EMPLOYMENT TRIBUNALS

Claimant: Mr P Stott

Respondent: Leadec Limited

Heard at: Liverpool **On:** 5 and 6 June 2018

Before: Employment Judge T Vincent Ryan
Mr M Gelling
Mr P C Northam

REPRESENTATION:

Claimant: Litigant in person
Respondent: Mr B Frew, Counsel

JUDGMENT

The unanimous judgment and order of the Tribunal is:

1. The claimant's claims that the respondent breached his contract of employment with regard to notice and all, if any, claims of detriment or dismissal related to health and safety matters are dismissed on having been withdrawn by the claimant.

2. The claimant is a disabled person within the definition of section 6 Equality Act 2010 by virtue of a mental impairment (anxiety). The claimant is not a disabled person by virtue of physical impairments relating to his right ankle or a spinal disc condition.

3. The respondent did not breach the statutory duty to make reasonable adjustments in relation to the claimant's mental impairment. There was no provision, criterion or practice that put the claimant to the required substantial disadvantage giving rise to such a duty.

4. The respondent dismissed the claimant fairly for a reason related to conduct upon receipt by the claimant of a letter dated 22 December 2016. The claimant's claim that he was unfairly dismissed fails and is dismissed.

5. The claimant's claim that the respondent treated him less favourably than any comparator by dismissing him because he is a disabled person (direct discrimination) fails and is dismissed.

6. Upon the respondent's application for a costs order made under rules 74-78 ETs (Constitution & Rules of Procedure) Regs 2013 the claimant is ordered to pay to the respondent a contribution to its costs totalling £2,400 (£2,000 plus VAT) on the basis that his claims had no reasonable prospect of success and the claimant acted unreasonably in his conduct of the proceedings.

REASONS

1. **The Issues**

It was agreed at the outset of the hearing that the following issues were to be decided upon by the Tribunal:

1.1 Did the claimant satisfy the definition of disability contained within section 6 Equality Act 2010 in respect of two physical impairments, taken either separately or cumulatively, namely his injured right ankle and his degenerative disc disease?

1.2 Did the respondent operate provisions, criteria or practices (PCPs):

1.2.1 That required employees to remain at their workstations throughout the working day

1.2.2 In the claimant's case, to work at a defective workstation where the surface was in need of repair

1.2.3 That postponement of meetings and hearings were not allowed during disciplinary proceedings.

1.3 In respect of any or all of the above alleged PCPs did they put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with a colleague(s) who are not disabled? The claimant says that he needed breaks from the workstation and while working at the workstation he needed to be able to rest components on a safe desk

1.4 Was the claimant put at a substantial disadvantage during the disciplinary proceedings because he was not allowed to postpone any meetings or hearings?

1.5 If any of the PCPs put the claimant at the alleged substantial disadvantage or disadvantages, did the respondent fail to make reasonable adjustments so as to remove the said disadvantage?

1.6 Was the claimant dismissed because he was a disabled person?

1.7 If the claimant was dismissed for a non-discriminatory reason, was that reason a potentially fair reason, such as a reason related to conduct?

1.8 If the claimant was dismissed, as the respondent says, for a reason related to his conduct, did the respondent act fairly and reasonably in all the circumstances in treating the claimant's conduct as sufficient reason to

dismiss? In that context the Tribunal was asked to determine the fairness and reasonableness of the respondent's actions according to consideration of the following:

1.8.1 The fact that the claimant was on a live disciplinary final written warning at the time of further alleged misconduct (a repeat of the same misconduct as led to the warning);

1.8.2 Whether the dismissing officer had a reasonable and genuine belief in the claimant's guilt;

1.8.3 Whether the dismissing officer's belief in the claimant's guilt was based upon and followed a reasonable investigation; and

1.8.4 Whether dismissal fell within the band of reasonable responses of a reasonable employer.

1.9 Subject to the findings above, if it was determined that the dismissal was unfair the Tribunal could take into account in respect of any award of compensation whether the claimant's conduct and the risk facing him of being fairly dismissed was such that his award should be reduced.

2. The Facts

2.1 The respondent is a large employer. The claimant was employed as a sequence picker. He started work as an operative on 14 June 2010 and continued to work until he received a letter that was dated 22 December 2016 dismissing him; he was subsequently paid in lieu of notice of termination of employment an amount equivalent to his notice pay.

2.2 The respondent has a rule that people work from the start of the shift, when a buzzer sounds, until the end of the shift, when the buzzer sounds again. In between times there are four breaks; the buzzer sounds at the start and end of each break. Between times all the operatives are meant to stay at their work cell unless they ask permission from a team leader, supervisor or manager; that is a rule. Permission to leave the cell is given for comfort breaks to use the toilet and in other circumstances at the discretion of the person giving permission. The claimant said in evidence that that rule "was drilled into him from the beginning", and that is the way the company operates. The buzzer sounds – work; buzzer sounds – break; buzzer sounds – back to work; and so it goes on. Although the respondent uses a buzzer the rule is commonly called "bell to bell".

2.3 The claimant knew the rule; he also knew how seriously the respondent took it and how strictly it was applied. He understood that he should not have broken the rule between 1 April 2016 and 7 June 2016 or at any other time, but he did. On 29 June 2016 the claimant received a final written warning which he did not appeal against. He was represented by his union at the time of the disciplinary hearing and the issuing of that warning. That final warning told the claimant that because he had been absent from his work cell on numerous occasions between 1 April 2016

and 7 June 2016 in breach of the rules, if he did it again he would be dismissed. That final written warning was to remain "live" for twelve months, until 28 June 2017. The claimant understood all of this. He knew that the warning he then received meant that he was in danger of being dismissed if he broke the rule again.

2.4 On 23 November 2016, and again on 7 December 2016 the claimant left his work cell before the buzzer at the end of the shift. He committed two breaches of the final written warning which had made it clear that any repeated misconduct could lead to dismissal. The claimant knew he was breaching and had breached the rules and admitted so doing; he had no explanation for so doing other than that he wanted to leave the building; he gave no explanation as to why he failed to request permission. He knew that he had acted contrary to the final written warning that he had received and against which he had not appealed. The reason that the claimant was dismissed from his employment was that he broke the "bell to bell" rule, on two separate occasions, contrary to a live final written warning.

2.5 The respondent followed a fair procedure before it dismissed the claimant, in that it told him that it was investigating the events of 23 November and 7 December 2016; Mr Miller (then the Manufacturing Shift Manager and a credible and reliable witness at this final hearing) investigated the events thoroughly taking witness statements from six colleagues that confirmed that the claimant left his cell without permission as alleged; a Mr Sampson interviewed the claimant and he admitted the alleged misconduct; the respondent gave him the details of the investigation; it allowed him a representative and he was represented throughout by his trade union; it did not refuse any request for postponement of any meeting or hearing and would have postponed reasonably if a reasonable request was made; the claimant was asked to explain why he did what he did and he was asked if there were any "mitigating circumstances" i.e. any reason why the respondent should not dismiss him. The claimant explained what he wanted to explain; he did not mention his health as a relevant factor either in his decisions to breach the "bell to bell" rule or as a circumstance to mitigate any sanction (punishment such as dismissal) facing him. The claimant did mention some very difficult personal circumstances that he had at home regarding housing and finances; all of those circumstances were made known to the dismissing officer before deciding to dismiss the claimant. The dismissing officer, Mr. Jason Adams, was not available to give evidence to the tribunal but the investigation statements and all correspondence including the letter of dismissal were available.

2.6 The claimant appealed against the decision to dismiss him. The appeal was heard by Mr. Chris Packwood who was then employed by the respondent as Regional Contracts – Regional Manager. Mr Packwood was a witness at the final hearing. He was a clear, cogent, credible and reliable witness. I accept his evidence in chief as a true statement. The claimant's only question in cross examination that was relevant to the appeal was whether Mr Packwood thought that the dismissal was unfair; Mr Packwood said not only that he did not think so but he knew that if he

had thought so then he would have been able to and would have upheld the appeal and revoked the decision to dismiss the claimant. I find that Mr. Packwood dealt with the appeal conscientiously and fairly, in full knowledge of the salient facts, circumstances and his powers as appeal officer.

2.7 The claimant has a mental impairment (anxiety) and the respondent accepts that his anxiety is a disabling condition. The claimant is a disabled person because of a mental impairment. The claimant has also sprained his ankle, which is a nuisance and causes him pain, and he says he has degenerative disc disease. The claimant was able to carry on working and to cope with his normal day to day activities notwithstanding his painful ankle and his back condition. He put up with any inconvenience and the pain; he was perfectly able to carry out his day to day activities despite his ankle and back conditions, which did not therefore have a substantial adverse effect on him or on those activities. His gait was normal (as seen in the medical reports). Those physical impairments do not amount to disabilities as defined by the Equality Act 2010.

2.8 The Tribunal has taken account of the difficulties the claimant has had particularly with housing. He has been served with court orders, received complaints from neighbours and he is the subject of an ASBO with a power of arrest attached. All of those circumstances are matters of concern to the claimant. He made the respondent aware of his difficulties. They were duly taken into account.

2.9 Despite all of those difficulties there is no evidence that the claimant was absent frequently or regularly from work, that he was a malingerer generally or that his work performance was poor; save for leaving the cell in breach of the rules there is no allegation that his timekeeping was bad. The claimant was a good employee except that he had a problem over that one particular rule which he repeatedly breached without good cause or explanation.

2.10 The respondent applied or followed two provisions, criteria and practices (PCPs) relevant to the claimant's claims. One is "the bell to bell" rule described above; and the other is that while an operative is working in the cell they use the equipment provided, equipment that is health and safety checked and audited (including by the union) and repaired when faults are reported. There is no PCP that the operative uses cardboard topped or defective desks as alleged by the claimant. Some operatives lay a piece of rubber or card on the surface of their workstation to protect parts from being scratched or from scratching the MDF or acrylic surface of the working area; that is an optional measure; the actual work surfaces are maintained in good working order and any defects are to be reported by operatives or are detected on safety audits following which they are repaired. The claimant's cell or workstation itself did not put the claimant at a substantial disadvantage because of his anxiety state.

2.11 We absolutely agree with the claimant that it would have been nice for the respondent to ask him if he would like to be a tugger driver or a forklift

truck driver; it would have made the claimant feel better; it did not so ask. We also agree with the claimant's evidence that neither tugger driver nor FLT driver would have been suitable jobs for him because of the risk of his turning his weakened ankle mounting and dismounting the equipment, and also the background information given relating to his anxiety state.

3. **The Law**

3.1 Dismissal:

3.1.1 Section 94 Employment Rights Act 1996 (ERA) states that an employee has the right not to be unfairly dismissed, while s.98 ERA sets out what is meant by fairness in this context in general. Section 98 (2) ERA lists the potentially fair reasons for an employee's dismissal, and these reasons include reasons related to the conduct of the employee (s.98 (2) (b) ERA). Section 98 (4) provides that once an employer has fulfilled the requirement to show that the dismissal was for a potentially fair reason the Tribunal must determine whether in al the circumstances the employer acted reasonably in treating that reason as sufficient reason for dismissal (determined in accordance with equity and the substantial merits of the case).

3.1.2 Case law has established that the essential terms of enquiry for the Employment Tribunal are whether, in all the circumstances, the employer carried out a reasonable investigation and, at the time of dismissal, genuinely believed on reasonable grounds that the employee was guilty of misconduct. If satisfied of the employer's fair conduct of the dismissal in those respects, the Employment Tribunal then has to decide whether the dismissal of the employee was a reasonable response to the misconduct. The Tribunal must determine whether, in all of the circumstances, the decision to dismiss fell within the band of reasonable responses of a reasonable employer; if it falls within the band the dismissal is fair but if it does not then the dismissal is unfair.

3.1.3 Questions of procedural fairness and reasonableness of the sanction (dismissal) are to be determined by reference to the range of reasonable responses test also (Sainsbury's Supermarkets Ltd v Hitt [2002] EWCA Civ 1588 and Iceland Frozen Foods Ltd. v. Jones - [1983] ICR 17).

3.1.4 The Tribunal must not substitute its judgment for that of the employer, finding in effect what it would have done, what its preferred sanction would have been if it, the Tribunal, had been the employer; that is not a consideration. The test is one of objectively assessed reasonableness.

3.1.5 Under the Polkey principle it may be appropriate to reduce an award by applying a percentage reduction to the Compensatory Award to reflect the risk facing a claimant of being fairly dismissed

or to limit the period of any award of losses to reflect this risk, estimating how long a claimant would have been employed had he not been unfairly dismissed, in circumstances where the respondent would or might have dismissed the claimant. I must consider all relevant evidence, and in assessing compensation I appreciate that there is bound to be a degree of uncertainty and speculation and should not be put off the exercise because of its speculative nature.

3.1.6 Where a Tribunal finds that a complainant's conduct before dismissal was such that it would be just and equitable to reduce a Basic Award it may do so (s.122 ERA). Where a Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant it shall reduce any compensatory award by such amount as it considers just and equitable having regard to that finding (s.123 ERA). In doing so a Tribunal must address four questions (Steen v ASP Packaging Ltd [2014] ICR 56, EAT):

3.1.6.1 What was the conduct giving rise to the possible reduction?

3.1.6.2 Was that conduct blameworthy?

3.1.6.3 Did the blameworthy conduct cause or contribute to the dismissal?

3.1.6.4 To what extent should the award be reduced?

3.1.7 When a claimant argues that a respondent's disciplinary decisions were inconsistent and that this gives rise to unfairness, it is important that the dismissing and/or appeals officers who are accused of being inconsistent are actually aware of the comparator cases. It is also essential that the comparators relied upon are in comparable situations to the claimant. Because of the need for respective facts to be truly comparable, arguments of inconsistency are difficult to maintain. That said, inconsistency of treatment in truly comparable situations may give rise to a finding of unreasonableness and unfairness on the part of the respondent, such as to render the decision to dismiss unfair.

3.1.8 As regards the relevance and effect of a final written warning the applicable law and guidance is set out in Wincanton Group PLC v Stone & Anor UKEAT/0011/12/LA where it was said:

3.1.8.1 "We can summarise our view of the law as it stands, for the benefit of Tribunals who may later have to consider the relevance of an earlier warning. A Tribunal must always begin by remembering that it is considering a question of dismissal to which section 98, and in particular section 98(4), applies. Thus the focus, as we

have indicated, is upon the reasonableness or otherwise of the employer's act in treating conduct as a reason for the dismissal. If a Tribunal is not satisfied that the first warning was issued for an oblique motive or was manifestly inappropriate or, put another way, was not issued in good faith nor with prima facie grounds for making it, then the earlier warning will be valid. If it is so satisfied, the earlier warning will not be valid and cannot and should not be relied upon subsequently. Where the earlier warning is valid, then:

3.1.8.1.1 The Tribunal should take into account the fact of that warning.

3.1.8.1.2 A Tribunal should take into account the fact of any proceedings that may affect the validity of that warning. That will usually be an internal appeal. This case is one in which the internal appeal procedures were exhausted, but an Employment Tribunal was to consider the underlying principles appropriate to the warning. An employer aware of the fact that the validity of a warning is being challenged in other proceedings may be expected to take account of that fact too, and a Tribunal is entitled to give that such weight as it sees appropriate.

3.1.8.1.3 It will be going behind a warning to hold that it should not have been issued or issued, for instance, as a final written warning where some lesser category of warning would have been appropriate, unless the Tribunal is satisfied as to the invalidity of the warning.

3.1.8.1.4 It is not to go behind a warning to take into account the factual circumstances giving rise to the warning. There may be a considerable difference between the circumstances giving rise to the first warning and those now being considered. Just as a degree of similarity will tend in favour of a more severe penalty, so a degree of dissimilarity may, in appropriate circumstances, tend the other way. There may be some particular feature related to the conduct or to the individual that may contextualise the earlier warning. An employer, and therefore Tribunal should be alert to give proper value to all those matters.

3.1.8.1.5 Nor is it wrong for a Tribunal to take account of the employers' treatment of similar matters relating to others in the employer's employment, since the treatment of the employees concerned may show that a more serious or a less serious view has been taken by the employer since the warning was given of circumstances of the sort giving rise to the warning, providing, of course, that was taken prior to the dismissal that falls for consideration.

3.1.8.1.6 A Tribunal must always remember that it is the employer's act that is to be considered in the light of section 98(4) and that a final written warning always implies, subject only to the individual terms of a contract, that any misconduct of whatever nature will often and usually be met with dismissal, and it is likely to be by way of exception that that will not occur.

3.2 Disability Discrimination: s.39 EA prohibits discrimination in employment on the basis of protected characteristic, including disability, in given circumstances.

3.2.1 Direct discrimination: s.13 EA defines this as where A treats B less favourably than A treats or would treat others, because of a protected characteristic. The key word is “because”; the protected characteristic (in this case disability by mental impairment) must be the causative reason for the less favourable treatment. The comparator may be actual or hypothetical and there must be no material difference between B and the comparator other than that characteristic.

3.2.2 The duty to make reasonable adjustments: s.20 and s.21 EA provide that where A applies a PCP that puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with person who are not disabled, then A must take such steps as are reasonable to avoid the disadvantage. The proposed adjustment must be one that could effectively avoid the disadvantage and need not be guaranteed to succeed.

4. Costs: The rules regarding costs awards are set out at R. 75 – 84 ETs (Constitution & Rules of Procedures) Regs 2013. A party may apply for, and a tribunal may order payment of, costs where the paying party has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings or the way that the proceedings have been conducted or the claim/response had no reasonable prospect of success (amongst other reasons). The paying party must be given a reasonable opportunity to make representations and the tribunal may have regard to their ability to pay. A tribunal may

order that costs be paid up to £20,000 or for there to be a detailed assessment.

5. **Application of Law to Facts**

4.1 Mr Stott withdrew his breach of contract (notice) claim and his health and safety detriment and automatic dismissal claims, if any were made; those claims are dismissed.

4.2 The claimant is disabled by virtue of a mental impairment but not by his ankle or back conditions (his physical impairments). The claimant failed to establish that, either separately or taken together, his physical impairments amounted to disabilities as defined by the Equality Act 2010.

4.3 The provisions relating to the claimant's work cell did not place him at any disadvantage because of his mental impairment (or for that matter his non-disabling physical impairments); if there were any structural defects they would be repaired and the claimant was not required to work at a work station or cell that was in a poor or unsatisfactory condition. The respondent did not breach a duty to make reasonable adjustments to the claimant's cell.

4.4 Operatives such as the claimant were required to remain at their cells working between breaks except where they asked to be, and were, excused. This PCP did not put the claimant at any disadvantage in respect of either his disabling mental impairment or his non-disabling physical impairments. He was required to stay put until the buzzer sounded or alternatively he obtained permission to leave his cell. There was no evidence that this created any adverse, let alone substantial adverse, effect for the claimant.

4.5 There was no PCP preventing or limiting postponement of disciplinary meetings and hearings. The claimant was not put at a substantial disadvantage because of his mental impairment in the way that the disciplinary procedure was followed by the parties.

4.6 The dismissal was fair in all the circumstances. The claimant admitted to the respondent breaking the bell to bell rule and he knew that in so doing he was in breach of a final written warning; he did not put forward any reason for his failure to obtain permission before leaving his work cell prior to the end of shift buzzer on the two occasions in question. The respondent's dismissing officer therefore had every reason to form a reasonable and genuine belief in the claimant's guilt. Even without hearing direct evidence from the dismissing officer this conclusion can be reached from the claimant's own concessions. In any event we are satisfied that the evidence of the appeal officer bears out the conclusion that the respondent had a reasonable and genuine belief in the claimant's misconduct as alleged.

4.7 The Tribunal is not saying what it would have done had it been the claimant's employer; we have not thought about what we would have

done if we were the respondent at the time. We have to decide whether the respondent acted fairly and reasonably in the circumstances in dismissing the claimant, where the reason for the claimant's dismissal was his conduct. We asked ourselves whether the steps and decisions taken by the respondent fell into a range of reasonable responses of a reasonable employer. We find that they did. Maybe not all employers would have sacked Mr Stott but some reasonable employers acting reasonably would have, and therefore dismissal fell into that range. In the light of the live final warning it is considered likely in fact that most employers would have dismissed the claimant but that is not the deciding factor; the point is that dismissal falls within a range of reasonable responses of a reasonable employer.

4.8 If someone is on a final written warning they can expect to be dismissed if they breach the terms of the warning. The Tribunal can consider whether a warning was wrong, that is whether it was “manifestly inappropriate”. The claimant’s live warning does not fall into that category. It was for misconduct and it was not appealed; it was there on the books and it was clear. The warning could be taken at face value. In those circumstances avoiding dismissal after breaching the warning would have been exceptional. Dismissal for repeated breaches of strictly applied and known rules, especially rules with health and safety implications (the respondent’s need not only for production but to know where its operatives were on site) would fall into the range of reasonable responses of a reasonable employer; where an employee acts contrary to the requirements and terms of a final written disciplinary warning then dismissal must fall within that range; the warning stated the risk.

6. **Costs**

5.1 The respondent applied for costs on the basis that the claimant had no realistic prospect of succeeding with his claims, had been warned about costs and had received commercial offers to settle the claim before the final hearing commenced. The Tribunal has taken into account everything it heard in Mr Frew’s application and the claimant's objection to the application for costs. The Tribunal Rules do permit a Tribunal to make orders for costs where there has been unreasonable behaviour or where a claim or a response is misconceived in that it has no reasonable prospect of success.

5.2 The Tribunal has taken into account a number of factors in reaching its decision in respect of the costs application:

5.2.1 Against the respondent, we note that they used a partner, experienced solicitor and a trainee to do a considerable amount of hours’ work on a case where the whole thrust of its defence has been that the case is obviously a non-starter; having said that it has wracked up £29,000 worth of costs. Also, and this is a matter between the respondent and its representatives, it seemed disproportionate to engage both counsel and his

instructing solicitor here at the Tribunal for two days, especially as it says that the claims were bound to fail.

5.2.2 Against the claimant, the claimant has had clear advice from his own representative, the trade union, that he had no reasonable prospect of success. He also had some words of guidance and indications from me and another Employment Judge that he would have some difficulties in proving his case. The claimant had an offer last week to settle the claim without any expense to him, where he would have received £1,000 and had a job reference that was worth having; we are told that that was repeated yesterday before the case started. The claimant rejected all advice received and refused the repeated offer of compensation without a clear rationale for so doing; that is what swung the Tribunal to making a costs order on the basis that the claimant's conduct of the case has been unreasonable.

5.2.3 At a preliminary hearing a tribunal rejected the respondent's earlier application to strike out the claim on the basis of it having no reasonable prospects. That does not prohibit this tribunal from making a cost order in part on the basis that the claim had no reasonable prospects. The earlier tribunal did not hear substantive evidence but considered the respective parties' representations; the repeated making of settlement offers was not relevant to that tribunal's considerations; it would be difficult for a tribunal to strike out a claim (especially a discrimination claim) which is fact sensitive and where evidence is required; in those circumstances it is possible that the Employment Judge on the last occasion gave the claimant the benefit of any doubt. We have had the benefit of hearing from the claimant who will have known the weakness of his evidence, the extent of his concessions, and that he had received and rejected financial settlement offers notwithstanding professional advice from his union that his claims had little or no prospects of success.

5.2.4 As to the respondent, the Tribunal could arguably have concluded the case yesterday by 5.00pm, on the first day, but Mr. Frew asked for an adjournment yesterday afternoon for time to prepare his submissions; this is not a criticism of Mr Frew but we are not persuaded to award costs in respect of today's hearing. The Tribunal does feel however that a contribution ought to be made by the claimant to yesterday's costs, and the Tribunal is ordering the claimant to pay the respondent £2,000 plus VAT as a contribution towards the costs.

Employment Judge T Vincent Ryan
Date: 12.06.18

JUDGMENT AND REASONS SENT TO THE PARTIES ON

9 July 2018

FOR THE TRIBUNAL OFFICE

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