was in respect of physical injury only. Although he was receiving treatment from the Community Mental Health Team in relation to depression (306-309), he did not tell his employer about this.

13. It is the respondent's position that the only time it knew about the claimant having depression for certain was on 2 October 2015. Mr New's evidence was that he only found out about depression when a sick note was received following events on 2 October. He wanted to find out more, hence the respondent's request for a doctor's report and chasing it up.

14. Mr Rawnsley says that when he started work he told the woman

interviewing him about having had depression and she told him not to put it in the application form. This was not in the claimant's witness statement and Veronica Smith has left the respondent's employ. None of the respondent's witnesses were aware of her having been told this. The claimant also said he had not mentioned having bouts of depression when he applied for the job because he was not depressed at the time.

15. In October 2014 the claimant was signed off work for "low mood". Although the claimant was prescribed antidepressants, this is not reflected in the sick note (169). He did, however, make reference to feeling low and being given 'anti-d' to take in a text message to Lynda Wood (49a).

16. The claimant says that in October 2014 Ms Wood knew he had depression, told him that she had suffered from depression herself and was on Citalopram. He alleges that she gave him some of her drugs when he had left his at home. Ms Wood denies this. She remembers the claimant telling her that he was feeling the pressures of work, she started telling him that she had had low periods in her life, she knew he was taking Citalopram and she had been on it herself. Her evidence is that the claimant did not mention having depression on a regular basis, as he alleges, despite speaking most days to him.

17. On the balance of probabilities we accept that whilst Ms Wood knew the claimant was on antidepressants and suffered from low mood, she was not told expressly that he had depression nor did she give him some of her Citalopram. We believe the claimant finds admitting to having a mental health condition difficult.

18. In her record of the meeting of 20 March 2015, Ms Wood stated: "looks like depression when I read this back". This supports her evidence to us that she did not know from the claimant but had speculated that this might be the case. As she put it, if she had known he suffered from depression, why would she have needed to speculate about it? It is more likely than not that Mr Rawnsley did not tell Ms Wood that he had depression.

19. Mr and Mrs New received this email. Mrs New told us she was not a doctor, she did not know that Mr Rawnsley had depression, and does not accept that this email put the respondent on notice of the claimant having depression. Mr New did not see the email as showing that the claimant had depression. It was primarily an email setting out Ms Wood's concerns about the claimant's behaviour and his interaction with others. It ended with her simply speculating that he might have depression.

20. The claimant told us that he told Mr New in the canteen in April 2015 that he suffered on and off with depression. There was a discussion in the canteen between them about a relationship breakdown. Mr New accepts that at this time he knew the claimant suffered with low mood and they had had a discussion about the claimant's personal problems. Mr New firmly denied being told by the claimant about him having depression.

21. Again on the balance of probabilities, we consider it unlikely that Mr Rawnsley did tell Mr New about his suffering from depression. It is clear that the claimant is not someone who willingly wanted to discuss his mental health openly with other people. Even before the tribunal he finds the expression 'mental ill-health' hard to accept, as we saw in his reaction to Mr Hignett in cross-examination. The difficulty for the claimant is that at no point did he tell the respondent that he had depression. It is the tribunal's view that the claimant did not want his employers to know about his condition, until events on 2 October 2015 happened.

22. After the meeting with Ms Wood, which as we have said ended positively, there was no need for the respondent to make further enquiries about the claimant's health. He had not suggested to Ms Wood that his behaviour was because of depression and after the meeting his conduct improved.

23. The respondent accepts that as of 2 October 2015, they became aware of the claimant's condition of depression. As Mr New's notes (page 63) about the day show it was a traumatic one. We do not need to go into the details of what happened, except to say that the claimant now expressly told Mr and Mrs New that he had been seeing a psychiatrist and was on medication for depression. The respondents therefore had the requisite knowledge of Mr Rawnsley having depression as of the 2 October 2016.

Events leading up to dismissal

24. On 1 October 2015, Mr New became aware of an altercation between the claimant and Wendy Shaw, Compliance Manager, the previous evening, about the locking of fire doors. Ms Shaw wrote an account of what happened that day which was sent to Mark Bradley (57). This account formed part of Mr Bradley's Quality Assurance Report on the Dudley branch. Although he had not yet seen the Quality Assurance Report itself, before the events on 2 October, Mr New found out about the incident from Ms Shaw and also about the report referring to other concerns about the claimant's behaviour.

25. Before Mr New could take further action, the claimant had his breakdown on 2 October. Although the claimant does not accept the full accuracy of the note Mr New made at the time, he does not challenge what it records about how unwell he was on that day. Mr New took the view that it was not appropriate at that time to discuss conduct and performance issues as the claimant was obviously very unwell.

26. The claimant was absent from 2 to 9 October with back pain and depression. During that absence a number of conduct issues came to light. They were contained in the Quality Assurance Report of Mr Bradley (p.53-62). They included Ms Shaw reporting that the fire doors were locked; rude and confrontational behaviour from the claimant towards other staff; and the claimant's attitude to learners. It was not about the claimant's competence to do the job, which the respondent felt was good, but more about his behaviour.

27. Mr Bradley reported: “There are concerns over staff comments within LEMA. Staff find Richard “rude, abrupt, arrogant and has an aggressive attitude”. Mr Bradley himself had previously observed Mr Rawnsley “shouting at learners where Lyn needed to step in to defuse the situation”. Mr Bradley concludes his report – “It is clear that Richard has anger issues and is unable to control his actions”.

28. On the claimant’s return to work, Mr New had decided to put any disciplinary action on hold, in order to put a plan in place which would enable the claimant to return to work in line with GP’s recommendations about lighter/amended duties. Mr New was intending to deal with the conduct issues at a further point, but not then. Mr New wanted to get the claimant working again. As a result, it was agreed any future disciplinary action was to be dealt with by Mrs New, particularly with reference to the Quality Assurance Report and the incident with the fire doors on 30 September.

29. There was a meeting on 20 October. The notes are at pages 66-68. This was not a disciplinary meeting but was intended to discuss the way forward in terms of the claimant’s return to work. It was obviously a productive meeting. The claimant explained to Mr New about having a support worker and this was the first Mr New knew of this. Behavioural issues were raised with the claimant, we note that the claimant did not ask what was being referred to. He was clearly aware that the respondent had issues with his conduct and what they were. It seems that the claimant agreed that his behaviour, particularly mood swings needed to improve(67). Nor did the claimant state in that meeting that his behaviour was related to his depression.

30. It was agreed that the claimant would have amended duties and a fresh start by returning to work at the Birmingham site. The notes record the claimant and his mother saying: “….how nice it is to find such supportive employers” (67). Mr Rawnsley gave consent for his employer to obtain medical records from his GP. The respondent wanted to find out how best to support the claimant in the workplace but again reiterated that a change in behaviour would be needed.

31. The claimant alleges that Mr New referred to him as being “a mental case” and that the respondent did not know how to deal with such. We do not find that Mr New referred to the claimant as being “a mental case”. As we have found, Mr Rawnsley finds being referred to as having a mental illness as offensive. He appears to use “mental case” and being mentally ill as interchangeable terms.

32. Further, the claimant is not consistent in his account of what was said by Mr New. In his ET1 he describes Mr New as saying: “don’t know how to deal with a mental case” (13)

33. There is nothing in the minutes of the meeting at pages 66-68, which the claimant countersigned which suggests any such comment was made. It is unlikely that Mr Rawnsley would not have challenged the notes, if he felt

they were inaccurate at the time.

34. At the disciplinary hearing the claimant's version of what the comment was about became: "the comment that concerned me in this meeting was around the fact that you don't know how to look after someone who was mentally ill and this is a concern to me and I find it offensive" (123). In the appeal meeting he says "they referred to me as being a mental case. 3 times it was said I was mentally ill and they did not know how to deal with this".

35. On the balance of probabilities, we accept that Mr New did not call Mr Rawnsley a 'mental case'. It is likely that reference was made to mental illness by Mr New, and the claimant found it offensive to be referred to as mentally ill. That is a very different situation to someone being called "a mental case", which the tribunal agrees would have been a derogatory and discriminatory expression to use. But it was not.

36. The claimant returned to work on 13 October at Birmingham. He had regular meetings with Mark Bradley or David New. The claimant contends that there was a lack of support on his return to work. It does not appear so to the tribunal. There are five recorded meetings (pages 69-72).

37. The first few weeks on the claimant's return to work went well. It is recorded by Mr New that the claimant had made "fantastic progress" (69) and "Richard showed his immense gratitude to both Mark and I and stated that the plan and support were greatly aiding a speeding return to normal life". This followed a progress meeting with both Mr Bradley and Mr New on 23 October 2015 (70). There was a meeting on 29 October, monitoring his progress, a further meeting on 9 November to discuss progress and a meeting on 13 November where there was a discussion about working with cohort 8a which had been referred to on 9 November. On page 69 we see that the move, which had been agreed to by the claimant on 12 October seemed to be working out, and was "hugely successful".

38. The respondent wrote to the claimant's GP on 16 October, enclosing a request for a medical assessment 68F – H). The claimant gave his consent. It is clear from the letter and the request that the respondent wanted to better understand how the depression affected him and what recommendations could be made for any adjustments. It is noteworthy that in her letter, Ms New put 'depression' in inverted commas. She was seeking further information about Mr Rawnsley's health, how it affected him and whether there was a disability. Despite four attempts chasing the report from the claimant's GP, it was not provided until 25 January 2016, after Ms New made her decision to dismiss. The tribunal does not know why there was such a delay in the respondent being provided a copy of the report but notes that the claimant had asked to see it before it was disclosed to LEMA (68g). He does not appear to have made his own efforts to find out why there was such a delay.

39. The situation did not remain a good one. There was a further altercation between the claimant, Majella Fitzpatrick and Ms Shaw on 19 November 2015. The record of Ms Shaw's account of this incident is at pages

74-75. It had been witnessed by Mr Bradley (76). Mr New viewed the incident seriously, as it alleged an aggressive attitude by Mr Rawnsley towards staff. This had been the subject of the meeting with Ms Wood in March.

40. In her account, Ms Shaw records: "I'm really shocked at the behaviour and the way in which Richard spoke to me. It is totally unnecessary. I communicate changes with people all the time and have never experienced this resistance – it was one simple change that was blown out of proportion. This isn't the first time that Richard has spoken to me like this".

41. It seems to the tribunal that if events of 19 November and 20 November had not occurred, and the claimant had continued to work satisfactorily in Birmingham, it is unlikely that the respondent would have taken disciplinary action over the earlier matters as they stated in the letter suspending the claimant (p.81). Prior to these dates, the focus had been very much on going forward with the claimant's employment. As Mr New wrote in the letter suspending the claimant "this alleged behaviour follows similar events whilst you were at Dudley and which we agree to shelve but return to if necessary. These earlier events have been included in my investigation".

42. On 20 November (p.77) a report was sent to Denise New from Majella Fitzpatrick about Tammy Leipacher alleging a comment had been made by the claimant to her. It made Ms Leipacher uncomfortable and Ms Fitzpatrick considered to be an inappropriate comment to have been made.

43. Mr New felt that these two new matters were serious enough to warrant investigation. Mr New suspended the claimant on 27 November (78-79). Much of this note is not accepted as accurate by Mr Rawnsley. The claimant's complaint about this meeting is that he was put under pressure to resign and that this was repeated to him. It is clear that reference was made by Mr New to the claimant resigning, rather than facing disciplinary action and possible dismissal. This was because Mr Rawnsley had previously indicated to Ms Wood that he would rather resign than face disciplinary action (p.52). It would be fair to say that Mr Rawnsley went on the offensive in this meeting. What is accepted by the claimant is that Mr New had asked Mr Rawnsley if he was aware of the allegations to which the claimant's response was "no", but that he would also make a complaint against Wendy. This indicates that he was aware of what one of the allegations against him was and indeed this comment was borne out by a subsequent grievance he raised. The tribunal has no reason to doubt Mr Bradley's note taking of this meeting.

44. The letter suspending the claimant after the meeting of 27 November (p.81) does not specifically set out the allegations other than a general allegation that he continued to display behaviour which was unacceptable to the company and in breach of the agreement we made on 12 October 2015. More specifically, it states: "your behaviour is alleged to be disrespectful and inappropriate to staff and learners and also disrespectful and aggressive to management". The letter included a number of documents, as did a further letter of 1 December (83).

45. Although no letter prior to the disciplinary hearing set out the specific allegations, and the respondents can be criticised for that, the documents sent with the letters included the notes of the meeting in March 2015 with Ms Wood (item 1), the incident account of 19 November (item 6), and the email from Majella Fitzpatrick about the alleged inappropriate comment regarding Tammy Leipacher (item 7). The claimant can have been in no doubt what was to be considered at the disciplinary hearing. It was not the case that he ever wrote to the respondent, or raised it at the disciplinary hearing, that he did not understand the allegations against him.

46. Due to ill-health and the Christmas holidays, the disciplinary hearing did not take place until 27 January 2016. The claimant was not sent a copy of the internal Quality Assurance Report (p.53-62), despite Ms New having it for the disciplinary hearing.

47. The notes of the disciplinary hearing are at pages 121-134. They have been signed by the claimant on each page.

48. In respect of the Tammy Leipacher comment, the claimant denied making such a comment and says that Tammy herself made a comment about her name meaning “tampon”. At page 122 it is recorded that Ms New asked Mr Rawnsley to tone down his aggressive tone of voice.

49. The conversation with Mrs Wood in March 2015 about Mr Rawnsley’s behaviour and conduct was discussed as was the fire door incident. Ms New felt there were two issues, namely the behaviour towards Ms Shaw and the locking of the door. Initially the claimant stated that he had locked the door after checking to see if anyone was in, later he amended the note to say that he did not lock the fire door. It appears that initially he did say he had locked the doors (this was not a mistake by the note taker as this is reflected in Ms New’s next comments about the fire doors must not be locked). There was an ensuing conversation where the claimant’s position was that they could be locked if no one was in the building and he did not know that Ms Shaw was still in the building. He pointed out that Ms Shaw’s tone was inappropriate to him. He told Ms New that in the past people had told him to lock the fire doors when students were still in the building.

50. In essence, during the disciplinary hearing the claimant denied the allegations and went on the offensive making counter allegations. There is no statement from him, or even a suggestion, that he told Ms New that his behaviour or conduct was related to depression. Nor did she have any medical evidence suggesting that this was the case. Mr Rawnsley went on to make threats of putting paperwork into the hands of Ofsted and that there were members of staff that he felt should not be employed in the profession and he would make the government aware of that knowledge.

51. It is alleged by the claimant that Ms New smiled during the disciplinary hearing. She does not accept that she did smile but in the notes it is stated that the claimant wanted it recorded that she was giving a smile. Ms New’s response was that she was smiling and she replied: “I am simply trying to

make this as pleasant as possible". Her evidence to us was that she was trying to keep a pleasant face but did not smile at what Mr Rawnsley had said. However in the appeal Mr Redmonds investigated this matter and Ms New accepted that she had smiled when it was stated by Mr Rawnsley that Ms Shaw had assaulted him and that on reflection this was inappropriate. In re-examination, Ms New accepted she had smiled. On the balance of probabilities we find that Ms New did smile at the suggestion made by Mr Rawnsley; she found it difficult to accept it but recognised that it was inappropriate for her to have done so.

52. The claimant's document (at pages 106-111) reads more as grievance letter than a defence to the allegations against him. He refers to the allegations as falsely written statements, and the allegations themselves as being false. It would be fair to say that the claimant does not deal with the documents he had been sent and the incidents about which he is facing disciplinary action. The document deals with his personal problems, accusations of assault, inappropriate comments and bullying (p.108). These allegations include poor treatment by Ms Wood, with whom we know he had had a good relationship. However, this letter, although dated 24 January, was received by the respondent on 5 February 2016 (106 and 112). Ms New could not have seen it before making her decision to dismiss the claimant.

53. After the disciplinary hearing, Ms New made the decision to dismiss. It was confirmed to the claimant in writing at pages 138-139. Her letter does not set out her full reasoning, as we have read in her witness statement. Nor did she set out her reasoning to Mr Rawnsley at the conclusion of the disciplinary hearing. What she says in her letter is that after a brief but positive start on his return to work, Mr Rawnsley had reverted to displaying exactly the same unacceptable behaviour towards his new colleagues and learners as his previous attitude and behaviour had been. Ms New records that she found that the claimant had addressed a member of staff in a manner which could only be described as harassment, that she had considered the claimant's comments relating to the incident and that whilst she noted the claimant denied culpability in respect of each and every case, she concluded that there would need to be a significant level of collusion between staff in order for the claimant's responses to be credible. She did not accept the allegations were false or unfounded.

54. Ms New preferred the evidence of Tammy Leipacher over what had been said. She could see no reason why Tammy Leipacher would make up such an allegation and did not accept Mr Rawnsley's explanation as plausible. He was not able to explain to her why he had refused Ms Leipacher's request to put her name on the board. She felt that this added weight to Ms Leipacher's version of what had happened. Indeed initially the claimant had said that he could not recall the event and then gave an explanation which she found difficult to accept.

55. In respect of the incident with Ms Shaw on 19 November, the claimant's defence was, apart from denying that he had reacted badly to Ms Shaw, that Ms Shaw had tapped, hit, or cracked him on the shoulder. In reaching her

decision on this incident, Ms New noted that both parties accepted there was an exchange of words. Although the claimant said that there was no one else around, Ms New had a statement from Mr Bradley who had witnessed the event. She felt that from this statement it was more likely that Ms Shaw's account reflected how the meeting went rather more accurately than Mr Rawnsley's. On checking with Mr Bradley, about whether there had been any form of assault by Ms Shaw on the claimant, Mr Bradley confirmed he had not observed such action. She also noted that Mr Rawnsley had not raised a complaint of being assaulted at the time. She preferred Ms Shaw's account of the incident, corroborated as it was, and did not accept Mr Rawnsley's version.

56. In respect of the fire door incident on 30 September, she noted that although Mr Rawnsley denied locking the fire escape doors, he admitted that he had intended to do so and that he was unaware other people were in the room. Ms New concluded that she believed Mr Rawnsley had locked the fire doors and that the discussion that followed between Ms Shaw and himself was an altercation, during which Mr Rawnsley had spoken to Ms Shaw in a manner which was not acceptable. She took on board that the claimant had changed his version of what had happened and she made further enquiries of Ms Wood as to whether the claimant had been instructed to lock the fire doors after 5pm.

57. Although Ms New was clearly aware of earlier complaints, such as the email from Ms Wood in March 2015, she made her decision to dismiss the claimant on the basis of her findings in respect of the Tammy Leipacher comment having been made and amounting to sexual harassment; that she did not accept his account about the fire doors and his reaction to Ms Shaw that evening; and that his behaviour, witnessed by Mr Bradley, had been unacceptable towards Ms Shaw on 19 November.

58. The role that the claimant's earlier behaviour played in her decision making was that she knew the claimant was aware that repetition of such behaviour could have serious consequences, and that his later behaviour was similar conduct.

59. The claimant appealed the decision to dismiss and the appeal was dealt with by Gary Redmonds. The claimant makes little criticism of the appeal, other than it wrongly upheld his dismissal. The claimant's letter of appeal is at pages 141-144. It is not precisely clear why the claimant considered the dismissal itself to be wrong. The letter primarily sets out complaints that the claimant had, in a similar way to his letter at 106-111. However, he denied Tammy Leipacher's version of events and puts forward his own; he stated that Denise had smiled in the disciplinary hearing; he had witnessed aggressive behaviour by Ms Wood; that he had been asked several times to resign; he had been referred to as "a mental case"; he complained of not being allowed to visit Dudley College; that he had not locked the fire doors; and Ms Shaw had been aggressive to him and that she had hit him, which was a physical assault.

60. It is clear from the notes of the appeal meeting (152-166) that much of the time was spent by Mr Redmonds getting Mr Rawnsley to focus on the relevant issues. It appears, from the minutes of the appeal hearing, that Mr Redmonds took the appeal seriously and carried out further investigations after his meeting with Mr Rawnsley on 23 February. He went comprehensively through the points with Mr Rawnsley and it was not just a cursory review of Ms New's decision making.

61. Mr Rawnsley's criticism of Mr Redmonds is that he repeatedly kept saying that the claimant did not want to return to work. From the notes, which were countersigned by the claimant, we can see that this is said once but in the context of responding to what the claimant himself was saying.

62. Mr Redmonds made further enquiries. He spoke to Denise New about whether she had smiled or laughed during the disciplinary hearing and we have dealt with this above. In respect of the matters for which Ms New had dismissed the claimant: Mr Redmonds could not see any reason why Tammy would have reported such a comment if she herself had made it. He also noted that Mr Rawnsley had refused Ms Leipacher's request to put her name on the board but that he could not remember why he had refused. Having considered the earlier evidence and from what Mr Rawnsley told him, Mr Redmonds also preferred Ms Leipacher's version of events. Again, after reconsidering the evidence and what Mr Rawnsley told him, he accepted Ms Shaw's version of the altercation on 19 November. The fact this had been witnessed was significant for him. Ms Shaw did not accept she had touched Mr Rawnsley, and Mr Redmonds' view was that there was no evidence of any action which would amount to assault.

63. In regard to the fire doors incident, Mr Redmonds agreed with Ms New that the weight of evidence suggested that the claimant had locked the doors and, in any event, he had not checked as he should have done before intending to lock the doors. Mr Redmonds made further enquiries of Mr Bradley, but Mr Bradley had not witnessed whether the doors had been locked or not. Mr Redmonds took the view he could not make a finding of fact regarding whether the doors had actually been locked but he did find Mr Rawnsley's benaviour to a manager to be unacceptable. Mr Redmonds confirmed his decision to uphold the original decision to dismiss for misconduct in a letter dated 1 March 2016 (167/168).

64. If Ms New's letter of dismissal did not fully explain her reasoning for reaching her decision, Mr Redmonds' letter of 1 March did so. He set out his reasoning as to why he preferred Ms Leipacher's version of events about the comment made, and he set out his concern that it was not so much the locking of the fire doors but the aggression displayed by the claimant towards Ms Shaw that concerned him. It is clear from the letter that Mr Redmonds also felt let down by the claimant. He felt that the display of unacceptable behaviour at Birmingham was similar to that which had been displayed by the claimant previously, despite the fresh start.

The law and submissions

65. As the tribunal did not have sufficient time for oral submissions at the hearing, both parties have sent in full written submissions and the tribunal has considered these in full, together with the case-law referred to in each. We are not proposing to reproduce the submissions in detail in this judgment.

66. In brief, Ms Foley-Fisher submits that the tribunal should find that the claimant did not lock a fire door on 30 September 2015, that he did not act inappropriately to Ms Shaw on 19 November 2015 and that the comments alleged to him on 20 November 2015 were not his words. With due respect to Counsel, at the liability stage it is not the tribunal's role to substitute its own view of the alleged misconduct, or make our own findings about it, but to look at the belief held by the respondent at the time and whether it was a genuine and reasonable belief for the respondent's managers to have that the claimant was guilty of gross misconduct.

67. The claimant further submits that there were a number of failings in the disciplinary process. The claimant was not informed expressly of the actual allegations he was facing, he was not given a copy of the Quality Assurance Report which was used by Ms New in reaching her decision, and she did not set out the reasoning in her dismissal letter in full thereby making it hard for the claimant to appeal. The claimant says that he did not have the opportunity to respond to what was in the report about his attitude to learners. The claimant was not shown a copy of the company policy in relation to the allegation from Tammy Leipacher, despite it being referred to as harassment and being a breach of the company policy.

68. It is put to us that the respondent did not take special circumstances into account, namely the claimant's health and the impact it might have had on his behaviour particularly as he returned to work after one week's sick leave in early October 2015. It is also pointed out that allegations which had arisen in March were used in the disciplinary process and these should have been dealt with at the time rather than being resurrected months later.

69. The respondent's submissions deal with the failings put forward by Ms Foley-Fisher in the disciplinary process. Mr Hignett contends that even if we find there have been failings, we have to go on to consider whether they led to any unfair treatment of the claimant. For example, the suspension letters might have set out the specific allegations, but there would be no unfairness if the documents clearly showed what allegations the claimant was facing. It is put to us that at no point did the claimant state he did not understand the case against him.

70. In respect of the quality assurance report from Mr Bradley, it is stated there was no unfairness to the claimant as this did not form part of Ms New's decision making when she took the decision to dismiss and the grounds on which she took that decision.

71. Mr Hignett accepts that the full reasoning may not have been set out in the dismissal letter but submits that it is clear that the claimant knew what he

had been found guilty of from his appeal letter and what he said in the appeal hearing.

72. In respect of the s.15 Equality Act disability discrimination claim, it is to be noted that whilst Ms Foley-Fisher sets out what the tribunal needs to find in respect of knowledge of the effects of the disability, and refers us to Pnaiser v NHS England and another(UKEAT/0137/15/LA), Mr Hignett does not pursue the argument that the respondent had to have knowledge of the something arising from disability. He concentrates his argument on the issue being whether the respondent had knowledge of the claimant's disability at the material time.

73. Aside from Pnaiser, the parties referred the tribunal to the following case law which we have applied it, where appropriate:

Burdett v Aviva Employment Services Ltd (UKEAT/0439/13/JOJ)

Gallop v Newport City Council (2013) EWCA 1583

Whitbread v Hall (2001) EWCA 268

Conclusions

74. The tribunal has followed the list of issues agreed between the parties set out above. We have taken into account the case law and the submissions to which we have been referred in our analysis of the findings of fact and our application of the law to those findings of fact.

75. Unfair Dismissal

75.1 It has been agreed that the reason for dismissal was misconduct. We consider Ms Foley-Fisher's submissions at paragraph 1 of her closing submissions to go more to whether the respondent had a reasonable belief that the claimant was guilty of misconduct and what the misconduct actually found by it was.

75.2 **Did the respondent have a genuine belief in the claimant's misconduct?**

There has been no suggestion of a lack of good faith by the respondent's managers, or that either Ms New or Mr Redmonds did not genuinely believe the claimant to be guilty of misconduct. It is put by Ms Foley-Fisher that the tribunal should find that the claimant did not commit the misconduct as found by the respondent. As already stated, that is not our role. It is put to us, in paragraph 3 of her submissions, that the claimant had simply caused too much trouble for the respondent and its staff and therefore he was dismissed. We are not sure how this assists us in our analysis. It was not put to Ms New nor Mr Redmonds that their belief in the claimant's misconduct was not a genuine one, or that they had some ulterior motive for wanting to dismiss him.

As we have found in our findings of fact, we do not find that Mr Rawnsley was referred to as “a mental case”. In respect of Ms New smiling, the tribunal accepted that she had done so, but in response to an assertion she found difficult to accept. There is simply no evidence that the motivation of either Ms New or Mr Redmonds was to protect other people or that there was an ulterior purpose, other than the alleged misconduct, for dismissing him. Therefore, the tribunal concludes that the respondent’s managers did hold a genuine belief that Mr Rawnsley was guilty of misconduct.

75.3 **Did the respondent have reasonable grounds for such a belief and had it carried out a reasonable investigation before reaching that conclusion?**

75.3.1 The tribunal has combined these two questions as, in this case, it is appropriate to do so. A belief can only be a reasonable one if it is based on a reasonable investigation. The results of the investigation, and the documents which were before Ms New when she made her decision were:

(i) the email about events in March 2015 which formed the backdrop to later events. It did not form part of the reasoning for dismissal in itself, other than demonstrating the claimant had been informally warned that his behaviour had to change by Ms Wood.
(ii) statements had been obtained from Tammy Leipacher, Wendy Shaw and Mark Bradley.
(iii) the claimant was dismissed for three matters. The fire door incident on 30 September, the comment to Tammy Leipacher on 20 November and the altercation with Ms Shaw on 19 November.
(iv) Ms New had spoken to the claimant about these incidents at the disciplinary hearing. She did not accept his account and his denial of them. She considered that Mr Rawnsley had changed his version of events about the fire doors, she did not accept his explanation as credible in respect of the comment made toTammy Leipacher, nor his defence to the altercation with Ms Shaw which was to accuse her of assaulting and insulting him. There was a witness to this altercation.
(v) the claimant sought to explain much of what was put to him by complaining about the complainants rather than accepting any blame on his part.

75.3.2 It is not the tribunal’s role to consider what further investigation might have been done but to look at what the respondent actually did and knew at the time. It is submitted that Ms New and Mr Redmonds had undocumented conversations. These happened after the claimant had raised issues about other staff using the term “tammy tampon” and not being remonstrated about doing so. The claimant has also submitted to the tribunal subsequent Facebook entries, and what can only be described as very distasteful jokey emails, apparently from colleagues. The relevance of these to the tribunal is not apparent as they were not before Ms New or Mr Redmonds at the time.

75.3.3 The claimant’s position during the disciplinary process was not that

comments such as the kind made about Tammy Leipacher went on all the time. It was not put to Ms New or Mr Redmonds that his comment was just banter and was not unwanted by her. Mr Rawnsley denied that he had made the comment and said Ms Leipacher had made it herself. In such circumstances, ascertaining the level of banter and what was accepted by colleagues in the workplace was not relevant as a matter to be investigated as it had not been the claimant's explanation for the comment. The claimant's position was, in effect, that Ms Leipacher was lying and had made a false accusation against him.

75.3.4 On the basis of the investigation was carried out by the respondent, the tribunal cannot say that Ms New and Mr Redmonds did not have reasonable grounds for their findings and conclusion that the claimant was guilty of misconduct. Their investigation does not need to have been akin to a police investigation, it does need to have been within the range of reasonable responses open to an employer in the situation this one found itself in, and sufficient to support a reasonable belief that the claimant was guilty of the alleged misconduct. The investigation here satisfies that standard.

75.4 **Did the respondent carry out a fair procedure?**

75.4.1 Whilst better documentation may have been kept by the respondent, we cannot say that it caused any material unfairness to the claimant. It would have been good practice on the respondent's part to set out exactly what the allegations he was to answer were, but we cannot see that this put the claimant at a disadvantage as documents setting out what was being alleged accompanied the letter and it is clear that the claimant fully understood the case he was to answer at the disciplinary hearing. Indeed that is what he did. Likewise, whilst some criticism can be made of the respondent for not setting out the reasoning for the dismissal itself in full to the claimant, it appears that he was not disadvantaged in the appeal as he fully set out the grounds for his appeal; did not express any reservations about not understanding why the decision had been made; and, if there had been any fault by Ms New in not setting out her reasoning fully, that was remedied by Mr Redmonds. He not only reconsidered and carried out investigations of his own but set out the reasoning for his decision to uphold the dismissal in some detail in the appeal outcome letter.

75.4.2 The claimant submits there were a number of further failings in the process.The first is that he did not receive the internal Quality Assurance Report prepared by Mr Bradley. He complains specifically that he could not defend allegations about his attitude to learners. Although this report was relied on by Mr New when he decided that disciplinary action and suspension had to take place, and Ms New had a copy of the report, we accept her evidence that it did not play a part in her decision-making in respect of the three main allegations. Further it would not have been a surprise to the claimant that the question of his behaviour was not just about that towards colleagues and managers but also to learners, as the meeting with Ms Wood on 20 March 2015 had been in part about how he was with the learners.

75.4.3 In her submissions Ms Foley-Fisher points out that the respondent referred to the allegation in respect of the comment made to Ms Leipacher as being in breach of company policy, but the claimant was not given a copy of the company policy concerned. Again, whilst this may have been a failing on the respondent's part, it is hard to see how the claimant was disadvantaged. It has not been put to us that the claimant did not understand what sexual harassment meant or that he was disadvantaged by not being taken to the policy. The decision of Ms New was a simple one, she accepted Ms Leipacher's statement that Mr Rawnsley had made the comment as alleged and, for the reasons she gave, she did not accept the claimant's version of events. It is not outwith the band of reasonable responses for her to have concluded, once having made those findings, that this could amount to sexual harassment.

75.4.4 The respondent is criticised for not getting information from the doctor. In the tribunal's view, it is hard to see how much more Ms New could have done, after she had chased four times for a report. The claimant says that the respondents did not take special circumstances into account, namely his depression. However the tribunal struggles to see what difference this might have made to the outcome as the respondent was not told by the claimant at the time that his behaviour and actions were a result of his depression.

75.4.5 Ms Foley-Fisher submits that it is not sufficient for the respondent to state that they attempted to get information from his doctor. She submits that the respondent closed their mind to any consideration of the claimant's mental health and failed to consider the facts that they were undoubtedly aware of, namely that the claimant had returned to work after only one week following a suicide attempt.

75.4.6 The problem for the claimant is that his case before us has never been that his behaviour or conduct as found by the respondent was linked to depression. His case before the respondent was that either he had not done the alleged act, or it was the fault of somebody else. For example that Tammy Leipacher herself had made a comment about her name meaning "tampon" and that Ms Shaw had precipitated an altercation by assaulting him. Had the respondent had gone further and investigated the potential effects of the claimant's depression, it is hard to see how that would have changed their view of his behaviour at the time. Even now, he contends before us that his depression would not have made him lock fire doors, be argumentative and aggressive towards managers or make a sexually inappropriate remark.

75.4.7 As already stated, it was not put to the respondent - in giving his explanations about the allegations - that the claimant accepted events happened as described but he had behaved in the way he did because of depression. It cannot be within the band of reasonable responses that a respondent should go behind what an employee is telling them and look for an explanation which is not actually being put forward by the employee himself.

75.4.8 As our findings show, although the allegations against him could

have been set out more clearly in the letter inviting the claimant to a disciplinary hearing the documents outlining those allegations were enclosed. Nor at any point did the claimant state that he did not understand or was unable to answer what the allegations were. In questions to him from Ms New in the disciplinary hearing he fully answered those allegations and his letter prior to this showed that he was aware of what he was to answer. Likewise, Ms New did not set out her reasoning in full in the dismissal letter nor at the conclusion of the meeting. She did not state why she had decided the allegations were proven in any detail. However as we have stated, it appears from Mr Rawnsley's appeal letter that he fully understood why he had been dismissed, primarily for the Tammy Leipacher comment (141). He deals with the fire door incident and his comments to Wendy Shaw and gives further details of his explanations, namely that Wendy Shaw had hit him and that she unfairly criticised his work and demonstrated disrespect to him. The tribunal has taken into account the fact that this is a small employer with around 20 employees and that the claimant was not disadvantaged by any procedural shortcomings on the respondent's part.

75.5 **Was dismissal within the band of reasonable responses and reasonable in all the circumstances?**

75.5.1 As Ms Foley-Fisher rightly puts to us a finding of gross misconduct does not automatically justify dismissal. It is put that the decision of the respondent to dismiss the claimant fell outside the band of reasonable responses, namely because the claimant had had no previous warnings; that in relation to the incident with Ms Leipacher, the claimant asserts that other employees were using inappropriate language in the workplace; that the claimant had been working for the respondent for some time and working to a competent level; and there had been no consideration of special mitigating circumstances, namely the claimant's health problems and, finally, there was no evidence that the respondent considered alternative sanctions.

75.5.2 Taking these submissions into account the tribunal asked itself whether dismissal was within the band of reasonable responses and reasonable in all the circumstances. It was not outside the band of reasonable responses, once the comment to Ms Leipacher was found to have been made, for Ms New to consider this was gross misconduct justifying dismissal. It is not for the tribunal to substitute its own view of the reasonableness of that sanction. The claimant was found by Ms New to have made that comment, she was reasonable in holding a belief that this was a form of sexual harassment. The claimant had had informal warning of his conduct but was found to have been, on two later dates - namely 30 September and 19 November - to be aggressive and argumentative towards Ms Shaw. It is clear that whilst Ms New considered the claimant had locked the fire doors, this was not what played a part in Mr Redman's decision making when he upheld the dismissal. What swayed him was the altercation with Ms Shaw and the claimant's conduct towards her.

75.5.3 In all the circumstances of this case, bearing in mind the size of and the resources of this employer, we cannot say that the decision to dismiss fell

outside the band of reasonable responses. Having found serious misconduct on Mr Rawnsley's part, compounded by accusing colleagues of a false allegation and trying to put the blame on them in the disciplinary hearing, Ms New concluded that the only sanction was dismissal. Medical evidence from the claimant's doctor was not before her, nor was the evidence of the Facebook and email pages which we have subsequently seen. In any event the medical report does not state that the effects of the claimant's depression is the conduct of the type for which he was found guilty of serious misconduct. The decision to dismiss therefore fell within the band of reasonable responses open to an employer in the situation in which this respondent found itself. The unfair dismissal claim fails and is dismissed.

76. Discrimination arising from disability

The claimant alleges the respondent discriminated against him by failing to support him by not holding review meetings and in dismissing him. This is put as discrimination arising from disability.

76.1 **Did the respondent have knowledge of disability at the relevant time?**

76.1.1 Following the Gallop case, the tribunal must determine whether the respondent had knowledge (actual or constructive) of three elements:

(i) that the claimant was suffering from a physical or mental impairment;
(ii) that the impairment has an effect on normal day to day activities which is adverse and substantial (more than minor or trivial);
(iii) that the impairment is long term.

The respondent now accepts that the claimant was a disabled person but denies knowledge of this at the relevant time. Without such knowledge, as defined in the Gallop case, there can be no liability under section 15 of the Equality Act 2010.

76.1.2 The respondent knew the claimant was suffering with a mental impairment. As we have found, that knowledge arose on 2 October 2015 and not earlier. Whilst the respondent was aware that the claimant suffered from low mood and was on antidepressants before that date, this is not sufficient for the tribunal to say that the respondent had knowledge of depression, or that it should have been aware that the claimant was a disabled person by reason of depression.

76.1.3 We do not accept the claimant's evidence in respect of Ms Wood's knowledge about him suffering from depression. None of the sick notes stated depression until after events on 2 October. As Mr Hignett submits, the employee must not only know that the claimant has an impairment but that this impairment has an effect on day-to-day activities which is a substantial one. It cannot be the case that knowledge of an impairment leads to the

conclusion that the respondent had knowledge, or should have had, of the claimant as a disabled person. Obviously, there are conditions which can only lead to that conclusion, such as cancer, but depression is not one of them. Following Gallop, the respondent must have knowledge of the impairment, it must know that the impairment has an effect on day-to-day activities which is substantial and, thirdly that it is long term i.e. has lasted more than 12 months or is likely to last for 12 months.

76.1.4 It is submitted by Mr Hignett that the respondent did not know all of these elements. It did not know that the claimant had suffered with depression for a long time, it did not know his previous history, whereby the RAF considered him to have a disability nor did it know that he had been under the Community Mental Health Team for his care.

76.1.5 As our findings of fact show, whilst the respondent did know from 2 October that the claimant had an impairment, namely depression, it did not know how long he had had it nor that it had substantial effects on his normal day-to-day activities. The sick notes only refer to depression from 2 October onwards, prior to this only one stated 'low mood'. The respondent was not in possession of any medical evidence from the claimant's doctor prior to dismissal. This was not for the want of trying to ascertain the medical position on the respondent's part. The claimant gave no information to the respondent during the disciplinary process which might suggest that his behaviour was due to his condition. This fits with his reluctance throughout to tell them that he had a mental health impairment and the effects of it on him. All the respondent knew after 2 October was that the claimant was seeing a psychiatrist, was on medication for depression and seeing the mental health team.

76.1.6 The respondent took steps after 2 October to find out more about the effects of the now known impairment of 'depression'. In the tribunal's view, it did all that could reasonably be expected of it to find out more about the claimant's impairment and the effects it had on him. It wrote to his GP, who was responsible for Mr Rawnsley's care, the claimant did not suggest any other source of information, and being a small employer it had no occupational health resources. The claimant had clearly not been forthcoming with information about his depression prior to 2 October and had only been absent from work for a week after events that day. In large part, and this is no criticism of the claimant, the respondent's lack of knowledge about his illness and the effects of it on him were a result of him not wishing them to know about it.

76.1.7 However, even if the respondent did, or should have had the requisite knowledge, both of the depression and that it amounted to a disability, the claimant's case must still fail. Before the tribunal, let alone his employer at the time of his dismissal, there was no evidence either medical or from the claimant himself that the behaviour which led to his dismissal was linked to or arising from his depression. The claimant has categorically denied that the three matters for which he was dismissed were in any way linked to depression. Therefore he cannot establish the behaviour for which he was

dismissed arose in consequence, or was even linked to his depression.

76.1.8 In relation to the allegation that the respondent failed to support the claimant by not holding review meetings, our findings are very clear that this was not the case. Regular meetings were held with him and indeed Mr Rawnsley was appreciative at the time for the support the respondent gave him.

76.1.9 Accordingly, the respondent did not have the requisite knowledge, nor should have had it, of the claimant as a disabled person at the material time and his claim for discrimination arising from disability must fail.

on 2 March 2017
Employment Judge Cocks

Reserved Judgment sent to Parties on

3 March 2017