EMPLOYMENT TRIBUNALS

Claimant: Mr P Bennett

Respondent: The Commissioners for Her Majesty's Revenue & Customs

HELD AT: Liverpool **ON:** 19, 20 & 21 August 2019

BEFORE: Employment Judge Shotter

REPRESENTATION:

Claimant: In person
Respondent: Ms K Wilson, Counsel

JUDGMENT having been sent to the parties on 13 September 2019 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Preamble

1. In a claim form received on the 1 October 2018 following ACAS Early Conciliation that took place between 16 & 31 July 2018 the claimant complained that he had been unfairly dismissed on the 8 June 2018 and that the decision to dismiss amounted to unlawful disability discrimination under section 15 of the Equality Act 2010. The claimant also maintained that the respondent had unfairly taken into account a live final written warning, which the claimant maintains was not fairly reached following a substantial delay.

2. In short, the respondent denies the claimant's claim of unfair dismissal on the basis that the claimant was dismissed for gross misconduct five-months into a live final written warning and dismiss fell within the band of reasonable responses and the dismissal was not discriminatory. It disputes the claimant was unlawfully discriminated against on the grounds of his disability.

Evidence

3. The Tribunal heard evidence from the claimant on his own behalf and he sought to adduce the evidence of Peter Harper, a friend who provided a signed written statement dated 25 July 2019 that he had witnessed the claimant purchasing a travel pass on 11 December 2011. Peter Harper's evidence related to a new matter not previously pleaded and therefore irrelevant to the issues in this case. The Tribunal was satisfied Peter Harper's evidence was not before dismissing officer prior to or at the disciplinary hearing or the appeal hearing, and it could therefore not have bene taken into account when the decision to dismiss was made. Peter Harper's evidence was not accepted by the respondent, and as it could not be tested by cross-examination and taking into accounts relevance, the Tribunal gave it no weight.

4. On behalf of the respondent it heard from Mr J Wright, higher officer and dismissing manager, and Lyn Powell, senior officer and appeal officer, who both gave direct and consistent evidence which the Tribunal preferred on balance when it came to conflicts in the evidence in comparison to that given by the claimant in the main.

5. The Tribunal has considerable sympathy for the claimant and his predicament in life. He has conducted himself in a dignified and professional way before the Tribunal, however the evidence he gave was not always believable and consistent. The Tribunal found the claimant was not on occasion, a credible witness and shifted his evidence. For example, he maintained that he had drunk alcohol 8-hours before making the inappropriate telephone and was not drunk, and on the other hand that he was under the influence of alcohol and medication when he made the call. The claimant's position in relation to the travel pass to the effect that he found his diary and obtained confirmation from Mr Harper might explain some of the inconsistencies being put down to the passage of time. The claimant's evidence as to the date he discovered his diary was confused, on the one hand he suggests that he had not brought Peter Harper's evidence to the respondent's attention because he did not think it would accepted on the basis that Peter Harper was his friend and not an employee, and on the other he was vague as to when Peter Harper confirmed that evidence, and asserted it had been brought to the respondent's attention during the relevant period. When pressed the claimant confirmed (a) it had been brought to the respondent's attention during or after the disciplinary hearing and appeal and (b) no mention had been made of Mr Harper and his evidence that he witnessed the claimant purchasing the travel pass during the disciplinary process. The claimant cannot have it both ways, and the Tribunal concluded on balance preferring the contemporaneous documentation which supported evidence given on behalf of the respondent, that Peter Harper's evidence was not raised during the disciplinary process and could therefore not have been taken into account by the dismissing officer or appeal officer.

.

Agreed issues

6. The issues were agreed between the parties from the outset as set out below:

UNFAIR DISMISSAL CLAIM

7. Can the Respondent can establish that the sole or principal reason for the dismissal was the Claimant's conduct (namely the threatening telephone call on 5th March 2018)?

8. Was the Respondent's decision to dismiss the Claimant within the range of reasonable responses?

9. In considering (2) above, the following issues require consideration:

9.1 Did the Respondent have a genuine belief in the Claimant's misconduct?

9.2 Was that belief based upon reasonable grounds?

9.3 Was there a fair investigation?

9.4 Can the Claimant establish that the Final Written Warning (p283) was issued "*for an oblique motive or was manifestly inappropriate or, put another way, was not issued in good faith nor with prima facie grounds for making it"* (Wincanton, paragraph 37) and therefore was the Respondent's reliance on this unreasonable? In particular, can the Claimant establish that any delay (not admitted) made the Final Written Warning manifestly inappropriate?

10. Alternatively, if the Claimant's dismissal was unfair:

10.1 Should any compensatory award be reduced on the ground that, had the Respondent acted fairly, the Claimant would or might have been dismissed in any event?

10.2 Would it be just and equitable to reduce the Claimant's basic and/or compensatory awards on the ground of the Claimant's contributory conduct?

SECTION 15 CLAIM

11. It is agreed that the Claimant was disabled for the purposes of the Equality Act 2010, as a result of the mental impairment of anxiety and depression.

12. It is agreed that the unfavourable treatment was the Claimant's dismissal.

13. The first question for the Tribunal is whether the unfavourable treatment was as a result of "something arising in consequence of the disability"?

14. For the purposes of Section 15, it is agreed that the "something" was the threatening telephone call on 5th March 2018.

15. Can the Claimant establish that the "something" (the telephone call) arose as in consequence of the disability?

16. Can the Respondent establish that the dismissal was a proportionate means of achieving a legitimate aim?

16.1 The legitimate aims relied upon by the Respondent are: (i) protecting the health, welfare and safety of its employees and (ii) maintaining reasonable standards of discipline;

16.2 Was the dismissal a proportionate means of achieving those legitimate aims?

17. The Tribunal was referred to an agreed bundle of documents and having considered the oral and written evidence and oral submissions presented by the parties (the Tribunal does not intend to repeat all of the oral submissions, but has attempted to incorporate the points made by the parties within the body of this judgment with reasons), we have made the following findings of the relevant facts.

Facts

18. The respondent employs thousands of employees with the UK and is a substantial undertaking.

19. The claimant was employed initially as call centre telephone advisor on 4 November 2002. In 2009 he moved to tax credits, and in December 2011 his role changed to a compliance role investigating potential undisclosed partners of single claimants of tax credits.

20. The claimant was disabled with a stress related condition for which adjustments had been made, including changing his roles and hours of work.

21. The respondent was aware the claimant was disabled with anxiety and depression for which he took medication. The claimant's attendance was managed, he had phased returns to work, a stress reduction plan was put in place in July 2017 until October 2017 and there were several occupation health referrals. One occupational health report was included in the trial bundle and that has bene referred to below.

Contract of employment, policies and procedures.

22. The claimant was issued with a contract of employment evidenced in the bundle with various policies and procedures including various Conduct Policies, the Civil Service Code, Advances of Salary and an application made by the claimant in October 2011 for a season ticket in the sum of £841.00 from 1 November 2011 to 31 October 2012 dated 17 October 2011. The application form made it clear that "a false application will render you liable to disciplinary proceedings" and the claimant was aware of this.

23. In the document tilted 'Advances of Salary' employees could choose to apply for salary advances to cover the cost of public transport season tickets with a number of restrictions attached to the application, including "it must cover your normal home to office journey." The basis of the application was that the respondent would pay to an employee a salary advances and then recover the advance in equal monthly instalments direct from salary.

24. Procedure HR23007 Discipline Guide provides in the list of gross misconduct examples of conduct "**serious enough to destroy the working relationship between the employee and employer and the potential penalty may be**

dismissal with or without notice for a first offence" which included "**misuse of an advance of salary for travel to work costs**…" [the Tribunal's emphasis]. The claimant was aware that misuse of advances of salary for travel costs could result in dismissal and so the Tribunal found.

25. Procedure HR22003 Conduct provided: conduct and behaviour at work requires employees "must maintain the expected standards of conduct, behaviour, performance and attendance in line with HMRC values, policies and procedures set out in HMRC guidance and elsewhere…"

26. Procedure HR23007 'Discipline: How to: Assess the Level of Misconduct' provided "HMRC will not tolerate rude or abusive behaviour, threats of violence of violence towards staff." The Tribunal took the view that the claimant did not need a policy to inform him that threats made to a fellow employee could lead to his dismissal, and if he was in any doubt the respondent's policies made the position clear that violence towards staff was an act of gross misconduct.

The claimant's history

The claimant had a difficult personal history. His marriage broke down in 2007 following which he was homeless for a period living on the streets but continuing to work for the respondent. He accumulated substantial debts and had problems with alcohol and mental health issues. In early 2013 he returned to the matrimonial home and lived with his estranged wife; the marriage had broken down but there was no divorce. The claimant was in financial difficulties, accumulated substantial debts had entered an IVA in November 2012 and then had problems with alcohol and mental health issues thereafter.

27. In October 2016 the claimant and his estranged wife were investigated for tax credit fraud relating to benefits claimed by the estranged wife. During the investigation the claimant's bank statements were accessed which identified an advance of salary paid into the claimant's account but no season ticket purchased in 2011. During the investigation into the alleged tax credit fraud held in May 2017 the claimant volunteered information about a 2012 loan he had obtained from the respondent which was subsequently incorporated into the investigation and disciplinary proceedings that led to the issuing of a final written warning.

28. During the investigation the claimant emailed his union representative on 5 June 2017 "mitigating circumstances which may have been a factor contributing to my delay in purchasing my Annual Travel Pass in 2011…I have an entry in an old personal diary that I went to purchase the Trio pass on Saturday 10 December." This entry raised an issue with the claimant's credibility at this final hearing and the evidence given to the effect that he came upon the diary entry too late to use it in any proceedings, too late for the disciplinary hearing that resulted in the final written warning and after the appeal hearing.

29. After the investigation the claimant attended a disciplinary hearing and informed the respondent "for a couple of weeks" he was getting a weekly rail ticket and then purchased a Trio ticket. No reference was made to any witnesses, such as Peter Harper, to the purchase or the Diary, and the respondent concluded at the disciplinary hearing that the advance had not been used for the intended purpose

and as conceded by the claimant, he had used an advance of salary to purchase a travel pass for lesser value than the advance. Despite the passage of time, whilst there was confusion over the first allegation, including the claimant being very confused with his evidence, there was no confusion over the second allegation which was admitted by the claimant where he had used less than half of the advance to purchase a travel pass.

30. Following an investigation and disciplinary hearing the claimant was found guilty of misconduct for which he could have been dismissed, his personal circumstances were taken into account and a final written warning was issued.

The final written warning

31. The final written warning is dated 5 October 2017 issued by Sue Barwise, the decision maker, to remain on his personal file for 24-months. The claimant was warned "**should you commit another act of misconduct within this time you are likely to be dismissed or if gross misconduct, save in exceptional circumstances, you will be dismissed without notice and pay inlie of notice**. It is therefore very important that you improve your standard of conduct and behaviour to that expected of all staff and act professionally at all times" [the Tribunal's emphasis].

32. The claimant did not appeal the final written warning acting on the advice of his union representative. He was pleased he had kept his job and an appeal could have resulted in his dismissal. The Tribunal considered the documents relating to the allegations that gave rise to the final written warning, including the invite letters and minutes of meeting, and there was no evident of an oblique motive on the part of Sue Barwise when she issued the final written warning, and nor was it manifestly inappropriate or not in good faith. It is notable the claimant admitted to the misconduct for the second allegation, and that alone was sufficient to merit a dismissal under the respondent's policies an procedures. With reference to the other allegation which was not admitted by the claimant, the Tribunal does not have enough information to go outside the first allegation, the respondent chose to treat it seriously and the claimant has a high bar to get over, and he has not got close.

The tax fraud investigation and AJ

33. The tax credit fraud investigation against the claimant was dropped, but the estranged wife was charged and pleaded guilty before the Crown Court in January 2018. An employee of the responded referred to as AJ for the purpose of these proceedings, attended the Crown court on behalf of the respondent as a witness. The claimant gave evidence today that he felt guilty and embarrassed that he had advised his estranged wife and that resulted in a penalty of £5000 and community service of 150 hours plus the £27,000 overpayment to be repaid. The claimant was criticised by the judge for the part that he had played, and the claimant was distressed by this. He believed the family had been through enough, and when the respondent decided to enforce the repayment against his estranged wife the claimant was upset and his mental health deteriorated. He had seen a letter to his estranged wife with the name of AJ on it and decided to act.

34. During this period the claimant had been prescribed medication and he did not think they were working. The claimant maintained he doubled the dose of anti-depressant medication on his own initiative, and on the 4 March 2018, he had visited family and on his return home celebrated by consuming a considerable amount of alcohol. The claimant possessed full knowledge of the likely effects of combining any alcohol with his medication, he had been warned against it and this was ignored despite the fact the amount of medication taken was doubled.

The incident

35. On the 5 Match at 8.30am the claimant telephoned the respondent's Preston office and asked to speak to AJ, who he knew worked there from the details on the letter to his estranged wife. AJ was not available and he was invited to leave a message which he did. An internal referral/record of phone call was made setting out the following "He told me to tell her to be watching over her shoulder and he will be coming. Her decision had caused his family so much grief. His ex-partner is considering suicide. He has mental issues and kept telling me to tell AJ to keep looking over her shoulder…"

36. In an email sent 8 March the call handler confirmed the claimant had said "scum." The claimant accepted it was a threatening and offensive call. He did not give his name, and the respondent traced him via Google on his personal mobile.

37. After making the call the claimant went back to bed, then subsequently went to work in the knowledge he had made an offensive call but could not recall precisely what he had said. The claimant did not go to his GP that day.

38. AJ was informed of the call and the police were involved. AJ was and remains disabled and very upset by the claimant's actions, so much so that she was advised by the police to take steps to secure herself. She was being concerned about being identified so changed her appearance in the knowledge that the claimant worked for the respondent.

Suspension

39. The claimant was suspended on full pay and in a letter dated 6 March 2018 the suspension was confirmed and the claimant informed "Internal Governance Civil Investigations (IGCI) has been appointed to investigate potential concerns that you may have seriously harassed and made threats of physical violence to a colleague. Such behaviours are listed as examples of gross misconduct at HR23007. Your actions also calls into question your integrity as a HMRC officer and have the potential to bring the department into serious disrepute." The claimant was informed the investigation would be digitally recorded, the possible penalty of dismissal, his right to be accompanied by a trade union official and the welfare support available for him to take up.

40. Wyatt Smith, internal governance civil investigations, wrote to the claimant on 21 March 2018 inviting him to an interview.

41. The claimant raised no issue with the disciplinary processes and investigation, and the only matters in issue were the reliance on the final written warning and the fact the respondent should have taken his disability into account. The Tribunal found

the ACAS Code of Practice was complied with. The claimant's case was that he would not have behaved in that way had it not been for his mental health issue and combination of that medication taken because of his disability with alcohol.

42. A Report of Disciplinary Investigation dated 27 April 2018 was produced and Wyatt Smith recommended that he considered, on the balance of probabilities, the claimant had made serious harassment and threats of physical violence against an HMRC colleague, which was not binding on the decision maker. The claimant was provided with a copy of the report that included a number of appendixes and transcripts. It was put to the claimant that the phone call was "threatening, intimidating and threatening violence" which the claimant agreed, later in the interview acknowledge it was not "a nice phone call…I was just a bit mad…trying to take it out on someone…I had a name and basically that, she was the target and she was only doing her job and obviously I felt mortified…". A detailed discussion took place about the claimant's mental state at the time of the incident and the medication he was on, the claimant confirming he should not have drank the alcohol and the phone call had been made from anger accepting he had breached HMRC conduct guidance and his behaviour was not professional and had put his "conduct, honesty and integrity in dispute as an officer of the HMRC."

43. It is evident from the transcript the claimant's union representative made lengthy submissions about the claimant's personal circumstances and health, arguing his behaviour was "a sign of his illness." The claimant's mental health was explored fully by Wyatt Smith evidenced in the transcript which the Tribunal has read but does not intend to refer to in any detail as it ran to approximately 30-pages of evidence.

44. Appendix C of the report included the Remploy Disability Guide, emails from the union, a GP report dated 23 April 2018 and Screen Print detailing the side effects of Citalopram, the medication taken by the claimant.

<u>GP report</u>

45. The claimant had been advised to obtain medical report in support of his defence, which he did by way of a GP report dated 23 April 2018 a key document that was considered. It was confirmed the claimant had been treated for stress and anxiety and had attended "over the last few years…I can confirm that at the time of the incident he was on anti-depressant medication. I am led to believe that he had been drinking heavily the night before. While his actions may not have been acceptable I can certainly see that his behaviour may have been adversely affected by his underlying condition, the anxiety and depression via the alcohol via the anti-depressant medication and potential interaction between the psycho active medication and alcohol. We are still attempting to deal with this gentlemen's symptoms and I feel that this episode may constitute part of this gentlemen's ongoing medical condition."

46. The investigation report, appendices including the GP report were before John Wright, decision maker. There is no issue with the process undertaken by the respondent inviting the claimant to a disciplinary hearing including the invite letter dated 24 May 2018 which read "I have carefully considered all the available evidence and conclude that: On 5 March 2018 you made a threat of physical

violence and made grossly offensive comments towards a HMRC colleague which constitutes serious harassment…at the end of the meeting I have to decide what further action to stake. I must make you aware that the allegations concerning your conduct and behaviour may result in dismissal without notice or a final written warning (for 24 months).

The disciplinary hearing

47. The disciplinary hearing before John Wright took place on 6 June 2018 in compliance with the ACAS code of Practice. The claimant was accompanied by his PCS representative. The claimant and his representative put forward his defence in full, the claimant accepted he had made the telephone call, went back to bed, then got up and went to work. He could not recall its content and yet knew it was an offensive call, and did not dispute the respondent's evidence. The claimant was asked about his mental health and whether he had any additions, to which the claimant responded alcohol was "really bad as it interacts with my medication. In the past alcohol has bene a problem…but my alcohol consumption has dropped…"

48. The claimant raised the issue of the final written warning, and it was explained that it would be considered. Even though it has not been recorded in the notes, it is not disputed John Wright gave the claimant an opportunity to locate the disputed travel pass relating the first travel past allegation. The respondent checked the claimant's desk for the travel pass, and the claimant also looked for it at home. The claimant, who claimed he had found the disputed travel pass was given the chance to locate it. He made no mention of his diary entry or the possibility of Peter Harper's supporting evidence produced for the first time at the liability hearing.

49. John Wright's evidence as to his thought processes were entirely credible and supported by contemporaneous documents. He took time to read the Remploy Disability Guide, and he concluded that he saw no evidence the business was not supportive to the claimant. His analysis took full account of what the claimant and his union represented said, and the mitigation offered balancing it against the seriousness of the allegation and the fact that the misconduct had taken place only 5-months after the final written warning was issued, the effect the incident had on AJ and the respondent's zero tolerance policy which required upholding.

50. John Wright took the view that as the claimant had not appealed the final written warning, and the terms of it, and the Tribunal finds he was entitled to consider the final written warning in the round when he came to make a decision in relation to the claimant and the mitigation relied upon.

51. John Wright accepted the claimant's disability went towards explaining how the incident took place, but it did not outweigh the claimant's act of gross misconduct and the effect of it on AJ. In oral evidence John Wright stated the fact the claimant was disabled did not given him total protection from the consequences of his actions, and he did not have sufficient confidence it would not be repeated, despite accepting the claimant was remorseful.

The decision to dismiss

52. The dismissal letter was sent to the claimant on the 18 June 2018 and confirmed the allegations had been found proven. John Wright produced document titled 'Decision Managers Deliberations' that ran to six pages in which reference was made to a number of matters including the claimant's mitigation relating to his anxiety, depression and anti-depressant medication, the GP report and personal circumstances, all factors taken into account during the decision making process in addition to the final written warning the claimant having disputed it "as he now had evidence that he had used the salary advance for a travel season ticket. Unfortunately, he has not been able to provide this evidence during the DM process."

53. John Wright also considered the Remploy Disability Guide and the guidance notes given with Citalopram reflecting on the claimant's mitigation concluding the claimant "has had and continues to have, significant health and financial issues that he is attempting to address. Whilst this goes some way to explaining the circumstances that led to the call…in my view this cannot outweigh he disregard to departmental guidance." The warning given to the claimant as to the consequences of committing another act of misconduct during the live final written warning was considered, and John Wright concluded "I do not regard PB's mitigation as exceptional circumstances…I have decided that dismissal without notice or compensation should be the penalty…because there has been clear disregard of the departmental guidance and PB is already subject to a live written warning."

54. The claimant appealed via a 4- page letter dated 18 July 2018 returning to the final written warning and procedural errors which was essentially the claimant disagreeing with the decision on the basis that "new evidence of purchase of the travel pass was shown to my line manager but this was not communicated to the Decision maker sue Barwise. The claimant argued the dismissal to dismiss was "incorrect as it has affected by the unsafe decision" that resulted in the final written warning. The claimant challenged the written warning and maintained John Wright had not considered the GP expert evidence and the fact "my actions were severely impacted by certain factors regarding my state of mind and medication I was taking and were completely out of character."

Appeal hearing

55. The appeal hearing took place on the 22 August 2018 before Lynne Powell whose role was to address procedural errors and any new evidence, but not rehear the case. Lynn Powell was unequivocal in her response to one of the questions raised by the claimant in cross-examination concerning what steps she would have taken had she felt the original decision had an element of discrimination. She explained that it has not within her remit when dealing with the appeal. Whilst it does not affect the fairness of the appeal the Tribunal found this response surprising. Lynn Powell was looking for procedural errors; there were none and the claimant did not produce any new evidence. There were no issues with the disciplinary hearing that required Lynn Powell to investigate or follow up procedural flaws, and had she looked at the decision for a taint of disability discrimination (which she did not) there was none. Even at the appeal hearing the claimant was preoccupied with the final written warning despite the fact that he had not appealed it at the time.

56. Lynne Powell due to the nature of the claimant's misconduct was satisfied that even if the final written warning had not been in place dismissal for this misconduct alone would have been consistent with the respondent's Discipline Guidance. She was satisfied that John Wright had given mitigation, the medical position and evidence full consideration and on the evidence before it the Tribunal accepted that this was the case.

57. The appeal was dismissed on 5 September 2018 and confirmed in writing by a letter dated of the same date.

58. The effective date of termination was 18 June 2018.

Law

59. Section 94(1) of the Employment Rights Act 1996 ("the 1996 Act") provides that an employee has the right not to be unfairly dismissed by her employer. Section 98(1) of the 1996 Act provides that in determining whether the dismissal is fair or unfair, it is for the employer to show the reasons for the dismissal, and that it is a reason falling within section 98 (2) of the 1996 Act. Section 98(2) includes conduct of the employee as being a potentially fair reason for dismissal.

60. Section 98(4) provides that where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal if fair or unfair (having regard to the reasons shown by the employer) depends on whether in the circumstances (including the size and administrative resources of the respondent's undertaking) the employer acted unreasonable or reasonably in treating it as a sufficient reason, and this shall be determined in accordance with equity and the substantial merits of the case.

61. Where the reason for dismissal is based upon the employee's conduct, the employer must show that this conduct was the reason for dismissal. For a dismissal to be procedurally fair in a case where the alleged reason for dismissal is misconduct, Lord Bridge in Polkey –v- A E Dayton Services Limited [1981] ICR (142) HL said that the procedural steps necessary in the great majority of cases of misconduct is a full investigation of the conduct and a fair hearing to hear what the employee has to say in explanation or mitigation. It is the employer who must show that misconduct was the reason for the dismissal, and must establish a genuine belief based upon reasonable grounds after a reasonable investigation that the employee was guilty of misconduct – British Home Stores Ltd v Birchell [1980] CA affirmed in Post Office v Foley [2000] ICR 1283 and J Sainsbury v Hitt [2003] C111. In short, the Tribunal is required to conduct an objective assessment of the entire dismissal process, including the investigation, without substituting itself for the employer.

62. The Court of Appeal in British Leyland (UK) Ltd v Swift [1981] IRLR 91 set out the correct approach: "If no reasonable employer would have dismissed him then the dismissal was fair. But is a reasonable employer might reasonably have dismissed him, then the dismissal was fair…in all these cases there is a band of reasonableness, within which one employer might reasonably take one view and another reasonably take a different view.

63. In between extreme cases of misconduct there will be cases where there is room for reasonable disagreement amongst reasonable employers as to whether dismissal for the misconduct is a reasonable or unreasonable response: LJ Mummery in HSBC Bank Plc v Madden [2000] ICT 1283.

64. The question for the Tribunal is the reasonableness of the decision to dismiss in the circumstances of the case, having regard to equity and the substantial merits of the case. The Tribunal will not substitute its own view for that of the respondent. In order for the dismissal to be fair, all that is required is that it falls within the band of reasonable responses open to employer. It is necessary to apply the objective standards of the reasonable employer – the "band of reasonable responses" test – to all aspects of the question of whether the employee had been fairly dismissed, including whether the dismissal of an employee was reasonable in all the circumstances of the case.

65. The test remains whether the dismissal was within the range of reasonable responses and whether a fair procedure was followed. Section 98 (4) provides that where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal if fair or unfair (having regard to the reasons shown by the employer) depends on whether in the circumstances (including the size and administrative resources of the respondent's undertaking) the employer acted unreasonable or reasonably in treating it as a sufficient reason, and this shall be determined in accordance with equity and the substantial merits of the case.

Disability discrimination arising from disability

66. Section 15(1) of the EqA provides-

(1) A person (A) discriminates against a disabled person (B) if –

(a) A treats B less favourably 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.

67. Paragraph 5.6 of the Equality and Human Rights Commission: Equality Act 2010 Code of Practice provides that when considering discrimination arising from disability there is no need to compare a disabled person's treatment with that of another person. It is only necessary to demonstrate that the unfavourable treatment is because of something arising in consequence of the disability.

68. In order for the claimant to succeed in his claims under s.15, the following must be made out:

68.1 there must be unfavourable treatment;

68.2 there must be something that arises in consequence of claimant's disability;

68.3 the unfavourable treatment must be because of (i.e. caused by) the something that arises in consequence of the disability;

68.4 the alleged discriminator cannot show that the unfavourable treatment is a proportionate means of achieving a legitimate aim

69. Unfavourable treatment is not the same as detriment. The test is whether a reasonable worker would consider that the treatment is unfavourable. An unjustified sense of grievance will not suffice, and this is particularly relevant to some of the claims made by Ms Melville. Useful guidance on the proper approach to a claim under s.15 was provided by Mrs Justice Simler in Pnaiser v NHS England and anor [2016] IRLR, EAT:

69.1 "A tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.

69.2 The tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a s.15 case. **The "something" that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it** [the Tribunal's emphasis].

69.3 Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant: see Nagarajan v London Regional Transport [1999] IRLR 572. A discriminatory motive is emphatically not (and never has been) a core consideration before any prima facie case of discrimination arises…"

69.4 The tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is 'something arising in consequence of B's disability'. That expression 'arising in consequence of' could describe a range of causal links. Having regard to the legislative history of s.15 of the Act (described comprehensively by Elisabeth Laing J in *Hall),* the statutory purpose which appears from the wording of s.15, namely to provide protection in cases where the consequence or effects of a disability lead to unfavourable treatment, and the availability of a justification defence, the causal link between the something that causes unfavourable treatment and the disability may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.

69.5 This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator".

70. With regard to the objective justification test, when assessing proportionality, the Tribunal must reach its own judgment, that must in turn be based on a fair and detailed analysis of the working practices and business considerations involved, having particular regard to the business needs of the employer: Hensman v Ministry of Defence UKEAT/0067/14/DM.

Burden of proof

71. Section 136 of the EqA provides: (1) this section applies to any proceedings relating to the contravention of this Act. (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provisions concerned, the court must hold that the contravention occurred. (3) Subsection (2) does not apply if A shows that A did not contravene the provisions. (4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule."

72. In determining whether the respondent discriminated the guidelines set out in Barton v Investec Henderson Crossthwaite Securities Limited [2003] IRLR 332 and Igen Limited and others v Wong [2005] IRLR 258 apply. The claimant must satisfy the Tribunal that there are primary facts from which inferences of unlawful discrimination can arise and that the Tribunal must find unlawful discrimination unless the employer can prove that he did not commit the act of discrimination. The burden of proof involves the two-stage process identified in Igen. With reference to the respondent's explanation, the Tribunal must disregard any exculpatory explanation by the respondents and can take into account evidence of an unsatisfactory explanation by the respondent, to support the claimant's case. Once the claimant has proved primary facts from which inferences of unlawful discrimination can be drawn the burden shifts to the respondent to provide an explanation untainted by sex [or in the present case disability], failing which the claim succeeds.

Conclusion

73. With reference to the first issue, namely, can the Respondent can establish that the sole or principal reason for the dismissal was the Claimant's conduct (the threatening telephone call on 5th March 2018), the Tribunal found that it was. The burden is on the respondent to show that misconduct was the reason, which it has discharged. On the balance of probabilities, the Tribunal found the reason for the dismissal was unconnected to the claimant's disability, and it was not a contrived situation to engineer the claimant's exit as suggested by the claimant in submissions. The respondent held a genuine and reasonable belief, reasonably tested, that the claimant was guilty of the misconduct alleged when he made the telephone call on 5 March 2018, the burden of proof for which is neutral. In particularly, the respondent was entitled to base its facts on the claimant's admission recorded above in the finding of facts, and John Wright had considered the medical evidence the claimant produced to causally link his disability with the misconduct in addition to considering the final written warning before coming to his decision to dismiss.

74. With reference to the second issue, namely, was the Respondent's decision to dismiss the Claimant within the range of reasonable responses, the Tribunal found it fell well within the band of reasonable responses even considering the claimant's disability and mitigation. There is a band of reasonableness, within which one employer might reasonably take one view and another reasonably take a different view and the Tribunal concluded the respondent had reasonably concluded the claimant's conduct was so serious and in breach of its policies and procedures, that a second chance was not an option taking into account the gross misconduct occurred some 5-months into a live final written warning and the claimant was aware of the serious consequences if he were to commit a further act of misconduct. The claimant in oral submissions stated he had offered to accept a second final written warning on his file for three years, and he was seeking to be re-instated, thus acknowledging the seriousness of his actions. It is notable the claimant was aware following the imposition of the final written warning that he could have been dismissed, and he is similarly aware of the situation he found himself in following making the abusive phone call when a 3-year final written warning was seen by him as alternative to dismissal.

75. John Wright did have a genuine belief in the Claimant's misconduct, and this belief based upon reasonable grounds, the claimant having admitted he had made the call and there was contemporaneous and convincing evidence of its content, which had serious implications for a female colleague who understandably felt threatened by the claimant.

76. There was a fair investigation, and the claimant's oral submission that the respondent should have obtained expert medical evidence over an above the GP letter was not accepted by the Tribunal, and nor was this suggested by the claimant tor his union representative at the time the disciplinary process took place. The respondent suggested the claimant obtain some medical evidence, and the claimant, who was supported by his union, relied upon that provided by his GP. He did not suggest the responded should consider other evidence, including the alleged 5 occupational reports previously obtained over many years, which may well be irrelevant to the March 2018 incident in any event. The occupational health report in the bundle did not suggest the claimant was susceptible to such outbursts, and the claimant in oral submissions confirmed it was a one-off act and he should have been given the benefit of the doubt because it would not happen again. The claimant relied upon P V Nottinghamshire County Council [1992] IRL 336 arguing he should have been transferred given the respondent's administrative resources, a proposition not put to the respondent at the time the disciplinary process took place. The Tribunal took the view that transferring the claimant was not a viable option given his behaviour towards a member of staff who worked in a different office to him.

77. The claimant argued that the lapse of time between 2011 and 2017 before the first allegation that led to the final written warning was investigated resulted in the dismissal relying upon the final written warning being unfair. The claimant referred to the EAT decision in A v B [2002] UKEAT 1167_01_1411 (14 November 2002) and the judgement of Elias J who observed delay in an investigation might of itself render an otherwise fair dismissal unfair. The Tribunal accepted there are circumstances in which a delay could result in a substantive unfairness, but this was not one of them. The Tribunal considered how the final written warning came about and the fact the claimant did not appeal it at the time, which he could have done using the arguments

he now relies on at this liability hearing. In short, as found by the Tribunal above, the claimant accepted the final written warning as an alternative to dismissal, and he chose not to appeal on the advice of the union as he did not want to take the risk of the final written warning being overturned and dismissal imposed. The Tribunal was satisfied on the evidence before it that the claimant could have been fairly dismissed for the act of gross misconduct he had committed and there existed prima facie grounds for the final written warning being imposed as an alternative.

78. The Tribunal was referred to Wincanton Group Plc v Stone & Gregory UKEAT/0011/12/LA at paragraph 37 and Davis v Sandwell Metropolitan Borough Council UKEAT/0416/10/DA on behalf of the respondent. In Wincanton at paragraph 37 the Honourable Mr Justice Langstaff (then President) summarised the law relating the relevance of an earlier warning reminding the Tribunal that it "must always begin" with reference to section 94 and 98 of the ERA, and "Thus, the focus…is upon the reasonableness or otherwise of the employer's act in treating conduct as a reason for dismissal. If a Tribunal is not satisfied that the first written warning was issued for an oblique motive, or was manifestly inappropriate, or…not issued in good faith nor with prima facia grounds for making it, then the earlier warning will be valid…then…the Tribunal should take into account the fact of that warning…it will not be going behind a warning to hold that it should not have been issued…to take into fact the factual circumstances giving rise to the warning." Mr Justice Langstaff confirmed a "final written warning always implies, subject only to the individual terms of the contract, that any misconduct of whatever nature will often and usually be met with dismissal, and it is likely to be by way of exception that this will not occur."

79. In Davies cited, above at paragraph 28 and 29 the Judgement of the Honourable Mr Justice Willkie confirmed the arguments put forward on behalf of the respondent were correct in that the focus of the Tribunal has to be on the final decision to dismiss, the respondent is entitled to conclude that the final written warning that was not appealed has a "significant degree of finality" and it would be contrary to policy for the validity of the final warning to be subject to the same test and same potential level of scrutiny; "Before it would be appropriate for an ET to look behind a final warning is deliberately couched in more exacting terms that the test for unfairness in respect of a dismissal. Provided the final warning has been issued in good faith and there are prima facie grounds for it…the employer and the Employment Tribunal is entitled to regard the final warning as valid for any dismissal."

80. The claimant attempted to re-open the unfairness of the final written warning and his written submissions reflect his arguments. He referred the Tribunal to many first instance decisions dealing with unreasonable delay, which the Tribunal is not bound by and does not intend to deal with. In written and oral submissions, the claimant also relied upon the EAT judgement in RSPCA v Cruden [1996] ICR 205 as a basis for his argument that there was an unjustifiable delay by the respondent when it investigated the allegations that gave rise to the final written warning, and as a result the claimant had suffered prejudice because he was unable to prove, due to the passage of time, he had purchased a travel pass and any proof held by the respondent had been shredded. The insurmountable problem for the claimant was that once the matter was brought to the respondent's attention the ensuing investigation was carried out without delay in accordance with the ACAS Code. Given the fading of recollections and the respondent having shredded documents

over a period, had the allegation been limited to the 2011 travel pass the claimant may have had a stronger argument at disciplinary and had he appealed, but it was not. The claimant admitted to the respondent he had committed the second allegation to prove that he had not committed the first, and the final written warning covered both allegations. It is not for the Tribunal to second-guess what would have happened at an appeal had the claimant argued the points he now raises before the Tribunal; the claimant chose not to appeal at the time because he was pleased about keeping his job and had been warned by his union representative that he ran the risk of being dismissed on appeal. It is notable that the claimant raised arguments at the liability hearing which he could have raised during the earlier disciplinary processes and did not, which raises a question mark over the credibility of the evidence he now produces, particularly the reference to fortuitously coming across an old diary which in turn reminded him of the part Peter Harper had played in December 2011.

81. The claimant's argument resulted in the Tribunal being required to consider whether the Claimant can establish that the Final Written Warning was issued "*for an oblique motive or was manifestly inappropriate or, put another way, was not issued in good faith nor with prima facie grounds for making it"* (Wincanton, paragraph 37) and therefore was the Respondent's reliance on this unreasonable? The Claimant did not establish that any delay made the final written warning manifestly inappropriate, the claimant cannot because he had admitted to the second allegation, and as soon as the evidence which resulted in the first allegations brought to the respondent's attention in 2017 the investigation took place. Inevitably, the time lapse from 2011 to 2017 caused some problems in establishing evidence in relation to the first allegation, but the second allegation was uncontroversial and admitted by the claimant. The contemporaneous evidence before the Tribunal appears to point to the claimant not using his salary advance for the purpose it was intended, and the claimant was confused before this Tribunal and certainly gave confusing evidence during the disciplinary process. It was hard for the claimant to deal with it coherently after 6-years, and even if the respondent had disregarded the first allegation (which it did not) the second allegation could have justified the final written warning alone and it suggested the claimant was capable of the first allegation given both involved the claimant using an advance of salary in breach of the respondent's policy and in the knowledge that to do so could lead to disciplinary proceedings and dismissal.

82. Given the seriousness of the act of gross misconduct that had been committed by the claimant 5-months after a final written warning had been issued, the dismissal was fair having regard to the reasons shown by the respondent as set out above. Taking into account all of the circumstances including the size and administrative resources of the respondent's undertaking, it had acted reasonably in treating it as a sufficient reason, determined in accordance with equity and the substantial merits of the case. The misconduct was admitted, the claimant had a fair hearing and could put forward what he wanted to say in explanation or mitigation. The Tribunal will not substitute its own view for that of the respondent. Objectively assessed, the dismissal fell within the band of reasonable responses open to the respondent in all the circumstances of the case.

83. Alternatively, if the Claimant's dismissal was found to have been unfair (which it was not) the Tribunal would have gone on to find it just and equitable to reduce the Claimant's basic and/or compensatory awards on the ground of the Claimant's contributory conduct by a 100 percent contribution. The issue of the phone call was

so serious he would have been dismissed for this allegation alone in any event, the Tribunal accepted the respondent's evidence on this point and the fact that there was a zero tolerance for threatening and aggressive behaviour towards other members of staff. The claimant was culpable, well-aware of the consequences if he were he breach the final written warning, and he was the author of his own misfortune, notwithstanding his mental health issues. He was fully aware that (a) his medication had been doubled without reference to the GP, (b) he should not be drinking alcohol when taking the medication and still he had chosen to drink a large amount of alcohol, (c) he was five months into a final written warning and (d) the respondent had a zero tolerance of threatening and aggressive behaviour in the workplace.

SECTION 15 CLAIM

84. It is agreed that the Claimant was disabled for the purposes of the Equality Act 2010, as a result of the mental impairment of anxiety and depression. It is agreed that the unfavourable treatment was the Claimant's dismissal. In written submissions the claimant cites direct discrimination as a claim. This is not a complaint before the Tribunal, nor has the claimant made an application to amend, and there is no requirement for the Tribunal to consider this complaint. The Tribunal notes that had a section 13 EqA claim been before it the claimant would more likely than not have been in difficulties with establishing an appropriate comparator sufficient to support a claim of direct discrimination.

85. The test in relation to unfair dismissal proceeds by reference to whether dismissal was within the range of reasonable responses available to an employer is different to the test under section 15(1)(b) of the EqA, it is an objective one, according to which the Tribunal must make its own assessment.

86. The claimant referred the Tribunal to the Court of Appeal decision in City of York Council v Grosset. No citation was given and the Tribunal assume it relates to a 2018 report that can be found at EWCA Civ 1105. The claimant argued that the respondent was aware of his disability and it would have been "wise" to look into the matter before taking the unfavourable action of dismissing him. In written submissions the claimant argued he made a telephone call he had no recollection of, he had never done anything like that before and it was a "one off" act directly caused by his medication being taken for depression. He had consumed alcohol the previous evening in the knowledge that it should not be consumed when taking anti-depressants but his judgment was "severely impaired" at the time.

87. In the judgement of Sales LJ at paragraphs 36 to 39 of Grosset a discussion took place concerning the proper construction of section 15(1)(a) and it was held "on its proper construction, section 15(1)(a) requires an investigation of two distinct causative issues: (i) did A treat B unfavourably because of an (identified) "something" and (ii) did that "something" arise in consequence of B's disability?" – paragraph 36. Sales J referred to the following;

87.1 Paragraph 37: "The first issue involves an examination of A's state of mind, to establish whether the unfavourable treatment which is in issue occurred by reason of A's attitude to the relevant "something". In this case, it is clear that the respondent dismissed the claimant because he showed the film. That is the

relevant "something" for the purposes of analysis. This is to be contrasted with a case like *Charlesworth v Dransfields Engineering Services Ltd (unreported) 12 January 2017* (Simler J), in which the reason the claimant was dismissed was redundancy, so that no liability arose under section 15 of the EqA , even though the redundancy of the claimant's job happened to be brought into focus by the ability of the employer to carry on its business in periods when he was absent from work due to a disability. In that case, therefore, the relevant "something" relied upon by the claimant was the claimant's absence from work due to sickness, but he was not dismissed because of that but because his post was redundant. "

87.2 Paragraph 38: "The second issue is an objective matter, whether there is a causal link between B's disability and the relevant "something". In this case, on the findings of the employment tribunal there was such a causal link. The claimant showed the film as a result of the exceptionally high stress he was subject to, which arose from the effect of his disability when new and increased demands were made of him at work in the autumn term of 2013. In my view, contrary to Mr Bowers's argument, it is not possible to spell out of section 15(1)(a) a further requirement, that A must be shown to have been aware when choosing to subject B to the unfavourable treatment in question that the relevant "something" arose in consequence of B's disability (i e that A should himself be aware of the objective causation referred to in issue (ii) above). There are a number of reasons for this."

88. In Grosset the Court of Appeal held that section 15(1)(a) of the Equality Act 2010 required an investigation of two distinct causative issues, namely whether a person had treated a disabled person unfavourably because of an identified "something" and whether that something had arisen in consequence of the disability; that section 15(1)(a) did not require that a person should be shown to have been aware when choosing to subject a disabled person to unfavourable treatment that the relevant something that provided him with his reason for treating the disabled person unfavourably had arisen in consequence of the disabled person's disability; that the respondent had dismissed the claimant because he had shown the film, which he had done because of the exceptionally high stress he was subjected to, which arose from the effect of his disability when greater demands were made of him at work…(paras 54, 56, 58)".

89. The EHRC Code provides an example 'A woman is disciplined for losing her temper with a colleague. However, this behaviour was out of character and is a result of severe pain caused by her cancer, of which her employer is aware. This disciplinary action is unfavourable treatment. The treatment is because of something which arises in consequence of the worker's disability' — para 5.9. In Grosset reference was made to the EHRC Code at paragraph 5.9 as follows: the employment tribunal attached significance to the example in para 5.9. It indicates the ambit of the "in consequence" formula used in section 15(1)(a) , which does not require an immediate causative link between the "something" (i e that which provides the respondent employer with his reason for treating the claimant unfavourably) and the claimant's disability. So, in the present case, there is a sufficient causative link between the showing of the film by the claimant and his disability. In any event, this relatively wide approach to that issue of causation is, in my view, inherent in the broadly drafted "in consequence" formula used in section 15(1)(a) ; and, as noted

above, for the purposes of the appeal Mr Bowers accepts that the statutory requirement of a causative link between the claimant's disability and the showing of the film by him is made out… In the example, it is not suggested that the employer has to be aware that the employee's loss of temper was due to her cancer, but only that the employer should be aware that she suffers from cancer (i.e. so that the employer cannot avail himself of the defence in subsection 15(2))."

90. Ms Wilson on behalf of the respondent submitted that the words "something arising in consequence of the disability" should be given their ordinary and natural meaning and she argued that there were a number of causative links and the claimant had failed to show there was a sufficient causative link between the threatening telephone call and his disability. The Tribunal did not agree finding that the causative link was established in the 23 April 2018 GP report that confirmed the claimant's behaviour "may have been adversely affected by his underlying condition" of stress and anxiety for which the claimant had been treated by anti-depressant medication." The GP concluded "I feel this episode may constitute part of this gentleman's ongoing medical condition."

91. In City of York Council v Grosset reference was made to Basildon and Thurrock NHS Foundation Trust v Weerasinghe [2016] ICR 305, EAT and Pnaiser v NHS England and anor [2016] IRLR 170.

92. In Basildon Mr Justice Langstaff, the then President of the EAT, explained that there is a need to identify two separate causative steps in order for a claim under S.15 EqA to be made out. The first is that the disability had the consequence of 'something'; the second is that the claimant was treated unfavourably because of that 'something'. According to Langstaff P, it does not matter in which order the tribunal approaches these two steps: 'It might ask first what the consequence, result or outcome of the disability is, in order to answer the question posed by "in consequence of", and thus find out what the "something" is, and then proceed to ask if it is "because of" that that A treated B unfavourably. It might equally ask why it was that A treated B unfavourably, and having identified that, ask whether that was something that arose in consequence of B's disability'.

93. In Pnaisner Mrs Justice Simler set out the proper approach to establishing causation under S.15. (1) the tribunal has to identify whether the claimant was treated unfavourably and by whom. It then has to determine what caused that treatment — focusing on the reason in the mind of the alleged discriminator, possibly requiring examination of the conscious or unconscious thought processes of that person, but keeping in mind that the actual motive of the alleged discriminator in acting as he or she did is irrelevant. (2) The Tribunal must then determine whether the reason was 'something arising in consequence of the claimant's disability', which could describe a range of causal links. This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.

94. With reference to there being more than one causative link Mrs Justice Simler accepted that 'just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a S.15 case. **The "something" that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or**

more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it' [the Tribunal's emphasis]. Simler J went on to explain that an employment tribunal is then required to determine whether the reason/cause or, if more than one, *a* reason or cause is 'something arising in consequence of [the claimant's] disability'.

95. With reference to the burden of proof Mrs Justice Simler confirmed that under the burden of proof rules the reason for unfavourable treatment can be inferred. In relation to Mr Bennett's case the Tribunal found he had established a prima facie case of discrimination such as to shift the burden of proof to the respondent given the factual matrix in this case, particularly the respondent's knowledge of the claimant's mental health and his personal circumstances.

96. With reference to the issue, namely, whether the unfavourable treatment was as a result of "something arising in consequence of the disability" the Tribunal found on the balance of probabilities that it was. For the purposes of Section 15, it is agreed that the "something" was the threatening telephone call on 5th March 2018. The Claimant has established, on the balance of probabilities, that the "something" (the telephone call) arose as in consequence of the disability in that he was on medication for depression and drank alcohol having taken double the prescription against a background of anxiety, stress and dire personal circumstances.

97. As indicated above, the GP report confirmed there may be some connection. The claimant increased his medication and then drank in celebration knowing the effect it would have. There were numerous factors affecting the claimant, financial problems and belief that he had let down his estranged wife that made him feel angry and guilty.

98. Ms Wilson submitted there were too many links in the chain to establish a causal link between the claimant's disability and telephone call. The Tribunal did not accept this submission and found the claimant's disability, of which the respondent was aware, had a more than trivial influence on the telephone call. The claimant was angry, and the telephone call reflected this, he felt guilty over the part he played and he had been drinking too much and this influenced his medication. In the investigation report the claimant was reported to have said "he had been drinking the night before, he was in a bit of a haze." Before the Tribunal the claimant's evidence was he had been drinking the night before, was not drunk by 8.30 but he "wasn't thinking straight" his tablets were not working properly and he doubled the number consumed, and was under pressure. It appears to the Tribunal, that on the claimant's account of the incident, his case could be analogous to Mr Grosset, and it found on the balance of probabilities one possible cause of the telephone call was something arising in consequence of his disability.

99. The claimant attempted to persuade the Tribunal that the responded was aware his disability caused anger, however, in his mitigation, he said "it was a one-off act". The claimant cannot argue both, and the evidence before the Tribunal was that anger or anger management did not form part of the claimant's disability; he took the step he did because of the celebratory circumstances he had found himself in. The mistake he made when taking a double dose of medication and drinking a substantial amount of alcohol was in short, a catalogue of poor judgment on the

claimant's behalf against a background of his disability and the "potential interaction between the psycho active medication and alcohol" – GP report 23 April 2018.

Objective justification under section 1591(b) of the EqA

100. In Grosset the Court of Appeal held the test of justification under section 15(1)(b) was an objective one according to which the employment tribunal had to make its own assessment, in contrast to the test in relation to unfair dismissal which proceeded by reference to whether the dismissal was within the range of reasonable responses available to an employer; (paras 54, 56, 58)". What amounts to a legitimate aim and proportionate means are two separate issues that should not be conflated.

101. Turning to the claimant's submissions, the Tribunal took the view Mr Bennett's case can be differentiated from that of Mr Grosset. In Mr Grosset's case the Tribunal's assessment that there was no good justification finding that the step of dismissal was disproportionate in the circumstances. It found "A particularly strong factor underlying the employment tribunal's conclusion that the dismissal was not proportionate was its unchallenged assessment that, if the respondent had put in place reasonable adjustments as required by sections 20 and 21 of the EqA , by reducing the work pressure on the claimant, he would not have been subjected to the same level of stress…"

102. Para 5.21 of the Code of Practice, set out above, makes it clear that a link between a failure to put in place reasonable adjustments and the unfavourable treatment in issue under section 15(1)(a) of the EqA may be an important factor to be taken into account under section 15(1)(b) . By virtue of EqA the Code of Practice should "be taken into account by a court or tribunal in any case in which it appears to the court or tribunal to be relevant." Mr Bennett's case was not that the respondent had failed to put in any reasonable adjustments, although he had attempted at an earlier preliminary hearing to amend proceedings so as to include a reasonable adjustment claim which was refused. There was no evidence to suggest reasonable adjustments was a factor; the claimant's stresses were not work related but family and he had made the decision to "celebrate" by drinking substantial amounts of alcohol in the knowledge that his anti-depressant medication would be adversely affected.

103. On the balance of probabilities the Tribunal was satisfied the Respondent has established objectively that the dismissal was a proportionate means of achieving the legitimate aim of (I) protecting the health, welfare and safety of its employees and (ii) maintaining reasonable standards of discipline and its zero-tolerance position when it came to serious harassment and threats of physical violence against a female colleague who was warned to keep "looking over her shoulder" for the claimant.

104. In oral submissions the claimant submitted that he was dismissed to avoid a claim being brought by AJ, supporting her rather than supporting him as a disabled person. The Tribunal took the view that this argument reflects the seriousness of his actions and the possible consequences to the respondent, who has established the claimant's dismissal was a legitimate aim and the only option to it given the act of gross misconduct had taken place 5-months into a live written warning and the

seriousness of the claimant's behaviour against a zero-tolerance policy of harassing and physically threatening employees who had the right for legal protection against harassment and violence within the workplace, including female employees being threatened by their male colleagues. In short, it is legitimate for the respondent to promote and secure the safety of employees when they are carrying out their contractual duties as was AJ when she attended Crown Court and a decision was made to enforce a money judgment against the claimant's estranged partner. Employees are protected by the respondent's policies and procedures as actioned by managers, including the claimant in relation to his disability and AJ in relation to her disability and sex, and to dismiss the claimant in accordance with the disciplinary policy was not disproportionate in the circumstances of the claimant's case given the seriousness of his behaviour and the respondent's reasonable objectives in controlling such behaviour.,

105. In relation to the question of proportionality, the Tribunal noted, on the evidence it had heard, the claimant's remorse and acceptance that he had acted badly towards a work colleague, and as a result had caused her harm, and there was no doubt in the respondent's and Tribunal's mind that he had intended this when the telephone call was made. Notwithstanding the claimant's remorse when he was facing a possible dismissal, and by applying the objective test under section 15(1)(b), the Tribunal was satisfied that the respondent had demonstrated there was a real need to dismiss given the seriousness of the claimant's actions and the context in which it occurred. It follows dismissal was a proportionate means of legitimate aim. Given the seriousness of the claimant's behaviour and consequences to AJ it was not proportionate to transfer the claimant to another role as suggested by the claimant; this would not have protected the respondent's employees from any possible repeat behaviour by the claimant. It was not proportionate to issue the claimant with yet another final written warning to lie on his file for 3-years as suggested by the claimant, in addition to the final written warning already issued. The claimant was fully aware that any act of gross misconduct would result in his dismissal and yet this did not stop him from making the threatening phone call. AJ was also disabled, she was a female employee and as a direct result of the claimant's actions the police were informed and advised her to take steps to secure herself, which she did even to the extent of changing her appearance.

106. The principle of proportionality requires the Tribunal to objectively balance the discriminatory effect of the claimant's dismissal and the respondent's needs, weighing and assessing whether the needs of the undertaking outweighs the discriminatory effect, and the Tribunal concluded on balance that the claimant's dismissal was reasonably necessary and in proportion to the respondent's objectives.

107. In conclusion, the unanimous judgement of the Tribunal is that the claimant was not unfairly dismissed and his claim for unfair dismissal is not well-founded and the claimant's claim of unlawful disability discrimination brought under section 15 of the Equality Act 2010 is dismissed the Respondent having established that the dismissal was a proportionate means of achieving a legitimate aim.

23.10.19
Employment Judge Shotter

_____
Employment Judge Shotter

JUDGEMENT & REASONS SENT TO THE PARTIES ON

28 October 2019

FOR THE SECRETARY OF THE TRIBUNALS