EMPLOYMENT TRIBUNALS

Claimant: **Mr G Plowright**

Respondent: **Sky-in-Home Services Limited**

Heard at: **Leeds** **On:** **18 June 2019**
6, 7 and 8 November 2019
Reserved on: **6 December 2019**

Before: **Employment Judge Licorish**

Members: **Mr D Dorman-Smith**
Mr S Carter

Representation
Claimant: in person, assisted by Mr A Shazad (friend)
Respondent: Mr T Semple (counsel)

JUDGMENT

The unanimous Judgment of the Tribunal is that:

1. At the relevant time, the claimant was a disabled person within the meaning of the Equality Act 2010.
2. The claimant's complaint of a failure to make reasonable adjustments in respect of the application of the respondent's conduct policy to health and safety breaches succeeds.
3. The claimant's complaint of a failure to make reasonable adjustments in respect of the applicable time frames in the respondent's operation of its conduct policy fails and is dismissed.
4. The claimant's claim for discrimination arising from his disability in respect of his dismissal succeeds.
5. The claimant's claim for unfair dismissal succeeds.
6. The claimant's compensatory award should not be reduced on the basis that respondent would have dismissed the claimant in any event.
7. The claimant's compensatory award should not be reduced for contributory fault.

8. The hearing to decide how much compensation the claimant should be awarded, which was provisionally listed to take place on **Tuesday 18 February 2020** at Employment Tribunals, 4th Floor, City Exchange, 11 Albion Street, Leeds LS1 5ES, will start at 10:00 am. The parties should proceed to comply with separate case management orders dated 20 December 2019.

REASONS

1. The claimant was employed by the respondent limited company as a field engineer from 26 March 2007 until his summary dismissal on 25 May 2018. By a claim form presented to the Tribunal on 12 September 2018, following a period of early conciliation from 8 August until 8 September 2018, he complains of unfair dismissal and disability discrimination. The respondent's primary position is that the claimant was fairly dismissed for gross misconduct.

The hearing

2. This case was originally listed to take place over three days in June 2019. On the first day of the hearing, we were told that the respondent had not previously sent its witness statements to the claimant. This is because the claimant had stated that he wanted a disability impact statement served on the respondent in March 2019 to stand as his evidence at the final hearing, together with a further short statement sent to the respondent by email in May 2019. The disability impact statement in fact went further than describing the effects of the claimant's contended condition, and set out why he thought he had been treated unfairly and in a discriminatory way. The respondent, however, maintained that the claimant had not served a witness statement in accordance with the Tribunal's later case management orders.

3. After discussion the claimant confirmed that he wanted the above two documents to stand as his written evidence, as well as the "*notes for consideration*" attached to his claim form. However, the claimant was anxious because he had only just been handed copies of the respondent's witness statements. In the circumstances, once the claim and issues had been clarified, we read into the case for the remainder of the day. It was agreed that the claimant would start to give evidence the next day, but he was unfortunately taken ill overnight and did not attend. He subsequently provided supporting medical evidence and the case was accordingly relisted to take place in November 2019.

4. During the reconvened hearing, we first heard evidence from the claimant. For the respondent we heard from Peter Reynolds (the claimant's team manager), Iain Naylor (another team manager, who took the decision to dismiss the claimant) and Barry Surtees (regional manager, who heard the claimant's appeal). We read all of the witnesses' statements before the claimant gave evidence.

5. We were also provided with an agreed bundle of documents (initially comprising 305 pages). We read the pleadings, and the documents referred to in the witness statements, during the evidence and in submissions. One additional document relating to the claimant's employment since his dismissal was added to the bundle by consent (at pages 306 to 318). References to

page numbers in these Reasons correspond to the page numbers in the complete bundle of documents before us.

The issues

6. The claimant's complaints and the relevant issues were first identified during a preliminary hearing on 14 February 2019. At the beginning of this hearing, the issues were confirmed as follows:

Disability

6.1 Did the claimant have the mental impairment of depression at the relevant time (namely, between 17 February and 23 August 2018), or at any point during that period?

6.2 If so, did that impairment have a substantial adverse effect on the claimant's day-to-day activities?

6.3 If so, was that effect long term?

6.4 If so, did the respondent know, or was it reasonably expected to know, that the claimant was a disabled person at the relevant time? If so:

Discrimination arising from disability

6.5 The unfavourable treatment complained of is dismissal.

6.6 Did the respondent dismiss the claimant because of "*something arising*" in consequence of his disability? The claimant says that, if he breached health and safety procedures, he did no owing to a lack of concentration and because he was not thinking properly, both of which arose out of his mental health impairment.

6.7 If so, has the respondent shown that the decision to dismiss was a proportionate means of achieving a legitimate aim? The respondent contends that its legitimate aim is "*the health and safety of its employees and customers*".

Duty to make reasonable adjustments

6.8 Did the respondent apply the following provision, criteria or practice (PCP) generally:

6.8.1 Its application of its conduct policy to instances of health and safety breaches?

6.8.2 The applicable time frames in its operation of its conduct policy?

6.9 Did the application of any PCP put the claimant at a substantial disadvantage compared to persons who are not disabled? The claimant contends that:

6.9.1 he had difficulty complying with all health and safety rules owing to his mental health impairment, including lack of concentration; and

6.9.2 the length of his suspension exacerbated his feelings of stress and depression by reason of his underlying mental health impairment.

6.10 Did the respondent know, or was it reasonably expected to know, that any relevant PCP was likely to put the claimant at a substantial disadvantage, as set out above?

6.11 Did the respondent take such steps as were reasonable to avoid the disadvantage? The claimant says that the following steps would have been reasonable:

6.11.1 not dismissing him, or applying a disciplinary sanction short of dismissal; and

6.11.2 completing the disciplinary process more quickly, in line with occupational health advice.

Unfair dismissal

6.12 It is not disputed that the reason for the claimant's dismissal related to his conduct.

6.13 At the time of dismissal, did the respondent hold that belief on reasonable grounds? That is to say, did it conduct sufficient investigation into the allegations against the claimant or otherwise follow a fair procedure? The claimant contends that:

6.13.1 the sanction was unreasonable, in view of his mental health issues;

6.13.2 the dismissal was discriminatory;

6.13.3 the period of his suspension was lengthy and the overall process protracted; and

6.13.4 the respondent failed to support him throughout the process in terms of his state of health, and it took a long time to notify him of the outcome of his appeal.

6.14 Did the respondent's decision to dismiss the claimant fall within the range of responses which a reasonable employer might have adopted?

6.15 If the dismissal was unfair, has the respondent shown that if it had adopted a fair procedure the claimant would have been dismissed in any event?

6.16 Did the claimant contribute to his dismissal?

Background

7. Having considered all of the evidence, we make the following findings of fact, on the balance of probabilities, which are relevant to the issues to be determined. Some of our findings are also set out in our Conclusion below (in particular, relating to the claimant's contended disability) to avoid unnecessary repetition.

8. In addition, we have not tried to resolve each and every dispute of fact. As a consequence, where we heard or read evidence on matters on which we make no finding, or do not make a finding to the same level of detail as the evidence presented to us, that reflects extent to which we consider that the particular matter assisted us in determining the identified issues.

9. Finally, following the evidence the respondent submitted that the claimant had proved to be an "*unreliable historian*", largely because at times he became confused about what had happened and when. We would say at this point that the claimant appeared to us to be genuinely confused rather than deliberately misleading. In the event of a dispute and in determining whose version of events we prefer, we went back to the contemporaneous

documents where possible. We have explained how we have resolved particular conflicts in more detail below.

10. The claimant started to work for the respondent as a field engineer on 26 March 2007 (pages 37 to 47). His job involved installing and maintaining satellite dishes at residential and commercial properties. This meant that he routinely worked at height using (among other things) single, double and triple-section ladders.

11. The respondent insists that all its engineers work safely to avoid injuring themselves, other engineers, customers and the general public. Its engineers are accordingly trained on and subject to various safety procedures, including relating to ladder working (pages 50 to 55). Engineers are also required to complete risk assessments for each job.

12. The respondent also has a conduct policy in respect of dealing with disciplinary issues (pages 56 to 60). The policy provides no timescales for completing a disciplinary process beyond stating that the respondent will carry out investigations "*as quickly as [it] can*" (page 56). Examples of gross misconduct which are "*likely to lead to … dismissal*" include "*any action that puts you or anyone else's health and safety at risk* "(page 59).

13. Engineers mostly work on their own, as a result of which the respondent regularly monitors the way in which they work by unannounced "*home safe*" site visits. Up until the incident which resulted in the claimant's dismissal, he had an unblemished disciplinary record and had passed all of his home safe checks without any concerns (for example, in September and October 2017 – pages 102 to 113).

14. On 17 February 2018, Dean Wilson (a team manager) carried out a home safe visit involving the claimant. Mr Wilson found the claimant working at the top of a double-section ladder without any safety equipment (other than a hard hat) or having secured the ladder according to his training. The claimant had nevertheless properly completed a risk assessment. Mr Wilson told the claimant to stop working and arranged to interview him later that day (pages 114 to 122).

15. In summary, the claimant was asked why he had "*breach[ed] health and safety*". He replied that his mind had been elsewhere. He was going through a divorce and his partner was moving out that day. His previous partner was also threatening to take him to court to obtain formal custody of his daughter, who had also recently moved out of the claimant's home. He thought he had been coping, but as the day progressed "*reality was hitting home*". The claimant said that he had told Peter Reynolds (his team manager) about his personal problems "*a few months back*". Dean Wilson explained that the claimant could access various of the respondent's support services, including occupational health (OH), if he was "*feeling stressed or unfit for work*". The claimant replied: "*I wish Peter would of told me about this when we had our discussion*."

16. The claimant also said that his personal issues had not affected his work until that day: "*I've been coping in my own mind. I don't like to take my problems to other people. I just bottle it up … Been the customers house chatting. Then went to my van. Got my hard hat on and ladders off and was thinking about issues at home. And what Im going home to. Then carried on with the job not*

thinking about anything else." He further confirmed that he had never breached health and safety *"in 11 years"* but had done so today owing to *"Everything that's going off."*

17. At the end of the meeting, Dean Wilson suspended the claimant pending further investigation (page 123). In a written report (also dated 17 February 2018), Mr Wilson recommended that the claimant attend a formal conduct meeting on the basis that he was fully aware of the safety equipment he should have used while working at height. Mr Wilson also recorded details of a discussion with Peter Reynolds, who recalled a telephone call with the claimant: which "*was just to ask him about where to go for anther TV … [the claimant] explained his girlfriend had damaged his tv in an argument … this was a general conversation over 6 months ago and [the claimant] did not ask for any support or go into any detail over personal home life issues*" (pages 124 to 126 and 128 to 131).

18. By letter dated 8 March 2018, the claimant was invited to attend a conduct meeting on 13 March to answer (among other things) the allegation: "*Breach of company's health and safety equipment whilst working at height on double section ladder set up formation*" (pages 155 to 156). It was also confirmed that the allegation, if upheld, would amount to gross misconduct.

19. On 9 March 2018, the claimant contacted Peter Reynolds to advise him that he had been diagnosed with anxiety and depression (page 262). As a result, the conduct meeting was cancelled and the claimant was referred for an OH assessment.

20. The OH report dated 23 March 2018 was produced by a senior nurse following an assessment of the claimant by telephone (pages 157 to 160). As the report comprises the only medical information obtained by the respondent throughout the disciplinary process, it is worth quoting at length:

"***Health background***

As you are aware [the claimant] has been experiencing symptoms of reactive depression in recent months. More specifically he reports symptoms of low mood, heightened emotions, reduced concentration, poor sleep pattern and loss of appetite. [The claimant] relates his symptoms to a combination of personal and work related stressors. From a personal perspective he reports that he has been dealing with some perceived stressors since around December 2017. [The claimant] reports that he made management aware of his personal situation at the time. From a work perspective [the claimant] reports an ongoing conduct investigation to be the source of significant stress.

[The claimant] reports that he first attended his GP regarding his symptoms in February 2018 following the start of the conduct issue at work. However, in hindsight he reports that he should have attended his GP prior to this as he struggled to cope with his personal stressors. [The claimant's] GP has commenced him on appropriate treatment for his symptoms. He reports some improvement in his mood and emotional state in response to this. However, to date there has been no improvement in his sleep pattern and he still reports issues with his concentration. [The claimant's] GP has also referred him for counselling support and he is due to attend his first appointment for this on the 8th May 2018. [The claimant's] next review with his GP is on the 8th April

2018. He has not requested a medical certificate from his GP as he reports that he is suspended from work anyway at the present time.

[The claimant] is aware of the options of additional support that are available …

***Current fitness for work**: In my opinion Garry is currently unfit for work.*

Anticipated future attendance prospects: [The claimant's] symptoms seem to be entirely reactive in nature to the presence of perceived stressors. As such the likelihood of future absence is likely to be dictated by the presence of perceived stressors and this is not possible to predict.

***Recommendations for consideration**:*

- *Whilst awaiting his counselling support commencing I would recommend that [the claimant] continue to use [the respondent's] Support Service as required for psychological support in the interim.*
- *I would recommend that management conclude [the claimant's] current conduct process as soon as feasible as in my opinion the uncertainty of this situation is a barrier to his symptoms improving at the present time.*
- *Once fit to return to work it is likely that [the claimant] would benefit from a graduated increase in workload as part of a 2 engineer team, followed by a week of 50% workload, a further week of 75%, prior to returning to his normal workload thereafter if coping adequately.*
- *Initially following his return to work I would recommend additional 1-2-1s with management to ensure he is coping adequately. Management may wish to consider the provision of some refresher training if there are concerns around following the process.*
- *In my clinical opinion, the disability remit of the Equality Act is unlikely to apply to [the claimant's] recent reactive symptoms, however the decision as to whether the act applies is a legal decision that can only be made in an Employment Tribunal.*

Additional questions in the referral: …

Q Were [the claimant's] personal circumstances/condition likely to have impacted his ability to assess his own fitness for work on the day of the alleged breach?

A I did not assess [the claimant] on the day of the alleged breach so it is difficult to retrospectively make meaningful comment on this matter. [The claimant] reports to be aware that his concentration was not at his best on the afternoon of the alleged breach. In hindsight he is aware that he should have made management aware of how he was feeling. However, he reports that he had reported how he was feeling to management previously and he didn't feel that any support was implemented. [The claimant] reports that this was a factor in him not reporting his symptoms that day …

Q If [the claimant] were to return to work, is he likely to experience further issues with his overall decision making?

A As detailed above the likelihood of [the claimant] having further symptoms going forward is likely to be influenced by whether he is experiencing

perceived stressors or not. It is [the claimant's] perception that his symptoms may have been a factor in the recent alleged safety breach. With this in mind [the claimant] reports that he is now fully aware that if he were experiencing such symptoms again at that level in the future then he would need to refrain from work and inform management immediately …"

21. The claimant asked for some corrections to be made to the draft report which led to a delay because the OH nurse was away for the Easter holidays. Peter Reynolds eventually received a copy of the OH report on 17 April 2018, but did not contact the claimant to discuss its contents because he remained suspended.

22. The claimant was invited to a conduct meeting due to take place on 10 May 2018, chaired by Iain Naylor (team manager). It was subsequently rearranged to take place on 16 May 2018 owing to the unavailability of the claimant's trade union representative. The respondent's case documents listed in the invite letter do not include the OH report (pages 163 to 164).

23. The respondent made a handwritten note of the first conduct meeting (pages 177 to 187). During the meeting, Iain Naylor was given a copy of a statement from one of the claimant's colleagues (page 165). The colleague stated that he told Peter Reynolds "*some time in December*" that the claimant was having problems at home.

24. In summary, the claimant explained that he had been coping up until December 2017, but between then and February 2018 matters had escalated at home. He maintained that he had made Peter Reynolds aware of his personal difficulties but "*didn't give him too many details*". On the day in question, his partner was moving out and his daughter had already left to live with her mother. It was "*all on mind and that would be going back to empty home*". He conceded that he probably would have been advised to "*take time off*" if he had fully explained to his team manager how he was feeling on that day.

25. The claimant also explained that he did not carry out the job in question in his usual way because of his "*state of mind. I wanted to finish work and go home. Mentioned previous unannounced visits being perfect with no issues … Mind not on job.*" He remembered completing the risk assessment and the customer talking about their own daughter. After that conversation, the claimant went to his van and "*at that point it hit me I was going to go home to an empty house*". He only realised he was working unsafely when he heard Dean Wilson asking him to come down from the ladder: "*I know what I should have done but I wasn't thinking properly*."

26. Finally, the claimant described his working relationship with Peter Reynolds as "*OK*" but Mr Reynolds could be forgetful. The claimant concluded: "*I've been honest – one off due to circumstances – now getting help which consists of attending support group – counselling – medication. Now I am getting this help it would not happen again*."

27. Later on the same day, Mr Naylor interviewed Peter Reynolds (pages 168 to 170). Mr Reynolds maintained that the claimant told him about an argument with his partner "*some time last year*", but only in the context of replacing his TV. Mr Reynolds also explained that he made the OH referral at Easter at the request of Dean Wilson or HR. Mr Reynolds also thought there was a delay of

approximately two weeks before the OH report was released to him and the reasons for it. He thereafter obtained the claimant's permission to include the report with the respondent's conduct case documents.

28. Mr Naylor also interviewed Dean Wilson (pages 171 to 175). Most importantly, he stated that the claimant was "*very surprised and scared*" when he realised that Mr Wilson was on site: "*He could hardly string two words together and he kept calling me Garry … He offered me the van key and said you'll want these as I won't be needing these as I won't have a job after today … I caught him off guard and he was shaking badly."*

29. The claimant's conduct meeting resumed on 25 May 2018 (pages 190 to 198). In summary, the claimant explained that team managers normally turned up unannounced to carry out home safe visits and he understood their purpose. He did not ask for an OH referral before the incident because "*I like to keep it to myself.*" However, the claimant reiterated that he was now able to talk more openly because of the counselling and support he had since received.

30. Following an adjournment, Iain Naylor informed the claimant that he was dismissed with immediate effect for gross misconduct. In summary, Mr Naylor's stated reasons recorded in the notes of the meeting were:

    30.1 he did not accept that the claimant proceeded to work unsafely as a result of a conversation with a customer, because the claimant had worked safely on his previous jobs that day and had completed a comprehensive risk assessment for the job in question;

    30.2 the claimant was confused and shocked by Dean Wilson's arrival on site because " *[Peter Reynolds] was not in work that day*";

    30.3 the claimant's personal circumstances had been an issue long before the day in question;

    30.4 the claimant had failed to seek support, either from his manager or his GP beforehand, thereby putting himself and others at risk for a considerable period of time;

    30.5 the claimant would have been aware of support around mental health issues offered by the respondent because there had been "*a great deal of publicity within the company … over the past 12-18 months*".

31. Towards the end of the meeting, the claimant had an anxiety attack and an ambulance was called.

32. By letter dated 28 May 2018, Iain Naylor confirmed his decision in writing to the claimant (but not the basis for the decision), and advised him of his right of appeal (pages 199 to 200). By email dated 4 June 2018, the claimant accordingly appealed (page 201). In summary, the claimant apologised. He maintained that the lapse occurred on his last job of the day and after 11 years of service because he had become "*very upset and confused*" owing to his personal circumstances. He also admitted that he should have sought help earlier: "*I have learnt a very valuable lesson on this occasion and give you assurances that no such errors or breaches will occur in the future … I hope you have it in your heart to accept my apologies and give me another chance.*"

33. The original manager assigned to determine the claimant's appeal declared a conflict of interest on 7 June 2018 (page 271). It was eventually assigned to Barry Surtees (regional manager) on his return from annual leave on 18 June 2018. In the invitation letter, Mr Surtees summarised the grounds of the claimant's appeal as follows: "*You state that your frame of mind was in confusion whilst completing the last job of the day prior to going hom*e" (page 203).

34. The appeal meeting took place on 27 June 2018 (pages 210 to 219). At the beginning of the meeting, the claimant's trade union representative read out a statement of case (pages 204 to 209). Most importantly, the following points were raised:

    34.1 Research carried out by the charity Men's Health Forum show that 46% of men who had experienced mental ill health would be embarrassed or ashamed to tell their employer, and 52% would be concerned about taking time off work.

    34.2 Iain Naylor unreasonably relied on a non-medical opinion as to why the claimant was shocked and shaking when he realised that Dean Wilson was on site. Mr Naylor's rejection of the claimant's explanation for working unsafely also showed a lack of understanding as to how mental health issues can suddenly manifest themselves. The claimant's panic attack at the end of the outcome meeting with Mr Naylor showed how he could decline abruptly and without warning. The claimant has also given the respondent permission to obtain his medical records, which to date it had not done.

    34.3 The respondent has been inconsistent in its approach to health and safety breaches. For example, in 2011 Iain Naylor gave another engineer who had been found working unsafely at height a final written warning.

    34.4 The claimant has admitted he made a mistake, apologised, and learned his lesson.

    34.5 The claimant's previously unblemished 11 years' service suggests that something was wrong on the day in question which led him to behave out of character.

    34.6 Adopting a "*one size fits all*" policy could be discrimination, and it would be a reasonable adjustment to support the claimant rather than dismiss him. If the claimant was affected by poor concentration and memory problems, a risk assessment should have been completed when he disclosed his personal problems to Mr Reynolds.

    34.7 The claimant and his representative had been unable to find evidence of any high-profile campaigns by the respondent on mental health awareness.

    34.8 The lack of consideration of the claimant's mental ill health amounted to discrimination under the Equality Act 2010. As a result, the claimant should be reinstated and the appropriate support put in place.

35. During the meeting, the claimant also stated that the incident had been "*a wake-up call*". He had become distressed after his conversation with the customer, and asked himself "*What I am doing*?" when he realised he had breached safety procedures.

36. The claimant further stated that in December 2017, while working at a customer's house, Peter Reynolds had told him not to worry and "*it would all blow over*" when he told him about his issues at home. Before the incident in question, the claimant also recalled completing the risk assessment and talking to the customer, and then his "*mind went blank*". Ultimately, he wished Mr Reynolds had previously been more receptive as he would have "*probably opened up more*".

37. In his written evidence, Mr Surtees also confirmed that the claimant gave him a copy of the OH report during that meeting, and he proceeded to read it with the claimant's permission.

38. On 9 July 2018, Mr Surtees interviewed Peter Reynolds (pages 220 to 223). Most importantly, Mr Reynolds denied that the claimant had spoken to him in December 2017 and his alleged comments in reply. He maintained that the only relevant conversation he remembered related to the claimant asking how he could replace his TV.

39. By an exchange of emails between 9 and 11 July 2018, the claimant told Barry Surtees where he thought that his conversation with Peter Reynolds had taken place. He had remembered because Mr Reynolds arrived at the property to present him with two certificates of achievement and some "*chocolate Santas*". He gave Mr Surtees the customer's address and thought that this could be verified via the respondent's data. He also asked Mr Surtees to speak to his colleague who had provided a statement for the disciplinary hearing (page 224 to 225).

40. On 12 July 2018, Barry Surtees interviewed Iain Naylor (pages 227 to 230). Mr Naylor confirmed:

    40.1 He had rejected the claimant's mental ill health as mitigation because he had not informed his line manager or been to his GP beforehand, and his personal problems were not a "*new issue*".

    40.2 The claimant had made a conscious choice to go into work on the day in question despite knowing that his partner was moving out.

    40.3 There had been no effort at all by the claimant to use the appropriate safety equipment on his final job, whereas he had been fully compliant on all other jobs on the day in question. If the claimant had been in "*such a bad state of mind*", he would have expected to see similar issues with all the jobs he had completed on that day.

    40.4 He could not recall the details of the conduct case in 2011, but always made his decisions "*based on the guidelines*".

    40.5 The claimant's anxiety attack at the outcome meeting was in response to his dismissal rather than because of his mental health.

    40.6 After the first conduct meeting, he spoke to Peter Reynolds but not the claimant's colleague who had provided a statement.

    40.7 In reaching his decision, he took into account the claimant's mental state but also his lack of responsibility. In his view, the claimant "*took no ownership at all of the situation"*.

41. Barry Surtees was thereafter on leave from 14 to 23 July 2018 inclusive (pages 256 to 257). On 27 July 2018, Mr Surtees spoke to the claimant's

colleague (pages 231 to 234). The colleague explained that he could not remember exactly when he spoke to Mr Reynolds about the claimant, but recalled that Mr Reynolds had said that he was going to see the claimant directly afterwards. In the event, he could not in fact confirm whether his conversation with Peter Reynolds took place in 2016 or 2017.

42. By an email exchange on 3 August 2018, Mr Surtees asked Iain Naylor for his comments on the claimant's suggestion that he had demonstrated a lack of understanding about mental health issues generally, and in particular the claimant's difficulties in talking about what had been happening to him (pages 235 to 236). In reply, Mr Naylor stated (among other things) that he did not doubt that the claimant was "*suffering mentally*", but remained of the view that it had been his responsibility to tell the respondent about his difficulties. He firmly believed that the claimant had made a conscious choice to place himself and others at risk each time he came to work. The claimant's response had been to make accusations against two experienced team leaders, and he had shown no remorse in the conduct meetings. Mr Naylor believed that Mr Wilson's description of the claimant's behaviour on the day in question (including the comment about his van keys) did not suggest that he had been stressed by external factors to the extent that he did not know what he had been doing. In his experience, the claimant's reaction was down to the surprise of being caught. Finally, he would not have expected Peter Reynolds to follow up on what the claimant had told him about his home life because it comprised "*very limited information*".

43. By email on 4 August 2018, Peter Reynolds confirmed to Mr Surtees that, based on the customer's address the claimant had provided, he had visited the claimant to give him his certificates on 28 November 2017 (pages 237 to 238). By email on 5 August 2018, Mr Reynolds also confirmed to Mr Surtees that the claimant's colleague had been off work on that day. From this information, Mr Surtees concluded that the claimant and his colleague were either mistaken or "*not being honest with [him]*".

44. Barry Surtees thereafter interviewed Dean Wilson on 6 August 2018 (pages 240 to 242). Mr Wilson stated that on the five or six occasions where he has stopped engineers who have been working unsafely, they are normally "*surprised, scared and shocked*". It was not, however, the normal reaction to unannounced visits generally. In Mr Wilson's view, the claimant had realised the seriousness of the situation. Mr Wilson had no "*reason to suspect that there was more to the breach than [the claimant] just working unsafely*".

45. Barry Surtees' draft outcome letter thereafter took approximately two weeks "*being sent back and forth to legal*" (page 226). By letter on 23 August 2018, Mr Surtees upheld the decision to dismiss the claimant (pages 247 to 255). He concluded, in summary:

    45.1 Iain Naylor had explored the nature of the claimant's mental health condition with him and his conclusions on this point had been reasonable.

    45.2 Dean Wilson reasonably concluded, based on his experience, that the claimant was shocked and shaken as a result of being found working unsafely.

45.3 The fact that the claimant got Mr Wilson's name wrong on the day in question did not necessarily mean that he was "*suffering from a mental health problem*".

45.4 It had been reasonable for Mr Naylor to conclude that the claimant's mental health was not the main contributing factor to the breach, notwithstanding the claimant's abrupt decline at the end of the disciplinary outcome meeting, in that "*the circumstances of each situation [were] very different*".

45.5 Mr Surtees said that he could not disclose the details of the disciplinary case in 2011 "*due to confidentiality*", but was satisfied that the correct process had been followed according to the respondent's Guiding Principles issued in 2016.

45.6 Although following 11 years' service the claimant's breach had been "*out of character*", the evidence suggested that he had made a choice not to follow health and safety procedures.

45.7 There was no evidence to support the allegation that the claimant had made Peter Reynolds aware of his personal difficulties.

45.8 The respondent does not adopt a "*one size fits all*" approach but decides each case on its merits. In the claimant's case, the respondent had been unaware of the claimant's condition prior to the breach and, in any event, "*the [OH] report does in no way suggest that you are suffering from a disability that falls within the Equality Act*".

45.9 Mr Naylor had not intended to suggest that the claimant was a risk to himself and others because of his "*mental health condition*".

45.10 The respondent takes the health and wellbeing of its employees seriously, and it remained down the claimant to access its support structures, rather than his team manager "*to pry into people's personal circumstances*".

The relevant law

Disability discrimination

46. Disability is a protected characteristic under section 6 of the Equality Act 2010 (EqA). Section 6 of the EqA (so far as it is relevant) provides:

"*(1) A person (P) has a disability if –*

(a) P has a physical or mental impairment, and

(b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities. …

(5) A Minister of the Crown may issue guidance about matters to be taken into account in deciding any question for the purposes of subsection (1).

(6) Schedule 1 (disability supplementary provisions) has effect."

47. Schedule 1 part 1 of the EqA deals with long-term effects:

"2(1) The effect of an impairment is long-term if –

(a) it has lasted for at least 12 months,

(b) it is likely to last for at least 12 months, or

(c) it is likely to last for the rest of the life of the person affected.

(2) If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur.

5(1) An impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if –

(a) measures are being taken to treat or correct it, and

(b) but for that, it would be likely to have that effect.

(2) 'Measures' includes, in particular, medical treatment."

48. A Tribunal must take into account any aspect of the Guidance issued under section 6(5) of the EqA (2011) which it considers to be relevant. The Guidance states (at A5): "*A disability can arise from a wide range of impairments which can be … impairments with fluctuating or recurring effects such as … depression*" or "*mental health conditions with symptoms such as anxiety, low mood, panic attacks*". Also of relevance to this case, the Guidance provides:

*"**Meaning of 'substantial adverse effect'***

B1. The requirement that an adverse effect on normal day-to-day activities should be a substantial one reflects the general understanding of disability as a limitation going beyond the normal differences in ability which may exist among people. A substantial effect is one that is greater than the effect which would be produced by the sort of physical or mental conditions experienced by many people which have only 'minor' or 'trivial' effects (this is stated in the Act at s212(1)). It should be read in conjunction with Section D which considers what is meant by 'normal day-today activities'.

Cumulative effects of an impairment

B4. An impairment might not have a substantial adverse effect on a person's ability to undertake a particular activity in isolation. However, it is important to consider whether its effect on more than one activity, when taken together, could result in an overall substantial adverse effect.

B5. For example … A man with depression experiences a range of symptoms that include a loss of energy and motivation that makes even the simplest of tasks or decisions seem quite difficult. He finds it difficult to get up in the morning, get washed and dressed, and prepare breakfast. He is forgetful and cannot plan ahead. Household tasks are frequently left undone, or take much longer to complete than normal. Together, the effects amount to an impairment having a substantial adverse effect on carrying out normal day-to-day activities …

Effects of treatment

B12 … In this context, medical treatments would include treatments such as counselling … and therapies, in addition to treatment with drugs …

B13 This provision applies even if the measures result in the effects being completely under control or not at all apparent. Where treatment is continuing it may be having the effect of masking or ameliorating a disability

so that it does not have a substantial adverse effect. If the final outcome of such treatment cannot be determined, or it is known that removal of the medical treatment would result in either a relapse or worsened condition, it would be reasonable to disregard the medical treatment in accordance with paragraph 5 of Schedule 1 …

B14 For example … A person with long-term depression is being treated by counselling. The effect of the treatment is to enable the person to undertake normal day-to-day activities, like shopping and going to work. If the effect of the treatment is disregarded, the person's impairment would have a substantial adverse effect on his ability to carry out normal day-to-day activities.

Meaning of 'likely'

C3. … 'likely' should be interpreted as meaning that it could well happen.

Recurring or fluctuating effects

C5. … Conditions with effects which recur only sporadically or for short periods can still qualify as impairments for the purposes of the Act, in respect of the meaning of 'long-term' …

C6. For example, a person with rheumatoid arthritis may experience substantial adverse effects for a few weeks after the first occurrence and then have a period of remission … If the substantial adverse effects are likely to recur, they are to be treated as if they are continuing. If the effects are likely to recur beyond 12 months after the first occurrence, they are to be treated as long-term. Other impairments with effects which can recur beyond 12 months, or where the effects can be sporadic, include … certain types of depression …

C7. It is not necessary for the effect to be the same throughout the period which is being considered in relation to determining whether the 'long-term' element of the definition is met. A person may still satisfy the long-term element of the definition even if the effect is not the same throughout the period. It may change: for example activities which are initially very difficult may become possible to a much greater extent. The effect might disappear temporarily. Or other effects on the ability to carry out normal day-to-day activities may develop and the initial effect may disappear altogether."

Likelihood of recurrence

C10 … it is possible that the way in which a person can control or cope with the effects of an impairment may not always be successful. For example, this may be because an avoidance routine is difficult to adhere to … If there is an increased likelihood that the control will break down, it will be more likely that there will be a recurrence.

Meaning of 'normal day-to-day activities'

D2. …In general, day-to-day activities are things people do on a regular or daily basis, and examples include shopping, reading and writing, having a conversation or using the telephone, watching television, getting washed and dressed, preparing and eating food, carrying out household tasks, walking or travelling by various forms of transport and taking part in social activities. Normal day-to-day activities can include general work-related activities … such as interacting with colleagues, following instructions, using

a computer, driving, carrying out interviews, preparing written documents, and keeping to a timetable or shift pattern."

49. The case of **Rayner v Turning Point 2010 11 WLUK 156** explains that in circumstances where a claimant was diagnosed with anxiety by his GP and his GP advised him to refrain from work, that was "*in itself*" evidence of a substantial effect on day-to-day activities, because were it not for the condition the claimant would have been at work, and his day-to-day activities included going to work. Appendix 1 to the EHRC Employment Code also provides guidance as to the meaning of "*substantial*" in that "*Account should … be taken of where a person avoids doing things … because of a loss of energy or motivation*".

50. Finally, in terms of recurring conditions a Tribunal need not be satisfied that any recurrence is likely to last 12 months. Further, it is the effects that must be likely to recur, not necessarily the impairment.

51. Section 39(2) EqA states:

"An employer (A) must not discriminate against an employee of A's (B) …

(c) by dismissing B;

(d) by subjecting B to any other detriment."

52. Section 15(1) EqA states:

"(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."

53. Sections 20 and 21 EqA, so far as is relevant, provide:

"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. …

21 Failure to comply with duty

(1) A failure to comply with the first … 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."

54. Section 39(5) EqA confirms that the duty to make reasonable adjustments applies to employers.

<u>Unfair dismissal</u>

55. Section 98 of the Employment Rights Act 1996 (ERA) states:

> "*(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 … relates to the conduct of the employee. …*
>
> *(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 the 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."*

56. First, an employer does not have to prove that misconduct actually took place, only that it held a genuine belief that it did so. Secondly, the Tribunal must determine, applying a neutral burden of proof, whether the employer had reasonable grounds for holding that belief and conducted as much investigation into the circumstances as was reasonable. This is the test set out in **British Home Stores Ltd v. Burchell 1980 ICR 303 EAT**.

57. In considering the issue of fairness (that is to say the procedure adopted and the decision to dismiss), Tribunals are also bound to follow the rule in **Iceland Frozen Foods Ltd v. Jones 1983 ICR 17 EAT** and **Sainsbury's Supermarkets Ltd v. Hitt 2003 IRLR 23 CA** that the Tribunal must not substitute its own view for that of the employer unless the actions of the employer fall outside "*the band of reasonable responses*". To this end, in determining liability, our role is confined to reviewing the employer's response during the dismissal process, not to substitute its own view based on the evidence that emerges before it during the Tribunal hearing.

58. The case of **Polkey v. A E Dayton Services Ltd 1987 IRLR 503 HL** explains that generally an employer will not have acted reasonably in treating a potentially fair reason as a sufficient reason for dismissal unless and until it has taken certain procedural steps which are necessary in the circumstances of that case to justify that course of action. However the one question the Tribunal is not permitted to ask in applying the test of reasonableness in section 98(4) ERA is whether it would have made any difference to the outcome if the appropriate procedural steps had been taken, unless doing so would have been "*futile*".

59. Nevertheless the **Polkey** issue will be relevant at the stage of assessing compensation. That case explains that any award of compensation may be nil if the Tribunal is satisfied that the claimant would have been dismissed in any event. However this process does not involve an "all or nothing" decision.

If the Tribunal finds that there is any doubt as to whether or not the employee would have been dismissed, the **Polkey** element can be reflected by reducing the normal amount of compensation accordingly.

60. Finally. section 123(6) ERA states:

"*Where the Tribunal finds dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of compensation by such proportion as it considers just and equitable having regard to that finding*."

Conclusion

61. The claimant and respondent's representative made a number of oral submissions at the end of the hearing. We have accordingly considered those submissions, and summarise the parties' contentions below where appropriate. We now apply the law to our findings of relevant facts in order to determine the identified issues.

Disability

62. In determining this issue, we also take into account the following evidence presented during the hearing.

63. Between 1 and 14 May 2012, the claimant was signed off work by his GP with "*anxiety*" (pages 64 to 69). The claimant explained to the Tribunal that this was in reaction to a family bereavement.

64. In the grounds of his claim, the claimant states that he had been feeling "*stressed and depressed*", and confided in his manager that he was "*going through a bad time*" in December 2017. He described the effects of his condition as "*finding it hard to sleep, some days were better than others, I could be ok one minute and lose concentration the next, small things could trigger me to become very depressed in minutes*." On the day in question, following his conversation with the customer he went into "*freefall mentally*". In cross-examination, he stated that the customer "*went on about her daughter – my mind went blank … next thing knew saw Dean standing there … Head was all over the place after speaking to customer.*"

65. In his written statement, he says that his relationship breakdown started in around July 2017. In hindsight, the claimant believes that he started to feel unwell at around this time, starting with "*anxiety and stress*" and "*ultimately leading to depression*". He continued to go to work "*to try to hold it all together*", but in December 2017 he "*hit rock bottom*".

66. At that point, he tried to speak to Peter Reynolds who was "*quite dismissive*". He was finding it hard to concentrate and feeling low, struggled to become motivated and lacked energy. As well as struggling to sleep, on some days he neglected his personal appearance. After his conversation with the customer on the day in question, he could not focus on what he was doing but did not want to let the customer down. In hindsight, he realised that he should have called his manager at that point but he was "*at an all-time low*" and "*not thinking straight at all*". The incident was a "*wake-up call*" and he immediately sought counselling and thereafter went to see his GP.

67. In cross-examination, the claimant maintained that his symptoms "*came on top of*" him in December 2017 and had been "*building up before then*". He was "*getting symptoms on and off*" which eventually led him to tell Peter

Reynolds that he was having problems at home. When asked whether he was struggling to cope between July and December 2017, he replied "*not as much*".

68. The claimant's GP has written two letters "*to whom it may concern*" (pages 292 to 293). On 4 June 2018, the GP confirms that claimant visited the surgery on 22 February 2018 reporting "*severe stress … he has not been thinking straight or sleeping … slightly better on 8 March, but condition up and down on 5 April. The medication was not helping him sleep.*" On 4 March 2019 the GP writes: *"[the clamant] suffers with anxiety and depression which was first diagnosed on 21st August 2018. He also suffers with low mood and irritability and stress. He is on the relevant medications for this but they do affect his day to day life.*"

69. A counsellor at LifeWorks (part of the respondent's employee assistance programme) wrote to the claimant's GP on the day of the incident following an initial conversation with him (page 294). Among other things, the claimant had stated that "*difficulties have been building over the course of a few months and he is finding this difficult to manage and is feeling quite low … he has been having thoughts of not wanting to be here anymore*". The counsellor therefore recommended an urgent consultation with his GP.

70. The OH report confirms that the claimant started attending counselling sessions on 8 May 2018 (page 157). In cross-examination, the claimant explained that there was in fact significant waiting list for an appointment with organisations recommended by the respondent's employee assistance programme, therefore he arranged the counselling sessions privately.

71. In 2018, the claimant also attended a five-week stress control course run by IAPT Kirklees/Calderdale. At the end of the course, on 23 August 2018 a senior psychological wellbeing practitioner wrote to the claimant's GP on the basis that he had indicated thoughts of suicide on his questionnaire. Among other things, the claimant stated that he was "*feeling overwhelmed*" by his appeal against dismissal (page 295).

72. The claimant's summary medical records otherwise cover the period from November 2017 until February 2019. They confirm that he was prescribed Citalopram at 20mg from February 2018. That medication was changed to Mirtazapine (an anti-depressant) at 15mg from March 2018. Amitriptyline (to treat anxiety) at 25mg was additionally prescribed from August 2018 and the dosage of Mirtazapine was increased to 30mg (page 296). A summary of the claimant's consultations with his GP record "*Mood disorder*" from 22 February 2018 and "*Mixed anxiety and depressive disorder*" from 29 May 2018 (page 297).

73. In response to our questions, the claimant explained that he was taken off Citalopram in March 2018 because it was "*not strong enough – not calming me down, helping me sleep – getting anxious over little things*". Without medication and counselling, he thought that would not "*be here*". He talked about being in "*a better place*" during his appeal hearing, but went downhill approximately 4 to 6 weeks later. He experienced mood swings and "*every little thing agitated me*". His GP therefore increased the dosage of his anti-depressant and prescribed the additional tablets to address his anxiety.

74. Based on this evidence, the respondent essentially submits that if the claimant was a disabled person, he became so only after the disciplinary incident in February 2018 and in reaction to his suspension. On the day on question, he was no more than distracted by and unhappy about the developments in his personal life. Even if the claimant had a mental health condition, he has presented no evidence that he was significantly affected prior to or at the time of the disciplinary incident. In particular, the fact that he cannot prove that he went to his GP prior to his suspension suggests that any contended condition was not having a substantial adverse effect on his daily activities.

75. In determining the issues summarised at paragraphs 6.1 to 6.3 above, we reminded ourselves that the claimant does not bear the onus of producing medical evidence to underpin each element of the definition of disability, so that in the absence of such evidence his case is bound to fail. It is the responsibility of the Tribunal to assess such evidence as is presented and thereafter conclude for itself whether the claimant was a disabled person at the relevant time. The includes giving sufficient weight to the claimant's own evidence of his condition and looking at the broader picture of an impairment, beyond any diagnosis or label.

76. Turning to the first question: did the claimant have the mental impairment of depression? We find that he did. At the relevant times, the claimant's GP first records the claimant's condition in February 2018 as "*mood disorder*" and from the end of May 2018 as "*mixed anxiety and depressive disorder*". Although the claimant's GP later states that he was first diagnosed in August 2018, from what the claimant has told us and according to his medical notes, he in fact went downhill in August 2018, and his medication was adjusted and augmented accordingly. In any event in March 2018, the OH report ascribed the symptoms the claimant had experienced "*in recent months*" to "*reactive depression*".

77. The next question is whether the impairment had a substantial adverse effect on the claimant's ability to carry out normal day-to-day activities? We find that it did. His inability to sleep affected his personal well-being. His concentration, memory, appetite, motivation and levels of energy were affected, sometimes to the extent that he neglected his personal appearance.

78. The adverse effect was also substantial – that is to say, more than minor or trivial. The claimant was experiencing a range of symptoms before the disciplinary incident, although we accept the claimant's account that those symptoms did fluctuate – that is to say, he had good and bad days. On the day in question, we further accept that the claimant went into "*freefall mentally*", following his conversation with the customer, as a result of which he put himself at risk. We also accept, as the claimant stated during his appeal meeting, that he was thereafter extremely shocked to realise how he had been working at height when he became aware of Dean Wilson's presence.

79. Based on the OH report, we are further satisfied that the claimant would have been certified as unfit for work from 18 February 2018 if he had not been suspended, and in hindsight he realised that he should have seen his GP prior to the disciplinary incident. He also accepted during his first conduct meeting that that he would have been advised not to attend work on 17

February if he had given a full account of his symptoms to his team manager. In accordance with paragraphs B4 and B5 of the Guidance, we are therefore satisfied that as at and from 17 February 2018, the claimant's symptoms taken together had a more than minor or trivial effect on his ability to carry out normal day-to-day activities.

80. We next ask whether that effect was long term. First, we conclude on balance that the substantial effects began in around December 2017, even though the claimant appeared to be functioning at work. That conclusion is supported in particular by the reference to the claimant's symptoms of reactive depression appearing in "*recent months*", as recorded in the OH report. In which case, the substantial effect of the claimant impairment had not lasted for at least 12 months at any time during the relevant period.

81. We therefore ask whether the effects of the impairment were likely to last for at least 12 months. We remind ourselves (in accordance with paragraph C4 of the Guidance) that in assessing this likelihood, account should be taken of the circumstances at the time that any alleged discrimination took place. Anything which occurred after that time will not be relevant in assessing this likelihood.

82. We accept that following the disciplinary incident the claimant would have experienced the greater difficulties he described in the absence of medication or counselling. In March 2018, the OH report also identified the claimant's symptoms as "*entirely reactive in nature*". As a consequence, any future pattern of absence (and therefore pattern of illness) was difficult to predict. The claimant was also sufficiently unwell in August 2018 that his medication was adjusted. We therefore find that the substantial effect of his condition (in the absence of any medication, counselling or attendance on therapeutic courses) could well have endured for at least 12 months.

83. Further and separately, if we had not been persuaded on that point we would turned to consider paragraph 2(2) of Schedule 1 Part 1 EqA.

84. Based on the evidence before us we are satisfied that the adverse effects of the claimant's impairment that we have identified between February and August 2018 were at least likely to recur beyond 12 months after their first occurrence, and therefore should be treated as long term. We again rely on the OH report in describing ithe claimant's symptoms as reactive and therefore difficult to predict. The claimant had also experienced a short-term anxiety reaction to a bereavement in 2012, and therefore appears to be vulnerable in this respect. In the circumstances, we find that even if the substantial adverse effects of the claimant's condition were unlikely have lasted beyond 12 months at the time of the alleged discrimination he complains of, they could well have recurred at a much later date given the nature of the claimant's condition as identified in the OH report.

85. On that basis we are satisfied that throughout the relevant period the claimant was a disabled person within the meaning of the EqA.

Knowledge of disability

86. We next consider whether at the relevant time the respondent knew or ought to have known that the claimant was a disabled person. Potential liability in respect of the claimant's discrimination complaints depend upon this issue. There is a further requirement regarding the reasonable adjustments

complaint and knowledge of substantial disadvantage, which we deal with below.

87. The case of **Gallop v Newport City Council [2014] IRLR 211** confirms that the employer must be aware of the facts constituting the elements of disability as now defined in the EqA. It is not necessary for the employer to know as a matter of law that, as a consequence, the employee will be disabled.

88. The ECHR Code of Practice (at paragraph 6.11) also provides guidance in respect of the duty to make reasonable adjustments, which in our view is equally applicable to the overall issue of knowledge in the claimant's case:

"*For disabled workers already in employment an employer only has a duty to make a reasonable adjustment if they know, or could reasonably be expected to know, that a worker has a disability and is, or is likely to be, place at a substantial disadvantage. The employer must however do all they can reasonably be expected to do to find out whether this is the case. What is reasonable will depend on the circumstances. This is an objective assessment. When making enquiries about disability, employers should consider issues of dignity and privacy and ensure that personal information is dealt with confidentially*."

89. The Code also gives the example (at paragraph 5.15) where a sudden deterioration in the employees' performance and change in behaviour should alert the employer to the possibility that these were connect to a disability.

90. The case of **Kelly v Royal Mail Group Limited UKEAT/0262/18/RN** confirms that any OH reports relied upon by an employer must contain more than bare assertions that an employee is not disabled. In reaching any decision to dismiss or to uphold a previous decision, the employer must also give active consideration to the question of disability rather than unquestioningly following any medical reports, taking into account all of the information available. Reliance upon an OH report to determine disability must involve more than a "*rubber stamping exercise*".

91. The recent case of **Baldeh v Churches Housing Association of Dudley & District Limited UKEAT/0290/18** also confirms that complaints based on dismissal require the Tribunal to consider the state of the respondent's knowledge throughout the entire process complained of, including any appeal. On this basis (and as agreed by the parties before the claimant gave evidence) we must consider whether the respondent knew or ought to have known that the claimant was a disabled person at any point from the date of the disciplinary incident on 17 February 2018 up until the determination of the claimant's appeal on 23 August 2018.

92. We have found that the claimant told Peter Reynolds on 9 March 2018 that he had been diagnosed with depression. We consider that this was sufficient indication to put the respondent on notice that the claimant may have a mental impairment. As to knowledge of the substantial adverse effect of his condition, we find that the respondent became aware of the difficulties the claimant had been experiencing (that is to say, before the incident and on the day in question) first by reason of the same conversation with Peter Reynolds. A copy of Mr Reynolds subsequent OH referral was not in the bundle of documents before us. However, in response to our questions Mr Reynolds conceded that the words "*as you are aware*" at the beginning of the resulting

report indicated that he had made reference to at least some of the claimant's symptoms in the referral. He further confirmed that, from that point, he became aware that the claimant had symptoms of depression.

93. Thereafter, the OH report summarised the claimant's symptoms and confirmed the claimant's belief that they may have been a factor in his behaviour on the day in question. The claimant repeated the same position to Iain Naylor and Barry Surtees throughout the conduct process, including that he had abruptly declined on the day in question. The claimant's statement of case for his appeal further reminded the respondent that he had given permission for the respondent to access his medical records.

94. As to the long-term nature of the effect of the claimant's condition, we take into account that the OH report states that the "*disability remit*" the EqA was unlikely to apply to the claimant's "*recent reactive symptoms*", but also reminded the respondent that this was a legal rather than clinical question. During the disciplinary process, the respondent sought no further clarification from the OH nurse regarding the basis for his opinion as at March 2018. In the absence of any further explanation, we find the mostly likely reason for his clinical opinion was that the claimant's symptoms were "*recent*" and it was therefore assumed that they could not be long term. However, the writer was also unable to provide any prognosis in terms of how long the claimant's symptoms were likely to last or develop in the future.

95. We also take into account the fact that during his evidence, Iain Naylor said that he remembered reading the OH report prior to the first conduct meeting, but it is not directly referred to in the notes of that meeting or Mr Naylor's written evidence in this respect. As a result, we are not persuaded that during the first conduct meeting the OH report was foremost in Mr Naylor's mind. During the outcome meeting, there was simply some discussion about whether Peter Reynolds should have followed up on the OH report with the claimant, but Mr Naylor thought this would not normally happen until an engineer returned to work.

96. We further take into account that one of Mr Surtees' conclusions in determining the claimant's appeal in August 2018 was that the respondent had been unaware of his condition prior to the disciplinary incident and, in any event, the OH report did not suggest that "*you are suffering from a disability*". In response to our questions, Mr Surtees said that his comment about the claimant's disability was "*wrong*". He meant to say that at the time of the disciplinary incident the claimant was not a disabled person. We were not persuaded by that additional evidence. Most importantly, Mr Surtees had described his draft outcome letter as going "*back and forth*" to the respondent's legal advisers for approximately two weeks before the final version was sent to the claimant. We therefore consider it highly unlikely that such an error would have escaped detection on this basis. Mr Surtees also told us that he thought that the claimant would need to have been diagnosed with a condition for at least 12 months to come within protection of the EqA. He confirmed that during the appeals process he did not seek further clarification from the claimant in terms of the nature or duration of the symptoms described in the OH report.

97. We will return to this point later, but for the present purposes we are satisfied that the respondent demonstrated in the contemporaneous documents no

active consideration of this issue either at the time of the decision to dismiss him or to reject his appeal. Most importantly, it appears to us that the respondent had simply resolved not to accept the claimant's condition as acceptable mitigation largely because he had not drawn it to his manager's attention prior to the disciplinary incident. Contrary to the EHRC Code, therefore, the respondent did not do all that it could be reasonably expected to do throughout the disciplinary process to find out whether the claimant had a disability. Instead, and in particular when an allegation of disability discrimination was specifically raised as part of the claimant's appeal, it unquestioningly followed the OH report which by then was some months old and unclear as to the basis for the writer's clinical opinion.

98. We therefore find that the respondent had constructive knowledge of the claimant's disability from 17 April 2018, when Peter Reynolds was sent a copy of the OH report. There was no suggestion from the evidence that the claimant would have failed to cooperate with any further investigations made by the respondent in this respect.

Discrimination arising from disability

99. We next turned to the claimant's complaint of unfavourable treatment arising from disability. The EHRC Code (at Chapter 5) provides that the claimant must now prove that: he was treated unfavourably (that is to say, put at a disadvantage), there was a link between the disability and the "*something*" said to be the ground for the unfavourable treatment, and on the face of it, the "*something*" was an effective reason for the unfavourable treatment.

100. More generally, if the claimant discharges the burden, we must hold that discrimination took place unless the respondent can prove that it did not contravene the EqA (section 136 EqA). If the claimant therefore establishes the above, the respondent must then show that the treatment was not because of something arising from his disability, or such treatment was objectively justified. In determining whether the claimant has discharged the burden of proving his case, we are entitled to consider all the evidence put forward by the parties. It might therefore be sensible in certain cases simply to consider the reason for the treatment, taking into account all of the evidence.

101. The EHRC Code equates being treated "*unfavourably*" with being "*put at a disadvantage*" (paragraph 5.7). There is no need to compare the disabled person's treatment with that of another. In the claimant's case, the contended unfavourable treatment is his dismissal. We are satisfied that his dismissal clearly put the claimant at a disadvantage and was therefore unfavourable to him. We must therefore next consider whether the claimant has proved that the decision was sufficiently connected with his disability.

102. The EHRC Code states that there must be a connection between whatever led to the unfavourable treatment and the disability. The "*consequences of disability*" include anything which is the result, effect or outcome of a disabled person's disability (paras 5.8 to 5.9). The case of **Pnaiser v NHS England and anor 2016 IRLR EAT** also summarises the following principles:

102.1 the focus at this stage is on the mind of the decision makers. An examination of their conscious and unconscious thought processes is

likely to be required, just as in a direct discrimination case. As a result, there may be more than one reason in a section 15 EqA case. The "*something*" that causes the unfavourable treatment need not be the sole or main reason, but must have had 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.

102.2 The expression "*arising in consequence of*" rather than "*because of*" is a looser connection that might involve one or more links in the chain of causation. It will be question of fact in each case whether something can properly be said to arise in consequence of disability. At this stage, the test is objective and motive of the alleged discriminator is irrelevant. The knowledge required is of the disability only and not any causal link between the "*something*" and the disability.

102.3 Depending on the facts, a Tribunal might simply ask why the claimant was treated unfavourably. Alternatively it might ask whether the disability has a particular consequence for the claimant that leads to the "*something*" that caused the unfavourable treatment.

103. The respondent essentially submits that the best evidence of any connection is contained in the OH report which refers only to "*reduced concentration*" rather than "*significant gaps in memory*"

104. The critical question for us is whether the claimant working unsafely at height on 17 February 2018 arose in consequence of his disability. We find that it did. First, we have found that the effects of the claimant's condition included difficulties with concentration and memory, as well as (on the day in question) an abrupt decline to the extent that he put himself at risk. Secondly, we find that the claimant "*not thinking straight*" and his difficulties in talking about what was happening to him also arose in consequence of his disability. The claimant after the event acknowledged that it had been an error of judgment on his part (partly explained he says by Peter Reynolds' previous lack of response). Nevertheless, we have found that he also explained during both conduct meetings that, as a result of his counselling sessions, he was subsequently able to talk more openly about his feelings. The OH report also confirmed that in hindsight the claimant realised that he should have contacted his GP much sooner. As part of his appeal, the claimant also cited statistics to show that approximately half of men who had experienced mental ill health would be too embarrassed or ashamed to tell their employer, or would be concerned about taking time off work.

105. We also find that the "*something arising*" was an effective reason for the claimant's dismissal. We have set out above Ian Naylor's and Barry Surtees' stated contemporaneous reasons for their decisions. Mr Naylor further explained to us that the fact that the claimant's mental health issues had not been escalated to his line manager before the disciplinary incident suggested that "*it was not the main reason for the breach [but] may have been a contributing factor*". He added that, notwithstanding the contents of the OH report, at the time he "*felt strongly*" that it had been the claimant's duty to disclose his symptoms to the respondent.

106. In his appeal outcome, Barry Surtees endorsed Mr Naylor's reasoning about the role that the claimant's mental health played in the incident. He further concluded (among other things) that the claimant had "*made a choice*

not to follow health and safety process", and had failed to tell the respondent about his symptoms prior to the incident. During his evidence, Mr Surtees confirmed that because the claimant had decided to attend work on the day in question and "*go up the ladder*" to complete his last job, the responsibility for what happened remained his alone.

107. In the circumstances, we accept that the respondent for various reasons effectively rejected any connection between the health and safety breach and the claimant's condition. This was the main factor in the respondent's decision to dismiss the claimant and not uphold his appeal. However, that does not mean that a consequence of the claimant's ill health (that is, his symptoms and his difficulties in acknowledging and discussing his condition) was not a cause of his dismissal.

108. In the circumstances, we are satisfied from the respondent's stated reasons for the claimant's dismissal that the claimant's difficulties with concentration and memory, including his abrupt decline on the day in question, together with his reasons for going to work on that day and trying to complete his last job, were operative factors in the respondent's decision to dismiss him and uphold that decision on appeal, rather than merely the context within which the circumstances of those considerations had arisen. Most importantly, Iain Naylor was adamant during his evidence that if the claimant was unwell he should told his team manager and stayed off work. As we have explained, it is enough that the *"something arising*" was an effective influence on the respondent's decision to dismiss him and uphold that decision on appeal.

109. We next consider whether the respondent's decision was a proportionate means of achieving a legitimate aim. We are aware that if it is found that there has been a failure to make reasonable adjustments, it will be very difficult for the respondent's defence to this complaint to succeed. Nevertheless, we have considered this issue first, not only because the respondent made more detailed submissions on it but also for the sake of completeness.

110. The EHRC Code (at paragraphs 4.25 to 4.32) provides guidance in this respect. In summary, it is for the respondent to produce evidence to support its assertion, and generalisations will not be sufficient. The question should also be approached in two stages. First, is the aim legal and non-discriminatory, and one that represents a real, objective consideration? Secondly, if the aim is legitimate, is the means of achieving it proportionate – that is, appropriate and necessary? This involves an objective balancing exercise, comparing the discriminatory effect on the claimant against the employer's reasons for it (including its business needs), taking into account all the relevant facts. Any unfavourable treatment will not be proportionate if the aim can be achieved by a less discriminatory measure.

111. We accept that the respondent's stated aim of "*protecting the health and safety of employees and customers*" satisfies the first question. However, in our judgment the respondent's evidence and submissions on this issue did not justify the claimant's dismissal.

112. First, Iain Naylor explained to us that he would have looked at the claimant's case differently if he had known that the EqA applied. Most importantly in the past, and as an alternative to imposing the sanction of

dismissal, he has made clear recommendations for engineers regarding future employment, including ensuring that the employee receives counselling to address any issues, and possibly retraining, rehabilitation and adjusted hours. The OH report in the claimant's case also included recommendations for keeping the claimant in his role once he was fit to return to work.

113. In his written evidence, Peter Reynolds further described the OH report's recommendations as "*reasonable adjustments*". In response to our questions, he said that he would have set about implementing the recommendations "*immediately*" on the claimant's return to work. He did not question the viability of those recommendations.

114. By contrast, in re-examination Iain Naylor qualified what he had told us. He said that he would have looked on the claimant's case "*less favourably*" compared to the example he had given to us, because the claimant had failed to ask the respondent for support prior to the disciplinary incident. When we subsequently asked Barry Surtees the same question, he maintained that dismissal was the only appropriate course of action because the respondent needed to be able to trust its engineers as they worked on their own.

115. Based on the evidence before us, we find that the balance tilts towards the claimant in this respect. The claimant lost a job that he had carried out with an unblemished record for over 11 years. The respondent maintains that it must be able to guarantee that work is completed to the highest standards of health and safety. However, the respondent does not say that it could never reintegrate an engineer found to have been working unsafely at height. The distinguishing factor in the claimant's case appears to be whether and how the issue of trust could be addressed, and the respondent presented conflicting evidence in this respect.

116. Our assessment of the evidence leads us to conclude that the claimant did not in fact refuse to take responsibility for what had happened. We are satisfied on balance that the claimant did tell Peter Reynolds about his personal difficulties at home in around November 2017, and Mr Reynolds tried to reassure him as best as he could. Mr Reynolds acknowledged to us that he managed 20 engineers and could not remember every conversation. In our judgment, the claimant had no reason to invent that conversation because he nevertheless admitted during the conduct process that he had given Peter Reynolds very few details. However, this was by no means a formal approach to his team manager, but in hindsight the claimant thought that Mr Reynolds should have been more proactive.

117. Nevertheless, the claimant also acknowledged throughout the conduct process that the incident had been a "*wake-up call*". The OH report advised the respondent that the claimant was currently well aware that he needed to alert his managers if he was feeling unwell. As we have explained, the claimant also told the respondent that counselling had enabled him to speak up in this respect.

118. We prefer Mr Naylor's evidence in response to our questions that it would have been possible to reintegrate the claimant once he was fit to return to work. Any lingering concerns about trust could have been addressed by issuing the claimant with a warning – effectively a "*yellow card*". The claimant's appeal was essentially a plea to be given another chance and the incident was out of character. We were not persuaded by Mr Surtees'

evidence that it would been inappropriate to administer a lesser sanction. In such circumstances, and in view of what the claimant was saying at the time, we find that the claimant case is not so material different from the example Mr Naylor gave in evidence in terms reintegrating an engineer back into its workforce. The respondent could have achieved its aim by also issuing the claimant with a warning.

119. Taking all these factors and anomalies into account, the respondent has not satisfied us that dismissing the claimant was an appropriate and necessary means of achieving its aim. We therefore find that in the particular circumstances of this case, the disadvantage suffered by the claimant in losing his job outweighed the reasonable needs of the respondent's business. On this basis, we conclude that the unfavourable treatment was unlawful and the claimant's complaint therefore succeeds.

Disability discrimination – reasonable adjustments

120. To succeed in a claim, in the claimant's case he must prove that: he was dismissed or was subjected to a detriment; the respondent applied a PCP; that PCP placed him at a substantial disadvantage compared to non-disabled employees (taking into account the identity of non-disabled comparators where appropriate, and the nature and extent of the substantial disadvantage suffered by the claimant); and in the absence of any explanation by the respondent, there were one or more steps that could have been taken which could have alleviated the substantial disadvantage.

121. If the claimant discharges his burden, the respondent will have to show that it did not contravene the EqA in any way.

122. The EHRC Code (at paragraph 6.10) states that "*The phrase [PCP] … should be construed widely so as to include, for example any formal or informal policies, rules, practices, arrangements or qualifications including a one-off decisions or actions.*"

123. In terms of "*substantial disadvantage*", section 212(1) of the EqA defines substantial as more than minor or trivial. The EHRC Code states (at paragraph 6.15) that whether such disadvantage exists in a particular case is a question of fact, to be assessed on an objective basis. Paragraph 6.16 confirms that the purpose of comparison with non-disabled people is to establish whether, because of the disability, a particular PCP disadvantages the disabled person. Accordingly, under the duty to make adjustments there is no requirement to identify a comparator or comparator group whose circumstances are the same or nearly the same as the disabled employee's.

124. In the claimant's case, it is not disputed that he was dismissed. We therefore first consider whether the respondent's applicable time frames in the operation of its conduct policy amounted to a PCP. The case of **Nottingham City Transport Ltd v Harvey UKEAT/0032/12** is authority for the proposition that contended unfair treatment during a disciplinary process will not necessarily amount to a PCP. A Tribunal must also not assume that certain aspects, because they cause a disadvantage to a disabled employee, necessarily fall within the phrase "*PCP*". In other words, a PCP must apply to disabled and non-disabled employees to be able to identify a disadvantage.

125. Based on what we read and heard, we are not persuaded that there were any generally applicable time frames in the operation of the

respondent's conduct policy, or that it applied such a PCP in the claimant's case. In particular, there was no suggestion from the evidence that the respondent applied such timescales to non-disabled employees. Furthermore, in considering substantial disadvantage we recognise that perceived delay might cause upset to whoever is the target, irrespective of whether they are disabled. Accordingly, that part of the claimant's reasonable adjustments complaint therefore fails and is dismissed.

126. We are, however, satisfied that the respondent's application of its conduct policy to instances of health and safety breaches amounts to a PCP. The respondent's conduct policy requires employees to adhere to its rules on health and safety, and treats any breach which places an employee or anyone else at risk as gross misconduct. Iain Naylor and Barry Surtees also confirmed in evidence that the respondent's disciplinary Guiding Principles identify working unsafely at significant height as a dismissible offence.

127. We are also satisfied, on balance, that this PCP put the claimant at a more than minor or trivial disadvantage. We have found that the claimant's conversation with the customer on the day in question triggered an episode whereby he went into "*freefall mentally*" and put himself at risk. As a consequence, he was liable to be disciplined and indeed was eventually dismissed. We are satisfied that non-disabled employees not experiencing such difficulties with memory or concentration and able to comply with the respondent's procedures would not have been placed at such a disadvantage. We therefore find that the respondent's application of its conduct policy to instances of health and safety breaches placed the claimant at a substantial disadvantage compared to non-disabled employees.

128. We next consider whether the respondent knew, or ought to have known that the claimant was likely to be placed at a substantial disadvantage. For the same reasons as set out above (at paragraphs 91 to 97) we find that that the respondent had such knowledge from 17 April 2018.

129. We next consider the claimant's proposed adjustments. The EHRC's Code sets out (at paragraph 6.28) some of the factors which may be taken into account when deciding what may have been a reasonable step for an employer to take, including whether taking any particular step would be effective in preventing the substantial disadvantage, the practicability of the step, the financial and other costs of making the adjustment and the extent of any disruption caused. The EHRC Code also states that ultimately the test of "*reasonableness*" of any step is an objective one and will depend on the circumstances of the case.

130. In the circumstances, we are persuaded that the respondent failed in its duty to make reasonable adjustments in this respect. Our analysis differs from an unfair dismissal complaint, in that our task here is to determine whether there was a reasonable alternative to what took place. We have found that there was, according to our analysis of the section 15 EqA complaint.

131. Our conclusion is, therefore, because the respondent adopted the position that the claimant's ill health would be accepted as mitigation only if he had previously told any of its managers about the extent of his difficulties, and the manager had failed to provide appropriate support, thereby absolving it

from any duty to make adjustments in this respect, the respondent was accordingly in breach of the duty to make reasonable adjustments.

Unfair dismissal

132. It is not disputed that the reason for the claimant's dismissal related to his conduct, which is a potentially fair reason. However, in the circumstances we are satisfied that the respondent's decision to dismiss the claimant cannot fall within the range of reasonable responses because it was tainted by discrimination. The claimant's complaint of unfair dismissal therefore succeeds.

133. Further and separately, we would have found in relation to the other matters contended by the claimant:

133.1 We were not satisfied that the overall time it took for the respondent to conclude its conduct process in itself rendered the claimant's dismissal unfair. The respondent was able to explain why the process took as long as it did. The claimant did not suggest that the effect of the delay meant that he was unable to participate effectively in the proceedings or that his case was prejudiced by, for example, witnesses leaving the respondent's employment.

133.2 Barry Surtees advised the claimant in his appeal outcome letter that he could not disclose details of the 2011 case in which an engineer was given a final written warning for working unsafely at height. In fact, in Mr Surtees' written evidence and in response to our questions, he confirmed that he had been unable to find any such details, but the subsequent introduction of the Guiding Principles marked a "*significant change*" in the way in which the respondent treated breaches of health and safety. He had therefore concluded that the engineer involved was also likely to have been dismissed in accordance with those guidelines. Iain Naylor also explained that the guidelines were introduced to ensure an element of consistency. They outline possible available sanctions depending on the charge. In the claimant's case, the highest sanction for working from a significant height is dismissal. Without more, we are therefore unable to conclude that the claimant was treated inconsistently in this respect. The respondent has provided a cogent reason for the discrepancy.

134. In terms of adjustments to compensation, we next consider the **Polkey** issue. As we have explained, if a Tribunal finds that there is any doubt as to whether or not the employee would have been dismissed, the **Polkey** element can be reflected by reducing the normal amount of compensation accordingly. The burden of proof is on the respondent in this respect.

135. In view of our findings in respect of the discrimination complaints, we conclude that, absent any discrimination, the claimant would have remained in his job. On this basis, we are satisfied that it would not have been open to the respondent to have reached a decision to dismiss the claimant which fell within the range of reasonable responses. It is not therefore appropriate to limit or adjust the claimant's compensatory award on this basis.

136. We finally considered whether the claimant contributed to his dismissal. In terms of the compensatory award, under section 123(6) of the ERA three factors must be satisfied: the relevant conduct must be culpable or

blameworthy, it must have actually caused or contributed to the dismissal, and it must be just and equitable to reduce the award of compensation by any percentage specified. A Tribunal can take into account only matters which are causative or contributory to the dismissal. The just and equitable discretion does not apply to whether to make a reduction in the first place, but to the amount of the reduction only. The burden of proof is on the respondent in this respect.

137. The respondent submitted that if the claimant is found to be disabled, a significant reduction should be made on the basis he did not seek medical help or tell any of his managers that he was unwell before the disciplinary incident.

138. In all the circumstances, we do not consider that the claimant's conduct reached the required threshold to trigger a reduction. Most importantly, based on our findings we are unable to conclude that the claimant's was culpable or blameworthy, but was unfortunate in terms of his abrupt decline on the day in question. The claimant also readily admitted that he was "*not thinking straight*" and the charge, and that he had learned his lesson. The benefit of counselling thereafter allowed him to acknowledge and talk about his difficulties. He further asked for and cooperated with the OH assessment, and gave his consent for the respondent to view his medical records.

139. We therefore do not therefore consider that any element of the claimant's conduct can be described as "*culpable or blameworthy*". Most importantly, the evidence indicates that before his dismissal the claimant was genuinely ill.

Compensation

140. The provisional hearing listed to take place on 18 February 2020 is confirmed and will start at 10:00am. The parties and their representatives must arrive by 9:30am. Case management orders have been made separately.

Employment Judge Licorish
Date: 20 December 2019