EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondent**
MR M P MORAN		AMEY SERVICES LTD

Heard at: London Central

On: 8-10 April, 2019

Before: Employment Judge O Segal QC
Members: Ms J Griffiths; Mr I McLaughlin

Representations
For the Claimant: Mr M Moran Snr, the Claimant's father
For the Respondent: Mr Wilson, Counsel

JUDGMENT

The unanimous judgment of the Tribunal is that:-

(1) The Claimant's claim of unfair dismissal succeeds.

(2) The parties agreed remedy.

(3) The Claimant's claim under s. 15 Equality Act 2010 is dismissed.

REASONS

1. The Claimant brings claims of unfair dismissal and of discrimination arising from a disability, because of his dismissal for gross misconduct by the Respondent.

2. The Claimant was represented by his father, Mr Moran senior, and the Respondent was represented by Mr Wilson of Counsel. We express our gratitude for the way in which both conducted the proceedings.

3. The hearing of this case has taken place over 4 years after the events it concerns. This is due to various procedural issues, in particular the institution and revocation of the tribunal fees regime. The result, of course, is that present recollection of events in 2014 was much less reliable and, where possible, we have determined the facts by reference to contemporaneous documents.

Evidence

4. We had an agreed bundle of 183 pages (and were referred to two additional photographs by the Claimant). We had witness statements and heard live oral evidence from:

   4.1. on the Claimant's behalf: himself, Mr Moran Snr (who also worked for the Respondent) and three other colleagues, Mr Grace, Mr Doyle and Mr Jenkins.

   4.2. for the Respondent: Jeremy Dixon (at the time, Operations Manager on the relevant client contract); Thomas Venn (HR Business Partner on the relevant client contract shortly after the Claimant's dismissal); and Ben Hawkins (at the time, Operational Support Manager on that client contract).

5. We also read without objection other short statements submitted on behalf of the Claimant. In the event, the question of what weight to give those statements did not arise since we placed no reliance on them.

6. We comment at the outset that we consider that all the witnesses were doing their best to assist the Tribunal.

Facts

7. The Claimant was employed by the Respondent between March 2010 and August 2014, latterly as a Waste Operative, working on the City of London Corporation contract. At the time of his dismissal he had a clean disciplinary record.

8. The Claimant has suffered during the whole of the material period from Type 1 Diabetes. This means, amongst other things, that the level of sugar in his blood fluctuates significantly and sometimes dangerously, and in particular he can suffer from hypoglycaemic episodes when he needs as quickly as possible to increase his level of blood sugar. The severity and effects of such episodes are unpredictable, but the symptoms can include irritability, aggression and unusual behaviour. Once a sugary item has been consumed, the speed with which that takes effect to ameliorate such an episode is also not predictable, but is often almost immediate. The Claimant's condition was well known to the Respondent, which had been accommodating in reassigning him to duties which did not involve his working alone and in allowing a more than usual number of days off sick.

9. In May 2016, the Claimant suffered a stroke, amongst the consequences of which are significantly reduced mobility and reduced memory function.

10. On 6 August 2014 the Claimant's shift started at 8 am. He had not slept well, probably related to his diabetes, and arrived at work around 5.30 am.

11. There were two machines available for employees' use, supplied by a third party, Selecta, one of which dispensed hot drinks, the other snacks and cold drinks. The latter, referred to as the vending machine, was clearly visible from a camera mounted on the low ceiling taking CCTV footage. The vending machine had been malfunctioning since the previous day, as the result of which some 6 or so bottles of coke had become jammed above the tray from which customers pick up the dispensed items; and an out of order sign had been placed on the machine.

12. Shortly after arriving at work, the Claimant attempted to get a hot chocolate from the hot drinks machine, but it dispensed only hot water. He then went to the vending machine and struck it with notable force, as the result of which the 6 coke bottles were released into the tray, possibly along with a bar of chocolate.

13. The Claimant placed the bottles of coke in a rucksack and brought them out to his colleagues who were waiting to begin their shifts and distributed some or all of them, including to some people who said they had paid money into the vending machine over the last day or so and not got the items they had selected. The latter actions would have been captured on CCTV via a camera in the relevant area, but that footage was not examined.

14. The first disputed fact of significance is whether the Claimant was suffering from a hypoglycaemic episode at the time he struck the vending machine. He says that he was. The Respondent, including the witnesses who had viewed the CCTV footage, decided that he was not. We state initially that we believe that the Respondent genuinely and with some reason believed that the Claimant was not suffering from a hypoglycaemic episode at the time.

15. We find, on the balance of probabilities, that the Claimant was suffering from a hypoglycaemic episode; although we acknowledge that we cannot be sure and that there is evidence pointing both ways. The reasons we so find are, in summary:-

    15.1. The Claimant consistently maintained that this had been the case and had a previous history of hypoglycaemic attacks including when at work.

    15.2. Three other witnesses provided statements at the time testifying to the fact that when he arrived for work the Claimant was not entirely well and, in one case (MR Grace), that he had said that *"his blood sugars were all over the place"*.

    15.3. The Claimant's aggressive striking of the vending machine was consistent with his suffering from a hypoglycaemic episode, particularly if he was trying to get a sugary item out – although equally with a determination to get products from the machine without paying.

    15.4. Pointing in the other direction is the fact that Mr Dixon, Mr Venn and others were struck by a lack of urgency in the Claimant's movements as recorded by the CCTV, which would perhaps be surprising if he had known he needed to get sugar into his blood quickly.

16. The evidence about the bar of chocolate came only from the Claimant. The Respondent's witnesses did not observe his obtaining that from the vending machine. The Claimant says he quickly ate a bar of chocolate that dropped down when he struck the machine; Mr Dixon in particular was sceptical about that on the basis that he had not seen it on the CCTV as he believed he would have done.

17. In the event, neither Mr Dixon (who took the decision to dismiss) nor Yvonne Roberts (who determined the appeal) relied on the Claimant having obtained and consumed a bar of chocolate, so the relevance of it is doubtful. The Respondent sought to rely at the tribunal hearing on the Claimant having obtained a bar of chocolate as he said, but not having consumed it until he had left the room (contrary to the Claimant's account), as evidence that the Claimant was not suffering from a hypoglycaemic episode. That seems somewhat to seek to "have the best of both worlds" and in any event to be speculative.

18. Present during the incident was a colleague Mr Mark Wilkins. He provided statements that day and the next, which added to the information seen on the CCTV as follows: he had pointed out to the Claimant, when the vending machine was persuaded to disgorge the coke bottles, that *"There's a camera up there"*; and that having removed the coke bottles the Claimant *"went downstairs and gave some stuff to someone else"*. In an investigatory interview on 7/8/14 Mr Wilkins stated that the Claimant had given him a bottle of drink immediately and another bottle shortly afterwards.

19. When Selecta arrived to repair the machine that day (the Claimant having begun working his shift as normal), it was noted that some stock had been taken, the CCTV was reviewed and the events described above were seen.

20. As a result the Claimant was suspended that day on the basis of an allegation that he had forcibly removed items from the machine without paying for them.

21. The Claimant himself attended an investigatory meeting on 12/8/14. His union representative was not allowed to accompany him at that meeting. The Respondent's policy states there is no entitlement to accompaniment but that the Respondent might allow it. We accept the evidence of Mr Grace, a senior union shop steward on site, that his union colleague, who had asked the Respondent if he could accompany the

Claimant and was refused, phoned him to query that, and he had replied that the Respondent had to let him in, on the basis that it had never been an issue previously. Indeed Mr Grace told us that this was the only occasion that had happened. That is consistent with Mr Dixon's evidence that he would have expected the union rep to be allowed to accompany the Claimant had that been requested. In those circumstances, and given the Claimant is not literate (as well as suffering from diabetes), we find the Respondent's approach surprising on this issue and it may even have had some practical negative effect.

22. At the investigatory hearing the Claimant gave his account of matters and gave various names of people, including supervisors, who he said could testify that he was not well on the morning of the incident. He did not expressly request that those people be interviewed – as his union rep might have done; he says because the suspension letter, having instructed him not to be in unauthorised contact with colleagues or suppliers, told him to let the investigating officer know of *"any documents or witnesses that you think will be relevant to the matters under investigation"*.

23. In any event, it is common ground that the Respondent did not make those investigations prior to the dismissal, save that one supervisor provided a statement on 13/8/14 saying that he could not recall whether the Claimant had been unwell or not on the day in question.

24. The Claimant also told the investigator that a conversation with the Selecta representative had revealed that all items were accounted for in terms of the money in the machine. That too was not explored by the Respondent with Selecta prior to dismissal.

25. Further, the Respondent did not attempt to get evidence about whether the Claimant's account of giving the bottles of coke to colleagues some or all of whom had attempted to purchase them with money left in the machine, could be verified – either before the dismissal or the appeal (although as noted above, the statements of Mr Wilkins rather supported that account).

26. The investigation report concluded that *"It cannot be conclusively proved that Mr Moran was not having a hypoglycaemic attack, but there is absolutely no evidence to*

suggest he was. Therefore, I recommend that his offence be seen as gross misconduct …". That suggests that if (as later proved to be the case) the investigator had found evidence to support the Claimant's account in that regard, he would not have classed the conduct observed as gross misconduct – a view consistent with Mr Dixon's evidence that the outcome (of dismissal) would have been different if he had believed the Claimant to have had a hypoglycaemic attack.

27. The Claimant attended the disciplinary hearing with Mr Dixon, accompanied by a union rep, on 22/8/14. Of note is that:

    27.1. The Claimant is twice recorded as expressing remorse for his actions.

    27.2. The Claimant said that he had given some of the items to Mr Grace (amongst others).

    27.3. Mr Dixon believed some of the items had not been accounted for.

    27.4. The Claimant raised *"the point of the 5 missing statements"* (the fact that the Respondent had not interviewed the colleagues whose names he had given to the investigator).

    27.5. The Claimant provided medical evidence that symptoms of a hypoglycaemic attack included inconsistent or odd behaviour.

28. At the end of the meeting Mr Dixon dismissed the Claimant after a short adjournment and confirmed that dismissal by letter the same day. The letter referred to an acceptance by the Claimant of *"the accusation against you"*. The charge was *"Theft of confectionary and drink products …"*, so that supposed "acceptance" goes too far; however, the Claimant accepted he had removed the items without paying for them. The letter continues with an important passage: *"I formed the belief at the time that you were guilty of gross misconduct on the grounds that there was no evidence to corroborate your claims regarding a hypoglycaemic attack. … You also claimed that you had informed several people that you were unwell before this incident. However, as there are no witnesses or witness statements to support this claim, this was not considered as part of your defence"*. There was no reference to the Claimant's length of service, clean record or display of remorse for his actions.

29. The Claimant, assisted by his father, appealed. The grounds included:

    29.1. Wrongly concluding there had been a theft and in particular not contacting Selecta to verify that no unpaid items had been taken, despite the Claimant telling the investigator about that issue.

    29.2. Not permitting the Claimant accompaniment or representation at the investigation meeting.

    29.3. The availability of evidence from various named people, including 5 named employees of the Respondent who had not been interviewed by the Respondent, who could inter alia corroborate that the Claimant had not been well and had insulin levels not in control on the day of the incident.

    29.4. An unfairly harsh sanction.

30. Statements were collected by the Claimant's father, and provided before the appeal, including:

    30.1. the three referred to at para 13.2 above;

    30.2. a letter from the Claimant's GP confirming that when having a hypoglycaemic attack a person might be *"quite aggressive and confused"*; and

    30.3. a statement from the Selecta rep confirming that he had been called out because products had become stuck at the bottom of the vending machine, but that by the time he arrived *"someone had unjammed the panel and removed the products at the bottom of the machine. All products were paid for, there was no damage to the machine."*

31. Prior to the appeal Ms Yvonne Roberts, who was to hear the appeal, was in communication with HR managers who recorded, materially, the following:

    31.1. Ms Roberts noted that *"In the interviews with witnesses none are asked if Michael appeared to be suffering from a hypo or other diabetes related attack"*.

    31.2. 'Guidance' that *"Selecta will not confirm any theft as all items were paid for. The belief is that the theft was from whichever member(s) of staff had paid*

for the item(s) Michael ate [sic]. Suffering a form of attack due to diabetes is potentially a mitigating reason … Alternatives to theft were available."

31.3. Recommended 'Next Steps' which included: *"Interview witnesses again to see if there was any indication that Michael was acting unconsciously due to a diabetic attack … Interview those who had paid for items from the machine to establish if they were returned to them"*

31.4. Later it is recorded that the statements procured by the Claimant's father for the purposes of the appeal have been *"uploaded"*.

31.5. Finally 'Guidance' was given that *"Procedurally there is no right at the investigation [to trade union accompaniment] but it is best practice if requested"*.

32. The appeal hearing took place on 19 September 2014 in front of Ms Roberts (now retired and not called to give evidence at this hearing), with Mr Hawkins taking notes and the Claimant being represented by his father. The new evidence was presented and the Claimant stated again that he had given the products he had removed to other colleagues, or at least offered them to those who had paid for them.

33. Mr Roberts accepted (and in fact, it appears from the notes of HR managers advising her remotely that they the Respondent had established this) that *"Based on the money put in the machine everything there had been paid for …"*.

34. There were at least two, probably three, breaks in the meeting during which Ms Roberts sought guidance from HR by phone. After the last of those Ms Roberts informed the Claimant that his appeal was not upheld. What happened next is the subject of the second factual dispute of any significance. The Claimant and his father gave evidence (although the Claimant's oral evidence was tenuous due to loss of memory function following his stroke in 2016) that Ms Roberts said words to the effect that the decision had been taken above her pay grade, if it had been down to her she would not have dismissed the Claimant, but HR had taken a different view. Mr Hawkins said that no such discussion took place in his presence; he could not be sure if (as Mr Moran senior recalled) he had left the room before the Claimant and his father did after which such remarks might have been made.

35. It is not relevant to our decision. However, doing the best we can on the basis of rather incomplete evidence (not least because Ms Roberts herself was not a witness) we all tend to the view that Ms Roberts, having announced the result of the appeal, attempted to say some sympathetic and supportive words (the Claimant recalled that he had broken down and was crying at this time), which may have gone a little too far, but which have been (genuinely) misinterpreted as entirely distancing herself from the decision.

36. The outcome of the appeal was set out in a letter of the same day. It records that Selecta had suffered no loss, but states that *"other employees who had put money in the machine and received no goods lost the right to claim back their money once the goods had been removed".* It does not accept that the Claimant had suffered a hypoglycaemic attack, noting *"The video evidence and your actions immediately after taking the items from the machine do not support the claim"*. No reference is made to the evidence from colleagues supporting the Claimant on that point – nor, at least in terms, to the grounds of appeal dealing with the refusal of trade union accompaniment at the investigation meeting, or the harshness of the sanction in the circumstances.

The Law

Discrimination arising from disability

37. Section 15 EqA 2010 provides that

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 detriment is a proportionate means of achieving a legitimate aim.

38. Mr Wilson helpfully referred us to several authorities, of which in the circumstances we note only ***Basildon v Thurrock NHS Trust v Weerasinghe*** **[2016] ICR 305**, which confirms that a tribunal must address two separate questions: was there

something which arose from the claimant's disability, and was that 'something' the reason for the unfavourable treatment.

Unfair dismissal

39. We have well in mind the statutory language of sections 94, 122(2) and 123(6) ERA.

40. Mr Wilson again helpfully cited several authorities, which he acknowledged were in the main "trite law". We note briefly the following in the main well-established legal propositions:-

40.1. A tribunal must not substitute its own view for that of the employer – the range of responses of the reasonable employer may vary.

40.2. Whether dismissal is a reasonable response in a conduct case must be determined by reference to the band of reasonable responses test.

40.3. That applies also to the question of whether the extent of investigation into the conduct was reasonable: the extent of investigation required is fact sensitive.

40.4. Whether a dismissal was fair must be judged "in the round" on the basis of the whole disciplinary process, including any appeal.

40.5. Where an employee is accused of theft, the gravity depends on all the circumstances, including whether the theft was of the employer's property (which might affect trust and confidence in the employee): ***Johnson Matthew Metals Ltd v Harding*** **[1978] IRLR 248** per Phillips J at [6].

The parties' submissions

40. Both parties provided written submissions and supplemented those orally.

41. We have taken those fully into account and summarise here only certain key points.

42. The Respondent accepted that the investigation had not been "reasonable" in the legal sense at the time of the dismissal by Mr Dixon, but argued that the "notable defects" had been remedied on appeal.

43. However, Mr Wilson acknowledged the problem with that approach presented by Mr Roberts' apparent failure to conduct (or arrange for others to conduct) the interviews with witnesses on key points – including the one she based her decision on: whether the Claimant had distributed the items in question to colleagues who had attempted to purchase them – despite such interviews being advised by HR. He also acknowledged that the evidence that Ms Roberts took the additional evidence procured by the Claimant into account was *"relatively sparse"*.

44. Mr Wilson argued strongly that the balance of evidence did not support the Claimant having had a hypoglycaemic attack. He accepted – as had the Respondent's witnesses before us – that the situation would be different in terms of judging the Claimant's conduct if he had been suffering a hypoglycaemic attack.

45. Mr Wilson placed reliance in his written submissions on the fact that the Claimant had admitted taking and eating a chocolate bar he had not paid for. However, he accepted that the dismissal and appeal outcome letters showed that this was not a matter which had been relied on by the Respondent in dismissing the Claimant or rejecting his appeal.

46. As to sanction, Mr Wilson stated that *"dismissal is likely to be regarded at the harsher end of the spectrum of possible outcomes in relation to a disciplinary matter such as this".*

47. Mr Wilson accepted that if we found the dismissal unfair there was no basis for making a Polkey reduction. However, he argued for a reduction for contributory fault of either 100% if we held the Claimant was acting calculatedly, or 50-75% if he had suffered a hypoglycaemic attack.

48. As to the discrimination claim, Mr Wilson argued that there had been no hypoglycaemic attack, and if there had been it had not been causative of the Claimant taking the items from the vending machine which he had not wanted to consume. In any event, he submitted, the dismissal was objectively justified as a proportionate way of pursuing the legitimate aim of upholding good discipline and deterring theft.

49. Mr Moran senior submitted, in essence, that at all stages the Respondent had failed to investigate properly and that if it had done so the result would not have been to

dismiss the Claimant. Also the Claimant's length of service and clean disciplinary record had been ignored.

50. On the discrimination claim, he submitted that the Claimant would not have removed the bottles of coke had he not been acting out of character because of the hypoglycaemic attack.

Discussion

Unfair dismissal

24. We are all of us convinced that this dismissal was unfair.

25. There was no proper excuse (and none argued for) for the Respondent's failure to speak to the witnesses identified by the Claimant before Mr Dixon dismissed him. Moreover, the reasons given for that dismissal – in particular the lack of corroborative evidence of the Claimant suffering from erratic blood sugar levels on the morning – do not stand up in light of the evidence which was later procured.

26. Ms Roberts' failure to get evidence from witnesses, as expressly recommended by HR, is equally inexcusable. Her reasoning that there had been "theft" from fellow employees who could no longer claim back from Selecta, is, at the highest, somewhat technical and perhaps artificial. However, if that was to form the basis of her decision, the failure to explore the true position is even more significant.

27. Allowing for any sensible margin of error in viewing the investigation and disciplinary process as a whole, and not substituting our view for that of a reasonable employer who might take a different view, we do not hesitate in finding that no reasonable employer would have conducted a disciplinary process into this alleged misconduct which was deficient in those regards.

28. We also all take the view that the sanction of dismissal – even on the evidence available to the Respondent by the time of the appeal – was outside of the range of reasonable responses open to the reasonable employer. In short, banging an out of order vending machine, extracting items which had been paid for and become stuck, and at least potentially returning or attempting to return them to colleagues who had paid for them (leaving aside any question of the Claimant's disability), does not seem

to any of us a dismissable first offence after several years' service without disciplinary record.

Contributory conduct

29. It is perhaps debatable whether the Claimant's actions transgressed into blameworthy conduct – although Mr Moran senior seemed to accept that they did. The Claimant could, however, have either left the items that had fallen down or handed them in to security – which would have been the more prudent course.

30. Given our findings on the unfairness of the dismissal, in particular as to sanction, we are not prepared to make a reduction for contributory conduct such as Mr Wilson suggested. Taking all the relevant circumstances into account, in particular our finding that the Claimant tried to distribute the bottles of coke he had removed to colleagues who had paid for them, we are not persuaded that that conduct (for which he was dismissed) was sufficiently blameworthy to justify a reduction under ss. 122(2) or 123(6). The possible eating of the chocolate bar did not cause or contribute to the dismissal in the event.

The discrimination claim

31. We have found as a fact that there was a hypoglycaemic attack, which obviously arose from the Claimant's disability, of which the Respondent was well aware.

32. The dismissal of the Claimant was clearly unfavourable conduct.

33. The remaining issue is whether the dismissal was in consequence of the hypoglycaemic attack.

34. As to that, we all take the view that it was not. The hypoglycaemic attack may well have caused the Claimant to strike the machine and to grab and eat a bar of chocolate. However, even had its effects not been thus ameliorated, the action of then packing into his rucksack 6 bottles of coke (which he had no intention of consuming, he confirmed in evidence) in order to distribute them to colleagues, seems to us an action he would have taken equally had he not suffered a hypoglycaemic attack just before. On that point, we do not accept the submission that the hypoglycaemic attack continued to cause the Claimant to act out of character in that way.

35. This claim therefore fails.

Remedy

36. The parties were able to agree remedy, which they informed the tribunal was in the sum of £19,773.60.

37. We therefore do not at this time make any award in respect of the unfair dismissal claim.

38. That claim will be automatically dismissed on withdrawal on 10 May 2019 unless the Claimant applies to the tribunal, on or before 9 May 2019, on the basis that the Respondent has not paid the sum agreed by that date.

_____
Employment Judge Segal

_____
Date 11 April 2019

JUDGMENT & REASONS SENT TO THE PARTIES ON

12 April 2019

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FOR THE TRIBUNAL OFFICE