



EMPLOYMENT TRIBUNALS

Claimant: Mr R Isherwood

Respondent: Peoples' Dispensary for Sick Animals

Heard at: Pontypridd **On:** 10, 11, 12 and 13 December 2019

Before: Employment Judge S Moore
Members:
Mr P Charles
Ms C Edwards

Representation:

Claimant: In person

Respondent: Ms C Urquhart (Counsel)

JUDGMENT having been sent to the parties on 22 December 2019 and reasons having been requested by the respondent in accordance with Rule 62(3) of the Rules of Procedure 2013:

REASONS

The background to this claim is as follows:-

1. The ET1 was presented on 28 January 2019. The Claimant brought claims of unfair dismissal, sex discrimination and disability discrimination. The discrimination claims were clarified in further and better particulars as a direct sex discrimination claim, indirect disability discrimination claim and failure to make reasonable adjustments. The condition relied upon was depression. The Respondent conceded that the Claimant was a disabled person within the meaning of section 6 of the Equality Act.
2. The issues in the claim had been discussed at a preliminary hearing on 24 April 2018. The sex discrimination claim was clarified as a direct sex

discrimination claim with the less favourable treatment as the dismissal. The comparators were Ms T Ball nee Evans, Ms H Croft, Ms A Patel and Ms L Parr and / or hypothetical comparators.

3. The disability discrimination was less clear. The Claimant had been ordered to provide further and better particulars of the claim which he did so on 7 May 2019. This set out a claim for failure to make reasonable adjustments. The Respondent had understood from paragraph 54 that the Claimant was also bringing an indirect disability discrimination claim and dealt with this in their amended response.
4. This was discussed with the Claimant at the outset of the hearing. The Claimant confirmed he was pursuing an indirect disability discrimination claim and failure to make reasonable adjustments. The PCP's were discussed and clarified. The issues were agreed with the parties as follows:
5. Indirect discrimination claim
 - a. A "PCP" is a "provision, criterion or practice". Did the Respondent have or apply the following PCP(s):
 - i. "assessing demeanour of a person as a ground to form belief as to a guilt"?
 - b. Did the Respondent apply the PCP(s) to the claimant at any relevant time?
 - c. Did the Respondent apply (or would the Respondent have applied) the PCP(s) to persons with whom the claimant does not share the characteristic?
 - d. Did the PCP(s) put persons with whom the Claimant shares the characteristic at one or more particular disadvantages when compared with persons with whom the Claimant does not share the characteristic, in that people with mental health impairments find it more difficult to deal with stressful situations which led to dismissal?
 - e. Did the PCP(s) put the Claimant at that/those disadvantage(s) at any relevant time?
 - f. The Respondent said this was an invalid PCP as it made no sense in law and the Respondent had not operated a policy of prejudging. In the alternative they put forward the legitimate aim of "making a fair assessment of witnesses in a disciplinary hearing".

6. Reasonable adjustments claim
7. Did the Respondent have / or apply the following PCP(s):
 - a. The standard of conduct was applied more strictly than was set out in the rules as the Claimant asserted the allegation was misconduct rather than gross misconduct and;
 - b. Assessing the demeanour of a person in order to decide guilt and ;
 - c. Questioning the Claimant in a badgering manner.
 - d. Did any PCP put the Claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled at any relevant time, in that people with mental health impairments find it more difficult to deal with stressful situations which led to dismissal?
 - e. If so, did the Respondent know or could it reasonably have been expected to know the claimant was likely to be placed at any such disadvantage?
 - f. If so, were there steps that were not taken that could have been taken by the Respondent to avoid the disadvantage? The burden of proof does not lie on the Claimant, however it is helpful to know what steps the Claimant alleges should have been taken and they are identified as follows:
 - (i) Interpreted the disciplinary rules less harshly and as laid down in the procedure;
 - (ii) Not to have used demeanour to assess guilt;
 - (iii) Used a reasonable line of questioning.
8. If so, would it have been reasonable for the Respondent to have to take those steps at any relevant time?
9. There was an agreed bundle of 405 pages. We heard evidence from the Claimant and from a Mr C Wallace (disciplinary officer), Ms I Gray (investigating officer and Claimant's line manager) and Mr Stephen Howard (appeal officer) for the Respondent.
10. We have made the following findings of fact on the balance of probability.
11. The Claimant was employed as a veterinary surgeon team leader at the Respondent's pet hospital in Cardiff. He commenced employment on 26 May 2011. The Respondent is a national charity providing veterinary services. The Claimant latterly reported to his line manager, Ms Maggs, who in turn reported to Ms Gray, who was an area manager. It was accepted by the Respondent that relationships within the Cardiff management team were under strain and causing challenges at the hospital. These included

challenges in the relationship between the Claimant and Ms Maggs, Ms Maggs and the head nurse (Ms Croft) and the Claimant and Ms Croft.

12. In September 2017 the Claimant had been instructed by Ms Maggs to initiate a formal investigation into an allegation that a vet had refused to see an animal in need. We will refer to this vet as "A". The Claimant later relied on this incident as evidence that Ms Maggs' evidence was unreliable. The Claimant's evidence was that Ms Maggs had denied sending him an email instructing him to formally raise the allegation with A and only admitted it when he later produced a copy. Ms Gray accepted that Ms Maggs had forgotten about the email, but did not see the situation that Ms Maggs had lied, merely that she had not mentioned the email until the Claimant had presented her with a copy and in any event the email did not contradict her version of events.
13. Ms Gray's notes recorded that Ms Maggs later apologised to A and that A had requested a retraction of the allegations the Claimant had been instructed to raise with her.
14. In February 2018 the Ms Gray held an informal meeting with the Claimant as he had misrepresented discussions between them to other members of the team. The Claimant was counselled that a further breach of confidentiality may lead to disciplinary action.
15. Also in February 2018 a series of meetings took place between Ms Maggs and the Claimant regarding the Claimant's performance which culminated in Ms Maggs informing the Claimant that he would be placed under a performance improvement plan (the "PIP").
16. On 6 April 2018 the Claimant raised a grievance regarding this decision and the Respondent appointed Mr Shrimpman to hear the grievance. The outcome of the grievance was that whilst it did not fully exonerate the Claimant, Mr Shrimpman's decision was to set aside the PIP completely. In summary the outcomes from the grievance were as follows. Firstly, Mr Shrimpman found there had been no structured approach by Ms Maggs and that the document itself was not fit for purpose nor did not achieve its purpose. Mr Shrimpman acknowledged that there had been an issue in regard to the Claimant's planning around Christmas rotas and that he deliberately had been obstructive about sharing notes with Ms Maggs. He also highlighted some issues in relation to the Claimant's behaviour surrounding breach of confidentiality, but as this had already been dealt with by Ms Gray resulting in an informal discussion with the Claimant, Mr Shrimpman found that it was unfair to re-visit this in the PIP. Mr Shrimpman also found or recorded that the Claimant accepted his use of expletives was inappropriate. In relation to Ms Maggs he found that her approach to

communication was inappropriate during meetings with the Claimant and was felt to be aggressive by the Claimant and other witnesses.

17. Mr Shrimpman also found that Ms Maggs had presented information to the Claimant as a fact that was not correct. The meaning of his words in the report were in dispute. Mr Shrimpman stated that a key point in performance meeting around the allegation the Claimant had put an article about a colleague on the notice board was presented as a fact but was incorrect. He went on to say he could not determine precisely who was responsible for this, but as it occurred he upheld the Claimant's complaint on this point. We find that the reference to not being able to determine who was responsible was clearly a reference to who had been responsible for putting the article about a colleague on the notice board. Ms Maggs had said that this was the Claimant but this was incorrect. Mr Shrimpman also found that Ms Maggs had not observed confidentiality in respect of the Claimant's performance management and recorded that having interviewed a number of members of the Cardiff team it was clear that this had been the case.
18. Following this grievance outcome Ms Gray put in a development plan for both Ms Maggs and the Claimant and they both attended mediation. There was a further investigation around this time regarding the Claimant's concerns about de-stocking of Ketamine. The Claimant had raised concerns that the lead nurse had de-stocked Ketamine and this led to Ms Gray undertaking investigation which had learning outcomes also for the Claimant. The Claimant relied on this as evidence, or one of the reasons he felt there had been a conspiracy between Ms Gray and Ms Maggs effectively to manufacture allegations against him with a view to exiting him from the Respondents employment. We do not accept that there was any such conspiracy on the part of Ms Maggs and Ms Gray. There was no evidence to suggest this and in our view the action taken against the Claimant in respect of the Ketamine investigation and the other factors relied on were simply reasonable matters for the Respondent to have raised with the Claimant.
19. Turning now to the incident which led to the Claimant's dismissal. On 12 September 2018 there were two incidents between the Claimant and Ms Maggs, the first of which was witnessed by a Ms Northover, who was a receptionist at the hospital. We were taken to a number of different accounts about these incidents and we set out the relevant parts of these accounts and how they have affected our conclusions.
20. Ms Maggs made a statement to Ms Gray when she later complained about the incident the following day. She described the first incident; that her and the Claimant were working in the office together and Ms Northover entered the office and asked the Claimant to see a pet. The Claimant was under some pressure to complete certain tasks and was short of time and it was

accepted by the Claimant that he expressed frustration by saying words to the effect of **“I’ve got sweet FA done this morning”**, or may have used the **“F word”**, but it was not directed at anyone, it was more of an expression of frustration. Ms Maggs reported in her statement to Ms Gray that she felt the Claimant was angry and said to Ms Northover, **“don’t worry [Ms Northover] he’s not angry with you, he’s just annoyed he’s not done what he’s got to do”**. To which point the Claimant said **“I am not angry at me, I’m angry at you”** directing this at Ms Maggs, **“you will not be quiet”** and may have said shut up. Ms Maggs then left the room. Ms Maggs later asked the Claimant to apologise to Ms Northover.

21. Ms Northover was asked about this exchange by Ms Gray. Ms Northover’s statement to the investigation was subsequently dismissed by both Ms Gray and Mr Wallace as being largely irrelevant on the basis that Ms Northover did not remember anything. Whilst we accepted that there were a number of entries where Ms Northover had said she could not remember, in the context of what she actually said we find that her evidence was in fact material and relevant and should have been given more weight by the Respondent. We have particularly taken into account that Ms Northover describes how she remembers Ms Maggs coming up to her afterwards saying that the Claimant should apologise. Ms Northover said she was confused as to why and told Ms Maggs there was no need for the Claimant to apologise. Ms Maggs did not mention that Ms Northover had said there was no need for the Claimant to apologise in her statement and in our view this should have cast doubt on the first part of Ms Maggs account. Ms Northover also said, when she was asked if the Claimant had sworn, **“no”** before she said **“not that I can remember”** and she said in response to a question of how the Claimant had seemed stressed or under pressure or annoyed, **“I can’t remember, but I think he just seemed jokey”**. She also stated that Ms Maggs was notoriously very chatty in the office and had appeared **“happy”**.
22. Turning then to the second incident between the Claimant and Ms Maggs, this took place a short time later when they were alone in the office. Ms Maggs alleges that the Claimant said to her, making intense eye contact **“you know that I hate you don’t you. No, I hate you, I really hate you.”** Ms Maggs also stated she found it intimidating and had been extremely upset to the extent she could not stay in the office with the Claimant and went to her car then worked front of house until the Claimant went home at lunchtime avoiding the office.
23. The Claimant was interviewed by Ms Gray on 14 September 2018 and in the investigation notes he accepted that he used the word **“hate”** but stated that he could not remember the exact words, but the context of the word **“hate”** was that he told Ms Maggs he hated the process that she had put

- him through, referring to the PIP. This was following an exchange where Ms Maggs had recognised she was chatting and invited the Claimant to just tell her to shut up to which the Claimant told her he could never feel comfortable in doing so. This led to a discussion about the PIP.
24. The Claimant insisted that that Ms Maggs' account that she had gone to her car and then worked front of house after the incident was not true. He told Ms Gray that he initially went upstairs after the second exchange but made a deliberate point of coming back down and worked alongside Ms Maggs for 20 – 30 minutes to demonstrate everything was OK.
 25. The Claimant also told Ms Gray that Ms Maggs would have to “pull his mum out of a building” for their relationship to ever recover following what he felt she had done to him regarding the PIP.
 26. The Respondent later refused to investigate or interview witnesses the Claimant said would have corroborated indeed they did work together after the second exchange. The reason given was they believed this to be irrelevant as Ms Maggs may not have displayed any reaction after the second incident. Mr Wallace was particularly struck that she may have not shown a reaction and therefore it was not going to be relevant to ask people how she had reacted.
 27. In Ms Gray's interview with the Claimant the notes were taken by a colleague called Linda Day. Ms Gray instructed Ms Day to ensure that she had included in the notes clarification on a hand gesture made by the Claimant when he lifted his hands and put them on the desk. This was later relied upon by Ms Gray in her investigation report to say that the Claimant had displayed aggressive behaviour during the investigation meeting.
 28. The Claimant was subsequently suspended and we find that it was reasonable for the Respondent to have suspended the Claimant in all the circumstances, particularly taking into account the breach of confidentiality concerns Ms Gray had raised previously.
 29. The Claimant was signed off sick and Ms Gray prepared an investigation report. The investigation report went further than recommending whether or not there should be a disciplinary. Ms Gray stated she had a reasonable belief that Ms Maggs was telling the truth effectively and listed four reasons. Firstly was Ms Gray's perception of the impact on Ms Maggs. Secondly, Ms Maggs had not deviated from what she claimed the Claimant had said whereas the Claimant's version of events had changed. Ms Gray reported that the Claimant accepted he had said something close to “I hate what you did to me”. She relied upon a comment that the Claimant made at a second investigation where he accepted that “I hate what you did to me” was not a million miles from “I hate you”.

30. Ms Gray also alleged in her report that during her investigation meetings with the Claimant that there were several examples where he had tone and body language perceived (by Ms Gray) to be aggressive, confrontational and highly assertive which led her to being confident to assume others would find this conduct aggressive and confrontational.
31. On 17 October 2018 the Claimant emailed Mr Wallace and requested that some questions be put to witnesses Ms Northover, Ms Bonner and Ms Croft who all were working front of house and would corroborate that Ms Maggs and the Claimant had worked together after the second exchange. He also asked if Ms Day could be asked to comment on Ms Gray's allegations about the Claimant's behaviour set out in paragraph 30 above.
32. The allegations put to the Claimant were "inappropriate, intimidating behaviour and language towards your line manager on Wednesday 12 September 2018 and breach of trust and confidence".
33. On 18 and 19 October 2018 the Claimant attended a disciplinary hearing that was conducted by Mr Wallace. Prior to this he had raised a grievance and it was agreed by the Claimant and the Respondent that as the grievance was all about the Claimant's concerns about the Respondent's failure to properly investigate, or largely about the failure to investigate and consider background information, that this would be dealt with as part and parcel of the disciplinary hearing. However Mr Wallace struggled to tell the Tribunal what parts of the grievance had been upheld and which had not. There was no separate grievance outcome letter.
34. The Respondent obtained an occupational health report prior to the disciplinary hearing as the Claimant had raised via his solicitor and in the grievance that he had depression. The occupational health report confirmed that to be the case that the Claimant had been diagnosed with depression in 2006, anti-depressant medication. The report said that he was fit to attend the meeting and would need breaks. In conclusion the report stated that the Claimant had underlying depression and as such it was likely his resilience in dealing with stress was reduced and he feels he has been experiencing work stress since changes to management two years previously and this was likely to have impacted on him and his behaviour.
35. The disciplinary hearing took place on 18 October 2018. It was an extremely long hearing considering the allegations in question. We do not accept that Mr Wallace "badgered" the Claimant at this hearing with his questions. Mr Wallace asked open questions seeking to establish factors that Mr Wallace wanted to take into account. The Claimant told Mr Wallace that he usually coped well with stress.

36. Mr Wallace discounted the relevance of everything that the Claimant had put forward as to reasons why Ms Maggs might have a different version of account to his account. He could not see the relevance of Ms Maggs having been found by a different manager to have unreasonably put the Claimant on a PIP and the other findings that we have discussed above about her behaviours outlined by Mr Shrimpsman in the PIP. He did not accept that the evidence of Ms Northover was in any way relevant (he referred to her as “the witness who didn’t remember anything”) and failed to take into account the differences in the accounts between Ms Northover and Ms Maggs. He also would not interview the other two staff who were said to have been able to have corroborated the Claimant’s account that he worked with Ms Maggs after the incident.
37. During the disciplinary hearing the Claimant was asked about a comment he had made to Ms Gray at the investigation meeting namely that Ms Maggs would have had to pull the Claimant’s mum out of a burning building for things to go back to where they were before. The Claimant believed the extent of the broken relationship between him and Ms Maggs was such that Ms Maggs would have had to have done something as significant as pulling his mother out of a burning building to repair that relationship. He also referred to Ms Maggs and Ms Gray as rogue managers on several occasions.
38. Mr Wallace adjourned the meeting and reconvened the following day.
39. Mr Wallace interviewed Ms Gray, Ms Day and Ms Maggs on 19 October 2018. Ms Day told Mr Wallace the Claimant had been “quite open” in the meeting with Ms Gary. When she was asked about Ms Gray’s comments about his aggressive behaviour she replied **“IG felt that way? It’s difficult I was there handwriting..the way he talks can appear as if he is quite angry not far under the surface but he didn’t shout or swear and didn’t appear to me to be threatening”**.
40. Mr Wallace spoke to Ms Maggs and it was evident that that this discussion had a profound effect on Mr Wallace to the extent that he immediately accepted Ms Maggs was telling the truth and the Claimant was not. Ms Maggs told Mr Wallace that Ms Northover had said “don’t worry about it” when she told Ms Northover the Claimant should apologise. This was not what Ms Northover had said in her statement. Mr Wallace reconvened the hearing. The witness statements from Ms Day, Ms Gray and Ms Maggs were not shared with the Claimant. Mr Wallace immediately reached a decision that the Claimant would be dismissed.
41. In the notes of the disciplinary hearing it was evident that Mr Wallace had assessed the Claimant’s demeanour in arriving at his belief and he had also assessed the demeanour of Ms Maggs. He stated that having met Ms Maggs and hearing her account first hand it had strengthened his belief, listening to her version of events coupled with the Claimant’s “general

- demeanour”, consistent anger and bitterness towards Ms Maggs and others that he shared during the meeting, he cited that he had the reasonable belief the Claimant did indeed say to Ms Maggs “I hate you”.
42. The Claimant was summarily dismissed for gross misconduct and the letter was sent to the Claimant confirming that on 22 October 2018. Mr Wallace concluded that the Claimant had not shown any remorse and demotion or another sanction was not an option based on his behaviour and words used. He described the conduct as “serious misconduct” and that the actions (as well as how he had responded during the disciplinary process) had led to a loss of trust and confidence.
43. The Claimant submitted an appeal and as part of that appeal process Mr Howard interviewed Mr Wallace. Mr Wallace informed Mr Howard that when he had initially received the investigation pack he was surprised to see had ended up where it did. His initial view was that two adults had had a ‘bit of a set to’ and had gone in thinking it was not likely to end in dismissal, but described his major swing of opinion which as we have seen above was his interview with Ms Maggs.
44. The Respondent’s disciplinary procedure provided a number of different examples of misconduct and gross misconduct. Under misconduct ‘objectional and/or insulting behaviour’ was listed. Under gross misconduct it was listed as ‘extreme cases of insulting behaviour and breach of trust and confidence’ along with other such behaviours such as dishonesty, assault, commission of acts of indecency or immorality.
45. The Claimant relied upon a comparator for both his discrimination claim and to assert the dismissal was unduly harsh and cited this in his appeal. Another employee (not a manager) who we shall call “B” had received a verbal warning for the following conduct. The allegation was she had behaved in an inappropriate and unprofessional manner towards her line manager. This particular employee had sworn at her line manager in connection with her not being permitted absence to attend a funeral arising from a bereavement. She had said to her manager that she “**couldn’t make any fucking decisions**” and that she was “**a fucking pawn**” and “**a pissing waste of time**”. This had been witnessed by a number of staff and took place in the staff kitchen. The individual subsequently apologised to her line manager and the sanction that she received from the Respondent on 18 April 2018 was a verbal warning.
46. The appeal hearing took place on 1 November 2018. Mr Howard upheld the decision to dismiss the Claimant. He also discounted any need to interview witnesses who were at front of house after the event as they were not witness to the incident. In relation to the comparator incident above his

conclusion letter stated that each case was different and should be taken on its own merits.

The Law

Unfair dismissal

47. The relevant law in relation to the unfair dismissal claim is set out in Section 98 of the Employment Rights Act 1996.

48. In a conduct dismissal case **British Home Stores v Burchell [1980] ICR 303**, the Court of Appeal set out the criteria to be applied by Tribunals in cases of dismissal by reason of misconduct. Firstly the Tribunal should decide whether the employer had an honest and genuine belief that the employee was guilty of the dishonesty in question. Secondly the Tribunal has to consider whether the employer had reasonable grounds upon which to sustain that belief. Thirdly at the stage at which the employer formed its belief, whether it has carried out as much as an investigation of the matter as was reasonable in all of the circumstances. Although this was not a case involving dishonesty it is well established that these guidelines apply equally in cases involving misconduct.

49. The relevant authorities in relation to reasonableness under Section 98 (4) were considered by the EAT (Browne-Wilkinson J presiding) in **Iceland Frozen Foods v Jones [1982] IRLR 439**. The test was formulated in the following terms:

"Since the present state of the law can only be found by going through a number of different authorities, it may be convenient if we should seek to summarise the present law. We consider that the authorities establish that in law the correct approach for the Industrial Tribunal to adopt in answering the question posed by [ERA 1996 s 98(4)] is as follows.

- *the starting point should always be the words of [s 98(4)] themselves;*
- *in applying the section an Industrial Tribunal must consider the reasonableness of the employer's conduct, not simply whether they (the members of the Industrial Tribunal) consider the dismissal to be fair;*
- *in judging the reasonableness of the employer's conduct an Industrial Tribunal must not substitute its decision as to what the right course to adopt for that of the employer;*
- *in many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, another quite reasonably take another;*

- *the function of the Industrial Tribunal, as an industrial jury, is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair'.*

50. In assessing whether the Claimant's conduct amounted to gross misconduct that conduct must be deliberate wrongdoing or gross negligence. In the case of deliberate wrong doing it must amount for wilful repudiation of the express or implied term of the contract (**Sandwell and West Birmingham Hospitals NHS Trust v Westwood**).
51. If the dismissal is procedurally unfair we must assess the percentage chance of the Claimant being fairly dismissed (**Polkey v AE Dayton Services Ltd [1987] IRLR 503, [1987]**).
52. We must also consider whether, under S207 (2) TULRCA 1992 there is any provision of the ACAS Code of Practice on disciplinary procedure which appears to be relevant.
53. Lastly whether the Claimant's basic and or compensatory award should be reduced under S122 (2) and S123 (6) ERA 1996. The wording of the two provisions are not identical and differing reductions can be made in principle. S122 (2) provides that where the tribunal considers any conduct of the Claimant before the dismissal was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly. S123 (6) provides that where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.
54. In **Steen v ASP Packaging Ltd [2014] ICR 56** (Langstaff P presiding) the EAT stated that the application of those sections to any question of compensation arising from a finding of unfair dismissal requires a Tribunal to address the following: (1) it must identify the conduct which is said to give rise to possible contributory fault; (2) having identified that it must ask whether that conduct is blameworthy—the answer depends on what the employee actually did or failed to do, which is a matter of fact for the Tribunal to establish and which, once established, it is for the Tribunal to evaluate; (3) the Tribunal must ask for the purposes of ERA 1996 s 123(6) if the conduct which it has identified and which it considers blameworthy caused or contributed to the dismissal to any extent. If it did cause or contribute to the dismissal to any extent then the Tribunal moves on to the next question;

(4) this is to what extent the award should be reduced and to what extent it is just and equitable to reduce it.

Disability Discrimination claim

55. Indirect Discrimination

Section 19 of the Equality Act 2010 provides:

(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—

(a) A applies, or would apply, it to persons with whom B does not share the characteristic,

(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

(c) it puts, or would put, B at that disadvantage, and

(d) A cannot show it to be a proportionate means of achieving a legitimate aim

56. The EHRC Code of Practice on Employment provides that the phrase 'provision criterion or practice' should be construed widely so as to include for example, any formal or informal policies, rules, practices, arrangements, criteria, conditions, prerequisites, qualifications or provisions.

57. The PCP must be of neutral application. A PCP can be a one-off decision (**British Airways Plc v Stamer [2005] IRLR 862**). A liberal rather than overly technical approach should be adopted when considering PCP's. However a one off flawed disciplinary procedure will not satisfy the low threshold (**Nottingham City Council v Harvey EAT 0032/12**).

58. In **Essop & Ors v Home Office (UK Border Agency) & another [2017] ICR 640** the Supreme Court identified six salient features of the definition of indirect discrimination: First, there was no express requirement for an explanation of the reasons why a particular PCP put one group at a disadvantage when compared with others. Second, whilst direct discrimination expressly required a causal link between the less favourable treatment and the protected characteristic, indirect discrimination did not. Instead, it required a causal link between the PCP and the particular disadvantage suffered by the group and the individual. Third, the reasons why one group might find it harder to comply with the PCP than others were many and various. The reason for the disadvantage did not need to be unlawful in itself or be under the control of the employer or provider. Both the PCP and the reason for the disadvantage were 'but for' causes of the disadvantage: removing one or the other would solve the problem. Fourth, there was no requirement that the PCP in question put every member of the group sharing the particular protected characteristic at a disadvantage.

Fifth, it was commonplace for the disparate impact, or particular disadvantage, to be established on the basis of statistical evidence. Sixth, it was always open to the respondent to show that his PCP was justified. There was no finding of unlawful discrimination until all four elements of the definition in s 19(2) were met. The essential element was a causal connection between the PCP and the disadvantage suffered, not only by the group, but also by the individual.

Failure to make reasonable adjustments

59. Sections 20 and 21 of the Equality Act 2010 set out the duty to make reasonable adjustments. The Tribunal must consider first of all the PCP applied by the employer, secondly the identity of non-disabled comparators (where appropriate) and thirdly the nature and extent of the substantial disadvantage suffered by the Claimant. (**Environment Agency v Rowan 2008 ICR 218, EAT**).

Sex Discrimination claim

60. This was a claim of direct sex discrimination. Section 13(1) of the Equality Act 2010 provides that direct discrimination takes place where a person treats the claimant less favourably because of disability (the relevant protected characteristic) than that person treats or would treat others. Under s23(1), when a comparison is made, there must be no material difference between the circumstances relating to each case.

61. Under s136, if there are facts from which a tribunal could decide, in the absence of any other explanation, that a person has contravened the provision concerned, the tribunal must hold that the contravention occurred, unless that person can show that he or she did not contravene the provision. Guidelines were set out by the Court of Appeal in **Igen Ltd v Wong [2005] IRLR 258** regarding the burden of proof (in the context of cases under the then Sex discrimination Act 1975).

Conclusions – Unfair Dismissal

62. We accepted that the reason put forward by the Respondent for the dismissal (conduct) was the reason for the dismissal and this was a potentially fair reason. We do not agree that there was a conspiracy between Ms Gray and Ms Maggs to dismiss the Claimant. Whilst we agree that Ms Gray's investigation was not a neutral investigation we do not think this is sufficient to conclude there was real bias against the Claimant with the motive of obtaining his dismissal.

63. Turning to the test under Section 98(4). We have considered the test in ***Burchell***.
64. Firstly the Tribunal should decide whether the employer had an honest and genuine belief that the employee was guilty of the dishonesty in question. In regard to the first element of the test we accept that Mr Wallace and Mr Howard had an honest and genuine belief that the Claimant was guilty of the misconduct alleged. It was abundantly clear that Mr Wallace in particular genuinely believed Ms Maggs and in turn Mr Howard was equally convinced of the genuineness of Mr Wallace's belief.
65. We went on to consider whether there were reasonable grounds to form that belief and also whether the investigation was reasonable and in answer to both of those questions we do not find in favour of the Respondent. We do not find that there were reasonable grounds to have concluded that the Claimant was guilty of the misconduct. This was a case of one person's word against the other. There was a history of animosity between these individuals. In such cases it was in our judgment even more important to conduct a thorough investigation and assess the credibility of the accounts of the individuals as well as any surrounding circumstances and evidence which could corroborate the accounts. This did not happen. Ms Maggs word was simply accepted over the Claimant's. Our reasons are as follows.
66. The investigation report was not balanced and it went further and beyond the remit of making a recommendation. Ms Day did not support Ms Gray's allegations of the Claimant's behaviour at the investigation meeting yet Mr Wallace does not appear to have taken this into account.
67. We do not find that the grievance was properly dealt with. The Claimant had put forward a number of matters that should have required a proper and further investigation and the Respondent refused to do so, they dismissed as irrelevant (failure to investigate relevant witnesses, motivation of Ms Maggs, bias by Ms Gray in the investigation report). As noted above Mr Wallace struggled to tell the Tribunal what if any parts of the grievance he upheld.
68. In cases where there is one word against another of an incident between employees and there is a history of a strained relationship we have concluded it is particularly important to assess any surrounding and corroborating evidence which might cast light on which of the parties is telling the truth. We find there was evidence particularly from Ms Northover that casted doubt on Ms Maggs' account of what happened on that day. Ms Maggs was not asked about the differences in her account and Ms Northover (the apology issue).

69. We also find that it was not reasonable considering the history of the two individuals to completely discounted that Ms Maggs may have had an “agenda” for potentially either exaggerating the comments. Ms Maggs was not even asked about this. Mr Wallace stated he simply could not understand why this kept being brought up by the Claimant but this was obvious to the Tribunal. Mr Shrimpton had found in his grievance some significant matters of concern in relation to Ms Magg’s behaviour towards the Claimant. Mr Wallace failed to take any of this into consideration, including when Ms Maggs had denied sending an email to the Claimant only later accepting she had done so. There was no proper assessment of her credibility in light of the background matters. We do not conclude that Ms Maggs did exaggerate in any way and it is not our function to do so. It is our role to decide whether or not there has been a reasonable investigation and we have concluded there has not.
70. The Claimant requested access to Ms Northover at least, to ask her questions and this was refused.
71. In our view it was potentially material as to whether Ms Maggs had gone to her car after the second incident and then front of house. If she had been as upset as she claimed to have been, then failing to ask the individuals about this who had worked with her directly after was unreasonable. If they had corroborated that Ms Maggs had worked with the Claimant as he had asserted, this could have cast doubt on her account.
72. The Claimant was not given the opportunity to comment on the further statements taken by Mr Wallace on 19 October 2018.
73. In summary we find that the Respondent closed their mind to any other possibility other than accepting Ms Maggs version of events.
74. We now turn now to whether the decision to summarily dismiss the Claimant for gross misconduct was within the range of reasonable responses.
75. We took into account the Respondents disciplinary procedure in the category of behaviour set out therein under gross misconduct. We are prepared to accept that it would be in the range of reasonable responses for an employer to summarily dismiss an employee for venomously telling another employee they hate them. This could fall under ‘extreme cases of insulting behaviour and breach of trust and confidence’ along with other such behaviours such as dishonesty, assault, commission of acts of indecency or immorality.
76. Mr Wallace himself acknowledged to Mr Howard that his initial impression of events, knowing the words alleged to have been said was that the matter

seemed fairly trivial. He expressed surprise that it had ended up where it did. This neatly summarises the range of reasonable responses in practice. We may take the view, as did Mr Wallace initially, that summary dismissal for those words, whilst unpleasant, was not a reasonable response. The Tribunal sees many cases where employees have difficult relationships and do not get along with each other and say unkind words. That is not our function. The Tribunals must consider whether it fell into a range of reasonable responses. One employer may not have dismissed whereas another would have.

77. We were particularly persuaded by how the Respondent has treated other employees for similar or potentially worse behaviour. The Claimant raised the inconsistent treatment at his appeal. The Respondent has not provided a satisfactory explanation as to why the conduct of B ended in a verbal warning yet the Claimant was dismissed. The suggestion that she apologised and was a junior member of staff does not explain the difference in sanction. The allegations were very similar. We took into account the behaviour of the employee B and the tirade and the language directed towards her manager, overheard by others as we had witness statements from other people, we do not accept that this was too different an incident for it to be discounted.

78. We therefore concluded the dismissal was not within the range of reasonable responses.

79. In relation to the trust and confidence element. In our view the Respondent reasonably concluded that the relationship between the Claimant and Ms Maggs was broken. What was material was how to deal with that – in other words was it reasonable to dismiss the Claimant due to that broken relationship? We have found there was not a reasonable investigation or grounds on which to form a reasonable belief the Claimant was guilty of the allegations of behaviour towards Ms Maggs. Therefore it must follow that it was not reasonable to have automatically dismissed the Claimant for the breakdown of trust and confidence. Whilst Mr Wallace does appear to have considered the Claimant being unable to return to the Cardiff hospital there was no evidence the Respondent considered a role elsewhere or whether one was available.

Polkey

80. Had there been a reasonable procedure followed we have reached the view that the Respondent would not have formed a reasonable belief that the Claimant was guilty of the allegations. We therefore decline to make a reduction under Polkey.

Contributory fault

81. We do however find that there was culpable conduct on the part of the Claimant in respect of contributory fault and we have arrived at a deduction of 30% based on the Claimant accepting that he had an outburst, he had used bad language and he had had a discussion with Ms Maggs that involved using the word "hate".

Sex Discrimination

82. The Claimant's sex discrimination claim was set out in his ET1 as the Respondent preferring the word of a female employee and appeared more concerned for the well-being of a female employee. The Claimant maintains the Respondent would not have dismissed a female for saying what he was alleged to have said and he was portrayed as a stereotypical male bully.

83. The Claimant did not pursue any other comparators other than the individual we have described as B.

84. Other than the fact the Claimant was male and B was female there was no evidence that the difference in treatment was due to gender or was because of the Claimant's sex.

85. For these reasons we have concluded that the Claimant has not proven facts from which we could conclude in the absence of any other explanation that the Respondent had dismissed him because of his sex, thus establishing a prima facie case shifting the burden of proof.

Indirect Disability Discrimination claim

86. The PCP put forward by the Claimant was that the Respondent had a policy or practice of assessing a person's demeanour as a ground to form belief as to guilt. It was not pleaded (paragraph 55) as assessing simply the Claimant's demeanour (as suggested in the Respondent's submissions) but a person's demeanour. In theory therefore, this was potentially of neutral application.

87. There was significant evidence that Mr Wallace assessed the demeanour of the Claimant and Ms Maggs in arriving at his decision. There were references to demeanour in his statement and his decision letter. The dismissal letter specifically stated that the Claimant's actions and how he had responded during the disciplinary process led to the loss of trust and confidence. Mr Wallace was so affected by how Ms Maggs' had appeared when he interviewed her that he was immediately persuaded that she was telling the truth and the Claimant was not. Ms Gray also assessed the Claimant's demeanour and cited it as a basis for reasonable belief in her

investigation report. Mr Howard said in his witness statement that Ms Maggs' emotion and distress led Mr Wallace to describe his interview with her as "harrowing".

88. We therefore conclude that the Claimant has demonstrated that Respondent had a practice of assessing a person's demeanour. We also conclude that this was to form a belief as to guilt. This is perhaps most starkly evidenced by the facts of this case – there was one word against the other. The potentially corroborative surrounding evidence was discounted. It was who was believed, based in demeanour that was the reason for concluding the Claimant was guilty of the allegations.
89. We go on to consider whether the PCP put persons such as the Claimant, as a group, at a disadvantage compared to those who did not have depression.
90. The Claimant had set out in paragraph 54 that assessing demeanour would disadvantage people with mental health impairments who found it more difficult to deal with stressful situations. The Claimant accepted that he had told Mr Wallace at the disciplinary hearing that he coped with stress well. The Claimant had not shown how his condition of depression would put persons such as the Claimant at a disadvantage when having their demeanour assessed. Ms Urquhart submitted that this PCP in operation could have a negative effect on everyone and we agree. A person who did not have depression could have their demeanour assessed and be found guilty. There was in our judgment no group disadvantage established. The indirect discrimination claim therefore fails.

Failure to make reasonable adjustments

91. There were three PCP's relied upon by the Claimant.
92. The PCP's of "the standard of conduct was applied more strictly than was set out in the rules as the Claimant asserted the allegation was misconduct rather than gross misconduct" and "questioning the Claimant in a badgering manner" were in our judgment not valid PCP's as they were one off acts that applied only to the Claimant. Furthermore we did not find that Mr Wallace had questioned the Claimant in a badgering manner. The claim advanced pursuant to these PCP's therefore fail.
93. In relation to the assessing a person's demeanour PCP. As with the issue of establishing a group disadvantage with the indirect discrimination claim, there was also no evidence as to why someone with depression would be particularly disadvantaged if their demeanour was assessed to form a belief in guilt.

94. For these reasons the failure to make reasonable adjustments also fails.

95. The matter will be listed for a remedy hearing in respect of the unfair dismissal claim.

Employment Judge S Moore
Dated: 27 February 2020

REASONS SENT TO THE PARTIES ON 4 March 2020

.....
FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS