



EMPLOYMENT TRIBUNALS

BETWEEN

CLAIMANT
MR M Z HASSAN

V

RESPONDENT
ROYAL MAIL
GROUP LIMITED

HELD AT: CARDIFF ON: 19, 20, 21 & 22 NOVEMBER 2018

EMPLOYMENT JUDGE W BEARD: MEMBERS: MS GEORGE
MR BRADNEY

REPRESENTATION:

FOR THE CLAIMANT - Mr Khan (Friend)

FOR THE RESPONDENT - Mr Bownes (Solicitor)

JUDGMENT

REASONS

Preliminaries

1. The claimant was represented by Mr Khan, he is a friend of the claimant with no legal qualifications. Mr Bownes, a solicitor, represented the respondent. The claimant gave oral evidence on his own behalf. The respondent called Ms J Kemp, who dismissed the claimant and Mr Kyte, who rejected the claimant's appeal, to give oral evidence. The tribunal was provided with a bundle of documents which ran to 238 pages.
2. On 23 and 24 July 2018 at a preliminary hearing EJ Ward set out an agreed list of issues to be resolved by the tribunal. The first series of issues, which fell under the heading unfair dismissal were: what was the principal reason for dismissal? Was the reason a potentially fair reason and was a fair process followed. The second series of issues, under the heading of direct discrimination because of race religion and disability, having set out that it was agreed that the respondent progressed the claimant through a disciplinary process and dismissed him, were: was the treatment less favourable than the treatment of comparators (the claimant relying on Mr Cieslak and Ms T Davis as comparators)? If so was this because of a relevant protected characteristic? The third heading of discrimination arising from disability set out these issues: did the respondent treat the claimant

unfavourably in progressing a disciplinary procedure and dismissing the claimant? Did the conduct on 29 March arise in consequence of the claimant's disability? Did the respondent treat the claimant unfavourably in dismissing him because of the conduct? If so has the respondent shown that dismissing the claimant was a proportionate means of achieving a legitimate aim.

The Facts

3. The claimant was employed as a driver by the respondent which operates the national postal service, he commenced his employment on 28 September 1998 and was dismissed on 10 May 2017. The respondent has conceded that the claimant is disabled with depression and anxiety. In the past the respondent has adjusted the claimant's work on the advice of occupational health practitioners. The claimant identifies as a Muslim and is of an Asian ethnic background.
4. As part of the claimant's case he contends that he has symptoms arising from his disability which mean that he may lose control and is irritable. The medical evidence provided to the tribunal is as follows.
 - 4.1. Various statements of fitness to work from the GP most of which refer to anxiety and depression as the diagnosis.
 - 4.2. An occupational health report from an adviser (there is no indication of the adviser's qualifications) dated 14 December 2011 which sets out that the claimant has been suffering from personal stress issues and depression and was being treated with medication. The report indicates that the claimant should make a full recovery.
 - 4.3. An occupational health report prepared by Dr Peter Milne dated 17 September 2012 which indicates that the claimant is likely to suffer from anxiety and depression for the foreseeable future but that with counselling this could improve but that the condition could recur in the future.
 - 4.4. A letter dated 9 October 2012 indicating that the claimant had been referred to a Community Mental Health Team.
 - 4.5. An occupational health report from an occupational health adviser (no indication of qualifications) dated 31 January 2013 indicating that the claimant had a long term mental health condition which was likely to improve with counselling. However, the report also indicated that the claimant would be vulnerable to unpredictable "flare ups" of the condition.
 - 4.6. There is a Med 3 "fit note" dated 27 January 2017 which indicates that the claimant may be fit for work with altered hours with the following noted *"this gentleman has been having some anxiety and stress related issue (sic) recently he has not been able to attend work from 24/1/17 for 4 days. He (sic) has been assessed in surgery on 25/1/17 and 27/1/17. I have advice (sic) him to go back to work on altered/reduced hours for two weeks starting Monday 30/1/17"*
 - 4.7. An occupational health report from Dr Osunsanya date 8 March 2017. This report refers to the claimant's anxiety illness, but indicates that he is medically fit for work.

- 4.8. A letter from the claimant's GP dated 16 May 2017 and addressed to whom it may concern. which indicates the claimant suffers from chronic anxiety and depression and had done so since 2011. The letter indicates that the claimant had been referred to mental health support services. A letter from that service dated 17 May 2017 and addressed to the claimant offering the claimant an opportunity to attend an appointment.
- 4.9. Nothing in the medical evidence attributes specific behavioural traits to the claimant's disability. In particular, there is nothing in the evidence which indicates that the conduct which led to the claimant's dismissal, was caused by his disability.
5. The respondent on receipt of medical advice had made changes to the claimant's working conditions making adjustments to reflect advice. Those adjustments were agreed by Mrs Kemp amongst others.
6. Before dealing with the facts relating to the main elements of the claimant's claim there is one element of evidence which does not sit within the general narrative. The tribunal were shown a copy of a Facebook page with the following comment "*Muslims are cunts*". It is difficult to establish the date of the original posting; however, 5 June 2017 and 10 August 2017 are dates set out on the copies of the documents we have seen. The respondent's witnesses accepted that the person to whom the comment was attributed was an employee of the respondent. The respondent also accepted that there was no action taken against this employee that the respondent was aware of. There was no evidence that the respondent had been made aware of this posting before these proceedings. Additionally, there is no evidence that there has been any investigation as to the provenance of the Facebook page (the tribunal are aware that fake accounts can feature on social media). We do not name the individual because they were not at tribunal and have had no opportunity to provide any evidence as to whether that person was the author of the comment. That said the comment is a foul insult and clearly intended to express and engender racial or religious hatred.
7. Mrs Kemp had previous dealings with the claimant over a number of matters. One particular incident of importance to our findings is that on 23 October 2013 Mrs Kemp recorded the following about the claimant in an interview meant to deal with unauthorised absence "*(h)e showed wild mood swings from contrite and apologetic through to angry and threatening (Not[sic] physically) and back again. I cannot continue any case against him as I believe he is suffering a more serious Psychological complaint and certainly he is unable to remember anything that is happening to him at all.*"
8. In January 2017 the claimant was absent from work with stress related issues. He returned to work with a recommendation that alterations be made to his working pattern for a short period. He returned to work and, as we understand it the March Occupational Health report was sought because of

the stress and anxiety elements of his absence. Part of the approach to dealing with the report raised issues about the claimant's disruptive conduct at a meeting on 30 January 2017 (see page70).

9. The incidents that led to the claimant's dismissal occurred on 29 March 2017. It is clear there are two parts to events.
 - 9.1. Mr Hassan had a conversation with his direct line manager towards the end of his shift at an area known as the platform. After the conversation had concluded the claimant began to make as if to leave work. Other employees began to remonstrate with the manager to stop the claimant leaving and he called him back in response. The claimant responded angrily, shouting and making points about the level of work that he had conducted in comparison to the colleagues that were complaining about the claimant leaving. At that stage a direct confrontation between the claimant and a Mr "C" (a white non-Asian employee) ensued. From the documents we have seen this had developed from banter into something more serious and the manager intervened. On the evidence it would appear that both the claimant and "C" were equally engaged in this confrontation. The manager separated the two to work in different parts of the platform. There is a degree of dispute as to what happened after the confrontation but the manager reported that the claimant was still shouting after "C".
 - 9.2. What followed was an incident in the car park between the claimant and "C". We are aware that there was some CCTV footage of this incident. The claimant accepted approaching "C" in his car. His position was that he wanted to resolve matters with "C". The respondent called no direct evidence of the incident but provided the evidence that it had gathered in its investigation. The claimant contended that he had been struck by "C". The witness statements gathered in the investigation indicated that the claimant had approached "C"'s car that "C" had emerged from the car and stood face to face to one and other. There are then, unsurprisingly, different perspectives on what then happened. What is clear from the witness statements is that "C" came into physical contact with the claimant apparently deliberately. This was described by witnesses as a push and by the claimant as a punch.
10. The respondent commenced an investigation into the incident suspending both men on 30 March 2017. This investigation began after Mrs Kemp and the line manager had viewed CCTV footage. A Mr Reynolds was appointed to carry out investigation interviews he met with the claimant on 3 April 2017. Other witnesses were then interviewed on 6 April 2017. A decision was made that the two men should be made subject of a disciplinary process and that the matter would not be decided at Mr Reynolds level, as Mr Reynolds did not have the authority to dismiss, and the matter would be passed to Mrs Kemp for decision. Our understanding is that if Mrs Kemp considered the matter was not so serious it would be passed back down the chain of command for a

disciplinary hearing. However, Mrs Kemp decided that she would deal with the case.

11. Two charges were brought against the claimant, the first in relation to the behaviour on the platform the second in relation to the incident in the car park. The first described as “*aggressive behaviour and abusive language on the platform*” the second as “*provocation of a colleague within the Royal Mail Car Park*”.
12. The claimant had requested a copy of the CCTV footage a short time after the incident and had reported the matter to the police. The claimant was not provided with a copy or given the opportunity to review the footage. The respondent did not keep a copy of the footage which was automatically deleted after 28 days. We were also told that the respondent’s policy, agreed with the unions, is that CCTV footage will not be used in disciplinary investigations.
13. A disciplinary hearing was held on the 21 April 2017. During the fact finding interview the claimant made a reference to his mental health and his return to work following illness. He also raised issues of discrimination. The claimant pointed to a window sticker for an organisation called the Pie ‘n’ Mash Squad. It was accepted by both parties that this is an organisation which expresses racist and Islamophobic views. Mrs Kemp told us, and we accept, that she was unaware of this organisation and had no idea about the views expressed by it. She further told us that she caused it to be removed as soon as the issue was raised by the claimant and that a subsequent investigation was unable to pinpoint when or by whom the sticker had been affixed to the window. She told us that the area was in constant use and that anyone could have placed the sticker on the window.
14. At the disciplinary hearing the claimant was clearly displaying some agitation as he had to be told by his representative to remain calm. The claimant gave his account and Mrs Kemp decided to dismiss the claimant finding that the two charges were proven and each amounted to gross misconduct. It was clear to the tribunal, from her own evidence, that Mrs Kemp had in mind the footage that she had seen when she rejected the claimant’s account that he had been assaulted by being punched and accepting that he had only been pushed only and, to some extent “C” acted in self-defence. Her answers at one point were to describe what she had seen in the footage and to say that it would have made no difference to the investigation as things could not be seen clearly on the footage. “C” was not charged with conduct on the platform but only with his conduct in the car park. He was also found to have committed an act of gross misconduct and was not dismissed but made subject to two-year final written warning. Mrs Kemp told us that she was advised by HR on the appropriate charges. The reason for the charge on the platform being raised against the claimant was because he had chosen to

continue behaviour by approaching “C” in the car park. Mrs Kemp took no account of the claimant’s health in coming to her decision.

15. Following his dismissal, the claimant appealed. Mr Kyte who conducted the appeal did not see the CCTV footage, but was informed of Mrs Kemp’s view of what the footage showed. The claimant met with Mr Kyte on 24 May 2017. Mr Kyte was informed about the claimant’s mental health as part of the appeal and he was provided with the letters dated 16 and 17 May 2017 referred to above. The claimant also wrote to Mr Kyte on the 30 May 2017 informing him about a potential witness to events. Mr Kyte re-interviewed some of the witnesses and interviewed other witnesses. Mr Kyte upheld the view that the CCTV footage did not need to be shown to the claimant because of policy. He did view and rely on the OH report of 8 March 2017 to conclude that although the claimant’s reaction to events was “disproportionate” that he was medically fit to resume driving duties and that his condition did not have a significant impact on his day to day activities. Mr Kyte upheld the decision to dismiss the claimant. The claimant, when asked, did not point to any particular failings on the approach of Mr Kyte or relate any discriminatory issues in respect of his handling of the appeal.

The Law

16. Section 98 of the Employment Rights Act 1996 provides:

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—

(b) relates to the conduct of the employee

(4) In any other case where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(a) depends on whether in the circumstances (including the size and administrative resources of the employer’s undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.

17. We remind ourselves that it remains the case that it is not the subjective view of the tribunal that is important, what is being examined is the employer's reason for dismissal and the objective reasonableness of that decision. It is a review of the employer's decision. That proposition is set out very clearly in **Turner v East Midlands Trains [2013] IRLR 107:**

*For a good many years it has been a source of distress to unfair dismissal claimants that, with rare exceptions, they cannot re-canvass the merits of their case before an employment tribunal. In spite of the requirement in s.98(4)(b) that the fairness of a dismissal is to be determined in accordance with equity and the substantial merits of the case, a tribunal which was once regarded as an industrial jury is today a forum of review, albeit not bound to the **Wednesbury** mast.*

18. Guidance has been given to Tribunals in dealing with misconduct cases beginning with that given in **Burchell v British Home Stores [1978] IRLR 379** as updated in **Iceland Frozen Foods Ltd v Jones [1982] IRLR 439; ICR 17**. Which guides tribunals to consider the following: whether the respondent has a genuine belief in the misconduct; whether that genuine belief is sustainable on the basis of the evidence that was before the respondent; whether that evidence was gained by such investigation as was reasonable in all the circumstances of the case. Finally, we must consider whether, in short, the punishment fits the crime, in other words whether dismissal was a reasonable decision to take given the genuine belief and the evidence upon which it was based. The examination the issue of reasonableness is based on the band of reasonable responses; that range includes the lenient and the harsh but fair employer. **Sainsburys Supermarkets Ltd v Hitt [2003] IRLR 23** makes it clear that the test to be applied to the extent of an investigation carried out by an employer is also the band of reasonable responses.

19. We must consider the evidence as it was before the respondent at the time of the decision, and decide whether that evidence is sufficient for a reasonable employer to hold the belief in the claimant's misconduct. Then to ask whether the investigation was reasonable in a **Sainsbury** sense. We are to ask whether or not that decision was reasonable in all of the circumstances at that point in time and on that evidence. Tribunals are warned to avoid what is referred to as the substitution mindset. Mummery LJ said in the **London Ambulance Service NHS Trust v Small [2009] IRLR 563 CA :**

It is all too easy even for an experienced Employment Tribunal to slip into the substitution mindset. In conduct cases the claimant often comes to the Employment Tribunal with more evidence and with an understandable determination to clear his name and prove to the Employment Tribunal that he is innocent of the charge made against him by his employer. He has lost his job in

circumstances that may make it difficult for him to get another job. He may well gain the sympathy of the Employment Tribunal so that it is carried along the acquittal route and away from the real question which is whether the employer acted fairly and reasonably in all the circumstances of the dismissal.

20. In respect of discrimination generally: race is a protected characteristic defined in the Equality Act 2010 as is religion and belief. It is clear that the claimant bases his race claim on his Asian ethnic origins. Further the claimant contends that there has been religious discrimination based on his religion; he is a Muslim that too is a protected characteristic. Finally, he relies on disability which is also a protected characteristic.
21. The Relevant elements of the Equality Act 2010 are as follows:
- 21.1. section 13 of provides:
(1) 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.
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- 21.2. Section 15 of the Equality Act 2010 provides:
(1) A person (A) discriminates against a disabled person (B) if—
- (a) A treats B unfavourably because of something arising in consequence of B's disability, and*
- (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim*
- (2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.*
- 21.3. Section 136 EA 2010 provides:
(1) This section applies to any proceedings relating to a contravention of this Act.
- (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.*
- (6) A reference to the court includes a reference to—*
- (a) an employment tribunal;*

22. The tribunal is required to examine evidence in a broad way in dealing with issues of discrimination, consider ***Anya –v- University of Oxford & Anr. [2001] IRLR 377*** which demonstrates that it is necessary for the employment tribunal to look beyond the act in question and to consider background to judge whether racial factors have played a part in the conduct complained of. This is particularly important in establishing unconscious factors in discrimination. ***Shamoon -v- Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285*** indicates that the tribunal in examining whether there has been less favourable treatment compared to a real or hypothetical comparator should note that a bare difference in treatment along with a difference in race/ religion is insufficient. It is always necessary to find that the protected characteristic is an operative cause of the treatment.
23. In respect of disability discrimination, the following is important to the issue of direct discrimination. In ***High Quality Lifestyles Ltd V. Watts [2006] IRLR 850***, HHJ McMullen QC said in respect of direct discrimination:
*Treatment of a person 'on the ground' of his or her disability is more exact and narrower in scope than treatment 'for a reason which relates' to the disability. The treatment here is diagnosed as the dismissal. The first question is the identity of a comparator-----
 ---. The comparator may be, but need not be, the same comparator as is envisaged for the purpose of disability-related discrimination. For example, for direct discrimination, the comparator may be a person who does not have the claimant's disability, and may not have a disability at all. The comparator might have a condition which falls short of the kind of impairment required to satisfy s.1 of the Act. This is because s.3A(5) focuses upon a person who does not have 'that particular disability'.*
- Section 13 no longer refers to 'that particular disability' however in our judgement the Equality Act was a consolidating Act and not intended to alter the law. On that basis we consider the decision in ***Watts*** is good law.
24. We should also reflect the decisions in ***Igen –v- Wong and Ors. [2005] IRLR 258*** and ***Barton –v- Investec Henderson Crosthwaite Securities Ltd. [2003] IRLR 332*** requiring the tribunal to decide whether the claimant has on the whole of the evidence demonstrated a *prima facie* case of discrimination. We must decide whether the evidence has allowed us to draw any appropriate inferences such that we might consider there has been discrimination in the absence of an explanation. If there is not, then the burden of proof will not shift to the respondent to provide an explanation.
25. The tribunal have in mind ***Royal Bank of Scotland v Morris UKEAT/0436/10.***

- 25.1. The tribunal consider that although that authority deals with the definition of disability, nonetheless it points the way as to the care which must be taken in deciding facts on aspects of mental health in the absence of medical reports which deal specifically with factual events.
- 25.2. **RBS** demonstrates that the tribunal must be clear that it has sufficient evidence on issues relating to such matters as recurrence, long term effects and deduced effects and that evidential basis must include expert evidence where the tribunal is unable to draw clear conclusions from medical notes.
- 25.3. However, the reference there is to specific matters which are requirements under the Act to establish disability, here we deal with requirements to establish causation.
- 25.4. We do not consider that a lesser evidential test is required for different aspects of the statutory requirements. The specific problems of recurrence, long term effects are in effect seeking a prognosis require a conclusion based on opinion about the future course of the illness. The issue of deduced effects requires a professional opinion based on the known effects of medication and their application to the specific patient.
- 25.5. However, what we are examining is not whether the conditions for a disability exist or would exist because of prognosis or the impacts of medication. Rather what we are considering is whether that disability has a specific characteristic, if the medical evidence establishes that characteristic on the balance of probabilities that will be sufficient for the first question as to whether this was a symptom of the claimant's condition.
- 25.6. We must consider whether the medical evidence in conjunction with other evidence is sufficient to establish that characteristic. Thereafter we must consider whether, if that element is a characteristic of the disability, and finally whether the behaviour on this specific occasion arose from that disability.

Analysis

26. Dealing first with direct discrimination.
- 26.1. The claimant has produced evidence that a sticker from a racist/Islamophobic organisation was attached to an office window.
- 26.2. Mrs Kemp did not know anything about the sticker or the organisation it referred to prior to it being drawn to her attention.
- 26.3. There was no evidence of when or by whom the sticker had been placed there.
- 26.4. We heard no evidence of any of the individuals involved in or witnessing the incident on 29 March 2017 having any connection with the sticker or making any reference to it.
- 26.5. An offensive racist/Islamophobic Facebook entry was made by someone and was attributed an employee of the respondent. There is no evidence that this was drawn to the attention of Mrs Kemp at any time

before these proceedings. That individual has not been investigated and no disciplinary processes have been commenced against her.

- 26.6. The claimant's disability and absences from work were not considered by Mrs Kemp in the disciplinary process.
- 26.7. The claimant admits being involved in an altercation with "C" on the platform and further admits that he approached "C" in the car park.
- 26.8. Both "C" and the claimant were suspended. Both were subject of a disciplinary process and both were considered to have committed an act of gross misconduct.
- 26.9. The only difference in treatment between the claimant and "C" is that the claimant was dismissed.
- 26.10. We explain below that Mrs Kemp failed to investigate the claimant's health sufficiently, however it was the claimant's conduct which caused her to make the decision she did and not the specifics of the claimant's disability.

27. In respect of the complaint of direct race discrimination and discrimination on the grounds of religion or belief the claimant has established that he was treated less favourably than "C" and that "C" was not Asian or a Muslim. However, we do not consider that the evidence of the sticker and the Facebook entry is sufficient for us to draw any inferences of racial or religious animosity. We do not consider this is sufficient for us to conclude that there was a culture or atmosphere at the workplace which would affect the evidence given to the respondent by the claimant's colleagues or the approach to the investigation and decision to dismiss made by the respondent.

- 27.1. If we were wrong about that then the respondent has provided an explanation for the dismissal of the claimant. That explanation relates to the view taken by Mrs Kemp that the claimant had continued to pursue his arguments from the platform to the car park and provoked "C". In our judgment, although we consider that decision unreasonable for the purposes of unfair dismissal as we set out below, we do consider it to be genuine.
- 27.2. Nothing in relation to Mr Kyte's conduct pointed to anything other than a genuine belief that the claimant's conduct merited dismissal. There was no evidence to indicate that his approach was in anyway influenced by the claimant's race or religion.
- 27.3. On that basis we conclude that the claimant's claim of discrimination on the grounds of race is not well founded.
- 27.4. Similarly, we consider that the claim of discrimination on the grounds of religious belief is not well founded.

28. In respect of discrimination on the grounds of the claimant's disability. The claimant has demonstrated that he is disabled with a depressive illness, further there is less favourable treatment compared to "C" who was not

dismissed. However, the evidence did not establish that Mrs Kemp or Mr Kyte had the claimant's particular disability in mind as a reason for the dismissal.

28.1. We take into account that the respondent had made adjustments for the claimant in the past to accommodate his disability and that Mrs Kemp was party to this.

28.2. There was no evidence advanced of a particular view of the claimant's depressive illness on the part of Mr Kyte or Mrs Kemp.

28.3. Again, if we were wrong about this and the burden of proof shifts, there is an explanation from the respondent as we have set out above.

29. In respect of the claim based on section 15 EA 2010. The medical evidence does not establish that the claimant's behaviour was caused by his disability. Even taking account of the surrounding evidence of the claimant's conduct there is nothing to distinguish this from a personality trait. Based on the claimant's conduct in 2013 as described by Mrs Kemp it may be that this is a trait which is exacerbated at a time when the claimant is suffering a periodic worsening of his disability symptoms. However, we have no basis upon which we could draw such a conclusion on the balance of probabilities. The claimant obtained no report from a medical expert setting out such a relationship and there is nothing in the medical documentation pointing to one. Even if we were able to say that there was such a relationship there is no specific evidence that the claimant was in the midst of such a periodic episode when the events of 29 March took place. In any event the claimant justifies his behaviour on 29 March 2017 and in evidence before us indicates that the conduct on the platform was "banter" which became heated and that he was attempting to resolve matters in the car park when "C" became aggressive. Therefore, even taking the claimant's case at the highest, we cannot say that the behaviour on 29 March 2017 arose in consequence of the claimant's disability.

30. In respect of unfair dismissal, we find the following:

30.1. The respondent in the person of Mrs Kemp and Mr Kyte had a genuine belief that the claimant was guilty of the conduct which was alleged.

30.1.1. The claimant had admitted involvement in an altercation on the platform and that he had approached "C" in the car park.

30.1.2. There were witnesses who indicated that the claimant had engaged in the altercation on the platform and that the claimant had approached the car.

30.1.3. On that basis findings that the claimant had behaved inappropriately on those two occasions were possible findings.

30.1.4. We heard no evidence which would lead us to believe that the decision was made for any other reason than that the existence of that evidence.

30.2. We consider that the investigation of the respondent was outside the band of reasonable investigations. The respondent was aware that the

claimant had a mental health disability and that this he had exhibited inappropriate conduct in the past. A reasonable employer, of the size and with the resources of the respondent, would not have ignored its knowledge of the claimant's condition and the potential connection with his conduct. The advice obtained in March 2017 was not directed to the question of the potential of claimant's disability impacting on his conduct a reasonable employer would not have relied on this advice as informing the respondent about this specific issue.

- 30.3. We consider that the respondent's approach to its procedure in reaching its conclusion on the claimant's guilt fell outside the range of reasonable responses.
- 30.3.1. No reasonable employer would have continued to allow Mrs Kemp, who had seen the CCTV footage, to be the decision maker in respect of the claimant's dismissal if the policy of not allowing footage to be part of proceedings was to be applied.
- 30.3.2. Conversely, if Mrs Kemp was to conduct the process, no reasonable employer would continue to exclude the CCTV footage from the process.
- 30.3.3. It was outside reasonable responses for Mrs Kemp to take account of the video Footage in coming to her conclusions when the claimant had not seen or been able to comment on the same. It offends natural justice for the decision maker to have and rely upon evidence which is not shown to the claimant unless there is good reason so to do. The respondent did not advance such a reason, the existence of the policy to exclude material from deliberation requires the respondent not to have viewed and considered that material.
- 30.3.4. Mr Kyte did not correct this failing. Mr Kyte relied upon and applied Mrs Kemp's description of the contents of the video in coming to his conclusions.
- 30.4. We consider that the respondent adopted an unreasonable approach in only considering the conduct of "C" in the car park whilst considering the conduct of the claimant on the platform and the car park. The reason advanced by the respondent is that the conduct of the claimant was a continuation of events. In our judgment that indicated a level of pre-judgment of the facts in absolving the conduct of "C" on the platform of any connection with the conduct of the claimant in approaching "C" in the car park.
- 30.5. For those reasons the tribunal considers that the procedure adopted by the respondent was not a reasonable procedure in all the circumstances.
- 30.6. Therefore, we consider that the claimant's claim of unfair dismissal is well founded.
31. In respect of the issue of contribution the tribunal are of the view that the claimant contributed to his dismissal to the extent of 20%.

- 31.1. The claimant admitted behaviour which was disruptive on the platform. We are unable on our findings to attribute this directly to the claimant's disability.
- 31.2. We conclude that the claimant approached "C" in the car park. This was unwise, if nothing more, given the previous disruption. This conduct too led to the claimant being made subject of disciplinary proceedings.

17 January 2019
Employment Judge Beard

Order sent to Parties on

.....18 January 2019.....