# EMPLOYMENT TRIBUNALS

**BETWEEN**

| **CLAIMANT** | | **RESPONDENT** |
|---|---|---|
| **MR M WILLS** | **V** | **MARKS & SPENCER PLC** |

**HELD AT: CARDIFF** **ON: HEARING**
**24 AND 25 JANUARY 2017**

**BEFORE: EMPLOYMENT JUDGE W BEARD**
**MEMBERS MR A FRYER**
**MR J STAFFORD**

**REPRESENTATION:**
**FOR THE CLAIMANT: Mr s Hughes (Counsel)**
**FOR THE RESPONDENT: Mr J Crozier (Counsel)**

## JUDGMENT

The judgment of the tribunal is as follows:

1. The claimant's claim of dismissal pursuant to section 103A Employment Rights Act 1996 is dismissed upon withdrawal.
2. The claimant's claim of discrimination pursuant to section 15 Equality Act 2010 is well founded.
3. The claimant's claim of discrimination pursuant to section 21 Equality Act 2010 is not well founded and is dismissed.
4. The respondent is ordered to pay to the claimant the sum of £6,518.67 in compensation.

## REASONS

**Preliminaries**

1. The claimant claims of disability discrimination pursuant to sections 15 and 21 of the Equality Act 2010. The parties set out in writing several issues between them arising from those claims.
   1.1. It is conceded that the claimant is disabled within the meaning of the Equality Act 2010, but the respondent's knowledge of disability remained an issue.

1.2. In addition, it was in issue whether loss of temper/control was a consequence of the claimant's disability (it was agreed that the tribunal should consider this as a preliminary matter).
1.3. In respect of the claimant's claim that the respondent failed to make any appropriate adjustments the following PCP's were identified:
  1.3.1. The shift pattern imposed by the respondent requiring the claimant to work Saturday and Sunday every fortnight.
  1.3.2. The application of the disciplinary policy.
1.4. In respect to the putative PCP's the claimant contended that:
  1.4.1. The shift pattern of working two weekend days disadvantaged him because of stress caused;
  1.4.2. The disciplinary policy placed the claimant at a disadvantage because of the difficulty controlling his temper arising from his condition.
1.5. In respect of the section 15 claim the issues (apart from knowledge and the preliminary point) were:
  1.5.1. Did the claimant's dismissal arise in consequence of his loss of temper (it being conceded that dismissal constitutes unfavourable treatment):
  1.5.2. The legitimate aim being that the respondent wished to protect staff and customers from aggressive conduct (not challenged by the claimant), has the respondent shown that dismissal was a proportionate means of achieving that legitimate aim?
1.6. In respect of quantum the respondent relied on the issue of contribution because of the claimant's conduct and asked for a ***Polkey*** reduction in that had the respondent conducted an appropriate process that dismissal would have been the likely outcome in any event.

2. The claimant was represented by Mr Hughes the respondent by Mr Crozier both of Counsel. The Tribunal was provided with a document bundle which ran to 389 pages. However, during the hearing the parties only referred the tribunal to a small percentage of those pages. The tribunal heard oral evidence from the claimant. The respondent called the following to give oral evidence: Mr Lilleywhite, manager of the café section in which the claimant worked, Mrs Bridge, who was the evening manager in the café and Ms Carr, manager of a different section and who dismissed the claimant.

**The Preliminary Issue**

3. The respondent concedes that the claimant is disabled as he suffers from a significant depressive illness. The claimant contends that an aspect of his depression is an inability to maintain his temper under certain stressful conditions. He goes further and argues that it was this inability that led to the outburst for which he was disciplined and ultimately dismissed. The respondent does not concede either that loss of temper is a consequence of the claimant's disability or that it was the cause of the loss of temper that led to his dismissal. The respondent argues that the claimant cannot prove that the loss of temper is a connected with his disability.

4. The tribunal heard oral evidence from the claimant, confined to this issue, as part of a preliminary consideration. The claimant's evidence was based on his current witness statement and an impact witness statement prepared for a potential preliminary hearing to decide whether the claimant was disabled. The tribunal also had copies of the claimant's GP records and letters from treating physicians and psychiatric practitioners. The following facts emerged.
   4.1. The claimant visited his GP with low mood in the Autumn of 2012, he was diagnosed as suffering from depression by December 2012. At this stage the claimant was prescribed medication and, as is often the case, it took a little time to establish the correct form of medication which would assist the claimant's recovery.
   4.2. The GP notes demonstrate that at the time of diagnosis the claimant described that anger as a symptom. During cross examination, when asked to describe the nature of that anger the claimant referred to it as the product of frustration with his situation and, in particular, because he was unable to find a reason for his state of mind.
   4.3. Anger is referred to again as being part of the claimant's complex of symptoms at a consultation in January 2013. The GP notes indicate that this an anger arose as the claimant was unable to understand what prevented him ending his life: it is again expressed as arising from frustration.
   4.4. Once the most efficacious medication was established as Sertraline the dose was gradually increased to a maximum of 150mg a day by the end of February 2013. In addition to medication the claimant was receiving support from the primary mental health care service.
   4.5. The medical notes from February 2013 until January 2016 indicate a significant improvement in the claimant's mental health.
   4.6. The claimant was asked in October 2013 whether he felt ready to reduce the dose of his medication; he declined preferring to wait until the winter had passed. However, despite this and various reviews the claimant did not reduce his medication throughout 2014.
   4.7. The claimant commenced employment with the respondent in November of 2014. His initial employment was in a temporary post.
   4.8. By the spring of 2015, the claimant was prepared to agree to a reduction in the dose of his medication to 100mg. At the consultation where this was agreed the claimant was very positive in speaking about his employment with the respondent relating how he had been made a permanent employee.
   4.9. It was intended that this reduction in dose would be reviewed at the end of three months. In fact, the claimant did not see his GP between April 2015 and January 2016.
   4.10. The claimant told us that he was doing well between April and November of 2015. However from this date his mental health had begun to deteriorate: the claimant began to have sleep issues and his mood was "massively yo-yoing". Prior to this the claimant had no issues at work, but from then on he found the work situation difficult.
   4.11. However, we are also aware that following an incident in September 2015 the claimant had a meeting with Mr Lillywhite and

informed him that he was finding some aspects of work stressful. The result of this meeting was that the claimant's hours of work were reduced. This incident did not involve a loss of temper. There was another incident where the claimant had been spoken to by management about conduct. The claimant accepted that this was not an incident involving loss of temper either.

4.12. On 2 January 2015, the claimant was involved in the incident (described more fully below). It involved an explosive outburst by the claimant when he was in a meeting with his manager.

4.12.1. The claimant was involved in a situation where a customer was complaining about the service provided.

4.12.2. The claimant did not agree that the complaint had substance.

4.12.3. The claimant called for a manager to deal with the complaint.

4.12.4. Whilst the manager was discussing the matter with the customer another customer approached the claimant and indicated that he supported the claimant's view of the situation and further said he was willing to provide information to his manager about what he had seen.

4.12.5. After her initial discussions with the customer who had complained the manager approached the claimant and asked him to go to a room to discuss matters. The claimant attempted to engage the manager with the supportive customer so that his account could be taken. The manager refused this.

4.12.6. In the room the claimant became more and more frustrated because he considered the manager was taking sides with the customer, was not prepared to listen to his account and had not been prepared to listen to the account of the independent evidence of the supportive customer.

4.12.7. As a result of this frustration the claimant got up, deliberately hit out at a plastic cup, and left the room. He accepted that the plastic cup travelled in the direction of the manager but did not intend to hit her with the cup.

4.13. The claimant's description of this event referred to the frustration that he felt at that point in time because from his point of view no-one was listening to him. He described a sudden loss of control.

4.14. The claimant went to see his GP. The notes set out that at a consultation on 19 January 2016. The history is recorded as *"was coping well, struggled of late with work and controlling his anger"*. Under the heading comments the following was written *"agreed inc Sert to 150mg daily for max 3motnhs*(sic)".

5. The parties did not refer the tribunal to any authorities. However, the tribunal had in mind ***Royal Bank of Scotland v Morris UKEAT/0436/10.***

5.1. We considered paragraph 63 of the Judgment where it is set out that in the case of mental impairment involving depression or cognate impairment contemporaneous medical notes or reports are not likely to be of assistance in answering questions about long term conditions and deduced effects where medication is used.

5.2. The tribunal consider that although the authority deals with the definition of disability, nonetheless it points the way as to the care which must be taken in deciding facts on aspects of mental health in the absence of medical reports.
5.3. ***RBS*** demonstrates that the tribunal must be clear that it has sufficient evidence on issues relating to such matters as recurrence, long term effects and deduced effects and that evidential basis must include expert evidence where the tribunal is unable to draw clear conclusions from medical notes.
5.4. However, the reference there is to specific matters which are requirements under the Act to establish disability, here we deal with requirements to establish causation.
5.5. We do not consider that a lesser evidential test is required for different aspects of the statutory requirements. The specific problems of recurrence, long term effects are in effect seeking a prognosis require a conclusion based on opinion about the future course of the illness. The issue of deduced effects requires a professional opinion based on the known effects of medication and their application to the specific patient.
5.6. However, what we are examining is not whether the conditions for a disability exist or would exist because of prognosis or the impacts of medication. Rather what we are considering is whether that disability has a specific characteristic, if the notes establish that characteristic on the balance of probabilities that will be sufficient for the first question as to whether this was a symptom of the claimant's condition.
5.7. We must consider whether the notes in conjunction with other evidence and in the absence of expert evidence is sufficient to establish that characteristic. Thereafter we must consider whether, if anger is a characteristic of the disability, whether the anger on this specific occasion arose from that disability.
5.8. In submissions both parties indicated that we were required to do the best we could on the evidence before us taking account not only the medical notes but the claimant's own explanations.

6. Was anger a symptom of the claimant's depression?
6.1. The tribunal are clear that depression is an illness with a broad spectrum of symptoms.
6.2. We concluded that the purpose of GP medical notes was to provide other medical practitioners with an account of those matters relevant to a clinical decision, whether that decision was in respect of diagnosis, treatment or both.
6.3. We took the view that matters included in the history element of any of the claimant's notes referring to anger must therefore be relevant to the diagnosis and treatment of the claimant.
6.4. Anger is referred to at first diagnosis in 2012 as part of the history and again in 2013. It is notable that anger is not mentioned as a problem again until January 2016 at which point medication is increased.
6.5. It is, in our judgment, reasonable to conclude that anger is part of the symptomology being treated on each occasion.
6.6. In addition to this, the claimant has told us about his anger. During evidence, he related this to a reaction to frustration. The frustration of

not understanding the root of his illness and the frustration of not being able to understand why he would do nothing about self-destructive thoughts.

6.7. On that basis, we are of the view that that, on the balance of probabilities anger arising from frustration was a consequential symptom of depression in the claimant's case.

7. The next question for the tribunal is whether the specific outburst was a consequence of this symptom of depression.
   7.1. We recognise that outbursts of anger, even where anger is a symptom of depression, are not necessarily caused by the depressive illness; anger can arise spontaneously without such a connection.
   7.2. We are clear that the claimant became increasingly frustrated as the specific incident progressed and as he was interviewed by his manager.
   7.3. We are clear that the claimant's behaviour prior to this incident had required management intervention, but did not involve loss of temper.
   7.4. It is also the case that there was a slow change in the claimant's conduct throughout 2015, such that he was initially taken on as a full-time employee but later was spoken to about conduct.
   7.5. We are also of the view that the claimant was demonstrating some deterioration in his mental condition as early as September 2015 when his hours were reduced because he was feeling stress.
   7.6. The tribunal take the view that this demonstrates a decline in the claimant's condition from that which is shown in the GP notes of April 2015 when his GP visit is recorded as positive and medication is reduced. The tribunal is in no position to conclude that the reduction in medication and the claimant's slow decline are connected and we do not conclude that they are or are not connected.
   7.7. However, we do conclude that the claimant's anger at work and the increase in medication in January 2016 are connected. This is for the reasons given above, the GP is unlikely to record a matter unless it is pertinent to the treatment being recorded. We further note about that the claimant visited his GP and discussed those issues before he was aware of any disciplinary process, and related anger to work.
   7.8. On that basis, we are of the view that on the balance of probabilities the angry outburst, related as it was to a growing sense of frustration, was a consequence of the claimant's depression.

**Facts**

8. The claimant commenced employment with the respondent on 30 November 2014. The claimant had applied to carry out shelf stacking overnight but at interview was advised of a vacancy in the cafeteria which would result in a better prospect of permanent employment. He took up his role with some enthusiasm and often worked overtime. The claimant's perception was that the role was congenial and helping him with his mental health. The claimant's perspective changed over time: he was finding fault with systems which he considered were causing him difficulty at work and was feeling stressed by them.

9. There was a general expectation that employees would cover weekend work, although there was flexibility of approach. The claimant was expected to work, in a fortnight, one weekend day on the first week and two weekend days in the next. The claimant was entitled to make a request about working. Nothing in the evidence pointed to this shift pattern (as opposed to working in the cafeteria generally) caused particular levels of stress in the claimant. Whilst the tribunal can accept that weekends are likely to be busier than weekdays, on the evidence we heard staffing levels were increased at busier times in any event. The claimant told us that it was working Friday, Saturday and Sunday in sequence led to the increase in stress, however the tribunal were also told that working at particular times of the day and at specific tasks such as preparing coffee also led to increases in frustration and stress. In our judgment there were general levels of increased stress arising from the claimant's deteriorating mental health and nothing which can be specifically related to working a Saturday and Sunday.

10. The first real evidence of stress came in September 2015. A customer had complained and a manager spoke to the claimant about this. The claimant did not respond appropriately to the manager, challenging her authority. Mr Lillywhite spoke informally to the claimant and during this discussion the claimant revealed that he was feeling "stressed", because of this the claimant's hours were reduced on a temporary basis.

11. In December 2015, the claimant had a discussion with his evening manager, Kim Bridge, at which he revealed, for the first time his history of depression. Whilst both Mrs Bridge and the claimant agree this discussion took place their recollections differ as to what was said by the claimant about his depression. We did not find it necessary to resolve those differences for the purposes of this judgment. Suffice to say that the respondent was aware at this point of the claimant having a history of a severe depression.

12. The incident that led to the claimant's dismissal occurred on 2 January 2016, the claimant was serving customers food.
    12.1. He had noticed that a customer had been waiting for a time and approached them to see if their order had been served. The claimant asked the customer about the order and told them of the fact that there was a limited range of sandwiches, the customer altered the order.
    12.2. The claimant served the new order but the customer was dissatisfied and expected both the new order and the original order to be served.
    12.3. The customer became agitated and the claimant called upon Sarah Fryer (a manager) to deal with the issue.
    12.4. Sarah Fryer arrived after a fifteen-minute interlude during which time the claimant was becoming anxious about the potential complaint as the customer kept making comments about him, as the claimant was carrying out his duties. The claimant wished to give his account to Sarah Fryer when she arrived but she told the claimant to go to a room upstairs without hearing his account.

12.5. At this stage the claimant was approached by another customer who told him that he had seen the incident and would give an account to the manager. The claimant attempted to approach his manager to inform her of this customer but was once again told to wait upstairs.

12.6. Approximately twenty minutes later Ms Fryer came up to discuss matters with the claimant asking for his account. His perception was that Ms Fryer was not listening to his account, he raised the matter of the supportive customer but Mms Fryer expressed that she had no awareness of this customer.

12.7. The claimant became extremely frustrated because of his perception that he was not being listened to and that anything that might help his explanation was being ignored.

12.8. The claimant's frustration led to an outburst of anger in which he threw his arms up in frustration and in the process hit a plastic cup of water off the table at which he was sitting; the cup may have struck the manager but no injury resulted. The claimant also stormed out of the room; he admitted that he had sworn by saying "fuck this" as he left.

13. An investigation commenced on 4 January 2016 undertaken by Dean Morris. The claimant was not in work between 2 and 23 January 2016 because of a combination of jury service and annual leave. The investigation led to the claimant being suspended in a letter dated 23 January 2016 prior to his due date for a return to work on 24 January 2016. The outcome of the investigation was that Mr Morris considered that there was insufficient evidence to conclude the claimant had intentionally hit his manager with the plastic cup. However, it was considered that the claimant had had committed an act of misconduct.

14. A disciplinary hearing was arranged and Mrs Carr was appointed to conduct the hearing. The hearing was held on 18 February 2016. The claimant told Mrs Carr that the day had been stressful and he considered that the outburst was connected to his depression explaining *"I do suffer from depression and when I am put under stressful and frustrating situations such as this it really exacerbates the condition"*. The claimant also explained that he had discussions with Mrs Bridge about his depression. Later when describing his outburst and what led to it the claimant referred to his condition taking hold making him realise he had to leave the room.

15. Following the disciplinary hearing Mrs Carr dismissed the claimant by a letter dated 22 February 2017.

15.1. In the letter Mrs Carr indicated she had considered the claimant's depression but concluded that it had not impacted on his conduct because the claimant had not raised the matter in order to obtain support or adjustments.

15.2. Further she took account of the fact his condition had had no impact on his work attendance.

15.3. When cross examined Mrs Carr said she had been unaware that the claimant suffered from depression before the meeting.

15.4. Mrs Carr said that she was not a medical expert but that some levels of behaviour are unacceptable and the claimant had not sought to have adjustments put in place to prevent this happening.

15.5. She indicated that she thought the claimant should have referred himself to the occupational health service provided by the respondent.

15.6. Mrs Carr accepted that she was not a medical practitioner and therefore was in no position to assess whether the behaviour arose out of the claimant's mental health condition.

15.7. Mrs Carr wavered in her responses as to whether she would have given a more lenient sanction had she understood that the claimant's depression was connected to his behaviour. We consider that her equivocation is evidence that she might have taken a different course had she been aware of the claimant's disability and its symptoms.

16. We heard no evidence from the individual that conducted the claimant's appeal. However, the following emerged from the appeal documents: The claimant's grounds of appeal letter indicated that his depression could explain his conduct on the day in question, but that it was treated dismissively at the disciplinary hearing. The claimant did argue that his depression was a mitigating factor, although he did say it did not cause the incident. The claimant's appeal hearing notes indicate that he raised the issue of his depression and he explained that the illness causes him to react to high levels of frustration. He also explained that since the incident his medication dose had been increased. The letter dismissing the appeal dealt with the issue in this way: "Whilst your current medical situation does provide some mitigation as to why the incident occurred, your conduct towards Sarah Jayne on the 2nd January 2016 at the time of the incident and after it had occurred is still unacceptable.

17. After we had indicated our judgment on liability (including reduction of award) the parties agreed the damages figure. We do not, therefore, find facts on the remedy matters.

**The Law**

18. The statutory provisions relied upon by the claimant begin with S. 15 of the Equality Act 2010 which provides:

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

19. The respondent has conceded that dismissal amounts to unfavourable treatment for the purposes of section 15 therefore we must consider the

remainder of the section. Langstaff J in ***Basildon & Thurrock NHS Foundation Trust v Weerasinghe [2016] ICR 305,*** set out the causation analysis to be applied to a section 15 claim when he said:

> *''The current statute requires two steps. There are two links in the chain, both of which are causal, though the causative relationship is differently expressed in respect of each of them. The Tribunal has first to focus upon the words "because of something", and therefore has to identify "something" – and second upon the fact that that "something" must be "something arising in consequence of B's disability", which constitutes a second causative (consequential) link. These are two separate stages.''*

20. A proportionate means of achieving a legitimate aim is generally referred to as justification. It is for the Tribunal to conduct a balancing exercise based on all the facts and circumstances of the case as to whether the legitimate aim relied upon justified the unfavourable treatment. The employer needs show that unfavourable treatment was 'reasonably necessary in order to achieve the legitimate aim. If it is shown that the respondent could have taken other measures with a less discriminatory impact but which would have achieved the same legitimate aim, the treatment would not be considered to be reasonably necessary. Less favourable (here unfavourable) treatment will be incapable of objective justification where there was an obviously less discriminatory means of achieving the same legitimate aim: see ***Williams v Ystrad Mynach College*** (Case 1600019/2011, unreported).
21.

22. Sections 20 and 21 along with Schedule 8 to the Equality Act 2010 provide the scheme by which the duty to make adjustments is set out. Section 20 covers the duty to make adjustments and provides:

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

    *The duty comprises the following----------*

    > *The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage."*

23. The tribunal has to have in mind the decision in the Employment Appeal Tribunal in the ***Environment Agency v Rowan UKEAT 0060/07***. There it is indicated that a tribunal must identify the provision criterion or practice applied by or on behalf of the employer, the identity of the non-disabled comparators where appropriate and the nature and extent of the substantial disadvantage suffered by the claimant. The guidance indicates that the entire circumstances must be looked at including the cumulative

effect of the provision, criterion or practice before going on to judge whether an adjustment was reasonable.

24. The tribunal has sought to remind itself of the statutory reversal of the burden of proof in discrimination cases. We consider the reasoning in the cases of ***Igen Ltd v Wong [2005] IRLR 258; Barton v Investec Henderson Crosthwaite Securities Ltd [2003] IRLR 332*** and ***Madarassy v Nomura International PLC [2007] IRLR 246***. Where it was demonstrated that the employment tribunal should go through a two-stage process, the first stage of which requires the claimant to prove facts which could establish that the respondent has committed an act of discrimination, after which, and only if the claimant has proved such facts, the respondent is required to establish on the balance of probabilities that it did not commit the unlawful act of discrimination. The ***Madarassy*** case also makes it clear that in coming to the conclusion as to whether the claimant had established a *prima facie* case, the tribunal is to examine all the evidence provided by the respondent and the claimant.

25. The tribunal is clear that the principles of contribution does apply to discrimaintion compensation. However, the decision in ***Polkey v AE Dayton Services Ltd [1987] IRLR 503*** does not directly apply to a discrimination claim. Any discrimination claim must be assessed on the basis of tortious assessment pursuant to section 124 Equality 2010. The claimant must, so far as possible, be placed in the position he would have been had the discrimination not occurred see ***Chagger v Abbey National [2010] IRLR 47***. The tribunal must take account of the prospects of dismissal in any event and the general vagaries of life in assessing the loss to the claimant. That means that decision in ***Polkey*** has relevance insofar that the respondent, had they followed the correct procedure, may nonetheless have dismissed the claimant legitimately. The question of contribution whilst not only directly applicable to dismissal on this occasion is also of assistance to the tribunal in considering the possibility of the claimant being dismissed at a future occasion because of his conduct.

**Analysis**

26. We deal first with the claim of a failure to make reasonable adjustments.
    26.1. There was a requirement generally to work a shift pattern which included Saturday and Sunday once a fortnight.
        26.1.1. If nothing more this was a practice. This was an expectation from the respondent albeit that it could be changed with a flexibility request.
        26.1.2. However, without such a request the claimant would, as others did, work these days as part of normal pattern.
    26.2. We cannot see that the evidence establishes that this pattern of work would generally cause a disadvantage to those suffering from the claimant's level of depression.
        26.2.1. Even were we to accept that such disadvantage existed there is no evidence that the claimant suffered disadvantage

because of working Saturday and Sunday as opposed to working any other days in sequence.

26.2.2. The claimant's depression was accompanied by becoming angry due to frustration; however, there is nothing to connect working on those particular days of the week with an increase in the claimant's levels of frustration over and above what would be expected in working any other days in sequence, or any other specific tasks or busy times of day.

26.3. Further to those findings we take the view that any disadvantage caused to the claimant by increased levels of stress would not be alleviated by not requiring the claimant to work a shift pattern where he was required to work Saturday and Sunday once a fortnight. The claimant suffered stress and frustration at other times simply removing the shift pattern would not have alleviated that difficulty.

26.4. On that basis, this adjustment would not have been reasonable for the respondent to have to make.

26.5. The claimant's claim pursuant to section 21 is therefore not well founded and the tribunal dismiss the same.

27. The next question we must address is the claimant's claim pursuant section 15 Equality Act 2010. The respondent concedes that dismissal is unfavourable treatment. The respondent accepts that it had knowledge of the claimant's disability from the time he referred to depression during the course of the disciplinary process.

27.1. The respondent dismissed the claimant because of his loss of temper outburst. The claimant's loss of temper arose as a consequence of the claimant's disability. Therefore the respondent treated the claimant unfavourably in consequence of something arsing from the claimant's disability.

27.2. Did the respondent had a legitimate aim in dismissing the claimant?

27.2.1. The tribunal consider it is common sense that it would be a legitimate aim to ensure that employees and customers should be protected from being subject to aggressive outbursts by its employees.

27.2.2. This aim would be legitimate in protecting health and safety matters and in protecting the respondent's commercial reputation.

27.3. Was the means of achieving that aim proportionate?

27.3.1. The evidence of Ms Carr tends to point to the conclusion that there could have been a different outcome to the disciplinary process had she been aware that the claimant's disability caused the outburst.

27.3.2. The respondent was, both at the disciplinary and appeal hearings, made aware that the claimant had depression and the claimant related his outburst to his condition.

27.3.3. The claimant was suspended and therefore presented no immediate problem in terms of health and safety and commercial reputation.

27.3.4. In addition, the respondent had access to an occupational health service which could have provided it with advice about the

claimant and his condition and any connection with the matter for which the claimant was being disciplined.

27.3.5. It was a deliberate decision not to obtain medical evidence from the occupational health service.

27.3.6. Obtaining such advice would have informed the respondent of the claimant's condition and may have indicated an alternative means of dealing with the claimant other than dismissal.

27.3.7. The absence of obtaining that advice cannot permit the respondent to say what we did in dismissing the claimant was proportionate on the basis of the information it had at the time. Such a defence would allow the unscrupulous to deliberately avoid seeking information in order to justify unfavourable treatment.

27.3.8. Without exploring the medical background in circumstances where the respondent had constructive knowledge of the claimant's disability, the respondent cannot establish that it was reasonably necessary to dismiss the claimant in order to achieve its legitimate aim.

27.4. In our judgement the justification defence is not established and the claimant's claim pursuant to section 15 Equality Act 2010 is well founded.

*28.* The claimant had not attended his GP, despite an obvious deterioration in his mental health (see being allowed to reduce his ours because of stress) and the fact that a three-month review should have been undertaken of his medication. In our judgement, this means that the claimant has a measure of culpability in respect of his outburst. In short, had he visited the GP it is possible that he would have received treatment and/or been permitted sickness leave. In the circumstances we consider that he has a level of contributory fault towards his dismissal. We also considered that had occupational health been involved by the respondent there was still, nonetheless, some prospect of the claimant being dismissed. However further to that we also consider that given the two conduct events it is a possibility that the claimant would have been dismissed at some point in the short term. Taking account of these factors we informed the parties of the percentage figures we considered reducing the award by. The parties then calculated there agreed figure that the award of compensation should be in the sum of £6,518.67.

Judgment posted to the parties on

20 March 2017

**EMPLOYMENT JUDGE W BEARD**

**Dated: 14 March 2017**

For the staff of the tribunal office