**Case No: 1600627/2016**

# EMPLOYMENT TRIBUNALS

## JUDGMENT

**BETWEEN**

| **CLAIMANT** | | **RESPONDENT** |
|---|---|---|
| **MR S SHONE** | **V** | **FLINTSHIRE COUNTY COUNCIL** |

**HELD AT: MOLD ON: 2, 3 & 4 MAY 2017**

**EMPLOYMENT JUDGE: M EMERY**
**MEMBER: MR JD WILLIAMS**
**MEMBER: MR JC ALBINO**

**REPRESENTATION:**
**FOR THE CLAIMANT** **Ms Amy Rimmer (friend)**
**FOR THE RESPONDENT** **Mr Richard Bradley (Counsel)**

## JUDGMENT

The unanimous judgment of the Tribunal is:

1. The claim of unfair dismissal succeeds
2. The claim of discrimination for a reason connected to disability succeeds to the extent set out below
3. The claim of a failure to make reasonable adjustments succeeds to the extent set out below
4. The claim of direct disability discrimination fails
5. The claim of disability-related harassment fails

# CASE MANAGEMENT ORDERS

The following Orders for the Remedy Hearing are made:

1. The Remedy Hearing has been listed for a one day hearing on 18 July 2017.

2. The claimant is to provide any medical evidence he wishes to rely on to the respondent by 23 June 2017 identifying (i) the injury to his feelings and/or to his health, if any, he may have suffered as a consequence of the disciplinary process and his dismissal; (ii) the impact of his health, if any, on his ability to obtain work since his dismissal; (iii) any future impact on his ability to obtain work.

3. If the respondent disputes the evidence set out in the claimant's medical evidence, it is to commission a joint experts' report for which it has agreed to pay, such report to be ready in advance of the remedy hearing. It is strongly recommended an expert is identified and booked as soon as possible and instructions provided in good time for a report to be produced in advance of the remedy hearing.

4. The claimant is to provide to the respondent by 16 June 2017:
    a. his evidence, if any, relevant to searching for work,
    b. any additional relevant evidence (medical or otherwise) relevant to a claim for his financial losses
    c. An updated schedule of loss (also to be sent to the Employment Tribunal).

5. The respondent is to send to the claimant any documentation on which it wishes to rely on the issue of mitigation by 23 June 2017.

6. The respondent is to provide a paginated bundle of agreed documents to the claimant by 30 June and to bring to the Remedy Hearing sufficient copies for use by the Employment Tribunal and witnesses.

7. If it disputes the claimant's schedule of loss, the respondent is to serve a counter-schedule of loss on the claimant by 30 June 2017 and a copy is to be sent to the Employment Tribunal.

8. The claimant is to provide a witness statement to the respondent by 30 June detailing the effects, if any, of the respondent's treatment on his health, his attempts, if any, to find work and any factors, medical or otherwise, which may have prevented him looking for work. The respondent is to serve any statement it wishes to make in response, including on issues of what may have happened if a fair process had been followed (the *Polkey* argument) and Contributory Fault, by 7 July 2017.

9. Should either party wish to arrange a telephone Case Management Preliminary Hearing to discuss any issues on Remedy, this is to be arranged as soon as possible.

# THE TRIBUNAL'S REASONS

## The Issues

1. The claimant was employed by the respondent as a plumber. He was dismissed for 3 acts of misconduct: being asleep in a works van during working time, misleading occupational health to say he was fit for work when he was not, and breach of trust and confidence in the employment relationship because of the claimant's actions. At the time of these incidents the claimant was on a live final written warning, and the dismissing officer considered that, in upholding these findings of misconduct, he had no option but to dismiss. The claimant received a payment in lieu of notice.

2. The respondent accepts the claimant is disabled for the purposes of the Equality Act 2010, his complex and interrelated medical conditions include (as summarised in the Case Management Order of 11 November 2016 and from the claimant's unchallenged evidence) Post-Traumatic Stress Disorder (PTSD), Obsessive Compulsive Disorder (OCD), Multiple Personality Disorder, depression, anxiety, paranoia, and schizophrenic tendencies.

3. The claimant's allegations are contained in paragraph 8.2 of his ET1 and in his email to the Tribunal dated 28 September 2016, which was submitted within the applicable limitation period as extended by the 19 day ACAS conciliation period (none of the 'pleadings' section of the bundle is paginated), and which was accepted by the respondent as a valid amendment. An issue arose at the outset of day 2 of the case, as the contents of these two documents could not easily be squared with the issues as set out in the Case Management Order of 11 November 2016 which had been referenced by the Tribunal at the outset of the Hearing. Mr Bradley accepted the claimant's case had not been limited by the way the issues were defined in this Order; he accepted the claimant had been represented at the Preliminary Hearing by Ms Rimmer, a friend of the claimant with no legal grounding. We noted the respondent's representative at that hearing had been a HR Manager of the respondent. Mr Bradley agreed the issues as clarified below, and he confirmed he had no need to recall the claimant, whose evidence had ended the evening before, to deal with any additional issues.

4. The issues for the Tribunal to determine are:

   Unfair dismissal

   The respondent alleges the claimant was fairly dismissed for a written warning for misconduct, being at that time on a live final written warning. The claimant alleges he was targeted for dismissal because of his recent 6 month sickness absence, and he argues the process and outcome were unfair.

   a. What was the reason for the claimant's dismissal? If the claimant shows he was dismissed because of his sickness absence the

respondent has not proven its reason for dismissal, and his dismissal is unfair.

b. If the respondent can prove the claimant was dismissed for misconduct, did the respondent:

i. undertake a reasonable investigation,

ii. have reasonable grounds for concluding in the disciplinary and appeal process that misconduct had occurred, and

iii. was the sanction of a written warning and dismissal reasonable in all the circumstances?

Disability Discrimination

5. The claimant alleges

a. Direct disability discrimination: he was targeted for dismissal because of his sickness absence, and a hypothetical comparator would not have received a written warning and been dismissed for sleeping in their van.

b. Discrimination for a reason connected to disability: he was dismissed because of his recent absence from work, which was connected to his disability; and/or because of fatigue and drowsiness which were a side effect of his medication, which was also connected to his disability.

c. Disability-related harassment: his managers (Tom Jennings and Ian Peters) would visit him at his home on a regular basis while on sick leave, he was accused by his managers of lying about his fitness to work in March 2016, and Ian Peters told his union rep he was going to sack him.

d. Failure to make reasonable adjustments: the claimant contends there was a failure to make reasonable adjustments to the practice of his driving a works van; other respondent employees are picked up and driven to their site of work and he contends that a reasonable adjustment would have been to do the same; he also contends it would be a reasonable adjustment to change the provision of not discounting his disability-related absences.

6. The respondent contends

a. Direct disability discrimination: a non-disabled comparator who fell asleep in his van would also get a written warning and, if on a final written warning, would be dismissed. Accordingly the claimant has not been differently treated, and this treatment is not on grounds of his disability.

b. Discrimination for a reason connected to disability: the claimant was not dismissed for his absences. He was dismissed for misconduct for

falling asleep and/or for misleading OH, which were not reasons connected to his disability. Alternatively, the respondent's actions in giving a written warning and dismissing the claimant were a proportionate means of achieving what the parties agreed was a legitimate aim – ensuring the public and employees are protected from harm from an employee driving and working while not fit because of drowsiness.

c. Disability-related harassment: the claimant was visited at home for legitimate reasons – welfare visits, to collect the van and to gain Fit Notes from the claimant so that he would be paid, this was legitimate management conduct and could not fit the legal definition of harassment.

d. Failure to make reasonable adjustments: the respondent implemented *'a significant number'* (Amended Grounds of Resistance para 37) of OH's recommendations, and the claimant said he was fit to drive on his return to work. *'The respondent maintains that every adjustment requested by the claimant or recommended by OH was carefully considered and applied if reasonable to do so'* (para 57). At the time he was suspended from work, OH recommendations on not driving were being considered, but dismissal superseded this issue and therefore it was not an adjustment it was reasonable to make.

## Witnesses

7. We heard evidence from the claimant. For the respondent we heard evidence from Andrew Roberts the dismissing manager, Susan Lunt, who heard the claimant's appeal against dismissal, Ian Peters, the claimant's line manager, and Katie Clubb, the investigating manager. On the first morning of the hearing and prior to hearing evidence we read all witness statements and the majority of the documents within the Tribunal bundle.

8. We do not recite all of the evidence we heard in our findings of fact, instead we confine our findings to the issues and the background evidence relevant to the issues in this case. Also, this judgment incorporates quotes from Judge Emery's notes of evidence; these are not verbatim quotes but are instead a detailed summary of the answers given to questions.

## The Tribunal's findings of fact

9. The claimant commenced employment with the respondent as an Apprentice Plumber on 6 September 2004. On qualifying he was kept on and employed as a Plumber from 1 July 2007 to the date of his dismissal.

10. Throughout his employment the claimant had periods where his health was poor. He was referred to Occupational Health in 2006, 2008, 2009 and 2012 for low mood and depression (page 23). A report in July 2012 by Dr Adie an Associate Specialist in Psychiatry to the respondent's OH team describes his long-term severe anxiety, phobia and paranoia, as well as more recent PTDS

symptoms which were a consequence of a violent night-time burglary during which he was stabbed several times and severely injured. The report details his psychotherapy and medication, including strong tranquilizer and anti-depressant medication (21-22).

11. It was known to the respondent that the claimant's ill-health and medication could impact on him at work. In September 2012, on his phased return to work from sickness absence, the claimant told his manager Ian Peters he was taking medication *'which makes him feel very tired in the afternoon'* and it was agreed his phased return would continue and be monitored by Mr Peters and this information *'shared'* with occupational health (page 28). At this stage there had been a management recommendation that his return to work should include a colleague to *'Buddy-Up'* with, for a stress risk assessment to be undertaken, and for Mr Peters to meet with him every week for the first month and then monthly thereafter (27). He continued on a phased return for nearly a year, returning to full-time duties on the recommendation of Dr Oliver, Consultant Occupational Physician, in June 2013. In his report, Dr Oliver says *'Given the stability of his current symptoms I would be happy for him to be provided with a small works van…'* (32)

12. On 17 October 2013 the claimant was hospitalised under the provisions of the Mental Health Act until early November 2013. The possible reasons for his hospitalisation were discussed at a meeting between Ray Roberts and OH on 8 November 2013 – the birth of his daughter a few days earlier *'added to Sam's stress'* (33). An OH report the same day by Janet Jones Specialist OH Practitioner said the claimant was to remain off work 'while his medication is changed and new medication takes effect.' (34). The claimant returned to work towards the end of November 2013 and was working full-time hours (less a ½ day per week for treatment) by mid-January 2014.

13. During his employment the claimant received disciplinary warnings. In July 2012 he received a 2nd written warning, downgraded from a gross misconduct dismissal because of his medical mitigation (24-27). On 20 May 2014 the claimant received a final written warning for writing unacceptable comments about colleagues into the wall of a property he was plastering, one comment which could have been *'perceived as having racial connotations'* and this brought the council into disrepute and was a breach of trust. The conduct was found to amount to gross misconduct, the sanction was downgraded to a final written warning because of his remorse and the good quality of his work. The warning was put on file for 2 years, during which time if there were *'any concerns about your behaviour or conduct in the workplace then I will have no hesitation in taking further action…'* (37-38). The claimant did not appeal this final written warning.

14. On 5 October 2015 the claimant was again signed-off work because of an adverse reaction to a change in medication. He returned to work on 21 March 2016.

15. There was a dispute of evidence as to whether the claimant provided medical certificates to his employer and how many times he was visited at home and

why during this period of absence, relevant to the claim of harassment. His team leader Tom Jennings wrote on 20 & 27 October 2015 asking for Fit Notes (40-41). Mr Peters says Mr Jennings went to collect certificates, effectively as a favour to ensure the claimant would be paid. They both went to collect his works van per usual procedure for a member of staff on long-term sick leave. In late January the claimant again did not submit certificates and on 27 January he was told if he did not provide certificates he faced not being paid. This letter also criticises him for failing to attend an OH appointment and not informing his manager, and he was asked to attend a meeting on for these (and other) issues including a failure to engage with management during his absence (44-45).

16. We accepted Mr Peters' account for the reason for visiting the claimant; if he did not send in certificates he would lose pay, and there was a need to collect the van. The clamant said that Mr Peters attended on more than one occasion, but in his evidence he accepted his memory on this issue was not perfect. We noted the claimant received and sent texts evidencing some of these visits. We accepted the respondent's motivation for attending his home were reasonable work-related reasons, including ensuring he submitted Fit Notes in time to be paid.

17. The claimant also evidently discussed the reason for his absence, as on 4 January 2016 Mr Peters sent a referral to OH referencing *'a change in medication'* as the cause of absence. He ticked boxes asking for information on likely return, any residual disability which may have an effect on work, implications of ongoing treatment, duties he may be unable to carry out, and additional support required (42-43).

18. The claimant was seen by OH on 10 February 2016. The report that followed says he had a recurrence of his depression *'and became acutely unwell following a change in his medications. He is improving now and continues under the care of his mental health team. Sam is feeling drowsy on his medications and he has spoken to his care worker who will discuss with his psychiatrist regarding his drowsiness. Once this is under control, Sam will be fit to return and Sam is keen to return to work.'* OH said they would review him on 16 March 2016, and *'hope to look at his return to work within the next few weeks after his appointment.'* (46).

19. On 16 March OH record to the respondent *'Sam is much better with the change in his medications and he is no longer drowsy.*[1] *Sam is now at the stage of fitness to return to work and is keen to return to work and get his life back to normal'*. The report said *'Sam will benefit from a phased return.'* And suggests this should be: week 1 - 75%, week 2 - 50% hours. The report says *'Please ensure Sam works with a colleague until I next review him for support during his reintroduction back into the workplace…'* (48).

20. The claimant returned to work on 21 March on 50% hours. In a return to work interview on 23 March Mr Peters writes *'Sam has had his medications*

[1] The respondent's underlining on the OH report

*changed and has made progress… Sam will work with a colleague and the situation will be monitored… [OH] have recommended that Sam works with a work colleague. Sam has changed his medications and is fit to return to work… I have advised Sam to inform me or a team leader of if his circumstances change or he requires any additional support* (50-52).

21. In questions at Tribunal about a possible risk or stress risk assessment (the return to work form states this as an *'option'*) Mr Peters answered that a risk assessment was not mandatory (it's required *'in some cases…'*) and that he covered this with employees by saying to them *'if any concerns, bring this to my attention'*. Mr Peters said he had no knowledge about the claimant's condition, he would simply refer any issues to occupational health. He said that if occupational health are saying the claimant was fit to work on his new medication *'…this is good enough'.* In his witness evidence he says the claimant *'assured me he was ok to drive and I issued the van to* him*'* – however this was not stated on the return to work form or elsewhere. The claimant having his own van meant that he would be required to drive to and from site, obtain materials etc. on his own. Mr Peters evidence was *'Had the claimant intimated to me that there was a problem with him driving a van I would have considered alternative arrangements.'* (para 16).

22. On 13 April 2016 the claimant, still working 50% hours of 8.00 - 12.00 was observed by Mr Peters at approximately 11.20am asleep in his van on the road outside of a property he was renovating with a colleague, Graham Grant. Mr Peters described what happened in a disciplinary investigation interview on 27 April 2016: He described loud music coming from the van, he saw the claimant with his head against the driver door, meaning he could not open the door. He banged twice loudly on the door, *'Sam did not wake up'*. He banged again loudly, *'Sam still did not wake up'*. He banged again loudly twice, at which time the claimant *'sat bolt upright'*. Mr Peters opened the car door and said *'what are you playing at?'* The claimant did not answer. He asked again, *'he didn't respond again'*. Mr Peters went into the property, told Mr Grant the claimant was asleep, then went outside and again asked the claimant *'What are you playing at, you were asleep then?'* The claimant *'…didn't speak but he was looking at me. I told him I was really disappointed in him after all the support everyone had given him and I would be taking this further.'* (57-59).

23. At 12.07pm that day the claimant texted Mr Peters, saying *'I felt faint and that … was when I went to the van I don't feel to well, when you came to my door I didn't know were I was you never asked if I was ok just what I was doing then telling me you weren't happy. I'm disappointed in myself that this has happened… just don't feel 100% today'* (56).

24. In questioning at Tribunal Mr Peters was asked whether he had any concern about the claimant's initial failure to wake up and then failure to respond to questions. He answered *'I had to bang hard'*. He said he reacted to the claimant as he did because *'I was disappointed, I think I have been supportive of Sam, so I was disappointed when I found him asleep... It was my belief that this is not medication. He spoke to me and said 'I don't know what I have done'.*

25. Mr Kitchen alleged in a handwritten and signed note dated 12 September 2016 that in a conversation with Mr Peters in which he questioned Mr Peters' *'duty of care'* towards the claimant, Mr Peters responded *'I will sack him'* (138-139), an alleged act of harassment. Mr Peters denied making this remark, saying it was well below his pay-grade to have any influence on the outcome of any process. Mr Kitchen did not attend the Tribunal to give evidence. We understood however that Mr Kitchen is an experienced Union rep, and as the defence points out the respondent has a *'positive working relationship'* with the Union. We considered it would be unlikely Mr Kitchen would write a deliberate untruth in a signed statement. This note was written some 6 months later, and on balance we believed that Mr Peters may have made an off the cuff remark to Mr Kitchen – he did believe this was a serious issue as his evidence made clear - and he was presumably aware management were seeing it so also, and he may well have foreseen the likely outcome.

26. Mr Grant was also interviewed; he said he had not seen the claimant that day, while he could hear music from a vehicle for 20 minutes from within the property, he couldn't see the van from the property and was unaware the claimant was inside the van. He was asked if he had noticed any unusual behaviour relating to the claimant, he said no, but *'…he doesn't look well sometimes'*. He said he did not always work with the claimant, he worked with lots of people depending on the work, that he had not been asked to mentor the claimant *'on this occasion'* (62-64).

27. On 4 May 2016 the claimant was suspended from work as a result of an allegation of the smell of drugs in his van. This allegation was subsequently not pursued. On 11 May 2016 the claimant had a disciplinary investigation interview with Mrs Clubb, the investigating manager. The interview dealt with the drugs allegation and being asleep in the van. He was accompanied by his UCATT rep, Brian Kitchen.

28. The numbering from the q&a below is from the respondent's record of witness interview dealing with being asleep in the van (67-71). Questions were asked by Mrs Clubb and, where indicated, the HR representative present, Marie Owens

*Question 1*

*Q* *Can you please explain what happened that day?*

*A* *'I pulled up in the van and I was filling in my paperwork. I was feeling unwell, I was sweaty and shaky and I flaked. I didn't know until Ian was there. I am sorry'.*

*Question 2*

*Q* *When did you start to feel unwell?*

*A* *When I was in the van, I didn't feel well at all.*

*Question 4*

*Q* *Does the medication you take affect your memory?*

*A* *Yes*

*KC* *'Sam provided a list of medication that he is currently prescribed. Three out of the four list the advice '<u>This medicine may make you feel sleepy. If this happens do not drive or use tools or machines.</u>[2]'*

*Question 6*

*Q* *That's quite a lot of driving before you've really started your day, when did you feel unwell?*

*A* *As I was driving I started to*

*Question 7*

*Q* *Is it usual for you to feel like this?*

*A* *All the time but I was of the understanding when I came back to work that I could take 10 minutes to sort myself out*

*Question 8*

*Q* *'We have the latest occupational heath report on your return that advised that he medication no longer makes you drowsy, are [you] now saying it does make you drowsy?',*

*A* *Yes I can still feel unwell. Meant to buddy up with 2 -3 people…'*

*Question 9*

*Q* *Would you tell Graham if you felt unwell?*

*A* *Yes in the past I have said, He would say take 10 minutes to sort myself out*

*Question 11*

*Q* *What happened after Ian left.*

*A* *I spoke to Graham and I told him that I didn't feel that good…*

*Question 12*

*MO* *'I'm wondering why Occupational Health would have advised that your medicine no longer made you drowsy and you were fit to return to work if they were still impacting?*

*A* *'It can be down to timings when I take them can have an impact. If I miss one by a bit I will get the shakes and feel unwell'*

*Question 13*

*Q* *Has this happened before, with you feeling unwell and falling asleep?'*

*A* *Yes, possibly once or twice before I was off the last time on those medications*

*Question 14*

*MO* *Has your driving licence ever been at risk due to the medications?*

*A* *They were going to take my licence off me but it was ok due to the reduction in tablets. Driving can be a drain.*

*Question 15*

[2] The respondent's underlining on the notes of interview

*Q Why do you think that OH confirmed you fit to work if you still felt drowsy on the medication?*
*A I want to keep my job, it was easier to tell them I am ok.*

29. Dr Oliver, Community Health Physician sent an OH report to Mrs Clubb dated 25 May 2016 which states *'Sam takes a number of medications in high doses to control his depression and these can cause drowsiness to a greater or lesser degree. Often individuals notice increased side effects when doses are changed but these can settle with time. … Given his treatment, I would suggest he does not drive a works vehicle, at least on a temporary basis…'.* Dr Oliver recommends further restrictions on work-activity *including 'entering confined spaces or climbing ladders'* (73-74).

30. Mrs Clubb prepared an investigating officers report on 5 June 2016. She recommended 3 allegations be pursued as allegations of misconduct to disciplinary hearing:

    a. He was sleeping in his van whilst on duty (allegation 1)
    b. He was dishonest about his fitness to work at the 16 March 2016 OH assessment (allegation 2)
    c. The two above have led to a breach of trust (allegation 3)

31. In relation to allegation 2, Mrs Clubb makes the following observation in her report: *'SS confirmed in his investigatory interview that he takes four separate medications and they do affect his memory and they do make him drowsy… that he had felt like this a lot… SS confirmed this was not the first time he had fallen asleep whilst on duty… SS admitted that the OH report dated 16th March stating he was fit to work was based on what he had said, he admitted he had not been completely honest with OH during his meetings…'* (77-82).

32. In her evidence at Tribunal, Mrs Clubb argued that there was evidence in the claimant's answers that the claimant had hoodwinked OH - the medication said it could make him drowsy; and he accepted there was an impact. For her, the answers to questions 4, 8, 12, 13 and in particular 15 were the basis of allegation 2. She said that the claimant's *'answers were very clear'* and there was no need to take forward for further investigation. Her view was that the claimant understood the questions. Mrs Clubb said she did not go back to OH for further information as *'I felt satisfied and we had the medical report - and he had told OH he was ok'*. She said she *'did not think'* of going back to OH to ask about the discussion in March with OH about drowsiness because divulging this discussion would breach patient confidentiality; she believed the medical reports plus the interview with the claimant *'was enough'*.

33. In answer to questions on the evidence relating to whether falling asleep could have been medication-related, Mrs Clubb said the claimant *'was asleep and whether this is medication related or not that was the case … it was hard one way or another to decide. His medication was still affecting him … He talked about the effect of medication - this may have an impact.'*

34. Mrs Clubb argued she did not consider the disability-related issues of the disciplinary, for example if falling asleep could have been medication related – *'if we had known about this before falling asleep maybe, but this had happened and therefore we needed to collect the evidence.'*

35. Mrs Clubb was asked about the apparent discrepancy between her questions and his answers, in particular her use of *'drowsy'*, and his responses of *'unwell'.* She answered that she had said drowsy in questions, and the answers related to that question. She argued the investigation *'had got to the bottom'* of the issues – *'he was asleep in the van and he had misled occupational health'.*

*36.* In re-examination Mrs Clubb stated her role in the investigation was *'to collect all the evidence and not to steer on the evidence – be balanced'.*

37. In her investigation report, Mrs Clubb says the timescale of the investigation was impacted for the need for OH advice and '*escalation to Dr Oliver'*. However, Dr Oliver's report, which said the claimant's medication can cause drowsiness and suggesting he does not drive (73-4) was not referred to in Mrs Clubb's investigation report nor sent as part of the disciplinary bundle. In her evidence she said she made the judgment this report was not relevant; she *'really can't recall why this report was not relevant'*, but she said she saw this report as advice on his return to work rather than the disciplinary issues.

38. The claimant asked for a medical report from Dr Niravani Consultant Psychiatrist which stated he was stable and compliant with his medication and does not report side affects to his driving, that he was fit to drive at present (85-86). A medical report from his GP (who says s/he has not see the claimant *'for some considerable time'*) referenced his medication as stable and not causing any significant side effects which would impair his driving (90), both documents were included in the disciplinary bundle.

39. Prior to the disciplinary hearing the claimant wrote asking for the final written warning to be disregarded because of the substantial period of time that had lapsed, and because it had no relevance to the case against him (87).

40. The disciplinary hearing took place on 24 June 2016, the claimant was again accompanied by his union rep Brian Kitchen. The hearing was conducted by Mr Roberts, who prepared a detailed script for the hearing. Following preliminaries, Mr Roberts read out the 3 allegations, then outlined the possible sanctions (warnings) and the possible consequence of the live final written warning (dismissal). He then asked the claimant, *'Please tell me if you accept or refute the allegations in whole or part?'.* The answer is recorded as *'Accept all 3'*. In his evidence to the Tribunal, Mr Roberts said he believed with this answer the claimant had admitted his guilt to all 3 allegations.

41. In cross-examination the claimant described his answers to these questions. He agreed he had *'accepted'* the allegations; when asked whether by accepting the allegations he was accepting them as true, he answered, *'…she said tell the truth and hope for the best… I was jumping through hoops… I*

*would not be arguing them if I was guilty.'* When asked if he understood what was meant by accepting or refuting the allegations, he answered *'the allegations that they are on about, accept what they are saying… I accepted the allegations but I did not accept it was true. They accept I was asleep.'* When asked what *'refute'* meant, he answered he did not know.

42. It was put to Mr Roberts that the claimant misunderstood what was being put - he accepted the allegations, but this was not the same as admitting them as true. Mr Roberts was clear that the claimant had admitted the allegations: *'The reason for this is I read the allegations out, I explained the consequences could be dismissal.'* He had union representation. He said he believed the claimant understood the trust and confidence allegation.

43. Because of the claimant's answer that he accepted the allegations, Mr Roberts proceeded to move straight onto issues of mitigation. In questioning on mitigation between Mr Roberts, the claimant and his union rep there was the following exchange:

*Q* *When did you start to feel unwell*
*A* *When I was driving*
*Q* *The tablets make you feel drowsy?*
*A* *It was a hot day. I felt as thorough I was going to pass out. The driving can take its toll.*
*Q* *Why didn't you stop the van and stop driving.*
*A* *I only felt not good when I stopped driving.*
*…*
*Q* *So you felt flaky and sweaty because of the heat of the day, not your medication?*
*A* *It was just the heat.*
*…*
*BK* *… I don't believe it was his medication that made him sleepy…*
*Q* *… you knew [the medication] could make you drowsy*
*A* *They don't*
*Q* *So you're changing your mind?*
*BK* *The heat of the day made him sleepy that day*
*Q* *In your statement to KC you stated that your medication makes you feel drowsy*
*BK* *In those situations SS will agree to anything because he gets stressed*
*Q* *But you told KC that you were drowsy*
*…*
*Q* *I need to know why you said it was usual to feel affected by your medication*
*A* *If I don't take them when I get up*
*…*
*BK* *When SS did return to work he felt good and normal*
*Q* *the Occ health meeting on 16 March 2016 … you said you were find and ready to return to work so Occ Health signed you back as fit for work*
*A* *My Dr and mental health said I was fine*

*Q* *Because you told them you were fine. You told KC you were worried about losing your job, why did you said this*
*A* *If you look at my record, there's always something wrong. They harass me like I'm a puppet*
*…*
*Q* *Did you come back knowing you were unfit?*
*A* *I felt ok*
*Q* *There is a contradiction in your Occ health report and your statement*
*BK* *SS will say whet he things needs to be heard so he can get out of that situation*
*AR* *But that in itself is a problem*
*LB* *The investigatory interview questions appear to be open questions.*
*MO* *We didn't lead SS with our questions.*
*KC* *You were clear with our answers. You stated that it was easier to tell OJ that you were fine. We didn't lead you.*
*…*
*KC* *You told us this wasn't a one off and you have fallen asleep before*
*BK* *SS gets confused and didn't know what he was saying*
*…*
*Q* *You felt drowsy. You admitted you fall asleep. You take medications that causes drowsiness. Yet you chose to drive a Flintshire van*
*A* *I don't know what to say. I don't know what you want me to say*
*BK* *I don't think he meant to mislead Occ Health*
*AR* *Occ Health have to provide management with advice based on what they're told from the employee. SS said he was fine. How is that not misleading? You have admitted you only said this to get back to work.*
*BK* *He may have felt ok on that day*.

44. In questioning Mr Roberts was asked about the claimant's and Mr Kitchen's comments which suggested the claimant had not admitted the disciplinary allegations as true: for example *'I felt ok'; 'he didn't mean to mislead OH'; 'In those situations SS will agree to anything because he gets stressed'; 'when SS did return to work he felt good and normal'.* Mr Roberts stated that *'on the balance of probability I was satisfied he was admitting'* the allegations.

45. Mr Roberts accepted medication was a live issue at disciplinary hearing. He said there was a contradiction in the evidence because on the one hand there was an admission in interview that medication could have been a live issue, yet he was being told in the evidence that it was not an issue. *'So I had to find the balance – eg whether it directly or indirectly had an influence.'* He said he found this balance by looking at the evidence and admissions in the investigation and structuring questions accordingly. Mr Roberts said he had an awareness of the claimant's medical condition but no in-depth understanding.

*46.* In questions from the Tribunal, Mr Roberts also accepted there were examples of confusion from the claimant. He accepted the claimant was saying *'I don't know what you want me to say',* and his union rep was pointing out the claimant is suggestable and tells people what they want to hear. Mr Roberts confirmed that he got a sense of this in the hearing, but his argument was *'the consequences that flow. He is employed and under contract and receiving pay to do a job, what this comes to is responsibility for his actions.'*

47. Mr Roberts said his view was if the claimant had in fact passed out as opposed to being asleep, this would be for a momentary period only, and his view was the claimant was in a deep-sleep. Mr Roberts said he tried to explore whether the medication had an effect on the claimant; he acknowledged he had not seen Dr Oliver's OH report of 25 May2016 saying that his medication can cause the claimant drowsiness and suggesting he does not drive (733-74), but he argued this would not have affected his decision as there was other medical evidence which said there was no effect, there was a *'need to see this in the round'*. He argued that any report from a clinician is based on what the claimant tells the clinician, and the claimant was *'very keen to get back to work'*. Mr Roberts argued there was no need for further investigation, as the issue was how the claimant presented himself to get himself signed fit for work.

48. The claimant was told he had accepted all allegations, so there was no need for further investigation. After a ½ hour adjournment the claimant was told he was being dismissed on notice for being asleep and for the risk to safety by driving while feeling drowsy.

49. The dismissal letter dated 30 June 2016 states the claimant was asleep while on duty, he was dishonest about his fitness to work, and there was a breach of trust between him and the respondent as a consequence. The letter said the claimant had told Mrs Clubb the medication made him feel drowsy and this was not the first time it made made him fall asleep, that the claimant chose not to mention to OH that the medication was *'in fact still making you feel drowsy'*, he misled OH and the council about his fitness to work and his fitness to drive a council vehicle. He was told the *'risk he knowingly placed himself and the public'* was unacceptable. Mr Roberts accepts there was some contradiction with what the claimant had said at the investigatory meeting and what was presented during the mitigation evidence, and that *'you may say the wrong thing or say what you believe is wanted to be heard, so you can get yourself out of that situation quickly…'* but he had signed the investigation notes as accurate. It was therefore it was reasonable to believe he was *'purposely dishonest with OH'*. Mr Roberts said he tried '*on numerous occasions to establish the true position…. It was disappointing that Brian presented the majority of the mitigation and answered many questions on your behalf... You did very little by way of preventing a dismissal outcome…'*. (pages 98-100).

50. The claimant appealed against his dismissal. He said the final written warning was only active for one more month, there was no connection between the incidents, and so it should be disregarded. He referred to a new issue, the fact his daughter had been hospitalised with suspected serious ill-health

around this time, his son was also ill. He expressed his continued sorrow for falling asleep, making it clear he liked his job and was a hard worker. *'…my community support and my doctors both said I was fit for work, I went to occ health and they said I was not fit for work, so I think it was about 4-6 weeks later I returned to Occ Health, I did not tell no lies…'* (104-106)

51. The claimant's GP submitted a to whom it may concern letter in advance of the appeal saying the claimant *'… suffers from Mixed Personality Disorder. He has problems with anxiety especially when put into situations such as meetings which can cause confusion and misrepresentation of facts. He is currently controlled with medications… to my knowledge he does not suffer from drowsiness as a result of these medications.'* (108)

52. In advance of his appeal the claimant submitted Citizens Advice material on reasonable adjustments and disability discrimination, and his daughter's medical records showing *'recent scarlet fever requiring hospital admission'* and repeated occurrences of acute viral tonsillitis (123-4).

53. Mr Roberts produced a response to the grounds of appeal setting out his thought processes. He said there was a *'significant concern we now have three potential reasons for sleeping'* referencing tablets and drowsiness effect; it was a hot day and amount of driving, and children were unwell. He said that this was *'clearly poor conduct, is not on its own the fundamental concern.'* The fundamental issue was, for Mr Roberts, the breach of trust because of the claimant's **'***failure to tell OH/managers things of relevant or significance and/or keeping things from them.'* He concluded that the claimant had misled OH regarding his fitness for work; he did so for reasons of self-preservation; and he did not consider the risk to himself, the public or the council (126A-C).

54. The appeal was heard by Susan Lunt. Ms Lunt argued the remit of the appeal was two issues – the harshness of the penalty, and whether the written warning was live. At the hearing the claimant said *'when he pulled up in his van … he felt unwell… Mr Shone said that he felt fit for work when he went to see OH and was placed on a phased return, but denied that he had deliberately lied to the Council… On the day in question … he was both mentally and physically tired but felt he was fit for work… he just felt sick at the time and just wanted to take some time out to feel better…'*

55. Mrs Lunt confirmed the dismissal as upheld after a short adjournment. She said there was *'conflicting information'* as to whether the claimant was fit for work – she said that OH and her GP had signed him as fit and the claimant *'had to take some responsibility for presenting to work on the day in question'* (127-129). A more detailed written rejection of appeal followed. On allegation 1 Mrs Lunt's report referred to the claimant saying he felt unwell, his children's illness was added pressure and he had not intended to fall asleep. On allegation 2, Mrs Lunt referred to his admission to Mrs Clubb, and agreed with Mr Roberts' analysis on this allegation. In upholding this allegation she did not refer to Dr Bottomley's GP statement - the claimant's anxiety causing *'confusion and misrepresentation of facts'* - in her report (130-133).

56. In her evidence to Tribunal, Mrs Lunt said she had looked into the evidence and she concluded this showed the claimant was asleep and that this was not as a consequence of medication. The claimant provided her with information of his child being poorly, adding to his physical tiredness. She said on the evidence she concluded the claimant was fit for work, OH had said he was fit, the GP advice was he was fit. She said that she did not believe the medication had made him drowsy, she argued he was asleep but not as a result of his medication; this was based on the medical evidence available to her.

57. Ms Lunt said she did not consider in detail whether the claimant had misled OH; her focus was on the harshness of the penalty. She argued on allegation 3 – trust and confidence – that a pattern was emerging – there was a final written warning and then can act of further misconduct; the two together led her to conclude there was a lack of trust of trust and confidence.

58. On Dr Oliver's OH report of 15 May 2016 (page 73), Ms Lunt said she had not seen this, but it would not have affected her decision as she had considered the evidence that said the medication did not cause him drowsiness. *'What I heard at appeal and evidence at interview, Sam pulled up in van, he felt unwell, he felt he could take 5/10 mins, he may have done this and then gone to sleep.'*

## Closing submissions

The Respondent's submission

59. Mr Bradley for the respondent argued there was a live final written warning, and so the respondent needs to show one allegation of misconduct is fair to succeed in its defence of the unfair dismissal claim, as it would be fair to dismiss the claimant for a written warning for misconduct given the final written warning. Mr Bradley argued there were duties of care involved, to employees and members of the public who could be seriously affected by an incident involving an employee who drove while not fit to do so.

60. For Mr Bradley, the simple fact was that the claimant was asleep in the van. He said it was not permissible for the Tribunal to enquire into how long it took Mr Peters to wake the claimant up, as he was asleep. There was no medical reason for being asleep, as all the medical evidence at the disciplinary hearing pointed to medication not being the reason he fell asleep.

61. Mr Bradley argued that if medication was not the reason he fell asleep, it means the claimant did not mislead OH, but he was still guilty of allegation 1, falling asleep in his vehicle. Mr Bradley argued the claimant and his union rep were in a conundrum. On the one hand if the claimant was asleep in his van with no medical reason then Equality Act was not engaged and he was guilty of misconduct; but if he has a medical reason he may have cause to be asleep in his van, but he would be guilty of allegation 2. This is why, he said, the claimant was 'swish-swashing' during the disciplinary process; if it was

medication causing him to fall asleep and this was therefore disability related, then why was the claimant working? The reason said Mr Bradley, he misled occupational health.

62. Mr Bradley was asked whether there could be other permissible scenarios on the evidence available during the disciplinary process, as the claimant had at different times given the following accounts for falling asleep: he felt ill, it was very hot, he was stressed and tired caused by his daughter's suspected serious ill-health; his medication. Mr Bradley was asked whether these could be factors in his falling asleep. Mr Bradley argued no, he had admitted being asleep, and that the ET would err in going down this road – the evidence was he had fallen asleep and this was enough.

63. Mr Bradley was asked was there the possibility the available evidence could equally suggest the claimant had been truthful at his occupational health appointment, but he got ill as he described for a medication-related reason? Mr Bradley argued it was clear this was not medication-related as said in his text to Mr Peters at page 56 – '*I felt faint – don't feel 100% today…'.* In any event, the GPs report at page 73 does not support the argument that the medication affected him. He was asked about the OH report at page 73 which says the medication may cause drowsiness. Mr Bradley argued this report was unreliable because it was coloured by the claimant's responses to OH at this time. In addition, the fact this report was not in the disciplinary bundle did not render the hearing unfair as the claimant had received a copy of this report; also this report evidenced the disciplinary allegation which had not been taken forward, and so it would be misleading to include this report in the disciplinary bundle. In addition, this report did not say the medication did cause drowsiness on this occasion, but that drowsiness could occur. The important reports are the OH reports of February and March 2016, one says he remains drowsy, the other says he is no longer drowsy.

64. In addition Mr Bradley argued, in his return to work interview, the claimant was asked to inform Mr Peters if his circumstances changed but he did not do so. Also, the claimant accepted the allegations at the disciplinary hearing. He accepted the charges against him, therefore he is accepting guilt.

65. At various times during the process the claimant said medication was a factor in him falling asleep, and in other times he said it was not a factor. Mr Bradley argued that it was reasonable for the respondent to arrive at a final conclusion of this issue at the appeal stage, as it was at this stage the respondent had the GP's report dated 14 July 2016 (108) – which states his GP has *'no knowledge'* the claimant suffers from drowsiness as a result of his medication. Mr Bradley accepted that if this report is true the claimant did not mislead occupational health. Mr Bradley said that at the appeal there was evidence the medication does not cause drowsiness, and he conceded the consequence of this is that at appeal there was evidence the claimant was not misleading occupational health.

66. However Mr Bradley did not accept that this meant the finding on allegation 2 – misleading OH – was unfair; the reason why this was the case is that the

claimant admitted this allegation, he was represented by a union rep and it was reasonable for the dismissing manager to accept this admission.

67. On the s.15 Equality Act claim, Mr Bradley argued there was objective justification for their actions: he misled occupational health, and the respondent's actions were an appropriate response.

68. Following the overnight break Mr Bradley continued his submission. He referenced the s.15 Equality Act claim, discrimination arising in consequence of the claimant's disability. He argued the respondent did not treat the claimant unfavourably because of something arising in consequence of his disability. Looking at evidence not in front of the disciplinary process, the evidence is clear. In particular page 85 Dr Nirvani's consultant psychiatrist report dated 16 June 2016: this states Dr Nirvani had *'no issues'* about his fitness to drive.

69. The issue therefore was not the claimant's fitness to drive, instead it was the claimant was taking a kip in the van. What of his evidence he was sweaty/flaky? Looking at the disciplinary process as a whole, including the appeal, for example the claimant's mitigation statement at appeal (104-5), there was nothing about medical fitness to drive, it was all about his personal life and daughter's illness. Looking at the evidence as a whole, it is right to say at one point he says he was sweating, but this does not mean there is truth in all that he says; overall the evidence shows he is taking a kip in the van. The medical evidence makes clear – eg page 90 – there is no significant side effects that could affect his driving; there is no objective evidence to suggest his disability was a cause of him being asleep in the van – page 108.

70. Is the evidence contradictory – is there evidence the claimant fell asleep because of medication, related to disability? Mr Bradley said no – all the evidence shows his medication did not cause drowsiness – see evidence at pages 85, 90, 104 and 108. The only medical report which could possibly contradict this finding is page 73. Mr Bradley argued that if the claimant did fall asleep for a reason connected to disability, then the treatment – a disciplinary hearing and dismissal - was proportionate because of the risk to the public and to him of injury. The hearing was fair, and a proportionate means of achieving this legitimate aim. Even if the process was unfair, the s.15 defence was made out.

71. Mr Bradley argued that it was clear the claimant had admitted the allegations by accepting them – he had *'accepted'* allegations in previous disciplinary hearings (25, 37). Accordingly it was not permissible for the Tribunal to go behind his admissions. Even if the claimant has mental health difficulties, as long as the Tribunal accepts that the respondent was acting in good faith, they were in a position to form a judgment. Also, the appeal can correct procedural errors. This was a judgment call for employer. In context, there was enough evidence to make this call based on answers at the investigation meeting, in particular answers to questions 12 and 15. The answer to 15 is accurate. There is also evidence that the medication does not make him drowsy. His

motivation is that he wants to keep his job and by the time of interview he knows that job is on the line.

72. In relation to the answer of the Union rep - he did not intend to mislead, the fact is that maybe the claimant did not intend to mislead, his answer to OH was not pre thought out. For Mr Bradley, the fundamental issue is that the claimant had not lied to OH; but the answer at 15 is not accurate. The claimant was not dismissed because of his medication, he was dismissed for being asleep.

73. What of the fact the appeal upheld allegation 2, that he had lied to OH? Mr Bradley accepted that the appeal decision latter does 'not expressly' say this, but he argued that Mrs Lunt accepted the evidence produced at appeal, the effect of which was the claimant was fit to drive. Mr Bradley said he was not relying on allegation 2 as a fair reason for dismissal – as the evidence was the claimant was fit to drive, and at appeal it was accepted he was fit to drive. On this basis there was no disability discrimination, and his dismissal was fair.

74. Mr Bradley argued there as still a breach of trust and confidence because he pursued a lie that he had misled OH in his answer to question 15. Also, he pursued different answers at different times, eg his daughter's sickness which had not been raised previously, there was a contradictory case, a change of account. Mr Bradley conceded the claimant had not faced a disciplinary allegation of contradictory answers amounting to a breach of trust, as he put it there only needs to be a finding of fairness in relation to allegation 1 to succeed.

75. In relation to direct discrimination, a hypothetical comparator would be a member of staff who was also asleep in the van on a live final written warning. This comparator would also be dismissed.

76. In relation to the claim for harassment relating to visits to his home and remarks on his return: the issue is that the respondent believed the claimant had not submitted sick notes. With regard to statements allegedly made to the Union rep by Mr Peters, he had not attended to give evidence and so no weight should be placed on this statement.

77. Mr Bradley urged the Tribunal to find that the respondent acted in good faith; this can be shown by Mrs Clubb deliberately removing issues relating to the drugs allegation which was not pursued.

78. What of a reasonable adjustment claim in relation to the disciplinary process: Mr Bradley argued this claim had not been brought. Should the process have been conducted differently on fairness grounds? He argued no, the claimant was sufficiently aware of the process to deal with it. Regarding issues such as the claimant's confusion and possible misrepresentation, Mr Bradley said the claimant had been given reasonable adjustments such as breaks. Whether questions were understood or not were not was not identified as a reasonable adjustment, but in any event, there was no required reasonable adjustment in respect of the respondent's conduct of the process.

The claimant's submission

79. Ms Rimmer argued in relation to allegation 2 that the claimant did not lie to OH; on the balance of probability on the evidence there was agreement amongst experts and health professionals that he was fit to work. This was supported by OH and his GP. All are professionals communicating the claimant is fit for work.

80. The claimant accepted the final written warning. There was never any issue with the quality of his work in 12 years. There is the evidence of witnesses that Mr Peters wanted him sacked.

81. Ms Rimmer argued the evidence of Mrs Clubb was based on assumptions and not factual evidence and this clouded the issues – for example she assumed the claimant said things which he did not mean and she then failed to clarify – for example, saying drowsy when no-one else had including the claimant in his answers. And Andy Roberts made accusations and accused the claimant of telling Mrs Clubb the medication made him drowsy, in fact this was not said by him.

82. Also, the respondent kept on referring to the medications without any medical knowledge, and they repeatedly barraged the claimant with medicine issues and gave scenarios about crashes not relevant to the issues.

83. Regarding Mrs Lunt's evidence, the claimant's Union rep was barred from speaking. Her decision letter is subjective, for example she states the claimant indicated the medication does not make him drowsy – but this is a subjective opinion and not a fact. She also states the claimant fell asleep at work previously – but there is no evidence for this and it never happened.

84. On misleading OH, how, why and where is the evidence for this? The claimant wants to keep his job, but this was a subjective finding and not reasonable to find he had misled OH.

85. In fact, on the claimant' return from work there should have been a care plan in place; there was no buddy system for the claimant – 'HR failed Sam'.

86. Ms Rimmer accepted that the final written warning should not be disregarded, but the decision to dismiss was made on 'cloudy/untrue facts'. The respondent 'say as facts presented are true, then claimant guilty, but the facts are an interpretation of what Sam was saying.'

87. Regarding the 'unfounded' allegation of drugs in his van. This issue should gave been included in the bundle as it forms part of the reasons why the claimant felt victimised. This process was a breach of human rights.

88. The attendance management process had risk and stress assessments, and there was a failure to adhere to this. the respondent failed to have a basic

understanding of the claimant's disability, so how can reasonable adjustments be set effectively?

89. The claimant had no appraisals; he had no buddy. He had humiliating treatment; he was told about weight, and weight gain is a side effect of his medication – as he would have known had there been a risk assessment.

90. Ms Rimmer concluded by saying the claimant felt humiliated by some of the comments made about his literacy. He is honest and naïve, suffering severe and enduring mental health issues.

## The Law

91. Employment Right Act 1996

Fairness s.98 General

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—
   a. the reason (or, if more than one, the principal reason) for the dismissal, and
   b. that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—

…

(b) relates to the conduct of the employee

…

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—
   (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
   (b) shall be determined in accordance with equity and the substantial merits of the case.

92. Equality Act 2010

Direct discrimination s.13

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

Discrimination arising from disability s.15

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

Duty to make adjustments s.20

…

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

Failure to comply with duty s.21

(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.
(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

…

Comparison by reference to circumstance s.23

(1) On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case.

Harassment s.26

(1) A person (A) harasses another (B) if—
(a) A engages in unwanted conduct related to a relevant protected characteristic, and
(b) the conduct has the purpose or effect of—
(i) violating B's dignity, or
(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

….

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—
(a) the perception of B:
(b) the other circumstances of the case;
(c) whether it is reasonable for the conduct to have that effect.

93. This was a misconduct dismissal. For the purposes of the unfair dismissal claim we accordingly had regard to *the Burchell test* – namely that a dismissal will be fair if, at the time of dismissal:

- The employer believed the employee to be guilty of misconduct.
- The employer had reasonable grounds for believing that the employee was guilty of that misconduct.
- At the time it held that belief, it had carried out as much investigation as was reasonable.

*British Home Stores Ltd v Burchell [1978] IRLR 379.*

94. We reminded ourselves that in determining fairness, it is not for us as the Employment Tribunal to consider whether the claimant is guilty of misconduct, but whether the employer believed, and had reasonable grounds for believing, the claimant was guilty of misconduct. Reasonable belief means the investigation must be within the 'range of reasonable responses' that a reasonable employer in those circumstances might have adopted (*Iceland Frozen Foods Ltd v Jones [1982] IRLR 439*). The next question is whether the employer acted within the band of reasonable responses in treating this misconduct as a sufficient reason to dismiss.

95. Range of reasonable responses: we reminded ourselves that it is irrelevant whether we as the Tribunal would have dismissed the employee in these circumstances, we reminded ourselves that we must not "substitute" our view for that of the employer's reasonably held views (*Midland Bank plc v Madden [2000] IRLR 827*), and we must not 'retry' the evidence to determine whether the respondent had reasonable grounds for believing in the misconduct – this amounts to a substitution mind-set. To put it another way, we accepted it was not our role to focus on our view of the claimant's guilt or innocence but we should confine itself to reviewing the reasonableness of the employer's actions.

96. What is a fair process? An employer must hold such investigation as is "reasonable in all the circumstances", judged objectively by reference to the "band of reasonable responses" (*Sainsbury's Supermarkets Ltd v Hitt [2002] EWCA Civ 1588*). "All the circumstances" includes the potential effect of the finding upon the employee (*A v B [2003] IRLR 405).*

97. We also noted the following case: if an employee has admitted misconduct, it may be reasonable for the employer to take this at face value without further investigation (*Royal Society for the Protection of Birds v Croucher [1984] IRLR 425*); however this may not be the case in each case and this decision must still be judged against the range of reasonable responses test – in particular if the employee concerned may be particularly vulnerable, for example, by reason of disability, or if the admission is retracted, or if new matters came to light, or there are any extenuating circumstances, these should be investigated (*CRO Ports London Ltd v Wiltshire UKEAT/0344/14*).

98. We also noted the provisions of the ACAS Code of Practice on Discipline and Grievance.

99. What of health issues: We noted the decision of the *Governing Body of Hastingsbury School v Clarke UKEAT/0373/07* in which it was found that if an employee's apparent ill-health may be contributing to behaviour that the employer considers amounts to gross misconduct, a failure to investigate that ill-health before dismissing the employee is likely to make the dismissal unfair; also *The City of Edinburgh Council v Dickson UKEATS/0038/09* – it is not reasonable to fail to investigate a possible medical explanation and instead rely on uninformed opinion that there was unlikely to be a connection between the medical condition and the behaviour.

100. In some cases an employer will consider more than one allegation of misconduct on the part of the employee. In these cases, the reason for dismissal will be the set of facts which lead it to dismiss the employee (Abernethy v Mott Hay and Anderson [1974] ICR 323). As explained by the EAT in Governing Body of Bearwood Humanities College v Ham UKEAT/0379/13, this means that the question for the Tribunal is not whether the individual acts of misconduct individually, or cumulatively, amounted to gross misconduct but whether the conduct in its totality amounted to a sufficient reason for dismissal.

101. Direct disability discrimination: We noted that the claimant must show he has been treated differently from a hypothetical comparator whose circumstances are not materially different from his own – i.e. on a final written warning and facing similar disciplinary allegations (*Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285*). We noted the question to be addressed is the reason why the claimant was dismissed – was it on the prohibited ground of his disability?

102. Discrimination arising from disability: We noted the legal test as set out in *Pnaiser v NHS England and another [2016] IRLR 170:*

- Has the claimant been treated unfavourably, if so who by;
- The tribunal then needs to decide what caused this treatment – what was in the mind of the decision-makers in the disciplinary process; this may involve a consideration of their thought processes, bearing in mind that 'motive' to discriminate is not required for the claimant to succeed in a s,15 claim;
- The tribunal then needs to determine whether the reason for the treatment is "something arising in consequence of the claimant's disability. This involves an objective question and does not depend on the thought processes of the alleged discriminator.

103. We noted that there need only be a loose causal connection between disability and the 'something arising' as a consequence of his disability. We noted the decision in *Risby v London Borough of Waltham Forest UKEAT/0318/15*, in which it was held a loss of temper was connected to a wheelchair user's disability, because there was a link between his loss of temper and his disability: the issue which gave rise to his loss of temper (a decision to hold an event in a wheelchair-inaccessible venue, meaning he could not attend) was linked to his disability; he would not have lost his temper had be not been disabled.

104. In *Hall v Chief Constable of West Yorkshire Police UKEAT/0057/15*, it was decided there was a connection between the unfavourable treatment and disability when an employee was dismissed because the employer had a genuine but mistaken belief she was falsely claiming to be sick. The employer's motivation was an irrelevant consideration: the employee had been dismissed for taking sick leave which was due to her disability.

105. We also noted the defence to the s.15 claim, the unfavourable treatment in question must be "a proportionate means of achieving a legitimate aim". We noted also the decision of *Burdett v Aviva Employment Services Ltd UKEAT/0439/13*; an employee was dismissed for assaulting a colleague and members of the public after he stopped taking his medication for schizophrenia. The EAT decided that this defence was not made out because the employer and the Tribunal failed to consider whether the claimant's mental illness meant that he was not culpable for the conduct in question. The EAT also noted the requirement to balance the discriminatory effects of what the employer consider to be the proportionate means of achieving legitimate aims and not put too much weight to either.

*106.* The failure to make reasonable adjustments claim: the claimant argued in his claim that employees who were not disabled were driven to their work sites, a statement not challenged by the respondent. The practice in this case was allowing the claimant to drive following his return to work interview. We noted we are required to identify the nature of the substantial disadvantage suffered by the claimant in comparison to the non-disabled comparators, and must focus on the steps which the employer can reasonably take, rather than the thought processes of the employer when considering what steps to tale *(Newham Sixth Form College v Sanders [2014] EWCA Civ 734)*.

## The Tribunal's conclusions on the facts and law

Unfair dismissal

107. Bearing in mind the requirement not to substitute our own views for that of a reasonable employer, we considered whether the respondent's investigation met the standard of a reasonable investigation – whether, given the issues involved, it was within the range of reasonable responses of a similar sized local authority.

108. We first considered whether it was within the range of reasonable responses to hold an investigation interview. We concluded yes, as an allegation had been made relating to a smell of drugs, and the claimant had apparently fallen asleep in his van during working time; these were potentially disciplinary issues. We did not consider the claimant's recent time off work on grounds of ill-health was a factor in the respondent's mind when it commenced this process.

109. As at the date of the investigation interview with the claimant, the respondent had the following knowledge of the claimant's work-related health issues:

    a. he had significant and long-term mental ill-health difficulties including multiple anxiety disorder, paranoia and schizophrenic tendencies
    b. in 2012, medication may 'make him very tired…' a situation which the respondent was monitoring and had informed OH about; the respondent carried out a work stress assessment and assigned him a work-buddy (28)
    c. the claimant's health could be significantly affected by stressful events in his private-life, including the birth of his child in 2013
    d. OH had said he could drive a works van in 2013 'given stability' of symptoms
    e. medication was a significant contributory factor in his hospitalisation in October 2015, and some four months later in February 2016 the claimant was still reporting significant difficulty with the control of his medication on his ability to work
    f. 3 of his medications said they may make the taker drowsy
    g. OH had said that while fit for work, they recommended he 'works with a colleague' yet Mr Grant was unaware he was in any way assigned to or mentored with the claimant
    h. the claimant had been at work 3 weeks and was still working 50% hours
    i. the claimant had been driving alone for parts to different stores, described by Mrs Clubb as 'quite a lot of driving'
    j. Ian Peters' witness account was describing an employee who was in a heavy sleep with loud music, who would not easily wake, and who was not reacting (for whatever reason) when he did wake

k. within an hour the claimant texted Mr Peters saying he felt faint, not well, he told Mr Peters in terms that he was disorientated on waking - 'I don't know where I was' (56)

110. We accepted it was reasonable for the respondent to have concerns, based on this evidence, of the effect of medication on the claimant and his ability to drive. The clamant said he was ill, he fell asleep, and his medication had on several times in the past been poorly controlled and it could cause drowsiness. The claimant's suitability to drive was, in the past, said by OH to be dependent on the stability of his symptoms and this could be dependent on his medication. We also accepted it was reasonable for the respondent to be concerned as to why he had been signed fit to return to work given he fell asleep on this occasion.

111. We next considered the nature of the questions and answers in the investigation interview. We bore in mind, as we considered a reasonable similar employer would do, that the claimant's mental health issues – including anxiety, paranoia and schizophrenic symptoms – may impact on his understanding of questions and answers and that this needed to be factored into the process. We accordingly considered whether the q&a was reasonably conducted and whether it was reasonable for the respondent to decide no further investigation was necessary following this interview.

112. We noted that the claimant answered he can still feel *'unwell'* in answer to several questions referencing drowsiness. However, his only explicit reference to falling asleep was prior to his last absence, while on different medication. Based on the answers to these questions, we considered the essential fairness of the premise of question 15: *'why do you think'* OH confirmed the claimant's fitness to work *'if you still felt drowsy on the medication?'* Based on the answers thus far, we did not feel the 2nd half of this question was reasonable, as the claimant had at no point during the interview indicated that, when he saw OH in March 2016 he was still feeling drowsy on his new medication.

113. We simply did not feel it was fair for the respondent, given the claimant's mental health vulnerabilities, to take what was at best a hypothesis and turn it into a factual assertion in this question. It was misleading, it was unfair and it was not, we considered, the task of an investigator in a reasonable investigation to put a hypothesis to a vulnerable witness as an assertion of fact.

114. An unreasonable question can, the Tribunal accepted, lead to evidence or an admission which can be used in a substantively fair manner. We considered it within the range of reasonable responses for the respondent to take account of the claimant's apparent admission of guilt obtained in answer to question 15. The claimant's answer appears at first appearance to be damming – he appeared to be admitting he hoodwinked OH to get back to work. This was, we accepted, a serious issue which required further investigation.

115. However, we disagreed with the respondent that it was within the range of reasonable responses of a county council in a disciplinary investigation which is looking at issues of some seriousness to leave the issue at this point. We considered a fair investigation would, given the claimant's medical health vulnerabilities, have ensured the claimant understood the question put and the answer he had given and what it was he appeared to be admitting to. We considered a fair investigation would ask follow-up questions on this point. If the claimant was making a genuine and frank admission of guilt in answer to question 15, he presumably would not have contradicted this in follow-up questions. We felt it was not within the range of reasonable responses to stop this line of questioning at this point and use this as the sole 'evidence' the claimant had misled OH into signing him fit for work.

116. Faced with the complex information gained about the claimant to this point and known to the investigator and HR, from the claimant's medical history to his falling asleep on 13 April 2016, to what the respondent characterised as an admission to misleading OH, we asked ourselves how would a reasonable employer treat this evidence, again bearing in mind the range of reasonable responses test? We also considered the *Hastingsbury School v Clarke and The City of Edinburgh Council v Dickson cases.* We accepted that the respondent had obtained medical evidence, for example the claimant's GP report (which records he had not seen the claimant *'for some considerable time'*), which says he is stable and able to drive. However, the respondent also had an OH report from Dr Oliver, who said he had seen the claimant that day, and he should not drive. We considered the answers of Mrs Clubb as to why she did not seek further information - she *'did not think'* of going back to OH because obtaining this information may breach patient confidentiality, she believed the medical reports plus the interview with the claimant, who she believed had understood the questions and provided very clear answers, was enough. However, Mrs Clubb also said in her evidence the claimant *'was asleep and whether this is medication related or not that was the case … it was hard one way or another to decide...'*

117. We did not agree the reasoning of Mrs Clubb was reasonable. We considered the only reasonable option open to the investigation was to look further into the allegations. If there was a medication related reason for falling asleep, this would assist the disciplinary process in determining whether he was guilty of allegation 1 or whether there was a significant medical reason involved. We did not consider it was appropriate for the investigation to focus on exactly what the claimant had told OH about his fitness to work and whether this indicated he had hoodwinked OH, without first ascertaining what the claimant had been asked, what he had answered and what further information if any OH had taken into account in reaching its conclusions the claimant was fit to work - with a colleague. We noted that the claimant was not in fact asked by Mrs Clubb what OH had asked him in March 2016 and what his answer had been.

118. We also noted in the February 2016 OH report there was reference to the claimant's care worker and psychiatrist being involved in assessing the effect of his medication on his ability to work. In March 2017 he was signed as fit to

return. While it was reasonable to consider what the claimant had told OH as a factor in the investigation, we considered a reasonable and even handed investigation would have at least considered how the recommendation the claimant was fit for work was made – was it made, as the respondent assumed, solely on what the claimant reported to OH? Or was it based also on psychiatrist recommendations? Does OH take the claimant's account as given? How was his fitness to work assessed? Was it possible he could have hoodwinked OH in this assessment? Given his medical history, was it possible for the claimant's falling asleep to be causative with other factors?

119. We accordingly decided the respondent's investigation was outside of the range of reasonable responses because it failed to ascertain – either from the claimant or from OH – what had been said and how OH's decision had been arrived at. It had also asked a question which was not based on evidence gained and was instead a hypothesis presented as a fact, and the Tribunal considered it unreasonable to take the 'admission' gained as the only required evidence on this allegation.

120. We next considered why Mrs Clubb's report excluded Dr Oliver's OH report, the very report which had delayed her investigation. In this report she is told by Dr Oliver the claimant is fit for work, but his medication can cause drowsiness and he should not drive *'at least on a temporary basis'.* This report goes to both allegations: was he asleep for a medication related reason? But also did he mislead OH if he is fit to work – was he in fact fit for work in March 2016? This report was potentially evidence in the claimant's favour and the Tribunal considered it should in a reasonable investigation have been included in the investigation report.

121. We next considered the contents of the investigation report. We considered the summary of evidence provided by Mrs Clubb. We did not consider the evidence in respect of allegation 1 was fairly summarised. Mr Clubb did not reference Dr Oliver's report or its recommendations. We did not consider it was within the range of reasonable responses to exclude this report given its potential relevance, for the reasons given by Mrs Clubb at Tribunal or otherwise.

122. We also did not consider Mrs Clubb's account of the evidence in respect of allegation 2 was fairly summarised. As well as the failure to refer to Dr Oliver's report, the claimant had not confirmed his medications make him drowsy, as Mrs Clubb said, he had said they make him unwell. He had not said he had [felt drowsy] 'a lot' he said he felt unwell, he had not confirmed he had fallen asleep on duty before, he had said he had fallen asleep.

123. The report quoted his answer to question 15, as evidence he had 'admitted he had not been completely honest with OH during his meetings'. We accepted it was reasonable to quote the question, and answer; however we did not feel this answer – on its own - could be treated as an absolute admission of dishonesty during his OH meetings for the reasons set out above.

124. We noted the report was silent on an issue we considered an even-handed and reasonably-conducted investigation would have looked at – why the claimant was working alone that morning and doing so much driving and why, given Mr Grant's evidence, had he not been assigned a colleague to work with as OH had recommended – this presumably encompassing driving?

125. We therefore felt the investigation was unreasonable as it failed to get relevant and likely reasonably available evidence to the bottom of whether his symptoms - as described by the claimant and by Mr Peters – were consistent with their being a medication related reason for falling asleep, and failed to properly investigate whether he had in fact misled OH. We felt this investigation and investigation report was well outside the range of reasonable responses open to a local authority conducting a complex medical-related investigation with potentially serious consequences for the employee concerned. In his case we noted the respondent would be aware of the potentially serious medical difficulties for the clamant that could result from dismissal.

126. The disciplinary hearing got off to an ambiguous start which, we felt, made the hearing unfair. We considered there was a clear issue as to whether the claimant was accepting he was guilty of all allegations, including misleading OH and being guilty of trust and confidence. In any event, during the course of the hearing, the ambiguity of the position became clear: the claimant stated he considered factors including the heat of the day and the toll of driving, and not the medication, made him fall asleep. He was told he had admitted to Mrs Clubb *'you stated your medication made you feel drowsy'*, and is told by his union rep *'In those situations SS will agree to anything because he gets stressed'*. As we say above, we did not consider it was a reasonable finding that the claimant had admitted he felt drowsy on his current medication. In fact, he repeated what he had said at the investigation interview, that he was affected by his medication if he did not take them when he woke up… His rep stated the claimant felt *'good and normal'* on his return to work the claimant referred to his Dr and mental health professionals saying he was fit, that he *'felt ok'* at this time. His union rep referenced his confusion, also saying he did not mean to mislead OH.

127. The Tribunal concluded that whatever the position at the outset of the hearing, it was quite apparent at the end of the hearing that the claimant was not admitting he had misled OH, he was in fact saying he was fit to return to work at this time; there was significant reference to his confusion and being easily led. The claimant was also bringing in another factor for falling asleep – the heat together with the excessive driving.

128. We noted that the ACAS Code suggests further investigation may be required if found to be necessary at a disciplinary hearing. We noted the *RSPB v Croucher* and *CRO Ports London Ltd v Wiltshire* decisions, that an apparent admission of guilt must still be judged under the range of reasonable responses test – in particular as the claimant's mental health vulnerabilities, his susceptibilities, his retraction, his new evidence.

129. We considered the claimant appeared to have retracted his apparent confession to misleading OH. Coupled with the respondent's knowledge of the claimant's mental health issues, and given what was being said about his vulnerability, further evidence could and should in a reasonable process have been taken at this time. One option would have been a reference to OH as above.

130. Mr Roberts was clear that Dr Oliver's 25 May 2016 OH report would not have made any difference to his decision; he said this report was the claimant's account to OH, whereas other reports said medication was stable. While we accepted Mr Roberts' statement that he needed to see the evidence 'in the round', we considered this report should reasonably have factored into his decision as to what to do next. In particular it added to the contradictions in the evidence as to why the claimant had fallen asleep, whether the claimant was fit to drive, and whether he had misled OH. We did not feel it was reasonable for the respondent to dismiss this report as irrelevant, for the reasons given or at all.

131. As at the conclusion of the disciplinary hearing there were many unresolved issues. For example, was it possible the claimant's falling asleep could have been medication related? Or was it the heat, or too much driving? Or a combination of factors? Should he have been driving with a colleague as per OH's recommendation, and if not why not? When he had presented to OH on 16 March 2016, how had OH assessed his fitness for work? We accept these are just examples of questions, and we are not saying a reasonable investigation must ask such questions, however the respondent should reasonably have been considering further enquiries to address the manifest contradictions and inconsistencies in the medical and witness evidence so far.

132. We considered that ½ hour break was wholly inadequate for Mr Roberts to assimilate the information he had collated; in particular the clear retractions to allegation 2, his reference to the heat and excessive driving, and reference to his mental health issues.

133. We noted the criticisms of the claimant's conduct at the disciplinary hearing, in particular the criticisms for relying on his Union rep's statements. This appeared to count against him on the assessment of mitigation – again we felt this was an unreasonable decision to take on mitigation, given claimant's mental health.

134. We considered the fact the final written warning was regarded as live, the claimant's request for this to be disregarded as rejected, and the claimant was dismissed under a totting-up procedure. We were of the view that it was reasonable for the respondent to have regard to the final written warning. It was still live, the claimant had not appealed its findings. Had the process otherwise been fair, we accepted the respondent would have acted reasonably in taking into account the final written warning in its determination of the sanction.

135. By the date of the appeal hearing the claimant had introduced further evidence – the ill-health of his daughter and lack of sleep. He had also provided a GP's report which said he was prone to anxiety *'which can cause confusion and misrepresentation of facts'* (108). These were, we considered, two further factors which reasonably needed to be considered by OH. As at this point, the factors potentially involved in the claimant falling asleep included medication, his underlying conditions, heat, excessive driving, not having a work colleague with him, stress caused by his daughter and lack of sleep. The respondent was aware that stress could affect his mental health. How and why he had fallen asleep – which was a factor to take into account in determining whether the claimant had committed an act of misconduct - was in part a medical question. The question as to whether it was reasonable to treat his answer to question 15 as an admission of guilt was now under question from his GP. We considered that a similar respondent, acting reasonably and within the range of reasonable responses would have sought an opinion from OH; they had assessed him as fit for work, they would be the best placed to give the reasons how and why they had done so.

136. Mrs Lunt confirmed her finding was the claimant was fit for work but decided to fall asleep. We did not consider it was reasonable to dismiss Dr Oliver's findings that his medication could potentially be a factor. We considered a reasonable process would consider this allegation unproven, and at least a process within the range of reasonable responses would make this an issue for further investigation. Mrs Lunt said she did not focus on the 2nd allegation that he misled OH, and she acknowledged that there was conflicting evidence on this point. However in her report she made unequivocal findings he had misled OH, yet in doing so did not refer to Dr Bottomley's GP report (108). We again considered there were sufficient ambiguities on the evidence at appeal for the 2nd allegation not to be proven at this stage.

137. It follows that if the respondent has not undertaken a fair process and has not proven allegations (1) and (2) to any reasonable standard, that allegation 3 is also not proven.

138. We therefore find that while the respondent has proven the reason for dismissal, it did not have reasonable grounds for believing that the employee as guilty of misconduct in relation to any of eth allegations, as there were substantial failings in the investigation process and at the disciplinary and appeal hearings meaning whole process was outside of the range of reasonable responses, and the claimant's dismissal was unfair.

Direct disability discrimination

139. To succeed in this claim, the claimant must show on the balance of probabilities the 'reason why' he was dismissed was because of his disability. We considered how a comparator who was on a final written warning who fell asleep and who was not disabled would have been treated. We concluded that a comparator in such circumstances would have gone through a disciplinary process. While we have criticisms of the process as identified above, we considered that a similar process would have been adopted with a

hypothetical or actual comparator. We therefore concluded such a comparator would also have been dismissed. Because the claimant has not shown differential treatment between himself and a comparator, this claim fails.

Discrimination arising from disability.

140. The claimant contends he was dismissed because of his prior absences which were disability related, his dismissal was for a reason arising from his disability. We accepted the claimant's sickness absence arose from his disability. As we found above, we concluded that the reason why the respondent commenced the disciplinary investigation was because of allegations of misconduct and not because of the claimant's prior sickness absence. We did not consider the claimant's sickness absence was in any way connected with the decision to commence this process, or the decisions taken in this process. It was clear to us the respondent's focus was on the disciplinary allegations rather than any other factors, including sickness absence. Accordingly this element of the s.15 claim fails as we did not find any causal connection between the claimant's sickness absences, the decision to discipline him and his dismissal.

141. The second claim for discrimination rising from the claimant's disability relates to his falling asleep, the claimant alleges his fatigue and drowsiness were a side effect of his medication, and his dismissal was for falling asleep which something arising from his disability. Mrs Clubb accepted that the evidence pointed both ways, *'… it was hard one way or another to decide. His medication was still affecting him … He talked about the effect of medication - this may have an impact*'. A significant focus of the disciplinary investigation had been on the impact of the claimant's medication; the 2nd allegation was an allegation he had misled OH, that the medication was still impacting which was a possible reason why he fell asleep. A significant focus of the disciplinary decision related to the health and safety risks of driving while unfit because of medication. Mr Roberts was quite clear he had misled OH and there was a possibility his falling asleep was medication related. We considered that the thought process of the managers involved throughout the disciplinary process was continuously linking the claimant's medication with his falling asleep, and this link played a significant factor in its decision to dismiss on all allegations.

142. In reaching this conclusion we noted there was no definitive medical conclusion on the available evidence as to whether claimant's falling asleep was medication related. However we considered the decision reached by the respondent was focussed on the medication issue, that his medication made him drowsy and this was a potential factor in his falling asleep. We were accordingly clear that the decision to dismiss was directly linked to his medication, which is directly connected to his disability, that the reason for his dismissal arose from his disability.

143. We next considered whether the respondent's actions were a proportionate means of achieving what the parties agreed was the legitimate aim. We considered not, for the reasons set out above: there was a failure to investigate further to assess whether the respondent's beliefs had any validity, there was a failure to consider reasonable adjustments, and the respondent failed to adopt OH's return to work requirements in full. Accordingly this element of the s.15 claim succeeds, as the claimant was dismissed for a reason collected to his disability in circumstances where the respondent's actions and decisions in the investigation and disciplinary process were not a proportionate response to the agreed legitimate aim.

Failure to make reasonable adjustments:

144. The first claim is for failing to discount sickness absences which were disability related. As found above, the Tribunal did not consider his recent absences played a factor in the decision to commence the disciplinary process. This was not therefore an issue for which reasonable adjustments were required, at this time as no absence management process was ongoing, and this element of the reasonable adjustments claim fails.

145. The second claim, set out in the claimant's email amending the claim dated 29 September 2016 is a claim for a failure to make reasonable adjustments relating to the practice of him driving a works van. We noted the respondent, in its referral to OH in January had ticked boxes referring to issues on the claimant's return, and that OH says *'Please ensure Sam works with a colleague until I next review him for support during the reintroduction back into the workplace'* (48). We noted the use of '*ensure'* – effectively a requirement that the claimant works with a colleague. We noted that OH had previously given permission for the claimant to drive as his condition was at that time stable (in 2012), a fact known to the respondent's HR team if not by Mr Peters. We noted that it appeared HR did not directly input into the claimant's return to work on this issue.

146. Mr Peters did not decide to allocate a dedicated work buddy (as Mr Grant had previously acted) or ensure the claimant drove or was driven to and from site and when collecting materials. We accepted there appeared to have been a consensus the claimant could drive – and we accepted the claimant's evidence he believed he was fit to drive and he was eager to get back to work as normal. However we considered there was a failure at his return to work to consider the overall picture of the claimant's health, his recently poorly controlled medication, and whether there was a need to act purposively on OH's request to 'ensure' he works with a colleague, and do so for all work-related activity, including driving. We accepted the claimant's uncontested claim that other employees were driven to site. We considered this was a failure by the respondent to make a reasonable adjustment, as suggested by OH.

147. The substantial disadvantage suffered by the claimant as a consequence of this failure was the fact he fell asleep in a works van, having driven

excessively on a hot day, having not worked with a colleague all day, and was disciplined and dismissed as a consequence.

148. We also considered the issue of the reasonable adjustment in relation to driving was a live issue throughout the disciplinary process, in particular in considering why the claimant was driving on his own, given OH's recommendations. This was reinforced by Dr Oliver's report in May 2016 which had expressly recommended he did not drive as an adjustment. Mrs Clubb agued this report related to reasonable adjustments, and this was something the respondent accepted it was considering. We considered that OH's recommendations in March and May 2016 were reasonable adjustments which the respondent should have put into place up to his dismissal.

Harassment

149. For the reasons set out above, we considered the respondent acted reasonably in visiting the claimant at home. The claimant was forewarned by text. While we accept the claimant was aggrieved by these visits, we noted that the claimant did not complain at the time. It is our considered view on the evidence that the claimant, because of subsequent events, now looks back on these visits with more anger than he felt at the time; this is overlaid by his medical conditions which have – quite understandably – impacted on all that has happened. We do not consider that the claimant was, at the time of the visits, harassed as defined by the law, that at the time his dignity was not violated by home visits, that these were not intimidating, hostile, degrading, humiliating or offensive environment for him.

150. We considered the remark made to the claimant's union rep to the effect that the claimant was to be sacked to be offensive, and potentially created an intimidating environment for the claimant. However, this statement was in effect a statement of fact, it was a one-off and off the cuff-remark, and as such we did not consider it formed a course of conduct required for a finding of harassment. Accordingly, this claim fails.

151. Following discussion with the parties at the end of the Hearing we made the direction Orders as set out above.

Judgment sent to the parties
On 31 May 2017

_____

…….
For the staff of the Tribunal office

**EMPLOYMENT JUDGE M EMERY**

**Dated: 30th May 2017**