Case Number: 3323102/2016

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	and	**Respondent**
Mr Yuri Bouwhuis		Evonik Membrane Extraction Technology Limited

Held at: Watford **On:** 13-17 February 2017

Before: Employment Judge Southam
Mr I Bone
Mrs A Brosnan

Appearances:

Claimant: Mr D Bayne, Counsel
Respondent: Mr D Dyal, Counsel

RESERVED JUDGMENT

1. The claimant became a disabled person, by reason of a mental impairment which had substantial adverse effects upon his ability to carry out normal day to day activities, on or just before 19 October 2015.

2. The respondent could not reasonably have been expected to know that the claimant had become disabled at any material time.

3. The claimant's dismissal was unfair.

4. The claimant is entitled to a basic award for unfair dismissal, and to a compensatory award, limited to six weeks' loss of earnings.

5. The claimant's complaints about harassment, discrimination arising from disability and failure to make reasonable adjustments fail and are dismissed.

6. The claimant's remedies are to be determined on a date to be fixed, if not agreed in the meantime.

REASONS

Claim and Response

1. The claimant submitted this claim to the tribunal on 13 May, 2016. He did so having entered into early conciliation with ACAS by sending them the requisite information about the intended claim on 4 March, 2016. The ACAS certificate of early conciliation was issued by email on 18 April, 2016.

2. In the claim, the claimant made complaints about unfair dismissal and disability discrimination. He had been employed by the respondent as its Managing Director from 1 December, 2011 until 23 December, 2015. He said that the respondent is part of a group of companies with an annual turnover of £15.5 billion and 33,576 employees worldwide.

3. There were internal audits of the accounts of the business in May and August 2015. The second of those revealed a number of red flags indicating matters which required action. The claimant understood that the respondent had been concerned about the possibility of what he said were described as "fairytale sales". He said that no such sales were found. His approach to financial matters had been accepted previously. Later, a further audit report was given a red evaluation; there were now significant deficiencies of importance, although the claimant said that the significance of risks arising from the deficiencies was regarded as low. The findings of the report were not discussed with the claimant. On 20 October, the claimant became ill and was unfit to continue working. The same day he was suspended from his duties in relation to a number of issues. He was then invited to a disciplinary hearing on 23 October, but the claimant said that he was unfit to attend it and it was postponed. The claimant remained unfit to attend work and the respondent wanted to establish, by means of advice from its Occupational Health provider, whether the claimant was fit to attend a disciplinary meeting. Appointments were made and then cancelled by the claimant because they clashed with other medical appointments already made. Then the claimant was informed, on 19 December, a Saturday, that the respondent intended to proceed with its disciplinary hearing on 22 December, without obtaining the advice originally sought from Occupational Health. The claimant, through solicitors, indicated that he would not be attending. The claimant set out the allegations which the respondent told him they wished to investigate at the disciplinary hearing. The claimant said that these allegations were not sufficiently particularised to enable him to understand the case he had to meet, but the disciplinary hearing went ahead in the claimant's absence and he was dismissed. He appealed against his dismissal and, when an appeal hearing was arranged, the claimant decided to attend. The decision of the respondent was not to uphold the appeal.

4. The claimant alleged that he was, at all material times, disabled by reason of depression and anxiety. He contended that the respondent knew or

ought to have known about his disability. The claimant contended that the respondent's conduct amounted to less favourable treatment of the claimant because of his disability and/or unfavourable treatment because of something arising from his disability and/or amounted to a failure to make reasonable adjustments. He contended that the respondent had suggested that he had fabricated his medical appointments and that this amounted to harassment related to his disability. Lastly, he alleged that his dismissal was unfair. The claimant made clear that he did not bring a complaint about wrongful dismissal and reserved the right to do so in another court. He sought compensation, including an award for injury to feelings, and reimbursement of tribunal fees paid.

5. By a response filed on 14 June, 2016, the claim was resisted. The respondent summarised the history of the relevant events as they saw them. They said it was alleged that the claimant had given instructions to junior members of staff to raise invoices in respect of work that had not been completed and without the expectation that the invoices would be issued to the client or that monies would be recovered in respect of those invoices. This practice gave a false impression, they alleged, that the respondent's forecasted revenue would be greater than the reality. It was also alleged that the claimant had covertly recorded a management meeting held in Germany. They agreed with the facts set out in the attachment to the claim form as to the convening of the disciplinary hearing. In the grounds of resistance attached to the response form, the respondent set out its findings. They said that they found that the claimant had purposefully misstated the financial position of the company, that he had failed to provide management information requested by members of the board, that he had downloaded confidential business information without authority or explanation, that he had covertly recorded a management meeting and that he had retained documentation and property belonging to the respondent which he had been asked to return. During his suspension, he had accessed the respondent's premises in contravention of the terms of his suspension. These matters were said to amount to gross misconduct and in the circumstances, having regard to the claimant's seniority, it was decided that the appropriate sanction was to dismiss the claimant. They agreed that the claimant appealed against his dismissal and that the appeal itself was dismissed.

6. They denied that the claimant was disabled at any material time. They understood that he had a medical condition. They sought further particulars as to which matters the claimant intended to rely upon as amounting to acts of discrimination and they denied those complaints. They also denied that the claimant had been unfairly dismissed. They contended that the claimant was dismissed because of his conduct and that they acted reasonably in respect of the procedure adopted in dismissing him. They reserved the right to contend however that, if the tribunal should find that they failed to follow a fair procedure, the claimant would still have been dismissed, following a fair procedure, for a substantially fair reason and, in any event, any compensation should be reduced to take account of his contributory conduct.

Case Management

7. This case was listed, in accordance with current practice, for a case management hearing as soon as the proceedings were issued. That hearing took place before Employment Judge Heal on 12 July, 2016. In notes and orders she prepared after that hearing, sent to the parties on 14 July, Judge Heal summarised the claims that were being pursued, set out an agreed list of the issues the tribunal would have to determine once it had heard the evidence and made case management orders. In particular, the claimant was required to notify the tribunal and the respondent whether or not he intended to pursue his complaint under section 15 Equality Act 2010 (discrimination arising from disability); the respondent was required to notify the claimant and the tribunal whether or not the issue of the claimant entering the respondent's premises during his suspension was part of the reason for the dismissal, and they were to respond to the claimant's section 15 case, once that had been clarified. The other directions she gave were routine. They included directions about disclosure of medical records, and the respondent was required to inform the tribunal whether or not it accepted, following such disclosure, that the claimant had become disabled by any material date.

8. On 15 July, the claimant submitted a revised pleading of his section 15 complaint and, later, the respondent put in a response to it. The claimant was permitted to amend his case so as to proceed in that way. After the disclosure of the claimant's medical records, the respondent continued to deny that he was disabled. The claimant made an application for specific disclosure, to which the respondent responded. A preliminary hearing was fixed to take place on 7 November for the purpose of that application. The hearing was postponed and then took place by telephone on 14 and 17 November. Judge Heal made detailed orders designed to bring before the tribunal a joint medical report to assist the tribunal in determining the disability question.

9. She also resolved the claimant's application for disclosure, rejecting it on the basis that the respondent had searched for relevant documents and had not found any. She also resolved disputes about the letter of instruction to the joint medical expert.

10. After a medical report had been obtained, the respondent continued to dispute that the claimant had become disabled. For his part the claimant confirmed that he intended to pursue his complaints about disability discrimination. The parties then fell into dispute about the exchange of witness statements and an appropriate extension of time was granted in order to resolve that matter. A medical report by Dr Ian Rogerson was delivered to the tribunal on 2 February 2017.

The Hearing

11. The hearing proceeded before this tribunal on the listed dates. A discussion at the start of the hearing about the proposed timetable revealed a misunderstanding as to the amount of time Judge Heal had

allocated for evidence. The consequence was that it was unlikely that, if the claimant should succeed, there would be time to deal with his remedies. The tribunal proceeded on that basis. We undertook the reading of witness statements and some relevant documents on the first morning. There was then three days of evidence and we heard the parties' submissions, which were partly oral and partly in writing, on the afternoon of the fourth day. We deliberated and reached our decisions on the fifth day.

12. During the course of the hearing there were a number of concessions. The respondent conceded at the start of the hearing that the claimant had become disabled before any relevant event. That meant in practice that they accepted that, by October 2015, the claimant had become disabled by reason of a mental impairment, but they did not concede that the respondent had the requisite knowledge of his disability at any time.

13. At the start of the fourth day, when the claimant was approximately halfway through his cross examination by Mr Dyal, Mr Dyal handed to the tribunal a written concession, in which the respondent admitted that the claimant's dismissal was unfair. There were detailed aspects of the dismissal, which the respondent was prepared to concede, and did concede, which amounted to unfairness. They were as follows:

    13.1 Charge 4 (failure to follow management instruction), was not drafted with sufficient particularity to enable the claimant to know the case he had to meet and this was otherwise unclear until the appeal hearing. This did not give the claimant a fair opportunity to respond to the allegations.

    13.2 Charge 5 (the IT charge) was not drafted with sufficient particularity to enable the claimant to know all of the case he had to meet and it did not become clear thereafter. To the extent that the decision to dismiss included a belief that the claimant had removed material from the S-Drive and/or had downloaded confidential information to an external device and/or had deliberately delayed or restricted access to relevant business information, there was an inadequate basis before the decision-makers to come to that conclusion and more investigation was required.

    13.3 Charge 6 (covert recording): the claimant was never told the basis upon which Dr Kobus believed that he had made a covert recording meeting of 07.10.15. Further, Dr Kobus was not a sufficiently impartial decision-maker in relation to this charge since he was a witness to the incident.

    13.4 The disciplinary hearing should not have proceeded upon such short notice. Either more notice should have been given or it should have been further adjourned.

    13.5 Together the above matters tainted the overall fairness of the dismissal.

14. The respondent made clear, for the avoidance of any doubt, as follows: that they contended that the claimant would certainly have been dismissed in any event if the respondent had not made these errors or any other errors, should there be any; that a Polkey reduction of 100% should be made from the date on which the tribunal finds the respondent would have dismissed the claimant; further or alternatively that the claimant contributed to his dismissal and a reduction of 100% should be made. The discrimination claims continued to be resisted in full.

15. There was also, during the course of the closing submissions, a concession by counsel for the claimant. He abandoned the complaint of direct disability discrimination. Furthermore, he made no submissions in relation to the complaint of harassment, without specifically abandoning it.

16. We heard the evidence of the respondent's witnesses first. They were Dr Axel Kobus, the chairman of the respondent and Mr Johannes Mey, Head of Human Resources. Then we heard the evidence of the claimant. There was an agreed bundle of documents, to which some additions were made during the hearing. In these reasons, references to page numbers are to the numbered pages of the agreed bundle.

Issues

17. The issues we had to determine were those which had been set down for determination by Employment Judge Heal, save that, the claimant having amended his case as to discrimination arising from disability, the tribunal had to determine the issues raised by the amended pleading, as to which the issues were not explicitly stated, although the pleading had itself been drafted so as to follow the format of the list of issues settled by Employment Judge Heal. They were, as originally drafted by her, as follows, using her numbering:

*4. **Unfair dismissal claim***

4.1 What was the reason for the dismissal? The respondent asserts that it was a reason related to conduct which is a potentially fair reason for section 98(2) Employment Rights Act 1996. It must prove that it had a genuine belief in the misconduct and that this was the reason for dismissal. There were 6 main findings in the dismissal letter: in particular and amongst other allegations, deliberate misstatement of the financial situation of the respondent. The claimant puts the respondent to strict proof of its reason.

4.2 Did the respondent hold that belief in the claimant's misconduct on reasonable grounds having carried out as much investigation as was reasonable in all the circumstances? The burden of proof is neutral here but it helps to know the claimant's challenges to the fairness of the dismissal in advance and they are identified as follows:

4.2.1 Failing to carry out as much investigation as reasonable: the respondent should have carried out an investigatory interview with the claimant. An internal audit report was produced in draft which did not appear serious, but the report was adjusted at the last

minute with wording that made it look more serious than it was. The claimant believes it may have been manipulated.

4.2.2 Failing to tell the claimant the full case against him: the multiple allegations were broad and the claimant was not told the full detail.

4.2.3 There were no witness statements produced.

4.2.4 The respondent did not give the claimant an adequate opportunity to state his case: the hearing went ahead in his absence. The claimant was unfit and the respondent had agreed to have him assessed by occupational health to see if he was fit to attend the hearing. It was not possible to arrange the appointment with occupational health so the respondent decided to go ahead without the claimant's attendance. The respondent fixed dates for appointments with occupational health without consultation with the claimant.

4.2.5 When the respondent decided to proceed with the hearing in the claimant's absence they gave him inadequate notice.

4.3 Was the decision to dismiss a fair sanction, that is, was it within the reasonable range of responses for a reasonable employer?

4.4 If the dismissal was unfair, did the claimant contribute to the dismissal by culpable conduct? This requires the respondent to prove, on the balance of probabilities, that the claimant actually committed the misconduct alleged.

4.5 Does the respondent prove that the claimant would have been fairly dismissed in any event? If so, what is the percentage chance of a fair dismissal and when?

5. ***Disability***

5.1Does the claimant have a mental impairment, namely anxiety and depression?

5.1 If so, does the impairment have a substantial adverse effect on the claimant's ability to carry out normal day-to-day activities?

5.2 If so, is that effect long term? In particular, when did it start and:

5.2.1 has the impairment lasted for at least 12 months?
5.2.2 is or was the impairment likely to last at least 12 months or the rest of the claimant's life, if less than 12 months?

N.B. in assessing the likelihood of an effect lasting 12 months, account should be taken of the circumstances at the time the alleged discrimination took place. Anything which occurs after that time will not be relevant in assessing this likelihood. See the Guidance on the Definition of Disability (2011) paragraph C4.

5.3 Are any measures being taken to treat or correct the impairment? But for those measures would the impairment be likely to have a substantial adverse effect on the claimant's ability to carry out normal day-to-day activities?

6 ***Section 26: Harassment on grounds of disability.***

6.1 Did the respondent engage in unwanted conduct as follows:

6.1.1 The respondent suggested that the claimant fabricated appointments with his GP and counsellor. Those appointments were part of his treatment for his health condition.

6.2 Was the conduct related to the claimant's protected characteristic?

6.3 Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

6.4 If not, did the conduct have the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

6.5 In considering whether the conduct had that effect, the Tribunal will take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

7 Section 13: Direct discrimination on grounds of disability.

7.1 Has the respondent subjected the claimant to the following treatment falling within section 39 Equality Act, namely

7.1.1 The respondent, through Dr Kobus, insisted on the claimant giving priority to the planned occupational health appointments as opposed to his existing medical appointments related to his condition, in e-mails to the claimant on 4 and 7 December 2015, and suggested that the claimant should re-arrange his GP's appointment.

7.1.2 Dismissed the claimant (the dismissal letter refers twice to the claimant cancelling appointments with occupational health claiming prior arrangements, thereby suggesting that the appointments were fabricated);

7.2 Has the respondent treated the claimant as alleged less favourably than it would have treated a hypothetical comparator?

7.3 If so, has the claimant proved primary facts from which the Tribunal could, properly and fairly, conclude that the difference in treatment was because of the protected characteristic?

7.4 If so, what is the respondent's explanation? Does it prove a non-discriminatory reason for any proven treatment?

8 ***Section 15: Discrimination arising from disability***

8.1 The "something arising in consequence of the claimant's disability" alleged is that the claimant's depression made it harder for the claimant to concentrate and he needed further time to consider the allegations against him:

8.2 No comparator is needed.

8.3 Does the claimant prove that the respondent treated the claimant as follows:

8.3.1 They held a disciplinary hearing in the claimant's absence
8.3.2 Gave the claimant short notice of the hearing
8.3.3 Failed to investigate allegations or put them to the claimant in an investigatory process
8.3.4 Failed to provide the claimant with full details of the allegations and the supporting evidence
8.3.5 Insisting that the claimant attend occupational health appointments at times that clashed with his existing medical appointments?
8.3.6 Abandoning the occupational health process that had been started.
8.3.7 Insisting that the claimant attend occupational health appointments at times that clashed with his existing medical appointments?

8.4 Did the respondent treat the claimant as aforesaid because of the "something arising" in consequence of the disability?

8.5 Does the respondent show that the treatment was a proportionate means of achieving a legitimate aim?

8.6 Alternatively, has the respondent shown that it did not know, and could not reasonably have been expected to know, that the claimant had a disability?

9 ***Reasonable adjustments: section 20 and section 21***

9.3 Did the respondent apply the following provision, criteria and/or practice ('the provision') generally, namely,
9.4 They held a disciplinary hearing in the claimant's absence
9.5 Gave the claimant short notice of the hearing
9.6 Failed to investigate allegations or put them to the claimant in an investigatory process
9.7 Failed to provide the claimant with full details of the allegations and the supporting evidence
9.8 Insisted that the claimant attend occupational health appointments at times that clashed with his existing medical appointments?
9.9 Abandoned the occupational health process that had been started.
9.10 Insisted that the claimant attend occupational health appointments at times that clashed with his existing medical appointments?

9.11 Did the application of any such provision put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who did not have the claimant's disability in that:

9.11.1 The claimant was at a disadvantage in responding in that he had difficulty concentrating, his memory was impaired, and his anxiety impacted his ability to deal with face to face questioning.

9.12 Did the respondent take such steps as were reasonable to avoid the disadvantage? The burden of proof does not lie on the claimant, however it is helpful to know the adjustments asserted as reasonably required and they are identified as follows:

9.12.1 Not holding the disciplinary hearing in the claimant's absence
9.12.2 Allowing the claimant written submissions and/or questions
9.12.3 Providing the claimant with detailed allegations supported by witness statements
9.12.4 Fixing dates with occupational health that were convenient to the claimant.
9.12.5 If the respondent dismissed the claimant because of his entering the premises while suspended, that should have been put to the claimant.
9.12.6 Giving longer notice of the eventual hearing.

9.13 Did the respondent not know, or could the respondent not be reasonably expected to know that the claimant had a disability or was likely to be placed at the disadvantage set out above?

10 Time

10.3 The claim form was presented on 13 May 2016. Day A was 4 March 2016. Day B was 18 April 2016. Accordingly any act or omission which took place before 5 December 2015 is potentially out of time, so that the tribunal may not have jurisdiction.

10.4 Does the claimant prove that there was conduct extending over a period which is to be treated as done at the end of the period? Is such conduct accordingly in time?

10.5 Was any complaint presented within such other period as the employment Tribunal considers just and equitable?

11 Remedies

11.3 If the claimant succeeds, in whole or part, the Tribunal will be concerned with issues of remedy.

11.4 There may fall to be considered a declaration in respect of any proven unlawful discrimination, recommendations and/or compensation for loss of earnings, injury to feelings, and/or the award of interest. The claimant does not seek re-instatement of re-engagement.

Relevant Law

18. We considered and applied the following provisions of law and case-law in reaching our decisions:

Disability Discrimination

18.1 By section 6 of the Equality Act 2010, a person has a disability if they have a physical or mental impairment which has a substantial and long-term effect on her ability to carry out normal day-to-day activities. In paragraph 1 of schedule 1 of that Act, the effect of an impairment is long-term if it has lasted for at least 12 months, or is likely to do so.

18.2 In connection with provisions of the Disability Discrimination Act 1995, concerned with the likelihood of the recurrence of a substantial adverse effect, and the likelihood of an effect being substantial but for measures taken to alleviate it, the House of Lords held in SCA Packaging v Boyle [2009] IRLR 746 that "likely" must mean "could well happen" rather than "probable" or "more likely than not".

18.3 The House of Lords also commented in that case that when an employer has to decide if it is subject to a duty to make reasonable adjustments, the employer needs to know in real time, and not to have to wait until a tribunal has heard all the evidence and reached a conclusion about what is more likely than not to happen in the future. This implies that such a judgment must be based on the information available at the time, and not on the basis of information which only comes to light subsequently.

18.4 By section 15 of the same Act, a person (A) discriminates against a disabled person (B), if A treats B unfavourably because of something arising in consequence of B's disability, and A cannot show that the treatment is justified, by showing that is a proportionate means of achieving a legitimate aim.

18.5 By section 20(3) of the same Act, where a provision criterion or practice applied by A puts a disabled person at a substantial disadvantage, in relation to a relevant matter, compared with persons who are not disabled, it is a requirement that A take such steps as it is reasonable to have to take to avoid the disadvantage.

18.6 By section 21 of the same Act, a failure to comply with that requirement is a failure to comply with a duty to make reasonable adjustments, and such a failure is deemed to be discrimination against the disabled person.

18.7 Paragraph 20 of schedule 8 to the Equality Act 2010 provides that an employer of an interested disabled person is not subject to a duty to make reasonable adjustments if the employer does not know and cannot reasonably be expected to know that the interested disabled person is disabled and likely to be placed at the disadvantage described at paragraph 18.5 above.

18.8 In relation to the requirement of knowledge, in Department for Work and Pensions v Alam [2010] IRLR 283, it was held that in order to ascertain whether the exemption from the obligation to make reasonable adjustments applies, two questions arise: (i) did the employer know both that the employee was disabled and that his disability was likely to affect in the manner described above? (ii) If the answer to question (i) is "no", ought the employer to have known both that the employee was disabled and that his disability was likely to affect him in the manner described above? If the answer to both questions is "no", then the employer will qualify for the exemption from the duty to make reasonable adjustments.

18.9 By section 26 of the same Act, harassment occurs when a person engages in conduct which is related to a relevant protected characteristic and the conduct has the purpose or effect of violating that person's dignity, or of creating for that person an intimidating, hostile, degrading, humiliating or offensive environment. In deciding whether conduct has that effect, the tribunal must consider the victim's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

18.10 Discrimination and harassment, as defined above, are examples of what the Equality Act calls "prohibited conduct". By section 39(2) of the same Act, an employer must not discriminate against an employee by, among other things, dismissing them or subjecting them to "any other detriment", (some specific forms of detriment, apart from dismissal, not relevant to this claim, having been previously mentioned).

18.11 By section 40(1) of the same Act, an employer must not harass, in the sense defined at section 26, their employee.

Unfair Dismissal

18.12 Section 98 Employment Rights Act 1996 provides that it is for the employer to show the reason for the dismissal and that it is one of the potentially fair reasons set out in sections 98(1)(b) or 98(2) of that Act. A reason related to the conduct of the employee is one of those reasons and is provided for at section 98(2)(b).

18.13 When that requirement has been fulfilled the determination of the question whether the dismissal is fair or unfair depends on whether in the circumstances, including the size and administrative resources of the employer's undertaking, the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee. That question is to be determined in accordance with equity and the substantial merits of the case: section 98(4) Employment Rights Act.

18.14 The leading authority on misconduct dismissals remains British Home Stores v Burchell [1978] IRLR 379, save that, since that case was decided, the burden of proof as to the matters set out in that decision as requirements became (on 1 October 1980) a neutral one (Employment Act 1980). Therefore, recasting the requirements set out in that case in neutral terms, the decision of the Employment Appeal Tribunal is to the effect that, where an employer has dismissed an employee for an act of misconduct, for the dismissal to be found to be not unfair, the tribunal should make findings about three matters. First the tribunal should find that the employer's officers believed the employee to be guilty of the misconduct alleged. Secondly, the tribunal should find that the employer had in his mind reasonable grounds upon which to sustain that belief. Third, the tribunal should find that the employer carried out as much

investigation into the matter as was reasonable in the circumstances. If the tribunal finds these matters, then the employer must not be examined further. It is not necessary that the tribunal would have shared the same view. Nor should the tribunal examine the quality of the material the employer had before him, for instance to see whether it was the sort of material which, objectively considered, would lead to a certain conclusion on a balance of probabilities.

18.15 In Sainsburys Supermarkets Ltd v Hitt [2003] IRLR 23, the Court of Appeal held that the range of reasonable responses test (which is applied to determine the reasonableness of the sanction adopted by an employer in relation to misconduct, see below), applies as much to the question of whether an investigation into suspected misconduct was reasonable in all the circumstances as it does to procedural and other substantive aspects of a decision to dismiss an employee for a conduct reason.

18.16 As regards dismissal itself, the case of Post Office v Foley [2000] IRLR 827 and other authorities show that the Tribunal's responsibility is to determine whether or not dismissal in the particular circumstances fell within the band of reasonable responses that a reasonable employer might have adopted. The Court of Appeal said, in that case, that the tribunal must not substitute its decision as to what was the right course for the employer to adopt. The Court of Appeal recognised, in Foley, that, if application of the reasonable responses test led the tribunal to conclude that the dismissal was unfair, they would, in effect, be substituting their view for that of the employer, but the process must be conducted by reference to the objective standards of the hypothetical reasonable employer, and not by reference to their own subjective views.

18.17 Where a tribunal has found that an employee's dismissal was unfair, the employee is entitled to basic and compensatory awards under section 118 Employment Rights Act 1996. The basic award is calculated by reference to the successful claimant's age and his length of service. By section 122(2), of the same Act, where the tribunal considers that any conduct of the complainant before the dismissal was such that it would be just and equitable to reduce the amount of the basic award to any extent, the tribunal shall reduce that amount accordingly.

18.18 The compensatory award is, by section 123 of the same Act, such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal insofar as that loss is attributable to action by the employer. Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the

compensatory award by such proportion as it considers just and equitable having regard to that finding.

18.19 In Polkey v A E Dayton Services Ltd [1987] IRLR 503 the House of Lords held that, in considering whether the employer acted reasonably or unreasonably in treating the reason for the dismissal as a sufficient reason for dismissing the employee, there is no scope for the tribunal to consider whether, if the employer had acted differently, he might have dismissed the employee. It is what the employer did that is to be judged, not what he might have done. It is necessary to distinguish between unreasonable conduct in reaching the conclusion to dismiss, which is a necessary ingredient of an unfair dismissal, and injustice to the employee, which is not a necessary ingredient of an unfair dismissal, although its absence will be important in relation to a compensatory award. As Lord Bridge said:

> "As was pointed out by Browne-Wilkinson J in *Sillifant's* case, if the Industrial Tribunal, in considering whether the employer who has omitted to take the appropriate procedural steps acted reasonably or unreasonably in treating his reason as a sufficient reason for dismissal, poses for itself the hypothetical question whether the result would have been any different if the appropriate procedural steps had been taken, it can only answer that question on a balance of probabilities. Accordingly, applying the *British Labour Pump* principle, if the answer is that it probably would have made no difference, the employee's unfair dismissal claim fails. But if the likely effect of taking the appropriate procedural steps is only considered, as it should be, at the stage of assessing compensation, the position is quite different. In that situation, as Browne-Wilkinson J puts it in *Sillifant's* case at page 96:
>
> > "There is no need for an "all or nothing" decision. If the Industrial Tribunal thinks there is doubt whether or not the employee would have been dismissed, this element can be reflected by reducing the normal amount of compensation by a percentage representing the chance that the employee would still have lost his employment".

18.20 Other authorities have emphasised that, in the application of that principle to assessment of the compensatory award, the tribunal is to assess the chance of a fair dismissal having occurred. For example, in Software 2000 Ltd v Andrews [2007] IRLR 568, Elias J (as he then was) said at paragraph 53 of the judgment of the Employment Appeal Tribunal:

> "..there may be insufficient evidence, or it may be too unreliable, to enable a tribunal to say with any precision whether an employee would, on the balance of probabilities, have been dismissed, and yet sufficient evidence for the tribunal to conclude that on any view there must have been some realistic chance that he would have been. Some assessment must be made of that risk when calculating compensation…"

18.21 In Ministry of Justice v Parry [2013] ICR 311, Langstaff J

emphasised that Polkey was not about probability but chance.

18.22 Mr Bayne referred us to the case of Rao v Civil Aviation Authority [1994] IRLR 240. There it was held that the application of the Polkey principle was a matter that went to calculation of the amount of the compensatory award in terms of assessing the amount that the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal. It was held that that question should be determined first, and the question as to whether or not there should be a reduction for contribution, which is concerned with whether, the amount having been determined as above, it should be reduced, second. In principle, it is permissible for deductions to be made in respect of both matters, but the Polkey issue is to be considered first.

Findings of Fact

19. Having heard the evidence, we reached the following findings of fact:

19.1 The respondent is a company established in the UK to provide chemical separations to the pharmaceutical and chemicals industry. The clients are international and are from the United States, Europe and the Asia-Pacific region. The company has a valuable range of proprietary, patented membrane technologies, which the company applies to the products it sells. Its primary product is a process called Organic Solvent Nanofiltration. The company is part of a very large business based in Germany, said to be one of the world's leading specialty chemicals companies. The group employs over 33,500 employees worldwide and, in 2015, generated sales of approximately €13.5 billion.

19.2 By comparison, the UK company is particularly small. We were told that the number of its employees was 20.

19.3 The claimant is originally a Dutch citizen and became the managing director of the respondent on 1 December, 2011. However, he had previous experience working with the group of which the respondent formed part and had begun working for a company within the group in the United States in 2006. In 2008 he moved to Germany and became Sales Director for Europe. His appointment to the UK company (the respondent) was his next appointment. The claimant had participated in a series of management development initiatives in the period 2011 to 2015, all listed at paragraph 4 of his witness statement.

19.4 As well as the position of Managing Director, the claimant held the positions of General Manager and Global Business Development Director and he was a board member of the board of UK company. He had responsibility for the profit and loss of the company. He reported to Dr Axel Kobus, the chairman of the company and there

were two other members of the board of the UK company. He also had responsibility to manage day-to-day operations of the company in London, at sites at Wharfside and Greenford. He was responsible for writing business plans and business strategies.

19.5 In the normal course of events, the claimant was responsible for the development of forecasts and budgeting. He was expected to demonstrate to the board and, no doubt, to the wider company what sales of the company's products could reasonably be anticipated over the period of any forecast. There were monthly reports to the board.

20. In October 2015, the respondent would present disciplinary charges against the claimant. In a letter dated 20 October 2015, page 550-551, three of those charges were expressed in the following terms:

20.1 “That you have persistently and purposefully misstated the financial situation of [the respondent];

20.2 That you have deliberately misled the board of [the respondent] and the wider Group regarding the commercial situation as to sales and the [net profit] of [the company]; and

20.3 That you have instructed a junior colleague to participate in this process”.

21. Although Mr Bayne submitted that the evidence of Dr Kobus significantly varied these disciplinary charges, we disagree. What his evidence did was to provide greater particulars than had been provided in the letter requiring the claimant to attend the disciplinary hearing. We therefore turned to the material that was in the respondent's possession relating to these three disciplinary charges. Although the respondent sent to the claimant a number of documents with its letter of 20 October, those documents were not the entirety of the documents they considered in relation to these disciplinary charges. We examine here all of the material the respondent considered:

21.1 The first evidence was a document described as a meeting report prepared by Dr Thomas Schiffer, at pages 279-283. This report reads in part as if it is a record of a meeting at which the claimant and his junior colleague Syed Adeel were present. In fact, the report is an analysis of results of a form of audit, called “Crosscheck of Sales Revenues booked by EMET” [the respondent]. In relation to the two customers about whom the respondent was principally concerned, the report refers to the booking of what are called "accrued sales" in May 2015. Dr Schiffer had examined sales for the seven-month period beginning on 1 January, 2015 and ending 31 July, 2015. He refers to the "accruing" of sales, which appears to refer to the recording of sales in the books of the company. The first matter which he described as a "red flag", was the accruing of the sum of €40,000 in respect of a customer called Dohler, which

was shown as an advance payment for equipment. He noted that the customer had not provided a purchase order. He decided that this entry should be reversed immediately.

21.2 He then described as the biggest issue that he had found in relation to a customer called Merck. He described there having been a joint development programme in three phases, that the company had quoted and received purchase orders for phases 1 and 2, and that they had also quoted for phase 3. He said that the company continued to show "regular paid application service for Merck in the sales revenues - expecting that Merck will sooner or later place the purchase order for phase 3". There was no purchase order from Merck and yet it was clear to him that the company had accrued sales of the value €125,000 in respect of phase 3. He described this as a "major red flag". It would have a negative impact on sales of 125,000 euro when it was reversed in the books of the company. Together, there were three reversals which had to be made, but the reversals in respect of Merck and Dohler were by far the greater in amount, even though about 80% of the bookings were correct. He said that most of the inconsistencies with the group's booking standards happen because the respondent does its booking and invoicing far too early. Invoices were issued in advance even before a business is completed or is to be delivered. He thought it was a systematic approach "trying to push the business, ignoring [Group] standards".

21.3 The second item considered by the respondent was a presentation made by Dr Schiffer to the board on 23 August 2015: two versions of this document appeared in the bundle, at pages 290-295 and 296-305. He said that the company has declining and unsatisfactory sales revenues, that projects had been announced but had not materialised and, in the original form of the presentation, that sales figures had been “falsified”. He mentioned that the accounts had to be amended by the removal of what were described as "non-existing sales". The reference to "falsified" was, both in the minutes of meeting and in the presentation, amended, the word being replaced by "wrong". The presentation also records that the board made a decision setting binding accounting rules, including, that, for all business, invoices may only be released after having received a written purchase order. The same would apply to shipping materials and equipment.

21.4 The third document was an audit report dated 1 October, 2015, page 428-436, which is not attributed to anyone. This document records the purpose of the audit, which was to evaluate and verify the sales recognition processes, analyse the efficiency of the internal control system and determine areas of risk by analysis of the firm’s management accounts. In the management summary, the figures for sales for 2014 and 2015 are recorded and it is recorded that the company sustained losses in both years. The audit revealed significant deficiencies of importance in the sales

recognition process, which was not done in line with international accounting standards and the Group Reporting Manual. It states that the practice was to record a sales invoice before the actual shipment of goods. This led to incorrect revenues being recorded. The accounts of the company had been certified by an external auditor. There was a series of recommendations.

21.5 In the detailed results, reference was made as before to the recording of sales before the shipment of goods to the customer had taken place. The report here makes reference to the Financial Controller (Syed Adeel) saying in particular that the booking of invoices was advised by the managing director in order to balance the actual revenue with forecasted revenue. Invoices had never been issued to the customer but were booked as revenues on the income statement. The report also recorded that this practice was standard practice before the Financial Controller took over his position in 2012.

21.6 Mr Adeel disclosed to Dr Kobus email correspondence between him and the claimant in May and June 2014, at page 160-163. In the email of 29 May, Mr Adeel reported the sales invoices for that month. The claimant replied, at page 161:

> "This is an absolute disaster again! Can you please run against my detailed forecast I gave you? What are we missing? Merck is one. We need to talk about this urgently as the sales should be 120,000 Euro for this month; we are €100,000 off!".

21.7 Mr Adeel replied that the Merck project was on hold.

21.8 In November 2014 a further exchange of emails, page 166-169, between the claimant and Mr Adeel included a rolling revenue forecast for the next three months and for the year of 2014 as a whole led to a reply from the claimant that the forecast was not being met and he asked the financial controller to "tweak the number". He described this as "marketing but helps a great heap of discussion that is coming our way!"

21.9 In an email of 3 December 2014, page 170, the claimant wrote that the "December numbers should just get us over the sales target for the year if my calculations are correct otherwise let us change so we close the year just above [the target]". This email also records that the third phase of the Merck project is on hold and the second phase seems within reach. Dohler had not provided approval for the plant.

21.10 In January 2015, Mr Adeel wrote to the claimant, page 185-186, with a sales listing for 2014. He said that he had had to book €25,000 more for Merck so that they land at 1.014 million Euro for the year. He asked if that was acceptable. The reply from the claimant was:

> "That works … that leaves 25,000 Euro for January… which I will use in my forecast. Reality check is that it does not look good for this project with Merck… so we will have to get creative soon!"

21.11 In an email to Thomas Scheffer of 18 August, page 275, Mr Adeel attached an email trail which he said confirmed the booking of revenue for the third generation of the Merck project prior to receiving a purchase order and in particular for phase 3 of that project, for which no purchase order had been received. He said that some €125,000 was still accrued in the books and they were no further in the project. He was therefore concerned that they would have to reverse the revenue back into the books this year, 2015, if no further progress was made.

21.12 On the same day, he sent a further email, page 277 to Dr Schiffer in which he attached an email confirming the booking of revenue of €40,000 for Dohler, for which a purchase order and project go ahead had yet to be received. The email chain he attached is at 204-207. Those emails show that, on 1 June 2015, Mr Adeel wrote to the claimant with a breakdown of sales for the month of May. He had excluded Dohler, because there was no purchase order or written confirmation. He was instructed nevertheless to book as sales the sum of €40,000 for that customer, and, when he asked how it should be booked, the claimant instructed him that it was to be shown as a sale of equipment, in particular, a down payment for a unit. This email correspondence implies that there was a conversation between the claimant and Mr Adeel between the sending of the two emails.

21.13 The claimant received a copy of the August audit report and wrote to Dr Schiffer: page 306-307. He said that, when they met before the process, Dr Schiffer informed him that he was checking for "fairytale sales". He said that he told Dr Schiffer that he was not happy with the use of that term, but, in any event, no such sales had been found, according to the report, in his view. He complained of factual errors which are not relevant to the employer's ultimate findings in relation to the first three disciplinary charges. He then said that Dr Schiffer had himself been overseeing the work of the Financial Controller Syed Adeel and that Dr Schiffer was therefore in the best position to verify compliance with the group policies on accounting principles. The UK company's own external auditors had verified compliance with UK legislation, he said. He then asked a series of questions about who adopted a systematic approach to trying to push the business and what standards had been ignored, and by whom. His case was that the approach taken was in line with accepted processes.

21.14 The claimant was given an opportunity to comment upon the early version of the audit report (page 428-436) which would eventually be approved and issued on 1 October. For instance, a version appears at page 341-349. An example of the comments the

claimant made appears at page 381-384, where he said that he did not have an accounting/controlling background and could only challenge on the surface of financial systems. He said he was reliant on the safeguards provided by the vice-president, the external auditor and the internal financial controller, Mr Adeel. In relation to Merck, the claimant commented, by reference to correspondence apparently enclosed, that Mr Adeel provided him with advice as to how best to answer questions from the external auditor, that he was therefore not providing direction but requesting advice and that in effect the financial controller was not acting on his instructions but advising him when and how sales can best be booked.

21.15 The claimant's letter to Dr Kullman at page 397 records his thanks to Dr Kullman for incorporating many of his proposed changes to the audit report so as to ensure accuracy and correctness.

21.16 However, on receipt of the final version of the audit report dated 1 October, claimant sent a letter, page 453-454, to a number of recipients, including Dr Kobus, in which he complained about the contents of the final report, in particular about significant changes which he said had been made without his agreement. He said that the report now amounted to a "red report". He said that the report suggested that the management of the company agreed with the reports, results and actions, but the claimant said that they did not agree. He suggested that the report misunderstood the relationship and respective responsibilities of the financial controller, Mr Adeel and himself, and he repeated that he did not have an accounting/controlling background and was reliant on Mr Adeel's professionalism.

21.17 On 3 September, the claimant's wife gave birth to a daughter and the claimant took a short period of paternity leave. He returned to work before 22 September. The exact date of his return was not clear to us.

21.18 On 7 October, the claimant was summoned to attend a meeting with Dr Kobus in Germany, at short notice, to discuss the overall business situation. Minutes of this meeting are at page 525-527. The minutes record discussion about general matters. There are brief references to Dohler and to Merck but with no indication of what was discussed. There is a reference to the financial audit report and how to follow through; and pre-evaluation of action items and those already addressed. The minute then records that Dr Kobus stopped the meeting because of, as it was put, the unlawful and unauthorised taping of the discussion by the claimant. What follows in the minutes are a series of bullet points which, we infer, were not discussed.

21.19 On 19 October, the claimant went to see his doctor and he was signed off as unfit to work because of an adjustment disorder with anxiety symptoms for a period of five days, until 24 October.

21.20 After the meeting on 7 October in Germany, Dr Kobus sought authority to take disciplinary action against the claimant. It was his intention to suspend the claimant from his duties. He told us that attempts were made to send a letter to the claimant's home address but that the letters were returned. The only evidence in the bundle about this is an email on page 546, which showed that an address, we infer his home address, for the claimant had been obtained.

21.21 The claimant was then suspended by means of a letter attached to an email on 20 October, page 556. There were a number of attachments to the email. Not only was the letter of suspension attached, page 548-549, there was also a letter requiring the claimant to attend a disciplinary hearing, page 550-551 already referred to, as well as a series of further documents which may have been attachments to the letter requiring the claimant to attend a disciplinary hearing. In the email itself there was nothing to suggest to the claimant that he was about to open a letter suspending him from his duties.

21.22 In the suspension letter, the claimant was informed that he was suspended on full pay pending formal consideration of a number of issues that had come to light, including in respect of information he had provided to the board. No further details were given. He was told that suspension was not a disciplinary sanction, but was a neutral act. He was to remain available and contactable during normal working hours and to respect the confidential nature of the internal processes. He should not contact any employee of the company. The claimant was not specifically told that he could not enter company premises.

21.23 In the letter requiring the claimant to attend a disciplinary hearing the disciplinary charges were set out. We have already set out the text of the first three of those charges. In addition to those three charges there were the following:

> "Persistent failure to comply with lawful management instructions in relation to the provision of management information;
>
> Deliberately delayed unrestricted access to relevant business information including unauthorised usage of IT devices; and
>
> The commission of an offence (the offence being alleged, to have taken place in a management meeting in Germany) in covertly recording a conversation without the consent of the other party 7 October, 2015".

21.24 He was told that if they were proved, those allegations could amount to gross misconduct and one potential outcome of the hearing could be his dismissal without notice or payment in lieu

thereof. The disciplinary hearing was to be on 23 October. He was then provided with a set of documents, analysed above at paragraphs 21.1-21.2; 21.3; 21.4-21.12, a document relating to a merit pay increase to the claimant, an IT audit report and the minutes referred to at paragraph 21.18 above. The claimant was invited to provide any further documents that he wished to be considered and was told that he could bring a fellow employee or trade union representative to the meeting with him, in accordance with the companies' disciplinary procedure, not shown to us.

21.25 On 21 October, the claimant sent an email to Dr Kobus, page 568, in which he said that he did not feel able to attend the disciplinary hearing and he reminded him that he had been signed off sick.

21.26 The claimant then obtained a further statement of fitness for work from his doctor dated 23 October, authorising him to remain off work because of work related stress until 6 November, page 569.

21.27 In response to the claimant's email, Dr Kobus agreed to postpone the disciplinary meeting until after the expiry of the claimant's first medical certificate. He did so on 22 October, postponing the hearing until 26 October. He commented that the certificate did not state that he was not fit for work or work related activities.

21.28 After he received the claimant's second certificate, Dr Kobus replied that, although the certificate referred to the claimant as unfit for work, it made no mention of him not being fit to attend the hearing. He thought that having the disciplinary matters outstanding would not assist his recovery. He said the company intended to obtain an occupational health appointment for the claimant so that they could understand his medical situation and prognosis generally, and how best to progress matters generally while he remained unfit for work. He said also that he hoped to obtain recommendations as to any adjustments that might be appropriate to minimise the impact of the process on his health. He postponed the hearing again.

21.29 The claimant was issued with a further statement of fitness for work on 6 November, page 575, indicating that the claimant was unfit to work by reason of work related stress and anxiety. It ran until 20 November. In the meantime, on 10 November, the claimant gave consent for the occupational health referral, page 580. The claimant then obtained, on 20 November, page 581, a further statement of fitness work on 20 November authorising him to remain away from work, for the same reason as previously, until 10 December

21.30 On 27 November, the respondent's occupational health provider sent the claimant an appointment to visit them for the purposes of an assessment, at a clinic in London near to the claimant's home on 10 December 2015. On 30 November, the claimant sent an email to his GP surgery, page 586, requesting confirmation of the time of

an appointment which he had there, on 10 December. He received a reply confirming the appointment on 10 December at 2:45pm.

21.31 The claimant then called the occupational health provider and cancelled the appointment on 10 December, without suggesting an alternative date. The provider said that the claimant had not given them a telephone number, and said that he would prefer to communicate by email.

21.32 Dr Kobus heard of the cancellation and sent an email to the claimant, on 4 December, page 593, stating that he understood that the claimant had cancelled the appointment without providing any reason, saying that it was not convenient. He said this was not acceptable. The company had given a clear instruction that he should attend the appointment, which was during normal working time. He should attend on 10 December. However, if the claimant needed to reschedule the appointment, he should contact Dr Kobus.

21.33 The claimant replied the same day, page 592, and said that the reason he had asked for the appointment to be rescheduled was that the appointment coincided with a doctor's appointment already scheduled. Dr Kobus replied and said that the claimant should rearrange his GP appointment.

21.34 The claimant objected to that. In a long email on 9 December, page 591, he said that he was very concerned about the way he was being treated. He objected to Dr Kobus' insistence on the cancellation of his GP appointment and also to the content and tone of his correspondence. He told Dr Kobus that he had been receiving counselling from a psychological therapy service, which had indicated that he has severe depression and anxiety. For that reason, it was unreasonable to expect him to cancel his appointment and he did not understand why the company took the view that the occupational health appointment should take priority. He proposed that the occupational health appointment be rearranged.

21.35 On 15 December, Dr Kobus sent an email, page 603, to the claimant to say that the occupational health appointment been rearranged for Friday 18 December in London at 130pm. Again, he said that if there were issues with the appointment the claimant should contact him immediately. The claimant had, on 11 December, received an email, page 595, from his psychological therapist, confirming appointments. The first was a workshop on 17 December between 10am and 1pm and second, an appointment with the psychologist herself at 2pm on 18 December.

21.36 The claimant replied to Dr Kobus' email on 16 December, in which he said that, regrettably, the OH provider had arranged an occupational health appointment which clashed with a prearranged appointment for his treatment. It follows that the claimant knew of

those appointments on 17 and 18 December as early as 11 December but did not inform the respondent of those appointments.

21.37 Thereafter the respondent did not attempt to arrange a further occupational health appointment. No such appointments were available before Christmas. There was communication between the claimant and the occupational health provider in expectation of a further appointment being arranged, but the provider told the claimant that they were waiting to hear from the respondent in this respect. No such appointment was arranged.

21.38 In the meantime, the respondent required the claimant to attend a disciplinary hearing on 22 December, in a letter dated 19 December, page 617, which he received that day, a Saturday. In the letter, Dr Kobus referred to the claimant's cancellation of the latest Occupational Health appointment set for 18 December and complained to the claimant that he did not notify him of the cancellation in advance, nor did he provide him with any appointment cards or similar evidence to explain his non-attendance. He further said that the claimant had now cancelled two appointments with Occupational Health, "claiming prior engagements".

21.39 He said that the decision had been made to proceed with the disciplinary hearing originally scheduled for 23 October. It would now take place on 22 December in Greenford. Dr Kobus would chair the meeting and there would be an HR representative present. He enclosed a copy of his letter of 20 October, setting out the allegations to be considered and further copies of the associated documents. He then said: "if you still feel unable to attend this hearing, you may if you wish provide us with written submissions in relation to the allegations that we will then proceed to consider at the hearing". He said that, if the claimant should not attend the hearing or provide written submissions, the hearing would nonetheless proceed and a decision would be made in the claimant's absence. He reminded him that one possible outcome of the meeting could be the termination of his employment.

21.40 Although the letter is clear, the evidence of emails sent to the claimant at this time suggests that the claimant received only the letter requiring him to attend the disciplinary hearing and a copy of the original letter of 20 October on Saturday 19 December. The remaining documents were sent to him by a separate email sent at 9:50am on Monday 21 December.

21.41 The claimant went to solicitors who, on that day, 21 December, wrote to the respondent complaining on his behalf about the holding of the proposed disciplinary hearing. They took issue with the suggestion that the claimant did not have prior medical appointments which clashed with the proposed appointments with Occupational Health. They suggested that the respondent should

continue with the proposal to have the claimant seen by their Occupational Health provider and to postpone the hearing.

21.42 Dr Kobus refused to postpone the hearing. For his part, the claimant informed the respondent, through his solicitors, that he would not be attending the hearing on 22 December.

21.43 The claimant was dismissed from his employment and communication of the dismissal was sent to him by a letter dated 23 December, page 627-630. In relation to the first three disciplinary charges, Dr Kobus indicated that he thought that the claimant's defence was to blame others for what happened. He said that he did not accept that explanation. He concluded that the claimant had booked invoices in order to balance the actual revenue with the forecasted revenue, despite the invoices not having been issued to the customer. He found that this was done on the claimant's instruction and that he had given clear instructions to the financial controller, his junior report, that he should file accounts so as to reflect those invoices. He made a number of other findings, relating to a failure by the claimant to comply with management instructions, deliberately delaying and restricting access to relevant business and company information, downloading company information onto memory devices without any explanation and removing expense claims for the period 2012 to 2014. The claimant had entered the companies premises notwithstanding, he said, the terms of his suspension. He also found that the claimant had covertly recorded a conversation in a management meeting. His decision was to dismiss the claimant because he considered that those allegations constituted clear and fundamental breaches of the claimant's obligations to the company and amounted to gross misconduct. That meant that dismissal was an option open to him. He said there was no real explanation for his behaviour despite every opportunity and nothing for him to take into account as mitigation for his action. Instead, the claimant had sought to blame his junior colleagues. He had given no assurances regarding his future conduct. For someone in the claimant's position, the respondent had to have complete trust in his honesty and integrity and they no longer had that. This decision was therefore to terminate the claimant's employment forthwith on 23 December. He explained the claimant's right to appeal his decision.

21.44 The claimant did appeal the decision to dismiss him. There were 14 grounds of his appeal, all set out in a letter to the respondent dated 5 January, 2016, seen at pages 635-637. These grounds were concerned with the decision to hold the disciplinary hearing on 22 December and not to postpone it, that the claimant had inadequate notice of hearing, that it was unclear what investigation was carried out in relation to the allegations but that it seemed to him that the investigation was woefully inadequate and that statements were not taken from other employees. He said that he had not been provided with sufficient detail of the precise allegations in relation to the first

three allegations. Changes were made to the audit report, but earlier drafts of the report suggested that there was nothing serious to be reported. He explained that Syed Adeel is not a junior employee, but is a certified accountant, able to ensure that financial reporting is conducted in accordance with group policies. He also provided grounds for appeal in relation to the other disciplinary charges. He said that the decision insofar as it was based on the removal of expense claim forms was based upon an entirely new allegation. He said there was no evidence to support an allegation of covert recording on 7 October, 2015. Lastly, he said that his conduct did not amount to gross misconduct. He should not have been dismissed.

21.45 The claimant attended his appeal hearing, which took place at an agreed venue in Ealing, West London on 29 January, 2016. The hearing was before Johannes Mey, Head of Human Resources. The claimant was not accompanied and nor was Mr Mey. There was a note taker. Minutes of the appeal hearing are at pages 646-657. The meeting lasted approximately two hours 40 minutes.

21.46 On 26 February, 2016, the respondent through Mr Mey, provided the claimant with their response to his appeal, which was to dismiss it. The letter appears in the bundle at pages 658-663. In view of the respondent's concession, the tribunal did not consider the appeal in any detail.

21.47 As indicated at the start of these reasons, the claimant approached ACAS for the purposes of early conciliation on 4 March, 2016 and the ACAS certificate of early conciliation was issued on 18 April, 2016. The claim itself was presented to the tribunal on 13 May, 2016.

Conclusions

22. We now give our conclusions. We do so, by applying to the facts that we have found, the above provisions of law, in relation to the issues that we were left to decide after the concessions made on both sides.

Knowledge of Disability

23. The first matter we had to consider was the question of knowledge on the part of the respondent of the claimant's admitted disability. The concession as to disability, made at the start of the proceedings, was in terms that respondent accepted that, by October 2015, the claimant had become disabled. By the start of the hearing, the respondent had the benefit of the joint medical report of Dr Rogerson, which is dated 16 December, 2016. As indicated above, a person is disabled if they have a physical or mental impairment which has substantial adverse effects on

their ability to carry out normal day-to-day activities and those effects are long-term. That is, those effects either have lasted for at least 12 months or are likely to do so. As was emphasised in the list of issues, account is to be taken of the circumstances at the time of the alleged discrimination. That is because, as has been said, for instance in SCA Packaging v Boyle, the employer has to be in a position to assess for itself whether an employee is disabled. At the very least it is necessary for them to know whether they are subject to a liability to make reasonable adjustments, and knowledge is expressly relevant to questions of discrimination arising from disability.

24. The respondent's concession did not extend to knowledge of the disability. All of us involved in this case now know, because the report of Dr Rogerson makes it clear, that the claimant experienced the onset of symptoms of a major depressive disorder starting in July 2015 and that those symptoms worsened or intensified by the time the claimant was assessed by his GP on 19 October, 2015. As the issue of disability itself was not contested, the tribunal is bound to conclude that the claimant had become disabled by the date of his first GP appointment on 19 October.

25. For the purposes of assessing the respondent's knowledge of the claimant's condition, the tribunal must take account only of what the respondent knew or could reasonably have been expected to know about the claimant at the relevant time. The relevant time is December 2015. The complaint about direct discrimination was withdrawn, but all of the complaints of disability discrimination are based on events which took place in December 2015.

26. As at that time, the tribunal analysed what information the respondent had about the claimant's illness. There had been five medical certificates. The first of those referred to an adjustment disorder with anxiety symptoms. That was on 19 October. The next certificate, on 23 October referred to "work-related stress". The next two certificates on 6 and 20 November respectively, both referred to "work-related stress and anxiety". The last certificate, issued on 10 December, 2015, referred to "depressed". The respondent had no other information.

27. The question for the tribunal is whether, at any point during the period covered by the certificates, the respondent knew, or alternatively, ought reasonably to have known that the claimant was encountering substantial adverse effects on his ability to do normal day-to-day activities, such that those effects were likely to last 12 months. Their efforts to obtain more medical input came to nothing. This is not the place to attribute blame for that situation. Any medical report is likely to provide more information than the shorthand note to be found in a GP fit certificate. It is not the purpose of such certificates to provide information about the extent to which the employee is able to cope with normal day-to-day activities. The claimant did not tell his employers anything about that.

28. We think that it would be reasonable for the employer to infer from the last of the certificates that the claimant's ability to carry out normal day-to-day

activities would be substantially affected in an adverse way. The last of the certificates indicates something more profound than the work-related stress referred to in the second, third and fourth certificates. However, the question whether the respondent could reasonably be expected to think that the effects would last 12 months is another matter. In the absence of more medical information we do not think that they could reasonably be expected to think that it was any more than a possibility that the claimant might suffer substantial adverse effects upon his ability to carry out normal day-to-day activities which would last for more than 12 months, bearing in mind that the illness was of recent origin and the claimant had no history of any mental illness. They could not be expected to think that that situation "could well happen".

29. We therefore find that the respondent could not, at any material date, reasonably be expected to have known that the claimant was disabled. That decision disposes of the questions in the list of issues at paragraphs 8.6 and 9.13, and the disability complaints pursued. However, as will be seen below, we have given alternative findings in case we are wrong about our decision on knowledge of disability.

Harassment

30. The next question we considered was the complaint of harassment. This complaint is confined to a single allegation based on the reference in the letter from the respondent to the claimant of 19 December, 2015 "claiming prior engagements". We noted above that Mr Bayne did not make any submissions in support of this particular complaint, but we have dealt with it since it was not withdrawn.

31. The claimant's case is that this amounts to a suggestion that the appointments were fabricated and was harassing behaviour related to the claimant's protected characteristic of disability. We agree with the claimant that the use of the word "claiming" implies some scepticism on the part of the respondent about the claimant's medical appointments. As such, it is unwanted conduct, quite clearly.

32. The tribunal has to decide whether this was done with the purpose of subjecting the claimant to the violation of his dignity or creating one or other of the environments described in section 26 Equality Act 2010. We are not satisfied that the use of that term was done deliberately for any of those purposes. The respondent did not have evidence of the appointments, only the claimant's word that they had been made. We take into account that this correspondence is being conducted in a language which was not the first language of either of the claimant or of Dr Kobus. That Dr Kobus was willing to challenge the claimant over the existence of appointments does not imply that he intended to humiliate him or violate his dignity, only that he expected the claimant to provide evidence of the appointments. Employment relations between the parties were not at a normal state. There was a tension based upon the respondent's wish to hold the disciplinary hearing.

33. The use of the term could still have amounted to harassment if the tribunal is satisfied that the use of that term had a harassing effect on the claimant. For this purpose, we are required to take into account the claimant's perception, the other circumstances and to assess whether it is reasonable for the conduct to have that effect. Clearly, the claimant believed the use of the word "claiming" to amount to a challenge to his honesty. That is a reasonable perception for the claimant to have. However, the other circumstances include the fact that he faced disciplinary proceedings and that he was ill at the time. The other circumstance is that the correspondence was not being conducted in Dr Kobus' first language. It is not unreasonable for words to be misinterpreted in such circumstances.

34. It would be reasonable for the claimant to think that he was being challenged as to his honesty in relation to the appointments but, in our view, not that his dignity should be violated or that he should feel that the environment thus created was intimidating, hostile, degrading, humiliating or offensive. None of those situations should reasonably have applied in the circumstances. The claimant was being challenged over the genuineness of the appointments but it was something that he could easily deal with by producing the evidence.

35. In view of our finding in that respect, it does not matter whether the conduct is related to the claimant's disability or not. Our view is that, whilst the claimant's own appointments were undoubtedly related to his disability, the respondent's use of the word "claiming" is not so related. It represents a challenge to the claimant to produce evidence of his appointments, during a process which included disciplinary proceedings. We cannot see how this is related to the claimant's disability.

Discrimination Arising from Disability

36. We now consider the complaints about discrimination arising from the claimant's disability. The short answer to these complaints is our earlier finding that the respondent did not know and could not reasonably be expected, at the time of the events in December 2015, that the claimant was disabled. The claimant cannot succeed with these complaints in view of that finding. However, we have considered them in case we are wrong on the question of knowledge of disability.

37. In his closing submissions, and in accordance with the amended pleading of the claimant’s section 15 case, Mr Bayne abandoned most of the complaints of discrimination under this heading. Originally, there were seven separate complaints, all set out at paragraph 8.3 in the list of issues. In the amended particulars, the only matters pursued were the arranging of a disciplinary hearing at short notice (originally paragraph 8.3.2, but paragraph 8.6.2 in the amended particulars) and the abandonment of the occupational health process started (originally paragraph 8.3.6, but then paragraph 8.6.1). We think there is a straightforward answer to these complaints. The abandonment of the occupational health process and the holding of the disciplinary hearing at short notice were not because of

anything arising in consequence of the claimant's disability. They were because the respondent wanted to move on with the disciplinary process and the claimant had raised obstacles in the way of completing the occupational health process.

38. It was said in the amended particulars that the matter which arose in consequence of the claimant's disability was that he had medical appointments already booked. Section 15 makes unlawful unfavourable treatment which is "because of something arising in consequence of B's disability". The decisions to abandon the occupational health process and to conduct a disciplinary hearing in the claimant's absence were not made because of the appointments, but because the respondent wished to press on with the disciplinary process. It follows that, if we are wrong about the question of knowledge of disability, these complaints must fail in any event.

Failure to Make Reasonable Adjustments

39. We therefore now turn to the complaints of the failure to make reasonable adjustments. These complaints fail because the respondent did not know and could not reasonably be expected to know that the claimant was disabled. There is an additional requirement in this case. It is that the respondent must know or must reasonably be expected to know of the disadvantage which application of the particular provision, criterion or practice causes in the case of the claimant. In the case of this complaint Mr Bayne appears to have sought to change the basis of the complaints against the respondent in his closing submissions, in paragraph 2c, where he says that the question is whether the respondent's disciplinary process put the claimant at a disadvantage compared to someone who did not have his mental impairment. This is not how the case was put in the list of issues.

40. We did not think that the claimant was entitled, in closing submissions, and without any intimation that he was thereby amending his case, so that the tribunal could consider an application, even at that late stage, to amend the claim, to put the claim in a radically different way from the way in which it was put in the list of issues. No doubt the approach adopted was because a brief analysis of the alleged provisions, criterions and practices set out at paragraph 9.4-9.10 in the list of issues would not suggest any disadvantage as between a disabled person and someone who is not disabled. (Paragraph 9.10 is the same as 9.8).

41. All of the matters complained of there would affect someone who is not disabled just as much as they would affect someone who is disabled. Holding a hearing in the absence of the employee, on short notice, would do so. If it were true that the respondent failed to investigate the allegations or put them to the claimant in an investigatory process, or failed to provide him with full details of the allegations, that would put a non-disabled employee at a similar disadvantage. The same applies to the insistence upon attending occupational health appointments at times which clashed with existing medical appointments or abandoning the

occupational health process. The comparator is someone who is not disabled but who is facing disciplinary proceedings and is ill, and has medical appointments arranged for treatment of the illness.

42. The tribunal could identify no particular disadvantage that the claimant would have suffered in relation to those matters over and above the obvious disadvantages that non-disabled employees would suffer in those circumstances. The more generic way in which Mr Bayne sought to put the case in his closing submissions does not assist the claimant. He fails to identify any disadvantage that the respondent's disciplinary process provoked. It follows that, even on alternative findings, the claimant would not succeed with complaints of failure to make reasonable adjustments on whatever basis that was pursued before us.

43. We should add that the respondent's concession in relation to the fairness of the dismissal, that the disciplinary hearing should not have proceeded upon such short notice only potentially assists the claimant if we had found that the respondent had the requisite knowledge of the claimant's disability. The concession does not extend to any admission that, in a disability context, holding the disciplinary hearing at short notice necessarily placed the claimant at a disadvantage compared with non-disabled employees. As indicated above we did not think that to be the case.

44. For those reasons, all of the complaints of disability discrimination must fail.

Unfair Dismissal

45. We therefore turn to the matter of unfair dismissal, in respect of which the respondent made substantial concessions including the concession that the dismissal was unfair. The tribunal had still to determine the issues at paragraphs 1.4 and 1.5 above. The first of those is concerned with contribution and the second is whether there should be a reduction in the awards on account of the Polkey principle.

Polkey

46. We decided to consider the Polkey question first. We are reassured that that is the right approach by consideration of the case of Rao v Civil Aviation Authority [1994] IRLR 240.

47. Therefore, the question we have to decide was first, whether there were any aspects of the dismissal process which we would regard as unfair, in addition to the matters the subject of the concession from the respondent. In effect this requires us to apply the Burchell tests in any event, even though there is a concession as to unfairness, since the question is whether or not the respondent could fairly have dismissed the claimant even if the aspects of the process conceded to be unfair had not occurred.

48. The concessions as to the clarity of the basis of certain disciplinary charges applied only to the fourth, fifth and sixth disciplinary charges.

There was no concession in relation to the first three, except that the respondent conceded that the disciplinary hearing should not have proceeded on such short notice. It was in relation to these disciplinary charges that Mr Dyal focused his submissions. He submitted that in relation to those three charges, the requirements of the Burchell tests were met. He made no similar submission in relation to the other disciplinary charges. He also conceded however, in relation to the fifth charge, the charge that was concerned with information technology, that there was an inadequate basis before the decision-makers to come to the conclusion that the claimant had removed material from the S-drive and/or had downloaded confidential information to an external device and/or that he had deliberately delayed or restricted access to relevant business information.

49. We have concentrated on the first three disciplinary charges in the light of the absence of any submission that a fair dismissal could have resulted from the fourth, fifth and sixth disciplinary charges.

50. We have not identified any other procedural unfairness. The matter raised by Mr Bayne on the claimant's behalf related to the clarity of the disciplinary charges. In effect, this refers to the first two only. It is true that those two disciplinary charges lack particulars as to the individual misstatements relied upon by the employer, but the position could not have been clearer on a reading of the reports, which the claimant had seen previously, but which were also included in the material sent to the claimant in October. The claimant would not have known until then upon which particular emails the respondent would rely in relation to the third charge: instructing Mr Adeel to participate in the process of misstatement of the company's financial position. However, once the material was sent to him in October, any lack of detail in the particulars of the disciplinary charges was remedied by the provision of the supporting information.

51. If the claimant had attended the disciplinary hearing, it is likely that he would have raised the following points in his defence. He is likely to have repeated what he had said earlier about reliance upon the professional expertise of Mr Adeel. He is likely to have said that accruals in respect of work done on projects for which there was no purchase order had been done in the past, before Mr Adeel began his employment with the respondent. He is likely to have said that the process was signed off by the external auditors. All of that was included in his response to the August report in his letter of 24 August at page 306. He is likely also to have said that a significant amount of work had been done in relation to the Merck project phase 3 and that the company had identified a potential tolling partner. He is likely also to have said that phase 3 was being developed on behalf of Merck in anticipation that a purchase order would materialise and that the company had product available.

52. In our view, none of this would have cut any ice with the company if the disciplinary hearing had been held later and the claimant had attended. The respondent was entitled to regard the claimant as the most senior person in the company, where the buck should stop. On the basis of the

emails, the respondent was entitled to think that the claimant had instructed Mr Adeel how to record sales. They were entitled to take the view that recording sales in that way since before Mr Adeel began his employment did not excuse the claimant. The evidence before us that the process had been adopted since 2012 allows for a view that Mr Adeel was not responsible for initiating that way of recording sales and it also enables the company to take the view that it was the claimant who began to record sales in that way. His employment by the respondent began in 2011. Lastly the fact that work was done in anticipation of a purchase order might amount to a form of mitigation, but the respondent was entitled to take the view that it did not excuse actual misstatement of the financial position.

53. It is not for us to determine whether the employer was right to decide that the evidence supported the disciplinary charges. It is sufficient if the evidence is capable of supporting the actual disciplinary charges. Under Burchell, it is for the employer to decide whether or not the disciplinary charges are substantiated and the tribunal can only interfere if the evidence is incapable of substantiating the disciplinary charges. That cannot be said here. There was therefore evidence before the employer to support the charges.

54. Was there a sufficient investigation, at least to the standard of the reasonable employer? There were no submissions from the claimant's side about the inadequacy of the investigation, apart from in relation to one matter. That matter was concerned with the selection of emails to be used in the disciplinary process. It was submitted that there were likely to have been hundreds of emails passing between the claimant and Mr Adeel. That may be true but there was no evidential basis before us to suggest that the emails relied upon were selected so as to present a misleading picture of the extent to which the claimant instructed Mr Adeel as to the way in which sales should be recorded. The claimant had not requested disclosure of all emails passing between him and Mr Adeel, which would be the first step in attempting to establish whether the selection was a misleading selection.

55. In our view the investigation met the standard of the reasonable employer. There were financial and audit reports. The respondent obtained from Mr Adeel copies of emails relevant to the questions they had to consider. The claimant was provided with all of this information. A disciplinary hearing was arranged. After the dismissal, there was an appeal hearing. This was a sufficient investigation.

56. At least as regards the first three disciplinary charges, we are satisfied that Dr Kobus believed the claimant to be responsible for the misconduct alleged against him. In the artificial world we have to create in order to consider the Polkey question, there are two possibilities as to who would have been the chair of the disciplinary hearing. The first possibility is that the sixth disciplinary charge would have been dropped and Dr Kobus would have continued as the disciplinary chair. The other possibility is that, in view of his involvement in the sixth disciplinary charge, a different

chair would have been chosen. It is likely in our view that if another director had considered the disciplinary charges the same result would have ensued.

57. Lastly, in connection with the Polkey question, it is necessary for us to consider whether dismissal could be said to be within the range of reasonable responses having regard to the matters the employer would have established at the end of a fair process. The tribunal would not be able to substitute its view. It would be sufficient if a reasonable employer could conclude that dismissal was a fair sanction. In this case, the hypothetical reasonable employer would have to take the view that the claimant's conduct in relation to the first three charges amounted to gross misconduct, as it was common ground that the claimant did not have any previous disciplinary record. However, bearing in mind the seniority of the claimant and the view the employer did take about the misconduct in relation to the first three disciplinary charges, we cannot say that no reasonable employer could have taken the view that dismissal was open to them in the circumstances.

58. This brings us to our conclusion on the Polkey question. We think that, if the respondent had decided, as Mr Dyal conceded they should have, to postpone the disciplinary hearing until after Christmas when, we speculate, it is likely that an Occupational Health appointment could have been obtained, the disciplinary hearing would have taken place some six weeks after the date on which it did take place. Our view is however, that the claimant would still have been dismissed and that, at least in relation to the first three disciplinary charges, such a dismissal would have been fair. A fair disciplinary chair would almost certainly in our view have rejected the fourth, fifth and sixth disciplinary charges, but would have held the claimant responsible for the misconduct alleged in relation to the first three and dismissed him. Such a dismissal would have been fair, in our view.

Contribution

59. On the question of whether it would be just and equitable to reduce the claimant's awards for unfair dismissal on the basis of conduct before the dismissal (which relates to the basic award) or conduct which caused or contributed to his dismissal (which relates to the compensatory award), we now give our conclusion. Our views are the same in relation to both the basic and the compensatory awards.

60. We understand the argument on contribution. But for the claimant's misconduct, he would not have been dismissed. However, section 123 requires the tribunal to determine whether it would be just and equitable to reduce the compensatory award on the basis of contribution. We do not think that it would be fair to reduce the award, which is likely to represent compensation for a period of no more than six weeks' loss of earnings. The claimant was entitled to have continued in employment for a further six weeks. In our judgment, the claimant is entitled to be compensated for the unfairness of his dismissal and no further reduction is justified. The same applies to the basic award.

Disposal

61. Unless the parties can agree matters between them, there will have to be a remedy hearing. The claimant is entitled to a basic award for unfair dismissal, and a compensatory award representing six weeks' loss of earnings. He is also entitled to reimbursement of any tribunal fees paid.

62. The parties are aware that the Employment Judge will retire on 7 April. They have agreed that, if a remedy hearing is necessary, it should be heard by the non-legal members of this tribunal and a different Employment Judge. If a remedy hearing is required, the claimant should apply, giving, if possible, dates to avoid for both parties. The tribunal will not fix a hearing unless it hears from the parties that a hearing is required. If matters become agreed, the tribunal should be informed.

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Employment Judge Southam

Date: __4 April 2017_____

JUDGMENT SENT TO THE PARTIES ON:

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FOR THE TRIBUNAL OFFICE