EMPLOYMENT TRIBUNALS

Claimant: Mr D Barker

Respondent: Co-operative Insurance

Heard at: Manchester **On:** 18, 19, 20, 21 and 22 June 2018
15 August 2018
(in Chambers)

Before: Employment Judge Ross
Mrs C Linney
Mrs S Ensell

REPRESENTATION:

Claimant: In person
Respondent: Ms L Gould

JUDGMENT

The judgment of the Tribunal is that:

1. The claimant's claim for unfair dismissal pursuant to section 95 and section 98 of the Employment Rights Act 1996 is not well-founded and fails.

2. The claimant's claim that he was directly discriminated against pursuant to section 13 of the Equality Act 2010 when he was dismissed by the respondent is not well-founded and fails.

3. The claimant's claim that he was treated unfavourably because of something arising in consequence of his disability when he was dismissed by the respondent, pursuant to section 15 of the Equality Act 2010, is not well-founded and fails.

4. The claimant's claim that the respondent failed to make reasonable adjustments pursuant to sections 20-22 of the Equality Act 2010 is not well-founded and fails.

REASONS

1. The claimant was employed by the respondent as a team manager from March 2012 until he was dismissed on 15 May 2017 for "some other substantial reason". The claimant appealed but he was unsuccessful and brought a claim to this Tribunal.

2. There was a case management hearing held before Employment Judge Sherratt on 30 October 2017. At the outset of this hearing the claimant's claims were clarified as follows. Firstly, he brought a claim for "ordinary" unfair dismissal pursuant to the Employment Rights Act 1996. Secondly, he brought a claim for disability discrimination. The disability was mental impairment, namely stress, depression, anxiety and suicidal ideation. Disability was conceded by the respondent although knowledge was not. The claimant brought claims for direct discrimination in relation to his dismissal and section 15 discrimination arising from disability also in connection with his dismissal. He also brought a claim for failure to make reasonable adjustments. The provision, criterion or practice ("PCP") was the respondent's disciplinary procedure. The claimant alleged the procedure put him at a substantial disadvantage in comparison with persons who are not disabled. (The claimant said his thought processes were severely impaired at the time). The reasonable adjustment the claimant contended for was that the respondent should have refrained from questioning him until his GP certified him as fit to return to work.

The Law

3. The relevant law is found in the Equality Act 2010 Section 13 (Direct Discrimination), Section 15 (Discrimination arising from disability) and Section Sections 20 to 21 (Duty to make reasonable adjustments). The burden of proof provision is relevant, Section 136.

4. We reminded ourselves of the principles in Igen Limited & others v Wong [2005] ICR 931 CA; Anya v The University of Oxford [2001] IRLR 377; Shamoon v The Chief Constable of the Royal Ulster Constabulary [2003] ICR 337 HL; Barton v Investec Securities [2003] ICR 1205; Madarassy v Nomura International PLC [2007] ICR 867; Laing v Manchester City Council [2006] ICR 1519; and Nagarajan v London Regional Transport [1999] ICR 877 HL and more recently chief Constable of Greater Manchester v Bailey 2017 EWCA Civ 425.

5. In the reasonable adjustments claim the Tribunal had regard to the principles in Environment Agency –v- Rowan 2008 ICR 218 EAT, Project Management –v- Latif 2007 IRLR 579 and Smith –v- Churchills Stair Lifts Plc 2006 ICR 525 CA.

6. The Tribunal also had regard to the EHRC Code of Practice on Employment (2011).

7. In the Section 15 claim the Tribunal had regard to Pnaiser –v- NHS England and Another 2016 IRLR 170 EAT and to to para 5.9 EHRC.

8. In the direct discrimination the Tribunal had regard to Section 23(1) Equality Act 2010 concerning the comparator and Shamoon –v- The Chief Constable of RUC 2003 ICR 337 and the principle in High Quality Life Style Limited –v- Watts 2006 IRLR 850 and Stockton on Tees Borough Council –v- Aylott 2010 ICR 1278 CA.

Witnesses

9. For the claimant, we heard from the claimant and Ms N Frattasi-Lane. For the respondent we heard from Mr L Marjoram, the claimant's line manager; Mr A Pope, the dismissing officer; Mr Hillon, the appeal officer; Mr A Turner, the investigation officer; and Mr A Clarke who advised in relation to the claimant's attendance at the appeal.

10. The Tribunal was presented with 3 lever arch bundles of documents:files A,B and C. Confusingly each bundle starts again at page 1.

The Facts

We found the following facts:

11. The claimant was employed by the respondent as a Customer Service Team Manager. He was absent from work between January and September 2016 due to psychological issues.

12. On 25 February 2016 an absence review meeting was conducted at the claimant's home with a manager, Lee Marjoram, and a notetaker, Sarah Bell (see pages 92-97 bundle B). During the course of that meeting whilst Mr Marjoram went upstairs to use the toilet and Ms Bell remained downstairs the claimant went into the kitchen to make a cup of tea. It is noted:

> "Dan came back out of the kitchen with the axe he said he was sharpening on the night of the work's do to show this to Sarah. At this point Mr Marjoram came downstairs. The claimant subsequently returned the axe to the kitchen." (See page 96)

13. The claimant agreed that this had occurred, although in cross examination stated that it was a hatchet rather than an axe.

14. We entirely accept the evidence of Mr Marjoram who we found to be a very credible and genuine witness who attended the Tribunal although he now works for another employer. He told us that when he came down from the toilet:

> "Sarah was sat down on the sofa and the claimant was in the archway dining room holding an axe/hatchet. I had no context. I felt very uncomfortable. I was scared and frightened."

15. The claimant asked Mr Marjoram in cross examination if he found it threatening. He replied, “Like I said, presented with an axe out of context I was anxious and scared. You then explained why and it relieved the anxiety a little”.

16. We accept the evidence of Mr Marjoram that following that meeting he spoke about his concerns regarding the axe to the respondent’s HR representative and it was agreed that any further meetings with the claimant would be held at the respondent’s premises at Angel Square and not at his home.

17. In April 2016 the claimant was referred to the respondent’s Occupational Health physician. He noted that the claimant was absent from work with what the claimant perceived to be “work related stress” and he also suffered from chronic back pain. He noted the claimant was on a high dose of antidepressants. He also noted:

> “There is a history of violence but this was some years ago when he was in his late teens and he does not feel in any way that he could harm individuals in the workplace.”

He also noted that the claimant was:

> “Mainly angry regarding work issues.”

He recommended that meetings with Mr Barker should take place on work premises and not at home or in any other situation.

18. Mr Marjoram was the claimant's line manager in January/February 2016.

19. There was a further absence review meeting held at the respondent’s premises on 5 May 2016 with the claimant and Mr Marjoram attending (notes at pages 107-111 bundle B). Mr Marjoram expressed concerns about the claimant's readiness to return to work, noting that although the claimant had agreed not to be in contact with the team he had spoken to an adviser. The claimant stated, “not sure why I did this” (see page 110).

20. On 31 May 2016 Mr Marjoram contacted the HR department by email (see pages 121-124 bundle B). The claimant had asked Mr Marjoram to give Lynn Royal, claimant’s union representative, a folder out of the claimant’s cupboard. Mr Marjoram had checked the contends of the folder to ensure they related to the claimant and came across a document dated 26 August 2014. The letter is at pages 123-124. It is from the Border Force and refers to a notice of seizure for offensive weapons. The letter is addressed to the claimant and identifies one friction lock extendable baton and one knuckleduster received from the USA. It explains that these items are liable for forfeiture because:

- They’re an offensive weapon imported into the United Kingdom contrary to the prohibition in force; and
- They were not described accurately by the sender on a written declaration accompanying the parcel.

21. Mr Marjoram also stated that in March whilst clearing the claimant's desk a knife was found in his drawer. When he had raised that concern with the claimant, the claimant had said it was used for his fruit. Mr Marjoram also raised his concern that the claimant had approached a member of staff outside of work and challenged her on how Mr Marjoram "used some information around calling him into work". The advice from HR was:

> "I don't think there is much we can do at this stage regarding the letter particularly given the date on it."

22. Mr Marjoram was advised to continue with an absence review meeting scheduled for the following day.

23. An absence review meeting was conducted by Mr Marjoram on 2 June 2016. Lynn Royal, the claimant's union representative, was in attendance together with the claimant and Mr Marjoram.

24. Mr Marjoram asked how the conversation with Sarah from HR, who had discussed the allegations with him, had impacted upon him. The claimant said:

> "It's had a severe impact. I'm not sleeping and stress levels are going through the roof. It's the anger and the rage that's the issue. I've had a severe relapse."

25. On 19 June 2016 the claimant lodged a grievance (see page 180). His grievance was acknowledged.

26. The claimant was referred to Occupational Health on 27 June 2016 (see page 193 bundle B). The Occupational Health Physician notes that Mr Barker confirmed he was told he was facing a misconduct hearing and states, "it was clear that he could return to work immediately if the current disciplinary was not hanging over him".

27. The claimant's grievance was heard in August 2016. The outcome letter is at pages 193-202 bundle C. The themes related to the claimant's current disciplinary which related to complaints made against him by colleagues, management of his work related stress and management of his back condition. The grievance concluded:

> "With regard to the outstanding disciplinary (misconduct against you) given the time that has elapsed I do not believe that it would in the interests of either you or the business to pursue this any further. I can confirm that in respect to this no further action will be taken against you."

28. It also confirmed that the move to Lee Marjoram as the claimant's line manager from January 2016 and his return to work was a good way of starting afresh (see page 199). It also confirms, "No further action will be taken with regard to the Border Force letter", although the claimant was cautioned against leaving documents of a personal nature in the work environment.

29. The claimant had a phased return to work from 14 September 2016 (page 190). The phased return was completed by 20 October 2016 (see page 220 bundle C).

30. A harassment complaint was made against the claimant by a member of his team, Aisha Sussain in February 2017(see page 431, Bundle A). The claimant was suspended on 27 February 2017 by Mr Marjoram.

31. On 17 March 2017 (see page 63) Mr Marjoram was still investigating the matter. He stated, "I'm a little further behind on where I would've hoped to be due to being off ill the first part of this week". He explained he was on annual leave the following week but hoped to conclude things "in the early part of next week".

32. We find on 22 March 2017 the claimant posted on Facebook (see pages 136a and 136b Bundle A). The claimant confirmed in his statement the post was made on 22 March 2017 (see the report to the police page 348). The post stated:

> "Got a little bit of delicate yet specialist wet work on offer if anyone is interested. F2F clean record and complete discretion with excellent powers of persuasion. Make your noise via messenger. Grasses and needy cunts need not apply."

33. This post was brought to Mr Marjoram's attention by a colleague who was friends with the claimant on Facebook.

34. Although the Facebook page is in the name of Dave Stevens the claimant agreed that this was his Facebook page and that colleagues in his team were aware that the Dave Stevens Facebook page was his Facebook page and were friends with him on Facebook. The photograph on the facebook page is the claimant.

35. A colleague explained to Mr Marjoram, who had suspended the claimant, that "wet work" was a euphemism for murder.

36. In the context of the previous information that Mr Marjoram knew about the claimant, namely that on a visit to his home he had produced an axe, that he had the document concerning illegal offensive weapons in his drawer and that the colleague had told him that the claimant had previously posted something saying, "snitches wear stitches" whilst he was suspension, he was very concerned. He contacted Andrew Turner, HR Business Partner, because he was concerned for his personal safety (see page 49 Bundle A). As advised by HR Mr Marjoram reported the post to the police. Mr Marjoram handed the matter to M Turner by 23 March. See p49 File A.

37. We entirely accept Mr Marjoram's evidence that he was very distressed and anxious when he saw that post.

38. Once Mr Marjoram had alerted his concern to Mr Turner of HR, Mr Turner took over the matter.His internal email to Mr Dixon on 23 March is at p52. On 27 March 2017 he sent a text to the claimant asking him to attend Angel Square on 28 March 2017 to give feedback on the conclusion of the process he was involved in, namely the complaint against him by Ms Sussain.. He also stated:

> "I also need your help on another matter which I would be grateful to speak with you about. Please get back to me." (Page 66)

39. The claimant called back and a meeting was confirmed for the following day. The claimant's representative, Lynn Royal was also invited to attend (see page 67 File A). The meeting took place on 28 March 2017 (see pages 68-72File A).

40. The claimant had been informed in the telephone conversation with Mr Turner that no further action would be taken in relation to the original complaint made by Ms Sussain and this was confirmed in the meeting on 28 March 2017 (see page 68).

41. However, the claimant was informed that because of the concern about the Facebook post his suspension would be continued. He was told, "full pay will apply within the suspension".

42. The claimant confirmed that "wet work" meant had a violent meaning. He said it meant "someone getting a kicking". He also said the post was "unrelated to himself and was related to a friend, a friend that had stolen something from a friend". The claimant raised his mental health (see page 71) although he did not expressly state that was why he had posted the message at that time. He also stated that he put the post up in question between 4.00am and 5.00am when he was his most "manic".

43. The claimant's formal letter of suspension is at page 92. It confirms the allegations are:

> "Inappropriate and intimidating posts on social media on 22 March 2017 which suggest incitement to serious criminal activity:
>
> - your actions are not in line with the Co-op's values and ethics and undermine your ability to fulfil your role as manager and leader within the Co-op;
>
> - that through your actions there has been a serious breakdown in your ability to maintain positive working relationships."

44. The claimant sent in a sick note from 10 April 2017 which was backdated (see page 137).

45. The claimant was invited to a disciplinary hearing on 12 April 2017 (see page 138 bundle A).

46. The claimant's email to his union representative on 2 April 2017 (see pages 136w-136y bundle B) was forwarded Mr Turner. The final paragraph of the email states:

> "I'm gonna have a face to face with Andrew. It's better to be pre-planned than me just turning up outside work and having an ex parte chat."

47. The claimant produced a letter from his doctor dated 19 April 2017 saying he had been suffering from problems with depression, sever anxiety, paranoia and

impaired judgment. It also referred to suicidal ideation. It does not expressly state that the reason for the Facebook page post was his mental health issue (page 193).

48. On 24 April 2017 he received a second invitation to a disciplinary hearing (see page 154).

49. On 2 May 2017 the claimant lodged a grievance (see pages 176-192).

50. By a letter of 2 May 2017 (see page 205) the respondent's HR representative dealt with the claimant's concern that Andrew Pope may not be impartial. He stated:

> "Based on the information you have provided it is not suggested he has been involved in the allegations against you and I can assure you that his request to deny you access to site or systems during your suspension is standard protocol. Please rest assured that any evidence held on site that is raised by you during the hearing and deemed relevant to the allegations against you will be looked into by Andrew Pope."

51. The disciplinary hearing took place on 4 May 2017. The minutes are at pages 214-219.

52. The claimant expressed concerned that his grievance was not being dealt with separately. Ms Kerr informed the claimant on 2 May (page 205):

> "I am satisfied that the points you have raised would constitute mitigation and therefore will be best placed being discussed during your formal hearing on Thursday 4 May."

53. Accordingly, the respondent determined that the issues in relation to the claimant's grievance should be heard at the disciplinary hearing.

54. At the disciplinary hearing the claimant had an opportunity to put his version of events. He was represented by his trade union representative. He continued to admit that he had made the post. He explained it was "a very difficult time" and "I can be manic, I can be bouncing off the wall". On page 214 the claimant told the respondent he had a mental breakdown, had tried to take his own life, was seeking medical treatment. He handed medical letters to Mr Pope.

55. The claimant confirmed he had a history of collecting items like those referred to in the Border Force letter although he said that, "someone sent to me without my knowledge the items stated within the letter". He also stated, "I'm not daft enough to order these items to my own address". He said he had a history of collecting these items when he was 17 but his wife would not have them in the house.

56. Following the meeting the claimant emailed Mr Pope to thank him for his patience (see page 223) and he apologised.

57. We find that Mr Pope dealt with the matter in a conscientious and sympathetic manner. We rely on his referral to Mr Turner (pages 224-225) when he asked, when undertaking the investigation whether Mr Turner took into account the claimant's

reported mental illness or mental state. He sought clarification with him of the investigatory meeting on 28 March 2017.

58. We also find that Mr Pope requested further information from the claimant (see page 247).

59. On 10 May 2017 the claimant sent in a further sick note (see page 137). A disciplinary outcome meeting was held.

60. The claimant was sent a disciplinary outcome letter on 15 May 2017 (see pages 253-257). Mr Pope concluded that the claimant had admitted being the author and to publishing the post on Facebook, and that by his own admission it was "wrong". He considered his medication, including his mental health state which was supported by his doctor. He balanced the duty of fairness to the claimant together with the duty of care to colleagues in ensuring their safety at work. He gave careful consideration to the contents of the Facebook post and he also took into account background information, such as the Border Agency letter.

61. We find that Mr Pope relied on the witness statements taken by Mr Turner, the investigating officer. Mr Turner's report is at page 129 onwards (bundle A). There were three witnesses. The first anonymous witness is at page 136aaC (typed version) and 136aaD (handwritten version). Witness two is at page 136aaE (bundle B – typed version) and 136aag-H (handwritten version). Witness three is at page 136aaI-J (typed version) and 136aaK-L (handwritten version).

62. Mr Pope relied on these statements to show that colleagues were frightened and concerned by the Facebook post.

63. He took into account the claimant's mental health but in the circumstances did not believe it would be reasonable to continue his employment. He did not consider it was reasonable for colleagues to continue working with him or for the Co-op to tolerate such inappropriate behaviour which had the potential to bring the business into serious disrepute. Accordingly, the claimant was dismissed.

64. The claimant appealed on 22 May 2017 (see letter of appeal pages 253-257). On 26 May 2017 he was invited to an appeal meeting on 7 June 2017 (pages 315-316).

65. We accept the evidence of Mr Turner at paragraph 6 of his statement that on 12 June 2017 it was brought to his attention that the claimant had presented a knuckleduster during a meeting. This is supported by a contemporaneous email (see page 334c bundle B). Advice was sought from the police (see page 334a).

66. On 15 June 2017 Mr Hillon wrote to the claimant following disclosure of the concerns about the knuckleduster stating:

> "Concerns have been raised to us and although we are not able to disclose these to you we are not allowing you to attend an appeal hearing as a precautionary measure. As a suitable alternative you can either provide written submissions to be considered in your absence or appoint an appropriate representative to attend on your behalf."

67. We accept the evidence of Mr Hillon that knowing the information received from the anonymous colleague about the knuckleduster being brought to work in a meeting, and the concern expressed to him by his PA who would attend as a notetaker, and taking all the security background into account, he considered it proportionate to hold a written appeal.

68. We also note that on 16 June 2017 (see page 353f) Mr Turner had sent an email explaining:

> "Dear all, our recently dismissed colleague has been outside of Angel Square this morning between 7.45 and 8.00am. He was talking to a colleague who doesn't want to be named, but the conversation was also witnessed by ……who is about to detail the events to me. The tone of the conversation, I am informed, was erratic and threatening."

The letter goes on to state that:

> "I will pick up security measures for those involved in the case today and provide the ability to get taxis to and from work and text managers when home safe etc. I have asked Mr Pope to help coordinate with the Police."

69. The claimant was represented by way of written submission by a Union Regional Officer (pages 372-373). He confirmed his firm belief that the comments made on the post were "a clear manifestation of Dan's mental health issues".

70. The notes of the appeal are at pages 392-394. The claimant presented his own submission and attachments ten minutes before the appeal meeting (pages 377-385).

71. We find Mr Hillon dealt with the matter carefully and conscientiously. We find he considered the matter conscientiously at pages 396a and 396b within the limit of his remit, which was a review rather than a re-investigation. The outcome was sent to the claimant on 19 July 2017 (pages 407-411). Mr Hillon dealt with both the claimant's appeal against dismissal and his grievance concerns.

Applying the law to the facts

72. We turn first to the claimant's claim for ordinary unfair dismissal pursuant to section 95 and section 98 of the Employment Rights Act 1996. The Tribunal reminds itself that we must not substitute our own view as to whether or not we would have dismissed the claimant for "some other substantial reason".

73. The issues for the Tribunal are:

(a) Has the respondent shown a potentially fair reason for dismissal? They rely on "some other substantial reason" and/or conduct. The "some other substantial reason" relied on by the respondent is an irretrievable breakdown in the working relationship between the claimant, his colleagues and the respondent as a whole in the context of the Facebook post requesting someone to do "wet work".

(b) As regards conduct, the principle in **BHS v Burchell** is relevant: did the respondent have a genuine belief based on reasonable grounds following a reasonable investigation of the claimant's guilt (conduct)?

(c) If the respondent has shown a potentially fair reason for dismissal, did the respondent act reasonable or unreasonably in treating that reason as sufficient reason for dismissal in all the circumstances (including the size and administrative resources of the employer's undertaking)?

(d) If conduct, was the belief based on reasonable grounds following a reasonable investigation? The Tribunal must take into account whether the procedure and penalty of dismissal are within the band of reasonable responses, and was the ACAS Code followed?

(e) If the dismissal was unfair, in a case where such assessment may be made what are the chances of the claimant being dismissed fairly in any event had a fair procedure been followed (**Polkey** type reduction)?

(f) If the dismissal was unfair, has the claimant contributed to the dismissal by his conduct (reduction of basic and compensatory award)?

74. The Tribunal finds that Mr Pope was a fair and careful dismissing officer. In reaching the decision to dismiss he relied on the detailed information contained in the investigation pack in the bundle. We find he genuinely believed the post made by the claimant in relation to "wet work" was a threat of violence. The claimant admitted the post and the meaning of it. We find Mr Pope did not believe the claimant's comments made after the meeting which suggested the post was an attempt to get someone to murder him. We find that when looking at the post Mr Pope took the whole circumstances in context. He believed the witness statements which clearly expressed the fears each witness had in relation to the post.

75. We are therefore satisfied that Mr Pope had a genuine belief that given the violent nature of the post, the fear expressed by colleagues, the background (the letter relating to offensive weapons), he had a genuine belief that the claimant had incited serious criminal activity, that this was inappropriate and intimidating and caused an irretrievable breakdown in relationships between the claimant and his colleagues.

76. We turned to consider the issue alternatively as conduct. We find that the respondent can show they had a genuine belief in the claimant's conduct. He placed an offensive post on Facebook and admitted making the post and admitted to Mr Pope it could be perceived as intimidating.

77. We turn to the next issue: having shown that conduct was a potentially fair reason for dismissal, did the respondent act reasonably or unreasonably in treating that reason as sufficient reason for dismissal in all the circumstances (including the size and administrative resources of the employer's undertaking)? Once again,we remind ourselves we must not substitute our own view.

78. We find that the respondent has. We turn to the matter first in relation to SOSR. We find Mr Pope carefully considered, once he had found there was an irretrievable breakdown of relationship, whether there was any other lesser sanction. We accept his reasoning that even if he moved the claimant to a different team or sent him back to work with a final written warning the risk from the threat of violence made by the claimant would remain.

79. We turn to procedural issues. The claimant complained he was dismissed for SOSR but was not warned about the fact he could be dismissed for this. The claimant relied on pages 121 and 196 of bundle A, which are internal emails between members of the respondent's management team and HR concerning the process.

80. The Tribunal finds that like most employers the respondent has a disciplinary procedure which refers to conduct. The claimant was warned in the invitation to the disciplinary hearing that following the disciplinary meeting he could be dismissed (see page 138). The behaviour for which the disciplinary hearing was being held was also clearly brought to his attention at page 138. Accordingly, the Tribunal is not satisfied that a reasonable employer of this size and undertaking could not dismiss the claimant for SOSR.

81. The claimant considers that he made it clear to Mr Pope that the post meant getting someone to murder him (page 247 bundle A and page 282 bundle B) after the disciplinary hearing. We accept Mr Pope's evidence that he did not find that a plausible explanation for the post .

82. The claimant relied on the fact that the Border Force letter at page 136 had been drawn to the respondent's attention previously and it had been confirmed to him that no action would be taken with regard to it. He therefore considered the respondent could not refer to it. We accept the evidence of Mr Pope that the Border Force letter was a matter of background information not a reason for dismissal and that the claimant was dismissed for the Facebook post .

83. There is a potential issue in relation to anonymity of witness statements and the failure to allow the claimant to attend the appeal.

84. In the context of a situation where a very serious threat of violence has been made on social media and in the context of a background of banned offensive weapons being sent to the claimant's home (the Border Force letter) the Tribunal is satisfied that a reasonable employer of this size and undertaking having regard to the safety of its staff could reasonably permit the witness statements to be produced anonymously.

85. The Tribunal notes that the interview notes of the investigating officer together with the typed version of the statements were both made available to the claimant so he knew what was being said and could comment on them.

86. So far as the failure to permit the claimant to attend an appeal, the Tribunal notes that the respondent's appeal procedure does not expressly permit a person appealing to attend. Furthermore, the claimant had the opportunity to put his own

views very fully, which he did, and he had the opportunity to be represented which he was, by a trade union officer who chose to make written submissions.

87. The Tribunal finds that a reasonable employer of this size and undertaking had to balance the right of the claimant who wished to attend the hearing in person with the responsibility of the employer to consider the safety of all staff in the context of other information which had been presented to it. The Tribunal is satisfied that the in these circumstances the respondent has shown it acted as a reasonable employer. In these circumstances failure to permit the claimant to attend an appeal hearing in person does not render the dismissal unfair.

88. The claimant complained that his disciplinary hearing and grievance were dealt with together. The Tribunal finds there was no procedural error in relation to this. The respondent's own policy at page 45 permits a grievance where it relates to a disciplinary hearing to be dealt with at the same time as the disciplinary matter. The claimant was expressly informed that this would occur and we find that the dismissing officer and the appeal officer conscientiously considered the grievance related matters as their respective hearings

89. The Tribunal turns to the last question: was the dismissal for SOSR within the band of reasonable responses of a reasonable employer? The Tribunal finds that it was. Both Mr Pope at the dismissing stage and Mr Hillon at the appeal stage considered a lesser sanction.We find they took into account the very serious threat of violence and the background to the case when rejecting a lesser sanction. Mr Pope and Mr Hillon explained that if a lesser sanction had been adopted, such as transferring the claimant to another team with a final written warning, that would potentially have placed other members of staff at risk.

90. Turning to conduct, the Tribunal is satisfied that the respondent had a genuine belief based on reasonable grounds following a reasonable investigation of the claimant's conduct. The claimant admitted making the Facebook post and admitted it amounted to a threat of violence. The Tribunal is therefore satisfied that Mr Pope and Mr Hillon both had a genuine belief that the threat of violence was to be taken seriously and accepted the threat caused fear to the claimant's colleagues as stated in the witness statements available before them.

91. Having found that the respondent had a genuine belief based on reasonable grounds following a reasonable investigation of the claimant's conduct, namely placing a threatening post threatening criminal activity on social media, the Tribunal turns to consider whether the respondent has shown the respondent acted reasonably or unreasonably in treating that reason as sufficient reason for dismissal in all the circumstances. The respondent's own policy permits dismissal for "conduct that the potential to bring the organisation into disrepute" and "a serious breach of confidence". The Tribunal finds, for the reasons set out above, that dismissal was within the band of reasonable responses of a reasonable employer.

92. The Tribunal relies on its reasoning above in relation to the alleged procedural errors.

93. Accordingly, the Tribunal finds that the dismissal is fair, both for the reason relied upon by the respondent, namely some other substantial reason, and in the alternative for conduct.

94. Therefore, there is no requirement for the Tribunal to go on to consider the **Polkey** issue or the contributory fault issue.

Disability Discrimination

95. The Tribunal turns to the claimant's claim for direct discrimination- section 13 Equality Act 2010. By dismissing the claimant did the respondent treat the claimant less favourably than it treated or would have treated others in the same material circumstances? If so, was this less favourable treatment because of the protected characteristic of disability?

96. The Tribunal reminds itself of guidance in relation to the appropriate comparator.

97. The less favourable treatment relied upon by the claimant is dismissal.

98. The Tribunal finds that the reason for dismissal was the threatening post on Facebook, not because he was a disabled person. The Tribunal relies on the evidence of Mr Pope to find that any employee with the same limitations on abilities as the claimant would have been dismissed in the same circumstances if they had made the same post on Facebook, and accordingly that claim must fail.

99. The Tribunal turns to the claim for discrimination arising from disability (section 15 Equality Act 2010). In relation to his dismissal, was the claimant treated unfavourably because of something arising in consequence of his disability? It is the claimant's case at this Tribunal that the unfavourable treatment was his dismissal, and the “something arising” was the Facebook post i.e. that he posted the Facebook entry because he was mentally ill by reason of stress depression anxiety and suicidal ideation.

100. At the investigation meeting which took place on 28 March 2017 the claimant told the respondent he had been “suffering from mental health issues”. He also said at the end of the meeting that he “put up the post in question between 4.00am and 5.00am” and advised that this was when he could be at his most manic due to his lack of sleep and medication. At that meeting the claimant sought to suggest that the post related to somebody else in relation to a burglary.

101. At the disciplinary meeting (pages 214-219) the claimant referred to his mental breakdown, that he had tried to take his own life, that he was seeking medical treatment, and he handed in medical letters to the dismissing officer.

102. The medical letters are a letter from his GP (19 April 2017 at page 193) and an earlier letter from 2016 at page 194 (bundle B). The letter for 2017 confirms that the claimant is suffering from impaired judgment, amongst other things, but does not state that the reason for the post on social media was his illness.

103. The Tribunal notes that at the time the claimant made the post on social media on 22 March 2017 he was not absent from work on sick leave. He was suspended because a complaint of harassment had been made against him by a female member of staff. It was not until after the claimant had been notified that his suspension was being extended, given the Facebook post, and he had attended an investigatory meeting and been informed that he would be invited to a formal disciplinary meeting, that he submitted a sick note dated 10 April 2017 (see page 137). That sick note is backdated and covers the period 3 March 2017 to 22 May 2017. It states the claimant is suffering from "low mood/back pain/stress at work".

104. The Tribunal also notes that at the investigatory meeting, disciplinary meeting, following the disciplinary meeting and in his written submissions to the appeal hearing the claimant gave different explanations as to what the post on Facebook meant and what it related to. In particular after the disciplinary hearing he sought to argue, referring back to minutes from a grievance meeting the previous year (see page 282 bundle B) that it was an attempt to get someone to murder him. The Tribunal finds that Mr Pope was not convinced by this explanation and found it implausible.

105. It was only by the time of the appeal that the claimant clearly stated through his Trade Union Regional Officer (see his union representative's submission at page 373 bundle A) : "It is my firm belief that the comments were a clear manifestation of Dan's mental health issues".

106. Although in each of the meetings where offensive post was discussed the claimant did mention his mental health issues he did not expressly state his mental health illness caused him to make the post.

107. The Tribunal also takes into account the claimant was noted to have an interest in offensive weapons in the past which we find illustrated by the border post letter. It was not suggested by the claimant that his interest in weapons was linked to his illness.

108. For these reasons we are not satisfied that the violent facebook post was made because of something arising in consequence of the claimant's disability.

109. However in case we are wrong about this the Tribunal has go on to consider the second issue: can the respondent show that the treatment was a proportionate means of achieving a legitimate aim?

110. The Tribunal finds that the respondent's legitimate aim was to protect and keep safe all of its workforce.

111. We find Mr Pope had to balance the interests of the claimant with the safety and well being of other Co-op employees.

112. Mr Pope confirmed that one of his roles is Head of Risk. He also confirmed that although he had heard about the axe/hatchet issue in the course of hearing evidence at the Tribunal he was not aware of that evidence at the time of dismissal.

113. In cross examination Mr Pope specifically stated when asked was there anywhere else in the Co-op business where the claimant could be placed, he said:

> "Was there anywhere else in the Co-op business where I could place you? My answer is no. Based on the account of you trying to initiative violence on Facebook. That action on its own, I couldn't justify you staying. I could not bring you back into the Co-op business."

114. We find the evidence for the fact that the respondent was taking concerns in relation to the legitimate aim very seriously was that there were safeguarding measures in place. Staff who worked with the claimant were offered alternative modes of transport, including taxis and parking. Mr Pope confirmed that there were security arrangements in place for the disciplinary meeting and he accompanied the claimant as he left the building. In evidence Mr Pope stated he was concerned about the claimant's unpredictability.

115. The Tribunal relies on the evidence of Mr Pope at paragraph 25 of his statement for the details of the arrangements. He notes that he was sufficiently concerned with the emotional and mental state of the claimant to initiate a risk assessment of the claimant's visiting the respondent's Head Office to attend the disciplinary hearing. He deemed the meeting to be of high risk with potential violence of acts of aggression by the claimant based on his understanding of the claimant and the matters being investigated. The risk assessment included room location, contents and attendees together with "on standby" individuals including security officers in plain clothing in designated locations. The original notetaker was not invited to the meeting as she was heavily pregnant and this created an added risk. (Mr Pope confirmed that despite the implementation of the risk assessment from the moment the claimant arrived until the moment he left he at no time displayed any form of aggression). Although the meeting went without incident Mr Pope remained of the opinion the claimant was an unpredictable risk.

116. Mr Pope also confirmed he held a de-brief with colleagues a few days after the disciplinary hearing as he received information that the claimant had been seen waiting around outside the office on days after he had been dismissed. All employee relations, HR and relevant general insurance colleagues were in the room. He did not go through the details of the case but explained he believed the claimant was a risk to the organisation, and any individual who felt scared or had any issues was to come to talk to the respondent and they would take it seriously. He also made provision with their internal security teams to protect colleagues.

117. In addition to inviting relevant colleagues to a meeting to discuss their personal safety, including travelling to and from work, the respondent reiterated to the security teams looking after the buildings to be on the lookout for the claimant and to report accordingly.

118. We turn to consider whether the means adopted by the respondent, namely the dismissal of the claimant, was a proportionate means of achieving their legitimate aim, which was to protect the safety of all of their employees. We find that it was. We accept the evidence of Mr Pope and Mr Hillon that they looked at the claimant's social media post which threatened violence in context of other previous behaviour,

namely the Border Force Agency letter and the evidence of the witnesses. We are not satisfied by the claimant's suggestion that the post was about being murdered himself (i.e. suicide). They had a real and genuine concern about the safety of other staff, and as Mr Pope clearly expressed if he brought the claimant back to work in another part of the business he was potentially putting other employees at risk.

119. Accordingly the claimant's claim under section 15 fails because we find dismissal was a proportionate means of achieving a legitimate aim.

120. We turn to the claimant's claim for failure to make reasonable adjustments. The first question is: what is the PCP? The claimant relied on the respondent's disciplinary procedure. The next question is: did the PCP put the claimant at a substantial disadvantage in relation to a relevant matter? There is also an issue of knowledge of any substantial disadvantage.

121. The substantial disadvantage contended for by the claimant is that he was not well enough to attend meetings because due to his illness, his thought processes were severely impaired at the time.

122. The Tribunal relies on its findings of fact. The claimant did not state, either at the investigatory meeting or at the disciplinary hearing, that he was not well enough to attend. The Tribunal notes the claimant was represented by his trade union at both of these meetings and the trade union representative did not suggest he was not well enough to attend. Indeed, at the time of the investigatory meeting the claimant was not absent from work on sick leave: he was suspended (although he was later covered by a sick note for this period).

123. There is nothing in the letter from the claimant's GP to state that the claimant, by nature of his illness, was not well enough to be interviewed by the respondent, either at the investigatory meeting or at the disciplinary hearing. There is no suggestion from the minutes of the meetings that the claimant is so unwell that he is unable to participate in the investigatory meeting or the disciplinary hearing.

124. Therefore for these reasons the Tribunal is not satisfied that the requirement to attend the investigatory and disciplinary meeting (the disciplinary procedure) put the claimant at a substantial disadvantage.

125. Even if the Tribunal is wrong about this it is satisfied that the respondent did not have knowledge of the substantial disadvantage. Although the respondent knew, or should have known by this stage, that the claimant was disabled, they had no knowledge that he was not well enough to attend the investigatory meeting or disciplinary hearing.

126. Accordingly the claimant's claim for failure to make reasonable adjustments fails at this stage.

127. There was a further issue in relation to time limits but it is not necessary for us to determine it because this claim has failed.

Employment Judge Ross

Date 5 September 2018

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON

19 September 2018

FOR THE TRIBUNAL OFFICE