

**EMPLOYMENT APPEAL TRIBUNAL**  
FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal  
On 3 September 2018

**Before**

**HER HONOUR JUDGE STACEY**

**(SITTING ALONE)**

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MR A WOOD

APPELLANT

DURHAM COUNTY COUNCIL

RESPONDENT

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Transcript of Proceedings

JUDGMENT

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## APPEARANCES

For the Appellant

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For the Respondent

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## **SUMMARY**

### **DISABILITY DISCRIMINATION – Exclusions/jurisdictions**

The Tribunal had not erred in concluding that a manifestation of the Claimant's post-traumatic stress disorder and dissociative amnesia was a tendency to steal which was an excluded condition pursuant to Regulation 4(1)(b) **Equality Act 2010 (Disability) Regulations 2010** (SI 2010/2128). The ET was entitled, on the evidence, to reject the Claimant's contention that his behaviour merely memory loss and forgetfulness and not dishonest. The Tribunal had correctly applied **Ivey v Genting Casinos (UK) Ltd t/a Crackfords** [2017] UKSC 67. Since the effective cause of the Claimant's dismissal - the discriminatory treatment complained of - was the excluded condition, it followed that the ET did not err in dismissing the complaint of disability discrimination (**Edmund Nuttall Ltd v Butterfield** [2006] ICR 77 followed and applied).

The ET did not err in conducting the Preliminary Hearing before a Judge sitting alone rather than a full Tribunal since neither party had made a request for a full Tribunal pursuant to **Rule 55 Employment Tribunal Rules of Procedure**. The Tribunal's findings of fact were not perverse. The Tribunal decision was upheld.

**A**      **HER HONOUR JUDGE STACEY**

**B**

1.      This is an appeal from the Employment Tribunal’s (“ET”) Judgment held at North Shields on 1 November 2017 before Employment Judge Johnson sitting alone at an open Preliminary Hearing which found that the Claimant was not disabled within the meaning of section 6 **Equality Act 2010**. The Tribunal found that the Claimant had a tendency to steal which arose as a manifestation of his post traumatic stress disorder. It was treated as an excluded condition which

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did not amount to an impairment pursuant to Regulation 4(1)(b) of the **Equality Act 2010** and **(Disability) Regulations 2010** SI2010/2128. Since the excluded condition was the reason for the discriminatory treatment complained of, the Tribunal dismissed his disability discrimination

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complaint, leaving his unfair dismissal complaint for determination at a further Tribunal hearing<sup>1</sup>. The Judgment, with Reasons, was sent to the parties on 10 November 2017. The Appellant before me today is the Claimant below and I shall continue to refer to the parties by reference to their status below in accordance with **Practice Direction** paragraph 16.4.

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2.      There are three grounds of appeal, which were permitted to go forward to a Full Hearing by Soole J at a Rule 3 (10) Hearing in this case. Firstly, that there was an error in the Tribunal’s conclusion that the Claimant had a tendency to steal; secondly, there had been an error for the issue to have been decided by an Employment Judge (“EJ”) sitting alone; and, thirdly, a perversity appeal in relation to the Tribunal’s findings of fact.

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3.      The background and history is as follows. The Claimant has brought ET proceedings for unfair dismissal and disability discrimination following his dismissal by the Respondent after nine years’ service, latterly as an Anti-Social Behaviour Officer. Before working for the

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<sup>1</sup> It has been stayed pending this appeal.

**A** Respondent, he had worked as a Police Officer for some seventeen years. The Respondent did not accept that the Claimant was a disabled person with the meaning of section 6 of the **Equality Act 2010** (“EqA”).

**B** 4. The Claimant was initially a litigant in person but Solicitors were subsequently instructed by him, following which the issues were clarified at a closed Preliminary Hearing before an EJ  
**C** on 2 December 2016. The Claimant asserted that he had post-traumatic stress disorder and associated amnesia and memory loss, which on occasions caused him to suffer forgetfulness and  
**D** that such forgetfulness would include him forgetting to pay for items before leaving a shop. It is common ground that on 24 August 2015, he left Boots the Chemist, not having paid for items he had placed in his bag, and that the consequence of his doing so ultimately led to his dismissal. It is not in dispute that what happened in Boots that day was the effective cause of his dismissal.

**E** 5. In relation to the disability discrimination complaints the issues were clarified as follows:

*“5 Section 19: Indirect discrimination in relation to disability*

**5.1 Did the respondent apply the following provision, criteria and/or practice (‘the provision’) generally, namely**

**5.1.1. The policies and procedures relied on by the respondent when dismissing him including the standards of conduct and the requirement to disclose the issue of the penalty notice.**

**F** **5.2 Does the application of the provision put people with the claimant’s mental impairment at a particular disadvantage when compared with persons who do not have this protected characteristic?**

**5.3 Did the application of the provision put the claimant at that disadvantage in that those with the claimant’s impairment are more likely to be accused of criminal offences e.g. by forgetting to pay for items in a shop and being more likely to be issued with a fixed penalty notice and such people are less likely to remember to report incidents.**

**G** **5.4 Does the respondent show that the treatment was a proportionate means of achieving a legitimate aim? [NOTE This assumes that the respondent will amend its response to include justification]**

*6. Section 15: Discrimination arising from disability*

**H** **6.1 The allegation of unfavourable treatment as “something arising in consequence of the claimant’s disability” falling within section 39 Equality Act was the dismissal (including the rejection of his appeal). The claimant asserts that his behaviour on 24 August 2015 which led to the accusation of shoplifting and the issue of the fixed penalty notice was something arising from his disability.**

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6.2 Does the claimant prove that the respondent treated the claimant as set out in paragraph 6.1 above?

6.3 Did the respondent treat the claimant as aforesaid because of the “something arising” in consequence of the disability?

6.4 Does the respondent show that the treatment was a proportionate means of achieving a legitimate aim? The respondent relies on the aim of maintaining the standards required of those in public office and the need to maintain the confidence of the public in the service they provide.

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*7. Reasonable adjustments: section 20 and section 21*

7.1 Did the respondent apply the PCP set out in paragraph 5.1.1.

7.2 Did the application of any such provision put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled as set out in paragraph 5.3?”

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6. Following that clarification, the Claimant provided further information requested by the Respondent and explained that, in relation to the indirect discrimination complaint, it was said that his condition puts him at an increased risk at being issued with a fixed penalty notice when compared with persons who do not share his disability. The reasonable adjustment case had always been put on the basis of his having a tendency to behave in that way, in other words to forget on occasions to pay for items in shops, and it was implicit that what happened on 24 August 2015 had not been an isolated or a one-off act.

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7. In the section 15 complaint the Claimant also puts his behaviour on 24 August 2015 at the heart of his case, asserting that the accusation of shoplifting and subsequent issue of a fixed penalty notice was something arising from his disability. His contention was that the behaviour was not dishonest, not that he did not have a tendency to behave in that way.

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8. A joint expert, Dr Robinson, was instructed on 5 May 2017. She agreed with the Claimant’s assertion that he suffered from severe depression, PTSD and associative amnesia. She answered a number of specific questions that the parties had jointly agreed be put to her.

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Following receipt of Dr Robinson’s report, the Respondent amended its defence and response to the claim and sought at that stage to rely on Regulation 4(1)(b) of the **2010 Regulations** and to

A assert in paragraph 2 of page 78 as follows, “Further, it is averred that the claimant is not entitled  
to the protection of the **Equality Act 2010** in relation to any discrimination he experienced, which  
is not admitted, as a consequence of any ‘tendency to steal’, because that is an excluded condition  
under the Act.”

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9. There was then a further Preliminary Hearing on 22 May 2017 when the case was listed  
for yet another Preliminary Hearing on 1 November 2017 to determine the disability issue since  
C it was thought it would shorten the hearing time by at least 1 day. No request was made by either  
party to list the 1 November 2017 Preliminary Hearing before a full Tribunal.

D 10. **Rule 55 of the Employment Tribunals Rules of Procedure** provides as follows:

“Constitution of tribunal for preliminary hearings

55. Preliminary hearings shall be conducted by an Employment Judge alone, except that where  
notice has been given that any preliminary issues are to be, or may be, decided at the hearing a  
party may request in writing that the hearing be conducted by a full tribunal in which case an  
E Employment Judge shall decide whether that would be desirable.”

F 11. It is therefore common ground that absent a written request by one or other of the parties,  
or a decision of the Tribunal’s own motion, a Preliminary Hearing will be heard by a Judge sitting  
alone pursuant to the **Employment Tribunal Act 1996**.

G 12. The Claimant had prepared a witness statement in anticipation of the Preliminary Hearing  
and addressed head-on the amended defence of the Respondent County Council stating at  
paragraph 6 to 8 as follows:

“6. The only argument put forward by the Respondent to date is based on the premise that as a  
result of my condition I have a tendency to steal and so I should not benefit from the protection  
offered by the Equality Act. This argument is very hurtful to me because I am a 52-year-old  
H man (and former police officer) with no previous cautions/convictions for anything let alone  
theft.

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7. A tendency would imply that this has happened multiple times which is simply not the case. The Respondent has produced no evidence to suggest that the incident which occurred on 24th August 2015 was anything other than an isolated incident.

8. "Stealing" is theft and requires dishonesty and intent. The evidence I have produced clearly shows that my actions when in a dissociative state (caused by my disability- please see pages 225 and 582 of the joint bundle) are entirely lacking in intent and I can confirm that during a dissociative state I would be incapable of dishonesty. Also, I have never been convicted of theft."

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13. Prior to the hearing, the Claimant obtained a letter from his care co-ordinator with Tees, Esk and Wear Valleys NHS Trust warning that his giving evidence may lead him to dissociate.

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The letter described the symptoms and stated that if this were to occur, he should be kept in a safe place and have someone with him. On the day of hearing, neither the Claimant, nor his counsel on that occasion, Mr J Anderson, requested any adjustments to the hearing. It is not recorded whether either his solicitor or any family or friends were there to support him.

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14. Mr Anderson decided not to call his client to give evidence. The Claimant attended the hearing centre but remained outside the hearing room. The ET therefore had no live evidence before it but had a bundle consisting of 587 pages, the Claimant's witness statement and the witness statement of a Mr Owen Cleugh, a Consumer Protection Manager for the Respondent. It does not appear to have been a problem however both counsel, whose skills were praised by the EJ, agreed that the Claimant's live evidence was not necessary. The primary facts did not appear to be in dispute and the case proceeded on legal argument and the proper inferences and conclusions to be drawn from the primary agreed facts.

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15. At the Tribunal hearing it was conceded by the Respondent that the Claimant had the mental impairment of PTSD as at 24 August 2015, which had a substantial, long-term and adverse effect on his ability to carry out normal day-to-day activities. On the face of it therefore, the Claimant was disabled within the meaning of section 6 **Equality Act 2010**. However, the Respondent relied on the Regulations in its submission that in the circumstances of the case, it

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A was an excluded condition by virtue of section 6(5) and (6) of the **Equality Act 2010** and the  
Schedule. The nub of the dispute between the parties was whether events of 24 August 2015  
demonstrated that the Claimant had a tendency to steal, or exhibited merely a tendency to memory  
B loss and forgetfulness. It appears to have been accepted by the Claimant that if the Respondent  
could prove to the civil standard that what happened in Boots on 24 August 2015 amounted to a  
tendency to steal, then his condition would be excluded by virtue of the Regulations because he  
was dismissed in consequence of events that day and he would be deemed not to be disabled.

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16. The ET correctly understood that it is necessary not only to consider if a Claimant has an  
excluded condition pursuant to Regulation 4(1)(b), but also how it relates to the act of  
D discrimination complained of. As explained in the statutory guidance on matters to be taken into  
account in determining questions relating to the definition of disability paragraph A13 and  
explored in the cases of **Edmund Nuttall Ltd v Butterfield** [2006] ICR 77 and **Governing Body**  
E **of X Endowed Primary School v Special Educational Needs and Disability Tribunal (No 1)**  
[2009] IRLR 1007, it is important to determine the basis for the alleged discrimination. If the  
alleged discrimination was a result of an excluded condition, the exclusion will apply. However,  
if the alleged discrimination is specifically related to the actual disability which gives rise to an  
F excluded condition, or is more tangentially related, the exclusion may not apply. The excluded  
condition is not considered in a vacuum but by reference to, and in the context of, the alleged  
discrimination complained of.

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17. The Tribunal correctly directed itself that the burden of proof was on the Respondent to  
prove that the condition was excluded.

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18. It was a mixed question of fact and law. It is accepted today that the Tribunal gave itself  
an impeccable self-direction concerning all the legal issues before it. It referenced the applicable

A test for dishonesty in light of the then recent Supreme Court Judgment of Ivey v Genting Casinos  
B (UK) Limited (t/a Crockfords) [2017] UKSC 67, citing paragraph 48 in paragraph 21 of the ET  
C Judgment that the question of dishonesty is a jury question of fact and standards and that it is  
ultimately for the court to decide whether conduct amounted to in this case theft, and that the  
standard is objective. The Tribunal's self-direction on Regulation 4 (1) and on causation at  
paragraphs 9 – 14 of the Judgment it is also accepted as impeccable.

19. Since perversity is alleged it is necessary to set out the Tribunal's findings of fact  
contained in paragraphs 7.1 to 7.10:

7.1 The claimant was a Police Officer from September 1989 until November 2005. Following  
his resignation from the police force, he worked with Durham County Council, initially as a  
Fraud Officer, and then as an Antisocial Behaviour Officer. He had a clean disciplinary record.

7.2 The claimant was subject to the respondent's code of conduct, under which public sector  
employees have a duty to act with honesty and integrity. The code of conduct itself specifies  
that breaches of any element of the code (inside or outside of work) are a serious matter and  
could result in disciplinary action, up to and including a dismissal. Along with other employees  
carrying out the same job, the claimant was required by Durham Constabulary to be vetted to  
Non Police Personnel Vetting (NPPV) Level 2, to ensure their suitability for clearance. This was  
considered to be an essential requirement for the post and is set out in the terms and conditions  
of appointment. The requirement is considered to be essential for the claimant's job because a  
fundamental aspect of the role of an Antisocial Behaviour Officer includes the necessity to work  
in close partnership with the police. The remit of the role includes access to police information  
and intelligence, unaccompanied access to police stations and being involved in multi-agency  
meetings to resolve complex antisocial behaviour cases. It is not disputed that the claimant was  
fully aware of the standards required for his job.

7.3 On 24 August 2015, the claimant went into a local Boots store and left the store without  
paying for goods which he had placed into his shopping bag. The claimant was apprehended  
and the police were called. The relevant extracts from the police officer's notebook appear at  
pages 96- 102 in the bundle. The claimant's admission is recorded at pages 99- 100 in the  
following terms: -

"My name is Anthony Wood and my date of birth is 2.8.65. I agree that I have been  
cautioned by PC 2019 Armstrong and I admit that I am responsible for the theft of a  
chicken and bacon wrap, a bottle of Nivea suntan lotion and 2 x Sure deodorant sprays  
from Boots Chemist in Durham Market Place on 24.8.15. I took them from the display  
in the store and placed them into a carrier bag that I had without paying for them or  
attempting to pay for them as I left the store. I was detained outside the store by  
security staff and I had no intention of paying for the items as I had no money on me  
and despite having the means to pay on me, I chose not to. I have made this admission  
of my own free will and I have not been pressured into making it."

The claimant's signature follows that statement.

7.4 At page 97 of the bundle is a note which records that at the time of this incident, when  
approached by the Boots security guard, the claimant had removed his Durham County Council  
ID lanyard and placed it in his pocket. When searched by the police, the claimant had the  
lanyard in his pocket, but when asked about his occupation, the claimant informed the officers  
that he "worked in security - travelling from site to site". This was untrue.

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7.5 The claimant was issued with a formal fixed penalty notice, known as a Penalty Notice for Disorder (PND). This required the claimant to pay a fine of £90 as an alternative to a formal prosecution for theft. The claimant agreed to accept the PND.

7.6 The claimant paid the £90 fine on 14 September. Before doing so, he consulted two separate solicitors to obtain advice as to whether or not he should do so. He was advised that paying the fixed penalty did not amount to an admission of guilt and the claimant therefore paid the fine.

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7.7 The claimant did not inform the respondent about the incident, nor the issue of the fixed penalty notice, as he was obliged to do under the respondent's code of practice. The claimant did not formally report the matter to the police, as he was also obliged to do.

7.8 In October 2015, the claimant's Non Police Personnel Vetting Level 2 application was refused as a result of the PND issued in August. As a result, the claimant was not permitted to enter any police premises or buildings under any circumstances, with immediate effect. That meant that the claimant was effectively unable to carry out his duties as an Antisocial Behaviour Officer. That matter was brought to the attention of the claimant's Line Manager Mr Ian Hoult, on the morning of 19 October 2015. The following day, Mr Hoult met with the claimant and asked him a series of questions designed to elicit from the claimant details about the incident at Boots in August. The questions put to the claimant were: -

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- Was he aware of any information that the council should be aware of?
- Has something happened outside of work that we need to know about?
- Has there been anything happening with the police that he should be making us aware of?
- Is there something that has happened in Durham City Centre that we should be aware of?
- Is there something that has happened at Boots the Chemist in Durham which we should be aware of?

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The claimant replied "No" to those questions. Mr Hoult then pointed out that the police had provided information to him that the claimant had been stopped for shoplifting, charged and that he had paid a fixed penalty notice. The claimant then accepted that he could remember about the incident, but that it had not been his fault. The claimant then explained that he had been seeing a consultant over the past 18 months as they thought he had a disorder that affected his memory.

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7.9 The claimant was suspended that day by Mr Hoult and by letter dated 18 November, invited to attend a disciplinary hearing on 14 January 2016. The allegations were described as follows:

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- Criminal misconduct outside of the workplace which impacts on your ability to undertake your role within the council.
- Withdrawal of your non police personnel vetting (NPPV) accreditation as a result of your own misconduct which impacts on your ability to undertake your role with the council.
- Your actions have the potential to cause serious reputational damage to the council and may give rise to a fundamental breakdown in the council's trust and confidence in their employment relationship with you.

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7.10 Following a prolonged disciplinary process, the claimant was dismissed by letter dated 19 May 2016 (page 200-202). His appeal was itself dismissed on 13 July 2016, following a hearing on 29 June."

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20. Having made those findings of fact, the Tribunal also considered the medical evidence, the evidence of the Claimant from his witness statement regarding his condition and the

A surrounding facts and the circumstances leading to the issue of the fixed penalty notice and his  
behaviour thereafter. The Judgment then listed the relevant matters that the Tribunal had  
considered most carefully in deciding what an ordinary person would consider to be dishonest in  
B numbered sub-paragraphs of paragraph 25 of the Judgment:

“25.1 The medical report of Dr Robinson together with her answers to the questions put to her.

25.2 The fact that the claimant had placed the items of shopping into his own shopping bag.

25.3 The fact that the claimant left the Boots store without paying for the goods.

25.4 The fact that the claimant removed his identification lanyard when approached by the  
C security guard.

25.5 The fact that the claimant lied about his occupation.

25.6 The notes contained in the police officer’s notebook.

25.7 The fact that the claimant had signed those notes.

25.8 The claimant spoke to two different solicitors the following day.

25.9 The claimant failed to report the matter to his employer.

25.10 The claimant failed to report the matter to the police.

25.11 Then subsequently challenged about the matter, the claimant could only remember telling  
a member of staff at the Boots make-up counter that he intended to go to a cash point to obtain  
some cash, that being something which may exculpate him, but could not remember anything  
which may be held against him.”

E 21. Drawing those threads together, the Tribunal Judge found that he was satisfied that  
“applying the objective standards of ordinary, reasonable and honest person armed with all the  
F information, the Claimant’s conduct is to be regarded as dishonest.” In paragraph 27, the  
Judgment went on:

“The question of whether or not the claimant satisfies the definition of disability must be  
considered in the light of the basis for the alleged discrimination. I am satisfied in the claimant’s  
case that the alleged discrimination is as a result of an excluded condition. The withdrawal of  
his police accreditation was caused by the commission of an offence which led to the issue (and  
acceptance) of the PND. The issue of the PND and failure to report the incident to his employer  
led to the suspension, disciplinary hearing and dismissal. As a matter of causation, I am satisfied  
that the reason for the less favourable treatment is the issue of the PND which in turn was caused  
by the claimant stealing goods from the Boots store. I am satisfied that the claimant’s mental  
impairment (post traumatic stress disorder) amounts to a legitimate medical impairment which  
manifests itself in what ordinary, decent people in possession of the facts would objectively  
consider to be a tendency to steal. That is an excluded condition under Regulation 4 of the 2010  
Regulations as is clearly explained by paragraph A13 in the 2011 Guidance. The claimant’s  
tendency to steal is either a consequence of, or a manifestation of, his impairment which  
constitutes a disability for the purposes of the Act. The alleged discrimination is therefore a  
result of an excluded condition and the exclusion in Regulation 4 therefore applies.”

A 22. The Judge concluded that he was satisfied that the Claimant's mental impairment  
amounted to a legitimate medical impairment, which manifests itself in what ordinary decent  
B people in possession of the facts would objectively consider to be a tendency to steal and which,  
by virtue of the precise allegations of the treatment complained of as amounting to disability  
discrimination, made it an excluded condition.

C 23. It is fortunate in this case that there is no dispute about the facts which led to the dismissal,  
dismissal being the act of discrimination complained of in each of the three disability  
D discrimination causes of action. The Tribunal summarised the cause of the dismissal as being the  
issue of the PND and failure to report the incident to his employer, which is a succinct distillation  
of the ET3<sup>2</sup> and not disputed by the Claimant. Therefore, the critical question of causation is  
answered and agreed, there is no lacuna or vacuum of the type that occurred in both **Edmund**  
**Nuttall Ltd v Butterfield** [2006] ICR 77 and **Governing Body of X Endowed Primary School**  
**v Special Educational Needs and Disability Tribunal (No 1)** [2009] IRLR 1007]. There was  
E therefore no uncertainty for the Employment Tribunal in the examination of whether the alleged  
discrimination related to protected disability, or an excluded condition, or to both, because the  
cause of the dismissal was not disputed.

F **A Tendency to Steal**

G 24. Turning to the grounds of appeal, the first is that the Tribunal erred in finding a tendency  
to steal. The Claimant's first criticism is that even if the Tribunal had concluded that the incident  
on 24 August 2015 in Boots amounted to theft, it fell short of demonstrating a tendency, and there

H <sup>2</sup> The ET3 states three reasons (1) criminal misconduct outside the workplace, which impacts upon the Claimant's  
ability to undertake his role with the council; (2) the withdrawal of the non-police personnel vetting accreditation  
as a result of his own misconduct, which impacts on his ability to undertake his role with the council; and (3) the  
actions had the potential to cause serious reputational damage to the council and may give rise to fundamental  
breakdown in the council's trust and confidence and the employment relationship (p62). But in reality (2) and (3)  
were inextricably linked to (1) and the ET summary was perfectly accurate.

A was nothing in the Tribunal’s Decision directing itself as to what is meant by the term “tendency.”  
B However, it is abundantly clear from the Claimant’s pleadings throughout that he has always put  
his case on the basis that he has a tendency to do whatever the correct description is for what  
happened in Boots on 24 August 2015.

25. He has made his case on the basis that it was not a one-off matter or an isolated event, but  
part of his condition and a manifestation of his PTSD which occurs and recurs, as is evident from  
C the agreed issues from the Preliminary Hearing of 2 December 2016 set out above. Therefore, it  
is clear that it was the Claimant’s case that he had a tendency to behave in a certain way that put  
him at a disadvantage compared to those who are not disabled in circumstances amounting to  
D indirect discrimination. Therefore, no criticism can be fairly levelled at the Tribunal for not  
addressing the point in greater detail since it was not in dispute.

26. The next question is whether it was an error of law for the Tribunal to define the way in  
E which the Claimant behaved on 24 August 2015 as stealing, as opposed to forgetfulness without  
intent or any dishonesty; it being the Claimant’s case that he simply walked out of shops without  
having paid for goods because of a dissociative state. The difficulty for the Claimant is that it  
F was a matter of fact for the Tribunal Judge to determine and, on the face of it (subject to the  
perversity challenge in ground 3 below), he was entitled to reach his conclusion. The question  
of dishonesty is a question for the fact-finder be that a jury or an Employment Judge see Ivey v  
G Genting.

27. The case of R v Hamer [2011] 1 WLR CACD ingeniously relied on by Ms Banton, on  
H close examination does not assist. Whilst a PND does not amount to a conviction or meet the  
criminal standard of proof of theft, Hamer is not authority for the proposition that an EJ or other

**A** Civil Court or Tribunal, is precluded from concluding that the issuing of a PND, meets the dishonesty test to the civil standard.

**B** 28. From the evidence before the ET I can entirely see why the EJ considered that the Claimant was dishonest, particularly when one reads the statement that the Claimant has signed confirming that he admits that he had stolen something together with his behaviour in the following days thereafter and his self-serving selective memory in the interview with his line manager Mr Hoult on 20 October 2015. On the face of it, it was a conclusion that was open to the Tribunal to find.

**C**

**EJ Sitting Alone**

**D** 29. The second ground of appeal is the alleged error for an EJ to make a determination sitting alone has no merit. The Claimant could have requested members pursuant to **Rule 55**, but neither he nor his representative did so. It is too late to regret that decision now, and in any event, it is by no means certain that the Tribunal would have agreed to the request, had it been made.

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**Perversity**

**F** 30. The third ground is perversity. Ms Banton has helpfully been precise and specific in her perversity challenge. Firstly, the finding at 7.4 set out above which was taken from a note at p91. This is a note that was prepared by an employee of the council reporting what was said to her or him by the police which had, in turn, been said to the Police Officer by the Security Guard at the store. The handwritten note is not helpful for the Claimant because it states that the Claimant had hidden his lanyard and given an incorrect explanation of his occupation when questioned at the time. The ET was entitled to take account of the note – the rules of hearsay do not apply strictly in the ET and the Claimant’s then representative had told the Tribunal that the facts were not in dispute and there was no need for the Claimant to give evidence. The agreed medical

**A** evidence was that the Claimant's condition was unlikely to be related to the matters in the note. The ET was entitled to conclude that the Claimant gave an untruthful answer. Furthermore, the Claimant's position was that he has forgotten everything that happened that day, and he was not  
**B** in a position to challenge the note in any event. Therefore, the Tribunal has not made a perverse finding in that regard.

**C** 31. The second perversity challenge is to the finding at 7.7 that the Claimant did not inform the Respondent about the incident as he was obliged to do under the Respondent's code of practice. It is common ground that he did not inform the Respondent about the incident. The only issue is whether or not he was obliged to do so under the code of practice. The code of  
**D** practice is set out in part in the Judgment. Whilst the point could perhaps be made that the issuing of a FPN per se would not require disclosure, or at least is a grey area, the loss of his accreditation and Level 2 NPPV (see findings of fact paragraph 7.2 in paragraph 19 above) unarguably required  
**E** him to inform his manager under paragraph 4.7 of the code.

**F** 32. His failure to do so is all the more interesting when the day after receiving the fixed penalty notice, the Claimant consulted not one, but two, Solicitors. He must have been well aware of the risks and the seriousness of the matter, yet still chose not to inform his employer. Furthermore, at the meeting with his line manager Mr Hoult, he was given the opportunity to disclose the matter and did not. It would appear to have been a conscious decision not to seek to  
**G** confess and avoid. The Tribunal's findings are not perverse.

**H** 33. A potentially more sustainable perversity ground is the finding at paragraph 8.5 and also referred to in paragraphs 25 and 27, that the Claimant failed to inform Durham Constabulary of the incident, which is conceded by the Respondent as being incorrect. It is evident from the



A documents in the bundle before the Tribunal (although not referred to in the Claimant’s witness  
statement), that six weeks after the incident he went to the trouble of sending a guaranteed, signed  
for delivery letter to the Police, informing them that he had been advised by Solicitors that he  
B should not have paid the penalty notice.

34. Therefore, it was factually incorrect for the Tribunal blandly to assert that the Claimant  
did not inform the Police about the matter. The difficulty for the Claimant however is that the  
C factual detail was immaterial to the ET’s Decision and overall conclusion. In an employment  
dispute, it is hard to see how it is relevant whether he drew Durham’s attention to the matter in  
an attempt to get reimbursement for the fixed penalty notice that he had paid.

D 35. If, on the other hand, there had been evidence of his having informed his employer  
promptly, it might have been different.

E 36. The final perversity challenge was a further attack, from a different angle, to the note  
described in paragraph 7.4 of the ET Judgment. For the reasons set out in paragraph 30 of this  
Judgment, no perversity is identified.

F 37. For those Reasons, I dismiss the appeal and uphold the Decision of the ET. The unfair  
dismissal claim can now be listed before the Tribunal to be determined.

G 38. By way of postscript, it is worth re-iterating that caution needs to be exercised by a  
Tribunal when deciding whether a Preliminary Hearing is appropriate and the guidance in **SCA**  
**Packaging Limited v Boyle (Northern Ireland)** [2009] IRLR 746 per Lord Hope at paragraph  
H 9 deserves repetition.

“As Lord Scarman said in *Tilling v Whiteman [1980] AC 1*, 25, preliminary points of law are too  
often treacherous short cuts. Even more so where the points to be decided are a mixture of fact

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and law. That the power to hold a pre-hearing exists is not in doubt: Industrial Tribunals (Constitution and Rules of Procedure) Regulations (Northern Ireland) 2005 (SR 2005/150), Schedule 1, rule 18. There are, however, dangers in taking what looks at first sight to be a short cut but turns out to be productive of more delay and costs than if the dispute had been tried in its entirety, as Mummery J said in National Union of Teachers v Governing Body of St Mary's Church of England (Aided) Junior School [1995] ICR 317, 323. The essential criterion for deciding whether or not to hold a pre-hearing is whether, as it was put by Lindsay J in CJ O'Shea Construction Ltd v Bassi [1998] ICR 1130, there is a succinct, knockout point which is capable of being decided after only a relatively short hearing. This is unlikely to be the case where a preliminary issue cannot be entirely divorced from the merits of the case, or the issue will require the consideration of a substantial body of evidence. In such a case it is preferable that there should be only one hearing to determine all the matters in dispute.”

39. In this case there was no knockout point since the unfair dismissal complaint remains to be determined and there is overlap in the issues before the Preliminary Hearing and the unfair dismissal claim, which would have been better dealt with together. The anticipated saving of one day of Tribunal hearing was also illusory. In future, it would be advisable for Tribunals to think extremely carefully before listing as a Preliminary Hearing matters involving **Regulation 4** where there is also a free-standing wrongful or unfair dismissal complaint unless the issues are genuinely discrete.

**EMPLOYMENT APPEAL TRIBUNAL**  
FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal  
On 3 September 2018

**Before**

**HER HONOUR JUDGE STACEY**

**(SITTING ALONE)**

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MR A WOOD

APPELLANT

DURHAM COUNTY COUNCIL

RESPONDENT

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Transcript of Proceedings

JUDGMENT

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## APPEARANCES

For the Appellant

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## **SUMMARY**

### **DISABILITY DISCRIMINATION – Exclusions/jurisdictions**

The Tribunal had not erred in concluding that a manifestation of the Claimant's post-traumatic stress disorder and dissociative amnesia was a tendency to steal which was an excluded condition pursuant to Regulation 4(1)(b) **Equality Act 2010 (Disability) Regulations 2010** (SI 2010/2128). The ET was entitled, on the evidence, to reject the Claimant's contention that his behaviour merely memory loss and forgetfulness and not dishonest. The Tribunal had correctly applied **Ivey v Genting Casinos (UK) Ltd t/a Crackfords** [2017] UKSC 67. Since the effective cause of the Claimant's dismissal - the discriminatory treatment complained of - was the excluded condition, it followed that the ET did not err in dismissing the complaint of disability discrimination (**Edmund Nuttall Ltd v Butterfield** [2006] ICR 77 followed and applied).

The ET did not err in conducting the Preliminary Hearing before a Judge sitting alone rather than a full Tribunal since neither party had made a request for a full Tribunal pursuant to **Rule 55 Employment Tribunal Rules of Procedure**. The Tribunal's findings of fact were not perverse. The Tribunal decision was upheld.

**A**      **HER HONOUR JUDGE STACEY**

**B**

1.      This is an appeal from the Employment Tribunal’s (“ET”) Judgment held at North Shields on 1 November 2017 before Employment Judge Johnson sitting alone at an open Preliminary Hearing which found that the Claimant was not disabled within the meaning of section 6 **Equality Act 2010**. The Tribunal found that the Claimant had a tendency to steal which arose as a manifestation of his post traumatic stress disorder. It was treated as an excluded condition which

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did not amount to an impairment pursuant to Regulation 4(1)(b) of the **Equality Act 2010** and **(Disability) Regulations 2010** SI2010/2128. Since the excluded condition was the reason for the discriminatory treatment complained of, the Tribunal dismissed his disability discrimination

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complaint, leaving his unfair dismissal complaint for determination at a further Tribunal hearing<sup>1</sup>. The Judgment, with Reasons, was sent to the parties on 10 November 2017. The Appellant before me today is the Claimant below and I shall continue to refer to the parties by reference to their status below in accordance with **Practice Direction** paragraph 16.4.

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2.      There are three grounds of appeal, which were permitted to go forward to a Full Hearing by Soole J at a Rule 3 (10) Hearing in this case. Firstly, that there was an error in the Tribunal’s conclusion that the Claimant had a tendency to steal; secondly, there had been an error for the issue to have been decided by an Employment Judge (“EJ”) sitting alone; and, thirdly, a perversity appeal in relation to the Tribunal’s findings of fact.

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3.      The background and history is as follows. The Claimant has brought ET proceedings for unfair dismissal and disability discrimination following his dismissal by the Respondent after nine years’ service, latterly as an Anti-Social Behaviour Officer. Before working for the

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<sup>1</sup> It has been stayed pending this appeal.

**A** Respondent, he had worked as a Police Officer for some seventeen years. The Respondent did not accept that the Claimant was a disabled person with the meaning of section 6 of the **Equality Act 2010** (“EqA”).

**B** 4. The Claimant was initially a litigant in person but Solicitors were subsequently instructed by him, following which the issues were clarified at a closed Preliminary Hearing before an EJ  
**C** on 2 December 2016. The Claimant asserted that he had post-traumatic stress disorder and associated amnesia and memory loss, which on occasions caused him to suffer forgetfulness and  
**D** that such forgetfulness would include him forgetting to pay for items before leaving a shop. It is common ground that on 24 August 2015, he left Boots the Chemist, not having paid for items he had placed in his bag, and that the consequence of his doing so ultimately led to his dismissal. It is not in dispute that what happened in Boots that day was the effective cause of his dismissal.

**E** 5. In relation to the disability discrimination complaints the issues were clarified as follows:

*“5 Section 19: Indirect discrimination in relation to disability*

**5.1 Did the respondent apply the following provision, criteria and/or practice (‘the provision’) generally, namely**

**5.1.1. The policies and procedures relied on by the respondent when dismissing him including the standards of conduct and the requirement to disclose the issue of the penalty notice.**

**F** **5.2 Does the application of the provision put people with the claimant’s mental impairment at a particular disadvantage when compared with persons who do not have this protected characteristic?**

**5.3 Did the application of the provision put the claimant at that disadvantage in that those with the claimant’s impairment are more likely to be accused of criminal offences e.g. by forgetting to pay for items in a shop and being more likely to be issued with a fixed penalty notice and such people are less likely to remember to report incidents.**

**G** **5.4 Does the respondent show that the treatment was a proportionate means of achieving a legitimate aim? [NOTE This assumes that the respondent will amend its response to include justification]**

*6. Section 15: Discrimination arising from disability*

**H** **6.1 The allegation of unfavourable treatment as “something arising in consequence of the claimant’s disability” falling within section 39 Equality Act was the dismissal (including the rejection of his appeal). The claimant asserts that his behaviour on 24 August 2015 which led to the accusation of shoplifting and the issue of the fixed penalty notice was something arising from his disability.**

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6.2 Does the claimant prove that the respondent treated the claimant as set out in paragraph 6.1 above?

6.3 Did the respondent treat the claimant as aforesaid because of the “something arising” in consequence of the disability?

6.4 Does the respondent show that the treatment was a proportionate means of achieving a legitimate aim? The respondent relies on the aim of maintaining the standards required of those in public office and the need to maintain the confidence of the public in the service they provide.

*7. Reasonable adjustments: section 20 and section 21*

7.1 Did the respondent apply the PCP set out in paragraph 5.1.1.

7.2 Did the application of any such provision put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled as set out in paragraph 5.3?”

6. Following that clarification, the Claimant provided further information requested by the Respondent and explained that, in relation to the indirect discrimination complaint, it was said that his condition puts him at an increased risk at being issued with a fixed penalty notice when compared with persons who do not share his disability. The reasonable adjustment case had always been put on the basis of his having a tendency to behave in that way, in other words to forget on occasions to pay for items in shops, and it was implicit that what happened on 24 August 2015 had not been an isolated or a one-off act.

7. In the section 15 complaint the Claimant also puts his behaviour on 24 August 2015 at the heart of his case, asserting that the accusation of shoplifting and subsequent issue of a fixed penalty notice was something arising from his disability. His contention was that the behaviour was not dishonest, not that he did not have a tendency to behave in that way.

8. A joint expert, Dr Robinson, was instructed on 5 May 2017. She agreed with the Claimant’s assertion that he suffered from severe depression, PTSD and associative amnesia. She answered a number of specific questions that the parties had jointly agreed be put to her. Following receipt of Dr Robinson’s report, the Respondent amended its defence and response to the claim and sought at that stage to rely on Regulation 4(1)(b) of the **2010 Regulations** and to



A assert in paragraph 2 of page 78 as follows, “Further, it is averred that the claimant is not entitled  
to the protection of the **Equality Act 2010** in relation to any discrimination he experienced, which  
is not admitted, as a consequence of any ‘tendency to steal’, because that is an excluded condition  
under the Act.”

B

9. There was then a further Preliminary Hearing on 22 May 2017 when the case was listed  
for yet another Preliminary Hearing on 1 November 2017 to determine the disability issue since  
it was thought it would shorten the hearing time by at least 1 day. No request was made by either  
party to list the 1 November 2017 Preliminary Hearing before a full Tribunal.

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D 10. **Rule 55 of the Employment Tribunals Rules of Procedure** provides as follows:

“Constitution of tribunal for preliminary hearings

55. Preliminary hearings shall be conducted by an Employment Judge alone, except that where  
notice has been given that any preliminary issues are to be, or may be, decided at the hearing a  
party may request in writing that the hearing be conducted by a full tribunal in which case an  
Employment Judge shall decide whether that would be desirable.”

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11. It is therefore common ground that absent a written request by one or other of the parties,  
or a decision of the Tribunal’s own motion, a Preliminary Hearing will be heard by a Judge sitting  
alone pursuant to the **Employment Tribunal Act 1996**.

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12. The Claimant had prepared a witness statement in anticipation of the Preliminary Hearing  
and addressed head-on the amended defence of the Respondent County Council stating at  
paragraph 6 to 8 as follows:

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“6. The only argument put forward by the Respondent to date is based on the premise that as a  
result of my condition I have a tendency to steal and so I should not benefit from the protection  
offered by the Equality Act. This argument is very hurtful to me because I am a 52-year-old  
man (and former police officer) with no previous cautions/convictions for anything let alone  
theft.

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7. A tendency would imply that this has happened multiple times which is simply not the case. The Respondent has produced no evidence to suggest that the incident which occurred on 24th August 2015 was anything other than an isolated incident.

8. "Stealing" is theft and requires dishonesty and intent. The evidence I have produced clearly shows that my actions when in a dissociative state (caused by my disability- please see pages 225 and 582 of the joint bundle) are entirely lacking in intent and I can confirm that during a dissociative state I would be incapable of dishonesty. Also, I have never been convicted of theft."

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13. Prior to the hearing, the Claimant obtained a letter from his care co-ordinator with Tees, Esk and Wear Valleys NHS Trust warning that his giving evidence may lead him to dissociate.

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The letter described the symptoms and stated that if this were to occur, he should be kept in a safe place and have someone with him. On the day of hearing, neither the Claimant, nor his counsel on that occasion, Mr J Anderson, requested any adjustments to the hearing. It is not recorded whether either his solicitor or any family or friends were there to support him.

D

14. Mr Anderson decided not to call his client to give evidence. The Claimant attended the hearing centre but remained outside the hearing room. The ET therefore had no live evidence before it but had a bundle consisting of 587 pages, the Claimant's witness statement and the witness statement of a Mr Owen Cleugh, a Consumer Protection Manager for the Respondent. It does not appear to have been a problem however both counsel, whose skills were praised by the EJ, agreed that the Claimant's live evidence was not necessary. The primary facts did not appear to be in dispute and the case proceeded on legal argument and the proper inferences and conclusions to be drawn from the primary agreed facts.

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15. At the Tribunal hearing it was conceded by the Respondent that the Claimant had the mental impairment of PTSD as at 24 August 2015, which had a substantial, long-term and adverse effect on his ability to carry out normal day-to-day activities. On the face of it therefore, the Claimant was disabled within the meaning of section 6 **Equality Act 2010**. However, the Respondent relied on the Regulations in its submission that in the circumstances of the case, it

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A was an excluded condition by virtue of section 6(5) and (6) of the **Equality Act 2010** and the  
Schedule. The nub of the dispute between the parties was whether events of 24 August 2015  
demonstrated that the Claimant had a tendency to steal, or exhibited merely a tendency to memory  
B loss and forgetfulness. It appears to have been accepted by the Claimant that if the Respondent  
could prove to the civil standard that what happened in Boots on 24 August 2015 amounted to a  
tendency to steal, then his condition would be excluded by virtue of the Regulations because he  
was dismissed in consequence of events that day and he would be deemed not to be disabled.

C  
16. The ET correctly understood that it is necessary not only to consider if a Claimant has an  
excluded condition pursuant to Regulation 4(1)(b), but also how it relates to the act of  
D discrimination complained of. As explained in the statutory guidance on matters to be taken into  
account in determining questions relating to the definition of disability paragraph A13 and  
explored in the cases of **Edmund Nuttall Ltd v Butterfield** [2006] ICR 77 and **Governing Body**  
E **of X Endowed Primary School v Special Educational Needs and Disability Tribunal (No 1)**  
[2009] IRLR 1007, it is important to determine the basis for the alleged discrimination. If the  
alleged discrimination was a result of an excluded condition, the exclusion will apply. However,  
if the alleged discrimination is specifically related to the actual disability which gives rise to an  
F excluded condition, or is more tangentially related, the exclusion may not apply. The excluded  
condition is not considered in a vacuum but by reference to, and in the context of, the alleged  
discrimination complained of.

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17. The Tribunal correctly directed itself that the burden of proof was on the Respondent to  
prove that the condition was excluded.

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18. It was a mixed question of fact and law. It is accepted today that the Tribunal gave itself  
an impeccable self-direction concerning all the legal issues before it. It referenced the applicable

A test for dishonesty in light of the then recent Supreme Court Judgment of Ivey v Genting Casinos  
(UK) Limited (t/a Crockfords) [2017] UKSC 67, citing paragraph 48 in paragraph 21 of the ET  
B Judgment that the question of dishonesty is a jury question of fact and standards and that it is  
ultimately for the court to decide whether conduct amounted to in this case theft, and that the  
standard is objective. The Tribunal's self-direction on Regulation 4 (1) and on causation at  
paragraphs 9 – 14 of the Judgment it is also accepted as impeccable.

C 19. Since perversity is alleged it is necessary to set out the Tribunal's findings of fact  
contained in paragraphs 7.1 to 7.10:

D "7.1 The claimant was a Police Officer from September 1989 until November 2005. Following  
his resignation from the police force, he worked with Durham County Council, initially as a  
Fraud Officer, and then as an Antisocial Behaviour Officer. He had a clean disciplinary record.

E 7.2 The claimant was subject to the respondent's code of conduct, under which public sector  
employees have a duty to act with honesty and integrity. The code of conduct itself specifies  
that breaches of any element of the code (inside or outside of work) are a serious matter and  
could result in disciplinary action, up to and including a dismissal. Along with other employees  
carrying out the same job, the claimant was required by Durham Constabulary to be vetted to  
Non Police Personnel Vetting (NPPV) Level 2, to ensure their suitability for clearance. This was  
considered to be an essential requirement for the post and is set out in the terms and conditions  
of appointment. The requirement is considered to be essential for the claimant's job because a  
fundamental aspect of the role of an Antisocial Behaviour Officer includes the necessity to work  
in close partnership with the police. The remit of the role includes access to police information  
and intelligence, unaccompanied access to police stations and being involved in multi-agency  
meetings to resolve complex antisocial behaviour cases. It is not disputed that the claimant was  
fully aware of the standards required for his job.

F 7.3 On 24 August 2015, the claimant went into a local Boots store and left the store without  
paying for goods which he had placed into his shopping bag. The claimant was apprehended  
and the police were called. The relevant extracts from the police officer's notebook appear at  
pages 96- 102 in the bundle. The claimant's admission is recorded at pages 99- 100 in the  
following terms: -

G "My name is Anthony Wood and my date of birth is 2.8.65. I agree that I have been  
cautioned by PC 2019 Armstrong and I admit that I am responsible for the theft of a  
chicken and bacon wrap, a bottle of Nivea suntan lotion and 2 x Sure deodorant sprays  
from Boots Chemist in Durham Market Place on 24.8.15. I took them from the display  
in the store and placed them into a carrier bag that I had without paying for them or  
attempting to pay for them as I left the store. I was detained outside the store by  
security staff and I had no intention of paying for the items as I had no money on me  
and despite having the means to pay on me, I chose not to. I have made this admission  
of my own free will and I have not been pressured into making it."

The claimant's signature follows that statement.

H 7.4 At page 97 of the bundle is a note which records that at the time of this incident, when  
approached by the Boots security guard, the claimant had removed his Durham County Council  
ID lanyard and placed it in his pocket. When searched by the police, the claimant had the  
lanyard in his pocket, but when asked about his occupation, the claimant informed the officers  
that he "worked in security - travelling from site to site". This was untrue.

A

7.5 The claimant was issued with a formal fixed penalty notice, known as a Penalty Notice for Disorder (PND). This required the claimant to pay a fine of £90 as an alternative to a formal prosecution for theft. The claimant agreed to accept the PND.

7.6 The claimant paid the £90 fine on 14 September. Before doing so, he consulted two separate solicitors to obtain advice as to whether or not he should do so. He was advised that paying the fixed penalty did not amount to an admission of guilt and the claimant therefore paid the fine.

B

7.7 The claimant did not inform the respondent about the incident, nor the issue of the fixed penalty notice, as he was obliged to do under the respondent's code of practice. The claimant did not formally report the matter to the police, as he was also obliged to do.

7.8 In October 2015, the claimant's Non Police Personnel Vetting Level 2 application was refused as a result of the PND issued in August. As a result, the claimant was not permitted to enter any police premises or buildings under any circumstances, with immediate effect. That meant that the claimant was effectively unable to carry out his duties as an Antisocial Behaviour Officer. That matter was brought to the attention of the claimant's Line Manager Mr Ian Hoult, on the morning of 19 October 2015. The following day, Mr Hoult met with the claimant and asked him a series of questions designed to elicit from the claimant details about the incident at Boots in August. The questions put to the claimant were: -

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- Was he aware of any information that the council should be aware of?
- Has something happened outside of work that we need to know about?
- Has there been anything happening with the police that he should be making us aware of?
- Is there something that has happened in Durham City Centre that we should be aware of?
- Is there something that has happened at Boots the Chemist in Durham which we should be aware of?

D

The claimant replied "No" to those questions. Mr Hoult then pointed out that the police had provided information to him that the claimant had been stopped for shoplifting, charged and that he had paid a fixed penalty notice. The claimant then accepted that he could remember about the incident, but that it had not been his fault. The claimant then explained that he had been seeing a consultant over the past 18 months as they thought he had a disorder that affected his memory.

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7.9 The claimant was suspended that day by Mr Hoult and by letter dated 18 November, invited to attend a disciplinary hearing on 14 January 2016. The allegations were described as follows:

F

- Criminal misconduct outside of the workplace which impacts on your ability to undertake your role within the council.
- Withdrawal of your non police personnel vetting (NPPV) accreditation as a result of your own misconduct which impacts on your ability to undertake your role with the council.
- Your actions have the potential to cause serious reputational damage to the council and may give rise to a fundamental breakdown in the council's trust and confidence in their employment relationship with you.

G

7.10 Following a prolonged disciplinary process, the claimant was dismissed by letter dated 19 May 2016 (page 200-202). His appeal was itself dismissed on 13 July 2016, following a hearing on 29 June."

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20. Having made those findings of fact, the Tribunal also considered the medical evidence, the evidence of the Claimant from his witness statement regarding his condition and the

A surrounding facts and the circumstances leading to the issue of the fixed penalty notice and his  
behaviour thereafter. The Judgment then listed the relevant matters that the Tribunal had  
considered most carefully in deciding what an ordinary person would consider to be dishonest in  
B numbered sub-paragraphs of paragraph 25 of the Judgment:

“25.1 The medical report of Dr Robinson together with her answers to the questions put to her.

25.2 The fact that the claimant had placed the items of shopping into his own shopping bag.

25.3 The fact that the claimant left the Boots store without paying for the goods.

25.4 The fact that the claimant removed his identification lanyard when approached by the  
C security guard.

25.5 The fact that the claimant lied about his occupation.

25.6 The notes contained in the police officer’s notebook.

25.7 The fact that the claimant had signed those notes.

25.8 The claimant spoke to two different solicitors the following day.

25.9 The claimant failed to report the matter to his employer.

25.10 The claimant failed to report the matter to the police.

25.11 Then subsequently challenged about the matter, the claimant could only remember telling  
a member of staff at the Boots make-up counter that he intended to go to a cash point to obtain  
some cash, that being something which may exculpate him, but could not remember anything  
which may be held against him.”

E 21. Drawing those threads together, the Tribunal Judge found that he was satisfied that  
“applying the objective standards of ordinary, reasonable and honest person armed with all the  
F information, the Claimant’s conduct is to be regarded as dishonest.” In paragraph 27, the  
Judgment went on:

“The question of whether or not the claimant satisfies the definition of disability must be  
considered in the light of the basis for the alleged discrimination. I am satisfied in the claimant’s  
case that the alleged discrimination is as a result of an excluded condition. The withdrawal of  
his police accreditation was caused by the commission of an offence which led to the issue (and  
acceptance) of the PND. The issue of the PND and failure to report the incident to his employer  
led to the suspension, disciplinary hearing and dismissal. As a matter of causation, I am satisfied  
that the reason for the less favourable treatment is the issue of the PND which in turn was caused  
by the claimant stealing goods from the Boots store. I am satisfied that the claimant’s mental  
impairment (post traumatic stress disorder) amounts to a legitimate medical impairment which  
manifests itself in what ordinary, decent people in possession of the facts would objectively  
consider to be a tendency to steal. That is an excluded condition under Regulation 4 of the 2010  
Regulations as is clearly explained by paragraph A13 in the 2011 Guidance. The claimant’s  
tendency to steal is either a consequence of, or a manifestation of, his impairment which  
constitutes a disability for the purposes of the Act. The alleged discrimination is therefore a  
result of an excluded condition and the exclusion in Regulation 4 therefore applies.”

A 22. The Judge concluded that he was satisfied that the Claimant's mental impairment  
amounted to a legitimate medical impairment, which manifests itself in what ordinary decent  
B people in possession of the facts would objectively consider to be a tendency to steal and which,  
by virtue of the precise allegations of the treatment complained of as amounting to disability  
discrimination, made it an excluded condition.

C 23. It is fortunate in this case that there is no dispute about the facts which led to the dismissal,  
dismissal being the act of discrimination complained of in each of the three disability  
D discrimination causes of action. The Tribunal summarised the cause of the dismissal as being the  
issue of the PND and failure to report the incident to his employer, which is a succinct distillation  
of the ET3<sup>2</sup> and not disputed by the Claimant. Therefore, the critical question of causation is  
answered and agreed, there is no lacuna or vacuum of the type that occurred in both **Edmund**  
**Nuttall Ltd v Butterfield** [2006] ICR 77 and **Governing Body of X Endowed Primary School**  
**v Special Educational Needs and Disability Tribunal (No 1)** [2009] IRLR 1007]. There was  
E therefore no uncertainty for the Employment Tribunal in the examination of whether the alleged  
discrimination related to protected disability, or an excluded condition, or to both, because the  
cause of the dismissal was not disputed.

F **A Tendency to Steal**

G 24. Turning to the grounds of appeal, the first is that the Tribunal erred in finding a tendency  
to steal. The Claimant's first criticism is that even if the Tribunal had concluded that the incident  
on 24 August 2015 in Boots amounted to theft, it fell short of demonstrating a tendency, and there

H <sup>2</sup> The ET3 states three reasons (1) criminal misconduct outside the workplace, which impacts upon the Claimant's  
ability to undertake his role with the council; (2) the withdrawal of the non-police personnel vetting accreditation  
as a result of his own misconduct, which impacts on his ability to undertake his role with the council; and (3) the  
actions had the potential to cause serious reputational damage to the council and may give rise to fundamental  
breakdown in the council's trust and confidence and the employment relationship (p62). But in reality (2) and (3)  
were inextricably linked to (1) and the ET summary was perfectly accurate.

**A** was nothing in the Tribunal’s Decision directing itself as to what is meant by the term “tendency.”  
However, it is abundantly clear from the Claimant’s pleadings throughout that he has always put  
his case on the basis that he has a tendency to do whatever the correct description is for what  
**B** happened in Boots on 24 August 2015.

25. He has made his case on the basis that it was not a one-off matter or an isolated event, but  
part of his condition and a manifestation of his PTSD which occurs and recurs, as is evident from  
**C** the agreed issues from the Preliminary Hearing of 2 December 2016 set out above. Therefore, it  
is clear that it was the Claimant’s case that he had a tendency to behave in a certain way that put  
him at a disadvantage compared to those who are not disabled in circumstances amounting to  
**D** indirect discrimination. Therefore, no criticism can be fairly levelled at the Tribunal for not  
addressing the point in greater detail since it was not in dispute.

26. The next question is whether it was an error of law for the Tribunal to define the way in  
which the Claimant behaved on 24 August 2015 as stealing, as opposed to forgetfulness without  
**E** intent or any dishonesty; it being the Claimant’s case that he simply walked out of shops without  
having paid for goods because of a dissociative state. The difficulty for the Claimant is that it  
**F** was a matter of fact for the Tribunal Judge to determine and, on the face of it (subject to the  
perversity challenge in ground 3 below), he was entitled to reach his conclusion. The question  
of dishonesty is a question for the fact-finder be that a jury or an Employment Judge see **Ivey v**  
**G** **Genting**.

27. The case of **R v Hamer** [2011] 1 WLR CACD ingeniously relied on by Ms Banton, on  
**H** close examination does not assist. Whilst a PND does not amount to a conviction or meet the  
criminal standard of proof of theft, **Hamer** is not authority for the proposition that an EJ or other



**A** Civil Court or Tribunal, is precluded from concluding that the issuing of a PND, meets the dishonesty test to the civil standard.

**B** 28. From the evidence before the ET I can entirely see why the EJ considered that the Claimant was dishonest, particularly when one reads the statement that the Claimant has signed confirming that he admits that he had stolen something together with his behaviour in the following days thereafter and his self-serving selective memory in the interview with his line manager Mr Hoult on 20 October 2015. On the face of it, it was a conclusion that was open to the Tribunal to find.

**C**

**EJ Sitting Alone**

**D** 29. The second ground of appeal is the alleged error for an EJ to make a determination sitting alone has no merit. The Claimant could have requested members pursuant to **Rule 55**, but neither he nor his representative did so. It is too late to regret that decision now, and in any event, it is by no means certain that the Tribunal would have agreed to the request, had it been made.

**E**

**Perversity**

**F** 30. The third ground is perversity. Ms Banton has helpfully been precise and specific in her perversity challenge. Firstly, the finding at 7.4 set out above which was taken from a note at p91. This is a note that was prepared by an employee of the council reporting what was said to her or him by the police which had, in turn, been said to the Police Officer by the Security Guard at the store. The handwritten note is not helpful for the Claimant because it states that the Claimant had hidden his lanyard and given an incorrect explanation of his occupation when questioned at the time. The ET was entitled to take account of the note – the rules of hearsay do not apply strictly in the ET and the Claimant’s then representative had told the Tribunal that the facts were not in dispute and there was no need for the Claimant to give evidence. The agreed medical

**A** evidence was that the Claimant's condition was unlikely to be related to the matters in the note. The ET was entitled to conclude that the Claimant gave an untruthful answer. Furthermore, the Claimant's position was that he has forgotten everything that happened that day, and he was not  
**B** in a position to challenge the note in any event. Therefore, the Tribunal has not made a perverse finding in that regard.

**C** 31. The second perversity challenge is to the finding at 7.7 that the Claimant did not inform the Respondent about the incident as he was obliged to do under the Respondent's code of practice. It is common ground that he did not inform the Respondent about the incident. The only issue is whether or not he was obliged to do so under the code of practice. The code of  
**D** practice is set out in part in the Judgment. Whilst the point could perhaps be made that the issuing of a FPN per se would not require disclosure, or at least is a grey area, the loss of his accreditation and Level 2 NPPV (see findings of fact paragraph 7.2 in paragraph 19 above) unarguably required  
**E** him to inform his manager under paragraph 4.7 of the code.

**F** 32. His failure to do so is all the more interesting when the day after receiving the fixed penalty notice, the Claimant consulted not one, but two, Solicitors. He must have been well aware of the risks and the seriousness of the matter, yet still chose not to inform his employer. Furthermore, at the meeting with his line manager Mr Hoult, he was given the opportunity to disclose the matter and did not. It would appear to have been a conscious decision not to seek to  
**G** confess and avoid. The Tribunal's findings are not perverse.

**H** 33. A potentially more sustainable perversity ground is the finding at paragraph 8.5 and also referred to in paragraphs 25 and 27, that the Claimant failed to inform Durham Constabulary of the incident, which is conceded by the Respondent as being incorrect. It is evident from the

A documents in the bundle before the Tribunal (although not referred to in the Claimant’s witness  
statement), that six weeks after the incident he went to the trouble of sending a guaranteed, signed  
for delivery letter to the Police, informing them that he had been advised by Solicitors that he  
B should not have paid the penalty notice.

34. Therefore, it was factually incorrect for the Tribunal blandly to assert that the Claimant  
did not inform the Police about the matter. The difficulty for the Claimant however is that the  
C factual detail was immaterial to the ET’s Decision and overall conclusion. In an employment  
dispute, it is hard to see how it is relevant whether he drew Durham’s attention to the matter in  
an attempt to get reimbursement for the fixed penalty notice that he had paid.

D 35. If, on the other hand, there had been evidence of his having informed his employer  
promptly, it might have been different.

E 36. The final perversity challenge was a further attack, from a different angle, to the note  
described in paragraph 7.4 of the ET Judgment. For the reasons set out in paragraph 30 of this  
Judgment, no perversity is identified.

F 37. For those Reasons, I dismiss the appeal and uphold the Decision of the ET. The unfair  
dismissal claim can now be listed before the Tribunal to be determined.

G 38. By way of postscript, it is worth re-iterating that caution needs to be exercised by a  
Tribunal when deciding whether a Preliminary Hearing is appropriate and the guidance in **SCA**  
**Packaging Limited v Boyle (Northern Ireland)** [2009] IRLR 746 per Lord Hope at paragraph  
H 9 deserves repetition.

“As Lord Scarman said in *Tilling v Whiteman [1980] AC 1*, 25, preliminary points of law are too  
often treacherous short cuts. Even more so where the points to be decided are a mixture of fact

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and law. That the power to hold a pre-hearing exists is not in doubt: Industrial Tribunals (Constitution and Rules of Procedure) Regulations (Northern Ireland) 2005 (SR 2005/150), Schedule 1, rule 18. There are, however, dangers in taking what looks at first sight to be a short cut but turns out to be productive of more delay and costs than if the dispute had been tried in its entirety, as Mummery J said in National Union of Teachers v Governing Body of St Mary's Church of England (Aided) Junior School [1995] ICR 317, 323. The essential criterion for deciding whether or not to hold a pre-hearing is whether, as it was put by Lindsay J in CJ O'Shea Construction Ltd v Bassi [1998] ICR 1130, there is a succinct, knockout point which is capable of being decided after only a relatively short hearing. This is unlikely to be the case where a preliminary issue cannot be entirely divorced from the merits of the case, or the issue will require the consideration of a substantial body of evidence. In such a case it is preferable that there should be only one hearing to determine all the matters in dispute.”

39. In this case there was no knockout point since the unfair dismissal complaint remains to be determined and there is overlap in the issues before the Preliminary Hearing and the unfair dismissal claim, which would have been better dealt with together. The anticipated saving of one day of Tribunal hearing was also illusory. In future, it would be advisable for Tribunals to think extremely carefully before listing as a Preliminary Hearing matters involving **Regulation 4** where there is also a free-standing wrongful or unfair dismissal complaint unless the issues are genuinely discrete.

Appeal No. UKEAT/0099/18/OO

**EMPLOYMENT APPEAL TRIBUNAL**  
FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal  
On 3 September 2018

**Before**

**HER HONOUR JUDGE STACEY**

**(SITTING ALONE)**

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MR A WOOD

APPELLANT

DURHAM COUNTY COUNCIL

RESPONDENT

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Transcript of Proceedings

JUDGMENT

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## APPEARANCES

For the Appellant

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## **SUMMARY**

### **DISABILITY DISCRIMINATION – Exclusions/jurisdictions**

The Tribunal had not erred in concluding that a manifestation of the Claimant's post-traumatic stress disorder and dissociative amnesia was a tendency to steal which was an excluded condition pursuant to Regulation 4(1)(b) **Equality Act 2010 (Disability) Regulations 2010** (SI 2010/2128). The ET was entitled, on the evidence, to reject the Claimant's contention that his behaviour merely memory loss and forgetfulness and not dishonest. The Tribunal had correctly applied **Ivey v Genting Casinos (UK) Ltd t/a Crackfords** [2017] UKSC 67. Since the effective cause of the Claimant's dismissal - the discriminatory treatment complained of - was the excluded condition, it followed that the ET did not err in dismissing the complaint of disability discrimination (**Edmund Nuttall Ltd v Butterfield** [2006] ICR 77 followed and applied).

The ET did not err in conducting the Preliminary Hearing before a Judge sitting alone rather than a full Tribunal since neither party had made a request for a full Tribunal pursuant to **Rule 55 Employment Tribunal Rules of Procedure**. The Tribunal's findings of fact were not perverse. The Tribunal decision was upheld.

**A** HER HONOUR JUDGE STACEY

**B** 1. This is an appeal from the Employment Tribunal’s (“ET”) Judgment held at North Shields  
on 1 November 2017 before Employment Judge Johnson sitting alone at an open Preliminary  
Hearing which found that the Claimant was not disabled within the meaning of section 6 **Equality**  
**C** **Act 2010**. The Tribunal found that the Claimant had a tendency to steal which arose as a  
manifestation of his post traumatic stress disorder. It was treated as an excluded condition which  
did not amount to an impairment pursuant to Regulation 4(1)(b) of the **Equality Act 2010** and  
**(Disability) Regulations 2010** SI2010/2128. Since the excluded condition was the reason for  
the discriminatory treatment complained of, the Tribunal dismissed his disability discrimination  
**D** complaint, leaving his unfair dismissal complaint for determination at a further Tribunal hearing<sup>1</sup>.  
The Judgment, with Reasons, was sent to the parties on 10 November 2017. The Appellant before  
me today is the Claimant below and I shall continue to refer to the parties by reference to their  
status below in accordance with **Practice Direction** paragraph 16.4.

**E** 2. There are three grounds of appeal, which were permitted to go forward to a Full Hearing  
by Soole J at a Rule 3 (10) Hearing in this case. Firstly, that there was an error in the Tribunal’s  
**F** conclusion that the Claimant had a tendency to steal; secondly, there had been an error for the  
issue to have been decided by an Employment Judge (“EJ”) sitting alone; and, thirdly, a perversity  
appeal in relation to the Tribunal’s findings of fact.

**G** 3. The background and history is as follows. The Claimant has brought ET proceedings for  
unfair dismissal and disability discrimination following his dismissal by the Respondent after  
nine years’ service, latterly as an Anti-Social Behaviour Officer. Before working for the  
**H**

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<sup>1</sup> It has been stayed pending this appeal.



**A** Respondent, he had worked as a Police Officer for some seventeen years. The Respondent did not accept that the Claimant was a disabled person with the meaning of section 6 of the **Equality Act 2010** (“EqA”).

**B** 4. The Claimant was initially a litigant in person but Solicitors were subsequently instructed by him, following which the issues were clarified at a closed Preliminary Hearing before an EJ  
**C** on 2 December 2016. The Claimant asserted that he had post-traumatic stress disorder and associated amnesia and memory loss, which on occasions caused him to suffer forgetfulness and  
**D** that such forgetfulness would include him forgetting to pay for items before leaving a shop. It is common ground that on 24 August 2015, he left Boots the Chemist, not having paid for items he had placed in his bag, and that the consequence of his doing so ultimately led to his dismissal. It is not in dispute that what happened in Boots that day was the effective cause of his dismissal.

**E** 5. In relation to the disability discrimination complaints the issues were clarified as follows:

*“5 Section 19: Indirect discrimination in relation to disability*

**5.1 Did the respondent apply the following provision, criteria and/or practice (‘the provision’) generally, namely**

**5.1.1. The policies and procedures relied on by the respondent when dismissing him including the standards of conduct and the requirement to disclose the issue of the penalty notice.**

**F** **5.2 Does the application of the provision put people with the claimant’s mental impairment at a particular disadvantage when compared with persons who do not have this protected characteristic?**

**5.3 Did the application of the provision put the claimant at that disadvantage in that those with the claimant’s impairment are more likely to be accused of criminal offences e.g. by forgetting to pay for items in a shop and being more likely to be issued with a fixed penalty notice and such people are less likely to remember to report incidents.**

**G** **5.4 Does the respondent show that the treatment was a proportionate means of achieving a legitimate aim? [NOTE This assumes that the respondent will amend its response to include justification]**

*6. Section 15: Discrimination arising from disability*

**H** **6.1 The allegation of unfavourable treatment as “something arising in consequence of the claimant’s disability” falling within section 39 Equality Act was the dismissal (including the rejection of his appeal). The claimant asserts that his behaviour on 24 August 2015 which led to the accusation of shoplifting and the issue of the fixed penalty notice was something arising from his disability.**

A

6.2 Does the claimant prove that the respondent treated the claimant as set out in paragraph 6.1 above?

6.3 Did the respondent treat the claimant as aforesaid because of the “something arising” in consequence of the disability?

6.4 Does the respondent show that the treatment was a proportionate means of achieving a legitimate aim? The respondent relies on the aim of maintaining the standards required of those in public office and the need to maintain the confidence of the public in the service they provide.

B

*7. Reasonable adjustments: section 20 and section 21*

7.1 Did the respondent apply the PCP set out in paragraph 5.1.1.

7.2 Did the application of any such provision put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled as set out in paragraph 5.3?”

C

6. Following that clarification, the Claimant provided further information requested by the Respondent and explained that, in relation to the indirect discrimination complaint, it was said that his condition puts him at an increased risk at being issued with a fixed penalty notice when compared with persons who do not share his disability. The reasonable adjustment case had always been put on the basis of his having a tendency to behave in that way, in other words to forget on occasions to pay for items in shops, and it was implicit that what happened on 24 August 2015 had not been an isolated or a one-off act.

D

E

7. In the section 15 complaint the Claimant also puts his behaviour on 24 August 2015 at the heart of his case, asserting that the accusation of shoplifting and subsequent issue of a fixed penalty notice was something arising from his disability. His contention was that the behaviour was not dishonest, not that he did not have a tendency to behave in that way.

F

G

8. A joint expert, Dr Robinson, was instructed on 5 May 2017. She agreed with the Claimant’s assertion that he suffered from severe depression, PTSD and associative amnesia. She answered a number of specific questions that the parties had jointly agreed be put to her.

H

Following receipt of Dr Robinson’s report, the Respondent amended its defence and response to the claim and sought at that stage to rely on Regulation 4(1)(b) of the **2010 Regulations** and to

A assert in paragraph 2 of page 78 as follows, “Further, it is averred that the claimant is not entitled  
to the protection of the **Equality Act 2010** in relation to any discrimination he experienced, which  
is not admitted, as a consequence of any ‘tendency to steal’, because that is an excluded condition  
under the Act.”

B

9. There was then a further Preliminary Hearing on 22 May 2017 when the case was listed  
for yet another Preliminary Hearing on 1 November 2017 to determine the disability issue since  
it was thought it would shorten the hearing time by at least 1 day. No request was made by either  
party to list the 1 November 2017 Preliminary Hearing before a full Tribunal.

C

D 10. **Rule 55 of the Employment Tribunals Rules of Procedure** provides as follows:

“Constitution of tribunal for preliminary hearings

55. Preliminary hearings shall be conducted by an Employment Judge alone, except that where  
notice has been given that any preliminary issues are to be, or may be, decided at the hearing a  
party may request in writing that the hearing be conducted by a full tribunal in which case an  
Employment Judge shall decide whether that would be desirable.”

E

11. It is therefore common ground that absent a written request by one or other of the parties,  
or a decision of the Tribunal’s own motion, a Preliminary Hearing will be heard by a Judge sitting  
alone pursuant to the **Employment Tribunal Act 1996**.

F

12. The Claimant had prepared a witness statement in anticipation of the Preliminary Hearing  
and addressed head-on the amended defence of the Respondent County Council stating at  
paragraph 6 to 8 as follows:

G

“6. The only argument put forward by the Respondent to date is based on the premise that as a  
result of my condition I have a tendency to steal and so I should not benefit from the protection  
offered by the Equality Act. This argument is very hurtful to me because I am a 52-year-old  
man (and former police officer) with no previous cautions/convictions for anything let alone  
theft.

H

A

7. A tendency would imply that this has happened multiple times which is simply not the case. The Respondent has produced no evidence to suggest that the incident which occurred on 24th August 2015 was anything other than an isolated incident.

8. "Stealing" is theft and requires dishonesty and intent. The evidence I have produced clearly shows that my actions when in a dissociative state (caused by my disability- please see pages 225 and 582 of the joint bundle) are entirely lacking in intent and I can confirm that during a dissociative state I would be incapable of dishonesty. Also, I have never been convicted of theft."

B

13. Prior to the hearing, the Claimant obtained a letter from his care co-ordinator with Tees, Esk and Wear Valleys NHS Trust warning that his giving evidence may lead him to dissociate.

C

The letter described the symptoms and stated that if this were to occur, he should be kept in a safe place and have someone with him. On the day of hearing, neither the Claimant, nor his counsel on that occasion, Mr J Anderson, requested any adjustments to the hearing. It is not recorded whether either his solicitor or any family or friends were there to support him.

D

14. Mr Anderson decided not to call his client to give evidence. The Claimant attended the hearing centre but remained outside the hearing room. The ET therefore had no live evidence before it but had a bundle consisting of 587 pages, the Claimant's witness statement and the witness statement of a Mr Owen Cleugh, a Consumer Protection Manager for the Respondent. It does not appear to have been a problem however both counsel, whose skills were praised by the EJ, agreed that the Claimant's live evidence was not necessary. The primary facts did not appear to be in dispute and the case proceeded on legal argument and the proper inferences and conclusions to be drawn from the primary agreed facts.

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15. At the Tribunal hearing it was conceded by the Respondent that the Claimant had the mental impairment of PTSD as at 24 August 2015, which had a substantial, long-term and adverse effect on his ability to carry out normal day-to-day activities. On the face of it therefore, the Claimant was disabled within the meaning of section 6 **Equality Act 2010**. However, the Respondent relied on the Regulations in its submission that in the circumstances of the case, it

H

A was an excluded condition by virtue of section 6(5) and (6) of the **Equality Act 2010** and the  
Schedule. The nub of the dispute between the parties was whether events of 24 August 2015  
demonstrated that the Claimant had a tendency to steal, or exhibited merely a tendency to memory  
B loss and forgetfulness. It appears to have been accepted by the Claimant that if the Respondent  
could prove to the civil standard that what happened in Boots on 24 August 2015 amounted to a  
tendency to steal, then his condition would be excluded by virtue of the Regulations because he  
was dismissed in consequence of events that day and he would be deemed not to be disabled.

C  
16. The ET correctly understood that it is necessary not only to consider if a Claimant has an  
excluded condition pursuant to Regulation 4(1)(b), but also how it relates to the act of  
D discrimination complained of. As explained in the statutory guidance on matters to be taken into  
account in determining questions relating to the definition of disability paragraph A13 and  
explored in the cases of **Edmund Nuttall Ltd v Butterfield** [2006] ICR 77 and **Governing Body**  
E **of X Endowed Primary School v Special Educational Needs and Disability Tribunal (No 1)**  
[2009] IRLR 1007, it is important to determine the basis for the alleged discrimination. If the  
alleged discrimination was a result of an excluded condition, the exclusion will apply. However,  
if the alleged discrimination is specifically related to the actual disability which gives rise to an  
F excluded condition, or is more tangentially related, the exclusion may not apply. The excluded  
condition is not considered in a vacuum but by reference to, and in the context of, the alleged  
discrimination complained of.

G  
17. The Tribunal correctly directed itself that the burden of proof was on the Respondent to  
prove that the condition was excluded.

H  
18. It was a mixed question of fact and law. It is accepted today that the Tribunal gave itself  
an impeccable self-direction concerning all the legal issues before it. It referenced the applicable

A test for dishonesty in light of the then recent Supreme Court Judgment of Ivey v Genting Casinos  
B (UK) Limited (t/a Crockfords) [2017] UKSC 67, citing paragraph 48 in paragraph 21 of the ET  
C Judgment that the question of dishonesty is a jury question of fact and standards and that it is  
ultimately for the court to decide whether conduct amounted to in this case theft, and that the  
standard is objective. The Tribunal's self-direction on Regulation 4 (1) and on causation at  
paragraphs 9 – 14 of the Judgment it is also accepted as impeccable.

19. Since perversity is alleged it is necessary to set out the Tribunal's findings of fact  
contained in paragraphs 7.1 to 7.10:

7.1 The claimant was a Police Officer from September 1989 until November 2005. Following  
his resignation from the police force, he worked with Durham County Council, initially as a  
Fraud Officer, and then as an Antisocial Behaviour Officer. He had a clean disciplinary record.

7.2 The claimant was subject to the respondent's code of conduct, under which public sector  
employees have a duty to act with honesty and integrity. The code of conduct itself specifies  
that breaches of any element of the code (inside or outside of work) are a serious matter and  
could result in disciplinary action, up to and including a dismissal. Along with other employees  
carrying out the same job, the claimant was required by Durham Constabulary to be vetted to  
Non Police Personnel Vetting (NPPV) Level 2, to ensure their suitability for clearance. This was  
considered to be an essential requirement for the post and is set out in the terms and conditions  
of appointment. The requirement is considered to be essential for the claimant's job because a  
fundamental aspect of the role of an Antisocial Behaviour Officer includes the necessity to work  
in close partnership with the police. The remit of the role includes access to police information  
and intelligence, unaccompanied access to police stations and being involved in multi-agency  
meetings to resolve complex antisocial behaviour cases. It is not disputed that the claimant was  
fully aware of the standards required for his job.

7.3 On 24 August 2015, the claimant went into a local Boots store and left the store without  
paying for goods which he had placed into his shopping bag. The claimant was apprehended  
and the police were called. The relevant extracts from the police officer's notebook appear at  
pages 96- 102 in the bundle. The claimant's admission is recorded at pages 99- 100 in the  
following terms: -

"My name is Anthony Wood and my date of birth is 2.8.65. I agree that I have been  
cautioned by PC 2019 Armstrong and I admit that I am responsible for the theft of a  
chicken and bacon wrap, a bottle of Nivea suntan lotion and 2 x Sure deodorant sprays  
from Boots Chemist in Durham Market Place on 24.8.15. I took them from the display  
in the store and placed them into a carrier bag that I had without paying for them or  
attempting to pay for them as I left the store. I was detained outside the store by  
security staff and I had no intention of paying for the items as I had no money on me  
and despite having the means to pay on me, I chose not to. I have made this admission  
of my own free will and I have not been pressured into making it."

The claimant's signature follows that statement.

7.4 At page 97 of the bundle is a note which records that at the time of this incident, when  
approached by the Boots security guard, the claimant had removed his Durham County Council  
ID lanyard and placed it in his pocket. When searched by the police, the claimant had the  
lanyard in his pocket, but when asked about his occupation, the claimant informed the officers  
that he "worked in security - travelling from site to site". This was untrue.

A

7.5 The claimant was issued with a formal fixed penalty notice, known as a Penalty Notice for Disorder (PND). This required the claimant to pay a fine of £90 as an alternative to a formal prosecution for theft. The claimant agreed to accept the PND.

7.6 The claimant paid the £90 fine on 14 September. Before doing so, he consulted two separate solicitors to obtain advice as to whether or not he should do so. He was advised that paying the fixed penalty did not amount to an admission of guilt and the claimant therefore paid the fine.

B

7.7 The claimant did not inform the respondent about the incident, nor the issue of the fixed penalty notice, as he was obliged to do under the respondent's code of practice. The claimant did not formally report the matter to the police, as he was also obliged to do.

7.8 In October 2015, the claimant's Non Police Personnel Vetting Level 2 application was refused as a result of the PND issued in August. As a result, the claimant was not permitted to enter any police premises or buildings under any circumstances, with immediate effect. That meant that the claimant was effectively unable to carry out his duties as an Antisocial Behaviour Officer. That matter was brought to the attention of the claimant's Line Manager Mr Ian Hoult, on the morning of 19 October 2015. The following day, Mr Hoult met with the claimant and asked him a series of questions designed to elicit from the claimant details about the incident at Boots in August. The questions put to the claimant were: -

C

- Was he aware of any information that the council should be aware of?
- Has something happened outside of work that we need to know about?
- Has there been anything happening with the police that he should be making us aware of?
- Is there something that has happened in Durham City Centre that we should be aware of?
- Is there something that has happened at Boots the Chemist in Durham which we should be aware of?

D

The claimant replied "No" to those questions. Mr Hoult then pointed out that the police had provided information to him that the claimant had been stopped for shoplifting, charged and that he had paid a fixed penalty notice. The claimant then accepted that he could remember about the incident, but that it had not been his fault. The claimant then explained that he had been seeing a consultant over the past 18 months as they thought he had a disorder that affected his memory.

E

7.9 The claimant was suspended that day by Mr Hoult and by letter dated 18 November, invited to attend a disciplinary hearing on 14 January 2016. The allegations were described as follows:

F

- Criminal misconduct outside of the workplace which impacts on your ability to undertake your role within the council.
- Withdrawal of your non police personnel vetting (NPPV) accreditation as a result of your own misconduct which impacts on your ability to undertake your role with the council.
- Your actions have the potential to cause serious reputational damage to the council and may give rise to a fundamental breakdown in the council's trust and confidence in their employment relationship with you.

G

7.10 Following a prolonged disciplinary process, the claimant was dismissed by letter dated 19 May 2016 (page 200-202). His appeal was itself dismissed on 13 July 2016, following a hearing on 29 June."

H

20. Having made those findings of fact, the Tribunal also considered the medical evidence, the evidence of the Claimant from his witness statement regarding his condition and the

A surrounding facts and the circumstances leading to the issue of the fixed penalty notice and his  
behaviour thereafter. The Judgment then listed the relevant matters that the Tribunal had  
considered most carefully in deciding what an ordinary person would consider to be dishonest in  
B numbered sub-paragraphs of paragraph 25 of the Judgment:

“25.1 The medical report of Dr Robinson together with her answers to the questions put to her.

25.2 The fact that the claimant had placed the items of shopping into his own shopping bag.

25.3 The fact that the claimant left the Boots store without paying for the goods.

25.4 The fact that the claimant removed his identification lanyard when approached by the  
C security guard.

25.5 The fact that the claimant lied about his occupation.

25.6 The notes contained in the police officer’s notebook.

25.7 The fact that the claimant had signed those notes.

25.8 The claimant spoke to two different solicitors the following day.

D 25.9 The claimant failed to report the matter to his employer.

25.10 The claimant failed to report the matter to the police.

25.11 Then subsequently challenged about the matter, the claimant could only remember telling  
a member of staff at the Boots make-up counter that he intended to go to a cash point to obtain  
some cash, that being something which may exculpate him, but could not remember anything  
which may be held against him.”

E 21. Drawing those threads together, the Tribunal Judge found that he was satisfied that  
“applying the objective standards of ordinary, reasonable and honest person armed with all the  
F information, the Claimant’s conduct is to be regarded as dishonest.” In paragraph 27, the  
Judgment went on:

G “The question of whether or not the claimant satisfies the definition of disability must be  
considered in the light of the basis for the alleged discrimination. I am satisfied in the claimant’s  
case that the alleged discrimination is as a result of an excluded condition. The withdrawal of  
his police accreditation was caused by the commission of an offence which led to the issue (and  
acceptance) of the PND. The issue of the PND and failure to report the incident to his employer  
led to the suspension, disciplinary hearing and dismissal. As a matter of causation, I am satisfied  
that the reason for the less favourable treatment is the issue of the PND which in turn was caused  
by the claimant stealing goods from the Boots store. I am satisfied that the claimant’s mental  
impairment (post traumatic stress disorder) amounts to a legitimate medical impairment which  
manifests itself in what ordinary, decent people in possession of the facts would objectively  
consider to be a tendency to steal. That is an excluded condition under Regulation 4 of the 2010  
Regulations as is clearly explained by paragraph A13 in the 2011 Guidance. The claimant’s  
tendency to steal is either a consequence of, or a manifestation of, his impairment which  
H constitutes a disability for the purposes of the Act. The alleged discrimination is therefore a  
result of an excluded condition and the exclusion in Regulation 4 therefore applies.”



A 22. The Judge concluded that he was satisfied that the Claimant's mental impairment  
amounted to a legitimate medical impairment, which manifests itself in what ordinary decent  
B people in possession of the facts would objectively consider to be a tendency to steal and which,  
by virtue of the precise allegations of the treatment complained of as amounting to disability  
discrimination, made it an excluded condition.

C 23. It is fortunate in this case that there is no dispute about the facts which led to the dismissal,  
dismissal being the act of discrimination complained of in each of the three disability  
D discrimination causes of action. The Tribunal summarised the cause of the dismissal as being the  
issue of the PND and failure to report the incident to his employer, which is a succinct distillation  
of the ET3<sup>2</sup> and not disputed by the Claimant. Therefore, the critical question of causation is  
answered and agreed, there is no lacuna or vacuum of the type that occurred in both **Edmund**  
**Nuttall Ltd v Butterfield** [2006] ICR 77 and **Governing Body of X Endowed Primary School**  
**v Special Educational Needs and Disability Tribunal (No 1)** [2009] IRLR 1007]. There was  
E therefore no uncertainty for the Employment Tribunal in the examination of whether the alleged  
discrimination related to protected disability, or an excluded condition, or to both, because the  
cause of the dismissal was not disputed.

F **A Tendency to Steal**

G 24. Turning to the grounds of appeal, the first is that the Tribunal erred in finding a tendency  
to steal. The Claimant's first criticism is that even if the Tribunal had concluded that the incident  
on 24 August 2015 in Boots amounted to theft, it fell short of demonstrating a tendency, and there

H <sup>2</sup> The ET3 states three reasons (1) criminal misconduct outside the workplace, which impacts upon the Claimant's  
ability to undertake his role with the council; (2) the withdrawal of the non-police personnel vetting accreditation  
as a result of his own misconduct, which impacts on his ability to undertake his role with the council; and (3) the  
actions had the potential to cause serious reputational damage to the council and may give rise to fundamental  
breakdown in the council's trust and confidence and the employment relationship (p62). But in reality (2) and (3)  
were inextricably linked to (1) and the ET summary was perfectly accurate.

A was nothing in the Tribunal’s Decision directing itself as to what is meant by the term “tendency.”  
B However, it is abundantly clear from the Claimant’s pleadings throughout that he has always put  
his case on the basis that he has a tendency to do whatever the correct description is for what  
happened in Boots on 24 August 2015.

25. He has made his case on the basis that it was not a one-off matter or an isolated event, but  
part of his condition and a manifestation of his PTSD which occurs and recurs, as is evident from  
C the agreed issues from the Preliminary Hearing of 2 December 2016 set out above. Therefore, it  
is clear that it was the Claimant’s case that he had a tendency to behave in a certain way that put  
him at a disadvantage compared to those who are not disabled in circumstances amounting to  
D indirect discrimination. Therefore, no criticism can be fairly levelled at the Tribunal for not  
addressing the point in greater detail since it was not in dispute.

26. The next question is whether it was an error of law for the Tribunal to define the way in  
E which the Claimant behaved on 24 August 2015 as stealing, as opposed to forgetfulness without  
intent or any dishonesty; it being the Claimant’s case that he simply walked out of shops without  
having paid for goods because of a dissociative state. The difficulty for the Claimant is that it  
F was a matter of fact for the Tribunal Judge to determine and, on the face of it (subject to the  
perversity challenge in ground 3 below), he was entitled to reach his conclusion. The question  
of dishonesty is a question for the fact-finder be that a jury or an Employment Judge see Ivey v  
G Genting.

27. The case of R v Hamer [2011] 1 WLR CACD ingeniously relied on by Ms Banton, on  
H close examination does not assist. Whilst a PND does not amount to a conviction or meet the  
criminal standard of proof of theft, Hamer is not authority for the proposition that an EJ or other

**A** Civil Court or Tribunal, is precluded from concluding that the issuing of a PND, meets the dishonesty test to the civil standard.

**B** 28. From the evidence before the ET I can entirely see why the EJ considered that the Claimant was dishonest, particularly when one reads the statement that the Claimant has signed confirming that he admits that he had stolen something together with his behaviour in the following days thereafter and his self-serving selective memory in the interview with his line manager Mr Houlton on 20 October 2015. On the face of it, it was a conclusion that was open to the Tribunal to find.

**C**

**EJ Sitting Alone**

**D** 29. The second ground of appeal is the alleged error for an EJ to make a determination sitting alone has no merit. The Claimant could have requested members pursuant to **Rule 55**, but neither he nor his representative did so. It is too late to regret that decision now, and in any event, it is by no means certain that the Tribunal would have agreed to the request, had it been made.

**E**

**Perversity**

**F** 30. The third ground is perversity. Ms Banton has helpfully been precise and specific in her perversity challenge. Firstly, the finding at 7.4 set out above which was taken from a note at p91. This is a note that was prepared by an employee of the council reporting what was said to her or him by the police which had, in turn, been said to the Police Officer by the Security Guard at the store. The handwritten note is not helpful for the Claimant because it states that the Claimant had hidden his lanyard and given an incorrect explanation of his occupation when questioned at the time. The ET was entitled to take account of the note – the rules of hearsay do not apply strictly in the ET and the Claimant’s then representative had told the Tribunal that the facts were not in dispute and there was no need for the Claimant to give evidence. The agreed medical

**A** evidence was that the Claimant's condition was unlikely to be related to the matters in the note. The ET was entitled to conclude that the Claimant gave an untruthful answer. Furthermore, the Claimant's position was that he has forgotten everything that happened that day, and he was not  
**B** in a position to challenge the note in any event. Therefore, the Tribunal has not made a perverse finding in that regard.

**C** 31. The second perversity challenge is to the finding at 7.7 that the Claimant did not inform the Respondent about the incident as he was obliged to do under the Respondent's code of practice. It is common ground that he did not inform the Respondent about the incident. The only issue is whether or not he was obliged to do so under the code of practice. The code of  
**D** practice is set out in part in the Judgment. Whilst the point could perhaps be made that the issuing of a FPN per se would not require disclosure, or at least is a grey area, the loss of his accreditation and Level 2 NPPV (see findings of fact paragraph 7.2 in paragraph 19 above) unarguably required  
**E** him to inform his manager under paragraph 4.7 of the code.

**F** 32. His failure to do so is all the more interesting when the day after receiving the fixed penalty notice, the Claimant consulted not one, but two, Solicitors. He must have been well aware of the risks and the seriousness of the matter, yet still chose not to inform his employer. Furthermore, at the meeting with his line manager Mr Hoult, he was given the opportunity to disclose the matter and did not. It would appear to have been a conscious decision not to seek to  
**G** confess and avoid. The Tribunal's findings are not perverse.

**H** 33. A potentially more sustainable perversity ground is the finding at paragraph 8.5 and also referred to in paragraphs 25 and 27, that the Claimant failed to inform Durham Constabulary of the incident, which is conceded by the Respondent as being incorrect. It is evident from the

A documents in the bundle before the Tribunal (although not referred to in the Claimant’s witness  
statement), that six weeks after the incident he went to the trouble of sending a guaranteed, signed  
for delivery letter to the Police, informing them that he had been advised by Solicitors that he  
B should not have paid the penalty notice.

34. Therefore, it was factually incorrect for the Tribunal blandly to assert that the Claimant  
did not inform the Police about the matter. The difficulty for the Claimant however is that the  
C factual detail was immaterial to the ET’s Decision and overall conclusion. In an employment  
dispute, it is hard to see how it is relevant whether he drew Durham’s attention to the matter in  
an attempt to get reimbursement for the fixed penalty notice that he had paid.

D 35. If, on the other hand, there had been evidence of his having informed his employer  
promptly, it might have been different.

E 36. The final perversity challenge was a further attack, from a different angle, to the note  
described in paragraph 7.4 of the ET Judgment. For the reasons set out in paragraph 30 of this  
Judgment, no perversity is identified.

F 37. For those Reasons, I dismiss the appeal and uphold the Decision of the ET. The unfair  
dismissal claim can now be listed before the Tribunal to be determined.

G 38. By way of postscript, it is worth re-iterating that caution needs to be exercised by a  
Tribunal when deciding whether a Preliminary Hearing is appropriate and the guidance in **SCA**  
**Packaging Limited v Boyle (Northern Ireland)** [2009] IRLR 746 per Lord Hope at paragraph  
H 9 deserves repetition.

“As Lord Scarman said in *Tilling v Whiteman [1980] AC 1*, 25, preliminary points of law are too  
often treacherous short cuts. Even more so where the points to be decided are a mixture of fact

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and law. That the power to hold a pre-hearing exists is not in doubt: Industrial Tribunals (Constitution and Rules of Procedure) Regulations (Northern Ireland) 2005 (SR 2005/150), Schedule 1, rule 18. There are, however, dangers in taking what looks at first sight to be a short cut but turns out to be productive of more delay and costs than if the dispute had been tried in its entirety, as Mummery J said in National Union of Teachers v Governing Body of St Mary's Church of England (Aided) Junior School [1995] ICR 317, 323. The essential criterion for deciding whether or not to hold a pre-hearing is whether, as it was put by Lindsay J in CJ O'Shea Construction Ltd v Bassi [1998] ICR 1130, there is a succinct, knockout point which is capable of being decided after only a relatively short hearing. This is unlikely to be the case where a preliminary issue cannot be entirely divorced from the merits of the case, or the issue will require the consideration of a substantial body of evidence. In such a case it is preferable that there should be only one hearing to determine all the matters in dispute.”

39. In this case there was no knockout point since the unfair dismissal complaint remains to be determined and there is overlap in the issues before the Preliminary Hearing and the unfair dismissal claim, which would have been better dealt with together. The anticipated saving of one day of Tribunal hearing was also illusory. In future, it would be advisable for Tribunals to think extremely carefully before listing as a Preliminary Hearing matters involving **Regulation 4** where there is also a free-standing wrongful or unfair dismissal complaint unless the issues are genuinely discrete.

**EMPLOYMENT APPEAL TRIBUNAL**  
FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal  
On 3 September 2018

**Before**

**HER HONOUR JUDGE STACEY**

**(SITTING ALONE)**

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MR A WOOD

APPELLANT

DURHAM COUNTY COUNCIL

RESPONDENT

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Transcript of Proceedings

JUDGMENT

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## APPEARANCES

For the Appellant

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## **SUMMARY**

### **DISABILITY DISCRIMINATION – Exclusions/jurisdictions**

The Tribunal had not erred in concluding that a manifestation of the Claimant's post-traumatic stress disorder and dissociative amnesia was a tendency to steal which was an excluded condition pursuant to Regulation 4(1)(b) **Equality Act 2010 (Disability) Regulations 2010** (SI 2010/2128). The ET was entitled, on the evidence, to reject the Claimant's contention that his behaviour merely memory loss and forgetfulness and not dishonest. The Tribunal had correctly applied **Ivey v Genting Casinos (UK) Ltd t/a Crackfords** [2017] UKSC 67. Since the effective cause of the Claimant's dismissal - the discriminatory treatment complained of - was the excluded condition, it followed that the ET did not err in dismissing the complaint of disability discrimination (**Edmund Nuttall Ltd v Butterfield** [2006] ICR 77 followed and applied).

The ET did not err in conducting the Preliminary Hearing before a Judge sitting alone rather than a full Tribunal since neither party had made a request for a full Tribunal pursuant to **Rule 55 Employment Tribunal Rules of Procedure**. The Tribunal's findings of fact were not perverse. The Tribunal decision was upheld.

**A**      **HER HONOUR JUDGE STACEY**

**B**

1.      This is an appeal from the Employment Tribunal’s (“ET”) Judgment held at North Shields on 1 November 2017 before Employment Judge Johnson sitting alone at an open Preliminary Hearing which found that the Claimant was not disabled within the meaning of section 6 **Equality Act 2010**. The Tribunal found that the Claimant had a tendency to steal which arose as a manifestation of his post traumatic stress disorder. It was treated as an excluded condition which

**C**

did not amount to an impairment pursuant to Regulation 4(1)(b) of the **Equality Act 2010** and **(Disability) Regulations 2010** SI2010/2128. Since the excluded condition was the reason for the discriminatory treatment complained of, the Tribunal dismissed his disability discrimination

**D**

complaint, leaving his unfair dismissal complaint for determination at a further Tribunal hearing<sup>1</sup>. The Judgment, with Reasons, was sent to the parties on 10 November 2017. The Appellant before me today is the Claimant below and I shall continue to refer to the parties by reference to their status below in accordance with **Practice Direction** paragraph 16.4.

**E**

2.      There are three grounds of appeal, which were permitted to go forward to a Full Hearing by Soole J at a Rule 3 (10) Hearing in this case. Firstly, that there was an error in the Tribunal’s conclusion that the Claimant had a tendency to steal; secondly, there had been an error for the issue to have been decided by an Employment Judge (“EJ”) sitting alone; and, thirdly, a perversity appeal in relation to the Tribunal’s findings of fact.

**F**

3.      The background and history is as follows. The Claimant has brought ET proceedings for unfair dismissal and disability discrimination following his dismissal by the Respondent after nine years’ service, latterly as an Anti-Social Behaviour Officer. Before working for the

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**H**

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<sup>1</sup> It has been stayed pending this appeal.

**A** Respondent, he had worked as a Police Officer for some seventeen years. The Respondent did not accept that the Claimant was a disabled person with the meaning of section 6 of the **Equality Act 2010** (“EqA”).

**B** 4. The Claimant was initially a litigant in person but Solicitors were subsequently instructed by him, following which the issues were clarified at a closed Preliminary Hearing before an EJ  
**C** on 2 December 2016. The Claimant asserted that he had post-traumatic stress disorder and associated amnesia and memory loss, which on occasions caused him to suffer forgetfulness and  
**D** that such forgetfulness would include him forgetting to pay for items before leaving a shop. It is common ground that on 24 August 2015, he left Boots the Chemist, not having paid for items he had placed in his bag, and that the consequence of his doing so ultimately led to his dismissal. It is not in dispute that what happened in Boots that day was the effective cause of his dismissal.

**E** 5. In relation to the disability discrimination complaints the issues were clarified as follows:

*“5 Section 19: Indirect discrimination in relation to disability*

**5.1 Did the respondent apply the following provision, criteria and/or practice (‘the provision’) generally, namely**

**5.1.1. The policies and procedures relied on by the respondent when dismissing him including the standards of conduct and the requirement to disclose the issue of the penalty notice.**

**F** **5.2 Does the application of the provision put people with the claimant’s mental impairment at a particular disadvantage when compared with persons who do not have this protected characteristic?**

**5.3 Did the application of the provision put the claimant at that disadvantage in that those with the claimant’s impairment are more likely to be accused of criminal offences e.g. by forgetting to pay for items in a shop and being more likely to be issued with a fixed penalty notice and such people are less likely to remember to report incidents.**

**G** **5.4 Does the respondent show that the treatment was a proportionate means of achieving a legitimate aim? [NOTE This assumes that the respondent will amend its response to include justification]**

*6. Section 15: Discrimination arising from disability*

**H** **6.1 The allegation of unfavourable treatment as “something arising in consequence of the claimant’s disability” falling within section 39 Equality Act was the dismissal (including the rejection of his appeal). The claimant asserts that his behaviour on 24 August 2015 which led to the accusation of shoplifting and the issue of the fixed penalty notice was something arising from his disability.**

A

6.2 Does the claimant prove that the respondent treated the claimant as set out in paragraph 6.1 above?

6.3 Did the respondent treat the claimant as aforesaid because of the “something arising” in consequence of the disability?

6.4 Does the respondent show that the treatment was a proportionate means of achieving a legitimate aim? The respondent relies on the aim of maintaining the standards required of those in public office and the need to maintain the confidence of the public in the service they provide.

B

*7. Reasonable adjustments: section 20 and section 21*

7.1 Did the respondent apply the PCP set out in paragraph 5.1.1.

7.2 Did the application of any such provision put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled as set out in paragraph 5.3?”

C

6. Following that clarification, the Claimant provided further information requested by the Respondent and explained that, in relation to the indirect discrimination complaint, it was said that his condition puts him at an increased risk at being issued with a fixed penalty notice when compared with persons who do not share his disability. The reasonable adjustment case had always been put on the basis of his having a tendency to behave in that way, in other words to forget on occasions to pay for items in shops, and it was implicit that what happened on 24 August 2015 had not been an isolated or a one-off act.

D

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7. In the section 15 complaint the Claimant also puts his behaviour on 24 August 2015 at the heart of his case, asserting that the accusation of shoplifting and subsequent issue of a fixed penalty notice was something arising from his disability. His contention was that the behaviour was not dishonest, not that he did not have a tendency to behave in that way.

F

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8. A joint expert, Dr Robinson, was instructed on 5 May 2017. She agreed with the Claimant’s assertion that he suffered from severe depression, PTSD and associative amnesia. She answered a number of specific questions that the parties had jointly agreed be put to her.

H

Following receipt of Dr Robinson’s report, the Respondent amended its defence and response to the claim and sought at that stage to rely on Regulation 4(1)(b) of the **2010 Regulations** and to

A assert in paragraph 2 of page 78 as follows, “Further, it is averred that the claimant is not entitled  
to the protection of the **Equality Act 2010** in relation to any discrimination he experienced, which  
is not admitted, as a consequence of any ‘tendency to steal’, because that is an excluded condition  
under the Act.”

B

9. There was then a further Preliminary Hearing on 22 May 2017 when the case was listed  
for yet another Preliminary Hearing on 1 November 2017 to determine the disability issue since  
it was thought it would shorten the hearing time by at least 1 day. No request was made by either  
party to list the 1 November 2017 Preliminary Hearing before a full Tribunal.

C

D 10. **Rule 55 of the Employment Tribunals Rules of Procedure** provides as follows:

“Constitution of tribunal for preliminary hearings

55. Preliminary hearings shall be conducted by an Employment Judge alone, except that where  
notice has been given that any preliminary issues are to be, or may be, decided at the hearing a  
party may request in writing that the hearing be conducted by a full tribunal in which case an  
Employment Judge shall decide whether that would be desirable.”

E

11. It is therefore common ground that absent a written request by one or other of the parties,  
or a decision of the Tribunal’s own motion, a Preliminary Hearing will be heard by a Judge sitting  
alone pursuant to the **Employment Tribunal Act 1996**.

F

12. The Claimant had prepared a witness statement in anticipation of the Preliminary Hearing  
and addressed head-on the amended defence of the Respondent County Council stating at  
paragraph 6 to 8 as follows:

G

“6. The only argument put forward by the Respondent to date is based on the premise that as a  
result of my condition I have a tendency to steal and so I should not benefit from the protection  
offered by the Equality Act. This argument is very hurtful to me because I am a 52-year-old  
man (and former police officer) with no previous cautions/convictions for anything let alone  
theft.

H

A

7. A tendency would imply that this has happened multiple times which is simply not the case. The Respondent has produced no evidence to suggest that the incident which occurred on 24th August 2015 was anything other than an isolated incident.

8. "Stealing" is theft and requires dishonesty and intent. The evidence I have produced clearly shows that my actions when in a dissociative state (caused by my disability- please see pages 225 and 582 of the joint bundle) are entirely lacking in intent and I can confirm that during a dissociative state I would be incapable of dishonesty. Also, I have never been convicted of theft."

B

13. Prior to the hearing, the Claimant obtained a letter from his care co-ordinator with Tees, Esk and Wear Valleys NHS Trust warning that his giving evidence may lead him to dissociate.

C

The letter described the symptoms and stated that if this were to occur, he should be kept in a safe place and have someone with him. On the day of hearing, neither the Claimant, nor his counsel on that occasion, Mr J Anderson, requested any adjustments to the hearing. It is not recorded whether either his solicitor or any family or friends were there to support him.

D

14. Mr Anderson decided not to call his client to give evidence. The Claimant attended the hearing centre but remained outside the hearing room. The ET therefore had no live evidence before it but had a bundle consisting of 587 pages, the Claimant's witness statement and the witness statement of a Mr Owen Cleugh, a Consumer Protection Manager for the Respondent. It does not appear to have been a problem however both counsel, whose skills were praised by the EJ, agreed that the Claimant's live evidence was not necessary. The primary facts did not appear to be in dispute and the case proceeded on legal argument and the proper inferences and conclusions to be drawn from the primary agreed facts.

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15. At the Tribunal hearing it was conceded by the Respondent that the Claimant had the mental impairment of PTSD as at 24 August 2015, which had a substantial, long-term and adverse effect on his ability to carry out normal day-to-day activities. On the face of it therefore, the Claimant was disabled within the meaning of section 6 **Equality Act 2010**. However, the Respondent relied on the Regulations in its submission that in the circumstances of the case, it

H

A was an excluded condition by virtue of section 6(5) and (6) of the **Equality Act 2010** and the  
Schedule. The nub of the dispute between the parties was whether events of 24 August 2015  
demonstrated that the Claimant had a tendency to steal, or exhibited merely a tendency to memory  
B loss and forgetfulness. It appears to have been accepted by the Claimant that if the Respondent  
could prove to the civil standard that what happened in Boots on 24 August 2015 amounted to a  
tendency to steal, then his condition would be excluded by virtue of the Regulations because he  
was dismissed in consequence of events that day and he would be deemed not to be disabled.

C  
16. The ET correctly understood that it is necessary not only to consider if a Claimant has an  
excluded condition pursuant to Regulation 4(1)(b), but also how it relates to the act of  
D discrimination complained of. As explained in the statutory guidance on matters to be taken into  
account in determining questions relating to the definition of disability paragraph A13 and  
explored in the cases of Edmund Nuttall Ltd v Butterfield [2006] ICR 77 and Governing Body  
E of X Endowed Primary School v Special Educational Needs and Disability Tribunal (No 1)  
[2009] IRLR 1007, it is important to determine the basis for the alleged discrimination. If the  
alleged discrimination was a result of an excluded condition, the exclusion will apply. However,  
if the alleged discrimination is specifically related to the actual disability which gives rise to an  
F excluded condition, or is more tangentially related, the exclusion may not apply. The excluded  
condition is not considered in a vacuum but by reference to, and in the context of, the alleged  
discrimination complained of.

G  
17. The Tribunal correctly directed itself that the burden of proof was on the Respondent to  
prove that the condition was excluded.

H  
18. It was a mixed question of fact and law. It is accepted today that the Tribunal gave itself  
an impeccable self-direction concerning all the legal issues before it. It referenced the applicable

A test for dishonesty in light of the then recent Supreme Court Judgment of Ivey v Genting Casinos  
(UK) Limited (t/a Crockfords) [2017] UKSC 67, citing paragraph 48 in paragraph 21 of the ET  
B Judgment that the question of dishonesty is a jury question of fact and standards and that it is  
ultimately for the court to decide whether conduct amounted to in this case theft, and that the  
standard is objective. The Tribunal's self-direction on Regulation 4 (1) and on causation at  
paragraphs 9 – 14 of the Judgment it is also accepted as impeccable.

C 19. Since perversity is alleged it is necessary to set out the Tribunal's findings of fact  
contained in paragraphs 7.1 to 7.10:

D "7.1 The claimant was a Police Officer from September 1989 until November 2005. Following  
his resignation from the police force, he worked with Durham County Council, initially as a  
Fraud Officer, and then as an Antisocial Behaviour Officer. He had a clean disciplinary record.

E 7.2 The claimant was subject to the respondent's code of conduct, under which public sector  
employees have a duty to act with honesty and integrity. The code of conduct itself specifies  
that breaches of any element of the code (inside or outside of work) are a serious matter and  
could result in disciplinary action, up to and including a dismissal. Along with other employees  
carrying out the same job, the claimant was required by Durham Constabulary to be vetted to  
Non Police Personnel Vetting (NPPV) Level 2, to ensure their suitability for clearance. This was  
considered to be an essential requirement for the post and is set out in the terms and conditions  
of appointment. The requirement is considered to be essential for the claimant's job because a  
fundamental aspect of the role of an Antisocial Behaviour Officer includes the necessity to work  
in close partnership with the police. The remit of the role includes access to police information  
and intelligence, unaccompanied access to police stations and being involved in multi-agency  
meetings to resolve complex antisocial behaviour cases. It is not disputed that the claimant was  
fully aware of the standards required for his job.

F 7.3 On 24 August 2015, the claimant went into a local Boots store and left the store without  
paying for goods which he had placed into his shopping bag. The claimant was apprehended  
and the police were called. The relevant extracts from the police officer's notebook appear at  
pages 96- 102 in the bundle. The claimant's admission is recorded at pages 99- 100 in the  
following terms: -

G "My name is Anthony Wood and my date of birth is 2.8.65. I agree that I have been  
cautioned by PC 2019 Armstrong and I admit that I am responsible for the theft of a  
chicken and bacon wrap, a bottle of Nivea suntan lotion and 2 x Sure deodorant sprays  
from Boots Chemist in Durham Market Place on 24.8.15. I took them from the display  
in the store and placed them into a carrier bag that I had without paying for them or  
attempting to pay for them as I left the store. I was detained outside the store by  
security staff and I had no intention of paying for the items as I had no money on me  
and despite having the means to pay on me, I chose not to. I have made this admission  
of my own free will and I have not been pressured into making it."

The claimant's signature follows that statement.

H 7.4 At page 97 of the bundle is a note which records that at the time of this incident, when  
approached by the Boots security guard, the claimant had removed his Durham County Council  
ID lanyard and placed it in his pocket. When searched by the police, the claimant had the  
lanyard in his pocket, but when asked about his occupation, the claimant informed the officers  
that he "worked in security - travelling from site to site". This was untrue.



A

7.5 The claimant was issued with a formal fixed penalty notice, known as a Penalty Notice for Disorder (PND). This required the claimant to pay a fine of £90 as an alternative to a formal prosecution for theft. The claimant agreed to accept the PND.

7.6 The claimant paid the £90 fine on 14 September. Before doing so, he consulted two separate solicitors to obtain advice as to whether or not he should do so. He was advised that paying the fixed penalty did not amount to an admission of guilt and the claimant therefore paid the fine.

B

7.7 The claimant did not inform the respondent about the incident, nor the issue of the fixed penalty notice, as he was obliged to do under the respondent's code of practice. The claimant did not formally report the matter to the police, as he was also obliged to do.

7.8 In October 2015, the claimant's Non Police Personnel Vetting Level 2 application was refused as a result of the PND issued in August. As a result, the claimant was not permitted to enter any police premises or buildings under any circumstances, with immediate effect. That meant that the claimant was effectively unable to carry out his duties as an Antisocial Behaviour Officer. That matter was brought to the attention of the claimant's Line Manager Mr Ian Hoult, on the morning of 19 October 2015. The following day, Mr Hoult met with the claimant and asked him a series of questions designed to elicit from the claimant details about the incident at Boots in August. The questions put to the claimant were: -

C

- Was he aware of any information that the council should be aware of?
- Has something happened outside of work that we need to know about?
- Has there been anything happening with the police that he should be making us aware of?
- Is there something that has happened in Durham City Centre that we should be aware of?
- Is there something that has happened at Boots the Chemist in Durham which we should be aware of?

D

The claimant replied "No" to those questions. Mr Hoult then pointed out that the police had provided information to him that the claimant had been stopped for shoplifting, charged and that he had paid a fixed penalty notice. The claimant then accepted that he could remember about the incident, but that it had not been his fault. The claimant then explained that he had been seeing a consultant over the past 18 months as they thought he had a disorder that affected his memory.

E

7.9 The claimant was suspended that day by Mr Hoult and by letter dated 18 November, invited to attend a disciplinary hearing on 14 January 2016. The allegations were described as follows:

F

- Criminal misconduct outside of the workplace which impacts on your ability to undertake your role within the council.
- Withdrawal of your non police personnel vetting (NPPV) accreditation as a result of your own misconduct which impacts on your ability to undertake your role with the council.
- Your actions have the potential to cause serious reputational damage to the council and may give rise to a fundamental breakdown in the council's trust and confidence in their employment relationship with you.

G

7.10 Following a prolonged disciplinary process, the claimant was dismissed by letter dated 19 May 2016 (page 200-202). His appeal was itself dismissed on 13 July 2016, following a hearing on 29 June."

H

20. Having made those findings of fact, the Tribunal also considered the medical evidence, the evidence of the Claimant from his witness statement regarding his condition and the

A surrounding facts and the circumstances leading to the issue of the fixed penalty notice and his  
behaviour thereafter. The Judgment then listed the relevant matters that the Tribunal had  
considered most carefully in deciding what an ordinary person would consider to be dishonest in  
B numbered sub-paragraphs of paragraph 25 of the Judgment:

“25.1 The medical report of Dr Robinson together with her answers to the questions put to her.

25.2 The fact that the claimant had placed the items of shopping into his own shopping bag.

25.3 The fact that the claimant left the Boots store without paying for the goods.

25.4 The fact that the claimant removed his identification lanyard when approached by the  
C security guard.

25.5 The fact that the claimant lied about his occupation.

25.6 The notes contained in the police officer’s notebook.

25.7 The fact that the claimant had signed those notes.

25.8 The claimant spoke to two different solicitors the following day.

25.9 The claimant failed to report the matter to his employer.

25.10 The claimant failed to report the matter to the police.

25.11 Then subsequently challenged about the matter, the claimant could only remember telling  
a member of staff at the Boots make-up counter that he intended to go to a cash point to obtain  
some cash, that being something which may exculpate him, but could not remember anything  
which may be held against him.”

E 21. Drawing those threads together, the Tribunal Judge found that he was satisfied that  
“applying the objective standards of ordinary, reasonable and honest person armed with all the  
F information, the Claimant’s conduct is to be regarded as dishonest.” In paragraph 27, the  
Judgment went on:

“The question of whether or not the claimant satisfies the definition of disability must be  
considered in the light of the basis for the alleged discrimination. I am satisfied in the claimant’s  
case that the alleged discrimination is as a result of an excluded condition. The withdrawal of  
his police accreditation was caused by the commission of an offence which led to the issue (and  
acceptance) of the PND. The issue of the PND and failure to report the incident to his employer  
led to the suspension, disciplinary hearing and dismissal. As a matter of causation, I am satisfied  
that the reason for the less favourable treatment is the issue of the PND which in turn was caused  
by the claimant stealing goods from the Boots store. I am satisfied that the claimant’s mental  
impairment (post traumatic stress disorder) amounts to a legitimate medical impairment which  
manifests itself in what ordinary, decent people in possession of the facts would objectively  
consider to be a tendency to steal. That is an excluded condition under Regulation 4 of the 2010  
Regulations as is clearly explained by paragraph A13 in the 2011 Guidance. The claimant’s  
tendency to steal is either a consequence of, or a manifestation of, his impairment which  
constitutes a disability for the purposes of the Act. The alleged discrimination is therefore a  
result of an excluded condition and the exclusion in Regulation 4 therefore applies.”

A 22. The Judge concluded that he was satisfied that the Claimant's mental impairment  
amounted to a legitimate medical impairment, which manifests itself in what ordinary decent  
B people in possession of the facts would objectively consider to be a tendency to steal and which,  
by virtue of the precise allegations of the treatment complained of as amounting to disability  
discrimination, made it an excluded condition.

C 23. It is fortunate in this case that there is no dispute about the facts which led to the dismissal,  
dismissal being the act of discrimination complained of in each of the three disability  
D discrimination causes of action. The Tribunal summarised the cause of the dismissal as being the  
issue of the PND and failure to report the incident to his employer, which is a succinct distillation  
of the ET3<sup>2</sup> and not disputed by the Claimant. Therefore, the critical question of causation is  
answered and agreed, there is no lacuna or vacuum of the type that occurred in both **Edmund**  
**Nuttall Ltd v Butterfield** [2006] ICR 77 and **Governing Body of X Endowed Primary School**  
**v Special Educational Needs and Disability Tribunal (No 1)** [2009] IRLR 1007]. There was  
E therefore no uncertainty for the Employment Tribunal in the examination of whether the alleged  
discrimination related to protected disability, or an excluded condition, or to both, because the  
cause of the dismissal was not disputed.

F **A Tendency to Steal**

G 24. Turning to the grounds of appeal, the first is that the Tribunal erred in finding a tendency  
to steal. The Claimant's first criticism is that even if the Tribunal had concluded that the incident  
on 24 August 2015 in Boots amounted to theft, it fell short of demonstrating a tendency, and there

H <sup>2</sup> The ET3 states three reasons (1) criminal misconduct outside the workplace, which impacts upon the Claimant's  
ability to undertake his role with the council; (2) the withdrawal of the non-police personnel vetting accreditation  
as a result of his own misconduct, which impacts on his ability to undertake his role with the council; and (3) the  
actions had the potential to cause serious reputational damage to the council and may give rise to fundamental  
breakdown in the council's trust and confidence and the employment relationship (p62). But in reality (2) and (3)  
were inextricably linked to (1) and the ET summary was perfectly accurate.

A was nothing in the Tribunal’s Decision directing itself as to what is meant by the term “tendency.”  
B However, it is abundantly clear from the Claimant’s pleadings throughout that he has always put  
his case on the basis that he has a tendency to do whatever the correct description is for what  
happened in Boots on 24 August 2015.

25. He has made his case on the basis that it was not a one-off matter or an isolated event, but  
part of his condition and a manifestation of his PTSD which occurs and recurs, as is evident from  
C the agreed issues from the Preliminary Hearing of 2 December 2016 set out above. Therefore, it  
is clear that it was the Claimant’s case that he had a tendency to behave in a certain way that put  
him at a disadvantage compared to those who are not disabled in circumstances amounting to  
D indirect discrimination. Therefore, no criticism can be fairly levelled at the Tribunal for not  
addressing the point in greater detail since it was not in dispute.

26. The next question is whether it was an error of law for the Tribunal to define the way in  
E which the Claimant behaved on 24 August 2015 as stealing, as opposed to forgetfulness without  
intent or any dishonesty; it being the Claimant’s case that he simply walked out of shops without  
having paid for goods because of a dissociative state. The difficulty for the Claimant is that it  
F was a matter of fact for the Tribunal Judge to determine and, on the face of it (subject to the  
perversity challenge in ground 3 below), he was entitled to reach his conclusion. The question  
of dishonesty is a question for the fact-finder be that a jury or an Employment Judge see Ivey v  
G Genting.

27. The case of R v Hamer [2011] 1 WLR CACD ingeniously relied on by Ms Banton, on  
H close examination does not assist. Whilst a PND does not amount to a conviction or meet the  
criminal standard of proof of theft, Hamer is not authority for the proposition that an EJ or other

**A** Civil Court or Tribunal, is precluded from concluding that the issuing of a PND, meets the dishonesty test to the civil standard.

**B** 28. From the evidence before the ET I can entirely see why the EJ considered that the Claimant was dishonest, particularly when one reads the statement that the Claimant has signed confirming that he admits that he had stolen something together with his behaviour in the following days thereafter and his self-serving selective memory in the interview with his line manager Mr Houlton on 20 October 2015. On the face of it, it was a conclusion that was open to the Tribunal to find.

**C**

**EJ Sitting Alone**

**D** 29. The second ground of appeal is the alleged error for an EJ to make a determination sitting alone has no merit. The Claimant could have requested members pursuant to **Rule 55**, but neither he nor his representative did so. It is too late to regret that decision now, and in any event, it is by no means certain that the Tribunal would have agreed to the request, had it been made.

**E**

**Perversity**

**F** 30. The third ground is perversity. Ms Banton has helpfully been precise and specific in her perversity challenge. Firstly, the finding at 7.4 set out above which was taken from a note at p91. This is a note that was prepared by an employee of the council reporting what was said to her or him by the police which had, in turn, been said to the Police Officer by the Security Guard at the store. The handwritten note is not helpful for the Claimant because it states that the Claimant had hidden his lanyard and given an incorrect explanation of his occupation when questioned at the time. The ET was entitled to take account of the note – the rules of hearsay do not apply strictly in the ET and the Claimant’s then representative had told the Tribunal that the facts were not in dispute and there was no need for the Claimant to give evidence. The agreed medical

**A** evidence was that the Claimant's condition was unlikely to be related to the matters in the note. The ET was entitled to conclude that the Claimant gave an untruthful answer. Furthermore, the Claimant's position was that he has forgotten everything that happened that day, and he was not  
**B** in a position to challenge the note in any event. Therefore, the Tribunal has not made a perverse finding in that regard.

**C** 31. The second perversity challenge is to the finding at 7.7 that the Claimant did not inform the Respondent about the incident as he was obliged to do under the Respondent's code of practice. It is common ground that he did not inform the Respondent about the incident. The only issue is whether or not he was obliged to do so under the code of practice. The code of  
**D** practice is set out in part in the Judgment. Whilst the point could perhaps be made that the issuing of a FPN per se would not require disclosure, or at least is a grey area, the loss of his accreditation and Level 2 NPPV (see findings of fact paragraph 7.2 in paragraph 19 above) unarguably required  
**E** him to inform his manager under paragraph 4.7 of the code.

**F** 32. His failure to do so is all the more interesting when the day after receiving the fixed penalty notice, the Claimant consulted not one, but two, Solicitors. He must have been well aware of the risks and the seriousness of the matter, yet still chose not to inform his employer. Furthermore, at the meeting with his line manager Mr Hoult, he was given the opportunity to disclose the matter and did not. It would appear to have been a conscious decision not to seek to  
**G** confess and avoid. The Tribunal's findings are not perverse.

**H** 33. A potentially more sustainable perversity ground is the finding at paragraph 8.5 and also referred to in paragraphs 25 and 27, that the Claimant failed to inform Durham Constabulary of the incident, which is conceded by the Respondent as being incorrect. It is evident from the

A documents in the bundle before the Tribunal (although not referred to in the Claimant’s witness  
statement), that six weeks after the incident he went to the trouble of sending a guaranteed, signed  
for delivery letter to the Police, informing them that he had been advised by Solicitors that he  
B should not have paid the penalty notice.

34. Therefore, it was factually incorrect for the Tribunal blandly to assert that the Claimant  
did not inform the Police about the matter. The difficulty for the Claimant however is that the  
C factual detail was immaterial to the ET’s Decision and overall conclusion. In an employment  
dispute, it is hard to see how it is relevant whether he drew Durham’s attention to the matter in  
an attempt to get reimbursement for the fixed penalty notice that he had paid.

D 35. If, on the other hand, there had been evidence of his having informed his employer  
promptly, it might have been different.

E 36. The final perversity challenge was a further attack, from a different angle, to the note  
described in paragraph 7.4 of the ET Judgment. For the reasons set out in paragraph 30 of this  
Judgment, no perversity is identified.

F 37. For those Reasons, I dismiss the appeal and uphold the Decision of the ET. The unfair  
dismissal claim can now be listed before the Tribunal to be determined.

G 38. By way of postscript, it is worth re-iterating that caution needs to be exercised by a  
Tribunal when deciding whether a Preliminary Hearing is appropriate and the guidance in **SCA**  
**Packaging Limited v Boyle (Northern Ireland)** [2009] IRLR 746 per Lord Hope at paragraph  
H 9 deserves repetition.

“As Lord Scarman said in *Tilling v Whiteman [1980] AC 1*, 25, preliminary points of law are too  
often treacherous short cuts. Even more so where the points to be decided are a mixture of fact

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and law. That the power to hold a pre-hearing exists is not in doubt: Industrial Tribunals (Constitution and Rules of Procedure) Regulations (Northern Ireland) 2005 (SR 2005/150), Schedule 1, rule 18. There are, however, dangers in taking what looks at first sight to be a short cut but turns out to be productive of more delay and costs than if the dispute had been tried in its entirety, as Mummery J said in National Union of Teachers v Governing Body of St Mary's Church of England (Aided) Junior School [1995] ICR 317 , 323. The essential criterion for deciding whether or not to hold a pre-hearing is whether, as it was put by Lindsay J in CJ O'Shea Construction Ltd v Bassi [1998] ICR 1130, there is a succinct, knockout point which is capable of being decided after only a relatively short hearing. This is unlikely to be the case where a preliminary issue cannot be entirely divorced from the merits of the case, or the issue will require the consideration of a substantial body of evidence. In such a case it is preferable that there should be only one hearing to determine all the matters in dispute.”

39. In this case there was no knockout point since the unfair dismissal complaint remains to be determined and there is overlap in the issues before the Preliminary Hearing and the unfair dismissal claim, which would have been better dealt with together. The anticipated saving of one day of Tribunal hearing was also illusory. In future, it would be advisable for Tribunals to think extremely carefully before listing as a Preliminary Hearing matters involving **Regulation 4** where there is also a free-standing wrongful or unfair dismissal complaint unless the issues are genuinely discrete.