EMPLOYMENT TRIBUNALS

Claimant: Mr. P Gaffney

Respondent: Glaxosmithkline Services Unlimted

Heard at: Teesside Hearing Centre

On: 23rd, 24th, 27th, 29th November
Deliberations 30th November

Before: Employment Judge Pitt
Mr. S Wykes
Mr. S Carter

Representation
Claimant: Mr. P Hargreaves Solicitor
Respondent: Mr. T Kirk of Counsel

JUDGMENT

1. The claimant was unfairly dismissed
2. The respondent failed to make reasonable adjustments
3. The reasonable adjustments claim is out of time and it is not just and equitable to extend it
4. The claimant did not suffer from direct discrimination as a result of disability
5. The claimant did not suffer from discrimination arising from his disability
6. The claimant did not suffer discrimination by the way of harassment
7. For the avoidance of doubt the claimant's claim for detriment as a result of a public interest disclosure is dismissed upon withdrawal by the claimant

REASONS

1 The claimant, date of birth, 30th March 1962, he was employed by the respondent as a warehouse operative from 11th June 1990 until 22nd Nov 2016;

at the effective date of termination he was 54 years of age. His gross salary was £25,000 per annum, in addition he was entitled to bonuses and overtime.

2 The respondent is a global pharmaceutical and healthcare business. It employs approximately 16,000 people across 18 sites in the UK. The claimant worked at the respondent Barnard Castle site.

3 The claimant brings claims the following claims; Unfair dismissal; Direct Disability Discrimination; Harassment; Discrimination arising from a disability; failure to make reasonable adjustments

4 The issues in the case were agreed between the parties as follows

UNFAIR DISMISSAL

1) What was the principle reason for dismissal

2) If it was conduct and potentially fair:

i) Did the respondent act reasonably in treating that reason as sufficient reason for dismissal in accordance with equity and the substantial merits of the case

ii) Did the respondent have an honest belief in misconduct

iii) Did the respondent have reasonable grounds to sustain that belief

iv) Did the respondent undertake as much of an investigation into the misconduct as was reasonable in all the circumstances

v) Was a fair disciplinary procedure followed

vi) In respect of the live final written warning for misconduct was that warning issued in bad faith, did the respondent have prima facie grounds or was that warning manifestly inappropriate

vii) Was the dismissal of the claimant within the range of reasonable response

3) If the dismissal was unfair should there be a reduction to the claimant's compensatory award to reflect the chance he would have been dismissed if a correct procedure followed

4) Did the claimant's conduct contribute to his dismissal and if so should that reduce the basic and compensatory award to reflect that contribution.

<u>DISABILITY DISCRIMINATIION</u>

<u>DIRECT section 13 Equality Act 2010</u>

5) Was the claimant treated less favourable in any of the following ways

i) In February 2016 was the claimant treated less favourably than a hypothetical non-disabled colleague by being asked by Nigel Foster how he could be trusted

ii) In or around March 2016 was the claimant treated less favourably than Mark Harle or another hypothetical non-disabled colleague by Nigel Boyt a) directing him to use an unsafe tool to pick items from the explosive store of b) reprimanding him for using the wrong tool

iii) In or around April 2016 was the claimant treated less favourably than Mark Hare or another hypothetical non-disabled colleague in being moved from despatch to cover other departments
iv) In April 2016 was the claimant treated less favourably than a hypothetical non-disabled colleague in being asked by Paul Mason to move to the goods In Section
v) In April 2016 was the claimant treated less favourably than his colleagues Anthony Todd and Kevin Nixon-Modica by being pulled up by Paul Mason for taking too long for his break
vi) In April/May 2016 was the claimant treated less favourably than either Chris Marmiont or Tony Borrowdale in not having time off for medical (dental) appointments or holiday
vii) In May 2016 was the claimant treated less favourably than Mark Harle, Chris Marmiont or Andrew Lee in being subjected to disciplinary proceedings over an alleged procedural error with an internal delivery note
viii) On dates to be specified was the claimant treated less favourably that Kevin Nixon-Modica of Tony Borrowdale by being pulled up for minor matters
6) If so was the claimant treated in any of the above ways because of his disability

<u>Harassment section 26 Equality Act 2010</u>
7) Did any of the above matters amount to unwanted conduct

8) If so did any of that conduct relate to disability?
9) If so did any of that conduct have the purpose of effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him?

<u>Discrimination arising from Disability s 15 Equality Act 2010</u>

10) Was the claimant treated unfavorably?
i) By being issued with a final written warning for misconduct on 12th November 2015
ii) By being dismissed on 22nd November 2016

11) Was the claimant either issued with a final written warning or dismissed because of a change in his behavior on 29th July namely an alleged hyper episode whereby his mood concentration and decision making abilities were adversely affected and he suffered fatigue.
12) Did this change in behavior in 29th July arise in consequence of Claimant Disability?
13) Was the claimant dismissed because of a reduced knowledge on the claimant part of Standard Operating Procedure 29416/ additional requirements for order to Saudi Arabia?
14) Did any reduced knowledge that the claimant may prove arise in consequence of his diabetes

15) Was the treatment at 9 a proportionate means of achieving a legitimate aim? That is to says maintain acceptable behavioral standards, ensuring the safe operation of its business and protecting the health and safety of its employees and customers

Failure to make reasonable adjustments s20 Equality Act 2010

16) Did the respondent apply a provision, criterion or practice to the claimant by transferring him Tribunal the night shift in July 2015?

17) If so did transferring the claimant put him at a substantial disadvantage when compared to Kevin Nixon-Modica or a hypothetical non-disabled colleague by adversely impacting on his ability to manage diet, routine, stress, sleep pattern, and did this in turn adversely impact on his behavior, performance or conduct

18) Did the respondent know or could reasonably have been expected to know that transferring the claimant to night shift was likely to put him at a disadvantage when compared to a hypothetical non-disabled colleague

19) If so did the respondent fail to take such steps as were reasonable to avoid that disadvantage? (Reasonable adjustment 1 to carryout risk assessment; 2 to transfer Kevin Nixon- Modica or to have transferred the claimant onto a shift other than a night shift

Jurisdiction

20) Were any of the discrimination claims presented out of time?

21) If so should time be extended on the basis it would be just and equitable to do so

22) If a fair procedure had been followed would the claimant still have been dismissed as per the guidance in Polkey?

23) Contribution if the dismissal was unfair did the claimant contribute to his dismissal which makes it just and equitable to reduce his award

FACTS

5. So far as is possible the facts are dealt with in chronological order. These are the facts as the Tribunal found them

Grievance.

6. The Tribunal agrees with Mr Hargreaves that this provides the backdrop to the events which ultimately led to the claimant's dismissal. It is from this point there is a shift in attitude towards the claimant. As is evidenced later by comments such as ' there is a lot of noise , and in the notes of events 'however Peter is currently involved in a disciplinary case pg. 244 when the claimant is absent through ill health, It is clear to the Tribunal that the claimant had become difficult to manage and was seen as a distraction.

7. Having heard from the officer who dealt with the grievance there is clear evidence to support the claimant's grievance; Mr Noxon-Mordica against whom the claimant had lodged the complaint accepted he had a bit of a temper (pg. 355); he further accepted that he had screamed obscenities down the aisle towards the claimant; in addition Mr Nixon-Modica when confronted by Nigel Boyt concerning a threat to the

claimant told Mr Boyt, 'I am going to kick [the claimant] around the warehouse.' Finally the behaviour of Mr Nixon-Modica was witnessed by Mr Mason when the issue was first raised

8. Whilst the Tribunal accept that Mr Nixon-Modica makes complaints against the claimant when interviewed, he clearly was engaging in bullying or threatening behaviour.

9. The Tribunal concluded that Mr Pickles abdicated his responsibility. In looking at his conclusions to the complaints raised, (pg. 364) at 3 Mr Pickles was satisfied that Mr Nixon-Mordica called the claimant a liar and left the meeting in an emotional and angry state. In addition he accepted that the respondent had used obscenities towards the claimant; although it appears he accepts Mr Nixon-Mordica's account. Mr Pickles seems to have completely disregarded the admissions Mr Nixon-Mordica made during the investigations.

10. It is unsurprising therefore that the claimant felt let down at this time

Change in shifts

11. When the complaint was lodged Mr Mason informed the claimant that he was to switch shifts in order to offer protection/support (pg. 244) whilst the investigation was ongoing. The claimant did not feel it should be him that moved.
12. As a result of the outcome of the complaint, and the intervening events in July. It was suggested that the claimant was move to 'goods in' department on the opposite shift to Mr Nixon-Mordica. According to Mr Mason (witness statement para 9) this was to provide the claimant with a fresh start and consistent line support.

Move to Night Shift

13. Whilst the grievance was ongoing the respondent required night shift cover. The claimant alleges that he was moved to permanent nights whilst the respondent case is that this was a temporary measure. On the evidence it heard the Tribunal is satisfied that this was a temporary measure carried out at short notice. The Tribunal concluded that on the 22nd July Mr McKitton asked the claimant to move to the night shift. The Tribunal is satisfied that the Respondent knew that the claimant had diabetes; in the documents before us Mr McKitton asserted he was unaware of the diabetes, however the Tribunal concluded that he was aware, especially in such a small team of managers where all the other managers were aware the claimant had diabetes. The Tribunal is further satisfied that the management team including Mr Mckitton were aware that there was a 'Night Worker' assessment (pg. 851) which ought to be completed before an employee moved to a night shift. Indeed the form produced specifically refers to diabetes. The managers seem to be of the impression that completion of the form

was only required for a permanent move to nights, no-one verified with the occupational health department whether it was required for a temporary change.

14. On the evidence we heard it was clear that the claimant's condition was not well controlled at this time. He himself told us that he did not have the appropriate equipment to test his bloods, so was unsure of whether they were in the correct range. At para 12 of his witness statement he states that he had not anticipated the impact the change in shifts would have on his diabetes. Although there are medical records in the bundle and some evidence was adduced at the disciplinary hearing (pg. 388a) it is not possible for the Tribunal to determine if the diabetes was the root cause for the acid spillage or not.

The Acid Spillage

15. The claimant started on nights on 27th July the acid spillage occurred on 29th July shortly before midnight. The chronology of events are as follows; the claimant was carrying out his duties, which in his opinion required him to move a Pallet Truck Rider (PRT). He disabled the PRT in error and he was unable to move it. He decided to use a High-Racker Truck (HRT) to move the PRT. When carrying out this manoeuvre the PRT toppled over and acid leaked from its battery onto the floor. The claimant did not immediately contact an emergency number but tried to right the PRT and contain the spillage. Other employees in the area did not assist. At one point the claimant drove through the edge of the acid.

16. The following day an Environmental, Health and Safety investigation was commenced. The claimant was interviewed as part of that investigation on 30th July by Sue Bryden and Paul Mason, the Tribunal has seen handwritten notes of that meeting. Six other employees were spoken to about the incident and produced their own witness statements. The claimant also provided a witness statement. His was the last statement to be obtained and is dated 6th August. In addition CCTV footage of the incident was obtained as well as the claimant's training records.

17. There was a dispute between Mr Mason and the claimant as to whether the claimant raised his diabetes during this meeting as a possible cause. This is important because it is not referred to in the completed report, nor is the fact that a night worker assessment was not carried out. There are two references to diabetes in the notes (pg. 258); the first appears to be a simple statement of fact that the claimant has diabetes and takes pills for it.

18. The second reads: ‘Felt lethargic thro nights/diabetes’ Mr Mason’s evidence was that the claimant never mentioned his diabetes at all and specifically not in the context of it contributing to the incident. Mr Mason’s evidence was that it was he who raised the question of diabetes. The Tribunal partly reject this evidence. It is likely that Mr Mason did raise the issue of diabetes at some point however the phrase ‘felt’ suggest to the Tribunal that this is the claimant’s account of how he felt and why. The Tribunal is satisfied that during this meeting the claimant did refer to his disability as a contributing factor

19. Nobody was able to confirm the date the report was completed; nor was anyone able to confirm who took the decision to commence disciplinary proceedings against the claimant or why it was not until November the claimant was aware that disciplinary proceedings were to follow.

20. Although the report is critical of both Anthony Todhunter and James Middleton and their failure to intervene at the time of the indent, or assist the claimant or call an emergency number, there is no explanation as to why they were not disciplined even in an informal manner.

21. The next the claimant is aware of the incident is 16th October when he is invited to an investigation meeting (pg. 367). The letter does not indicate that the investigation is for the purpose of a disciplinary meeting. The most it reads is ‘be aware your statement is likely to be referred to during any meeting or subsequent disciplinary hearing if applicable.’ The Tribunal is satisfied that at this point the claimant was unsure if he was to be the subject of disciplinary proceedings.

22. The meeting was held on 20th October. The claimant was told at the commencement that the meeting was to ‘ask specific questions that were key to the investigation and to establish further information not clear prior to the meeting. The answers would then form part of the formal investigation….And it was Peter’s opportunity to help the investigation in clarifying a number of points. ‘This opening does not specify that it is a disciplinary investigation; it refers to the investigation; the only investigation so far has been the Environmental, Health and Safety investigation.

23. The Tribunal concluded that the claimant was unaware that there was to be any disciplinary sanction until he received the letter of 2nd November (pg. 373). This must be accurate as this coincides with the date the claimant commences his sickness absence. The diary of events (pg. 244) reads; ‘**currently trying to determine the reason for sickness. Diabetes has been cited. However Peter is currently involved

is a disciplinary case.' This the Tribunal concluded supports its conclusion that the claimant became aware on that day of the disciplinary hearing.

24. The allegations against the claimant were:
    i. Failure to follow the correct process when the PRT ignition was locked out due to you failed Davis Derby checks
    ii. Your attempt to move a PRT using a HRT without the correct/relevant training, resulting in the PRT being dropped from a height and an acid spillage incident
    iii. Your failure to call out the shift fire officer as specified in the site spillage procedure
    iv. You using slinging equipment to left the fallen PRT without the relevant/correct training
    v. Your disregard of H&S for yourself and others through making the initial acid spill incident worse by:
        a. Driving a forklift through the acid spillage
        b. Dragging the leaking battery away from the incident.

    With the letter the claimant was provided with the investigation report and various other documents and the CCTV footage. This is the first opportunity the claimant had to view this footage.

25. The hearing was held on 9th November 2016, the hearing manager was Robert Smith. The meeting was adjourned for Mr Smith to make further enquiries to 7th December when the outcome was announced. The outcome is set out by Mr Smith in the 'Hearing Decision Making Tool' (pg. 418) Mr Smith considered that the allegations were made out; however in mitigation he took account of the claimant's diabetes he concluded 'I believe if the employee had been given the night shift questionnaire that EHM may have offered some adjustments, safer working practices or even advised against working night shift. 'Mr Smith's conclusion was this constituted gross misconduct however because of the mitigation the claimant was issued with a Final Written Warning in addition he made recommendations for the respondent as well as the claimant to carry out.

26. Throughout the period of the disciplinary process the claimant was absent through ill health. He returned to work on 11th January 2016.

<u>Miscellaneous complaints February –May 2016</u>

27. The claimant complains that on his return Mr Foster asked if he could be trusted. The Tribunal is satisfied that these words were spoken but in the context of a manager asking his employee how could he trust him and not connected to nor associated to the diabetes. .As the disciplinary had not concluded that the claimant's disability was the

cause of the incident, the Tribunal is satisfied that that this was an appropriate question to put to the claimant.

28. The Tribunal is further satisfied that Mr Boyt did not deliberately direct the claimant to use an unsafe tool. The account given by Mr Boyt of a third tool being placed on the relevant table by someone is credible as are the circumstances of him following the claimant and shouting to attract his attention when he believed it was the wrong tool.

29. The claimant was clearly asked to cover a variety of other jobs; no proper explanation has been given by the respondent as to why this was. However when it was raised with the management another operative was also took on other tasks.

30. The Tribunal is satisfied that the claimant was reprimanded for taking too long on his break. The claimant admitted he was late back although he disputed the length of time. There was no evidence adduced to suggest that other employees were not equally reprimanded

31. The claimant was not permitted to have time away from work for dental treatment however the respondent's policy is that dental treatment should be taken in an employee's own time. There is no evidence that the claimant was ever refused time off for medical treatment. The claimant was refused a day's holiday for his birthday although this appears to have been a request at short notice.

<u>The IDN incident</u>

32. When picking and packing items for despatch employees are instructed by use of an Internal Despatch Note (IDN). This contains information such as the height of the package .On 2nd February 2016 Mr Boyt sent an email to a number of employees including the claimant. It was to advise them of a change in regulations for shipments to Saudi Arabia. Specifically that temperature logger serial numbers are required. Mr Boyt's instruction was to 'provide this information via the text field from the change outbound delivery in SAP. Same field used to enter the SLAC count'. Mr Boyt considered this of sufficient importance to hold a briefing with his employees concerning this. The Tribunal is satisfied that the claimant was not present at this meeting. His work records show an entry 'X' for 1st and 2nd February; 'X' stands for multiple entries; 'H' for 3rd and 4th Feb; 'T' for 5th February' T being time off in lieu. It seems clear that the claimant was not at work that week.

33. On 10th May an IDN was raised for a shipment to Saudi Arabia; it fell to the claimant to deal with it on 12th May. The IDN (pg. 456) contains a number of instructions which included the height the addition of a

shroud and 'Saudi requirement: Temperature monitor serial numbers to be entered into text field within the outbound delivery. The Tribunal accepts that the claimant did not know of the instruction issued on 2nd February; this was the first time he had encountered this instruction and he dealt with the package as he had previously done by logging the serial number manually on the temperature monitor usage record (pg. 530)

34. The error was picked up by the freight carriers DHL on 20th May and an email was sent from them to Debbie Boyt, requesting the serial numbers. A second email was sent later the same day, this time Nigel Boyt was copied in. There was no response and a further email was sent on 24th May; this email appears to a raise a concern that the product is 'predicted out of stock' and the request is repeated. Glyn Wood tasked Andrew Lee with the request on 24th May at 9:57. Mr Lee responded to DHL at 10:45 on 24th May. At 14:34 the same day Mr Mason requested that DHL raise a Distribution Incident Report (DIR) 'this will ensure a full investigation'

35. The respondent's case is that a DIR is required to trigger an investigation; on the evidence this does not appear to be accurate. A DIR is required for compliance purposes; that is to say that the respondent has an audit trail for inspection purposes if there is an error.

36. The DIR reads as follows;

Details of Incident: Control Tower require details of Data logger before they can book the freight. CT requested site to provide the details of the data logger on 2oth , didn't receive it until today 24/5,Action required to resolve this incident: This has now been provided to CT, but it is important that when CT requests for these information, is provided to us as soon as possible as we cannot process the shipment without it The Tribunal's interpretation of this document is that DHL (the control tower) was concerned as to the length of time it took for the information to be provided rather than the fact it was missing. In fact once MR Lee was appraised of the situation it took him less than an hour.

37. Mr Mason conducted an enquiry into why the information was not entered into the SAP system and sent his conclusions to Mr Rivers at HR on 10th June. Mr Rivers responded on 13th June as follows: it is apparent that the operator has not followed instructions and therefore these is a cause for a disciplinary investigation. Can one of you trigger this?

38. It was not until 10th August that the claimant was informed he was to be the subject of disciplinary action. The hearing conducted by Rob Lavin

was held on 22nd August; the claimant was dismissed, the reasoning from Mr Lavin was that he had no option. It was only misconduct as a stand alone incident but because of the final written warning he had to dismiss the claimant. He did not consider the difference in the nature of the misconduct; nor did he take account of the claimant's previous 25 years good service.

39. The claimant appealed the decision; the appeal was heard by Mr Farrell on 24th October and concluded it on 2nd December when the appeal was dismissed.

The Law

40. The Tribunal had regard to the following statutory provisions; sections 13; 26; 15 and 20 Equality Act 2010. These sections set out the heads of claims for the disability discrimination claims. Section 120 Equality Act 2010 which sets out the Tribunal's jurisdiction for such claims and in what circumstances time limits may be extended. Section 136 Equality Act 2010 which sets out the burden of proof in claims under the Equality Act 2010 namely; If there are facts from which the court could decide in the absence of any other explanations that a person contravened the provision concerned the court must hold that the contravention occurred; Save where the person shows that he did not contravene the provision.

41. Counsel for the respondent referred the Tribunal to a number of authorities including: Ayodele v Citylink {2017] EWCA Civ 1913 in relation to who bears the initial burden of proof: Land Registry v Grant [2011] EWCA Civ 769 relates to trivial acts being caught in the concept of harassment; Tarbuck v Sainsburys Supermarkets Ltd [2006] IRLR 664. In addition he referred us to the ECHR Employment Code

42. In relation to unfair dismissal the Tribunal had regard to section 98 Employment Rights Act 1996 which sets out the general provisions as to fairness in dismissal. This claim falls within s98 (2) (b); that is to say that conduct may found a fair dismissal. The leading authority on conduct case is BHS v Burchell 1978 UKEAT 108 5.3 which sets out the test as follows an:'... employer must entertain a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. That is really stating shortly and compendiously what in fact more than one element is. First of all, there must be established by the employer the fact of that belief; that the employer did believe it. Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief. And thirdly, we think, that the employer, at the stage at which he formed that belief on

those grounds, at any rate at the final stage at which he formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case. It is the employer who manages to discharge the onus of demonstrating those three matters....' In addition the Tribunal had regard to Iceland Frozen Foods ltd. v Jones [1982] ICR 142 which established the principle of the range of reasonable responses test.

43. Turning to any potential remedy the Tribunal had regard to sections 122 Employment Rights Act 1996, reductions of the basic award Section 123(6) Employment Rights Act 1996 as to reductions in the compensatory award. These are both considered in relation to contribution by the claimant.

44. The Tribunal also considered the issues raised in Polkey, that is to say, should the award be reduced on the basis that if there had been a fair procedure the claimant would still have been dismissed.

Submissions

45. Both Mr Hargreaves and Mr Kirk supplied the Tribunal with written submissions it is not proposed to rehearse them here.

Discussion and conclusions

46. In relation to the Discrimination claims; it is agreed between the parties that the claimant was disabled by virtue of his diabetes and that the respondent had actual or constructive knowledge of the disability.

Direct discrimination

47. In relation to the issues at 5 above. The Tribunal considered the following questions in relation to each allegation:

Did the alleged act occur?
If so did it amount to less favourable treatment?
If so what was the reason for the treatment. Was the reason discriminatory?

47.1 On the evidence we heard there was a comment made by Mr Foster in relation to trust. The Tribunal did not consider this was less favourable treatment; in the context of a person returning to work following disciplinary proceedings for a serious incident any manager would make the same enquiry.

47.2 The facts in relation to this incident are very similar between the parties. The Tribunal accept that Mr Boyt did not intentionally direct the claimant to use an incorrect tool. The Tribunal accepted his explanation as to the tools appearance on the relevant table. Clearly believing that the claimant had an unsafe

tool, Mr Boyt needed to alert the claimant to it. The Tribunal accept that Mr Boyt chased after the claimant, but not that he reprimanded him merely to ensure he didn't use a piece of equipment that was not safe. He may well have raised his voice but this was because of the urgency of the situation. This was not less favourable treatment.

47.3 The claimant was moved to cover different departments; however on the evidence we have heard it is unclear why the claimant asserts this is less favourable treatment. It is clearly different treatment to that of Mr Harle. The Tribunal is not satisfied that it was less favourable treatment.

47.4 The claimant was asked to move to the Goods in section; the claimant asserts that this was less favourable because it required heavier work which may amount to less favourable work. Whilst it's clear requiring the claimant to carry out heaver manual work may be less favourable treatment it is unclear why the request of itself would be less favourable treatment. The Tribunal is satisfied that the request was not related to the claimant's diabetes.

47.5 The Tribunal accepts that the claimant was 'pulled up for timekeeping' and this could amount to less favourable if the comparators were not also 'pulled up'. However on the evidence Tribunal is not satisfied that others were not also spoken to.

47.6 Whilst the evidence of the claimant being spoken to by about a Facebook icon is accepted; the Tribunal did not consider this less favourable treatment as it is satisfied that the respondent would request any employee to remove a Facebook Icon from a computer.

47.7 The Tribunal accepts that the claimant was not allowed time off for dental appointments this is in accordance with the respondent policy. The claimant was never refused time off for medical appointments with his GP there is no evidence before the Tribunal concerning other employees being granted time off for dental appointments.

47.8 The claimant refers to three people in relation to the despatch to Saudi who were not disciplined. The Tribunal is satisfied that following the investigation none of those referred to could have

been responsible for the error. Therefore there was not less favourable treatment all three were investigated.

47.9 In relation to the final allegation of 'being pulled up for minor matters' these have not been particularised the claimant has therefore failed to establish a prima facie case.

47.10 In relation to all of the above the Tribunal is not satisfied that the claimant was the subject of direct discrimination

Harassment

48. Turning to the harassment claims; the Tribunal first asked itself whether the conduct was unwanted by the claimant; then was the conduct for a reason relating to the claimant's disability; in particular has the claimant established facts upon which the Tribunal could conclude that the conduct relates to the claimant disability If so then the burden switches to the respondent to establish that it did not relate to the claimant disability.

48.1 The Tribunal's factual findings are listed above. On the evidence it heard from the claimant, the behaviour above was unwanted conduct. That is to say in a subjective test the claimant considered it to be unwanted.

48.2 However the Tribunal have to look at whether the behaviour related to the claimant's disability. On this point the claimant's case seems to be that as he was disabled the treatment must be because of that. This is not sufficient for the burden to shift. The instance where a simple link may possibly be made was that of time keeping; on the claimant's case he was late back because of an urgent need to use the lavatory as a direct result of his diabetes. However there is no medical evidence to support this assertion.

Discrimination Arising S15 Employment Rights Act 1996

49. The two acts of unfavourable treatment complained of by the claimant are: being issued with a final written warning for misconduct and being dismissed.

49.1 Although the claimant was given a final written warning the Tribunal concluded this was not unfavourable treatment. The Tribunal noted that others were not disciplined as a result of their inaction on the night in question; however had it not been for his disability he would have been dismissed from his conduct on 29th July. The others involvement was less serious; so whilst it may

be that they should have been the subject of disciplinary proceedings the claimant was treated in fact more favourably by the imposition of a final written warning than another hypothetical non-disabled colleague.

49.2 The dismissal is discussed at length below. The Tribunal is not satisfied that the dismissal was related to the disability.

49.3 As can been seen above the Tribunal is not satisfied that the behaviour of the claimant during the acid spillage incident was a result of a hyper episode. The evidence on this point comes solely from the claimant there is no medical evidence to support this precise assertion.

49.4 It follows therefore that the Tribunal cannot be satisfied that the change in behaviour arose in consequence of his diabetes.

49.5 The dismissal of the claimant was based on failure to follow new instructions. The Tribunal is satisfied that the claimant was unaware of these new instructions.

49.6 The Tribunal is not satisfied that this lack of knowledge had anything to do with his diabetes. The claimant was absence from work, for a reason not related to ill health and appears to be an oversight.

Reasonable adjustments section 20 Employment Rights Act 1996

50. The issue here is the transferring the claimant to a night shift. There is a dispute as to whether this was a permanent or temporary move. For the purposes of the adjustments it is immaterial.

45.1 The provision, criterion or practice was the requirement for the claimant to work a night shift. Regulation 7 of the Working Time Regs 1998 require an employer to ensure that an employee has the opportunity to have a free health check prior to taking up the assignment; the requirement does not apply where the employee has had a previous assessment and there has been no change.

45.2 There is nothing in the regulation which pertain to the length of time a person will be required to carry out a night shift. There is therefore no need for the Tribunal to determine that issue; although it did it would conclude this was a temporary move.

45.3 Having looked at the night worker assessment used by the respondent the Tribunal noted that one of the conditions which will require further assessment is diabetes. The Tribunal concluded that this is because a person who has such a condition may be placed at a substantial disadvantage compared with a hypothetical non-disabled colleague.

45.4 The respondent accepts that it was aware of the disability. Mr. McKitton, in the documents says he knew the claimant had previously been on nights and didn't think an assessment was required. In the intervening period however the claimant has been diagnosed with diabetes. On the evidence we have heard this was a relatively small team; each knew about the acid spillage and the fact that the claimant was, unusually not dismissed. It is inconceivable to suggest that one of the claimant's managers did not know about his disability.

45.5 The claimant asserts that the respondent should have carried out the assessment or transferred Mr. Nixon Modica to nights. Clearly the respondent should have carried out the assessment in order to identify whether the claimant should go on to nights or whether any adjustments would assist him in carrying out his tasks.

45.5 The Tribunal therefore concluded that the respondent failed to make a reasonable adjustment.

Jurisdiction

51. The Tribunal have to consider whether the failure to make adjustments was lodged with the relevant time periods. First the Tribunal must decide whether this act of discrimination was one of a series of discriminatory acts which continued up to the point of dismissal. If that is the case then time will run from that date. If not time will run from the date of the failure to make a reasonable adjustment and the Tribunal must then consider if it is just and equitable to extend time.

51.1 As already noted above the Tribunal did not conclude that any of the other acts of discrimination were made out. The failure cannot be part of a series of acts or continuing discrimination.

51.2 The Tribunal therefore asked itself was it just and equitable to extend time. The time limit for such for this claim expired on 28th October 2015 that is some 15 months prior to the claim being presented. It is for the claimant to establish why the limit may be extended. Save for asserting a continuing act this issue has not been addressed. The Tribunal looked at the circumstances pertaining at the time, that is to say, the disciplinary proceedings were about to commence and the claimant went on sickness absence. However he returned to work by February. If the claim had been presented between October and February of 2016 the Tribunal may have had some sympathy but another year passes before the claim is lodged. The Tribunal consider that this is far too long a gap between the events and presentation and as such it is not just and equitable to extend time.

Unfair dismissal s 98 Employment Rights Act 1996

52. The respondent case is that the claimant was dismissed for conduct. This may be found a fair dismissal under section 98(2) (b). The claimant's case is that there was an ulterior motive in that the management team wanted him out.

The reason for the dismissal

53. It is for the employer to show the reason for the dismissal and that that reason was a potentially fair reason. The claimant's case is that the management team wanted him out following the disciplinary hearing for the acid spill. In effect that because he hadn't been dismissed previously they were now trying to get him dismissed. The evidence from the claimant as to the ulterior motive relates to the acts listed above under harassment and specifically the facts surrounding his dismissal for the failure to follow Good Manufacturing Process.

54. As may be clear form the Tribunal's comments above it did not conclude that those acts, which the Tribunal found had happened were designed to harass the claimant in particular into leaving the position.

55. That leaves the facts surrounding the IDN in May. As an opening comment it is clear from the diary of events maintained by Mr Mason that the claimant had made previous errors in packing goods for despatch. These were never referred to in the investigation report or disciplinary. If these events had been relied it might raise the suggestion of bias by the management team.

56. The Tribunal does have concerns as to the manner in which the disciplinary was carried out. First the ET3 at para 51 reads 'The Distribution Incident Report prompted the initiation of the investigation into the alleged breach of Good Manufacturing Practice; Mr Masons witness statement is that (para 18) a distribution Incident Report is then usually raised automatically. His oral evidence supported by the documents was that he requested a DIR 'to ensure that a full investigation will be initiated at site therefore ensuring that a root cause is found and possible GAPA's are put in place to stop recurrence'. These three assertions are not compatible with each other. Clearly the truth of the matter is that Mr Mason requested a DIR which triggered an investigation.

The investigation

57.1 The Dir records the details of the incident as follows: (pg. 461)

'Control tower requires details of data logger before they can book the freight. CT requested site to provide details of the data logger on 2oth didn't receive it until today 24/5
Under action required:

This has now been provided but it is important that when CT requests for these information it is provided to us as so as possible as we cannot process the shipment without it.

51.2 The Tribunal upon considering this complaint concluded that CT was complaining about the delay in providing the information. Whilst it is correct that the claimant did not follow the procedure, it was picked up by CT; the DIR simply refers to the delay in providing the temperature log serial numbers. Whilst the Tribunal agree that the claimant's failure was the root cause, the delay was occasioned by management team not responding to emails.

51.3 When giving evidence Mr Lavin said he didn't know where the information would be and it would possibly be archived. It is clear for the documentary evidence that it only took Andrew Lee 45 minutes to source the information. It appears no investigation was conducted into why Debbie Boyt and Nigel Boyt had not made arrangements for their emails to be covered whilst they were on annual leave; such as having an out of office message. It is also apparent from the emails, in particular the informal greeting 'Hi' sent to them that Mr Manu from CT had a good working relationship with the Barnard Castle site and this was a regular occurrence.

51.4 Mr Mason failed to give satisfactory answers as to why his investigation did not pursue the lack of response and concentrated on the claimant's error.

51.5 Having concluded his investigation Mr Mason reported to Mr Rivers; this is curious as in his email to CT the reason for the DIR was to in effect find out where the problem was and if necessary put into place procedures to stop it happening again. As far as the panel is aware no action has been taken to ensure that the information is correctly logged not to ensure a prompt response to CT. the investigation package was sent to the HR department. During the first investigation the claimant was interviewed on 25th May. There are no notes of that interview, the only record is in the email Mr Mason sent to Mr Rivers which states: 'The claimant had not been trained in how to put the comments in the SAP text box and he thought by adding unit numbers to the casing sheet he was conforming to the IDN instructions.'. It was Mr Rivers who gave the instructions to carry out disciplinary investigation against the operator.

51.6 At this point, 13th June, the claimant is unaware that there are to be disciplinary proceedings; he is notified of the investigation as disciplinary around 29th June; and he was not notified of a disciplinary hearing until 10th August. It is unclear why the claimant was unaware of potential proceedings for such a long time. It is especially worrying in light of the contents of the letter at pg. 488 which reads: 'I can confirm that an investigation has been instigated into allegations that you have not been following GMP practices. Once the matter has been fully investigated an independent Hearing Manager will decide if a disciplinary hearing is necessary.' Following that letter the claimant was not formally interviewed as part of this process. Mr Mason appears to have compiled the report at pgs. 458-9. It is not clear why it took until 29th June (from 13th) to inform the claimant of the investigation nor why it took form 29th June to 10th August to inform him of disciplinary when there was no additional investigation simply a compiling of a report. The report itself is scarcely unbiased as there are comments such as; 'During Peters time with us it is fair to say there has been some noise in terms of issues Peter has a serious sanction on his file at present.'

51.7 Mr Lavin told us it was his decision based on the report to instigate disciplinary proceedings.

51.8 The Tribunal concluded that the investigation of itself was poor. The claimant was not notified when he was interviewed this may lead to disciplinary. When he was notified that a disciplinary investigation was being undertaken he was misled as it was in fact already completed. He was not asked as part of a disciplinary investigation to give his account of the events.

51.9 The decision to proceed to a disciplinary hearing was taken by Mr Lavin who also conducted the hearing. It was put to him that this was a training issue and not a disciplinary. His answers were unsatisfactory on this point. He was unaware that there had been previous failures by the claimant and seems to have had uppermost in his mind that the claimant was the subject of a sanction and therefore disregarded any training issues.

51.10 The hearing of itself although delayed was conducted in a fair manner, save for the issue of the management team wishing to rid of the claimant. The Tribunal is satisfied that this was raised by the claimant at his disciplinary hearing (pg. 493) but was not followed up by Mr Lavin.

51.11 The crux of the matter is whether the decision of Mr Lavin was coloured by the claimant's management team and a potential desire to dismiss the claimant. The Tribunal is satisfied that that is not the case. Although there may be flaws in the process, Mr Lavin was from a different department on the Barnard Castle and had little knowledge of the personalities involved. The Tribunal is therefore satisfied that the decision made by Mr Lavin is free of the taint of bias. That is to say that Mr Lavin had a genuine belief in the guilt of the claimant. The Tribunal is satisfied that the reason for the dismissal was conduct.

51.12 However the Tribunal must look at the guidance in Burchell to establish if this was a fair dismissal. First was the belief held by Mr Lavin reasonable based on the investigation? As noted above the Tribunal found a number of flaws in the investigation including not addressing the actual DIR complaint, delay in notifying the claimant of the proceedings, the limitation of the proceedings and the hearing itself in particular the lack of investigation into the claimant's assertion about people in his department.

58. Mr Lavin told the Tribunal that if the claimant did not have a final written warning this misconduct did not merit dismissal. His evidence was that the claimant being subject to such a warning he had no option but to dismiss him. He did not consider the misconduct which led to the final written warning; nor the fact that those events had occurred 10 months prior to the IDN incident. It appears to the Tribunal he did not even take account of the claimant's 25 years of good service. To Mr Lavin it was a simple case of he must be dismissed because of the final written warning. It seems he either did not read the disciplinary policy or misinterpreted it. The policy is 'dismissal on notice will normally result' (pg. 132) clearly there a discretion here. Further previous errors by the claimant had been dealt with very informally and no training needs were identified. These were never brought to the attention of either the Hearing or Appeal Manager, if that is the case it is difficult to understand how it now becomes a matter worthy of dismissal, even in light of the final written warning. The Tribunal concluded that in light of the mitigation the dismissal did not fall within the range of reasonable responses.

59. The claimant appealed to Mr Farrell. He was completely independent of the Barnard Castle site. The Tribunal asked itself if the appeal hearing rectified the earlier problems identified above. The claimant again raised the issue of a 'conspiracy to remove Peter form his role team very disappointed not dismissed' (pg.523) and 'I thought the person investigating should have been subject to investigation'. It was

also pointed out that the claimant had not been invited to an investigatory meeting as part of the disciplinary process

59.1 None of these issues were investigated by Mr Farrell. He focused on the actions of the claimant alone and ignored any suggestion of a conspiracy. Having decided that the claimant was at fault Mr Farrell did not give separate consideration to the penalty imposed. It is not referred to at the hearing nor is it referred to in the letter. Whilst in evidence he accepted there was a discretion the documentary evidence suggests he did not turn his mind to it.

59.2 The Tribunal therefore concluded that the appeal did not rectify the earlier flaws. In particular the penalty.

60. The Tribunal then turned its mind to the Polkey point. That is to say if a fair procedure had been followed would the claimant still have been dismissed. The Tribunal concluded this because the sanction of dismissal did not fall within the range of reasonable responses.

61. Finally in relation to the unfair dismissal the Tribunal had to consider if the claimant had made a contribution, to his dismissal and if so whether that required a reduction in ether the basic or compensatory award.

61.1 Section 122 Employment Rights Act 1996 permits a Tribunal to reduce a basic award in circumstances where the Tribunal consider the behaviour of the claimant was such that it would be just and equitable to reduce the basic award.

61.2 In considering this issue the Tribunal looked to the behaviour of the claimant in relation to the acid spill incident. The reason for this was, without that incident and the final written warning for it the claimant would never have been dismissed. The behaviour here may be the claimant's failure to control his diabetes correctly; however this must be set off against the respondent failure to carry out the night assessment. The Tribunal concluded it would not be just and equitable to reduce that award.

61.3 The compensatory award shall be reduced where the claimant has contributed towards his dismissal by any of his actions. This necessitates the Tribunal assessing whether there was any blameworthy conduct by the claimant. Again the Tribunal started with a consideration of the acid spill incident. Although noted above that the claimant was unaware of the impact of the night shift on his diabetes, the Tribunal concluded, as did Mr Smith that it was not possible to say whether the initial behaviour of the

claimant by locking himself out of the PRT and the decision to use the HRT to move it were affected by his disability. The Tribunal concluded that the behaviour following the spill quite possibly was. For that reason the Tribunal concluded that there was blameworthy conduct which contributed to the dismissal. In assessing the level the Tribunal took account of the fact that some time had passed and that his subsequent actions may have been affected by his diabetes and concluded this merited a 15% reduction in the compensatory award.

62 Therefore the claim for unfair dismissal is upheld all other claims are dismissed.

Employment Judge Pitt

3rd January 2018
Date