EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4100758/2017

Held at Glasgow on 20 and 21 September 2017

Employment Judge: W A Meiklejohn
Members: Mr G Doherty
Mr A K Smith

Mr Douglas Brown — **Claimant**
Represented by:-
Mr S Wilson - Solicitor

Storefirst Management Limited — **Respondent**
Represented by:
Mr I Maclean - Consultant

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous judgment of the Employment Tribunal is that –

(1) The Claimant was unfairly dismissed by the Respondent and the Respondent is ordered to pay to the Claimant the sum of ELEVEN THOUSAND EIGHT HUNDRED AND TWENTY NINE POUNDS and FIFTY FIVE PENCE (£11829.55).

(2) The Claimant's claim of unlawful disability discrimination under section 13 of the Equality Act 2010 fails and is dismissed.

(3) The Claimant's claims of unlawful disability discrimination under sections 15 and 19 of the Equality Act 2010 succeed and the Respondent is ordered to

pay to the Claimant the sum of SIX THOUSAND POUNDS (£6000.00) together with interest of THREE HUNDRED AND FIFTY NINE POUNDS AND ONE PENCE (£359.01).

REASONS

1. In this case the Claimant alleged that his dismissal by the Respondent had been unfair. He also alleged that he had suffered unlawful disability discrimination under Section 13 (direct discrimination), Section 15 (discrimination arising from disability) and Section 19 (indirect discrimination) of the Equality Act 2010 ("EqA"). The Respondent resisted these claims. The Respondent did not dispute that the Claimant was disabled for the purposes of the EqA.

2. A Preliminary Hearing took place on 6 July 2017 at which it was decided that the Claimant should lead at the Hearing. The Claimant was represented at the Hearing by Mr Wilson and the Respondent was represented by Mr Maclean.

3. At the time of the Preliminary Hearing the Respondent's position was that the Claimant had been dismissed on 5 December 2016 and that his claim was time barred. The Claimant's position was that he had been dismissed by the Respondent on 30 December 2016 (the date stated on his P45) and that his claim was not time barred. Mr Maclean advised us at the start of the Hearing that the Respondent would not now be arguing the time bar point and matters proceeded on the basis that the claim had been lodged timeously.

4. We delivered Oral Reasons at the conclusion of the Hearing on 21 September 2017. Mr Maclean for the Respondent has requested Written Reasons which we now provide.

5. Prior to issuing these Written Reasons, we decided on our own initiative, pursuant to Rule 73 in Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, to reconsider one aspect of our decision. This was necessary because our Judgment, as originally promulgated, incorrectly provided for recoupment of benefit under the Employment Protection (Recoupment of Benefit) Regulations 1996. These Written Reasons reflect that reconsideration.

Evidence and Findings in Fact

6. We heard evidence from the Claimant and from his wife, Mrs Laura Brown. For the Respondent we heard evidence from Mr Darrel Coggin, Regional Manager and Ms Cheryl McFadyen, Business Centre Manager. Ms McFadyen was not employed by the Respondent but by another company in the same group of companies as the Respondent. We had a joint bundle of documents extending to 87 pages.

7. The Respondent conducted a storage business from premises in Linwood. The offices which formed part of these premises were operated as a business centre by a company called Business First. This company was in the same group as the Respondent and it was this company which employed Ms McFadyen.

8. The Claimant commenced employment with the Respondent on 26 May 2014. He was offered the position of Store Manager by Mr Coggin's predecessor as Regional Manager but declined this as he was concerned that it might be too stressful. He was offered and accepted the position of Assistant Manager. He became Branch Manager in January 2015. An Assistant Manager (Mr M English) and two Store Assistants reported to him. It was a matter of agreement that at the time his employment with the Respondent ended in December 2016 the Claimant's gross weekly pay was £461 (£376 net). There was no pension.

9. The Claimant has Bipolar Affective Mood Disorder. This was first diagnosed in 2005 or 2006. This causes the Claimant to have periods of depression and elation. During periods of depression attributable to his Bipolar Disorder the Claimant absents himself from home and work. We accepted the Claimant's evidence that he had told Mr Coggin's predecessor about his Bipolar Disorder at the time of his appointment.

10. On 29 September 2015 Mrs Brown sent an email (page 55 of the bundle) to Mr Oliver Kitson, a director of the Respondent, referring to the Claimant being under pressure at work, having become unwell and having failed to return home after work on a Saturday evening. She also referred to a previous similar situation when the Claimant had attempted to take his own life. The pressure at work arose because an employee who had been dismissed by the Claimant had been reinstated on appeal. This incident did not involve the Claimant being absent from work.

11. In January 2016 the Claimant again became unwell as a result of his Bipolar Disorder. He sent an email to Mr Kitson and Mr Coggin on 20 January 2016 (page 56) to advise them that he would be taking two days off work. On the same date Mrs Brown sent an email to Mr Kitson confirming that the Claimant had gone missing from home. The Claimant sent a further email to Mr Kitson on 23 January 2016 (page 58) in which he referred to his Bipolar Disorder and to the fact that he was "*not in the UK at present*".

12. The Claimant had in fact travelled to Lanzarote. He was seen there by someone who knew him, and who contacted Mrs Brown. Mrs Brown travelled to Lanzarote and brought the Claimant home. Upon his return he received by email a letter dated 28 January 2016 (page 60) which Mr Coggin had sent him. This letter advised the Claimant that he had been "*suspended on contractual pay following the allegations of unauthorised absence and failure to follow correct procedures*" and required him to attend a disciplinary hearing on 3 February 2016.

13. The Claimant contacted his GP and submitted to the Respondent a statement of fitness to work dated 29 January 2016 (page 61) which referred to the condition of "*bi-polar*". He also submitted a letter dated 2 February 2016 (page 62) from Dr Baljeet Kaur, his Consultant Psychiatrist, which referred to his Bipolar Disorder and asked that he be excused from attending any meetings at present as they would be detrimental to his recovery.

14. The Respondent cancelled the disciplinary hearing scheduled for 3 February 2016. Mr Coggin said that he did consider dismissing the Claimant when he heard that he was missing, but not when he learned that the Claimant was "*off sick*". Mr Coggin wrote to the Claimant on 3 March 2016 (page 63), at which time the Claimant remained absent from work, seeking his consent to approach Health Assured for an occupational health report on the Claimant's state of health. The Claimant agreed to this.

15. Professor Ewan Macdonald of Health Assured provided the Respondent with a case management report dated 4 April 2016 (pages 64-67). This report confirmed that the Claimant was fit for work and recommended a phased return over four weeks. The report stated that it could be helpful if the Claimant's work colleagues were briefed about his condition so that they could better understand it and identify if issues were arising so that the Claimant could take early action to prevent exacerbations or mood swings happening in the future. There was also reference to the Claimant's Job Retention Officer, provided by the local authority and NHS, giving further support to the Respondent as well as to the Claimant.

16. In the section headed "Future Outlook" (page 66) the report stated –

> "*Bipolar disease is a condition which is usually long-term and can be associated with fluctuating mood. In Mr Brown's case, he has been able to work at relatively high levels for very long periods while*

> *having this condition. His medication has been reviewed and adjusted. He is under ongoing supervision from his General Practitioner and separately from his Consultant Psychiatrist. He also has access to a Community Psychiatric Nurse and is currently having support from the Network Service. With this support system in place, it is highly likely that the likelihood of further problems can be minimised, identified early and treated if necessary, and the outlook is relatively good*."

17. In response to a question about the Claimant's ability to provide regular and effective service in the future, the report (at page 67) stated –

> "*Yes, he should be able to provide regular and effective service in future. He has a slightly higher risk than average of having further sickness absence, but this can be minimised if colleagues are aware and he continues to have the high-quality medical care he is receiving*."

18. Mr Coggin wrote to the Claimant on 20 April 2016 (page 68) inviting him to attend a medical capability meeting on 28 April 2016. Pages 69-70 were the minutes of this meeting. It was agreed that no adjustments needed to be made and that the Claimant would have a phased return to work. The Claimant indicated that he did not want his work colleagues to be told about his medical condition as he saw no benefit in this. He said in evidence that "*there would have been no understanding or empathy from those who worked for me*". One of his colleagues was the store assistant who had been dismissed by the Claimant and then reinstated on appeal (see paragraph 9 above). The Claimant told us that the Assistant Manager (Mr English) had taken this employee's side.

19. The Claimant had a day off work on 22 November 2016. In the course of that day he visited the Respondent's premises with a new family pet dog. During the evening of 22 November 2016 the Claimant suffered the onset of

another Bipolar episode. He left home. Mrs Brown contacted the police who found the Claimant and took him to the Royal Alexandra Hospital in Paisley. The Claimant went missing from the hospital and was not found until 21 December 2016 when he was admitted to Leverndale Psychiatric Hospital. He was in a poor state both mentally and physically.

20. Mrs Brown worked for a domestic cleaning company which at that time operated from the office premises at Linwood where the Respondent was based. This company was one of the Business First tenants within the Business Centre. Ms McFadyen as Business Centre Manager occupied a desk past which Mrs Brown would walk whenever entering and leaving the office where she worked.

21. Mrs Brown had a day off work on 23 November 2016. She felt too distressed to contact the Respondent on that date. She attended for work on 24 November 2016 and spoke with Ms McFadyen. According to Mrs Brown's evidence, Ms McFadyen saw that she was distressed. Ms McFadyen asked Mrs Brown how she was. Mrs Brown told her about the Claimant becoming ill again. She said that she could not give details of the Claimant's whereabouts. She said that she was very worried for his wellbeing.

22. According to Ms McFadyen's evidence, she asked Mrs Brown on 24 November 2016 if the Claimant was coming in. Mrs Brown told her that she was not aware of why the Claimant was not in, and that it was nothing to do with her. Ms McFadyen said that Mrs Brown did not provide her with any information. Of these versions of their conversation we preferred the evidence of Mrs Brown.

23. Mr Coggin learned on 23 November 2016 that the Claimant had not come in to work. He tried to contact the Claimant and left a voicemail message. He also sent a message via Whats App (page 72). The Claimant did not take his mobile phone or any other form of communication with him when he

went missing on 22 November 2016 and so, not surprisingly, Mr Coggin received no response from him.

24. Mr Coggin contacted Ms McFadyen and asked her to speak to Mrs Brown about the Claimant's absence from work. This led to the conversation described in paragraphs 20-21 above. Ms McFadyen reported to Mr Coggin after her conversation with Mrs Brown that Mrs Brown had been "*unhelpful*" and "*not friendly*".

25. Mr Coggin wrote to the Claimant on 24 November 2016 (page 73). This letter referred to the lack of communication from the Claimant and advised that as the Respondent had received no explanation for the Claimant's absence, they had no alternative but to conclude that he was absent without authorisation. The letter stated that unless the Respondent heard otherwise by 28 November 2016 they would have no option but to commence disciplinary action against the Claimant.

26. Having heard nothing from the Claimant, Mr Coggin wrote to him again on 28 November 2016 (page 74) requiring him to attend a disciplinary hearing on 1 December 2016 to discuss his "*alleged unauthorised absence from work, namely no attendance at work since Tuesday 22nd November 2016 and reporting of incapacity for work*". The letter warned the Claimant that his non attendance at the disciplinary hearing without advance notification or good reason would be treated as a separate issue of misconduct.

27. In the meantime according to the evidence of Mrs Brown, which we accepted in preference to that of Ms McFadyen, Ms McFadyen spoke to Mrs Brown almost daily asking for an update and if she had heard from the Claimant. In the course of one of these conversations, approximately one week after the Claimant's disappearance, Ms McFadyen asked Mrs Brown if the Respondent's head office had been in contact with her. Mrs Brown found this upsetting as she knew that Mr Coggin had her contact details. She wrote her home and mobile phone numbers on a piece of paper and

gave this to Ms McFadyen asking that she should pass on these details to the Respondent. Ms McFadyen denied that these events occurred but again we preferred the evidence of Mrs Brown. We believed that Mrs Brown's recollection of her conversations with Ms McFadyen was clearer and more credible than Ms McFadyen's.

28. In another conversation between Ms McFadyen and Mrs Brown some three or four days after the Claimant had gone missing, Ms McFadyen told Mrs Brown that she did not think there would be a job for the Claimant when he came back. Ms McFadyen denied saying this but we preferred the evidence of Mrs Brown. Ms McFadyen would be aware that Mr Coggin had required the Claimant to attend a disciplinary hearing because she had been asked by Mr Coggin to attend on 1 December 2016 as notetaker.

29. Mr Coggin visited the Respondent's Linwood premises on a regular basis, usually once in every two/three weeks. During these visits he would speak with the Claimant and their discussions included the Claimant's mental health. Mr Coggin acknowledged in the course of his evidence that he was aware that the Claimant had a mental health condition which could cause fluctuations in his mood and could lead him to go missing.

30. Although the point was not covered expressly in the course of evidence we believed it was likely that Mr Coggin did attend at the Respondent's Linwood premises for the disciplinary hearing arranged for 1 December 2016. The letter arranging this hearing (page 74) stated that the hearing would be conducted by Mr Coggin, whereas the subsequent letter of 1 December 2016 from Mr Coggin to the Claimant (page 75) stated that the hearing would be conducted by Mr Coggin but would be held over the telephone. If that had also been the intention for the 1 December 2016 meeting it seemed to us probable that the letter of 28 November 2016 would have said so.

31. Mr Coggin did consider the possibility that the Claimant might have had another Bipolar episode when he became absent from work in November

2016. He described not moving immediately to disciplinary action as giving the Claimant a period of "*grace*". Whereas in January 2016 there had been contact from the Claimant, in November/December 2016 there was no contact so Mr Coggin believed the Respondent had to follow their disciplinary procedure.

32. Mr Coggin wrote to the Claimant on 1 December 2016 (page 75) requiring him to attend a rearranged disciplinary hearing on 5 December 2016. This letter set out a second allegation against the Claimant – "*failure to attend a disciplinary hearing scheduled for Thursday 1st December 2016 without explanation*".

33. When the Claimant failed to attend the rearranged disciplinary hearing Mr Coggin wrote to him again on 5 December 2016 (page 76). In this letter Mr Coggin stated that each of his previous letters (of 28 November 2016 and 1 December 2016) had "*in order to ensure safe receipt*" been sent by both special delivery and by normal first class post. Mr Coggin's letter of 5 December 2016 advised the Claimant that his employment was being terminated and that he would be paid for four weeks' notice in lieu of working. A right of appeal to Mr Kitson was offered, to be exercised within five days.

34. Pages 77-81 comprised tracking documentation relating to the Respondent's letters to the Claimant of 24 November 2016 and 5 December 2016. The latter had been returned to sender from the Burnley Delivery Office on 8 December 2016. The former had been returned to sender from the Wombwell Delivery Office on 4 February 2017. Mrs Brown had declined to accept two special delivery letters from the Respondent addressed to the Claimant during his absence. She had however received the Respondent's letter of 28 November 2016 and also a subsequent envelope enclosing the Claimant's P45. The P45 stated the Claimant's termination date as 30 December 2016.

35. There was conflicting evidence from Mrs Brown and Mr Coggin about meeting in the kitchen of the Linwood premises while the Claimant was missing. The kitchen was one of the communal areas of the Linwood premises. According to Mrs Brown she went to the kitchen and found Mr Coggin there alone. She was taken aback to see him and expected him to say something about the Claimant. Mrs Brown said that Mr Coggin made eye contact with her then walked out of the kitchen without acknowledging her. She said this occurred in early or mid December 2016, after she had given Ms McFadyen her contact numbers. Mr Coggin's evidence was that he did not recall seeing Mrs Brown in the kitchen. We preferred the evidence of Mrs Brown who was again clear in her recollection of events. We found it surprising that Mr Coggan did not take the opportunity to speak to Mrs Brown when at the Respondent's premises.

36. When the Claimant was in hospital after being found, Mrs Brown spoke to a psychiatrist there and was asked about communications from the Respondent. Mrs Brown was advised to open the envelopes she had received and did so. These were the Respondent's letter of 28 November 2016 and the envelope containing the Claimant's P45. Mrs Brown's evidence was that the Claimant saw the letter of 28 November 2016 while he was in hospital but not the P45.

37. The Claimant had no contact with the Respondent while he was in hospital and, after his discharge from hospital, the Claimant did not feel well enough to contact the Respondent. By February 2017 the Claimant felt, as he put it, "*able to deal with the real world again*". He wrote to Mr Coggin on 20 February 2017 (page 82). He raised a number of questions and, after referring to the provisions in the Respondent's staff handbook relating to notification of incapacity for work (page 48) which stated that other than in exceptional circumstances notification should be made personally to the employee's manager, he said –

> "*My condition, and the effects arising from it, should be regarded as exceptional circumstances and it would have been more prudent to wait until it had been established that I had been found safely and was in recovery before commencing any proceedings against me*."

38. Mr Coggin did not respond to this letter. The Claimant sent a follow up letter on 6 March 2017 (page 83). Mr Coggin did not respond to this. Mr Coggin said in evidence that he had nothing to add or defend. He "*had spent enough time*" on the matter. He did not feel the need to respond.

39. In answer to questions from the Tribunal Mr Coggin said that he did not know how many disabled employees the Respondent had. He did not know if the Respondent had any disabled employees. He had not personally dealt with a disabled employee before.

40. Mr Coggin also said that it occurred to him that the Claimant might have absented himself again and that the letters sent to his home address might not have been received by the Claimant. However he would have expected the Claimant or a family member to be in touch. It was in Mr Coggin's view still misconduct if an employee failed to attend a meeting when he had not received the letter inviting him to that meeting.

41. Under cross examination Mr Coggin said that he understood that Mrs Brown did not want anything to do with the Respondent. He said he did not know what he could have done to find out more. He accepted that his only investigation was to send out letters and ask Ms McFadyen to speak to Mrs Brown. He said that it "*did not seem a good idea to speak to Mrs Brown*".

42. The Claimant had not secured fresh employment since his dismissal. He was in receipt of Employment and Support Allowance, details of which were provided at page 86. Pages 84-85 were a letter from Dr Kaur dated 6 September 2017 in which she stated that "*Mr Brown's dismissal from his*

employer has been highly detrimental to his mental state". After referring to the Claimant's "*good work record*" she said –

> "*Over the past few months I have been rather surprised to see how anxious he has become about applying for new jobs. In the past he has applied for jobs easily and has secured good jobs very quickly. It would appear that at present Mr Brown is highly affected by his lack of confidence resulting from the poor experience with his current employment*."

Comments on evidence

43. Mr Brown was composed and articulate in giving his evidence. The description of him by Prof Macdonald in the Health Assured report of 4 April 2016 (at page 65) as having "*good insight into his problems*" and being "*well orientated, alert and mentally normal*" were consistent with how he presented at the Tribunal.

44. Mrs Brown demonstrated a clear recollection of events which was not challenged under cross examination. Where her evidence conflicted with that of the Respondent's witnesses we found Mrs Brown to be the more credible and reliable witness.

45. Mr Coggin gave his evidence in a straight forward and direct manner and, apart from the evidence referred to at paragraph 35 above, was in general a credible witness. He did however demonstrate a lack of insight into the admittedly difficult situation created by the Claimant's disappearance in November 2016. He knew Mrs Brown, he had her contact details (because she was the Claimant's emergency contact), she worked in the same building as the Respondent's business operated from and he had the opportunity to speak to her when he visited the Linwood premises. It was difficult to understand why he considered that it did not seem a good idea to speak to Mrs Brown.

46. Ms McFadyen was a less impressive witness. On at least two occasions she had to correct earlier statements she had made. She said during her examination in chief that she was not asked to approach Mrs Brown to get information. Under cross examination she said that Mr Coggin had spoken to her on the telephone and had asked to get information about the Claimant. She said during her examination in chief that she did not know where the Claimant had been when he went missing in January 2016. In answer to a question from the Tribunal she said she was aware that the Claimant had been in Lanzarote. When asked by the Tribunal about her description of Mrs Brown as "*unhelpful*" she accepted that Mrs Brown had been as helpful as she could have been.

Submissions

47. Mr Wilson for the Claimant provided the Tribunal with a written submission. This contained the Findings in Fact which he asked us to make and, in the course of the Oral Judgment delivered at the Hearing, we said that we adopted these for the purposes of that Judgment. We have expanded upon the Findings in Fact which Mr Wilson invited us to make but in essence our Findings in Fact mirror those set out in Mr Wilson's written submission.

48. Mr Wilson referred to ***Griffiths v Secretary of State for Works and Pensions [2015] EWCA Civ 1265*****,** and in particular paragraphs 46 and 47 of the judgment. It was hard to "*envisage circumstances where an employer who is held to have committed indirect disability discrimination will not also be committing discrimination arising out of disability, at least where the employer has, or ought to have, knowledge that the employee is disabled. Both require essentially the same proportionality analysis*" (at para 46). After referring to the appropriate formulation of the relevant provision, criterion or practice ("*PCP*)" in that case as "*the employee must maintain a certain level of attendance at work in order not to be subject to the risk of disciplinary sanctions*" it was stated that:-

> "*A disabled employee whose disability increases the likelihood of absence from work on ill health grounds, is disadvantaged in more than a minor or trivial way. Whilst it is no doubt true that both disabled and able-bodied alike will, to a greater or lesser extent, suffer stress and anxiety if they are ill in circumstances which may lead to disciplinary sanctions, the risk of this occurring is obviously greater for that group of disabled workers whose disability results in more frequent, and perhaps longer, absences. They will find it more difficult to comply with the requirement relating to absenteeism and therefore will be disadvantaged by it*."

49. Mr Wilson submitted that the Claimant had been directly discriminated against on the grounds of his disability. He was dismissed because he was a person who suffered from Bipolar Disorder. Mr Coggin in his evidence made reference to the amount of time that had been spent in dealing with the Claimant and it was reasonable to infer from his evidence and his demeanour when presenting that evidence that he had decided he would no longer tolerate the additional work required in dealing with the Claimant.

50. Mr Wilson submitted that there should be a finding that the Respondent was in breach of section 15 EqA and that the Claimant had been dismissed for a disability related reason. This was his absence. More precisely, the dismissal was for failure to communicate the reason for his absence. Mr Wilson asked us to accept that this failure on the part of the Claimant was caused by his disability (while also submitting that the Claimant's wife informed the Respondent of the reason for the Claimant's absence).

51. Mr Wilson further submitted that there had been a breach of section 19 EqA in that the Respondent imposed a PCP, in this case their disciplinary policy, upon the Claimant. The imposition of this policy placed disabled people such as the Claimant at a disadvantage because the disability rendered it impossible for him to comply with the requirements to attend disciplinary

meetings, and that in turn meant that the practice of bringing additional allegations for failure to attend such meetings would have and did place the Claimant at a significant disadvantage. There was no evidence, Mr Wilson submitted, from which the Tribunal could draw the conclusion that placing persons such as the Claimant at such a disadvantage was a proportionate means of achieving a legitimate aim.

52. Mr Wilson submitted that the Claimant had been unfairly dismissed. There was a lack of any reasonable investigation into the Claimant's absence. The evidence of Mr Coggin was to the effect that he did no more than ask Ms McFadyen to speak to Mrs Brown. He even caused letters to be sent to the Claimant's home address in the full knowledge that he was not there and would not receive them.

53. The Respondent failed to cause any enquiry to be made into the Claimant's medical position and was ignorant of the nature and extent of his illness at the time of his dismissal and the prognosis for his recovery.

54. The Respondent failed to allow the Claimant to answer the allegations made, in circumstances where it would have been possible to do so, when the Claimant wrote in effect requesting a review of the disciplinary outcome on 20 February 2017. The decision to dismiss was outwith the band of reasonable responses standing that the misconduct forming the basis for the dismissal was entirely occasioned by the Claimant's disability and was accordingly not deliberate.

55. Mr Wilson submitted under reference to Dr Kaur's report (pages 84-85) that the Claimant's absence from work (which we understood to be a reference to his certification as unfit for work following his dismissal) related to the manner of his dismissal.

56. Finally Mr Wilson invited us to make an award to the Claimant for injury to feelings falling at the lower end of the middle band in ***Vento*** (a reference to

the three bands of compensation for injury to feelings set out in ***Chief Constable of West Yorkshire Police v Vento (No 2) [2003] IRLR 102, CA*** as updated in ***Da'Bell v NSPCC [2010] IRLR 19*** *and* ***De Souza v Vinci Construction (UK) Ltd [2017] EWCA Civ 879***).

57. Mr Maclean for the Respondent referred to the different accounts in the evidence of the conversations between Mrs Brown and Ms McFadyen and submitted that it was for the Tribunal to decide which was the more credible.

58. There had been two episodes where the Claimant had absented himself without authority and disciplinary action had commenced. In January 2016 the Respondent had been told about the Claimant's Bipolar episode and had halted the disciplinary action. It was more likely that if full information had been provided in November 2016, the disciplinary process would have been put on hold. Mr Coggin had considered that it might have been another Bipolar episode but he did not know categorically that it was.

59. Mr Maclean submitted that the claim of direct discrimination under section 13 EqA could not succeed. The Claimant was not treated less favourably because of his disability. He was subjected to the same rules and procedures when absent without proper authority as a non-disabled employee would have been. Indeed the Claimant was actually treated more favourably (which we understood to be a reference to the period of "grace" which Mr Coggin afforded the Claimant before invoking the disciplinary process).

60. Under reference to ***Griffiths***, Mr Maclean agreed that the claims under section 15 EqA (discrimination arising from disability) and section 19 EqA (indirect discrimination) stood or fell together. He submitted that the Respondent could show a proportionate means of achieving a legitimate aim. The Respondent's absence reporting procedures and disciplinary procedures had the legitimate aim of the Respondent having control of their

workforce. An employee could not ignore these because they suffered from a disability.

61. The action which the Respondent took was due to the lack of communication from the Claimant. All that had been required was a note, text, email or at least something. However the Respondent had nothing from the Claimant and so it had been appropriate to implement their rules. The application of these rules – compliance with which was the PCP – was appropriate due to the Respondent's state of knowledge at the time their decision to dismiss was made.

62. In answer to the criticism of the Respondent sending letters to the Claimant's home address, Mr Maclean observed that where else could the Respondent have sent them? They had no alternative address for the Claimant. Two of the four letters had been received. Two had been delivered but Mrs Brown refused to accept them. There should be no criticism of the Respondent over this.

63. Mr Maclean submitted that there was contributory fault on the part of the Claimant in the form of the absence of communication from him. He had not made contact with the Respondent until February 2017. He was the manager of a small team and his absence had an adverse effect on the Respondent.

64. Had the Respondent waited rather than dismissing the Claimant when they did, due to the lack of information coming from the Claimant it was more likely than not that the dismissal would still have occurred. Any award we might be minded to make to the Claimant should be restricted accordingly.

65. Mr Maclean pointed out that the Claimant remained unfit for work. It was not possible to say whether the Claimant would have returned to work if he had not been dismissed. In his letter to Mr Coggin of 20 February 2017 the Claimant had said that he was "*in recovery*" from his latest Bipolar episode.

It was, Mr Maclean submitted, unlikely that the Claimant would have been able to return to work, and any award should be restricted accordingly.

66. Mr Maclean submitted that the manner of the Respondent's dismissal of the Claimant had not been overly harsh or critical. The manner of dismissal had not caused the Bipolar episode which the Claimant was experiencing. Mr Maclean noted that the previous episode had related to personal rather than work issues. The letters sent by the Respondent had been standard letters and they had gone through a normal process.

67. In relation to injury to feelings, Mr Maclean said that while he did not doubt that the Claimant had been disappointed to lose his job, it had not been his work that had caused the problem. If we were minded to make an award it should be in the lower ***Vento*** band.

Applicable law

68. In relation to the unfair dismissal claim we reminded ourselves of the terms of Sections 98 and 123 of the Employment Rights Act 1996 ("ERA"). In relation to the discrimination claims we reminded ourselves of the terms of Sections 13 (direct discrimination), Section 15 (discrimination arising from disability) and section 19 (indirect discrimination) EqA.

Discussion and Disposal

69. We will deal firstly with the unfair dismissal claim. It was for the Respondent to show the reason or, if more than one, the principal reason for the Claimant's dismissal. In their ET3 the Respondent relied on Section 98(1)(b) ERA, contending that the Claimant was dismissed "*by way of some other reason*" (page 26). Mr Maclean sensibly did not adhere to this position and argued that the reason for the Claimant's dismissal related to his conduct.

70. This was supported by the letters Mr Coggin sent to the Claimant which articulated the reasons for the Claimant being required to attend a disciplinary hearing (pages 74-75). In both letters Mr Coggin stated, referring to the allegation(s), that if substantiated "*we will regard them as gross misconduct*". The Respondent's disciplinary procedure contained (at page 52) an illustrative and not exhaustive list of examples of gross misconduct. None of the examples covered the reasons set out in the said letters. In contrast, the list (again not exhaustive) of examples of conduct which might lead to disciplinary action included "*failure…to follow our rules and procedures*" (page 51).

71. In fairness to the Respondent the list of examples of gross misconduct was prefaced by a paragraph (at page 52) which included the statement that "*any behaviour or negligence resulting in a fundamental breach of contractual terms that irrevocably destroys the trust and confidence necessary to continue the employment relationship will constitute gross misconduct*". However, Mr Coggin knew that the Claimant suffered from Bipolar Disorder. It had occurred to him when the Claimant went missing in November 2016 that the Claimant might have absented himself again. Mr Coggin was aware that this was the reason why the Claimant had absented himself in January 2016. At that time Mr Coggin had recognised that there was a medical reason for the Claimant's unauthorised absence and that disciplinary action against the Claimant was not appropriate.

72. Despite this, Mr Coggin proceeded to take action against the Claimant in November/December 2016 under the Respondent's disciplinary procedure. We were satisfied that the reason for the Claimant's dismissal related to his conduct as detailed in the allegations set out in Mr Coggin's letter of 1 December 2016 (page 75) and in the letter of dismissal of 5 December 2016 (page 76).

73. We then considered whether the Respondent had acted reasonably or unreasonably in treating the Claimant's conduct as sufficient reason for

dismissing him. We reminded ourselves of the terms of Section 98(4) ERA. We decided that question in favour of the Claimant.

74. The steps an employer should take when dealing with alleged misconduct on the part of an employee are set out in ***British Home Stores Ltd v Burchell [1998] IRLR 379***. These include carrying out as much investigation as is reasonable. We did not consider that the Respondent had carried out an adequate investigation. Their investigation extended to Mr Coggin asking Ms McFadyen to speak to Mrs Brown. She reported to Mr Coggin that Mrs Brown had been "*unhelpful*" and "*not friendly*". That was of little assistance to Mr Coggin in deciding whether the Claimant was guilty of misconduct of sufficient gravity to justify dismissal for gross misconduct.

75. Mr Coggin could have spoken to Mrs Brown had he chosen to do so. He knew that she worked at the Linwood premises. He knew, or should have known, that she was the Claimant's emergency contact and that the Respondent therefore had her contact telephone number. He was at the Linwood premises on 1 December 2016 and could have taken the opportunity to make contact with Mrs Brown. He encountered Mrs Brown in the kitchen of the Linwood premises but did not engage in conversation with her. The date of this encounter was not established by the evidence available to us and it might have been after Mr Coggin had decided to dismiss the Claimant, in which case it could be argued that enquiry of Mrs Brown would have served no useful purpose, the decision to dismiss having already been taken.

76. However, in our view no reasonable dismissing officer (and therefore no reasonable employer) being aware of the Claimant's Bipolar Disorder and the effect that this had on the Claimant (as Mr Coggin was, given what happened in January 2016 and being in possession of the Health Assured report) would have failed to make his own enquiry of Mrs Brown when there was nothing preventing him from doing so. His evidence that it "*did not*

seem a good idea to speak to Mrs Brown" (see para 40 above) was indicative of a failure to understand what reasonably adequate investigation of alleged misconduct required.

77. There was some force in Mr Maclean's submission about where else the Respondent could have sent their letters to the Claimant (see para 62 above). However, Mr Coggin was alert to the possibility that the Claimant had absented himself and would not receive these letters (see para 40 above). In these circumstances no reasonable employer would have proceeded to disciplinary action on the basis that the employee had been given a period of "*grace*" as Mr Coggin did. Any reasonable employer would have attached more weight to the possibility that the Claimant's Bipolar Disorder was the reason for his absence and would have appreciated the need for adequate investigation to ascertain what had happened to the Claimant before deciding to initiate disciplinary action.

78. We found that the Claimant's dismissal, communicated in terms of Mr Coggin's letter of 5 December 2016, was unfair. We will deal with the issue of remedy later in this Judgment.

79. We will deal next with the claim of direct discrimination under Section 13 EqA. We reminded ourselves of the terms of Section 13(1) EqA – direct discrimination occurs (in the context of employment) when, because of a protected characteristic, an employer treats an employee less favourably than he treats or would treat other employees.

80. We believed that there was considerable force in Mr Maclean's submission as recorded at paragraph 59 above. A non disabled employee who faced the same allegations as the Claimant as recorded in Mr Coggin's letter of 1 December 2016 (page 75) and who failed to attend the rearranged disciplinary hearing would, on the balance of probabilities, have been dismissed. That non disabled employee was the Claimant's hypothetical comparator. The Claimant had not been treated less favourably than the

hypothetical comparator. His claim of direct discrimination under section 13 EqA could not succeed.

81. We agreed with the position taken by both parties' representatives that the claims of discrimination arising from disability under Section 15 EqA and of indirect discrimination under Section 19 EqA stood or fell together. Paragraph 46 of the decision in ***Griffiths*** clearly supports this.

82. Mr Wilson submitted that the PCP in this case was the Respondent's disciplinary policy. Mr Maclean submitted that the PCP was compliance with the Respondent's absence reporting procedures and disciplinary procedures. We believed that Mr Maclean's formulation of the PCP was more accurate. The stated reasons for the Claimant's dismissal referenced both (a) his unauthorised absence and reporting of incapacity and (b) his alleged misconduct by failing to attend a disciplinary hearing.

83. Mr Maclean submitted that the Respondent's legitimate aim was having control of their workforce. We accepted that. It was reasonable for the Respondent to have a set of rules and procedures which their employees were required to observe.

84. We considered whether this PCP was discriminatory in relation to the Claimant's disability. We approached this by looking at section 19(2) EqA. Firstly, did the Respondent apply, or would they apply, the PCP to persons with whom the Claimant did not share his protected characteristic of disability? The answer to this was yes – the Respondent's absence reporting procedures and disciplinary procedures were contained in their staff handbook (pages 43-47 and 48-54) which was clearly intended to apply to all of the Respondent's staff.

85. Secondly, did the PCP put persons with whom the Claimant shared his disability at a particular disadvantage when compared with persons with whom the Claimant did not share his disability? Again, the answer was yes.

According to Prof Macdonald (at page 65) "*Bipolar disease is a condition which is usually long-term and can be associated with fluctuating mood*". We understood that such fluctuations in mood would include periods of depression, and that during such periods a person with Bipolar Disorder would be less able to engage with others at home and at work, and therefore to engage with an employer's absence reporting and disciplinary procedures.

86. Thirdly, did the PCP put the Claimant at that disadvantage? Again, the answer is yes. When Dr Kaur wrote her letter of 2 February 2016 (page 62) the Claimant was facing a disciplinary meeting regarding unauthorised absence to which he had been summoned by Mr Coggin's letter of 28 January 2016 (page 60). Dr Kaur said "*Meetings at present would be detrimental to his recovery*." In her letter of 5 September 2017 (pages 84-85) Dr Kaur said "Going away from home has been a regular part of Mr Brown's presentation. On many occasions in period of distress he has gone away from his home leaving his family worried with not knowing his whereabouts." By absenting himself while unwell as a consequence of his mental impairment, the Claimant put himself at a particular disadvantage in terms of his ability to comply with the Respondent's absence reporting and disciplinary procedures.

87. Finally, can the Respondent show that their application of their absence reporting and disciplinary procedures was a proportionate means of achieving a legitimate aim? We accepted that the Respondent had shown a legitimate aim (see para 83 above) but we did not consider that the process followed by the Respondent constituted proportionate means.

88. When the Claimant absented himself in November 2016 the Respondent invoked their disciplinary procedure by reason of the Claimant's failure to comply with their absence reporting procedure. When the Claimant failed to attend the first disciplinary meeting to which he was invited, the Respondent added a second disciplinary allegation relating to his non-attendance. They

then dismissed the Claimant when he failed to attend the rescheduled disciplinary hearing. This was in sharp contrast to the course of action they had taken in January/February 2016 when the Claimant had taken himself to Lanzarote. On that occasion the Respondent recognised that there was a medical explanation for the Claimant's absence and stepped back from the disciplinary process.

89. We noted that the circumstances of the Claimant's absence in November/December 2016 differed in a number of respects from his earlier absence. He did not make contact with the Respondent. Mrs Brown did not initiate contact with the Respondent. The absence subsisted for a longer period. Notwithstanding these differences we did not believe that the course of action taken by the Respondent in November/December 2016 leading to the Claimant's dismissal constituted proportionate means. They failed to appreciate that they were not dealing with misconduct, but with the effects of a mental impairment. It was not proportionate to discipline and dismiss the Claimant when his behaviour was caused by his mental impairment and not by any voluntary or deliberate failure to comply with the Respondent's rules and procedures.

90. The same reasoning applied to the claim of discrimination arising from disability under Section 15 EqA. The Respondent's application of their absence reporting and disciplinary procedure to the Claimant resulting in his dismissal constituted unfavourable treatment. That treatment was because the Claimant had absented himself. He had absented himself as a consequence of his mental impairment. The last sentence of the preceding paragraph applies.

91. Accordingly we found that the Respondent had discriminated against the Claimant under Sections 15 and 19 EqA.

92. We turn now to remedy. The Claimant's gross weekly pay was £461. He had at the time of his dismissal been employed for two years, both over the

age of 41 so that the appropriate multiplier was 1.5. That meant a basic award of £1,353. The Claimant had lost the benefit of his employment protection rights and we considered the figure of £350 sought by the Claimant under this heading in the schedule of loss was reasonable.

93. We reminded ourselves of the terms of Section 123 ERA when considering the appropriate compensatory award. It required to be "*such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the Claimant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer*". The Claimant had a duty to mitigate that loss (section 123(4)). He had not secured fresh employment. We noted the terms of Dr Kaur's letter of 5 September 2017 and in particular the passages quoted at paragraph 42 above.

94. We were satisfied that the Claimant's ability to seek fresh employment had been adversely affected by his treatment by the Respondent which had been detrimental to his mental state. This had in our view rendered the Claimant unable to mitigate his loss in the period between his dismissal and the Hearing. That loss was attributable to action taken by the Respondent. It would be just and equitable to award compensation for this period but to take account of the Employment and Support Allowance the Claimant had received. We found support for this approach in ***Morgans v Alpha Plus Security Ltd [2005] IRLR 234***.

95. The Claimant's net weekly pay was £376. The period between the date of dismissal (30 December 2016) and the date of the Hearing was 38 weeks. That equated to a loss to the Claimant of £14288. The Employment and Support Allowance received by the Claimant in the same period was £109.30 per week between 30 December 2016 and 14 April 2017 and £109.65 per week thereafter (page 86). This totalled £4,161.45. Deducting this from £14,288 resulted in a balance of £10,126.55. Adding this figure to those in paragraph 92 produced an award of £11,829.55.

96. We considered whether there should be an award of compensation for future loss. We noted the terms of Dr Kaur's report (pages 84-85) and came to the view that it was simply too speculative an exercise to allow us to determine an appropriate measure of future loss.

97. We considered Mr Maclean's submission that there had been contributory fault on the part of the Claimant but did not agree with him. We reminded ourselves of the terms of Section 123(6) ERA. We did not believe that the absence of communication by the Claimant could be characterised as action which caused or contributed to his dismissal. He did not communicate with the Respondent because he was suffering a Bipolar episode which resulted in his absenting himself from home and work and as a result he did not receive the Respondent's letters. That was not in our view contributory conduct.

98. We also considered Mr Maclean's submission that it was unlikely the Claimant would have been able to return to work, and any award should be restricted accordingly. That was not in our view supported by the medical evidence. The report from Prof Macdonald of Health Assured (pages 64-67) gave a positive prognosis, stating that the Claimant *"should be able to provide regular and effective service in future*". Reading that with Dr Kaur's letter (pages 84-85) where she comments on the effect on the Claimant of his dismissal and on his previous good work record and being "*highly invested in employment*", we believed that it was more likely that, if the Claimant had not been dismissed, he would have been able to return to his employment with the Respondent when he recovered from his Bipolar episode.

99. We applied our minds to whether the Claimant's unfair dismissal compensation should be adjusted with reference to the case of ***Polkey v A E Dayton Services Ltd [1987] UKHL 8***. Might the Claimant have been dismissed anyway, and fairly, if he had not been unfairly dismissed? The

point was not canvassed with Mr Coggin in the course of his evidence. It seemed to us more likely than not that the Respondent would have taken the same approach as they did in January/February 2016 and would have treated the Claimant as being off sick (as indeed he was). We found no reason to restrict compensation on this basis.

100. We also considered whether there should be an uplift in compensation by reference to any unreasonable failure by the Respondent to follow the ACAS Code of Practice on Disciplinary and Grievance Procedures. Notwithstanding our criticisms of the Respondent's investigation, they had sought to comply with the other steps required of them under the ACAS Code - informing the employee of the allegation, inviting him to a meeting, offering a right of appeal. It did not seem to us that there had been such a level of unreasonable failure to comply with the Code as to merit an uplift in this case.

101. We finally considered what compensation the Claimant should be awarded for injury to feelings. We had to consider a number of factors – the degree of distress caused to the Claimant, the seriousness of what had happened, the Claimant's medical condition and whether the Claimant had suffered from a loss of confidence. We had to consider where this case fell with regard to the three bands of compensation in **Vento** (see para 56 above). We reminded ourselves that compensation within the lower band was appropriate for one off or isolated incidents, within the middle band for more serious cases which did not however fall within the top band, and within the top band for very serious cases such as an extended campaign of harassment. We had to decide whether to apply a 10% uplift following the case of ***Simmons v Castle [2013] 1 WLR 1239***. We also noted that this case had commenced prior to the issuing of the recent Presidential Guidance on such awards.

102. We decided that this case fell towards the upper end of the lower band. The discrimination which the Claimant had suffered was in respect of a

single course of action by the Respondent in applying their absence reporting and disciplinary procedures to him, and dismissing him, in circumstances which we found to constitute unlawful discrimination. It had caused the Claimant a significant degree of distress and loss of confidence at a time when he was recovering from a Bipolar episode.

103. Taking matters in the round we decided that the award for injury to feelings should be £6000 and that this figure was adequate without any uplift. This attracted interest at 8 from the date of dismissal which we calculated in the sum of £359.01.

Employment Judge: W A Meiklejohn
Date of Judgment: 26 October 2017
Entered in register: 31 October 2017
and copied to parties

5