EMPLOYMENT TRIBUNALS

Claimant: **Mr P Finn**

Respondent: **British Telecommunications plc**

Heard at: **Bristol** **On:** **19, 20 and 21 November 2018**

Before: **Employment Judge Livesey**
Mr H Launder
Ms S Maidment

Representation
Claimant: Mr Cooper, trade union representative
Respondent: Ms Maher, solicitor

JUDGMENT having been sent to the parties on 26 November 2018 and written reasons having been requested in accordance with rule 62 (3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. The Claim

1.1 By a claim form dated 24 January 2018, the Claimant brought complaints of discrimination on the grounds of disability, unfair dismissal and breach of contract relating to notice. A fourth complaint, of unpaid holiday pay, was withdrawn at the start of the hearing.

2. The evidence

2.1 The Claimant gave evidence in support of his case and, on behalf of the Respondent, we heard from Mr Ponting, an Operational Manager, and Mr Cotton, a General Manager.

2.2 We received a bundle of documents for the hearing, R1.

3. The issues

3.1 The issues for determination had been discussed before Employment Judge Holmes on 10 May 2018 at a Case Management Preliminary

Hearing which had been conducted by telephone. An agreed List of Issues followed somewhat belatedly on 20 September, the first draft having been prepared by the Claimant's representative. It was reproduced within the hearing bundle at pages 75-8.

3.2 The issues were, in summary, as follows;

3.2.1 Unfair dismissal; the Respondent relied upon the fair reasons of conduct or some other substantial reason. The standard questions fell to be determined under s. 98 (4); we had to consider the *Burchell* test, whether the sanction of dismissal had fallen within a band of responses available to a reasonable employer and issues relating to procedural fairness.

The Respondent invited us to consider the application of the principle in *Polkey* and issues of contributory conduct under ss. 122 (2) and 123 (6);

3.2.2 Discrimination on the grounds of disability; although the Claimant had sought rely upon two disabilities (post-traumatic stress disorder ('PTSD') and dyslexia), it was clear from discussions at the start of the hearing that the alleged disability of dyslexia was not relied upon for the purposes of the two complaints under the Equality Act, which were of direct discrimination, relating to the Claimant's dismissal, and of indirect discrimination, relating to his move between teams in June or July 2017. The Respondent admitted that the Claimant was disabled by virtue of PTSD;

3.2.3 Breach of contract relating to notice; the Claimant alleged that he ought not to have been dismissed for gross misconduct.

3.3 At the start of the hearing, we clarified with the parties that we would deal with issues relating to liability and leave matters of remedy until we had delivered our judgment in that respect, but we also made it clear, however, that we would address the Respondent's arguments in relation to *Polkey* and contributory conduct as part of our primary determinations.

4. The facts

4.1 We reached the following factual findings on the balance of probabilities. We attempted to restrict our findings to matters which were relevant to a determination of the issues. Page numbers referred to within these Reasons are to pages within the hearing bundle, R1, unless otherwise stated and have been cited in square brackets.

Background

4.2 The Respondent is a well known telecommunications business. It's Openreach operation, within which the Claimant worked, is responsible for its network infrastructure.

4.3 The Respondent had an agreement with government through which it had agreed to employ a number of ex-service personnel who had been made redundant from the armed forces. Many of them had valuable engineering skills.

4.4 We were shown a number of the Respondent's policies, which included the Standards of Behaviour Policy [201-8], the Working with Trauma

Policy [96.1-96.8] and the Disciplinary Policy [82-94] which we have referred to below, where relevant.

4.5 The Claimant began working for the Respondent on 4 April 2014. He was an ex-serviceman and was employed as an engineer. From May 2015, he was part of the Fibre Business and Corporate Delivery ('BCD') team which was based at a depot in Bristol. He was line managed by Mr Ponting. From mid-2016, he worked in a cable laying team which was also based at the same depot. He continued to be managed by Mr Ponting.

4.6 In June or July 2017, he became a Fibre Jointer within the BCD Team which was also based out of the same Bristol depot. Mr Ponting remained his line manager. There were 35 to 40 people within that team and, for the vast majority of the Claimant's time, he was required to work as part of a two-man team. The nature of the work was customer facing and much of it was undertaken on or around highways. Mr Ponting believed that the Claimant would have undertaken shifts with between 25 and 35 people during his time under his supervision.

<u>The Claimant's disability</u>

4.7 The Claimant had served in the army for approximately 13 years prior to joining the Respondent. He had undertaken tours to Iraq and Afghanistan and had seen action. He was discharged in December 2013.

4.8 Both as a result of some difficult childhood experiences and because of his time in the army, he developed PTSD. He stated that the Respondent had been made aware of his condition at the point of his selection for employment. That part of his evidence was not challenged.

4.9 The hearing bundle contained a significant amount of evidence regarding the Claimant's disability which we considered;

- The Claimant's impact statement [43-5];
- Documentation from the Somerset NHS Community Mental Health Team including, in particular, a letter of 21 September 2017 [46-8];
- The Respondent's Occupational Health ('OH') reports of 21 August and the supplement of 6 September 2017 [49-52];
- Various letters and reports from the South West Veterans Mental Health Service [53-63].

4.10 The Claimant had been diagnosed with borderline personality disorder and PTSD in 2013. He had received counselling and therapy. In February 2014, Wing Commander Neal reported as follows;

> "*Mr Finn is suffering from moderately severe borderline personality traits, which have predictably reduced in severity as he passes through the third and fourth decades of his life and this is likely to be associated with experiencing extreme stress in childhood. At the moment this is likely to manifest as difficulties in interpersonal relationships. It is possible that crises could occur which will require acute management.*
>
> *He also has mild combat-related PTSD together with pre-existent PTSD associated with the child abuse. He has an alcohol use disorder and may be physically dependent.*"

4.11 When the Respondent's OH provider reported on the Claimant's condition in August 2017, he was considered fit for work. He did not have any difficulty with the working hours and/or the travelling and he was reported to have good working relationships with his colleagues, although there had been some issues which he had found distressing to deal with. It was stated that "*he advised that seemingly innocent personal remarks or physical touch can lead to him becoming very stressed*" [49] and that "*as a result of this condition he may experience a more labile mood and seemingly react in an exaggerated manner at times*" [50].

4.12 The OH physician, Dr Folkes, made recommendations as to how the Claimant's condition might have been accommodated at work; she suggested that he should work in a small team, that change should be kept to a minimum, and that, if possible, his fellow team members should have been of a similar age to him because younger people '*can interact with him in a way that he finds distressing*'. It was also suggested that the Claimant's team should receive a confidential briefing from Mr Ponting about the Claimant's condition so that they might have had a better understanding of his behaviour.

4.13 The Claimant continued to be well supported by the NHS and, in September 2017, his risk level was considered to have been "*low*" [47]. His treating therapist, Mrs Felton, stated that, over the time that she had worked with him, she had never felt at any personal risk "*including at times when he has described and vividly expressed situations which have put him in touch with anger*".

4.14 Although Mr Ponting had seen the OH report in late August 2017, he remained somewhat suspicious of the Claimant's condition (paragraph 6 of his witness statement);

> "*The Claimant's reactions that he attributed to his PTSD came across as formatted and it seemed that the Claimant could display certain behaviours that he attributed to his PTSD when he wanted, he appeared to switch it on and off almost like a light switch. I did not consider that the Claimant's behaviours were as a result of PTSD. I also did not have any medical evidence confirming a diagnosis of PTSD.*"

Despite the disclosure of all of the other medical evidence to which we referred since the Claimant's dismissal, Mr Ponting did not resile from his views when he gave evidence. It was important to note that he had actually accompanied the Claimant to one of his therapy sessions in 2016 when the following triggers had been identified as potential difficulties at work; "*people being too close (personal space)..rooms with closed doors and no exit..things that trigger flashbacks*" [135].

<u>Adjustments and attendance</u>

4.15 During the Claimant's employment and because of his disability, the Respondent contended that it had put additional support mechanisms in place for him which included (paragraph 15 of its Amended Response);

(i) The provision of a Health and Wellbeing Passport [137-145] which reflected and recorded the support mechanisms that were in place and which recognised that certain scenarios might have provoked traumatic flashbacks;

(ii) Amended work hours and start times to accommodate therapies [146-9];
(iii) Authority was given for the Claimant to take special leave on occasions;
(iv) Mr Ponting undertook extra duty of care actions including, as previously mentioned, his attendance at a therapy session with the Claimant [135];
(v) Additional one-to-one meetings with Mr Ponting and increased general day-to-day communication;
(vi) Support through the Respondent's Employee Assistance Programme ('EAP') was offered, but declined by the Claimant because he had adequate support from the NHS at the time [154];
(vii) An OH assessment was clearly undertaken in 2017 but the Claimant had declined earlier referrals in September 2015 [117] and August 2016 [128] because, again, he was satisfied with the support that he had from the NHS.

4.16 Despite the level of support, the Claimant still experienced problems with his attendance levels. He had 28 days off work over 3 years [95]. He had been in a formal performance management process in August 2017, but Mr Ponting acknowledged that there were a handful of his colleagues (approximately 6) who would have been in the same or a similar position at that time too.

Team change

4.17 The Claimant's move to the Fibre Jointing Team in June or July 2017 had, according to Mr Ponting, been purely because of his desire for more money. He had access to more overtime, was paid a higher callout fee and had the benefit of a reactive planned network pay uplift with his new team. The Claimant, however, said that there were difficulties which he experienced with his work several weeks into the move which had included the nature of the work itself, which he found hard, and the lack of teamwork which he perceived in others. He asserted that he had been moved against his will by Mr Ponting because of the Respondent's need for more jointers.

4.18 Mr Cooper did not cross-examine Mr Ponting on his evidence on that issue at all. He also conceded, during his closing remarks, that the move had benefited the Claimant in terms of improving his skills and enabling him to gain greater access to overtime payments.

4.19 Having considered all of the evidence on this issue, our view was that the Claimant had probably been happy with his move to the Fibre Jointing Team at first, but he became disillusioned with the work after several weeks.

August 2017

4.20 Mr Ponting stated that he had received concerns about the Claimant's conduct over a significant period of time, but which came to a head in August. Some had related to the Claimant's own well-being and safety and others had concerned those who came into contact with him, the public and his colleagues. According to Mr Ponting, some colleagues did not

want to work with him and others had requested that another person be present in the normal two-man team.

4.21 One specific concern had arisen from an incident which had occurred in June 2017 whilst the Claimant had been working in Clevedon with Mr Ware and Mr Hicks. The Claimant asserted that, whilst he had been up a ladder trying to solve a problem in a confined roof space at the All Hands Stadium, Mr Ware had put a finger in a hole in his trousers. He had not been at all happy and had come down the ladder repeating "*get it out, get it out*" and had said to Mr Ware that that kind of conduct was "*a red flag to someone with PTSD*". Mr Ware's account was very different, when it was eventually taken [191]; he said that his hand may only have accidentally brushed past the Claimant's leg.

4.22 Having heard the Claimant's compelling account in person, however, we had no reason to doubt what he told us. We concluded that Mr Ware probably had inserted his finger into a hole that had led him to become very cross and upset. Given the contents of the medical evidence, we appreciated just how upsetting such an incident could have been.

4.23 Further, we accepted the Claimant's evidence about the date of the incident. He stated that the event had taken place in June and was very specific in that regard. Mr Ponting had understood that it had occurred in August, but he was less clear and, considering the fact that he had not been present, that was not surprising. There was nothing within the initial statements that were provided which served to date the incident, save in one respect.

4.24 Initial statements were provided by Miss Talbot [156], Mr Hicks [160] and Mr Ware [161]. In Miss Talbot's, she referred to an occasion when the Claimant had recalled how angry he had been about Mr Ware's actions in Clevedon. He had said "*I wanted to smash his head right in, then and there and it literally took me all weekend to calm down, had I seen him during the weekend I would of* [sic] *done him in*". The statement was dated 18 August 2017 and the conversation with the Claimant was said to have been a 'recent' one. Given that we had accepted that the incident in Clevedon had probably occurred in June, it appeared that the Claimant had been describing his feelings two months later.

4.25 Mr Hicks's statement referred to the Claimant doing a good job whilst he was on site, but there being problems with him arriving late and leaving early and being somewhat unpredictable. He stated that he preferred not to work with him and a number of other people. Mr Ware referred to communication difficulties that he experienced with the Claimant. He stated that he did not like working with him either because of his aggression. It was important to note that neither gentleman referred to the Clevedon incident at all in their initial statements. It was also noteworthy that they were both in their early 20s.

4.26 On the basis of the evidence that Mr Ponting had, he felt that a fact-finding interview with the Claimant was appropriate. That took place on 24 August with Mr Buxton who took the notes [180-5]. Some of the general nature of the Claimant's colleagues' concerns was put to him. He said that he was

able to control his hot headedness but clearly accepted that there had been flareups which had been caused by a clash of personalities. Nevertheless, he was keen to improve and get better;

> "*I'm not a bad egg. I can only beg. I don't want to lose my job over this. I'm getting the help I need to get better.*" [182]

He was also contrite;

> "*Peter said that he wanted to keep saying sorry but doesn't think it is going to help. He said he will write a letter to apologise for his outburst over the finger in the whole incident.*" [183]

He admitted that he '*could blow*' if you felt vulnerable.

4.27 Mr Ponting said that the meeting was challenging, with the Claimant displaying erratic behaviour throughout (paragraph 18 of his witness statement). Nevertheless, the Claimant made the OH report of 21 August available to him at the meeting, but it was only available to read on his telephone and it was not therefore easy for Mr Ponting to digest. He did not adjourn the meeting to take time to read it carefully or to obtain a hard copy. Instead, he concluded the meeting by deciding to refer the case to his manager for consideration "*under BT's Gross Misconduct process*" [185]. Mr Ponting accepted in evidence that the Respondent had no such process, although gross misconduct was, of course, one of the possible findings available under the Disciplinary Policy.

4.28 Following the Claimant's fact-finding interview, Mr Ponting undertook similar interviews with Mr Hicks [190] and Mr Ware [191-2] which focused upon the events at Clevedon which had not been covered in their first statements. It had been as a result of the Claimant's reference to the incident in his own interview which had led to that matter being investigated in the way that it was (see Mr Ponting's explanation [225]). It was important to note that Miss Talbot was not re-interviewed.

4.29 The Claimant was offered a further fact-finding interview after the additional statements from Mr Hicks and Mr Ware were provided to him [189]. He was also invited to comment upon them in writing, but declined to do so [193]. What he did suggest, however, was mediation. That offer appeared to have been overlooked.

4.30 The Claimant had been suspended on 24 August, which was subsequently confirmed in writing [197-8] and, on 5 October, he was called to a disciplinary hearing to face two allegations which related to the Clevedon incident and the subsequent expression of his feelings to Miss Talbot about Mr Ware's conduct [174];

> "• *Whilst working at All Hands Stadium, Clevedon, you behaved aggressively by yelling and swearing at another colleague.*
>
> • *In a conversation with colleague, whilst discussing another colleague, you stated 'I wanted to smash his head writing, then and there and it literally took me all weekend to calm down, had I of seen him during the weekend I would of done him in.'*"

4.31 The disciplinary hearing took place on 6 November before Mr Moore, a Business and Corporate Delivery SOM. He was supported by Ms Downing from HR who attended by telephone and the Claimant was represented by Mr Crothall, a union representative. No notes of the hearing were

produced to us in evidence, which we found surprising. We were told that a recording had been taken, but neither representative invited us to hear any part of it and the Respondent had not transcribed it. All that we had was Mr Crothall's submissions [209-220].

4.32 After the hearing concluded, Mr Moore put several questions to Mr Buxton, Mr Crabol and Mr Ponting in writing, which they answered [221-6]. As far as we were aware, none of that further evidence was shared with the Claimant. The evidence from Mr Ponting and Mr Crobal was of a much more general nature and broadened the evidence in respect of the two allegations significantly, particularly that contained within the second and third questions and answers dealt with by Mr Crabol [223] and by Mr Ponting [225]. It appeared to us to contain a good deal of hearsay and rumour.

4.33 Mr Moore provided his outcome letter on 21 November [227-239]. The Claimant was dismissed for gross misconduct and Mr Moore's summary contained the following;

> "…*the business cannot condone threatening behaviour and violence at work.*
> *It is evident in this case that there have been multiple reports of violence and threatening behaviour from Peter with the line manager confirming that people are too afraid to have their comments put in writing out of fear of what Peter may do.*
> *Peter's mitigation around his actions was that Mitch Ware inappropriately touched him which led to his outburst and violent behaviour, however reviewing a 3rd party witness statement from Lee Hicks, he confirms this was not the case.*"

4.34 The Claimant indicated that he wished to appeal on 30 November [241] and, after some difficulties in communication, an appeal hearing was eventually arranged for 30 January 2018.

4.35 The appeal hearing was conducted by Mr Cotton and the Claimant and Mr Crothall were also present. Again, there was no record of that hearing before the Tribunal, but Mr Cotton did give evidence, unlike Mr Moore. He clarified that the evidence that he had seen had been restricted to the initial statements from Messrs Hicks, Ware and Talbot, the three fact-finding interviews, Mr Moore's outcome letter and the three sets of questions and answers provided by Messrs Buxton, Ponting and Crabol. He did not speak to Miss Talbot, Mr Ware or Mr Hicks himself nor did he know whether Mr Moore had. They had certainly not given evidence at the initial disciplinary hearing.

4.36 Mr Cotton provided his outcome letter on 23 February 2018 [260-4]. The Claimant's appeal was dismissed. During his evidence, Mr Cotton clarified that, in terms of the two allegations themselves, he did not regard the first one as an incident of gross misconduct on its own, but he had regarded the second one in that way.

5. Conclusions

Unfair dismissal

5.1 We were satisfied that the Claimant had been dismissed for a reason relating to his conduct, as he accepted in cross-examination (see paragraph 1 of the List of Issues). We did not accept that he was dismissed for any reason connected to his attendance, as Mr Cooper had suggested. His attendance record was similar to that of a significant number of other employees and we did not perceive any particular deterioration in it in 2017. We also, therefore, rejected the suggestion that the Claimant had been dismissed for some other substantial reason as suggested in paragraph 2 of the List.

5.2 We turned to issues under s. 98 (4) of the Act, first, the application of the *Burchell* test as set out within paragraph 3 and 4 of the List of Issues.

5.3 Following the decision in the case of *BHS-v-Burchell* [1980] ICR 303, in conduct dismissal cases, we had to consider whether the Respondent had genuinely believed that the Claimant was guilty of the misconduct alleged, secondly, whether that belief had been based upon reasonable grounds and, finally, whether there had been a reasonable investigation prior to the Respondent reaching that view. It was not for us to decide whether the employee had actually committed the acts complained of.

5.4 We concluded that the Respondent had genuinely believed that the Claimant had been guilty of misconduct, as he himself had conceded. We did not, however, consider that the second and third limbs of the *Burchell* test were met.

5.5 In relation to the first allegation of misconduct, there appeared to have been little or no recognition of the age of the allegation and the fact that it had dated back to June. Neither Mr Hicks nor Mr Ware had raised any complaint about it and Mr Moore and Mr Cotton did not appear to have dated the incident and did not therefore seem to have appreciated how long after the event the witness evidence was taken. It was only after the Claimant had referred to it that his colleagues were re-interviewed.

5.6 Ms Maher suggested to the Claimant in cross-examination that he had not challenged the allegation that he had lost his temper and sworn at Mr Ware throughout the disciplinary process. That may have been correct, but it was difficult to verify in the absence of any notes of the disciplinary and/or appeal hearings. Nevertheless, there was no evidence as to what he had allegedly *said*, apart from Mr Hicks's evidence that he had sworn in the following way only; "*don't fucking do that again*" [191].

5.7 Mr Moore appeared to have rejected the Claimant's account of the Mr Ware having used his finger to penetrate a hole in his trousers in favour of Mr Ware's story, given the wording of his letter [237], yet the reason for that conclusion was not explained. That was particularly surprising given that he had heard from the Claimant at the disciplinary hearing and not from Mr Ware. That seemed to us to have been a rather crucial element of the incident, given the nature of the Claimant's disability and the manner in

which it was said to have manifested itself. Mr Cotton, curiously, said that he made no finding either way on that point.

5.8 In relation to the second allegation, Miss Talbot did not give evidence to Mr Moore and was not even interviewed by Mr Ponting. Although the Claimant accepted that he had said what was alleged, the comment could have been made in a number of different ways depending upon the tone, intent, the level of anger displayed and the time which had elapsed since the material event. There might have been a very significant difference between an idle threat and a deliberately malicious expression of intent, yet none of that type of qualitative evidence was found within Miss Talbot's statement and she was never interviewed by either Mr Ponting or Mr Moore. It appeared that Mr Moore really had little way of determining how the comment was made; whether it had been a stupid, idle remark or a genuinely meaningful expression of intent. The threat had clearly not been carried into action.

5.9 Then there was the more general evidence which Mr Moore appeared to have been accounted when he considered the two specific allegations which the Claimant faced. That evidence, particularly seen in Mr Crabol's and Mr Ponting's answers to Mr Moore's questions, was unspecific, woolly and simply appeared to have tainted Mr Moore's approach to his analysis. In particular, some of his findings proved to have been factually wrong; there was no evidence that the Claimant had been involved in *actual* violence [237]. The evidence which Mr Ponting gathered contained no such reports.

5.10 In addition, not having heard from Mr Moore, we did not know to what extent he considered the Claimant's condition and the manner in which it may have caused or contributed to the conduct complained of. The factual matrix of the Clevedon incident was such that a colleague, who was significantly younger than the Claimant, had invaded his personal space at a sensitive part of his body whilst he was engaged in work in a confined space. The OH report suggested that those factors were likely triggers for the provocation of an excessive reaction from the Claimant. There was no evaluation of those issues within Mr Moore's long outcome letter.

5.11 Under paragraph 5 of the List of Issues, we asked to consider the sanction of dismissal. We were not permitted to impose our own view of an appropriate sanction. Rather, we had to ask whether the one that was chosen had fallen somewhere within the band of responses available to a reasonable employer in the circumstances (*Foley-v-Post Office, HSBC-v-Madden* [2000] ICR 1283). An employer had to consider any mitigating features which might have justified a lesser sanction and the ACAS Guidance was instructive in that respect; factors such as the employer's disciplinary rules, the penalty imposed in similar previous cases, the employee's disciplinary record, experience and length of service were all relevant. An employer was entitled to take into account both the actual impact and/or the potential impact of the conduct alleged upon its business. Section 98 (4)(b) of the Act required us to approach those questions "*in accordance with equity and the substantial merits of the case*". A Tribunal was entitled to find that a sanction had been outside the band of reasonable responses without being accused of having taken the

decision again; the "*band is not infinitely wide*" it was said in *Newbound-v-Thames Water* [2015] EWCA Civ 677.

5.12 Here, we were not satisfied that the decision to dismiss had fallen within the band of responses available to a reasonable employer in the circumstances for three main reasons.

5.13 First, it was highly debatable that the Claimant's admitted conduct, on its face, was capable of having been properly described as gross misconduct. Mr Cotton did not think that the first allegation had been that significant on its own and, without more colour, tone or detail to Miss Talbot's evidence, it was difficult to tell whether the second allegation could really have been properly described in that way either. It was important to remember that neither of the two men involved had ever complained about the event at Clevedon, until they were invited to. The conduct was not covered within the Respondent's Standards of Behaviour Policy [204], although we acknowledged that the list was not exhaustive. Further, the Respondent's thought processes appear to have been skewed by the fallacious assumption that the Claimant had in fact been violent. It also accounted for other, unspecific hearsay evidence.

5.14 Secondly, the Claimant had been remorseful. He was contrite and apologetic on 24 August and had clearly wanted to improve his behaviour, having just started a new phase in his therapy and recovery plan. He was prepared to mediate with his colleagues, an offer which appeared to have been ignored. As far as we were aware, he had a clean disciplinary record.

5.15 Finally, insufficient regard was given to the Claimant's disability. Even though his PTSD had been admitted *as* a disability in the face of a significant amount of medical evidence, doubts appeared to exist over his veracity, as illustrated by Mr Ponting's evidence. The circumstances which unfolded at Clevedon contained many of the triggers identified by OH and his treating therapist (those identified at the therapy session which Mr Ponting had attended in 2016 [135]).

5.16 There had been no time to consider and/or implement the OH recommendations or adjustments in August 2017. One might have expected a reasonable employer to have taken that step before considering such a draconian step as dismissal. All of this we found particularly surprising given the number of ex-servicemen who were employed by the Respondent as a result of its covenant with the government.

5.17 Paragraph 6 of the List of Issues required us to consider whether the Respondent had adopted a fair procedure. By and large, the framework which led to the Claimant's dismissal appeared to have been fair, but there were at least three legitimate criticisms that stood against it;

5.17.1 On 24 August, the supposedly impartial investigator, Mr Ponting, recommended a finding of 'gross misconduct' when he referred the matter up to Mr Moore [185];

5.17.2 The further evidence which Mr Moore gathered through his questions and answers [221-6], were not shared with the Claimant

and he had no opportunity to comment, particularly the more amorphous issues contained in the emails from Messrs Crabol and Ponting;

5.17.3 Mr Moore appeared to have accounted for much more evidence than that which was relevant to the two allegations which the Claimant faced.

5.18 For all those reasons, we concluded that the Claimant's dismissal was unfair within the meaning of s. 98 (4).

Polkey and ss. 122(2) and 123 (6)

5.19 We had been asked to consider the application of the principle in *Polkey* and arguments of contributory conduct (paragraphs 7-9 of the List of Issues).

5.20 The decision in *Polkey-v-AE Dayton Services* [1988] ICR 142 introduced an approach which required a tribunal to reduce compensation if it found that there was a possibility that the employee would still have been dismissed even if a fair procedure had been adopted. Compensation could have been reduced to reflect the percentage chance of that possibility. Alternatively, a tribunal might have concluded that a fair of procedure would have delayed the dismissal, in which case compensation could have been tailored to reflect the likely delay. A tribunal had to consider whether a fair procedure would have made a difference, but also what that difference might have been, if any (*Singh-v-Glass Express Midlands Ltd* UKEAT/0071/18/DM).

5.21 It was for the employer to adduce relevant evidence on that issue, although a tribunal should have regard to any relevant evidence when making the assessment. A degree of uncertainty was inevitable, but there may have been circumstances when the nature of the evidence was such as to make a prediction so unreliable that it was unsafe to attempt to reconstruct what might have happened had a fair procedure been used. A tribunal should not, however, have been reluctant to have undertaken an examination of a *Polkey* issue simply because it involved some degree of speculation (*Software 2000 Ltd.-v-Andrews* [2007] ICR 825 and *Contract Bottling Ltd-v-Cave* [2014] UKEAT/0100/14).

5.22 Ms Maher did not address us on *Polkey* during her closing submissions. We considered the issue in any event and concluded that there was no evidence that we were able to identify which indicated that a fair procedure ought still to have resulted in the Claimant having been fairly dismissed.

5.23 We also had to consider whether the Claimant's dismissal was caused by or contributed to by his own conduct within the meaning of s 123 (6) of the Act. In order for a deduction to have been made under the section, the conduct needed to have been culpable or blameworthy in the sense that it was foolish, perverse or unreasonable. It did not have to have been in breach of contract or tortious (*Nelson-v-BBC* [1980] ICR 110). We applied the test recommended in *Steen-v-ASP Packaging Ltd* [2014] ICR 56 and we;

(i) Identified the conduct;

(ii) Considered whether it was blameworthy;

(iii) Considered whether it had caused or contributed to the dismissal;
(iv) Determined whether it was just and equitable to reduce compensation;
(v) Determined by what level such a reduction was just and equitable.

5.24 We also considered the slightly different test under s. 122 (2); whether any of the Claimant's conduct prior to his dismissal made it just and equitable to reduce the basic award, even if that conduct had not necessarily caused or contributed to the dismissal.

5.25 Although, again, Ms Maher made no submissions on this point, we were able to identify the relevant conduct and were satisfied that it had caused or at least contributed to the Claimant's dismissal within the meaning of paragraphs (i) and (iii) above (the conduct concerning the two allegations of misconduct), but, even if we had found that the conduct had been blameworthy, given the Claimant's disability, we did not consider that it was just and equitable to reduce compensation under (iv) because of the evidence which illustrated its effect upon his behaviour in such circumstances and the Respondent's failure to implement the suggested OH adjustments rather than dismissing him.

5.26 The Claimant was therefore unfairly dismissed and there were no deductions to make from his compensation under paragraphs 9-7 of the List of Issues.

Direct discrimination

5.27 The Claimant's PTSD had been admitted (paragraph 10 of the List of Issues) and paragraphs 11 and 12 had become irrelevant. The complaint of direct discrimination was set out within paragraphs 15-17 and was solely related to his dismissal, but the intervening paragraphs (13 and 14) related to the complaint under s. 19 and have been addressed below.

5.28 Section13 of the Equality Act 2010 provides as follows:

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

The comparison that we had to make was that which was set out within s. 23 (1):

> "*On a comparison of cases for the purposes of sections 13, 14 or 19, there must be no material difference between the circumstances relating to each case.*"

5.29 We approached the case by applying the test in *Igen-v-Wong* [2005] EWCA Civ 142 to the Equality Act's provisions concerning the burden of proof, s. 136 (2) and (3):

> "*(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.*
> *(3) But subsection (2) does not apply if A shows that A did not contravene the provision.*"

5.30 In order to trigger the reversal of the burden, it needed to be shown by the Claimant, either directly or by reasonable inference, that a prohibited factor may have been the reason for the treatment alleged. More than a difference in treatment and a difference in protected characteristic needed to have been shown before the burden would shift. The evidence needed to have been of a different quality, but a claimant did not need to have to find positive evidence that the treatment had been on the alleged prohibited ground; evidence from which reasonable inferences could have been drawn might have sufficed. Unreasonable treatment of itself was generally of little helpful relevance when considering the test. The treatment ought to have been connected to the protected characteristic. What we were looking for was whether there was evidence from which we could see, either directly or by reasonable inference, that the Claimant had been treated less favourably than others not of his disability, because of his disability.

5.31 During closing submissions, we asked Mr Cooper whether it was contended that a non-disabled hypothetical comparator would have been treated differently from the Claimant in the same or a similar situation. He said not. His response accorded with the evidence in our judgment. Indeed, he then indicated that he was going to withdraw the claim but, having been given some time to discuss the position with his client, he left it before us for our determination.

5.32 Accordingly, the complaint of direct discrimination was dismissed since was no evidence from which we could determine that a non-disabled comparator would have been treated differently. The Claimant was not dismissed because of his disability, but because of his conduct. A non-disabled comparator who had exhibited similar behavior was likely to have been treated the same way. As we pointed out to Mr Cooper, the situation might have been different if the complaint had been brought under s. 15.

Indirect discrimination

5.33 In relation to the claim of indirect discrimination, we considered and applied the test in s. 19 of the Act;

> *"(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.*
>
> *(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—*
>
> *(a) A applies, or would apply, it to persons with whom B does not share the characteristic,*
>
> *(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,*

(c) it puts, or would put, B at that disadvantage, and

(d) A cannot show it to be a proportionate means of achieving a legitimate aim.

We applied the same test as set out above in relation to the shifting burden of proof.

5.34 We first considered whether a provision, criterion or practice ('PCP') had been applied. We then turned to the question of disadvantage under s. 19 (2)(b) and (c). That required us to ask two questions; first, whether people with the Claimant's characteristics were exposed to a particular disadvantage as a result of the PCP and, secondly, whether the Claimant himself was exposed to that disadvantage.

5.35 The PCP that was relied upon was set out in paragraph 18 of the List of Issues;

> "*[moving individuals] from a safe working environment with a working party of much your then who understand [the individuals'] disabilities and coped with them and [the individuals].*"

5.36 There was no evidence that the Claimant's previous team had been 'mature men' and/or had understood his disabilities. Further, there was no evidence that such a PCP had been applied since we found that the Claimant had been happy with his move to the new team in June or July 2017, at least at first. Yet further, there was no evidence of any group disadvantage within the meaning of s.19 (2)(b).

5.37 Even if there had been merit in the complaint, we had to consider paragraphs 13 and 14 of the List of Issues relating to s. 123 of the Act. The complaint related, at its latest, to an event in July 2017. The Claim Form had been issued on 24 January 2018, approximately 6 months later. The Claimant had contacted ACAS on 30 November 2017 and a certificate had been issued on 4 December and no extension to the three-month time limit was generated. The complaint was therefore out of time. Mr Cooper made no submissions as to why it might have been just and equitable for the time limit to have been extended, nor was there any evidence before us which might have enabled a proper evaluation of such an argument.

5.38 Accordingly, the complaint of indirect discrimination was out of time and failed on its merits in any event.

<u>Wrongful dismissal</u>

5.39 We also had to decide whether, in fact, the Claimant was guilty of the conduct alleged to have been able to determine whether he had been in fundamental breach of contract such that a summary dismissal was justified. That was a very different test from that we had had to apply when considering the claim under the Employment Rights Act and the *Burchell* test.

5.40 Repudiatory conduct must ordinarily disclose a deliberate intention not to have been bound by the essential requirements of the contract. The burden was on the employer to demonstrate that the Claimant's conduct was of such a nature so as to have justified his dismissal without notice.

5.41 It will have been clear from our previous findings that we concluded that the Claimant had been wrongfully dismissed. We did not hear from Mr Moore nor, perhaps more importantly, Miss Talbot, Mr Ware or Mr Hicks. The Respondent had not discharged the burden upon it to prove that the Claimant had in fact been guilty of a repudiatory breach of the contract.

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Employment Judge Livesey

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Date 27 November 2018