EMPLOYMENT TRIBUNALS

Claimant: Mr A Tuffley

Respondent: Cavaghan and Gray Limited

HELD AT: Carlisle **ON:** 4,5 & 6 February 2019
Manchester 29 March 2019 (In Chambers)
BEFORE: Employment Judge Holmes
Ms M T Dowling
Mr S T Anslow

REPRESENTATION:
Claimant: Mrs J Tuffley, Partner
Respondents: Miss A Rollings, Counsel

RESERVED JUDGMENT

It is the judgment of the Tribunal that:

1. The claimant was not unfairly dismissed.

2. The respondent did not discriminate against the claimant on the grounds of his disability, and did not fail to make reasonable adjustments for his disability.

3. The respondent did not directly discriminate against the claimant because of his disability.

REASONS

1.The claimant , by a claim form presented to the Tribunal on 15 March 2018, brought claims of unfair dismissal and disability discrimination arising out of his dismissal by the respondent on 5 February 2018. The respondent admitted dismissal, which it contended was for the potentially fair reason of conduct, and was fair in all the circumstances. The respondent also conceded that the claimant was a person with a disability for the purposes of the Equality Act 2010, but denied that he had been subjected to any form of discrimination.

2.A preliminary hearing was held on 31 July 2018, at which the issues were identified, and case management orders made. This hearing was listed at, or shortly after, that hearing.

3.The claimant was (very courteously and ably , we wish to record) represented by his wife, Joanne Tuffley, and called Richard Bell, and Jason Selkirk as his witnesses. He also adduced a witness statement from Carol Gill. The respondent called Michael Wilkinson, Malcolm Turner, Stuart Turnbull and Ruth Carswell as its witnesses. There was an agreed bundle. The Tribunal heard the evidence over three days sitting in Carlisle, but could not deliver its judgment, which was accordingly reserved, the parties having submitted sequential closing submissions. The Tribunal re-convened in Chambers on 29 March 2019 to deliberate, when it reached this unanimous judgment, which is now delivered. The Tribunal apologises for the delay in promulgation of this judgement, which has arisen due to pressure of judicial business, and intervening IT issues.

4.Having heard and read the evidence, considered the documents in the bundle, and the submissions made by the parties, the Tribunal finds the following relevant facts:

4.1 The claimant , who was known at work as “Lenny” , was employed by the respondent from 2 December 1996 at its factory at Brunel Way in Carlisle. The respondent is a large food manufacturer with over 500 employees. It operates production lines at Easter Way, one known as EW1 and the other EW2/3.

4.2 The claimant in or about 2002 sustained an injury at work, when he fell off a machine. This left him with a back condition, which the respondent accepts constitutes a disability. Upon his return to work from this injury in 2002 he was continually assessed for his fitness to carry out his duties at the time, and restrictions were placed on the work he could do.

4.3 In July 2006 Dr Frost recommended that he be placed on permanent light duties to avoid bending and heavy lifting (see page 184 of the bundle).

4.4. The claimant subsequently developed an ankle condition, which led to a period of absence in 2012. At that time he was still deployed to the Hygiene Department, but in 2013 his then manager Atteque Chugtai referred him again to Occupational Health , expressing concerns that he was not fit to remain working in the Hygiene Department, where he would need permanent restrictions. He recommended a change of role (see page 188 of the bundle). The claimant. however, continued to work on the production line, EW2, albeit on restricted duties.

4.5 In 2015, around March, the claimant was off work again following an operation on his ankle. He returned to work in September 2015. He was assessed by Ruth Carswell , Occupational Health Advisor, on 9 September 2015. She advised (page 193 of the bundle) that upon his phased return to work the claimant should discuss his hours and capabilities with his manager, then Mr Byers.

4.6 Upon his return to work in September 2015 the claimant he was assigned a role as a hygiene operative, or janitor. This involved him carrying out cleaning, toilets, keeping them supplied, and mopping and sweeping floors . He would work largely on his own, unsupervised, in various areas of the factory, but mostly in the office area , and away from the production lines.

4.7 The claimant was reviewed by Ruth Carswell in January 2016, and she reported on his progress in this role. Her report (page 195 of the bundle) of 28 January 2016 recommended that he may need to be accommodated on janitorial duties long term. This was indeed what occurred, and the claimant continued to carry out those duties until his dismissal.

4.8 The respondent provides a canteen for its employees. There are in fact two, one serving the production lines EW2/3, and the other EW1 . References to "the canteen" are, unless otherwise stated, to the former.

4.9 On 26 October 2017 the respondent received as report through its whistleblowing procedures (page 59 of the bundle) to the effect that employees were playing cards in the canteen, and that loan sharking was going on , linked to these card games, which were being played for money. The whistleblower identified the claimant as one of the main two people involved.

4.10 As a result of this report, Michael Wilkinson, Production Manager at Easter Way 2/3 was asked to carry out an investigation, initially into the allegations of gambling and loan sharking. The respondent has CCTV covering the canteen, and Michael Wilkinson accordingly reviewed footage taken from it. Whilst he was looking specifically for card playing or gambling, and money changing hands, he soon realised that the footage revealed that the claimant, along with others, appeared to be spending a lot of time in the canteen.

4.11 He therefore reviewed the footage and noted when claimant, and others, entered and left the canteen during the course of the working day. The initial period that was reviewed was for week commencing 29 October 2017. The claimant worked from 30 October , the Monday, through to Friday 3 November that week.

4.12 Michael Wilkinson had observed that the claimant was one of those spending a considerable amount of time in the canteen, so on 29 November 2017 he held a meeting with him . The notes of that meeting are at pages 69 and 70 of the bundle. The claimant was not given any advance notice, or the right to be accompanied , as this was an investigation meeting. Michael Wilkinson asked the claimant about how long he took for breaks, and he said he took 40 minutes and 10 minutes. When asked if he thought he may have exceeded his break times, he replied "possibly". He was also asked about playing cards for money, which he denied. He said he had done so years ago, but that he did not know that employees were not allowed to gamble until 6 months previously. He said that any money that changed hands was for football coupons, and that he was surprised that there were no posters on the wall saying that gambling was not allowed.

4.13 Michael Wilkinson suspended the claimant at the end of this meeting, for allegations of gambling on site and extended break taking. A record of the claimant's suspension was made (page 71 of the bundle).

4.14. Michael Wilkinson compiled a table (page 116 of the bundle) of the financial implications for the respondent of the excessive time being spent by employees in the canteen .

4.14 On 4 December 2017 Michael Wilkinson conducted an investigation meeting with the claimant. Gillian McEwan of HR was present, and the claimant was accompanied by Andrew Murdoch as his trade union representative. The notes of this investigation meeting are at pages 91 to 100 of the bundle. There were photographs of the claimant in the canteen which were available in this meeting, and which the claimant was shown (pages 61 to 68 of the bundle).

4.15 In this meeting two topics were discussed, gambling and break times. In relation to the former, the claimant denied that he had ever been told that there was a gambling policy, and "held his hands up" to playing cards. He denied playing for money. Any money that changed hands, he explained, would be for football cards, or similar games that employees joined in. He said he played cards "occasionally", but also said that he usually did so "all the time"

4.16 Moving onto the issue of break times, the claimant said that in an eight hour shift one 40 minute breaks and two 10 minute coffee breaks were what the company allowed. He went on to say that everyone had longer, and that he did not clock in and out for breaks. He said that he fitted his breaks around the jobs he was doing, and he always managed to take breaks. He was aware of the CCTV recordings, and it was put to him that he was allowed one hour per day, five hours per week. He had been observed not working for long periods. The claimant queried why he had never been "pulled up" about this in the past, and said that he had a disability. Management had told him , for as long as he had been doing that job, that he could sit in the canteen because of his back, which would be bad in the cold. He did not look at the clock, and when questioned about which manager had allowed this arrangement, he said that it was on his file. Occupational health were aware of his condition, he said, and the medication that he took for it.

4.17 The discussion then reverted to issue of cardplaying, and at one point Michael Wilkinson said to the claimant there was a perception that he had spent a lot of time in the canteen.

4.18 Following his interview with the claimant , on 6 December 2017 Michael Wilkinson interviewed Robert Wharmby , the claimant's line manager (the notes are at pages 101 to 103 of the bundle). He was asked if the claimant had ever approached him and said that he was struggling to get his breaks in , to which the reply was negative. He was also asked if the claimant had ever approached him with any medical conditions and said that he needed to sit down and take extra time. Robert Wharmby replied that he knew the claimant was classed as a quarter disabled, so he would not object if he had said that he needed to sit down for five minutes. He had not heard this from occupational health. Michael Wilkinson showed him the time the claimant had spent in the canteen. He was constantly, Michael Wilkinson said, taking two hours plus. He asked if this was a surprise, to which Robert Wharmby replied that it was.

4.19 Michael Wilkinson asked how it could be possible for the claimant do this without Robert Wharmby being aware of it. He replied that it was difficult with the claimant , as he did not see a lot of him. He would be working in the corridor or the toilets, whilst he himself was on the factory floor. It was hard for him to know where the claimant was for this reason. Michael Wilkinson went on to discuss the need

greater supervision of the claimant in relation to his break times. Robert Wharmby was shocked by the amount of time the claimant was spending in the canteen. He was asked if there were any other tasks claimant could be carrying out, but his line manager explained how his was a never-ending job as the whole purpose was to keep upstairs clean.

4.20 On 7 December 2017 the claimant , at the instigation of Sara Murphy, was seen by Ruth Carswell the respondent's occupational health advisor. During this meeting Ruth Carswell found the claimant intimidating and obstructive. He accused her of interrogating him. She had to end the meeting abruptly, and called Sara Murphy for assistance. She was in fact with Michael Wilkinson at that time, they both came to her room to end the consultation.

4.21 Ruth Carswell prepared a report dated 7 December 2017 (page 196 of the bundle) in which she set out the history of the claimant's back condition, and his ankle operation two years previously. She stated how the claimant was aware of the need to keep moving around, and how he had told her that in the past he had been advised that he could sit for short periods. She noted that there was no recent documentation in his occupational health file to support this and that it was not something that she would advise. In her recommendations she stated that the claimant had a long-term back issue and was classed as having a 20% disability due to this. He was coping with his janitorial role. Sitting, however, for long periods was not advised for people with back pain, as where possible they need to keep moving.

4.22 Michael Wilkinson held a further investigation meeting with the claimant on 9 January 2018. Sara Murphy of HR was present and the claimant was accompanied by Jason Selkirk his USDAW representative. There was also a notetaker present. The notes of this meeting are at pages 105 to 115 of the bundle.

4.23 By this time Michael Wilkinson had viewed a further three weeks of CCTV footage, in addition to the initial week that he had viewed at the start of his investigation. From his observations of four weeks of CCTV footage Michael Wilkinson had compiled tables in which the claimant's time at work was broken down, and the length of the times that he spent on breaks was recorded. These tables are at pages 75 to 82 of the bundle. Michael Wilkinson had also calculated (see pages 83 to 88 of the bundle) the amount of additional break time the claimant had taken in each week. In respect of the first week this was some 13 hours and 50 minutes, in respect of the second 11 hours 27 minutes, in respect of the third 13 hours 55 minutes, and the fourth 6 hours 30 minutes.

4.24 Michael Wilkinson put to the claimant in this meeting that he had taken an extra 13, 11, 13 and 6 hours by way of breaks in this four-week period, and showed him the tables he had compiled. He put it to him also that this would mean the claimant had been overpaid by £373 , which over a year would amount to £4000. If all the respondents employees did this it would cost £4.7m. The claimant replied by asking how Mike Wilkinson knew that they were not doing this?

4.25 The claimant was asked if sitting in the canteen was fine, to which he replied that , with the problem that he had, it was. Michael Wilkinson asked him more about this, to which the claimant replied that managers had told him that he could go in the

canteen with his back problem. He said that he could be on the sick but he was not, and this was the result of an industrial injury he had sustained at work for which the respondent had admitted fault and paid compensation. He agreed he spent a lot of time in the canteen but said that he could do so because of his back. This was alright if the managers had said that he could do so. He also said that the nurse told him to go and sit down if he at the bad back, and that this would be in his records.

4.26 Michael Wilkinson asked him if the manager who had said that he could sit in the canteen still worked here. The claimant replied that he did not. Michael Wilkinson asked what would managers say they were asked if they were aware of the claimants back problem? The claimant said that Luke Thompson would not know as he was new, and Rob Wharmby was “on and off”.

4.27 There was further discussion about how the claimant managed his back problem, and how he should manage his own breaks. It was put to him that he had abused the trust placed in him, which he denied. He said again that the end of the day he could be on the sick, and was working to the best of his ability. He said he was registered disabled because of the respondent. Later in the meeting he was asked if he believed the company owed him, to which he replied “no”, but said the company should look after him after his accident, he had been told he was unemployable.

4.28 The claimant in this meeting did allege that the respondent was discriminating against him as a disabled person, he was there to do a job and was doing his best. Sara Murphy took up this point, and asked whether the claimant thought it was reasonable for him to be sitting in a canteen for more than half of his shift?

4.29 The claimant was asked about the recent report by Ruth Carswell, which he said had not been discussed with him. A copy was therefore provided to him, but at this point of the claimant explained that he was unable to read, and his union representative was accordingly asked to read the report out to him. It was put to him that sitting down may make his back worse, and the claimant replied that he had been told to do the best he could, and had a good days and bad days.

4.30 After an adjournment the meeting continued, and there was a discussion about other jobs claimant may be able to do. The meeting then turned to the gambling issues, and the claimant’s understanding of what was and was not permitted. The claimant was shown photographs from the CCTV footage in which money appeared to change hands, and there was further discussion as to whether gambling for money was taking place. The claimant also complained about his suspension and the length of time that the investigation was taking. He considered that he was being singled out, and said (page 112 of the bundle) that he wanted to see the video. This was a request that was not responded to, nor was it ever repeated.

4.31 After further discussions about gambling, the claimant made a comment about his consultation with Ruth Carswell , and how Sara Murphy and Michael Wilkinson had run to her aid “like Robocop”. Michael Wilkinson explained that they had been informed by Ruth Carswell that the claimant was being obstructive and aggressive and how they therefore attended to speak to him and remind him of the terms of his

suspension. The claimant contended that Sara Murphy and Michael Wilkinson were bullying and intimidating him and threatened to ring the whistleblowing line. Sara Murphy suggested ending the meeting there, and Jason Selkirk agreed, telling the claimant to leave it there.

4.32 Michael Wilkinson interviewed Darin Byers, the Hygiene Coordinator , on 24 January 2018. Sara Murphy accompanied him, and a note taker was present. The notes are at pages 117 to 119 of the bundle. He initially asked if Darin Byers was aware of the claimant's difficulty with reading and writing, and he was not. There was a discussion about the jobs that the claimant could do, and his duties in his current role. He had not seen the claimant in the canteen for the amount of time that Michael Wilkinson had shown him, and if he had done so he would have asked him to do work for him. He said there were always jobs to do in hygiene, and he was shocked by what he was being told. He would not leave him on his own in the future if he were to return to work after his suspension.

4.33 On 26 January 2018 Michael Wilkinson interviewed Luke Thompson, again with Sara Murphy in attendance, and Carol Gill, USDAW representative accompanied Luke Thompson, who was a Hygiene Team Leader. He confirmed that he would be in charge of the claimant for one week, and Rob Wharmby would for the second week, both of them responsible to Darin Byers. He was not aware of any entitlement to additional break times due to any health condition, as the claimant had not mentioned this to him. If he was not around he would assume that he was elsewhere. He was aware of the claimants back condition, but the claimant had not told him that he could not do any particular jobs. He just let him get on with what he could do, he did not ask him any details because it was personal.

4.34 Michael Wilkinson showed Luke Thompson the record of the breaks the claimant had taken over the relevant four week period, and he suggested that the claimant may have done this over 20 years. It should have been nipped in the bud. He went on to say that he could not really comment because he had been doing the same. When it was put to him that over four weeks the claimant had been in the canteen to 65 hours and he was allowed 19 hours break, Luke Thompson said that he couldn't really say anything, could he? He said he could see why the company had had to take action.

4.35 Following these meetings, and having concluded his investigations, Michael Wilkinson prepared an investigation report dated January 2018, with assistance from Sara Murphy. That report is at pages 123 to 136 of the bundle. It comprises of sections headed: Introduction, Background, Remit of investigation, Investigation Process, Summary of Meetings with Anthony Tuffley, Findings, Conclusion and Recommendations. There are 24 Appendices.

4.36 In his conclusions Michael Wilkinson considered that there was clear evidence to support a finding that the claimant had consistently taken extended breaks over the four weeks of monitoring. He concluded that there was no evidence to support an allegation that the claimant was involved in any loan shark activities, but there was evidence support the allegation that the claimant was playing cards for money. He recommended that there was enough evidence to support this action being taken.

4.37 By letter of 30 January 2018 (pages 136 to138 of the bundle) Malcolm Turner, factory manager, invited the claimant to a disciplinary hearing on 5 February 2018. The claimant was informed that he was required to attend this hearing in respect of a whistleblowing complaint which had made allegations into gambling on site, which had led into investigation of extended break times. He was told that the allegations could be deemed to be serious misconduct and may lead to dismissal, under points (a), (j) and (p) of the respondent's Disciplinary Rules and Procedures. The claimant was advised of his right to be accompanied by a trade union representative, and was provided with Michael Wilkinson's report and the appendices thereto.

4.38 The disciplinary hearing was held on 5 February 2018 where Malcolm Turner was supported by Gavin Dring of HR, and the claimant was represented by Jason Selkirk as his union representative. The notes of this hearing are at pages 139 to 142 of the bundle.

4.39 Prior to the meeting the claimant had prepared (probably with assistance from his union representative) some notes on the contents of the investigation pack that he had received. These are at pages 143 to 144 of the bundle. These were tabled at the beginning of the meeting and read out loud by Malcolm Turner. These notes raised queries in relation to the statement made by Tom Snaith, and a statement by Sydney Norton, a security guard. Other general points were made about allegations relating to the claimant's use of his mobile phone during his suspension, the absence of a gambling policy, and the alleged behaviour of the claimant towards Ruth Carswell.

4.40 In the course of the meeting there was further discussion about whether there had been a briefing in relation to playing of cards , and whether the company had in fact condoned this practice by taking no action to so long. Reference was made to the dismissal of the loansharking allegation, and to alleged discrepancies in the account of the incident involving Sara Murphy and Ruth Carswell. Jason Selkirk strongly made the point that there was no gambling policy in place and so that allegation should also be dismissed.

4.41 Malcolm Turner summed up the three main points from the whistleblowing investigation, and summarised the position as he saw it. He invited the claimant to add anything else. The claimant declined to do so, saying that he did not think it would help at that hearing and he would have to appeal if he could. He said he felt that Malcolm Turner had already made a decision, which Malcolm Turner refuted and said that he would base his decision on the investigation pack and what the claimant had to say. The claimant referred to Carol Gill and how she could provide facts about his back condition. The meeting was adjourned at that point for the claimant and his union representative to consult. Upon reconvening Jason Selkirk asked to speak on behalf of the claimant. He said that the respondent had known about the claimant's bad back and that it had been agreed by previous managers that he could go to a warmer place or sit down for medication. Those managers had now left the business. Team leaders do ask him to get things to do the job. He could not lift, so it was organised that someone else would. The claimant himself at this point added that Carol Gill knew a lot of this. Jason Selkirk went on to say that Carol Gill would make a statement if she needed to. He went on to add that the claimant

wanted to apologise for the breaks that he had taken and that he did not know that he was taking that long. Finally he added that if the claimant was to be reinstated he would sign the register breaks and do other roles the best of his ability.

4.42 Malcolm Turner adjourned and then reconvened the meeting to announce his decision. He had consulted with Ruth Carswell, and there was no support for the claimant's contention that he had been advised to take additional rest breaks in order to assist his back condition. Her advice was that it would be better to stay mobile with a bad back. The loansharking allegation had been discarded as was no evidence to support it but Malcolm Turner considered there was enough evidence to support the gambling allegation. Consequently the claimant was summarily dismissed for gross misconduct, the terms of which were explained by Gavin Dring.

4.43 The decision to dismiss was confirmed by letter dated 6 February 2018 from Malcolm Turner (pages 146 to 147 of the bundle) . In it he set out the three allegations that had been considered, and how the first, loansharking, had been dismissed. In respect of the second, abuse of breaks, this had been admitted during the course of the investigation and during the disciplinary meeting. The claimant was in a position of trust, where he was not continuously managed, and taken advantage of the situation. He was being paid 54% of his working week in the canteen. A large percentage of this extra time spent playing cards. In relation to the third allegation, gambling, Malcolm Turner believed there was a definite exchange of money while cardplaying was in progress. The only reasonable conclusion that he could come to was that the claimant had gambled for money on company premises and during company time.

4.44 He went on to say that because the abuse of breaks and the associated cost to the company was an act of gross misconduct causing an irrevocable breakdown of trust between the respondent and the claimant. The claimant was advised in this letter of his right to appeal.

4.45 The claimant did appeal by letter dated 6 February 2018 (page 148 of the bundle) . In this letter stated as his grounds as he felt had not handled this fairly, and that he felt that parts had not been taken into consideration.

4.46 The claimant's appeal was acknowledged by letter of 6 February 2018 (page 149 of the bundle) , and Stuart Turnbull, Head of Operations, was assigned as the appeals officer. By letter of 1 March 2018 Stuart Turnbull invited the claimant to an appeal meeting on 6 March 2018, and advised him of his right to be accompanied by a trade union representative. He was also informed that at the appeal he would have the opportunity to present his case on the specific grounds of his appeal, but the appeal would not discuss the whole of the investigation process, or the disciplinary hearing, unless it was relevant to the grounds of appeal, which were repeated from the claimant's appeal letter.

4.47 The appeal hearing was held on 6 March 2018 with Stuart Turnbull being supported by Andrea Pattinson of HR, and the claimant being represented by Jim Postings as his trade union representative. A notetaker was also present. The notes of the appeal pages 153 to 157 of the bundle.

4.48 The claimant had not expanded upon the grounds of his appeal, but in the appeal hearing Jim Postings on his behalf initially sought to argue that the claimant's treatment had been unduly harsh. He referred to the absence of any warnings, the fact that employees had been playing cards for the last 15 years with the company turning a blind eye, and the fact claimant in has been told he could take extra breaks. Stuart Turnbull made the initial point company had allowed cards not gambling . He said that Luke Thompson had carried out briefings but the claimant stated that he was never involved in these.

4.49 Jim Postings have also mentioned the number of people involved, which prompted Stuart Turnbull to respond that there had been a range of disciplinary sanctions imposed depending upon the severity of the offences. He referred to a breakpoint above which a decision had been taken to dismiss. He said that there was a big gap between the top three and other people. Andrea Pattinson asked if the claimant had any comments on the length of the times of the breaks taken, to which Jim Postings replied that setting a breakpoint was totally unfair. He drew an analogy with the difference between stealing £30 and £29.

4.50 Stuart Turnbull then wanted to discuss the claimants back condition and explored with him when he had last seen the respondent's nurse. Claimant told him that the respondent had not had one and that he had seen a number of them in the past. There was discussion as to whether having paid additional breaks would be a reasonable adjustment. Jim Postings argued that the company should have monitored the claimant's breaks and should have sent him to his doctor. At this point statements were provided to the meeting from Jason Selkirk and Carol Gill. They have not been retained, and are not in the bundle. The Tribunal presumes they were in similar terms to those provided by those witnesses to the Tribunal.

4.51 The discussion then reverted to the manner in which the respondent had set a cut-off point in terms of the percentages of excessive break times and how this had been unfair , in the eyes of the claimant and his union representative. It was suggested by Jim Postings at the three employees who had been dismissed were all union members, and he queried if that was the reason they had been chosen, and were they troublemakers?

4.52 A point was then taken on the calculation of the per centage of time that the claimant had been applied as being the amount of break time the claimant had taken. Jim Postings disputed the 54% figure, and said it was under 30%.

4.53 In the course of this exchange Jim Postings also stated that he was not disputing that the claimant had abused breaks, but there was a statement from a manager (Luke Thompson) stating that he had done this himself. It was pointed out that he too was investigated. Jim Postings argued that the claimant should not be put to any disadvantage because there was a manager sitting there with him.

4.54 Points were then made about the treatment of managers, and the suggestion was made that they were aware of the CCTV investigation and had therefore modified their behaviour. It was also suggested that people who had been given a warning, but then given a further warning. Jim Postings said that the union legal department considered that this was an unfair dismissal and could go to a Tribunal.

4.55 The meeting adjourned, and upon resumption Jim Postings raised a matter that had come to light in relation to breaks, suggesting that there had been a full meeting , discussing breaks, where notes been taken. It was suggested this was evidence that the breaks were known about. No evidence was produced to support this, and none has since been produced.

4.56 Andrea Pattinson said that they had a decision. Jim Postings tried to say more, , and also tried to go back over previous points, but Stuart Turnbull drew the appeal to a close, and accordingly announced his decision, which was that the claimant's appeal was not upheld. He considered that the company had treated everyone involved fairly, and whilst there were similar circumstances they were not always comparable and the company had tried to link the severity of the sanction with the severity of the conduct. The sanction of dismissal reserved for those who had the most serious breaches, and this was his conclusion.

4.57 A table of employees whose conduct was also investigated by Michael Wilkinson, and who faced disciplinary action, is at page 159 of the bundle. That table sets out the results of Michael Wilkinson's investigation in terms of the total amount of extra time each employee spent in the canteen over the relevant weeks in the period of investigation. Luke Thompson, however , was on holiday for one week and the figures have accordingly been averaged up in his case. The claimant is first, with a total of 45 hours and 42 minutes extra time in this period, then after the second employee is LS, with 36 hours and 23 minutes, and the third is VH with 34 hours and 3 minutes.

4.58 All of the top three on this table were dismissed, the others received lesser sanctions. LS appealed, and Stuart Turner heard his appeal. This employee had been apologetic, and had a mental health disability, and some personal circumstances , which led Stuart Turner on appeal to reinstate him with a final written warning. He considered that he could trust him in the future.

5. Those, then are the relevant facts found by the Tribunal. Whilst the claimant has, particularly in his submissions, suggested that the respondent's witnesses, particularly Michael Wilkinson , had not told the truth, and had in fact manipulated evidence to make him look bad, in order to dismiss him, the Tribunal found no basis for such a finding. On the whole the Tribunal found the respondent's evidence reliable, and supported by other evidence, whereas the claimant, allowing for any difficulties he may have, has come across as rather shifting in his case, it being at times very unclear what his case was. On the one hand, it appeared, as it did to the respondent, that he was not really disputing the amount of time he had spent on breaks, but was contending that he had been allowed to take such breaks as a reasonable adjustment for his back condition. Similarly, he appeared to be arguing that he was doing no worse than others were doing, and they were not dismissed. More recently, however, he has challenged Michael Wilkinson's findings as to the amount of time he was spending in the canteen, a challenge which was not made, or pursued, during the disciplinary and appeal stages. The evidence of the claimant's witnesses was not strong on details, and the Tribunal considers it fell well short of establishing, as the claimant was seeking to, that he had actually been given

permission for such a high level of breaks as a reasonable adjustment for his back condition.

The Submissions

6. The parties' submissions were received in writing, sequentially, as the Tribunal intended as it did not consider it fair for the claimant to be expected to make his without sight of the respondent's first. The Tribunal did not consider that this would afford the claimant any significant advantage, but would level the playing field. For the respondent Miss Rollings set out the law, which the Tribunal accepts is correctly summarised. He submitted that the respondent had conducted a (more than) reasonable investigation, and had reasonably concluded that the claimant had been guilty of the misconduct of taking excessive rest breaks. Having done so, it was entitled to conclude that he had committed serious misconduct, for which dismissal was within the band of reasonable responses. In relation to the disability discrimination claims, she submitted that the claimant had not established the first limb of a s.15 or a s.21 claim, and that his disability was nothing to do with the amount of breaks that he was taking.

7. Mrs Tuffley, not being lawyer, was not expected to deal with legal issues, but produced arguments in support of the claimant's claims. The claimant's submissions at first blush appear to be a further witness statement, but he does make a number of points which are submissions, which can be summarised thus (by reference to the paragraph numbers in the document):

(2) and (20) The respondent treated another employee with a mental health disability more favourably, apparently because he was apologetic. The claimant too had been apologetic.

(3) and (4) There were many other employees who could and should have been investigated. He was one of 8 who could be seen in one of the photographs , 3 of whom were managers. Why were they not suspended and investigated as well?

(5) Only Michael Wilkinson had viewed all of the CCTV footage, with Stuart Turnbull only viewing 10 minutes of it. He questioned why the CCTV footage was not produced. He reiterates this point in para. (7), referring to his request to view it.

(6) Michael Wilkinson had not been honest about whether there was a poster on the wall about gambling.

(8) The pack was posted out to the claimant on 30 January 2018, and he did not see it until late on 1 February 2018. He had only a short time to prepare for the disciplinary meeting on 5 February 2018 , and his understanding of it was not good.

(9) There was a lack of independence . Michael Wilkinson had interviewed and investigated. Stuart Turnbull had agreed that there should be a cut off per centage point.

(10) The decision took only 13 minutes, and he had offered to sign a register to monitor his breaks. He questions whether a decision had already been made.

(11) Andrea Pattinson , an HR officer, in the appeal stated “we have made a decision”, after a 38 minute adjournment , when Stuart Turnbull was the appeals officer, and the claimant was trying to put forward new evidence.

(12) This repeats the argument that an attempt was made in the appeal to adduce new evidence.

(13) and (14) The per centage system adopted put him at a disadvantage , and he feels it could have been adopted to lead to his dismissal. He suggests that these results could have been “doctored” .

(15) If he had “stolen” £360 , others should have been accused of stealing, whether it be £360 or £20, as Stuart Turner stated that the amount did not matter.

(16) He disputes that minutes, which he never agreed or signed, show truly what was discussed about his back condition.

(17) He had not been irate or aggressive during the investigation , as his union representative had confirmed.

(18) Inadequate consideration was given to his length of service and clean record, or his deteriorating health.

(19) The whilstleblowing complaints had been dismissed, but he was dismissed for excessive breaks, which was not a factor in the original complaint.

(21) Other sanctions could have been imposed, as they were for others.

(22) This relates to the reason why the claimant was in the janitor’s role.

(23) His breaks had been agreed by his previous managers. This was confirmed by Jason Selkirk and Carol Gill. The company should have minutes of this, but produced none.

(24) The claimant feels he and his wife have been disadvantaged by their lack of legal skills and representation, and could have done with more help to get their points across. He also refers to how his level of education may also have impacted on this.

(25) This is a repeat of the claimant’s account of what occurred with Ruth Carswell.

(26) The claimant challenges the report made by Ruth Carswell in December 2017, and suggests that it written to assist the investigation, as no previous report had mentioned his sitting, or how long he should be sitting for.

(27) An earlier report (20 March 2013) stated he should be moved off Hygiene to a less manual job. This never happened.

(28) He felt that a decision to dismiss had been made from the start. He had not been listened to, and anything he said was dismissed or ignored. He had not had the amount of breaks that the respondent had said he had taken in the tables that were produced. He feels that the respondent has made him look the highest to get him out of the company due to his disability, as he was unable to complete all the other jobs that other employees did. *[Tribunal's emphasis]*

(29) This paragraph relates to the consequences of the dismissal..

(30) This paragraph relates to "court expenses" , which the claimant cannot afford, but with which he need not concern himself, as there are no such expenses in the Employment Tribunal.

The Law.

8. The relevant statutory provisions are set out in Annex A to this judgment. They were also referred to in the preliminary hearing.

9. In relation to the unfair dismissal claim, the burden is upon the respondents initially to establish a potentially fair reason for dismissal, and that is fairly and squarely put as the claimant's conduct. For these purposes the respondent does not to have to establish that the claimant was actually guilty of the conduct which led to his dismissal, merely that it entertained a reasonable belief, after a reasonable investigation, on reasonable grounds that the claimant was guilty of the conduct alleged against him, applying the classic test laid down in ***British Home Stores v Burchell [1980] ICR 303*** . In doing so, the Tribunal does not substitute its own views for that of the respondent , but considers whether or not the actions of the respondent, both in terms of the procedure followed and the substantive decision fell within the band of reasonable responses.

10. In relation to disability discrimination, the claimant and his wife not being legally represented or trained , did not formulate these claims with particular reference to the Equality Act 2010. The Tribunal identified, however, in the preliminary hearing on 31 July 2018, that his claims were of discrimination arising from disability (a claim under s.15 of the Equality Act 2010) or failure to make reasonable adjustments (a claim under sections 20 and 21 of the Act). No other disability discrimination claims were identified.

11. Translated into the context of the claims made, the Tribunal understood the claims to be, firstly, in relation to the s.15 claim, that because the claimant was dismissed for spending too much time in the canteen, and the fact that he did so arose from the disability he had relating to his back condition, that dismissal was because of "something arising in consequence" of that disability. The law (as set out in Annex A) is that if the claimant establishes that this was the case, the respondent will be liable, unless it can show that such treatment was a proportionate means of achieving a legitimate aim, i.e can justify this treatment.

12. In terms of the reasonable adjustment claim, the Tribunal understands that to be that the PCP of limiting the amount of break time that the claimant could spend in the canteen put him, by reason of his back condition, at a disadvantage, and it would

have been a reasonable adjustment to allow him to spend longer in the canteen, and/or not to have dismissed him for doing so. Again the relevant sections are set out in Annex A.

13. It has to be noted, however, that in para. 28 of the claimant's submissions, he is alleging direct disability discrimination, i.e that he was dismissed because of his disability. This had not been put previously in the disciplinary meeting, nor the appeal, nor, more significantly, until para. 9 of his witness statement was served in the course of the Tribunal proceedings.

Discussion and Findings.

a)The disability discrimination claims.

14. We will start with the disability claims. There is no issue but that the claimant's back condition amounts to a disability. There is no issue either but that the respondent had made reasonable adjustments for the claimant's work by giving him the janitor role. His case rests upon the alleged need for him to take longer breaks in the canteen (which he thereby implicitly accepts he was doing) because of his back condition, it being a means of relieving his symptoms , particularly in cold weather. He claims that he was authorised to do this by "previous managers", but was unable to produce any evidence that this was so. He named one a Attque Chugtai, who had not managed him for some time, and has since named one Cameron McIntosh as another manager. He contends that his additional breaks were discussed and documented. The evidence of Jason Selkirk and Richard Bell, and to some extend Carol Gill is relied upon in this regard. He criticises the respondent for not adducing such records, or obtaining evidence from these persons. That cuts both ways. There was nothing to stop the claimant, or more importantly, the union that has supported him, from, firstly seeking documents from the respondent, or , secondly, calling these witnesses (who, it is understood no longer work for the respondent) to give evidence.

15. The Tribunal considers that the claimant has failed to show that he was granted permission to spend long periods of time in the canteen, or, more relevantly, that there was in fact any medical need for him to do so. The Tribunal considers that anything which pre-dates the change in his duties to the janitorial role from September 2015 is, in any event irrelevant. That role was not based on the production floor, was far more internal, and the likelihood of the claimant working in cold conditions which may exacerbate his back condition seems to us to have reduced with his change of duties. Secondly, even if the Tribunal could accept that the claimant was given any such permission by any manager, at any time, the Tribunal does not accept that this is evidence of the fact that the claimant actually needed such breaks as a consequence of his disability. Such issues may be relevant to the unfair dismissal claim, but in order to establish the first limb of a s.15 claim, the claimant needs to show that that there was "something arising in consequence of" his disability. In other words he needs to demonstrate to the Tribunal (regardless of what his managers may or may not have said - what they thought his condition required is not evidence that it actually did) that he did indeed have such a need because of his disability. He puts the case on the basis that he needed to go to the canteen to warm up, as the cold made his back worse, and to sit down.

16. He has adduced no medical evidence to this effect. The only medical evidence is from the respondent, in the form of Ruth Carswell's report, on 7 December 2017 (page 196 of the bundle) which expresses the view that sitting for long periods of time is not advised for people with back pain, and that where possible they need to keep moving as it keeps the back more supple. The claimant in his submissions has suggested that this report was written for the benefit of the investigation, and was in some way designed to assist it. The Tribunal rejects that. The report covers two aspects. The first is whether there is any previous record of any advice in relation to the claimant's break periods, which there was not, and the claimant agrees there was not. The second was to give an opinion as to whether, as a matter of medical fact, taking longer breaks sitting in the canteen would be likely to relieve the claimant's symptoms. Ruth Carswell's view was to the effect that increased breaks spent sitting down would not assist the claimant. The Tribunal accepts that evidence, as a matter of both experience and common sense.

17. There is thus no evidence to support , but there is evidence to refute, the claimant's contention that the need to sit down in the canteen for long periods of time was something that arose as a consequence of his disability. In any event, the Tribunal notes that the pattern of the claimant's periods in the canteen was largely the same each day, and was daily over the relevant period. It seems odd that the effects of cold , or the need to sit down , should occur at the same time each day. Further, whilst the Carlisle autumnal climate is hardly tropical, the relevant period of observation was October/November. No evidence has been adduced any particularly cold or icy snaps occurring around that time, and the claimant worked inside.

18. The point made in the claimant's submissions that there is nothing in any previous occupational health report about the need for him to sit down, thus undermines, rather than supports his case. In short, the Tribunal does not accept that the claimant has established that the need to take the breaks that he did (if in fact he did) has anything to do with his disability, and he fails to satisfy the first limb of s.15. It must also follow that he similarly has failed to show that it would have been a reasonable adjustment to allow him to take such extended breaks to avoid any disadvantages that his disability would otherwise have occurred. He has produced no medical evidence to this effect, and the respondent has produced medical evidence to the contrary.

19. Assuming therefore he was spending long periods of time in the canteen (which he now disputes) , his dismissal was therefore not "because of something arising in consequence of" his disability, because extended break periods were not taken because of his disability. Similarly, the PCP of requiring the claimant to take "standard" break periods, did not put him at a disadvantage because of his inability to limit himself to such periods, and hence any reasonable adjustment claims fails too. Consequently, the s.15 and s.21 disability discrimination claims fail, and are dismissed.

20. Finally, and very late in the day, the claimant has suggested that his dismissal was an act of direct discrimination , i.e he was dismissed because of his disability. This was not one of the claims identified in the preliminary hearing on 31 July 2018. It first appeared in para. 9 of the claimant's witness statement. This complaint lacks any foundation. There is no evidence whatsoever that the respondent was finding

the claimant's working arrangements a problem, or that he was somehow resented. Further, the claimant overlooks the fact that two other persons were dismissed, and several others disciplined, in this exercise. One of those dismissed was disabled (or at least considered to be) , one was not, but the disabled one was reinstated on appeal. There is no basis at all for a claim of direct discrimination, and this claim fails too.

b)The unfair dismissal claim.

21. We now turn to the unfair dismissal claim. Disability is not the issue here, the fairness of the dismissal is. The first issue is the reason for dismissal, the burden of proving which lies with the respondent. The potentially fair reason relied upon is conduct. That reason has not been challenged, and the Tribunal has no hesitation in accepting that this was indeed the reason that the claimant, and indeed others, was dismissed.

22. That then leads to an examination of the fairness of the process, in terms of the investigation, the procedure, and the merits of the decision to dismiss.

23. Starting with the investigation, the obligation upon an employee, as is clear from ***Burchell,*** and indeed, the ACAS Code of Practice, is to carry out such investigation as is reasonable in the circumstances. The more serious the allegations, he more extensive the investigation is required to be. That said, an employer need not carry out a criminal investigation, and be sure beyond reasonable doubt, it merely must carry out such enquiries as are reasonable, not ignoring obvious lines of enquiry or considering points raised by the employee.

24. The Tribunal's view is that Michael Wilkinson's investigation was a reasonable one. He carried out an initial viewing of one week's worth of CCTV footage, then viewed a further three weeks. He noted the times, and produced clear documented evidence of what he had seen. He interviewed the claimant twice, as part of the investigation. He held meetings with relevant witnesses. He attached to his report a considerable number of appendices. His investigation was balanced, and thorough. The Tribunal cannot fault it, and , frankly, there was little the claimant could suggest to Michel Wilkinson that he should have done to make his investigation any more thorough. His only real argument was that it should have been wider in scope , and more employees should have been investigated.

25. In terms of the procedure, there has been no real attack upon the procedure adopted by the respondent. The claimant was allowed to be accompanied at the second investigation meeting, and was supplied well in advance with details of the discipline allegations against him, and the evidence, in the form of Michael Wilkinson's investigation report that would be relied upon. Similarly, in relation to the right of appeal, the claimant was afforded such a right, and was represented by union representative in that appeal hearing. The appeal was, the Tribunal accepts, a review, and not a rehearing, but that does not make it unreasonable.

26. Ultimately then the real test of, and challenge to, the fairness of this dismissal is in relation to whether it was an excessive sanction. That was really the thrust of the argument advanced on appeal, and seems to us to be the nub of this unfair

dismissal claim. In approaching this issue, the Tribunal of course is not entitled to substitute its own view for that of the employer. A Tribunal may , therefore, in some circumstances come to the view that it would not have dismissed the claimant. That is not, however, the test, which is whether the dismissal fell within what is known as the "band of reasonable responses" as has been repeatedly endorsed as the correct test in cases such as ***Post Office v. Foley 2001 1 All ER 550.***

27. Further, in assessing the fairness of this dismissal the Tribunal has focused upon the excessive breaks taken by the claimant, and not the allegation of gambling. Whilst it is right that the respondent, in the person of Malcolm Turner, considered that that allegation was also made out, it is clear from the dismissal letter, and indeed the way in which the matter was dealt with on appeal, that it was the excessive breaks which led to the claimant's dismissal.

28. In terms of whether the respondent had reasonable grounds to believe that the claimant had taken excessive breaks, the Tribunal is quite satisfied that there was ample evidence upon which it could come to that conclusion. Michael Wilkinson's investigation set out very clearly in table form the results of his analysis of the CCTV footage. This was never, at the time, seriously challenged, and although on appeal the calculation of the percentage of non-working time was challenged, on any view there was ample evidence of the claimant spending a considerable amount of what should have been working time sat in the canteen. Neither he nor his two union representatives seriously challenged the amount of time that he was spending in the canteen, so the only issue then is whether in doing so the claimant could reasonably be regarded as behaving in a manner which amounted to misconduct. Again, the question is not whether the Tribunal comes to that view, but whether the respondent was entitled to come to that view.

29. It has now to be noted, however, that in para. (28) of his submissions the claimant expressly challenges the amount of time that he took as breaks. He goes further and suggests that the respondent (presumably Michael Wilkinson) has done something untoward, and has made him look the worst offender, in order to dismiss him. This was not put to the respondent's witnesses in the hearing. Further, neither Jason Selkirk nor on appeal Jim Postings, challenged the amount of breaks that the claimant took. It is true, as the claimant submits, that in the course of the meeting on 9 January 2018 (page 112 of the bundle) the claimant did say that he wanted to see the CCTV footage. Jason Selkirk was with him in that meeting. That request was never repeated, nor was it ever referred to in the subsequent disciplinary or appeal hearings. It is not now open to the claimant to contend that the dismissal was unfair because he did not see the CCTV footage, when , represented in all but the first hearing by experienced and senior trade union representatives neither of them raised any serious challenge to the amount of time that the footage revealed had been spent in the canteen by the claimant, nor to the fact that the claimant or his representatives, had not been afforded access to this material.

30. The Tribunal finds that there was ample material upon which the respondent could and did come to that view. The claimant's responses throughout the investigation disciplinary and appeal stages all displayed what could reasonably be regarded as an unconcerned, and slightly cavalier, approach to the taking of breaks. Indeed, some of the claimant's responses could be viewed as him considering that

he had some form of entitlement to take breaks as and when he wanted, because the respondent had been responsible for his back injury, and had forced him into a return to work in the circumstances, for which he considered that it was responsible.

31. The claimant , of course, tried to justify these breaks by contending that they had been authorised by previous managers as some form of reasonable adjustment for his back injury. The respondent did not accept this, and the Tribunal considers that the respondent was perfectly entitled to reject this explanation. It was wholly unsupported by anything in the claimant's occupational health or other records, and he was signally unable to be specific about precisely who, when, and in what terms gave him this authority. Further, if there was to be any prospect of credibility of such an explanation, one might have expected, indeed the respondent would have expected, there to be some variation in the times and occasions upon which such breaks were taken. Examination of Michael Wilkinson's records of the CCTV recordings show that the claimant took these extensive breaks at specific times of day, coinciding often with breaks being taken by others. That card games were being played during these breaks (regardless of whether this constituted gambling) is another factor which legitimately led to doubts as to whether the claimant was really taking these breaks because of anything to do with his back condition. In short, the respondent rejected this explanation, and was, we find, entitled to do so.

32. A further attack was mounted on the fairness of the dismissal at the appeal stage, and has been maintained during these proceedings, on the basis of lack of consistency. By the appeal stage the claimant and his union were aware of the sanctions imposed upon other persons who were found in the course of this investigation have been taking excessive breaks. Quite understandably the claimant has questioned whether he has been treated unduly harshly given the lesser sanctions imposed upon others, one of whom included a team leader Luke Thompson.

33. The respondent's response to this attack is that the seriousness of the level of abuse of break times was considered, and the employees in question were dealt with in accordance with the severity of their conduct . In terms of what might be termed the "league table" at page 159 the bundle, the claimant is at the top. Two others below him who took an additional 36 and 34 hours of breaks in the relevant period respectively were also dismissed. Others, lower down the table, were given warnings. Malcolm Turner dealt with all of them, and made the necessary distinctions between the levels of abuse of break times.

34. On appeal, one of the dismissed employees, LS, was reinstated with a final written warning. The claimant suggests that he should have been treated the same way. The employee in question, however, it was explained by Stuart Turner had mental health issues, and it was considered a reasonable adjustment to mitigate the sanction in his case. The claimant argued that this was a reasonable adjustment in respect of that disability, and a similar reason adjustment should be made in his case. The difficulty with that argument is that the respondents did not consider the claimant's abuse of break periods to be in any way related to his disability. There was thus no basis for making any similar adjustment in his case.

35. In terms of the law, the relevance of consistency of treatment has been considered in ***Paul v East Surrey District Health Authority [1995] IRLR 305.*** Beldam LJ (with whose judgment Sir Christopher Slade and Nourse LJ concurred), having concluded that the appeal panel had indeed considered the question of disparity and reached a rational conclusion, examined the general scope of the argument on disparity in the following terms:

"I consider that all industrial Tribunals would be wise to heed the warning of Waterhouse J, giving the judgment of the Employment Appeal Tribunal in ***Hadjioannou v Coral Casinos Ltd [1981] IRLR 352*** *where, in paragraph 25, he said:*

""We accept that analysis by counsel for the respondents of the potential relevance of arguments based on disparity. We should add, however, as counsel has urged upon us, that industrial Tribunals would be wise to scrutinise arguments based upon disparity with particular care. It is only in the limited circumstances that we have indicated that the argument is likely to be relevant, and there will not be many cases in which the evidence supports the proposition that there are other cases which are truly similar, or sufficiently similar, to afford an adequate basis for the argument. The danger of the argument is that a Tribunal may be led away from a proper consideration of the issues raised by [s 98(4) of the ERA]. The emphasis in that section is upon the particular circumstances of the individual employee's case. It would be most regrettable if Tribunals or employers were to be encouraged to adopt rules of thumb, or codes, for dealing with industrial relations problems and, in particular, issues arising when dismissal is being considered. It is of the highest importance that flexibility should be retained, and we hope that nothing that we say in the course of our judgment will encourage employers or Tribunals to think that a tariff approach to industrial misconduct is appropriate. One has only to consider for a moment the dangers of the tariff approach in other spheres of the law to realise how inappropriate it would be to import it into this particular legislation"."

I would endorse the guidance that ultimately the question for the employer is whether in the particular case dismissal is a reasonable response to the misconduct proved. If the employer has an established policy applied for similar misconduct, it would not be fair to change the policy without warning. If the employer has no established policy but has on other occasions dealt differently with misconduct properly regarded as similar, fairness demands that he should consider whether in all the circumstances, including the degree of misconduct proved, more serious disciplinary action is justified.

An employer is entitled to take into account not only the nature of the conduct and the surrounding facts but also any mitigating personal circumstances affecting the employee concerned. The attitude of the employee to his conduct may be a relevant factor in deciding whether a repetition is likely. Thus an employee who admits that conduct proved is unacceptable and accepts advice and help to avoid a repetition may be regarded differently from one who refuses to accept responsibility for his actions, argues with management or makes unfounded suggestions that his fellow employees have conspired to accuse him falsely. I mention this because I consider that if the industrial Tribunal in this case had had regard to these factors they would not have regarded the actions of the employers in Mrs Rice's case as disparate or

have said that Mr Verling's misconduct should have been treated just as seriously, if not more seriously, than Mr Paul's."

36. In essence therefore, provided that an employer has addressed its mind to the issue of consistency of treatment, and has made decisions as to how different employees are to be treated on a rational basis, it is not open to an Employment Tribunal to find that a particular claimant has been unfairly dismissed simply because another has not in similar circumstances. That is we find the position here, and we cannot find that the claimant's dismissal has been rendered unfair by virtue of the fact that others were not dismissed, or that one who was subsequently reinstated on appeal.

37. As will be appreciated a Tribunal may well consider that a dismissal is harsh, but is not entitled to substitute its own views if that dismissal fell within the band of reasonable responses. This is the Tribunal considers a classic instance of such a case, and with some sympathy for the claimant who has, it has been discovered, other difficulties those arising from his back condition, this Tribunal cannot find that this dismissal was unfair and the claimant accordingly fail.

38. For completeness, and to the extent it has not done so above, the Tribunal will address the claimant's specific submissions in Annex B, and explain why they are not accepted.

Conclusion.

39. This dismissal, whilst obviously upsetting for the claimant and his family, cannot , for the above reasons, be regarded as unfair, or discriminatory.

Employment Judge Holmes

Dated: 29 July 2019

RESERVED JUDGMENT SENT TO THE PARTIES ON

9 August 2019

FOR THE TRIBUNAL OFFICE

ANNEX A

THE RELEVANT STATUTORY PROVISIONS

Employment Rights Act 1996

98 General

(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—

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b) relates to the conduct of the employee,

(c) is that the employee was redundant, or

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(3) In subsection (2)(a)—
(a) 'capability', in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and

(b) 'qualifications', in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.

(4) [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.

Equality Act 2010

15 Discrimination arising from disability

(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.

20 Duty to make adjustments

(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

(2) The duty comprises the following three requirements.

(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(4) The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.

(6) Where the first or third requirement relates to the provision of information, the steps which it is reasonable for A to have to take include steps for ensuring that in the circumstances concerned the information is provided in an accessible format.

(7) A person (A) who is subject to a duty to make reasonable adjustments is not (subject to express provision to the contrary) entitled to require a disabled person, in relation to whom A is required to comply with the duty, to pay to any extent A's costs of complying with the duty.

(8) A reference in section 21 or 22 or an applicable Schedule to the first, second or third requirement is to be construed in accordance with this section.

(9) In relation to the second requirement, a reference in this section or an applicable Schedule to avoiding a substantial disadvantage includes a reference to—

(a) removing the physical feature in question,

(b) altering it, or

(c) providing a reasonable means of avoiding it.

(10) A reference in this section, section 21 or 22 or an applicable Schedule (apart from paragraphs 2 to 4 of Schedule 4) to a physical feature is a reference to—

(a) a feature arising from the design or construction of a building,

(b) a feature of an approach to, exit from or access to a building,

(c) a fixture or fitting, or furniture, furnishings, materials, equipment or other chattels, in or on premises, or

(d) any other physical element or quality.

(11) – (13) N/a

21 Failure to comply with duty

(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.

(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

(3) A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purpose of establishing whether A has contravened this Act by virtue of subsection (2); a failure to comply is, accordingly, not actionable by virtue of another provision of this Act or otherwise.

ANNEX B

THE CLAIMANT'S SUBMISSIONS CONSIDERED

(2) and (20) The respondent treated another employee with a mental health disability more favourably, apparently because he was apologetic. The claimant too had been apologetic.

The Tribunal considers that the respondent was entitled to view the case of LS differently. The claimant had late in the day offered to sign in and out of breaks, but his responses in the investigatory interviews were less than encouraging, and in the disciplinary meeting it was Jason Selkirk who actually offered the apology, it did not come directly from the claimant. Further, in doing so he said that the claimant had not realised that he was talking that long, but now he challenging that he actually did so.

(3) and (4) There were many other employees who could and should have been investigated. He was one of 8 who could be seen in one of the photographs , 3 of whom were managers. Why were they not suspended and investigated as well?

Two wrongs do not make a right, and that more persons could, and possibly should, have been investigated is not a relevant factor in deciding, firstly, whether the claimant's dismissal was fair, and secondly, whether it was discriminatory. A number of other employees were involved in this exercise.

(5) Only Michael Wilkinson had viewed all of the CCTV footage, with Stuart Turnbull only viewing 10 minutes of it. He questioned why the CCTV footage was not produced. He reiterates this point in para. (7), referring to his request to view it.

Firstly, the Tribunal does not, for the purposes of the unfair dismissal claim, have to be satisfied of the conduct that is alleged., it only has to be satisfied that the respondent was so satisfied. The respondent accepted Michael Wilkinson's analysis of what he had viewed, CCTV footage over a period of 4 weeks. Whilst the claimant asked to see it in the course of his meeting on 9 January 2018 that request was never repeated, nor was any point taken by either of his union representatives in the disciplinary and the appeal hearings. Secondly, and for the purposes of the claimant's two original (i.e s.15 and s.20) disability discrimination claims, his case has to be that he <u>was</u> taking longer breaks. His approach in the investigation meetings was not so much to challenge how long he was taking, but to explain why he was doing so, or to point out that others were doing the same.

(6) Michael Wilkinson had not been honest about whether there was a poster on the wall about gambling.

This is a credibility issue. The Tribunal found no reason to doubt Michael Wilkinson's good faith and honesty.

(8) The pack was posted out to the claimant on 30 January 2018, and he did not see it until late on 1 February 2018. He had only a short time to prepare for the disciplinary meeting on 5 February 2018 , and his understanding of it was not good.

The difficulty for the claimant here is that no complaint or issue was raised about this at the disciplinary hearing, where he was represented by Jason Selkirk. Further, the claimant and his representative had been able to prepare two pages of notes for that meeting (pages 143 and 144 of the bundle) . Further, no complaint was made about this at the appeal stage, where again the claimant was represented by his union.

(9) There was a lack of independence . Michael Wilkinson had interviewed and investigated. Stuart Turnbull had agreed that there should be a cut off per centage point.

The Tribunal does not understand the first point. An investigator has to interview, and there is nothing unreasonable about the role that Michael Wilkinson took. As to the second point, Stuart Turnbull's limited involvement in agreeing an approach to this issue by having a per centage cut off point, does not, in our view, sufficiently compromise his ability to hold the appeal. In any event, the per centage issue is irrelevant, as on any basis the claimant was the worst offender.

(10) The decision took only 13 minutes, and he had offered to sign a register to monitor his breaks. He questions whether a decision had already been made.

The decision in question is the one taken at the disciplinary hearing. It is noted that this was a short hearing, taking 20 minutes to the first adjournment (which was for the claimant to consult with his representative) , then lasting another 4 minutes before the break to consider the outcome. The first part of the meeting focussed mainly on the gambling allegation, with very little being said about the breaks. The claimant expressly stated that did not want to give more information, because he felt the decision had been made, preferring to keep what he had to say for an appeal. That may well be how he felt, but it can hardly then be surprising , or a matter of reasonable criticism, that Malcolm turner was then in a position to make a decision after he had had a relatively short adjournment. The Tribunal does not accept that the decision had already been made. Given the contents of the investigation report it may well have been something that was being contemplated, and in effect, would depend upon what the claimant had to say, but that is far from being a pre-determination.

(11) Andrea Pattinson , an HR officer, in the appeal stated "we have made a decision", after a 38 minute adjournment , when Stuart Turnbull was the appeals officer, and the claimant was trying to put forward new evidence.

(12) This repeats the argument that an attempt was made in the appeal to adduce new evidence.

The Tribunal takes this point, but does not consider that it fatally undermines the fairness of the appeal. There are only so many "bites of the cherry" an employee can expect, and here, at the 11th hour, having been represented by a trade union every step of the way, the claimant was seeking to raise the possibility of fresh evidence

(not to adduce it, for there is no suggestion that this was any more than a line of enquiry). Jim Postings was suggesting, for the first time , that there were formal meetings between senior management at which , it was contended, the breaks were discussed, and hence known about. This was a very imprecise contention. Was Jim Postings suggesting that everybody's extended breaks were known of, and condoned, or just the claimant's ? It is impossible to say, and he has not given evidence. The implication is that it was the former, as it would be unlikely such meetings would discuss only the claimant. Be that as it may, this was a last minute point, which would only have led to the need for further enquiries. No one has explained why such an apparently vital piece of evidence or argument was not raised earlier, nor is there any evidence now before the Tribunal of what this evidence would have been. The respondent was not, in the view of the Tribunal, acting unreasonably in proceeding with the appeal, the outcome of which had, by then, been determined.

(13) and (14) The per centage system adopted put him at a disadvantage , and he feels it could have been adopted to lead to his dismissal. He suggests that these could have been "doctored" .

Two points arise. Firstly, whilst the claimant contends that the results of the CCTV analysis could have been "doctored" , we can see no basis for such a finding. We are quite satisfied Michael Wilkinson carried out a thorough, genuine and unbiased investigation. Secondly, the per centage issue is a red – herring. If the actual total number of hours and minutes that the claimant spent in the canteen as viewed from the CCTV footage and tabulated by Michael Wilkinson is correct, and the total number of hours and minutes spent by the others he investigated is also correct, the claimant is still "top". Per centage does not enter into the equation until the respondent then decides where to draw the line. Three employees, initially were above it. Wherever it was drawn the claimant would be above it.

(15) If he had "stolen" £360 , others should have been accused of stealing, whether it be £360 or £20, as Stuart Turner stated that the amount did not matter.

The Tribunal accepts that the respondent has on occasion used some confusing and unhelpful language, which has obscured rather than illuminated the issues. Whilst taking excessive breaks can be likened to theft, in that an employee is being paid for work he is not doing, it is, of course, not actually "theft" as anyone would recognise it. The claimant has a point , in that if all excessive breaks are to be regarded as theft, all offenders should theoretically be dismissed. The respondent did not, however, do that, and did draw distinctions. The less serious offenders were treated more leniently. That, even if a true ground of complaint, does not mean that the claimant should not have been dismissed. It may mean others were lucky not to have been, but, as in the discussion of consistency above, this is of little assistance to the claimant. Such an argument would only really have any purchase if there had been previous instances of such misconduct which had not resulted in dismissal, so as to lull the claimant into a false belief that his own conduct was not likely to be viewed so seriously. That is not the case here.

(16) He disputes that minutes, which he never agreed or signed, show truly what was discussed about his back condition.

This is an evidential issue. The claimant was accompanied at each meeting bar the first investigatory meeting. No such issue has been raised by his union representative, nor has he produced any alternative notes or evidence was what was or was not said in the meetings.

(17) He had not been irate or aggressive during the investigation , as his union representative had confirmed.

This dispute is noted, but the Tribunal prefers the evidence of Ruth Carwell and the respondent's witnesses. This is not, however, an important issue, as it did not lead to the claimant's dismissal, and seems to us to have little bearing upon it.

(18) Inadequate consideration was given to his length of service and clean record, or his deteriorating health.

The Tribunal accepted Malcolm Turner's evidence that he did take these into account, and also considered alternatives to dismissal. His view was that the lack of trust in the claimant meant that this was a case where dismissal was the appropriate sanction. The Tribunal cannot find that falls outside the range of reasonable responses.

(19) The whilstleblowing complaints had been dismissed, but he was dismissed for excessive breaks, which was not a factor in the original complaint.

This is an irrelevant consideration. The whilstleblowing complaint was merely the catalyst for the investigation.

(21) Other sanctions could have been imposed, as they were for others.

This has been addressed in the Reasons above.

(22) This relates to the reason why the claimant was in the janitor's role.

This requires no comment.

(23) His breaks had been agreed by his previous managers. This was confirmed by Jason Selkirk and Carol Gill. The company should have minutes of this, but produced none.

This has been addressed in the Reasons.

(24) The claimant feels he and his wife have been disadvantaged by their lack of legal skills and representation, and could have done with more help to get their points across. He also refers to how his level of education may also have impacted on this.

The Tribunal has taken these factors into account in its decision.

(25) This is a repeat of the claimant's account of what occurred with Ruth Carswell.

(26) The claimant challenges the report made by Ruth Carswell in December 2017, and suggests that it written to assist the investigation, as no previous report had mentioned his sitting, or how long he should be sitting for.

This has been addressed in the Reasons.

(27) An earlier report (20 March 2013) stated he should be moved off Hygiene to a less manual job. This never happened.

The Tribunal does not see this as a relevant consideration.

(28) He felt that a decision to dismiss had been made from the start. He had not been listened to, and anything he said was dismissed or ignored. He had not had the amount of breaks that the respondent had said he had taken in the tables that were produced. He feels that the respondent has made him look the highest to get him out of the company due to his disability, as he was unable to complete all the other jobs that other employees did.

This is addressed in the Reasons.

(29) This paragraph relates to the consequences of the dismissal.

(30) This paragraph relates to “court expenses” , which the claimant cannot afford, but with which he need not concern himself, as there are no such expenses in the Employment Tribunal.
